Markelson v Samadi
2019 NY Slip Op 32887(U)
September 23, 2019
Supreme Court, New York County
Docket Number: 805463/17
Judge: Joan A. Madden
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

-- X Index No. 805463/17

GEORGE MARKELSON, as Executor of the Estate of STEPHEN MARKELSON, deceased

Plaintiff

-against-

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

Defendants.

--X

ANGELOS MARKATOS and LINDA MARKATOS Index No. 805338/18

Plaintiffs

-against-

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

Defendants.

--X

MICHAEL J. PINO, Index No. 150789/18

Plaintiff

-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 David B. Samadi, M.D. ("Dr. Samadi") and David B. Samadi,

M.D., P.C. (together "the Samadi defendants") move for an order dismissing (I) the fraud claims asserted by all the plaintiffs, the claims for negligence, prima facie tort and assault claims asserted by plaintiffs George Markelson, as Executor of the Estate of Stephen Markelson ("Markelson"), and Michael J. Pino ("Pino"), and the claims by Angelos Markotos and Linda Markotos (together "the Markatos plaintiffs") for violations of General Business Law (GBL") §§ 349 and 350 and for loss of consortium related to the fraud; (ii) the medical malpractice claim asserted by Markelson; and (iii) plaintiffs' request for punitive damages. Lenox Hill Hospital ("Lenox Hill") and Northwell Health, Inc. ("Northwell")(together "the Hospital defendants") separately move to dismiss the claims against them on the same grounds and also seek an order striking certain allegations as scandalous and prejudicial pursuant to CPLR 3042 (b).

Plaintiffs oppose the dismissal of their fraud claims, Markelson opposes the dismissal of his medical malpractice claim, while the Markatos plaintiffs oppose the dismissal of their claims asserting violations of GBL §§ 349 and 350, and for loss consortium related to the fraud. Plaintiffs also oppose the motions to strike/dismiss their requests for punitive damages and the Hospital defendants' motion to strike certain allegations as scandalous and prejudicial. However, plaintiffs Markelson and Pino do not oppose the motions to dismiss their assault, prima facie tort and negligence claims.

Markelson and Pino each cross move for leave to amend their amended complaints to add claims for violations of General Business Law §§ 349 and 350, and defendants oppose the cross motions.[1]

---

[1]The motions and cross motions in these three actions are consolidated for disposition. In Markelson v. Samadi, et al, and in Pino v. Samadi et al , the Samadi defendants move under motion sequence no. 001, while the Hospital defendants move under motion sequence no. 002.

Background

Plaintiff George Markelson's decedent Stephen Markelson ("Mr. Markelson" or "decedent"),[2] plaintiff Angelos Markatos (Markotos)[3] and plaintiff Michael J. Pino ("Pino"),[4]

In Markotos v. Samadi, et al, the Hospital defendants move under motion sequence 001 and the Samadi defendants move under motion sequence no. 002.

[2]Mr. Markelson was treated by Dr. Samadi beginning in October 2013, when he was 79 years old, for intermittent hermaturia (blood in urine) and a retained blood clot in his bladder (Markelson Amended Complaint ¶-s 323,326-327). Dr. Samadi recommended a transurethral resection of the prostate ("TURP") when medical treatment failed to resolve the bleeding and scheduled surgery at Lenox Hill for October 30, 2013 (Compl. ¶ 327). He underwent the TURP and a cytoscopy at Lenox Hill on October 30, 2013 (Id ¶ 332). The TURP and cystoscopy were performed by a second year resident, Billy Cordon, M.D. in O.R. 21 while Dr. Samadi was performing a robotic assisted laparoscopic prostatectomy ("RALP") on another patient in O.R. 25 (Id ¶ 333). It is alleged that Mr. Markelson believed that Dr. Samadi would personally perform the TURP and cytoscopy (Id ¶ 328). According to his medical records, Mr. Markelson had a markedly enlarged prostate (150 - 200 grams) and a mechanical aortic valve that required daily anticoagulation medication, and the TURP was contraindicated due to an excessively high risk of postoperative hemorrhage (Id ¶'s 365-69). The operative report indicates difficulty in controlling bleeding during the procedure (Id ¶ 353). Mr. Markelson's blood pressure became unstable and he became hypotensive and he was given neosynephrine, ephedrine, and crystalloids during surgery to treat hypotension (Id ¶'s 354-56). Several days after the TURP was performed, decedent returned to Lenox Hill's Emergency Department with a urinary tract hemorrhage and was readmitted to the hospital, where an open prostatectomy was performed to stop the bleeding (Id ¶'s 360-361;363-364).

[3]Markatos began treating with Dr. Samadi in December 2014, when he was 60 years old. He was diagnosed with an obstructive prostate, and Dr. Samadi recommended that Markatos undergo a TURP (Markotos Complaint ¶'s 322,329-330). Markatos believed Dr. Samadi would personally perform the TURP, which he underwent at Lenox Hill on January 25, 2016 (Id ¶ 336). The TURP was performed by a second year resident, Johnson Tsui, M.D., in O.R. 21 while Dr. Samadi was performing a RALP on another patient in O.R. 25 (Id ¶ 337). Dr. Tsui removed 11 grams of prostatic tissue during the TURP according to the surgical pathology report (Id ¶ 352). It is alleged that removal of this amount of tissue was inadequate to relieve purportedly obstructive BPH (i.e. benign prostatic hyperplasia); therefore the surgery was nontherapeutic and without any medical benefit, as well as medically unnecessary (Id ¶ 353). It is further alleged that Markatos did not obtain relief as a result of the TURP but instead postoperatively began to experience urinary obstructive symptoms with pain, discomfort, urgency, frequency, urinary incontinence episodes, and passage of apparent prostatic tissue fragments; as his symptoms worsened he went to North Shore University Hospital's emergency room with urinary

---

obstruction, underwent catheterization to permit urinary drainage, and was told to contact Dr. Samadi's office to be seen by him (Id ¶ 356). Thereafter, because Markatos's symptoms remained unchanged, Dr. Samadi scheduled him for another cystoscopy on February 26, 2016, a month after surgery (Id ¶ 357). Markatos was then admitted to Lenox Hill Hospital from April 18, 2016 – April 19, 2016 under the care of Dr. Samadi for cystoscopy, cystolitholapaxy and TURP (Id. ¶ 358). Markatos again believed that Dr. Samadi would personally perform the TURP (Id. ¶ 359). Markatos underwent the cystoscopy, cystolitholapaxy, and TURP at Lenox Hill on April 18, 2016 (Id ¶ 363). The TURP was performed by residents, Shawn Mendonca, M.D. and Yaniv Larish, M.D., in O.R. 21 while Dr. Samadi was performing a RALP on another patient in O.R. 25 (Id ¶ 364). Drs. Mendonca and Larish removed 4 grams of prostatic tissue during the TURP performed on Markatos according to the surgical pathology report (Id ¶ 378). It is alleged that removal of this amount of tissue was inadequate to relieve purportedly obstructive BPH; therefore the surgery was allegedly non-therapeutic and without any medical benefit, as well as medically unnecessary, and Markatos did not obtain relief as a result of the TURP and that instead postoperatively he suffered from, *inter alia,* urinary tract obstruction causing marked pain, discomfort, urgency and frequency that were worse than his symptoms before treating with Dr. Samadi (Id ¶'s 379, 382).

[4]Pino began to treat with Dr. Samadi in September 2015, when he was 68 years old, for severe benign prostatic hyperplasia, a grossly enlarged prostate, urinary obstruction, dysuria, and frequency (Pino Complaint ¶'s 317-318, 320). Pino's prior treating urologists had recommended that he undergo an open prostatectomy to treat these conditions; however, Dr. Samadi advised Pino that an open prostatectomy was not necessary and recommended the "TURP plus" which he described as "removing more tissue from the prostate than is normally removed during an ordinary TURP" (Id ¶'s 322- 324). Dr. Samadi indicated to Pino that, other than himself, no other urologist or urologic surgeon could successfully perform the "TURP plus" operation and he was the "only urologist in the world" who was sufficiently skilled to perform this surgery, though no such surgical procedure is specifically known to exist in the field of urology (Id ¶¶ 324-25). Pino believed that Dr Samadi would personally perform the TURP (Id ¶ 328). However, when Pino underwent the TURP at Lenox Hill on September 30, 2015, the procedure was performed by a second year resident, Nitin Sharma, M.D., in O.R. 21 while Dr. Samadi was performing a RALP on another patient in O.R. 25 (Id ¶S 332, 334). According to Pino's medical records, his prostate was markedly enlarged at 202 grams and his medical history included severe benign prostatic hyperplasia, urinary obstruction, prostatitis/UTI, dysuria, and an episode of urosepsis treated by hospitalization and IV antibiotics, implying to plaintiff that the TURP had not been medically indicated (Id ¶'s 357, 359). Dr. Sharma removed 7 grams of prostatic tissue during the TURP according to the surgical pathology report (Id ¶ 365). It is alleged that removal of this amount of tissue was inadequate to relieve purportedly obstructive BPH; therefore the surgery was nontherapeutic and without any medical benefit, as well as medically unnecessary (Id ¶ 366). It is alleged that Pino did not obtain relief of his urinary tract obstruction as a result of the TURP but instead postoperatively suffered worse complaints, sexual dysfunction, persistent urinary tract infections, worsened urinary tract function, dysuria,

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. The surgeries at issue were performed s at Lenox Hill. Mr. Markelson underwent a transurethral resection of the prostate ("TURP") and a cystoscopy on October 20, 2013; while Markotos underwent a TURP on January 25, 2016, and a second TURP and a cystoscopy, and a cystolitholapaxy on April 18, 2016; Pino underwent a TURP on September 30, 2015.

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 resident(s), and that during these surgeries, Dr. Samadi was simultaneously/concurrently performing robotic assisted laparoscopic prostatectomy surgeries ("RALP") in operating room 25 ("O.R. 25"). It is further alleged that defendants intentionally 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.

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.

---

frequency, nocturia, and recurrent prostatitis (Id ¶ 369).

The complaint/amended complaints[5] 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 Pino and Markelson, who assert claims or negligence, prima facie tort and assault, do not oppose the dismissal of these claims and cross move to amend their amended complaints to assert claims for violations of GBL §§ 349 and 350, while Markelson opposes the motions to dismiss his medical malpractice claim on statute of limitations grounds and also argues that his amended complaint states a timely claim for lack of informed consent. As to the Markotos plaintiffs, they oppose the motions to dismiss their GBL §§ 349 and 350 claims, and that part of the loss of consortium claim related to the fraud. Accordingly, at issue on the defendants' dismissal motions is the viability of plaintiffs' fraud claims, and that part of the Markotos' loss of consortium claims based on the alleged fraudulent billing, and of the proposed and asserted claims for violations of GBL §§ 349 and 350, and whether Markelson's medical malpractice claim is barred by the statute of limitations.

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

---

[5]For the purposes of the motion when the complaint and amended complaints are referred together as "the complaints."

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 medically 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 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

---

[6]The 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.

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*, 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. 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).

The Hospital defendants 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.[7]

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

---

[7]The Hospital defendants also argue that the contents of operative consent forms, which plaintiffs allege were part of the scheme to defraud, show that plaintiffs were fully appraised of the risks, benefits and alternatives to surgery and were given an opportunity to ask questions. They also contend that the forms accurately indicate that Dr. Samadi and his associates or assistants and "possible residents"would perform the surgery; notably, however, the consent forms, which only include Dr. Samadi's name, state that the surgery would be performed by Dr. Samadi and others, and, in the case of the forms signed by Markotos and Pinto, there is a space for the names of any assistants, associates, which is blank. As there is no motion to dismiss any claim for lack of informed consent, the court does not reach the issue of whether the complaints state a cause of action for this 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. 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

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).

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. 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 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.

Defendants' Motions to Dismiss Markelson's Medical Malpractice Claim as Time-Barred

"An action for medical [or dental] malpractice must be commenced within two years and six months of the date of accrual." Massie v. Crawford, 78 NY2d 516, 519 (1991), citing CPLR 214-a. Moreover, "[a] claim accrues on the date the alleged malpractice takes place." Id (internal citation omitted).

Defendants argue that since the Amended Complaint alleges that Mr. Markelson was treated by Samadi defendants from on or about October 19, 2013 to November 5, 2013, and by the Hospital defendants from on or about October 7, 2013 to November 30, 2013, even assuming continuous treatment, the two and half year statute of limitations expired as to the claims against the Samadi defendants on May 5, 2016, and as to those against the Hospital defendants on May 30, 2016. Defendants assert that as this action was not commenced until December 22, 2016, it is time-barred.

In opposition, Markelson does not deny that the action was filed after the expiration of the applicable statute of limitations, However, he argues that the doctrine of equitable estoppel

precludes defendants from asserting the statute of limitations as a defense since defendants concealed their fraud and malpractice, including by making false statements before the surgery that Dr. Samadi was "personally" performing the surgery, unnecessarily using general anesthesia, preparing false operative reports and generating false and excessive bills showing that Dr. Samadi performed the surgery, and that the Amended Complaint alleges that it was only after investigation that the fraud and malpractice were discovered.

"[T]he doctrine of equitable estoppel is to be invoked sparingly and only under exceptional circumstances." Badgett v. New York City Health and Hospitals Corp., 227 AD2d 127, 128 (1st Dept 1996).[8] That said, however, it has been held that "[e]quitable estoppel will preclude [a party] from using the statute of limitations as a defense where it is the [party's] affirmative wrongdoing ... which produced the long delay between the accrual of the cause of action and the institution of the legal proceeding " Putter v. North Shore University Hosp., 7 NY3d 548, 552-553 (2006)(internal citations and quotations omitted). The wrongdoing must be shown to involve "'subsequent and specific actions by defendants somehow kept [plaintiff] from timely bringing suit.'" Id, at 552-553 quoting Zumpano v. Quinn, 6 NY3d at 674. Of relevance here, it has been held that in the context of medical malpractice actions, although allegations of nondisclosure or concealment of the malpractice are insufficient to give rise to a distinct cause of

---

[8]Contrary to defendants' argument, a fiduciary relationship is not a requirement of equitable estoppel where in addition to a concealment there is an intentional misrepresentation, as alleged here. See e.g. Zumpano v. Quinn, 6 NY3d 666, 675 (2006). In any event, with regard to the Samadi defendants, it has been held that a physician owes a fiduciary duty to a patient. See Ross v. Community General Hospital of Sullivan, 150 AD2d 838, 841 (3d Dept 1989)(noting that "because of the fiduciary relationship between physician and patient, in which confidence is normally reposed in the integrity of one's physician, intentional concealment of material facts itself may be sufficient to create an estoppel... and also to support an inference of the patient's reliance").

action for fraud, they may be a basis for applying equitable estoppel to extend the statute of limitations. Simcuski v. Saeli, 44 NY2d at 452.

Under this standard, at least at this juncture, Markelson has satisfied his burden of alleging that intentional acts of concealment by Samadi defendants and the Hospital defendants prevented Markelson from timely bringing an action for medical malpractice. Notably, the gravamen of his medical malpractice claim is that defendants deviated from the standard of care by permitting an unsupervised resident to perform his surgery and by failing to inform Mr. Markelson as to who would perform the surgery, and that the surgery performed on him was part of a fraudulent scheme involving concurrent/and medically unnecessary surgeries in order to economically benefit the defendants. In this connection, allegations that subsequent to the surgery defendants misrepresented that Dr. Samadi performed the surgery, including by falsifying operative reports and billing records in effort to conceal the malpractice, and that investigation of plaintiff's attorney revealed the fraud and malpractice shortly before the Markelson action was filed are sufficient to plead facts that, if proven, would establish equitable estoppel. See Vigliotti v. North Shore University Hospital, 24 AD3d at 754-755 (allegations that defendant's intentionally concealed surgeon's potential infection with hepatitis C adequately provide a basis for equitable estoppel);Giannetto v. Knee, 82 AD3d 1043, 1046 (2d Dept 2013)(holding that plaintiff raised factual question as to the applicability of equitable estoppel based on allegations that dentist knowingly misrepresented plaintiff's condition by bonding a tooth even though he knew it was ineffective); Ross v. Community General Hospital of Sullivan, 150 AD2d at 841 (defendants in medical malpractice action arising from the failure to timely diagnose lung cancer were equitably estopped from asserting a statute of limitations defense

when, during the limitations period, the defendant physician concealed that he obtained a copy of an x-ray tending to show that decedent's cancer should have been diagnosed earlier);compare Putter v. North Shore University Hosp., 7 NY3d at 552-553 (holding that alleged misrepresentation by the chief infectious disease doctor at the defendant hospital that patient contracted hepatitis C from an unknown source did not preclude the defense from using the statute of limitations defense where plaintiff was aware that he had been infected with hepatitis C within a few months of the surgery and was advised by four medical professionals that he likely contracted the condition during the surgery).

Accordingly, as equitable estoppel potentially applies to preclude defendants from asserting that statute of limitations defense, defendants' motions to dismiss Markelson's medical malpractice claim as time-barred is denied.[9]

Hospital Defendants' Motion to Strike Allegedly Scandalous Allegations

The Hospital defendants move to strike (I) paragraphs 129 and 163 in the Markelson Amended Complaint, (ii) paragraphs 124 and 158 in the Markatos Complaint, and (iii) paragraphs 123 and 157 in the Pinto Amended Complaint, all of which specifically name certain hospital executives/administrators who are not defendants in this action, as redundant of paragraphs which contain the same allegations without naming the hospital executives/administrators.[10] CPLR 3024(b) provides that "[a] party may move to strike any

[9]While Markelson argues that his complaint also states a claim for lack of informed consent, which argument defendants reject in reply, since the purported lack of informed claim is not the subject of the dismissal motion, the court does not reach this argument.

[10]Specifically, the Hospital defendants assert that the same information without the names of the executives/administrators is contained in paragraphs 130 and 162 in the Markelson Amended Complaint; paragraphs 125, 157, and 159 in the Markatos Complaint; and paragraphs

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 to not initiate the action, as these allegations were not relevant to the 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, so there are no grounds upon which to seek recovery based on vicarious liability and, in any event, the names of individual executives and administrators, who have not been named as defendants in this action, are irrelevant to plaintiffs' claims.

Accordingly, the motions to strike are granted to the extent of striking paragraphs paragraphs 129 and 163 in the Markelson Amended Complaint; paragraphs 124, 158 in the Markatos Complaint; and paragraphs 123 and 157 in the Pinto Amended Complaint.

Defendants' Motions to Dismiss/Strike Request for Punitive Damages

Defendants move to dismiss/strike plaintiffs' requests for punitive damages in the three

---

124 and 156 in the Pino Amended Complaint are redundant.

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).

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. The Hospital defendants also argue that they cannot be held liable for punitive damages based on their employees' intentional conduct.

This argument is without merit. Here, plaintiffs' allegations that defendants misled them by stating that Dr. Samadi would be 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 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 in 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.

Viability of Claims Under General Business Law § § 349 and 350

At issue is the cross motions by Markelson and Pino for permission to file second amended complaints to include claims for violations of General Business Law ("GBL") §§ 349 and 350, and defendants' motion to dismiss these claims in the Markotos complaint.

The GBL §§ 349 and 350 claims and proposed 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 would be 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 advertise[d]" Dr. Samadi's services and spent "approximately $70,000 primarily for internet advertising related to [Dr. Samadi's] services." It is further alleged that "'the department of urology' on Lenox Hill's website directs [the user] to a page that touts only defendant [Dr. Samadi's] services, [and provides] the contact information for [Dr. Samadi's] private urology practice [as well as] various links directed to 'Lenox Hill Prostate Cancer Center' and 'Robotic Oncology.com'....[which] also exclusively advertise [Dr. Samadi's] services and similarly provide the contact information for [Dr. Samadi's] private urology practice."

In further support of their GBL claims, plaintiffs submit, *inter alia*, 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 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 claims 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.

In their opposition to the cross motions to amend, defendants argue that plaintiffs provided no excuse for not including the claims in their initial complaints, and that the proposed

claims are without merit. Defendants also argue that the GBL claims are without merit as they do not allege consumer oriented or materially deceptive conduct, or an injury resulting from allegedly deceptive conduct. With regard to the GBL § 350 claims, the Samadi defendants additionally argue that the claims are insufficient as the false advertisements on which they are based are at best "puffery" as to Dr. Samadi's credentials, and do 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 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.[11] 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

[11] While 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 defendants 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.

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.

In addition, with respect to Markelson's proposed the GBL §§ 349 and 350 claims, defendants argue that such claims are untimely as they were asserted after the expiration of the applicable three year statute of limitations for statutory claims provided under CPLR 214(2), citing Gaidon v. Guardian Life Ins. Co. of America, 96 NY2d 201 (2001).

With regard to the cross motions to amend, the court notes that "[l]eave 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 in Markelson's and Pino's proposed Second Amended Complaints, and those asserted in the Markatos Complaint, 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" such as appearances by Dr. Samadi regarding his treatments 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.

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

As for defendants' argument that Markelson's proposed GBL claims are untimely, the court notes that, as defendants argue, these claims are subject to a three-year statute of limitations under CPLR 214(2) which accrues on the date of injury. See Lucker v. Bayside Cemetery, 114 AD3d 162, 175 (1st Dept 2013), lv denied 24 NY3d 901 (2014), citing Corsello v. Verizon N.Y., Inc., 18 NY3d 777, 789, rearg denied, 19 NY3d 937 (2012). While the GBL claims relate back to the claims in the original complaint which was filed on December 22, 2016 (See CPLR

203[f]), as it is alleged that Mr. Markelson was injured as a result of the malpractice at or about the time of the October 30, 2013 surgery, the three-year statute of limitations expired on these claims prior to the commencement of this action. That said, however, for the reasons stated above in connection with the medical malpractice claims, the doctrine of equitable estoppel potentially applies to preclude defendants' statute of limitations defense based on allegations that defendants intentionally concealed their fraud through subsequent affirmative actions including falsify operative reports and billing records. See Ross v. Community General Hospital of Sullivan, 150 AD2d at 841 (defendants in medical malpractice action arising from the failure to timely diagnose lung cancer were equitably estopped from asserting a statute of limitations defense when, during the limitations period, the defendant physician concealed that he obtained a copy of an x-ray tending to show that decedent's cancer should have been diagnosed earlier); compare Lucker v. Bayside Cemetery, 114 AD3d at 175 (holding that plaintiff's claims under GBL §§ 349 and 350 were untimely and equitable estoppel did not apply where plaintiff provided no basis for a claim that he relied on later acts of deception or concealment).

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.

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, and the defendants' motion to dismiss the Markatos plaintiffs' GBL § 350 claim must be granted. 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.

Conclusion

In view of the above, it is

ORDERED that with respect to the Markelson and Pino actions, the motions to dismiss are granted to the extent of dismissing the first causes of action for fraud, and the second causes of action for negligence, assault and prima facie tort; and it is further

ORDERED that with respect to the Markotos action, the motions to dismiss are granted to the extent of dismissing the first cause of action for fraud, the fifth cause of action for violations of GBL § 350, and that part of the sixth cause of action for loss of services and consortium to the extent is based on the fraud claim; and it is further

ORDERED that the Hospital defendants' motions to strike (I) paragraphs 129 and 163 in the Markelson Amended Complaint, (ii) paragraphs 124 and 158 in the Markatos Complaint, and (iii) paragraphs 123 and 157 in the Pino Amended Complaint 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 defendants' motions to strike/dismiss plaintiffs' request for punitive damages are denied; and it is further

ORDERED that the cross motions to amend by Markelson and Pino are granted, except to the extent they seek leave to add a claim under GBL § 350; and it is further

ORDERED that within 30 days of efiling this order plaintiffs Markelson and Pino shall serve second amended complaints consistent with this decision and order; 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 December 12, 2019 at 11:30 am.

DATED: September 23, 2019 .

J.S.C.

HON. JOAN A. MADDEN
J.S.C