Aristocrat Plastic Surgery P.C. v Silva
2021 NY Slip Op 33386(U)
August 19, 2021
Supreme Court, New York County
Docket Number: Index No. 153200/2021
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C. PART 8

Aristocrat Plastic Surgery P.C. d/b/a Aristocrat Plastic Surgery & Medaesthetics et al

INDEX NO. 153200/2021

MOT. DATE

- v -

Paige Silva

MOT. SEQ. NO. 001

The following papers were read on this motion to/for ____________

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	NYSCEF DOC No(s).________
Notice of Cross-Motion/Answering Affidavits — Exhibits	NYSCEF DOC No(s).________
Replying Affidavits	NYSCEF DOC No(s).________

In this action, plaintiffs seek to recover from defendant, a former patient, for allegedly false reviews she posted on Yelp and Realself concerning plaintiffs. Defendant moves to dismiss pursuant to CPLR § 3211[a][7], and further seeks costs, attorneys fees, punitive damages and "for a preference in the hearing of this Motion pursuant to CPLR 3211[g]". Plaintiffs oppose the motion. For the reasons that follow, the motion is granted.

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]). The court must accept 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 (*id.* citing *Morone v. Morone*, 50 NY2d 481 [1980]; *Rovello v. Orofino Realty Co.*, 40 NY2d 633 [1976]).

Under CPLR § 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v. Martinez, supra* at 88).

According to the complaint plaintiffs, specifically Dr. Kevin Tehrani, performed multiple medical procedures on defendant, culminating in an internal gluteal lift which defendant claims went awry. After the procedure, defendant posted reviews on Yelp and Realself stating in relevant part as follows:

> I recently had a surgery with Dr. Tehrani, I had a internal gluteal lift that went horribly wrong. Within 48 hours post surgery I began to feel excruciating pains in my buttocks and I told Dr. Tehrani and his staff that it felt as if a stitch came out. Dr. Tehrani then FaceTimed me to look at the area and said nothing was wrong. A few days later as the pain and my draining got worst, I went in for a follow up and I had them check more extensively and sure enough the dissolvable stitches that he used had came out!

Dated: 8/19/21

HON. LYNN R. KOTLER, J.S.C.

1. Check one:	☒ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**
2. Check as appropriate: Motion is	☒ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. Check if appropriate:	☐ **SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**
	☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

I was left with a 4 inch long and 1 inch wide open incision between my buttocks, he then told me would not be able to stitch it back up because it has to close from the inside out and it would take two weeks to close. Two months later the incision is still not fully closed and he discharged me from his practice because I left a bad review about his practice because I felt as if his office was extremely negligent .

I never thought I would go through anything like this especially when I paid over $38,000. Ive had other surgery's that were more invasive and I've never had any issues until Dr. Tehrani.

The emotional and physical pain I had to go through these past 2 months have been unbearable!

Please do not book Dr. Tehrani! Reasons not to book Dr. Tehrani:

- He left all of my messages on read when I was asking medical question and then told me when he discharged me he blocked my phone number because I was asking to many questions. For example, I had to have a wound vac installed to help close my wound faster and at one point it started making an extremely loud noise to the point I could not sleep at all. I text him asking if that was normal and I also called his offices aftercare line and no one got back to me.

- I also had a lipo stitch come open during this surgery and during my first surgery with him I had another stitch that came out that no one knew about until my boyfriend pointed it out. - I also realized they overcharged me for the facility fee after everything was said and done.

- He banned my fiancé from his office because he called him incompetent, negligent, and egotistical. So every time he drove me to my appointments he had to wait inside the car.

- They are extremely money hungry!!!"

Plaintiffs have lumped this entire review into the complaint as one long defamatory statement, and the only allegations that plaintiffs categorically identify as false is the defendant's alleged "overcharge" claim and the claim that defendant's fiancé was banned from plaintiffs' office. Otherwise, plaintiffs allege that the reviews contain "a host of false or misleading facts concerning plaintiffs including a republication of a statement made by Defendant's fiancé, also based on false facts as to the plaintiffs."

Plaintiffs assert four causes of action against the defendant: defamation *per se*, tortious interference with prospective contractual relations, intentional infliction of emotional distress and *prima facie* tort. Defendant argues that plaintiffs have failed to allege a *prima facie* case of action and that this action is subject to New York's anti-SLAPP law and the complaint fails to meet the heightened standard under CPLR § 3211[g].

Discussion

Defamation

Defamation is "the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society" (*Stepanov v. Dow Jones & Co., Inc.*, 120 AD3d 28 [1st Dept 2014] citing *Foster v. Churchill*, 87 NY2d 744, [1996]). Whether the statements

constitute fact or opinion is a question of law for the court to decide (*Silsdorf v. Levine*, 59 NY2d 8 [1983] *cert denied* 464 US 831).

The elements of a defamation claim are: [1] a false statement; [2] publication of the statement without privilege or authorization to a third party; [3] constituting fault as judged by, at a minimum, a negligence standard; and [4] the statement must either cause special harm or constitute defamation *per se* (*Dillon v. City of New York*, 261 AD2d 34 [1st Dept 1999] citing Restatement of Torts, Second § 558). A defamation claim must be pled with particularity, so that a plaintiff must allege the particular words complained of as well as the time, place and manner of the statement and to whom the statement was made (CPLR 3016[a]; *Dillon*, *supra* at 38).

In evaluating the viability of a defamation claim, the words must be construed in the context of the entire statement before an ordinary audience, and if the statement is not reasonably susceptible to a defamatory meaning, the claim is not actionable (*Silsdorf v. Levine*, 59 NY2d 8 [1983] *cert denied* 464 US 831). "Courts will not strain to find defamation where none exists" (*Dillon, supra* at 38 [internal quotation omitted]).

Plaintiffs attempt to lump allegedly defamatory statements in with clear expressions of opinion and is otherwise a kitchen-sink approach and cannot survive a motion to dismiss. Indeed, the only two claims that plaintiffs specifically allege are false are that defendant was overcharged and her fiancé was banned from defendant's office. It is irrelevant whether defendant paid $38,000 for the procedure because her claim that the procedure cost $38,000 and given the results, she was overcharged, is unactionable opinion. Further, her claim that her fiancé was banned from the office is not reasonably susceptible to a defamatory meaning.

In opposition to the motion, plaintiffs' counsel argues: "The Defendant's primary claim that "I had an internal gluteal lift that went horribly wrong" coupled with select statements about follow-up care (e.g. "sure enough the dissolvable stitches that he used had came out!") is a carefully crafted allegation that not only purports medical falsities but improperly links cause and effect." This argument is unavailing. Defendant's opinion that the procedure went horribly wrong is not actionable defamation. Further, plaintiffs do not allege that defendant's statement that the stitches came out was false, which is a necessary element to a defamation claim. To the extent that plaintiffs' counsel argues that "[t]he steps, risks, side effects, and expected results of a medical procedure like an internal gluteal lift are all quantifiable, provable facts", this argument ignores the fact that it is plaintiffs' burden to allege a *prima facie* cause of action. Plaintiff must specifically allege each purported facts stated by the defendant which is false and defamatory. Other than the two specific facts already discussed herein which are not defamatory, plaintiff has otherwise failed to do so.

Accordingly, the first cause of action is severed and dismissed.

<u>Tortious interference with prospective contractual relations</u>

To state a claim for tortious interference with prospective contractual relations, plaintiffs must allege that the defendant engaged in wrongful conduct which interfered with a prospective contractual relationship between plaintiffs and a third party. (*Smith v. Meridian Technologies, Inc.*, 86 AD3d 557 [2d Dept 2011]). "As a general rule, such wrongful conduct must amount to a crime or an independent tort, and may consist of "physical violence, fraud or misrepresentation, civil suits and criminal prosecutions". (*Id.*) Interference with precontractual relations is actionable in New York when a contract would have been entered into but for the actions of the defendant if the defendant's sole purpose is to damage the plaintiff or if the means employed to induce termination of the relationship are dishonest, unfair or otherwise improper" *Harden, S.P.A. v Commodore Elecs.*, 90 AD2d 733, 734 [1st Dept 1982]).

Beyond conclusory allegations such as the "[d]efendant intentionally and improperly interfered with Plaintiffs' contracts with Plaintiffs' prospective patients, and did so with the intent and purpose of damaging Plaintiffs' business reputation", plaintiffs have failed to allege any facts which would demonstrate

wrongful conduct on the part of the defendant. Indeed, it could simply be that in defendant's opinion, she was not satisfied with the outcome of the procedure and wanted to let others know what happened to her. Such a fact would vitiate any claim of conduct. Further, merely alleging that "[d]efendant's interference presumptively caused prospective patients' confusion and to cease doing business with [p]laintiffs" is insufficient to establish the element of interference with plaintiffs' prospective relationship with a third party. Plaintiffs' use of the word "presumptively" highlights this issue.

Accordingly, the second cause of action is severed and dismissed.

Intentional infliction of emotional distress

A cause of action for intentional infliction of emotional distress has four elements: "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress" (*Chanko v. American Broadcasting Companies Inc.*, 27 NY3d 46 [2016] quoting *Howell v. New York Post Co.*, 81 NY2d 115 [1993]). This cause of action is subject to a one-year statute of limitations (CPLR § 215[3]; see *Bellissimo v. Mitchell*, 122 AD3d 560 [2d Dept 2014]).

A plaintiff bears a heavy burden of alleging a claim for intentional infliction of emotional distress (*Howell v. New York Post Co., Inc.*, 81 NY2d 115 [1993]). Plaintiff must assert conduct that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency ... and [is] utterly intolerable in a civilized community" (*Kickertz v. New York University*, 110 AD3d 268, 277-278 [1st Dept 2013] citing *Marmelstein v. Kehillat New Hempstead: The Rav Aron Jofen Community Synagogue*, 11 N.Y.3d 15 [2008]).

Plaintiffs have wholly failed to meet their burden to survive the motion. Indeed, the complaint fails to allege any extreme or outrageous conduct which would give rise to an intentional infliction of emotional distress claim. Posting two reviews on the internet about an experience that defendant had and her expressions of opinion about that experience is not outrageous or extreme. Accordingly, the third cause of action is severed and dismissed.

Prima facie tort

Plaintiff's fourth cause of action is for *prima facie* tort. The elements of the cause of action for *prima facie* tort is "an intentional infliction of harm, without excuse or justification, by an act or series of acts that would otherwise be lawful" (*Lerwick v. Kelsey*, 24 AD3d 931 [3d Dept 2005] *citing Freihofer v. Hearst Corp.*, 65 NY2d 135 [1985]). A plaintiff must also demonstrate special damages and that the defendant acted with "disinterested malevolence" (*Kickertz v. New York University*, 110 AD3d 268 [1st Dept 2013]). Not only have the plaintiffs failed to allege any facts which would show that the defendant acted with disinterested malevolence, and the reviews offer an excuse or justification for their contents on their face, the cause of action may not be used as an alternative for a traditional tort (*Beck v. General Tire and Rubber Co.*, 98 AD2d 756 [2d Dept 1983]). Since this cause of action has merely been asserted as an alternative to the now-dismissed defamation, tortious interference and IIED claims, it must be dismissed as well.

Remaining issues

While plaintiffs seek damages, including punitive damages, they are not entitled to such relief. The court does not view this as an anti-SLAPP suit. CPLR § 3211[g] provides that an action involving public petition and participation as defined in paragraph (a) of subdivision one of section seventy-six-a of the civil rights law, shall be dismissed unless the plaintiff demonstrates "that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law." Civil Rights Law § 76-a defines an "action involving public petition and participation" is based on "any communication in a place open to the public or a public forum in connection with an issue of public interest" or "any other lawful conduct in furtherance of the exercise of the constitutional

right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition." The purpose of CPLR § 3211[g] is to safeguard the first amendment rights of public members who are opposing government action or against those who try to interfere with a citizen's constitutional rights (*Yeshiva Chofetz Chaim Radin, Inc. v. Village of New Hempstead by its Bd. of Trustees of Village of New Hempstead*, 98 FSupp2d 347 [SDNY 2000]).

Although plaintiffs did not prevail on this motion, the alleged statements do not fall within the ambit of New York's anti-SLAPP law. Therefore, the balance of defendant's motion is denied.

CONCLUSION

Accordingly, it is hereby

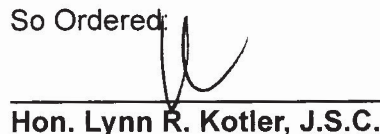
ORDERED that defendant's motion to dismiss is granted to the extent that the complaint is dismissed and the Clerk is directed to enter judgment accordingly, together with costs and disbursements; and it is further

ORDERED that the motion is otherwise denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order and Judgment of the court.

Dated: 8/19/21
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.