

Cebularz v Samadi
2019 NY Slip Op 31260(U)
April 24, 2019
Supreme Court, Kings County
Docket Number: 501652/2018
Judge: Genine D. Edwards
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At Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Brooklyn, New York, on the 24th day of April, 2019.

PRESENT:

Hon. Genine D. Edwards
Justice, Supreme Court

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LEON CEBULARZ,

Plaintiff,

Index No. 501652/2018

-against-

DECISION/ORDER

DAVID B. SAMADI, M.D., DAVID B. SAMADI,
M.D., P.C., LENOX HILL HOSPITAL and
NORTHWELL HEALTH, INC.,

Defendants.

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Cross-Motion and Affidavit (Affirmations).....	1-3
Opposing Affidavit (Affirmations).....	4-6
Reply Affidavit (Affirmations)	7-8
Memorandum of Law	9
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Plaintiff commenced this action for medical malpractice, fraud, assault, and prima-facie tort against defendants on January 25, 2018. Dr. David B. Samadi and David B. Samadi, M.D., P.C. (collectively "Samadi defendants") moved to dismiss plaintiff's fraud, assault, and prima facie tort claims for failure to state a cause of action pursuant to CPLR 3211(a)(7). The Samadi defendants also moved to dismiss plaintiff's claims of assault and prima facie tort as time-barred by the statute of limitations pursuant to CPLR 3211(a)(5) and CPLR 215(3). Defendants Lenox Hill Hospital and Northwell Health,

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Inc. (collectively “Hospital defendants”) moved to dismiss plaintiff’s claims for punitive damages and fraud pursuant to CPLR 3211(a)(7) and the negligence, assault, and prima facie tort claims pursuant to CPLR 3211(a)(5) and/or CPLR 3211(a)(7). They also moved to strike any scandalous and prejudicial matter unnecessarily inserted in the complaint pursuant to CPLR 3024. Lastly, plaintiff cross-moved to amend the complaint to add causes of action alleging violations of General Business Law 349 and General Business Law 350.

Factual and Procedural Background

David B. Samadi, M.D. (“Dr. Samadi”) is a popular, board-certified urologic oncologist whose specialties include diagnosing and treating prostate issues. Plaintiff consulted Dr. Samadi in 2016 regarding his prostate. Dr. Samadi recommended performing a transurethral resection of plaintiff’s prostate (“TURP”). Plaintiff obliged and scheduled the TURP for August 22, 2016.

In 2016, Dr. Samadi’s website indicated that he: (1) was the Chairman of Urology and Chief of Robotic Surgery at co-defendant Lenox Hill Hospital; (2) was a professor of urology at North Shore-LIJ School of Medicine; (3) performed over 7,000 robotic surgeries; and (4) that “the entire procedure was performed by Dr. Samadi.”

Leading up to and through the surgery, plaintiff expected Dr. Samadi to perform the TURP. Instead, the TURP was performed by a second-year resident. Plaintiff alleged that Dr. Samadi unnecessarily administered an excessive amount of anesthesia to conceal the resident’s role in the TURP. Plaintiff further alleged that although the medical records listed Dr. Samadi as the surgeon, the resident performed the entire TURP while Dr. Samadi operated on another patient in a separate operating room. Within hours of the TURP, plaintiff sustained a marked deterioration in his condition. Specifically, plaintiff experienced severe postoperative injuries including coma, cardiorespiratory arrest, and placement

on mechanical ventilation. Plaintiff asserted that the resident was uninformed of his pre-existing bladder issues, which caused his injuries.

Samadi Defendants

Assault and Prima Facie Tort

A defendant who seeks dismissal of a cause of action pursuant to CPLR 3211(a)(5) based upon the ground that it is barred by the statute of limitation bears the initial burden of proving, prima facie, that the time in which to commence suit has expired. *Singh v. New York City Health and Hospitals Corp.*, 107 A.D.3d 780, 970 N.Y.S.2d 33 (2d. Dept. 2013). A cause of action for assault must be commenced within one year. CPLR 215(3). A cause of action for prima-facie tort is essentially an intentional tort claim that is subject to a one-year statute of limitations. *Wen v. Chan*, 17 A.D.3d 356, 792 N.Y.S.2d 589 (2d Dept. 2005). Considering the foregoing, plaintiff's causes of action for assault and prima facie tort are time-barred since they were filed on January 25, 2018, which is more than one year after they accrued on August 22, 2016. Hence, the Court will not address the Samadi defendants' assertion that those same causes of action fail to state a cause of action pursuant to CPLR 3211(a)(7).

Fraud

On a motion to dismiss the complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the plaintiff is accorded the benefit of every possible favorable inference. *Herman v. Kveton-Cattani*, 123 A.D.3d 1093, 999 N.Y.S.2d 528 (2d Dept. 2014). The pleading is afforded a liberal construction, the facts as alleged in the complaint are accepted as true, and the Court determines only whether the facts as alleged fit within any cognizable legal theory. *Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994). “[W]here evidentiary material is submitted and considered . . . and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and, unless it has been shown that a material fact as claimed

by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate.” *Antoine v. Kalandrishvili*, 150 A.D.3d 941, 56 N.Y.S.3d 142 (2d Dept. 2017).

Where fraud is alleged in conjunction with a medical malpractice claim, the fraud claim must give rise to damages that are separate and distinct from the damages alleged in the malpractice claim. *See Simcuski v. Saeli*, 44 N.Y.2d 442, 406 N.Y.S.2d 259 (1978); *Viglotti v. North Shore Univ. Hosp.*, 24 A.D.3d 752, 810 N.Y.S.2d 82 (2d. Dept. 2005). If not, the fraud claim must be dismissed. *Luciano v. Levine*, 232 A.D.2d 378, 648 N.Y.S.2d 149 (2d Dept. 1996); *McNamara v. Droesch*, 49 A.D.3d 511, 855 N.Y.S.2d 555 (2d Dept. 2008); *Harja v. Milhorat*, 95 A.D.3d 829, 943 N.Y.S.2d 885 (2d Dept. 2012). To assert fraud and medical malpractice in a single action, plaintiff must establish: knowledge on the part of the physician of the fact of his malpractice and of his patient's injury in consequence thereof, coupled with a subsequent intentional, material misrepresentation by the physician to his patient known by him to be false at the time it was made, and on which the patient relied, to his damage. *See Simcuski*, 44 N.Y.2d 442, 406 N.Y.S.2d 259. However, concealment alone by a physician does not give rise to a cause of action in fraud separate from the customary malpractice action. *See Spinosa v. Weinstein*, 168 A.D.2d 32, 571 N.Y.S.2d 747 (2d Dept. 1991); *Harja*, 95 A.D.3d 829, 942 N.Y.S.2d 885.

Here, the injuries identified in plaintiff's fraud claim are identical to those asserted in the medical malpractice claim. Moreover, plaintiff's claim that the billing statement was the subsequent material misrepresentation used to conceal Dr. Samadi's fraud was insufficient to give rise to a cause of action separate from the customary malpractice action.

Hospital Defendants

Fraud, Assault and Prima Facie Tort

Plaintiff's causes of action for fraud, assault and prima facie tort, as against the Hospital defendants fail based upon this Court's aforementioned analysis.

Negligence

A negligence cause of action must be dismissed when it is duplicative of medical malpractice. See *Baker v. Inamdar*, 99 A.D.3d 742, 952 N.Y.S.2d 208 (2d Dept. 2012); *Freely v. Donnenfeld*, 150 A.D.3d 695, 54 N.Y.S.3d 63 (2d Dept. 2017). Medical malpractice exists where the conduct at issue "constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician." *Bleiler v. Bodnar*, 65 N.Y.2d 65, 489 N.Y.S.2d 885 (1985); See *Weiner v. Lenox Hill Hosp.*, 88 N.Y.2d 784, 650 N.Y.S.2d 629 (1996); *D'Elia v. Menorah Home & Hosp. for Aged & Infirm*, 51 A.D.3d 848, 859 N.Y.S.2d 224 (2d Dept. 2008). Conversely, negligence exists where "the gravamen of the complaint is not negligence in furnishing medical treatment to a patient, but the hospital's failure in fulfilling a different duty." *Bleiler*, 65 N.Y.2d 65, 489 N.Y.S.2d 885.

The crux of the complaint is a failure to adhere to standards of proper urology, anesthesiology, and medical practice in each aspect of plaintiff's surgical and medical treatment. As such, the conduct at issue constitutes medical treatment, and thus sounds in medical malpractice. Moreover, the causes of action for negligence and medical malpractice arise from the same facts and do not allege distinct damages. Therefore, the negligence cause of action is duplicative of the medical malpractice cause of action.

Punitive Damages

Punitive damages are recoverable in a medical malpractice action only where the defendant's conduct evinces a high degree of moral culpability or willful or wanton negligence or recklessness. *Dmytryszyn v. Herschman*, 78 A.D.3d 1108, 912 N.Y.S.2d 107 (2d Dept. 2010). A plaintiff's claim of

conduct by a physician, for economic gain, without claim of intent to cause harm is insufficient to establish that defendant was “activated by evil or reprehensible motives.” *Spinosa*, 168 A.D.2d 32, 571 N.Y.S.2d 747.

In this instance, plaintiff alleges that the conduct was motivated by greed and inflation of surgical volume, revenue, profit, and incomes. However, economic gain without a claim of intent to harm is insufficient to substantiate punitive damages in a medical malpractice action.

Prejudicial and Scandalous Allegations in the Complaint

CPLR 3024(b) provides that “[a] party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading.” The inquiry is whether the purportedly scandalous or prejudicial allegations are relevant to a cause of action. *Kinzer v. Bederman*, 59 A.D.3d 496, 873 N.Y.S.2d 692 (2d Dept 2009); *Irving v. Four Seasons Nursing and Rehabilitation Center*, 121 A.D.3d 1046, 995 N.Y.S.2d 184 (2d Dept. 2014). Language that is irrelevant to the viability of the cause of action and prejudicial to any party should be stricken from the pleading. *See Kinzer v. Bederman*, 59 A.D.3d 496, 873 N.Y.S.2d 962 (2d Dept. 2009). Here, the Court is not persuaded that listing the executives’ names in the pleading is prejudicial to the defendants.

Plaintiff’s Cross-motion

Leave to amend the pleadings “shall be freely given” absent prejudice or surprise resulting directly from the delay. *McCaskey, Davies and Associates, Inc. v. New York City Health & Hospitals Corp.*, 59 N.Y.2d 755, 463 N.Y.S.2d 434 (1983); *Dixon v. Chang*, 137 A.D.3d 957, 27 N.Y.S.3d 239 (2d. Dept. 2016). Moreover, leave to amend should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit. *Morris v. Queens Long Island Medical Group*, 49 A.D.3d 827, 854 N.Y.S.2d 222 (2d Dept. 2008); *Balcolm v. Reither*, 77 A.D.3d 863, 911 N.Y.S.2d 72 (2d Dept. 2010).

General Business Law §349

The elements of a cause of action based upon General Business Law §349 are: (1) a deceptive consumer-oriented act or practice which is misleading in a material respect, and (2) injury resulting from such act. *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 623 N.Y.S.2d 529 (1995); *See North State Autobahn, Inc. v. Progressive Ins. Group Co.*, 102 A.D.3d 5, 953 N.Y.S.2d 96 (2d Dept. 2012). In determining whether a representation or omission is a deceptive act, the test is whether such act is “likely to mislead a reasonable consumer acting reasonably under the circumstances.” *Oswego Laborers' Local 214 Pension Fund*, 85 N.Y.2d 20.

In this instance, plaintiff alleged that Dr. Samadi misrepresented his professional medical credentials and double-booked operations. Plaintiff also alleged that he was injured as a result of these misrepresentations and double-bookings. Therefore, the proposed amendment is not patently devoid of merit since misrepresentations about the surgeon’s medical credentials and his involvement in plaintiff’s surgery could likely mislead plaintiff, a consumer, into agreeing to have his surgery performed by Dr. Samadi. Further, since no new facts have been alleged and the issue of fraud was raised in the first amended complaint, there is no prejudice or surprise resulting from the delay in adding this cause of action.

General Business Law §350


To establish a claim pursuant to General Business Law §350, plaintiff must demonstrate that the advertisement (1) had an impact on consumers at large, (2) was deceptive or misleading in a material way, and (3) resulted in injury. *Andre Strishak & Associates, P.C. v. Hewlett Packard Co.*, 300 A.D.2d 608, 752 N.Y.S.2d 400 (2d Dept. 2002). Absent a showing of plaintiff’s reliance on defendant’s misrepresentation, defendant cannot be held liable for false advertising. *See Colbert v. Rank America, Inc.*, 295 A.D.2d 300, 743 N.Y.S.2d 150 (2d Dept. 2002).

Here, plaintiff did not specifically allege that he relied on defendant's misrepresentation in ultimately deciding to have Dr. Samadi perform the operation. Thus, defendants cannot be held liable for false advertising as a matter of law. *See Dank v. Sears Holding Management Corp.*, 93 A.D.3d 627, 940 N.Y.S.2d 648 (2d Dept. 2012); *See Also Karlin v. IVF America, Inc.*, 93 N.Y.2d 282, 690 N.Y.S.2d 495 (1999).

Conclusion

Accordingly, the Samadi defendants' motion is denied in its entirety; the Hospital defendants' motion to dismiss is denied and their motion to strike is denied; and plaintiff's cross-motion for leave to amend is granted only to the extent that plaintiff shall amend his complaint to add a cause of action under General Business Law §349. The amended complaint shall be filed and served on or before May 15, 2019.

This constitutes the Decision and Order of the Court.

ENTER,

HON. GENINE D. EDWARDS
J. S. C.

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KINGS COUNTY CLERK
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