

Brancato v Laser Plus DVA Inc.
2020 NY Slip Op 34589(U)
May 4, 2020
Supreme Court, Nassau County
Docket Number: Index No. 609025/2017
Judge: Antonio I. Brandveen
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SHORT FORM ORDER

SUPREME COURT — STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

ANTOINETTE BRANCATO,

Plaintiff,

— against —

LASER PLUS DVA INC. d/b/a LASER PLUS SPA

Defendant.

TRIAL / IAS PART 22
NASSAU COUNTY

Index No. 609025/2017

Motion Sequence No. 003

The following papers having been read on this motion:

Notice of Motion, Affidavits & Exhibits	1, 2
Answering Affidavits.....	3
Replying Affidavits.....	4
Briefs: Plaintiff / Petitioner.....	_____
Defendant / Respondent.....	_____

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, including efiled documents/exhibits numbered 36–53, this motion is decided as follows:

Motion by defendant for an order pursuant to CPLR 3212 dismissing the complaint is GRANTED.

Plaintiff brings this action against defendant alleging that it improperly performed laser skin treatments and caused her face to burn.

Plaintiff's facial laser procedures were performed by Ana Nunez, a laser technician/aesthetician employed by Laser Plus Spa, on September 15, 2016 and October 14, 2016. Ms. Nunez attended the Christine Valmy International School for nine months to become an aesthetician, and graduated in 2007. She is licensed by the State of New York as an aesthetician and also holds certificates from Palomar Medical Technologies certifying her as having undergone training in "Pulsed-Light and Laser Systems" and "QYag5 Laser System." In addition, Ms. Nunez trained for about six months at Laser Plus before she could treat a client.

Plaintiff first approached Laser Plus for "Clear and Brilliant" facial laser treatments on September 15, 2016. Prior to the treatment, Ms. Nunez discussed plaintiff's concerns with her. Plaintiff indicated that she had acne for many years and was concerned about her the structure of her skin, pressure lines and scars from acne. Among other things, Ms. Nunez explained to plaintiff that laser treatment could cause redness and dryness. Prior to treatment, photographs were taken of plaintiff. The photographs taken on September 15, 2016 show an acne scar on the right side of plaintiff's chin, which plaintiff was concerned about. Therefore, in addition to the overall face treatment, plaintiff was also to undergo four sessions with the fractional laser for just the chin.

Plaintiff filled out a form regarding her medical history and skin type, and also signed two informed consent forms. She testified she signed the forms after reading and understanding them. The form titled "Informed Consent for Photo Facial/Skin/Skin Rejuvenation/Non-Ablative Wrinkle Reduction" states, that "Photo therapy, despite efficacy and safety, is not free of side effects. Erythema (redness) and edema (swelling) of the treated area can occur but usually subsides within a few hours but can last up to seven days or longer. Irritation, itching, and or mild burning sensation or pain similar to sunburn may occur within 48 hours after treatment . . . Scarring, which can be hypertrophic or even keloid, is very rare but can occur. Other known complications of this procedure include blisters, reddening, pinpoint pitted scars, bruising, superficial crusting, burns, pain, and infections. These side effects are usually temporary, lasting from 5 to 10 days but can be permanent as well . . . Even though appropriate measures are taken to reduce side effects, they cannot be completely eliminated in every case. I understand that the treatment may involve risks of complication or injury from both known and unknown causes, and I freely assume these risks".

The form titled, "Clear + Brilliant Treatment Patient Consent Form" states, that "The nature of the Clear + Brilliant procedure has been explained to me. I understand that just as there may be benefits from the procedure, all procedures involve risk to some degree.

I understand that the following are among the expected side effects of the Clear + Brilliant procedure. Discomfort — Most people will feel some heat-related discomfort (pain) associated with the treatment. This discomfort is usually temporary during the procedure and localized within the treatment area. A small number of patients have reported tenderness in the treatment area lasting up to several weeks.

Redness and Swelling — Laser treatment will cause varying degrees of redness and swelling in the treatment area. These common side effects last from several days to a couple of weeks, depending upon the aggressiveness of the treatments . . . I understand that the following are among the possible risks or complications associated with the Clear + Brilliant procedure: Bleeding; Oozing; Crusting - Aggressive treatment may cause pin point bleeding, petechiae (small red dots under the skin surface), and/or oozing. Crusting or scabbing may form if the clear fluid or blood dries. Blisters; Burns; Scabbing — Heating in the upper layers of the skin may cause blisters or burns and subsequent scab formation. Steam from the heating may produce a separation between the upper and middle layers of the skin resulting in blister formation. The blisters usually disappear within 2-4 days. A scab may be present after a blister forms, but typically will disappear during the natural wound healing process of the skin. Scarring — Scarring is a possibility due to the disruption to the skin's surface and/or abnormal healing. Scars, which can be permanent, may be raised or depressed, and scarring could lead to loss of pigment ("hypopigmentation") in the scarred area." On September 15, 2016, Ms. Nunez performed Clear and Brilliant fractional laser treatment on plaintiff's forehead, cheek and chin area, using a 35/15 setting. The treatment uses beams of light to penetrate the skin in order to reduce scars and pores.

Each session lasted 40-45 minutes. 17. The September 15, 2016 treatment was performed without any complication. There was no swelling or blistering, but there was reddening of plaintiff's face . Ms. Nunez explained that the laser can cause irritation, redness, swelling and dry skin, and clients are given cream to soothe it. The inflammation is common, occurring in 99.5% of laser treatment clients, and usually goes away in four to five days. On September 17, 2016, plaintiff telephoned Laser Plus Spa to discuss dry spots on her upper cheeks; she was concerned that she was burned and would have scarring. She was told that redness was a normal side effect of the laser treatment and advised to come in to have the staff at Laser Plus Spa examine her. On October 7, 2016, the plaintiff returned for further laser treatment.

However, due to an acne breakout on her chin area, she was told that the procedure could not be performed that day. She was given products, including salicylic acid, to control her acne, and told to return in one week. On October 14, 2016, Ms. Nunez performed another Clear and Brilliant treatment on plaintiff without complication. The laser was again set to 35/15.

Following the treatment, plaintiff went home and looked in the mirror. She testified that she saw pus or fluids coming off of an inflamed area on her face on the right side of her chin . She did not recall if there were any blisters Plaintiff telephoned Laser Plus Spa to say that the area of treatment was irritated, and spoke with Ms. Nunez. Ms. Nunez told her that the irritation is normal, and asked her to come in to pick up some creams to apply to the irritated area . Plaintiff telephoned Laser Plus again on October 19, 2016 and stated that her chin is bleeding from the treatment; she was concerned about scarring. She was asked to come in. Plaintiff was seen by Ms. Nunez

and her supervisor. Plaintiff had irritation, and it was determined that she did not have a burn or an open wound.

Ms. Nunez asked plaintiff if she had been using the products they had given her two weeks earlier, including the salicylic acid she was given for her acne. Plaintiff said that she had used up the products, and Ms. Nunez responded that they were supposed to last one or two months. She was assessed as having a very dry patch where she had previously had an acne breakout from using too much salicylic acid and/or glycolic, and given some product to help correct the dryness. Ms. Nunez testified that plaintiff had hurt her own skin by using too much of the product. Plaintiff testified that the pus and inflammation went away after a few weeks, and she was left with a “divot” – an indented line scar by the right side of her mouth.

In further support of the motion, defendant submits the expert affirmation of Deborah S. Sarnoff, M.D., F.A.A.D., F.A.C.P., a Diplomate of the American Board of Dermatology and, a Fellow of the American Society for Laser Medicine & Surgery and a Clinical Professor in the Department of Dermatology at the New York University School of Medicine. Dr. Sarnoff also performs laser skin treatments in her private dermatology office. Dr. Sarnoff, a board-certified dermatologist who is experienced in performing laser skin treatments, opined that Ana Nunez, a licensed aesthetician, who had undergone specific training from Palomar Medical Technologies certifying her to perform Pulsed-Light and Laser Systems and QYag5 Laser System treatments and trained for about six months at Laser Plus before she could treat a client, underwent sufficient training for the use of non-ablative fractional lasers, and that, therefore, there was no failure on behalf of Laser Plus Spa to train or supervise its employees, particularly Ana Nunez, who performed plaintiff’s treatments. Dr. Sarnoff further opined that that Ms. Nunez appropriately performed plaintiff’s Clear and Brilliant treatments at a standard power level of 35/15, with no notations of any complications following the procedure.

Dr. Sarnoff also opined that a fractional non-ablative laser such as the Clear and Brilliant laser used on plaintiff cannot directly cause scarring even if improperly used. She noted that plaintiff’s complained of chin scar was not caused by the treatment plaintiff received at Laser Plus Spa as demonstrated by pre-procedure photographs showing the same scar. Defendant argues that the plaintiff voluntarily assumed the risks of undergoing laser treatment. Plaintiff signed two consent forms after reading and understanding them. The plaintiff testified that she was informed that second-degree burns were a risk. Further, she testified that she was informed of the very risks that she now alleges as damages before willingly undergoing the treatment. Plaintiff fails to offer any evidence by affidavit, or otherwise that she did not intend the consent forms to apply to all four of the planned treatments.

On a motion for summary judgment, the Court’s function is to decide whether there is a material factual issue to be tried, not to resolve it (*see Stillman v. Twentieth Century Fox Films Corp.* 3 NY2d395,404). Once a movant has shown a prima facie right to summary judgment, the burden shifts to the opposing party to show that a

factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form (*see Zuckerman v. City of New York*, 49 NY2d 557). Defendant has made a prima facie showing of entitlement to summary judgment by demonstrating that it treated the plaintiff within the standard of good and accepted practice, that none of its acts or omissions caused plaintiff's alleged injuries and that the plaintiff fully understood and accepted the possibility of the injuries she now complains of as a risk of the laser treatment she underwent.

In opposition, the plaintiffs fails to raise a triable issue of fact (*see Zuckerman v City of New York, supra*). The plaintiffs' assertions, set forth in an attorney's affirmation and not supported by any expert opinion evidence, involves matter outside the ordinary experience and knowledge of laypersons and lacks probative value. (*see Faiella v. Oradell Constr. Co.*, 171 AD3d 1013). Mere conclusions, expressions of hope or unsubstantiated allegations are insufficient to raise a triable issue of fact. (*see Billordo v. E.P. Realty Associates*, 300 Ad2d 523).

ORDERED that the motion is GRANTED, and all proceedings under index no. 609025/2017 are terminated.

This decision will constitute the order of the Court.

Dated: May 4, 2020

ENTERED



ANTONIO I. BRANDVEEN
J. S. C.

FINAL DISPOSITION

ENTERED

May 06 2020

NASSAU COUNTY
COUNTY CLERK'S OFFICE