

Nadler v Samadi

2019 NY Slip Op 31328(U)

April 10, 2019

Supreme Court, New York County

Docket Number: 805464/17

Judge: Joan A. Madden

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SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 11

----- X Index No. 805464/17

PETER NADLER and LORRAINE WATERS,

Plaintiffs

-against-

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

Defendants.

-----X

KENNETH PABON and MYRA PABON,

Index No. 805118/18

Plaintiffs

-against-

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

Defendants.

-----X

ROBERT ROSS and JODI BETH ROSS,

Index No. 805119/18

Plaintiffs

-against-

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

Defendants.

-----X

JOAN A. MADDEN, J.:

In these three actions arising out of defendants' treatment and care of plaintiffs for urinary tract/prostate issues, defendants Lenox Hill Hospital ("Lenox Hill") and Northwell

Health, Inc. (“Northwell”)(together “the Hospital defendants”)(motion sequence nos. 001) move for an order (i) dismissing plaintiffs’ first causes of action for fraud, second causes of action for negligence, assault and prima facie tort, and third causes of action for loss of services and consortium insofar as they relate to the fraud claims for failure to state cause of action, (ii) striking certain allegations as scandalous and prejudicial pursuant to CPLR 3042 (b), and (iii) striking plaintiffs’ requests for punitive damages. Defendants David B. Samadi, M.D. (“Dr. Samadi”) and David B. Samadi, M.D., P.C. (together “the Samadi defendants”) move for an order dismissing plaintiffs’ intentional tort claims, including common law fraud and loss of consortium claim related to the fraud, assault and prima facie tort for failure to state a cause of action (motion seq. nos 002). Plaintiffs oppose the motions to the extent that defendants seek to dismiss their claims for fraud and loss of consortium related to fraud, and to strike certain allegations as scandalous and prejudicial and punitive damage requests, and cross move for leave to amend the complaints in the three actions to add claims under General Business Law §§ 349 and 350.¹ Defendants oppose the cross motions to amend.

Background²

Plaintiffs Peter Nadler (Nadler),³ Robert Ross (Ross)⁴, and Kenneth Pabon (Pabon),⁵

¹The motions and cross motions in the three actions are consolidated for disposition.

²Unless otherwise noted, the facts in this section are based on the allegations in the relevant complaint(s)/amended complaints that are the subject of this motion and cross motion.

³Nadler was treated by Dr. Samadi starting in the spring of 2015, when he was 66 years old, for lower urinary tract symptoms , including, *inter alia*, difficulties voiding his bladder, weak urinary stream and pain and discomfort (Nadler Amended Complaint ¶’s 336-337). Dr. Samadi diagnosed Nadler with Benign Prostate Hyperplasia (“BPH”) and recommended a transurethral resection of the prostate (“TURP”) be performed (Id ¶ 344). Nadler had the TURP surgery at Lenox Hill on June 22, 2015 (Id ¶ 349). It is alleged that TURP was performed by an

each received treatment for urinary tract/prostate issues from Dr. Samadi, a New York licensed physician who is board certified in the field of urology. Nadler and Ross underwent a transurethral resection of the prostate ("TURP") performed at Lenox Hill, while Pabon underwent a cystolitholapaxy also at Lenox Hill. It is alleged, *inter alia*, that plaintiffs' surgeries, which occurred in operating room 21 ("O.R. 21"), were not performed by Dr. Samadi but by unsupervised residents, and that during these surgeries, Dr. Samadi was simultaneously/concurrently performing robotic assisted laparoscopic prostatectomy surgeries ("RALP") in

unsupervised second year resident, Johnson Tsui while Dr. Samadi was performing a robotic assisted laparoscopic prostatectomy ("RALP") in another operating room (Id ¶ 350). It is alleged that the amount of tissue removed during the TURP was inadequate to remove the purported obstructive BPH, and that Nadler did not obtain relief of his lower urinary tract symptoms as a result of the TURP but instead postoperatively suffered worse complaints, sexual dysfunction, persistent urinary tract infections and worsened urinary tract function (Compl. ¶'s 368, 371).

⁴Ross originally consulted with Dr. Samadi in March 2012 for an enlarged prostate (Ross Complaint, ¶ 347), and continued to treat with Dr. Samadi for three years during which time he rejected Dr. Samadi's recommendation that he undergo a RALP to remove his prostate (Id ¶ 352, 353). Thereafter, Dr. Samadi diagnosed Ross with BPH and recommended a TURP be performed (Id ¶ 358). Ross underwent the TURP at Lenox Hill on December 21, 2015, and it is alleged that an unsupervised second year resident Dr. Yaniv Larish preformed the TURP without supervision (Id ¶ 380), while Dr. Samadi is alleged to have performed the RALP on another patient in another operating room (Id ¶ 382). It is alleged that Ross had complications following the surgery, including an inability to urinate, an infection of the bladder, persistent urinary track bleeding, sepsis and acute renal failure (Id 404-407).

⁵Pabon, who suffered from bladder stones, was treated by Dr. Samadi beginning on December 17, 2015, when he was 61 years old (Pabon Complaint, ¶'s 336, 337). Dr. Samadi recommended an operative procedure known as a cystolitholapaxy (a procedure involving a laser to fragment the bladder stones for removal purposes) to be followed by a TURP to be performed approximately one month later (Id ¶'s 346, 347). It alleged that the cystolitholapaxy was performed without supervision by Dr. Tsui, a second year resident, while Dr. Samadi performed a RALP on another patient in another operating room. It is alleged that procedure was improperly performed leading to severe iatrogenic injury to the bladder, prostate and adjacent neurovascular structures by improper use of the laser with faulty targeting of the laser bridge and failing to remove any stone fragments (Id . ¶'s 369, 370). The TURP surgery was cancelled because Pabon was unable to pay \$6,600 in excess of his Medicare benefits (Id. ¶'s 383-385).

operating room 25 ("O.R. 25"). It is further alleged that defendants concealed that Dr. Samadi was not performing plaintiffs' surgeries through false statements on consent forms, operative reports, and progress notes, and by unnecessarily using general anesthesia. In the third causes of action for consortium and services, the spouses of the plaintiffs Nadler, Ross and Pabon, seek damages, including in connection with allegations that plaintiffs paid false bills generated under fraudulent pretenses.

Defendant Northwell Health, Inc. ("Northwell") is a corporate health care network that owns and operates Lenox Hill. Dr. Samadi is authorized to provide care and treatment, and is employed by Lenox Hill and/or Northwell. Lenox Hill and Northwell employed the Operating Room (O.R.) schedulers, O.R. administrators, O.R. supervisory staff, medical billers, and O.R. personnel (e.g., O.R. nurses, anesthesiologists, residents, etc.) for the surgeries and related medical services performed at the Lenox Hill by Dr. Samadi.

The complaints which are subject to the dismissal motions contain substantially identical allegations except for the particulars as to each plaintiff's medical treatment and the timing and extent of such treatment. Plaintiffs do not oppose the dismissal of their claims for negligence, prima facie tort and assault. Accordingly, at issue on the defendants' dismissal motions is the viability of plaintiffs' fraud claims, and that part of the loss of consortium claims based on the alleged fraudulent billing.

Motions to Dismiss Fraud Claims

The complaints allege that there was "conspiracy to defraud" engaged in among Dr. Samadi and the corporate executives and administrators and non-medical defendants employed by the Hospital defendants, the purpose of which was to increase and inflate the volumes for

urologic surgeries, inpatient admissions, anesthesia services and medical services to inflate billing revenue, health system profits, and physician income and compensation. The alleged conspiracy involved (1) fraudulently billing patients, including plaintiffs, for urologic surgeries performed on plaintiffs by unsupervised residents where Dr. Samadi was not present for “critical or key portions of the surgeries’ and/or “the entire viewing” during endoscopic/laparoscopic surgery performed in O.R. 21 as Dr. Samadi was simultaneously or concurrently performing robotic assisted laparoscopic prostatectomy surgeries (“RALP”) in O.R. 25; (2) fraudulently placing patients, including plaintiffs, under general anesthesia without medical necessity and for excessively prolonged periods of time, including for the purpose of concealing the fraud, and billing such patients for general anesthesia services that were medically unjustifiable and excessively prolonged; (3) defrauding patients, including plaintiffs, for surgeries, anesthesia services, related medical treatment and hospitalization that occurred without proper consent; (4) defrauding patients, including plaintiffs, for surgeries, anesthesia services and related medical treatment through the preparation of fraudulent medical records (e.g., operative reports, anesthesia records, operative case records, etc.) that falsely indicated that Dr. Samadi either performed the surgery or was present during the surgery, including for the purpose of concealing the fraud; (5) defrauding patients, including plaintiffs, by publicizing that Dr. Samadi as purportedly “world reknown” prostate expert, “Best Prostate Surgeon in the World” and “NY’s Best Prostate Surgeon” to attract numerous patients, increase surgical volume and hospital admissions and, consequently, inflate revenue, profits and physician compensation.

As for the Hospital defendants, the complaints allege that these defendants, including through their specifically named executives, administrators, medical directors and O.R.

schedulers and O.R. supervisory staff, “authorized, approved, permitted, allowed, ratified, enabled, equipped, supported, assisted, encouraged, and promoted” the fraud scheme, including Dr. Samadi’s simultaneous surgeries, the fraudulent billing practices, the use of medically unnecessary anesthesia, the improperly obtained consents and the falsified medical records.⁶ The complaints further allege that the Hospital defendants are vicariously liable, under the theories of respondent superior and agency, for the fraud of their executives, administrators, medical directors and O.R. schedulers and O.R. supervisory staff, and that this vicarious liability also extends to acts and conduct by Dr. Samadi as their employee.

As for damages, the following harm is alleged as a result of the fraudulent scheme: (1) plaintiffs’ rights to receive ethical medical treatment were knowingly, intentionally and willfully violated; (2) plaintiffs’ rights to receive a proper informed consent were violated and they underwent surgery without giving a full, proper, knowledgeable and informed consent for the

⁶The overt acts by the Hospital defendants and their executives, administrators and employees as alleged in the complaints include, *inter alia*, (1) revoking the thirty (30) year ban on double booked operating rooms for urological surgeries; (2) the entering into an employment contract with Samadi which included incentive clauses related to surgical volume and revenue generation; (3) approving the use of Northwell employees to make surgical schedules simultaneously reserving O.R. 21 and O.R. 25 for Samadi’s use to engage in fraudulent concurrent surgeries on a routine basis; (4) furnishing Samadi with two fully equipped and staffed O.R.’s to perform fraudulent concurrent surgeries; (5) authorizing the use of unsupervised urology residents to perform the actual “ghost” surgeries on Samadi’s patients; (6) allowing the Lenox Hill Hospital urology residency program to be downgraded due to the failure to properly train residents so they could be exploited as unqualified labor to perform concurrent surgeries on Samadi’s patients; (7) providing and directing Northwell employed medical billers to generate false and excessive billing to Samadi’s patients; (8) approving and permitting the surgical schedules that self-evidently exhibited Samadi’s simultaneous use of two operating rooms and blatant concurrent surgeries fraud scheme; and (9) preparing the extensively detailed urological surgery department statistical records that documented the fraudulent concurrent surgeries on Samadi’s patients numbering in the thousands during the period July 2013 – August 2016

operation; (3) plaintiffs underwent surgery, general anesthesia, and hospitalization under false pretenses; (4) plaintiffs were subjected to surgery by an unsupervised inexperienced resident without his knowledge; (5) plaintiffs were subjected to medically unjustifiable, unnecessary and excessively risky general anesthesia; (6) plaintiffs sustained serious physical injuries; (7) plaintiffs sustained a breach of trust and confidence in the honesty and integrity of the medical profession and health care system; (8) plaintiffs paid for false bills generated under fraudulent pretenses; and (9) plaintiffs were defrauded in multiple ways.

With respect to the fraudulent billing practices, it is alleged that defendants defrauded patients by billing them excess amounts (I) for surgeon's fees, copayments and account balances related to the "concurrent" and "simultaneous" non-RALP urologic surgeries and operative procedures performed by unsupervised residents in O.R. 21; (ii) for co-payments and account balances related to medically unjustifiable and unnecessary general anesthesia services and excessively prolonged general anesthesia services related to the "concurrent" and "simultaneous" non-RALP urologic surgeries and operative procedures performed by unsupervised residents in O.R. 21; (iii) for co-payments and account balances for medical treatment that lacked a legal and proper consent related to the "concurrent" and "simultaneous" non-RALP urologic surgeries and operative procedures performed by unsupervised residents in O.R. 21. As a result of such fraudulent billing practices, it is alleged that plaintiffs were damaged as they were billed, and paid, for excessive amounts for the subject surgeries.

Defendants' Motions to Dismiss the Fraud Claims

Defendants argue that the fraud claims must be dismissed as they are duplicative of, and seek the same damages as, the medical malpractice claims, citing, *inter alia*, See Simcuski v.

Saeli, 44 NY2d 442 (1978). Defendants also argue that plaintiffs have not alleged, as required to assert a fraud claim in the context of a medical malpractice action, that an intentional and material misrepresentation was made subsequent to the alleged malpractice which caused additional damages, citing, *inter alia*, Aton v. Bier, 12 AD3d 240, 241 (1st Dept 2004). Instead, they assert that the alleged misrepresentations and concealment occurred before the asserted malpractice and thus these allegations, at best, provide a basis for a lack of informed consent claim as opposed to one for fraud. Defendants also argue that the fraud claims, including the claims for fraudulent billing, are not pleaded with sufficient particularity to satisfy CPLR 3016(b), citing Callas v Eisenberg, 192 AD2d 349, 350 (1st Dept 1993).

Lenox Hill and Northwell additionally argue that they cannot be held liable for intentional misrepresentations outside the scope of Dr. Samadi's employment. Moreover, they argue that the consent forms which are part of the record belie plaintiffs' allegations that they were unaware that a resident would be involved in the medical procedure and that, in any event, fraud by omission requires a fiduciary duty which was not pleaded and does not exist between the Hospital defendants and the plaintiffs.

In opposition, plaintiffs argue that the damages for the fraud claims are separate and apart from those related to the medical malpractice, including the costs of the surgeries that plaintiffs would not have consented to if they had known that the surgeries were going to be performed by an unsupervised resident, as opposed to Dr. Samadi, citing Liberatore v. Greuner, 55 Misc3d 361 (Sup Ct NY Co. 2016), aff'd 153 AD3d 1207 (1st Dept 2017)(complaint stated a fraud claim based on allegations that defendant physician prescribed plaintiff dangerous amounts of Demerol in furtherance of a scheme to enrich himself). Plaintiffs also argue that the fraud claims

are pleaded with sufficient particularity to satisfy CPLR 3016(b) as the complaints provide, *inter alia*, the dates, time frames, and locations of the fraud scheme, the fraudulent acts involved in the scheme, and identify the persons involved in the fraud, the motive for the scheme, and that plaintiffs justifiably relied on the fraudulent inducement to consent to the surgeries and the resultant damages.

On a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), the court “accept[s] the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” Leon v. Martinez, 84 NY2d 83, 87–88 (1994). “Dismissal of the complaint is warranted [however] if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery.” Connaughton v. Chiptole Mexican Grill, Inc., 29 NY3d 137, 142 (2017).

To maintain a cause of action for fraud, a plaintiff must allege a representation of a material existing fact, falsity, scienter, justifiable reliance and damages. Callas v Eisenberg, 192 AD2d at 350; see also Cohen v. Houseconnect Realty Corp., 289 AD2d 277 (2d Dept 2001). Each of these essential elements must be supported by factual allegations sufficient to satisfy CPLR 3016 (b), which requires, in a cause of action based on fraud, that “the circumstances constituting the wrong shall be stated in detail.” Megaris Furs, Inc. v Gimbel Bros., Inc., 172 AD2d 209, 210 (1st Dept 1991).

To plead a viable cause of action for fraud in connection with claims of medical malpractice, the allegations must include “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 him to his patient known by him to be false at the time it was made, and on which the patient relied to his damage.” Aton v. Bier, 12 AD3d at 241. Moreover, the damages resulting from the fraud must be “separate and distinct from those generated by the alleged malpractice.” Spinosa v. Weinstein, 168 AD2d 32, 42 (2d Dept 1991)(internal citations and quotations omitted); see also Otero v. Presbyterian Hospital in the City of New York, 240 AD2d 279, 280 (1st Dept 1997). Furthermore, “without more, concealment by a physician or failure to disclose his own malpractice does not give rise to a cause of action in fraud or deceit separate and different from the customary malpractice action.” See Simcuski v. Saeli, 44 NY2d at 452.

Here, even assuming *arguendo* that the fraud claims are adequately pleaded, such claims are insufficient as they are based on the same conduct underlying medical malpractice claims, that is the use of unsupervised residents to conduct simultaneous/concurrent surgeries, and the administration of unnecessary anesthesia and false statements to conceal the alleged conduct underlying the malpractice. See Spinosa v. Weinstein, 168 AD2d at 42 (allegations of fraud based on the performance of unnecessary surgeries and false promises regarding the results are tantamount to a failure to disclose physician’s malpractice and are insufficient to state a claim for fraud); Meyers v. Epstein, 232 FSupp2d 192, 200 (SD NY 2002)(applying New York law to find that the defendant’s physician’s misstatements as to the identity of the surgeon performing the surgery does not state a cause of action for fraud as it is not distinct from plaintiff’s medical malpractice claim).

The fraud claims also fail as the damages alleged in connection with these claims are not

“separate and distinct from those flowing from the original malpractice.” Abbondandolo v. Hitzig, 282 AD2d 224, 225 (1st Dept 2001)(internal citation and quotations omitted). Specifically, the harm with respect to the fraud claims, including physical injuries to plaintiffs from the unnecessary surgery and the unjustified use of anesthesia, and the loss of the right to receive proper informed consent, are not distinct from the damages allegedly suffered as a result of the underlying medical malpractice.⁷ See Vigliotti v. North Shore University Hospital, 24 AD3d 752 (2d Dept 2005)(plaintiff did not state a claim for fraud against surgeon who allegedly transmitted Hepatitis-C to plaintiff during surgery based on the concealment of the surgeon’s condition as the damages arising from the fraud were “no different from those alleged to have resulted from his lack of informed consent and malpractice claims”); compare Kramer v. City of New York, 157 AD2d 404 (1st Dept 1990)(trial court erred in dismissing fraud claim based on physician’s misrepresentation that a surgical sponge inadvertently left in plaintiff during surgery would not cause plaintiff any problems, as such misrepresentation gave rise to damages separate and distinct from the original malpractice when, twenty years after the surgery, plaintiff developed an abnormal mass around the sponge required medical treatment including the surgical removal of the mass); Abraham v. Kosinski, 251 AD2d 967 (4th Dept 1998)(fraud claim was stated where damages flowed from fraud were separate and distinct from medical malpractice as they arose out of continuing course of ineffective treatment which would not have been pursued but for the fraudulently withheld information).

Next, the damages related to the allegedly fraudulent billing practices arise from

⁷While plaintiffs also alleged they were harmed in that their rights to receive ethical treatment and loss of trust in the medical system, these allegations do not provide a basis for the recovery of damages for fraud.

payments made in connection with the surgeries and treatment underlying the malpractice claims, and therefore are not distinct and separate from the damages arising from such claims. See Oren v. Applebaum, 205 AD2d 976 (3d Dept 1994)(allegations that plaintiff continued to pay fees to psychiatrist who misrepresented that she was providing psychoanalysis when she was not, did not constitute a basis for damages independent from those flowing from the malpractice).⁸

Moreover, contrary to plaintiff's argument, the holding in Liberatore v. Greuner, 55 Misc3d 361 (Sup Ct NY Co. 2016), aff'd 153 AD3d 1207 (1st Dept 2017) is not controlling here.⁹ In Liberatore, the plaintiff asserted claims for medical malpractice and fraud based on allegations that the defendant/physician prescribed plaintiff dangerous amounts of Demerol to enrich himself. The fraud claim was based on allegations that "defendant made a representation that he was providing her with medical care, when in fact he knew that he was simply providing her with dangerous amounts of drugs for his own profit ...[and that defendant] repeatedly told her that Demerol, in the amount he prescribed and administered, was helping her and that taking such quantities of it was in her best medical interest...[when]... nothing could be further from the truth; the overuse of Demerol almost killed [plaintiff]." Id at 370. In denying the motion to dismiss plaintiff's fraud claim as duplicative of the medical malpractice claim, the court wrote that "the allegations are more essentially fraud claims than medical malpractice claims." In fact, the court

⁸As for plaintiffs' argument that pursuant to CPLR 3014 and 3017, pleading inconsistent theories does not render the causes of action insufficient or warrant their dismissal, such argument is unavailing as the issue here is not inconsistent claims but fraud claims which are redundant or duplicative of medical malpractice claims..

⁹Plaintiffs also rely on Adames v. Velasquez, 19 Misc3d 881 (Sup Ct Queens Co. 2008). However, Adames is inapposite as the fraud in that case arose out of false representations by defendant that he was a licensed dentist.

dismissed the medical malpractice claims on statute of limitations grounds and refused to apply the insanity toll explaining that, “this is not really a medical malpractice case in essence...the main thrust of the allegations, instead, is that [doctor] did not behave as a doctor, but as a drug dealer...” *Id* at 369. In affirming the trial court, the Appellate Division, First Department noted that “[p]laintiff’s fraud claim alleges, not malpractice, but that defendant intentionally drugged [plaintiff] in furtherance of stealing money from her.” Liberatore v. Greuner, 153 AD3d at 1207.

In this case, while plaintiffs allege that certain aspects of their treatment were unnecessary and the defendants misled them as to the identity of the physician performing the surgeries, unlike in Liberatore, the gravamen plaintiffs’ claims is that defendants committed medical malpractice by providing unnecessary and inappropriate medical care and treatment to plaintiffs. Since, as explained above, the fraud claims at issue arise from these allegations of medical malpractice and the damages flowing therefrom, they must be dismissed, together with that part of the loss of consortium claim related to the fraud.

Hospital Defendants’ Motion to Strike Allegedly Scandalous Allegations

The Hospital defendants move to strike paragraphs 124, 158 and 160 of all three complaints, which specifically name certain hospital executives/administrators who are not defendants in this action, as redundant of paragraphs 125, 157 and 159 which contain the same allegations without naming the hospital executives/administrators. CPLR 3024(b) provides that “[a] party may move to strike any scandalous or prejudicial matter unnecessarily asserted in a pleading.” In determining whether a pleading should be stricken under this provision, the court examines, *inter alia*, whether the allegations are relevant to the claims at issue. New York City Health & Hosps. Corp v. St. Barnabas Community Health Plan, 22 AD3d 391, 391 (1st Dept

2005). See e.g., Soumayah v. Minnelli, 41 AD3d 390, 392-393 (1st Dept), appeal withdrawn 9 NY3d 989 (2007)(trial court erred in denying motion to strike allegations that defendant asked plaintiff how much money he wanted not to initiated the action as allegations which were not relevant to sufficiency of plaintiff's claims); Della Villa v. Constantino, 246 AD2d 867 (3d Dept 1998)(trial court properly struck allegations in the complaint regarding nature of defendants' personal relationship which was irrelevant to plaintiffs' claims).

Plaintiffs oppose the motion, arguing that the allegations are relevant to the fraud claim against the corporate defendants insofar as they seek to recover based on theories of vicarious liability and allegations of a conspiracy to defraud. Plaintiffs' opposition is unavailing as the fraud claims have been dismissed, and the names of the individual executives and administrators are not relevant to the claims.

Accordingly, the motions to strike are granted to the extent of striking paragraphs 124,160, and 160 in the three complaints.

Hospital Defendants' Motion to Strike Request for Punitive Damages

The Hospital defendants move to strike plaintiffs' requests for punitive damages in the three actions. Plaintiffs oppose the motions.

Punitive damages may be recovered in a medical malpractice action where a defendant's conduct amounts to "willful or wanton negligence or recklessness that evinces a gross indifference to patient care." Garber v. Lynn, 79 AD3d 401, 403 (1st Dept 2010)(internal citations omitted); see also, Brown v. La Fontaine-Rish Medical Assoc, 33 AD3d 470, 471 (1st Dept 2006)(holding that "[p]unitive damages were properly submitted to jury upon record containing ample evidence of reprehensible conduct evincing a gross indifference to patient

care”). Moreover, “[o]nly if it can be said, as a matter of law, that punitive damages are unavailable to a plaintiff in a medical malpractice action is a summary determination in favor of defendant warranted on this issue.” Graham v. Columbia-Presbyterian Medical Center, 185 AD2d 753, 756 (1st Dept 1992).

The Hospital defendants argue that the requests for punitive damages must be stricken as the gravamen of this action is for medical malpractice and an award of punitive damages is a rarity in such cases, and that the allegations in the complaints do not rise to the level of punitive damages. They also argue that they cannot be held liable for punitive damages based on their employees’ intentional conduct.

This argument is without merit. Here, allegations defendants misled plaintiffs that Dr. Samadi was performing their surgeries when, in fact, the surgeries were performed by a resident, and that defendants concealed the identity of the surgeon, including by administering unnecessary general anesthesia and making false statements on consent forms and operative reports, provide a sufficient basis for plaintiffs’ request for punitive damages as the allegations evince “a gross indifference to patient care.” Brown v. La Fontaine-Rish Medical Assoc, 33 AD3d at 471. See also Garber v. Lynn, 79 AD3d at 403 (punitive damages were appropriately awarded in dental malpractice action where defendant dental group engaged in “the sort of willful or wanton negligence and recklessness that evinces gross indifference to patient care”); Marsh v. Arnot Ogden, 91 AD3d 1070, 1072-1073 (3d Dept 2012)(reversing trial court’s dismissal of punitive damage claim based on allegations that the decedent was mistakenly injected with an insulin-reducing medication not prescribed for him despite decedent’s warning that medication was not used by decedent who was not diabetic, and that subsequently the

defendant doctor discontinued monitoring of the decedent's glucose levels until the morning of his death).

As for the Hospital defendants' argument that they cannot be held liable for punitive damages attributable to the intentional conduct of their employees, such argument is unavailing as there are allegations that the Hospital defendants knew about, and were complicit in, the conduct providing the basis for the punitive damages request. See Loughry v. Lincoln First National Bank, 67 NY2d 369 (1986) ("punitive damages can be imposed on an employer for the intentional wrongdoing of its employees ... where management has authorized, participated in, consented to or ratified the conduct giving rise to such damages or deliberately retained the unfit servant"); Sultan v Kings Highway Hosp Center, Inc., 167 AD2d 534, 535 (2d Dept 1990) (denying hospital's motion to strike punitive request, finding there were questions of fact as to whether hospital's superior officers had any knowledge of or participated in the actions of the emergency room nursing staff denying plaintiff's decedent treatment that resulted in her death).

Accordingly, the motions to strike the punitive damages requests are denied.

Plaintiffs' Cross Motions to Add Claims Under General Business Law §§ 349 and 350

Plaintiffs cross move to amend their complaints to assert claims for relief under General Business Law ("GBL") §§ 349 and 350. These claims are grounded in the facts alleged in connection with the fraud claims, including that defendants engaged in a scheme to defraud plaintiffs, and over a 1,000 other patients, when they were misled that Dr. Samadi was performing their surgeries, and that the scheme involved the performance of plaintiffs' surgery by unsupervised interns while Dr. Samadi was simultaneously/ concurrently performing RALP in another operating room, and the concealment of these facts through the unnecessary use of

general anesthesia, and false statements on consent forms and operative reports with the purpose of increasing profits.

In this connection it is alleged that the Hospital defendants “heavily advertised” Dr. Samadi’s services and spent “approximately \$70,000” primarily for internet advertising related to [Dr. Samadi’s] services, and that the “department of urology” on Lenox Hill’s website directs to a page that touts only defendant [Dr. Samadi’s] services, the contact information for [Dr. Samadi’s] private urology practice... and provides various resource links directed to ‘Lenox Hill Prostate Cancer Center’ and ‘Robotic Oncology.com’ ‘Lenox Hill Prostate Cancer Center’ and ‘Robotic Oncology.com’ also exclusively advertise defendant [Dr. Samadi’s] services and similarly provide the contact information for [Dr. Samadi’s] private urology practice.” In support of their GBL claims, plaintiffs refer to their submission of printouts of internet advertisements regarding Dr. Samadi’s services, which identify him as the Chairman of Urology and Chief of Robotic Surgery at Lenox Hill, and news reports of Dr. Samadi’s conduct and its widespread effects on patients he treated..

The proposed GBL § 349 claims allege that defendants engaged in a “pervasive pattern” of fraudulent conduct related to circumstances under which the surgeries were performed and the anesthesia services and admission related to the surgery and the concealment of material facts relating the surgeries, and that they acted with “utter disregard for honesty and truthfulness” and the safety of the plaintiffs. It is further alleged that defendants made false statements and material misrepresentations of fact to plaintiffs that were known to be false and that this pattern of fraudulent conduct was a substantial factor in causing harm to plaintiffs. It is also alleged that the defendants, which held themselves out to the public as offering health care services and as

health care providers engaged in consumer oriented business practices, activities and operations had a broad impact on the public, patients and medical consumers including plaintiffs.

As for proposed claim under GBL § 350, it is alleged that defendants held themselves out as offering health care services and as health care providers to the public, patients and medical consumers, including in advertisements, which included statements, representations, assertions and claims to the effect that Dr. Samadi performed the "entire" surgery, procedure and operation on his patients and that this was a reason to choose him to be their doctor and surgeon statements, and that Dr. Samadi was a professor of urology at Hofstra School of Medicine, and that such statements were false, fraudulent and materially misleading, and that as a result of the false advertisements by defendants caused material harm and injuries.

Defendants oppose the cross motions to amend, arguing that plaintiffs provide no excuse for not including the claims in their initial complaints, and that the proposed claims are without merit. As for the purported lack of merit, defendants assert that the claims are not consumer oriented, they fail to allege materially deceptive conduct, and have failed to show injury as a result of the allegedly deceptive conduct. With regard to the proposed GBL § 350 claims, the Samadi defendants argue that the claims are insufficient as the false advertisement on which they are based contains no false advertising but at best "puffery" as to Dr. Samadi's credentials, and did not promise any specific results. As for allegations that the website was misleading since it stated that Dr. Samadi would perform the entire surgery, defendants assert that the website deals with robotic prostate surgeries also known as RALP, and is irrelevant to the non-robotic surgeries performed on plaintiffs.

The Hospital defendants additionally argue that they did not engage in any consumer

oriented conducted directed at public, including through advertising, and that any advertising was done by the Samadi defendants and not the Hospital defendants. In this connection, they note that websites advertising Dr. Samadi's services were outside websites containing contact information for Dr. Samadi's private practice, and that the advertisements are copyrighted by Dr. Samadi, and that allegations that these advertisements were accessible via hyperlinks on the Lenox Hill's Department of Urology website are insufficient to state a deceptive practices claim. They also assert that "loss causation" is inadequately alleged as there are no allegations that plaintiffs saw the website or the advertisement and, that in any event, the consent forms indicated that residents would be participating in the surgeries.

"Leave to amend a pleading should be 'freely given' (CPLR 3025[b]) as a matter of discretion in the absence of prejudice or surprise." Zaid Theatre Corp. v. Sona Realty Co., 18 AD3d 352, 355-356 (1st Dept 2005)(internal citations and quotations omitted). However, "if the proposed amendments are totally devoid of merit and legally insufficient leave to amend should be denied." Mosaic Caribe, Ltd. v. AllSettled Group, Inc., 117 AD3d 421, 422 (1st Dept 2014); see also, MBIA Ins Corp. v. Greystone & Co., Inc., 74 AD3d 499 (1st Dept 2010)(citation omitted).

As a preliminary matter, it cannot be said that any delay in seeking to add the proposed claims caused prejudice or surprise of the kind warranting the denial of the cross motion to amend as discovery has not begun and the facts underlying the proposed claims are the same as those underlying previously asserted fraud claims. See Burlington Ins. Co. v. New York City Transit Authority, 153 AD3d 438, 439 (1st Dept 2017)(defendant not prejudiced by amendment of original pleading where defendant "failed to demonstrate a change of position resulting from

the alleged prejudice”).

With respect to the merit of plaintiffs’ proposed GBL § 349 claims, it is well settled that “providers of medical services are potentially subject to liability under GBL § 349. Karlin v. IVF America, Inc., 93 NY2d 282, 292 (1999). Moreover, a claim under this section may be stated in connection with a medical malpractice claim, even when a fraud claim is dismissed as duplicative of the malpractice claim. Abbondandolo v. Hitzig, 282 AD2d at 225.

To state a claim under GBL § 349, a plaintiff must allege that the defendant engaged “in an act or practice that is deceptive or misleading in a material way and that plaintiff has been injured by reason thereof.” Small v. Lorillard Tobacco Co., 94 NY2d 43, 55 (1999)(internal citations and quotations omitted). “A deceptive practice need not reach the level of common-law fraud to be actionable under section 349, and intent to defraud and justifiable reliance are not elements of a statutory claim.” Id. However, to qualify for protection under the statute, it must be shown that “the acts or practices have a broader impact on consumers at large [and] [p]rivate contract disputes, unique to the parties, ... would not fall within the ambit of the statute.” Id. at 25.

Contrary to defendants’ position, the proposed GBL § 349 claims adequately allege that defendants engaged in consumer oriented conduct based on allegations that defendants marketed the professional services provided by Dr. Samadi to the public, including through the dissemination of information through website advertisements. Indeed, the web pages advertising Dr. Samadi’s services refer to “media highlights” including appearances by Dr. Samadi regarding his treatments including on the *Today* show and *Late Show* with David Letterman. Karlin v. IVF America, Inc., 93 NY2d at 293 (noting that “multi-media dissemination of information to the

public is precisely the sort of consumer oriented conduct target by the General Business Law §§ 349 and 350"). Furthermore, while the Hospital defendants argue that they were not responsible for the websites advertising Dr. Samadi's services, the court finds that the proposed claims adequately allege that the Hospital defendants had a role in disseminating information about Dr. Samadi's services to the public, including allegations that these defendants spent \$70,000 to advertise Dr. Samadi's services on the internet. Moreover, it is alleged that hyperlinks on Lenox Hill's website linked patients to Dr. Samadi's web advertisements which state that Dr. Samadi is the Chairman of Urology and Chief of Robotic Surgery at Lenox Hill.¹⁰

Next, with respect to the requirement that the act is misleading in a material way, the test is whether the allegedly deceptive practice is "likely to mislead a reasonable consumer acting reasonably under the circumstances." Solomon v. Bell Atlantic Corp., 9 AD3d 49, 52 (1st Dept 2004)(internal citations and quotations omitted). Here, at the very least, there are factual issues as to whether the alleged pattern of fraud related to the surgeries was likely to mislead a reasonable consumer. And, the proposed claims adequately allege that plaintiffs were injured as a result of the deceptive conduct such as to state a claim under GBL § 349. Karlin v. IVF

¹⁰While the Hospital defendants argue that these hyperlinks to outside websites are not a basis for finding them responsible for the advertisements at issue, such argument is unavailing. Moreover, Weinstein v. eBay, Inc., 819 F. Supp. 2d 219, 228 (SD NY 2011) on which the Hospital defendant rely is inapposite. In that case, the court dismissed a claim brought by a baseball fan against the New York Yankees finding that the team's provision of a hyperlink to a unlicensed professional baseball ticket reseller did not constitute a deceptive act or practice. In reaching this conclusion, the court noted that a reasonable consumer would not find that tickets came directly from the Yankees based on the fact that the ticket resellers sold tickets to numerous non-Yankee events, including music concerts, circuses and other sports events. In contrast, in this case, given that Dr. Samadi is identified on the advertisement as Hospital Defendants' Chairman of Urology and Chief of Robotic Surgery, at this juncture it cannot be said that the reasonable consumer would not believe that the Hospital defendants were responsible for the content of the information in the advertisements.

America, Inc., 93 NY2d at 293. Accordingly, plaintiffs' request for leave to add the claim under GBL § 349 is granted.

As for GBL § 350, to state a claim under this section, which proscribes “[f]alse advertising in the conduct of any business, trade or commerce,” a plaintiff must allege 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 & Assocs., P.C. v. Hewlett Packard Co., 300 AD2d 608, 609 (2d Dept 2002). To prove a false advertising claim, it must be shown that the advertisement was likely to mislead a reasonable consumer acting reasonably under the circumstances. Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A., 85 NY2d at 26. Moreover, to state a claim under GBL § 350, plaintiffs must show that they relied “upon or were aware of the allegedly false advertisement when purchasing the [product].” Id. at 610.

Here, for the reasons above, the advertisements had an impact on the public at large. However, the cross motions to amend to add the claims under GBL § 350 must be denied. First, the alleged misrepresentations in the relevant advertisement that Dr. Samadi would perform the “entire surgery” would not mislead a reasonable consumer, including plaintiffs, since, as noted by defendants, the reference to the entire surgery clearly pertains to the RALP as opposed to the type of surgery performed on plaintiffs. As for the other alleged misrepresentation regarding Dr. Samadi's position as a professor at Hofstra, such misrepresentation is not material to plaintiffs' belief as to whether Dr. Samadi was performing plaintiffs' surgery. Lastly, the GBL § 350 claims are also insufficient as plaintiffs do not allege that they were aware of the advertisements or relied on them. See, Gershon v. Hertz Corp., 215 AD2d 202, 203 (1st Dept 1995)(finding that

“[p]laintiff's cause of action under General Business Law § 350 for false advertising is legally insufficient absent an allegation that he relied upon or even knew of defendant's advertising”).

Conclusion

In view of the above, it is

ORDERED that the motions to dismiss are granted to the extent of dismissing the first causes of action for fraud, the second causes of action for negligence, assault and prima facie tort, and the third causes of action for consortium and services to the extent it alleged losses in connection with fraud; and it is further

ORDERED that the Hospital defendants' motions to strike paragraphs 124, 158 and 160 are granted and these paragraphs shall not be included in any amended pleading without further leave of the court; and it is further

ORDERED that the Hospital defendants' motions to strike plaintiffs' request for punitive damages are denied; and it is further

ORDERED that plaintiffs' cross motions to amend are granted only to the extent of granting leave to plaintiffs to add a claim under GBL § 349; and it is further

ORDERED that within 30 days of e-filing this order plaintiffs shall serve amended complaints in the three actions consistent with this decision and order finding that plaintiffs have viable claims for medical malpractice, loss of consortium unrelated to the fraud, and under GBL § 349; and it is further

ORDERED that a preliminary conference shall be held in the three actions in Part 11. Room 351, 60 Centre Street, New York, NY on August 1, 2019 at 11:30 am..

DATED: April 16, 2019 .



J.S.C.

HON. JOAN A. MADDEN
23 **J.S.C**