Khurdayan v Kassir
2020 NY Slip Op 32077(U)
June 5, 2020
Supreme Court, New York County
Docket Number: 159480/17
Judge: Joan A. Madden

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

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AREVIK KHURDAYAN, INDEX NO. 159480/17

Plaintiff,

-against-

RAMTIN KASSIR, M.D., NY SNORING AND SINUS CLINIC, NY SNORING AND SINUS, P.C., and NEW YORK SNORING AND SINUS MEDICAL TREATMENT, P.C, PARK AVENUE PLASTIC SURGERY PLLC, DANIELLE TOSI, M.D., AND DANIELLE TOSI, M.D., LLC,

Defendants.

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JOAN A. MADDEN

Defendants Ramtin Kassir, M.D., NY Snoring and Sinus Clinic, NY Snoring and Sinus, P.C., New York Snoring and Sinus Medical Treatment, P.C. and Park Avenue Plastic Surgery PLLC (hereinafter "the Kassir defendants") move for an order (i) dismissing the medical malpractice claim as insufficiently pleaded, (ii) dismissing the remaining claims for failure to state a cognizable cause of action, (iii) issuing a protective order precluding discovery as to claims not relevant to the asserted medical malpractice claim, and the further deposition of Dr. Kassir. Plaintiff opposes the motion.

Background

This action arises from an elective nose surgery, and plaintiff's allegations that she consented to two distinct and concurrent surgeries but that defendant Dr. Kassir performed only one surgery. Specifically, plaintiff alleges she consented to have Dr. Kassir perform both a purely cosmetic rhinoplasty to alter the appearance of her nose and a septoplasty to address

structural problems associated with her deviated septum, and that Dr. Kassir performed only rhinoplasty. When performed concurrently, the two procedures of rhinoplasty and septoplasty are commonly referred to as septorhinoplasty. The procedure at issue was performed by Dr. Kassir on February 9, 2016. Dr. Kassir was assisted by defendant Danielle Tosi, M.D. ("Dr. Tosi") who acted in her capacity as an anesthesiologist.

The amended complaint asserts causes of action against Kassir defendants (i.e. all defendants except Dr. Tosi) for: (1) breach of contract (alleging that plaintiff entered into contract for performance of septorhinoplasty, and that the contract was breached because a septorhinoplasty was not performed and that plaintiff tendered full payment for the septorhinoplasty; (2) violations of General Business Law §§ 349 and 350 based on allegations that defendants acted deceptively to induce plaintiff to have Dr. Kassir perform the medical procedure:(3) fraud/fraud in the inducement in connection with statements re performance of two procedures and the pricing; (4) unjust enrichment based on allegations that one procedure performed instead of two that she paid for; (5) promissory estoppel; (6) forgery in connection with allegations that the defendants forged plaintiff's signature and initials on multiple informed consent forms; and against all defendants for (7) medical malpractice, and (8) lack of informed consent.

As indicated above, the Kassir defendants move for an order (i) dismissing the medical malpractice claim asinsufficiently pleaded, and the other causes of action as duplicative of the medical malpracticeclaim and for failure to state a cognizable cause of action, and (ii) granting a protective order,including with respect to plaintiff's request for a further deposition of Dr. Kassir.

Plaintiff opposes the motion, arguing that medical malpractice is not an exclusive cause of action, and that the causes of action for breach of contract, violations of GBL §§ 349 and 350,

unjust enrichment, medical malpractice, lack of informed consent, and forgery are properly pleaded, and that no protective order is warranted. Plaintiff, however, does not oppose the motion to the extent it seeks to dismiss the causes of action for fraud and promissory estoppel.

Discussion

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[s] plaintiff the benefit of every possible favorable inference, and determine[s] 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). In addition, "[a] CPLR 3211(a)(7) motion ...may be used to dispose of an action in which the plaintiff identifie[s] a cognizable cause of action but fail[s] to assert a material allegation necessary to support the cause of action." Basis Yield Alpha Fund v. Goldman Sachs, Group, Inc., 115 AD3d 128, 134 (1st Dept 2014).

Under this standard, the amended complaint states a cause of action for medical malpractice. Specifically, the amended complaint alleges that defendants, "while performing a rhinoplasty on plaintiff … failed to properly diagnose, care for, and treat plaintiff… by failing to take a proper medical history; failing to properly monitor plaintiff's vital signs during the administration of general anesthesia, including but not limited to EKGs, blood pressure, and oxygenation; failing to biopsy a polyp supposedly removed from [p]laintiff's nose; failing to take adequate precautionary measures for Plaintiff's anemia; failing to operate on the appropriate anatomical site required of a septorhinoplasty; failing to remove the obstructions in [p]laintiff's

nasal passages causing her breathing problems; and failing to provide good and appropriate follow-up care, including but not limited to failing to examine [p]laintiff in person following surgery for several weeks, and prescribing medication without documenting such prescriptions." It is further alleged that as a result of these failures, plaintiff "suffered severe injuries and complications, including but not limited to worsened breathing problems, the need to undergo additional surgical procedures, emotional distress and pain and suffering." See Hayden v. Gordon, 91 AD3d 819, 820 (2d Dept 2012)(noting that "[t]he essential elements of medical malpractice are (1) a deviation or departure from accepted medical practice, and (2) evidence that such departure was a proximate cause of injury); Ingutti v. Rochester General Hospital, 145 AD3d 1423 (4th Dept 2016) (holding that complaint stated a cause of action for medical malpractice against hospital under the liberal pleading requirements that the court accept the allegations in the complaint as true).[1]

With respect to the breach of contract claim, defendants assert that the claim is duplicative of the medical malpractice claim as it fails to allege that defendants breached an express promise to effect a cure. Plaintiff opposes the motion, arguing that the complaint adequately pleads that Dr. Kassir made a specific promise to plaintiff to perform a septorhinoplasty to repair the structural issue with her nose that caused her to have trouble breathing, that plaintiff relied on the promise, and that Dr. Kassir breached his promise by failing to perform a septorhinoplasty.

To withstand a motion to dismiss a breach of contract claim "in relation to the rendition of medical services by a physician [the claim must be] …based upon an express special promise

[1] While the medical malpractice claim states a cause of action on the standard for a motion to dismiss, the court makes no determination as to the viability of any alleged departure.

to effect a cure or to accomplish some definite result." McCarthy v. Berlin, 178 AD2d 584, 585 (2d Dep 1991) (internal citations and quotation omitted); see also, Scalisi v. New York University Medical Center, 24 AD3d 145, 147 (1st Dept 2005). In addition, to the extent such cause of action seeks damages for pain and suffering as opposed to economic loss, it will be subject to dismissal as duplicative of the medical malpractice claim. See Detringo v. South Island Family Medical, LLC, 158 AD3d 609, 610 (2d Dept 2018) (noting that the alleged damages which "are in the nature of pain and suffering, are not recoverable in a cause of action to recover damages for breach of contract to provide medical services").

Here, while the parties dispute whether Dr. Kassir agreed to perform a septorhinoplasty to repair structure of plaintiff's nose, plaintiff has adequately pleaded a cause of action for breach of contract based on allegations that Dr. Kassir expressly promised to perform this procedure to alleviate her breathing issues, that plaintiff relied on this promise, which Dr. Kassir breached by not performing a septorhinoplasty. See e.g., Nicoleau v. Brookhaven Memorial Hosp. Center, 201 AD2d 544, 545 (2d Dept 1994)(complaint stated a cause of action for breach of contract where plaintiff alleged that she "entered into an oral agreement with her attending physician pursuant to which she agreed to retain his services in exchange for his specific promise to deliver her baby without the administration of blood, which treatment was contrary to her religious beliefs, and that the breach occurred when he administered blood transfusions to her after she gave birth to her child."). Moreover, as the amended complaint seeks damages for compensatory, consequential and incidental damages, as opposed to damages for noneconomic losses, it is not subject to dismissal as duplicative of the medical malpractice claim. Compare Detringo v. South Island Family Medical, LLC, 158 AD3d at 610. Accordingly, the motion to dismiss plaintiff's breach of contract claim is denied.

The next cause of action alleges violations of General Business Law ("GBL") §§ 349 and 350. The Kassir defendants argue that this claim is redundant of the malpractice claim and legally insufficient as the claims pleaded involve a "purely private contract dispute." Plaintiff counters that as she reviewed Dr. Kassir's website and relied on its representations on his letterhead with the heading "New York Snoring & Sinus" before using his services, she has adequately alleged consumer related conduct.

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). Deceptive or misleading representations or omissions are defined as those "likely to mislead a reasonable consumer acting reasonably under the[plaintiff's] circumstances." Solomon v. Bell Atlantic Corp., 9 AD3d 49, 52 (1st Dept 2004)(internal citations and quotations omitted). The deceptive act or practice must be "the actual misrepresentation or omission to a consumer," Goshen v. Mutual Life Ins. Co. of New York, 98 NY2d 314, 325 (2002), by which the consumer is "caused actual, although not necessarily pecuniary, harm." Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 NY2d 20, 26 (1995). In addition, 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.

While the courts have held that "providers of medical services are potentially subject to liability under GBL § 349" (Karlin v. IVF America, Inc. 93 NY2d 282, 292 [1999]), here the allegations in the amended complaint are insufficient to show consumer oriented conduct as they reflect a dispute unique to the parties arising out of the defendant-physician's alleged deception

in connection with his failure to perform a promised procedure on plaintiff. Accordingly, plaintiff has not adequately stated a cause of action under GBL § 349.

With respect to 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). In addition, 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, while the amended complaint alleges that plaintiff relied on misrepresentations on Dr. Kassir's website and statements that "he would perform a septorhinoplasty on plaintiff," in deciding to use his services, and that she paid a premium for such services, the claim falls short as it fails to allege that any of the purported deceptive or misleading statements impact the public at large. In this connection as quoted above, the alleged misrepresentations relate only to plaintiff's dispute with defendants. Accordingly, the motion is granted to the extent of dismissing plaintiff's claims under GBL §§ 349 and 350.

As for the unjust enrichment claim, defendants argue that plaintiff fails to plead that she performed services for defendants causing them to be unjustly enrichment and that, in any event, the facts of case do not warrant equitable relief. To prevail on a claim of unjust enrichment, the plaintiff must establish that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against good conscience and equity to permit the other party to keep what is sought to be recovered. Cruz v. McAneney, 31 AD3d 54, 59 (2d Dept 2006). Central to a claim for unjust enrichment is an allegation that a "'benefit was bestowed...by plaintiffs and that

defendants will obtain such benefit without adequately compensating plaintiff." Weiner v. Lazard Freres & Co., 241 AD2d 114, 119 (1st Dept 1998).

While a claim for unjust enrichment may stand alongside a breach of contract cause of action at the pleading stage (see Wilmoth v. Sandor, 259 AD2d 252, 254 [1st Dept 1999]), when, as here, a defendant obtained the benefit based on an agreement between the parties, and the gravamen of the allegations is that the defendant breached the agreement, a claim for unjust enrichment is not stated. See Shilkoff, Inc. v. 885 Third Avenue Corp., 299 AD2d 253 (1st Dept 2002)(plaintiff's cause of action was properly dismissed because it was not unjust for defendant to retain funds obtained pursuant to its clear contractual right); Brintec Corp. v. Akzo, N.V., 171 AD2d 440 (1st Dept 1991) (recovery for unjust enrichment applies only in the absence of an express agreement). Accordingly, the unjust enrichment claim is dismissed.

As for the claim for lack of informed consent, which alleges that plaintiff did not consent to the procedure performed, defendants argue that as the gravamen of plaintiff's claim is for battery, it is barred by the one-year statute of limitations provided under CPLR 215 for intentional torts. This argument is unavailing.

"To establish a claim for assault or battery, it must be shown that 'the defendant made bodily contact with the plaintiff and that the contact was either offensive in nature or without [the patient's] consent." Messina v. Matarasso, 284 AD2d 32, 34-35 (1st Dept 2001) (internal citations omitted). A claim for assault or battery is properly asserted against a medical professional based on evidence that plaintiff had given no consent to a procedure, such as "'where a physician ... performed an operation on a patient although the patient emphatically refused to consent to such operation.'" Id at 35 quoting Oates v. New York Hospital, 131 AD2d 368, 369 (1st Dept 1987).

As plaintiff does not allege that the procedure performed, that is a rhinoplasty, was unauthorized, but rather that she would not have consented to a rhinoplasty if she had been informed that the physician was not also going to perform a septoplasty, such allegations state a claim for lack of informed consent and not for battery. In other words, as the allegations here are not that the treatment went beyond the scope of plaintiff's consent, but that the treatment was not consistent with the procedure consented to, the amended complaint states a claim for lack of informed consent as opposed to battery. Compare Messina, 284 AD2d 32 (finding that claim against the defendant surgeon sounded in battery based on allegations that during a cosmetic surgery on plaintiff's face, the surgeon performed unauthorized surgery on her breasts).

With respect to the forgery claim, which is based on allegations that defendants electronically signed her name and initials on forms consenting to the surgery without her authorization, defendants asserts that claim fails since the signature/initials on the form were the result of an electronic "glitch" in defendants' electronic record system which "inadvertently auto populated consent forms with the plaintiff's signature from another document into various medical provider signature fields on blank pre-operative records." Defendants also assert that the forgery claim is insufficient as it fails to allege damages separate and distinct from the alleged malpractice.

New York courts have considered forgery to be a species of fraud. See Piedra v. Vanover, 174 AD2d 191, 194 (2d Dept 1992)(writing that [i]t is clear from these definitions that forgery is but one species of fraud" and that forgery is "defined by the common law to be the fraudulent making of a writing to the prejudice of another's rights ... or the making *malo animo* of any written instrument for the purpose of fraud and deceit....") (citations and internal quotations omitted). Here, plaintiff's forgery claim is not subject to dismissal as duplicative of

medical malpractice cause of action, as the forgery claim is not based on professional negligence but, rather, intentional conduct. See e.g., Liberatore v. Greuner, 153 AD3d 1207 (1st Dept 2017)(affirming trial court's denial of motion to dismiss fraud claim as duplicative of medical malpractice claim, writing that "[p]laintiff's fraud claim alleges, not malpractice, but that defendant intentionally drugged [plaintiff] in furtherance of stealing money from her"); Gomez v. Cabatic, 159 AD3d 62 (2d Dept 2018) (finding that a plaintiff who recovers compensatory damages for a medical professional's malpractice may also recover punitive damages for that medical professional's act of altering or destroying medical records). Furthermore, while defendants assert that any unauthorized use of plaintiff's electronic signature and initials was the result of an error, such assertion does not provide a basis for dismissal of the claim at this juncture.

As for defendants' motion for a protective order, such order is granted only to the extent of directing that a discovery conference be held determine proper scope of discovery in light of this decision and order dismissing certain of the claims in the amended complaint.

Conclusion

In view of the above, it is

ORDERED that Kassir defendants' motion to dismiss is granted to the extent of dismissing the claims in the amended complaint for violations of General Business Law §§ 349 and 350 (second cause of action), fraud/fraud in the inducement (third cause of action), unjust enrichment (fourth cause of action), and promissory estoppel (fifth cause of action) and is otherwise denied; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment dismissing these claims; and it is further

ORDERED the remaining claims for breach of contract (first cause of action), medical malpractice (sixth cause of action), lack of informed consent (seventh cause of action), and forgery (eighth cause of action) are severed and shall continue; and it is further

ORDERED that Kassir defendants' motion for a protective order is granted to the extent of directing that a remote discovery conference be held with the court on July 1, 2020 at 11am to determine the proper scope of discovery in light of this decision and order; and it is further

ORDERED that upon receiving notice of this decision and order, the parties shall email the court at SFC-Part11@nycourts.gov, with call in information for the telephone conference; and it is further

ORDERED that prior to this conference, the parties shall confer with the goal of stipulating to discovery, and such stipulation shall be emailed to SFC-PART11@nycourts.gov by June 29, 2020.

DATED: June 5, 2020

Joan Madden J.S.C.

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