

May v Filstein

2022 NY Slip Op 31424(U)

April 29, 2022

Supreme Court, New York County

Docket Number: Index No. 805374/2018

Judge: Judith N. McMahon

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.

Plaintiff now seeks to amend her first amended complaint to add causes of action against Dr. Filstein for breach of express warranty and promissory estoppel.¹ In support, plaintiff points to the deposition testimony of her mother, Joanne Marshall, who claims that plaintiff paid Dr. Filstein \$1500.00 for the April 17, 2017 revision surgery because the doctor represented that this procedure would effectively drop plaintiff's left buttocks to match the right.

Defendant opposes the motion, and cross moves to vacate the Note of Issue or alternatively, for an additional 120 days to move for summary judgment, in order to complete discovery on plaintiff's additional causes of action.

While "leave to amend a pleading should be 'freely given' (CPLR 3025[b]) as a matter of discretion in the absence of prejudice or surprise" (*Zaid Theatre Corp. Sona Realty Co.*, 18 AD3d 352, 355-356 [1st Dept. 2005]), the courts have consistently held that in order to conserve judicial resources, an examination of the proposed causes of action is warranted (*Non-Linear Trading Co. v Braddis Assocs.*, 243 AD2d 107, 116 [1st Dept. 1998]; *East Asiatic Co. v Corash*, 34 AD2d 432 [1st Dept. 1970]), and leave to amend will be denied where the proposed pleading fails to state a cause of action (*Tishman Constr. Corp. v City of New York*, 280 AD2d 374 [1st Dept. 2001]; *Stroock & Stroock & Lavan v Beltramini*, 157 AD2d 590 [1st Dept. 1990]), or is palpably insufficient as a matter of law (*Bankers Trust Co. v Cusumano*, 177 AD2d 450, *lv dismissed* 81 NY2d 1067 [1993]; *Bencivenga & Co. v Phylfe*, 210 AD2d 22[1st Dept. 1994]).

Plaintiff's proposed second amended complaint fails to state causes of action for breach of express warranty or promissory estoppel against the defendant, Dr. Filstein.

¹ This is plaintiff's second motion to amend her complaint. By Decision and Order dated August 23, 2021, this Court denied plaintiff's first motion to amend, with leave to renew upon the submission of Dr. Filstein's fully executed deposition transcript (*see* NYSCEF Doc. No. 105).

The cause of action for breach of express warranty relates to products, not services (*see, e.g., Schimmenti v. Ply Gem Industries, Inc.*, 156 AD2d 658 [2d Dept. 1989]). Plaintiff does not claim that Dr. Filstein, as the provider of a surgical service, manufactured or sold the implant. Additionally, for an express warranty to exist, there must be an affirmation of fact or promise that induced the plaintiff, and plaintiff must set forth the terms of the alleged express warranty with sufficient particularity (*Hicksville v. Stanley*, 37 AD3d 218 [1st Dept 2007]; *Friedman v. Medtronic*, 42 AD2d 185 [2nd Dept 1973].) The relevant portion of plaintiff's "Fourth Cause of Action" (*see* NYSCEF Doc. No. 112) alleges that "plaintiff justifiably and reasonably relied on the express oral representation made by defendant...on or about April 11, 2017...paid monetary consideration and...underwent the procedure..." The pleading fails to set forth any facts regarding the language or terms of the alleged express warranty.

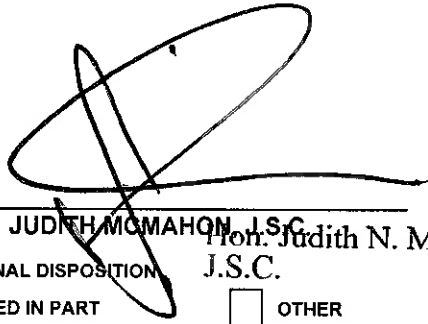
"The elements of a cause of action based upon promissory estoppel are a clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise is made, and an injury sustained in reliance on that promise" (*Schwartz v. Miltz*, 77 AD3d 723 [2d Dept. 2010]; [*internal citations omitted*]). Whether an unambiguous promise was made to plaintiff is belied by plaintiff's consent form, attached to the moving papers.

Accordingly, it is

ORDERED that plaintiff's motion to amend the First Amended Complaint is denied in its entirety; and it is further

ORDERED that defendant's motion to vacate plaintiff's Note of Issue is denied as academic; and it is further

ORDERED that the parties appear for a pre-trial conference via Microsoft Teams on July 14, 2022 at 3:00 p.m.

<u>4/29/2022</u> DATE			 _____ JUDITH MCMAHON, J.S.C. Hon. Judith N. McMahon J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> OTHER
			<input type="checkbox"/> REFERENCE