

Hill v Newman

2020 NY Slip Op 32550(U)

August 3, 2020

Supreme Court, New York County

Docket Number: 805119/2019

Judge: Eileen A. Rakower

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 OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER
Justice

PART 6

PAMELA HILL,

Plaintiff,

INDEX NO. 805119/2019
MOTION DATE
MOTION SEQ. NO. 1, 2, 3
MOTION CAL. NO.

- against-

STEPHEN NEWMAN, M.D., ISLAND NEUROLOGICAL ASSOCIATES, P.C., PROHEALTH CARE ASSOCIATES, LLP., BIOGEN IDEC, INC., ABBVIE INC.,

Defendants.

The following papers, numbered 1 to _____ were read on this motion for/to

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...
Answer – Affidavits – Exhibits _____
Replying Affidavits

PAPERS NUMBERED

■
■
■

Cross-Motion: x Yes No

Under Motion Sequence 1, Defendants Stephen Newman, M.D. (“Dr. Newman”), Island Neurological Associates, P.C., and Prohealth Care Associates, LLP (collectively, “Moving Defendants”) move for an Order pursuant to CPLR § 3211(a)(7), dismissing Plaintiff Pamela Hill’s (“Plaintiff”) claims for fraud. Plaintiff cross moves for an Order pursuant to CPLR § 3025(b), granting leave to file a Verified Amended Complaint in order to explicitly allege General Business Law (“GBL”) § 349 as the basis for the fraud claim alleged in the Third Cause of Action in the previously filed and served Complaint, and to dismiss claims against Defendants Biogen IDEC Inc. (“Biogen”) and AbbVie Inc. (“AbbVie”). Moving Defendants oppose.

Under Motion Sequence 2, Biogen moves for an Order pursuant to CPLR §§ 3211(a)(7) and 3016(b), dismissing all claims against it. There is no opposition.

Under Motion Sequence 3, AbbVie moves for an Order pursuant to CPLR §§ 3211(a)(1), 3211(a)(7), and 4511(b), dismissing all claims against it. There is no opposition.

Plaintiff commenced this action by filing the Summons and Verified Complaint on April 16, 2019. The action arises out of the alleged medical malpractice, negligence, lack of informed consent, fraud, and vicarious liability.

Plaintiff alleges that on April 19, 2017, Dr. Newman treated her multiple sclerosis with Zinbryta, a drug manufactured by Biogen. Plaintiff alleges that she was not an appropriate candidate for Zinbryta because she already responded well to two other drugs, Rebif and Gilenya. Plaintiff further alleges that Dr. Newman treated with Zinbryta not because it was a medically indicated treatment but because he received payments from Biogen. Plaintiff asserts that as a result of using Zinbryta, she suffered a relapse of her multiple sclerosis, loss of hair, weakness, rashes, dizziness, and lower extremity pain. Defendants have not filed Answers to the Summons and Verified Complaint.

Parties' Contentions

Moving Defendants assert that “Plaintiff failed to allege any damages in her fraud cause of action that are separate and distinct from this claimed in her medical malpractice negligence cause of action.” Moving Defendants argue that “[i]t is well established that a plaintiff may only allege fraud in conjunction with a medical malpractice negligence claim when the fraud gives rise to damages that are separate and distinct from this flowing from the alleged medical malpractice.” Moving Defendants assert that Plaintiff’s cause of action for fraud is based on the Plaintiff’s assertion “that Dr. Newman represented that Zinbryta was medically appropriate for [Plaintiff], while knowing this was false and that [Plaintiff] relied upon it in consenting to receive Zinbryta injections.” Moving Defendants further assert that Plaintiff’s cause of action for medical malpractice negligence is based on “allegations of damages allegedly flowing from Dr. Newman’s recommendation that [Plaintiff] receive injections of Zinbryta.” Moving Defendants contend that Plaintiff alleges that both the claims for fraud and medical malpractice negligence caused her to suffer “personal injuries including pain and suffering.” Moving Defendants argue “that Plaintiff’s alleged injuries from ‘fraud’ flow from, and are encompassed by, the allegations relating to the negligence.” Moving Defendants assert that “Plaintiff cannot arbitrarily choose which elements of the claimed damages she attributed to the fraud cause of action, and which apply to the medical malpractice negligence claim when such damages are equally attributable to both theories of recovery.”

Moreover, Moving Defendants argue that Plaintiff failed to plead the necessary elements of fraud. Moving Defendants assert that “[P]laintiff fails to allege a false misrepresentation that occurred subsequent to the alleged medical malpractice, or that she justifiably relied on such a misrepresentation, causing her to forgo an available remedy or cure.” Moving Defendants argue that the alleged misrepresentation occurred prior to the treatment and therefore, it does not support Plaintiff’s fraud claim. Moving Defendants assert that “Plaintiff has failed to

articulate a subsequent, intentional, material misrepresentation by defendant known by defendant to be false at the time it was made. Such an allegation is necessary to satisfy an essential element of fraud in the context of a medical malpractice negligence action.”

Moving Defendants further argue that Plaintiff failed to meet the heightened pleading standard for alleged fraud pursuant to CPLR § 3016(b). Moving Defendants assert that “[a]lthough fraud is a common law action, it subject to the special pleading requirements of CPLR 3016(b)” which requires “ where a cause of action... is based upon misrepresentation, fraud, mistake, willful default, breach of or undue influence, the circumstances constituting the wrong shall be stated in detail.” CPLR § 3016(b) (emphasis added). Moving Defendants argue that Plaintiff’s complaint does not contain “allegations describing a subsequent intentional misrepresentation of material fact by dr. Newman.” Furthermore, Moving Defendants argue that “[t]here are no details concerning: (i) the time or dates of any subsequent misrepresentation, (ii) the content of any subsequent misrepresentation, (iii) the source of any subsequent misrepresentation, (iv) the location for any subsequent misrepresentation, (v) the reasons why the subsequent misrepresentation was fraudulent, or (vi) the length of time between the alleged negligence and the subsequent misrepresentation.” Moving Defendants assert that Plaintiff makes general and conclusory allegations.

Plaintiff cross moves for an Order pursuant to CPLR § 3025(b), granting leave to file a Verified Amended Complaint “to clarify that the fraud claim is based on N.Y. Gen. Bus. Law § 349,” and to dismiss claims against Biogen and AbbVie. Plaintiff argues that her Verified Complaint should be liberally construed pursuant to CPLR § 3026. Plaintiff asserts that her factual allegations establish a cause of action for fraud. Plaintiff argues that “[a] cause of action for deceptive business practices under GBL § 349 is not subject to the heightened pleading requirements of CPLR § 3016.” Plaintiff contends that her Third Cause of Action for fraud should be construed as a “statutory” fraud claim in the context of “deceptive business practices” pursuant to GBL § 349. Plaintiff asserts that facts alleged in a complaint must be accorded every favorable inference in a motion to dismiss.

Plaintiff asserts that while common law fraud against medical providers is usually dismissed as not separate and distinct from the medical malpractice claims and/or insufficiently plead pursuant to CPLR § 3016, GBL § 349 is not subject to the restrictions applicable to common law fraud. Petitioner contends that GBL § 349 applies to the health care industry and the medical business, and “provides a remedy to those who have been subject to deceptive or misleading acts that are consumer orientated.” Plaintiff argues that a statutory fraud claim can be asserted concurrently

with a medical malpractice claim and must be broadly construed. Plaintiff asserts that to properly plead a statutory fraud claim pursuant to GBL § 349, plaintiff must allege that: “that (1) the challenged act or practice was consumer oriented, (2) it was misleading in a material way, and (3) the plaintiff suffered injury as a result of the deceptive act.” Plaintiff argues that she has sufficiently plead the elements of statutory fraud pursuant to GBL § 349 in her Complaint. Plaintiff asserts that “[t]he Complaint contains multiple allegations pleading the requisite elements of § 349 claims in the form of Dr. NEWMAN’s deceptive acts and practices that were directed to influence [Plaintiff’s] decision as a medical consumer, as a result of which [Plaintiff] was in fact misled and injured.” Plaintiff argues that:

Dr. NEWMAN’s deceptive acts and practices were consumer-oriented under the meaning of N.Y. GBL § 349. The complaint alleges that Dr. NEWMAN was accepting payments from BIOGEN “totaling over 30 times the national average for specialists in his field,” as part of the joint sales and marketing efforts that influenced his treatment decisions (*see* Dkt. No. 1, Complaint ¶¶ 58-61). In light of the magnitude of payments that Dr. NEWMAN was receiving from BIOGEN (which was “well beyond what could be considered routine or ordinary”) (*id.* ¶ 60), an inference can be drawn that Dr. NEWMAN was a part of a marketing campaign that involved many more patients than plaintiff Ms. HILL.

In addition, the complaint alleges that defendant Dr. NEWMAN “authored multiple studies funded by BIOGEN and ABBVIE,” the manufacturer and distributor of Zinbryta (*id.* ¶ 62). The complaint alleges that Dr. NEWMAN failed to properly disclose the payments he received from these companies not only to [Plaintiff] but to the public in general who would rely on clinical studies like his to compare the benefits and risks of different MS medications (*see id.* ¶ 64) (Plaintiff’s Affirmation in Opposition at 10-11).

Plaintiff argues that Dr. Newman’s deceptive business practices resulted in permanent physical injuries, and had Plaintiff known of the risks she would have not subjected herself to a risky treatment option.

Plaintiff argues that she is within her right to amend the complaint without leave of the court pursuant to CPLR § 3025(a), because Moving Defendants' Pre-answer motion to dismiss automatically extends Plaintiff's time to amend the complaint as of right. Plaintiff asserts that Moving Defendants have not answered the Complaint and therefore Plaintiff's time to amend the Complaint as a right has not expired. Plaintiff argues that this cross-motion seeking leave of the Court to amend the Complaint is brought for the sake of clarity while Moving Defendant's motion is still pending. Plaintiff argues that there is no prejudice to the Defendants because the Complaint alleges claims pursuant to GBL § 349 "just without the specification of the grounds on which the claim was being raised." Plaintiff further argues that none of the Defendants have answered the Complaint and the case is still in its infancy.

In reply, Moving Defendants contends that Plaintiff does not oppose their motion but Plaintiff asserts that her action "should be interpreted favorably as pleading statutory fraud." Moving Defendants argue that Plaintiff does not provide any case law that "the Court and defendants are under an obligation to 'interpret' her complaint and then guess which section of law provides the basis for her fraud claim." Moving Defendants assert that Plaintiff has failed to properly plead a cause of action of statutory fraud pursuant to GBL § 349. Moving Defendants argue that Plaintiff failed to state: "(1) Dr. Neman's knowledge of his alleged malpractice and the patient's resulting 'injury,' (2) coupled with a subsequent, intentional, material misrepresentation by Dr. Newman to [Plaintiff] that was known by Dr. Newman to be false at the time it was made, and upon which [Plaintiff] relied to her detriment." Moreover, Moving Defendants argue that Plaintiff fails to allege that Dr. Newman made misrepresentations after Plaintiff received Zinbryta injections. Moving Defendants assert that Plaintiff fails to provide: "(i) the time or dates of the subsequent misrepresentation, (ii) the content of the subsequent misrepresentation, (iii) the source of the subsequent misrepresentation, (iv) the location of the subsequent misrepresentation, (v) the reasons why the subsequent misrepresentation was fraudulent, or (vi) the length of time between the alleged malpractice and the subsequent misrepresentation."

Moving Defendants argue that Plaintiff's proposed Amended Complaint is insufficient on its face and should be denied. Moving Defendants assert that to state a claim pursuant to GBL § 349, Plaintiff must show: "(1) that the act or practice was consumer-oriented, (2) that the act or practice was misleading in a material respect, and (3) that the plaintiff was injured as a result of the deceptive practice or act." Moving Defendants argue that that Plaintiff has failed to show that the alleged misconduct is consumer-orientated because Dr. Newman's recommendation to use

Zinbryta for Plaintiff was a “single shot transaction” involving a specific medical procedure that is individual to each patient. Moving Defendants assert that Plaintiff has also failed to show materially deceptive conduct because Plaintiff does not allege that Dr. Newman “made any guarantees, provided her with misleading statistics on success rates, or asserted that there were no risks to taking Zinbryta.” Furthermore, Moving Defendants argue that while Plaintiff alleges that Dr. Newman received money from Biogen for his studies, Plaintiff fails to allege that Dr. Newman’s studies were incorrect.

Biogen and AbbVie do not oppose Plaintiff’s cross-motion, and assents to Plaintiff’s request to dismiss them from the case without prejudice.

Plaintiff’s Cross Motion to Amend the Complaint

Pursuant to CPLR § 3025(b), “[a] party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences at any time by leave of court.... Leave shall be freely given upon such terms as may be just....” “CPLR 3025 allows liberal amendment of pleadings absent demonstrable prejudice” *Atlantic Mut. Ins. Co. v. Greater New York Mut. Ins. Co.*, 271 A.D.2d 278, 280 [1st Dept. 2000]. Notwithstanding the absence of prejudice, leave to amend a pleading must be denied where the proposed amendment is plainly lacking in merit. *see Bd. of Managers of Gramercy Park Habitat Condo. v. Zucker*, 190 A.D.2d 636 [1st Dept. 1993].

Here, Plaintiff is entitled to amend her Verified Complaint. There is nothing in the record indicating that any prejudice will result from amendment nor is the proposed amendment plainly lacking in merit. Accordingly, Plaintiff’s cross motion to amend her Verified Complaint is granted.

This court will review Moving Defendants’ motion to dismiss as it relates to the Amended Verified Complaint.

Moving Defendants’ Motion to Dismiss

CPLR § 3211(a)(7) provides that, “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that: ... the pleading fails to state a cause of action.” “As an initial matter, it is important to note that the scope of a court’s inquiry on a motion to dismiss under CPLR 3211(a)(7) is very narrowly circumscribed.” *People ex rel. Spitzer v. Sturm, Ruger*

& Co., Inc., 309 AD2d 91, 108 [1st Dept 2003]. “The court must ‘accept the facts alleged as true and determine simply whether the facts alleged fit within any cognizable legal theory.’” *Id.* (internal citation omitted). “The complaint must be construed ‘liberally’ (CPLR 3026), and the court must accept as true not only ‘the complaint’s material allegations’ but also ‘whatever can be reasonably inferred therefrom’ in favor of the pleader. *Id.* “In ruling on a motion to dismiss, the court is not authorized to assess the merits of the complaint or any of its factual allegations, but only to determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action.” *Id.*

“General Business Law § 349 provides that ‘[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful’ (General Business Law § 349[a]).” *Goshen v. Mut. Life Ins. Co. of New York*, 98 NY2d 314, 324 [2002]. “A plaintiff under section 349 must prove three elements: first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act.” *Stutman v. Chem. Bank*, 95 NY2d 24, 29 [2000]. “Whether a representation or an omission, the deceptive practice must be likely to mislead a reasonable consumer acting reasonably under the circumstances.” *Id.* (citation omitted). “A deceptive practice, however, need not reach the level of common-law fraud to be actionable under section 349.” *Id.* “In addition, a plaintiff must prove ‘actual’ injury to recover under the statute, though not necessarily pecuniary harm.” *Id.* “[R]eliance is not an element of a section 349 claim.” *Id.* “The plaintiff, however, must show that the defendant’s ‘material deceptive act’ caused the injury.” *Id.*

Discussion

Here, accepting all allegations of Plaintiff’s papers as true and affording her the benefit of every possible favorable inference, Plaintiff has stated a claim for GBL § 349. The Amended Verified Complaint sufficiently pleads the three elements of GBL § 349: first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act.” *Stutman*, 95 NY2d at 29. Plaintiff pleads that:

Dr. NEWMAN’s deceptive acts and practices were consumer-oriented under the meaning of N.Y. GBL § 349. The complaint alleges that Dr. NEWMAN was accepting payments from BIOGEN “totaling over 30 times the national average for specialists in his field,” as part of the

joint sales and marketing efforts that influenced his treatment decisions (*see* Dkt. No. 1, Complaint ¶¶ 58-61). In light of the magnitude of payments that Dr. NEWMAN was receiving from BIOGEN (which was “well beyond what could be considered routine or ordinary”) (*id.* ¶ 60), an inference can be drawn that Dr. NEWMAN was a part of a marketing campaign that involved many more patients than plaintiff Ms. HILL.

In addition, the complaint alleges that defendant Dr. NEWMAN “authored multiple studies funded by BIOGEN and ABBVIE,” the manufacturer and distributor of Zinbryta (*id.* ¶ 62). The complaint alleges that Dr. NEWMAN failed to properly disclose the payments he received from these companies not only to [Plaintiff] but to the public in general who would rely on clinical studies like his to compare the benefits and risks of different MS medications (*see id.* ¶ 64) (Plaintiff’s Affirmation in Opposition at 10-11).

Plaintiff pleads that Dr. Newman’s deceptive business practices resulted in permanent physical injuries, including relapse of her multiple sclerosis, loss of hair, weakness, rashes, dizziness, and lower extremity pain. Plaintiff pleads that had she known of the risks associated with using Zinbryta, Plaintiff would have not subjected herself to a risky treatment option.

Wherefore it is hereby

ORDERED that Defendants Stephen Newman, M.D., Island Neurological Associates, P.C., and Prohealth Care Associates, LLP’s motion (Motion Sequence 1) is denied; and it is further

ORDERED that Plaintiff’s cross-motion is granted and Plaintiff’s proposed Verified Amended Complaint is deemed served and all claims against Defendants Biogen IDEC Inc and AbbVie Inc. are dismissed; and it is further

ORDERED that Defendants Stephen Newman, M.D., Island Neurological Associates, P.C., and Prohealth Care Associates, LLP shall file and serve their Answer within 20 days; and it is further

ORDERED that Defendant Biogen IDEC, Inc.’s motion to dismiss (Motion Sequence 2) is granted without opposition and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that Defendant AbbVie, Inc.’s motion to dismiss (Motion Sequence 3) is granted without opposition and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the parties are directed to appear on September 22, 2020 at 9:30am in Part 6 at 71 Thomas Street for a preliminary conference.

This constitutes the Decision and Order of the Court. All other relief requested is denied; and it is further

Dated: August 3, 2020

ENTER: 
J.S.C.

HON. EILEEN A. RAKOWER

Check one: **FINAL DISPOSITION** **X NON-FINAL DISPOSITION**