

**Heisler v Advanced Dermatology of N.Y. P.C.**

2023 NY Slip Op 30410(U)

February 3, 2023

Supreme Court, New York County

Docket Number: Index No. 805326/2017

Judge: Kathy J. King

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. KATHY J. KING PART 06**

*Justice*

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DAVID HEISLER,

Plaintiff,

- v -

ADVANCED DERMATOLOGY OF NEW YORK  
P.C., RICHARD W. GREEN, MD, LAWRENCE D. JAEGER,  
DO, and DANIEL LEBOVITS, RPA,

Defendants.

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**INDEX NO.** 805326/2017

**MOTION DATE** 05/05/2022,  
05/19/2022

**MOTION SEQ. NO.** 004 005

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 59, 60, 61, 71, 72, 73, 74, 75, 76, 77, 78, 79, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 110, 111, 112

were read on this motion to/for AMEND CAPTION/PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 62, 63, 64, 65, 66, 67, 68, 69, 70, 80, 81, 82, 83, 84, 85, 86, 87, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 113, 114, 115

were read on this motion to/for AMEND CAPTION/PLEADINGS.

Upon the foregoing papers, plaintiff moves to amend the complaint, pursuant to CPLR §§ 3025(b) and 3025(c), to add causes of action for violation of General Business Law (“GBL”) § 349 (Motion Seq. No. 04) and common-law fraud (Motion Seq. No. 05). Defendants oppose the plaintiff’s motions. <sup>1</sup>

In the instant action, the complaint sets forth five causes of action. The first four causes of action arise from defendants’ alleged departures from the standard of care in failing to identify, biopsy or remove a cancerous lesion on plaintiff’s neck. The fifth cause of action alleges that defendants Advanced Dermatology of New York, P.C (“Advanced Dermatology”),

<sup>1</sup> The Court the branch of plaintiff’s motion seeking to compel the deposition of defendant Green, pursuant to CPLR § 3124, is denied as moot since plaintiff advised the Court that the deposition has taken place.

Richard W. Green, M.D. (“Green”) and Lawrence Jaeger, D.O. (“Jaeger”), the alleged owner of Advanced Dermatology, failed to adhere to Education Law § 6542, which requires a physician to supervise a physicians’ assistant, in this case Daniel Lebovits (“Lebovits”), while performing medical services.

According to the complaint, defendant Lebovits evaluated and treated the plaintiff, without the supervision of a medical doctor, a total of 14 visits from January 2013 through February 2015. Plaintiff contends that he believed he was being treated by a medical doctor during that time, and that defendant Green never met with him, although he was responsible for plaintiff’s medical care, and for supervising Lebovits. In April 2015, after consulting with non-party physician Roy Geronemus, M.D., plaintiff was told he had a basal cell carcinoma on his neck, and surgery was performed to remove the lesion. Plaintiff alleges that at or about that time, he first discovered that Lebovits was not a medical doctor; that defendant, Jaeger, was a doctor of osteopathic medicine; and that Green was a retired physician. The complaint alleges that as a result of defendants’ medical malpractice in failing to identify, biopsy or remove a cancerous lesion on plaintiff’s neck, the plaintiff was required to undergo more invasive treatment, and sustained pain and suffering, along with emotional distress. Plaintiff also seeks punitive damages on each cause of action, contending that defendants’ actions were “purposeful or grossly indifferent to causing [plaintiff’s] injury.”

Plaintiff now seeks to amend his complaint to add causes of action arising from a violation of General Business Law § 349 and common-law fraud. Plaintiff contends that at the time of the filing of the complaint he was unaware that defendants were allegedly engaging in conduct constituting said causes of action. Plaintiff asserts that he first became aware of the breadth of the defendants’ “scheme” to deceive him and other consumers during discovery, when

defendant Green served responses to plaintiff's Notice for Discovery and Inspection on February 14, 2022. The responses provided metadata from Advanced Dermatology's Progress Notes Log that allegedly show the absence of any supervision of its physicians' assistant, Lebovits, and that no doctor reviewed plaintiff's file or accessed the plaintiff's file until two years after his initial visit. Plaintiff asserts the records show that when the chart and notes were reviewed, it was accessed on two occasions for a total of three seconds.

Plaintiff further asserts that defendants' conduct also constitutes common-law fraud because defendants knowingly made false statements and material omissions to the plaintiff that he was being treated by a doctor. Plaintiff argues the Services Agreement between Advanced Dermatology and Green, which was provided in discovery, demonstrates that Green knew and participated in the defendants' scheme, as he was paid approximately \$250,000 annually for providing medical services that he knew he was not providing, and an additional \$8,000 per year specifically for supervising Lebovits, whom he knew he was not supervising.

Leave to amend a pleading pursuant to CPLR § 3025(b) is freely given, and will be denied only if there is "prejudice or surprise resulting directly from the delay" in moving to amend, "or if the proposed amendment is palpably improper or insufficient as a matter of law" (*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012] [internal quotation marks omitted]). In seeking to amend the complaint plaintiff does not need to establish the merit of the proposed new allegations, but show that the proffered amendment is not "palpably insufficient or clearly devoid of merit" (*Sorge v Gona Realty, LLC*, 188 AD3d 474, 475 [1st Dept 2020], quoting *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 [1st Dept 2010] [internal quotation marks omitted]).

The requisite elements of a cause of action for violation of GBL § 349 are: “(1) the defendant's conduct was consumer-oriented; (2) the defendant's act or practice was deceptive or misleading in a material way; and (3) the plaintiff suffered an injury as a result of the deception” (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co.*, 37 NY3d 169, 176 [2021]). A plaintiff bringing a claim under GBL § 349 “must demonstrate an impact on consumers at large – something that a physician’s treatment of an individual patient typically does not have...” (*Karlin v IVF America, Inc.*, 93 NY2d 282, 294 [1999]). Further, “an act or practice is consumer-oriented when it has a broader impact on consumers at large” (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co.*, 37 NY3d at 177, quoting *Oswego Laborers’ Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20 [1995]).

Here, plaintiff’s proposed amended complaint adding a cause of action based on a violation of GBL § 349, is palpably insufficient as a matter of law. The complaint alleges, in general terms, that defendants engaged in a consumer-oriented business, i.e. providing medical services to consumers such as plaintiff, and made material misrepresentations and false statements to their patients “for the purpose of deceiving plaintiff into believing he was treating with a doctor with skills, expertise, and training in dermatology, when in fact, he was not”, causing plaintiff to suffer damages.

The Court finds that plaintiff’s complaint fails to allege how consumers at large, and not just the plaintiff, were impacted by the defendants’ alleged material misrepresentations and false statements, or how consumers, other than the plaintiff, were deceptively lured into medical treatment by defendants. Thus, plaintiff’s motion seeking to amend the complaint to add a cause of action based on GBL § 349 is denied (Motion Seq. No. 04).

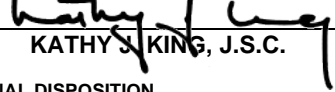
Likewise, plaintiff's motion seeking to amend the complaint to add a cause of action for common-law fraud also fails. A plaintiff is entitled to allege and prove a cause of action for intentional tort, such as a common-law fraud cause of action, "only when the alleged fraud occurs separately from and subsequent to the malpractice...and then only where the fraud claim gives rise to damages separate and distinct from those flowing from the malpractice" (*Abbondandolo v Hitzig*, 282 AD2d 224, 225 [1<sup>st</sup> Dept 2001]). "[O]nly actual pecuniary losses are sustainable as damages in a fraud cause of action" (*Helbig v City of New York*, 212 AD2d 506, 508 [2d Dept 1995]). Further, a fraud cause of action will not be permitted where the fraud claim is based upon the same underlying allegations of malpractice, and seeks essentially the same relief, and is merely duplicative of the malpractice causes of action. (*see Atton v Bier*, 12 AD3d 240 [1<sup>st</sup> Dept 2004]).

In the case at bar, plaintiff's proposed cause of action for fraud is "part and parcel" of his malpractice claims (*Abbondandolo v Hitzig*, 282 AD2d at 225). Plaintiff's proposed complaint does not allege that the fraud occurred separately from and subsequent to the malpractice. The critical component of plaintiff's malpractice claim, i.e. that plaintiff was treated by a physicians' assistant he believed to be a medical doctor, is identical to plaintiff's fraud claim. Moreover, the damages sought as a result of the fraud, are identical to those alleged to have been caused by the malpractice, including medical expense, pain and suffering, emotional distress, additional laser surgeries, and punitive damages.

Accordingly, it is hereby,

**ORDERED**, that the branch of plaintiff's motion seeking to compel defendant Green's deposition is denied as moot; and it is further

**ORDERED**, that plaintiff's motions seeking leave to amend the complaint to add causes of action based on GBL § 349 (Motion Seq. No. 04) and common-law fraud (Motion Seq. No. 05) are denied.

<u>2/3/2023</u> DATE		 KATHY J. KING, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED <input type="checkbox"/> GRANTED <input type="checkbox"/> SETTLE ORDER <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input checked="" type="checkbox"/> DENIED <input checked="" type="checkbox"/> NON-FINAL DISPOSITION <input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> SUBMIT ORDER <input type="checkbox"/> FIDUCIARY APPOINTMENT
APPLICATION:		<input type="checkbox"/> OTHER <input type="checkbox"/> REFERENCE
CHECK IF APPROPRIATE:		