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| Ciaccio v Theodore A. Lublin, DDS, PC |
| 2021 NY Slip Op 31118(U) |
| April 7, 2021 |
| Supreme Court, Kings County |
| Docket Number: 500310/2019 |
| Judge: Genine D. Edwards |
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At Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Brooklyn, New York, on the 7th day of April 2021.

PRESENT:

Hon. Genine D. Edwards
Justice, Supreme Court

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VINCENT CIACCIO,

Plaintiff,

Index. No. 500310/2019

-against-

DECISION/ORDER

THEODORE A. LUBLIN, DDS, PC,

Defendant.

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

| <u>Papers</u> | <u>Numbered</u> |
|--|-----------------|
| Notice of Motion and Affirmation in Support..... | 1 |
| Affirmation in Opposition..... | 2 |
| Affirmation in Reply..... | 3 |

Pursuant to CPLR 3212, defendant Theodore A. Lublin, DDS, PC (“The Practice”), moves, in motion sequence #1, for an order granting summary judgment to The Practice and dismissing the causes of action sounding in: (1) breach of contract; (2) fraud; and (3) prima facie tort. The Practice contends that plaintiff failed to make a prima facie showing as to all three claims. Plaintiff opposes.

Plaintiff commenced this action on January 4, 2019. The chief allegation is that on July 27, 2016, The Practice agreed to provide specific dental treatment, including dental implants. Plaintiff further alleges that pursuant to the agreement, he secured

financing and paid The Practice for the agreed upon services, including the implants. Thereafter, plaintiff contends The Practice refused to provide the implants.

On February 19, 2019, The Practice joined issue, and filed the instant motion in June of 2020. In support thereof The Practice submits plaintiff's treatment records. The Practice argues that plaintiff's breach of contract claim must be dismissed because he failed to establish the existence of a contract. Specifically, plaintiff has not presented any facts that would support a breach of contract claim in relation to the rendition of dental services. The Practice also contends that plaintiff's causes of action for fraud and prima facie tort must be dismissed because plaintiff failed to make the requisite prima facie showings.

Breach of Contract

A breach of contract claim based upon dental services provided by a dentist will withstand the test of its legal sufficiency only when it is based on an express special promise to affect a cure or to accomplish some definite result. *See Derby v. Bitan*, 89 A.D.3d 889, 933 N.Y.S.2d 315 (2d Dept. 2011); *Varone v. Delman*, 272 A.D.2d 320, 707 N.Y.S.2d 879 (2d Dept. 2000); *Mitchell v. Spataro*, 89 A.D.2d 599, 452 N.Y.S.2d 646 (2d Dept. 1982).

Here, plaintiff's allegations do not include an express promise to affect a cure or accomplish a definite result. The complaint alleged defendant "entered into a valid agreement with [p]laintiff to provide certain and specific dental treatment to [p]laintiff, including...the provision of dental implants." (NYSCEF Doc. No. 1, para. 15). Moreover, and contrary to plaintiff's assertion, the requirement that the complaint allege an express special promise to affect a cure or accomplish some result is not limited to

medical malpractice cases; it also applies to cases in which the plaintiff alleges a breach of a medical contract. See *Detringo v. South Island Family Medical, LLC*, 158 A.D.3d 609, 71 N.Y.S.3d 525 (2d Dept. 2018); *Varone*, 272 A.D.2d 320.

Fraud

A cause of action alleging fraud does not lie where the only fraud claim relates to a breach of contract. See *Board of Mgrs. of Beacon Tower Condominium v. 85 Adams St. LLC*, 136 A.D.3d 680, 25 N.Y.S.3d 233 (2d Dept. 2016).

Here, the complaint alleged that defendant committed a fraud upon plaintiff by knowingly and intentionally inducing plaintiff to enter into an agreement with defendant for dental services and while at the time of making such agreement defendant had no intention of providing such dental implants to plaintiff. (NYSCEF Doc. No. 1, para. 23). However, general allegations that a defendant entered a contract with the intent not to perform the contract are insufficient to establish a cause of action sounding in fraud. See *Putnam County Sav. Bank v. Aditya*, 91 A.D.3d 840, 938 N.Y.S.2d 98 (2d Dept. 2012); *Introna v. Huntington Learning Ctrs., Inc.*, 78 A.D.3d 896, 911 N.Y.S.2d 442 (2d Dept. 2010); *Mendelovitz v. Cohen*, 37 A.D.3d 670, 830 N.Y.S.2d 577 (2d Dept. 2007).

Prima Facie Tort

The elements of a cause of action alleging prima facie tort are: (1) the intentional infliction of harm; (2) which results in special damages; (3) without any excuse or justification; and (4) by an act or a series of acts which would otherwise be lawful. *Berland v. Chi*, 142 A.D.3d 1121, 38 N.Y.S.3d 57 (2d Dept. 2016). “[T]here is no recovery in prima facie tort unless malevolence is the sole motive for defendant's

otherwise lawful act, that is, unless defendant acts from disinterested malevolence”

Edwards v. Walsh, 169 A.D.3d 865, 94 N.Y.S.3d 629 (2d Dept. 2019).

In support of this branch of the motion, defendant purportedly submits office records regarding plaintiff’s treatment. However, the office records are not in admissible form since they are not supported by the statutory foundations set forth in CPLR 4518(a). See *Banister v. Marquis*, 87 A.D.3d 1046, 929 N.Y.S.2d 748 (2d Dept. 2011); *Bronstein-Becher v. Becher*, 25 A.D.3d 796, 809 N.Y.S.2d 140 (2d Dept. 2006); *Wilson v. Bodian*, 130 A.D.2d 221, 519 N.Y.S.2d 126 (2d Dept. 1987). Consequently, defendant failed to establish its prima facie entitlement to judgment as a matter of law on this issue. See *United Specialty Insurance v. Columbia Casualty Company*, 186 A.D.3d 650, 129 N.Y.S.3d 510 (2d Dept. 2020).

Accordingly, the branches of defendant’s motion seeking to dismiss plaintiff’s claims for breach of contract and fraud is granted. The branch of defendant’s motion seeking to dismiss plaintiff’s cause of action for prima facie tort is denied.

This constitutes the Decision of this Court.

ENTER,


Hon. Genine D. Edwards, J.S.C