At an IAS Term, Part 63 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 27 day of October, 2023.

PRESENT:

HON. ELLEN M. SPODEK,
Justice.

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ZURAB KAKUSHADZE,
Plaintiff,

-against-

SKIN CANCER & AESTHETIC SURGERY, P.C., HELEN CHERNOVETS-VERGILIS, and MARIYA FUZAYLOVA,
Defendants.

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DECISION/ORDER

Index No. 523468/22

Mot. Seq. No. 2, 12, 16-17

The following e-filed papers read herein:	NYSCEF Doc. Nos.:
Notice of Motion, Affirmations (Affidavits), and Exhibits Annexed	45-67, 563-585; 379-387; 601-608; 617-624
Affirmations (Affidavits) in Opposition and Exhibits Annexed	377, 698; 392, 625-627; 609-610; 628-632
Reply Affirmations (Affidavits)	633; 696; 611-615; 697

In this action to recover damages for common-law fraud, negligence, negligent infliction of emotional distress, and medical malpractice, a total of four motions and cross motions have been consolidated for disposition, as rearranged by the Court in two groups to streamline their analysis and determination.

Defendants' Motions. In motion (mot.) sequence (seq.) Nos. 12 and 17, respectively, defendant Skin Cancer & Aesthetic Surgery, P.C. ("SCAS"), moves and defendant RN/NP-FH Helen Chernovets-Vergilis, (sued herein as Helen Chernovets-Vergilis ("Chernovets")), cross-moves for an order: (1) pursuant to CPLR 3211 (a) (7), dismissing the claims of plaintiff Zurab Kakushadze ("plaintiff") for common-law fraud,

negligence, and negligent infliction of emotional distress as being duplicative, in each instance, of his claim for medical malpractice as against each such defendant; and (2) pursuant to CPLR 3211 (a) (5), dismissing the allegations underlying the "intentional conduct" as time-barred, as against each such defendant.

Plaintiff's Motions. In mot. seq. No. 2, plaintiff moves, by amended notice of motion, dated May 14, 2023 for an order, pursuant to CPLR 3211 (b), 3013 and CPLR 3018 (b), striking, in each instance, all affirmative defenses asserted in the respective answers of defendants Chernovets, SCAS, and Mariya Fuzaylova ("Fuzaylova"). In mot. seq. No. 16, plaintiff moves for an order "sealing NYSCEF Doc. No. 600 [as] containing his private medical information, which was improperly e-filed in gross violation of applicable Federal and State Laws; and . . . imposing sanction[s] [therefor]."

Facts and Allegations

Between July 9, 2020 and September 23, 2021, plaintiff was a patient of SCAS and of two of its non-physician employees, Chernovets and Fuzaylova (collectively with SCAS, "defendants") (Complaint, ¶¶ 21, 50, 52). Plaintiff's grievances with defendants are two-fold: first, defendants allegedly failed to properly treat his skin complaints/conditions during the relevant period; and, second, defendants allegedly overbilled his medical insurance for the actual (as well as for the non-existent) medico-surgical treatments/procedures.

Starting with the first category of his grievances, plaintiff alleges that he underwent at SCAS a minimum of four medico-surgical treatments/procedures during the relevant period. According to plaintiff, each of those treatments/procedures were either

unsatisfactory or unnecessary, or both. The treatments/procedures are summarized and ranked below from the complex to the simplest (rather than chronologically). During his visits to SCAS, plaintiff saw either Chernovets or Fuzaylova (both non-physicians), depending on who was then on duty at SCAS.

First, on July 3, 2021, when plaintiff presented to SCAS with a lesion on his left ring finger, Chernovets allegedly diagnosed it as a "wart" in need of immediate surgical removal (the "left ring-finger lesion").[1] After assuring plaintiff that the lesion removal would leave him without a scar, Chernovets performed the removal with the curettage and electrodesiccation (*id.*, ¶¶ 32-33, 52). Contrary to Chernovets's *pre*-operative diagnosis, the *post*-operative biopsy of the removed lesion revealed vesicular dermatitis of the necrotic type (rather than a wart) (*id.*, ¶ 34). Plaintiff continues, that to make matters worse, the wound resulting from the surgical removal of his left ring-finger lesion "subsequently turned into a nasty keloid," which has caused him occasional, needle-like pain (*id.*, ¶¶ 34, 39) (the "left ring-finger keloid").

Second, on August 12, 2021, when plaintiff returned to SCAS for treatment of his left ring-finger keloid, Fuzaylova (then on duty) prescribed him "a topical corticosteroid clobetasol propionate" (quantity 45 grams, to be applied to his left ring-finger keloid twice daily, without specifying the treatment duration) (Complaint, ¶ 39) (the "clobetasol"). Although Fuzaylova assured plaintiff that the clobetasol would be free of

[1] Although the complaint (in ¶¶ 65 and 71 [d]) incorrectly refers to plaintiff's *right* ring finger as the injured finger, the remainder of the complaint consistently refers to his *left* ring finger as the injured one.

side effects, the clobetasol, when applied, worsened the condition of his left ring-finger keloid (*id.*, ¶¶ 39, 41). According to plaintiff, "the skin on [his] left ring finger began looking very wrinkly, like a very old person's finger and its condition was exacerbated after taking a shower or having contact with warm water in general. [His] left ring finger also felt dry, and [he] developed what's known as spider veins both inside [the left ring-finger] [k]eloid and around it. Plaintiff claims it was quite scary, [with his] left ring finger look[ing] abnormal, and the skin on it appear[ing] to be thinning and becoming . . . transparent" (*id.*, ¶ 39). After looking up the clobetasol online and matching its known side effects against those he had experienced, plaintiff concluded that Fuzaylova "was (and should have been) well-aware of the aforesaid side effects of [the] clobetasol . . . , and [that she] intentionally and fraudulently concealed those known side effects from [him] so [that], unsuspecting of such side effects, [he] would apply [the clobetasol] to [his left ring-finger] [k]eloid" (*id.*, ¶ 41). When plaintiff next encountered Fuzaylova on his return visit to SCAS on September 23, 2021, she allegedly not only brushed off his concerns with a pronouncement that the clobetasol "probably ha[d] already done what it was supposed to do" but also failed to offer "to treat [the left ring-finger] [k]eloid with steroid injections, which, if done properly and soon after the [underlying] surgery[,] . . . would have reduced its size" (*id.*, ¶¶ 42, 53). Plaintiff "subsequently found out that it was too late to treat [the left ring-finger] [k]eloid and [that] its discoloration was permanent" (*id.*, ¶ 52).

Third, and moving back in time to January 13, 2021 when plaintiff presented to SCAS with a then-recent color change of a mole on his right upper back (Complaint,

¶ 25), Chernovets insisted on its immediate removal by way of a shave biopsy (*id.*). Concerned that the mole might be cancerous, plaintiff agreed to its immediate removal (*id.*). The biopsied sample was returned as benign in nature. To treat the resulting wound, Chernovets prescribed plaintiff mupirocin ointment with the assurance that he would have no scarring so long as he applied the mupirocin to the surgical wound (*id.*) (the "mupirocin"). Despite some healing, however, the surgical wound on his right upper back ultimately "ended up turning into a keloid" (*id.*, ¶ 26) (the "right upper-back keloid"). Although, at his June 24, 2021 visit to SCAS, plaintiff complained to Fuzaylova that his right upper-back keloid was "itchy," she failed to "administer (or suggest) any treatment for [it]" (*id.*, ¶ 31). According to plaintiff, his right upper-back keloid was (and remains) "nasty" (*id.*, ¶ 52).

The fourth and final episode of defendants' treatment of plaintiff occurred on June 24, 2021 (Complaint, ¶ 28).[2] On that day, plaintiff (who was then visiting SCAS for a different dermatological complaint) told Fuzaylova that he "had a rash on [his] left abdomen/ribcage areas" (*id.*). Fuzaylova diagnosed plaintiff's rash as "a fungal infection (tinea corporis)," for which she "prescribed clotrimazole-betamethasone topical cream" (*id.*) (the "clotrimazole/betamethasone"). Upon his return visit to SCAS approximately one week later on July 3, 2021, plaintiff complained to Chernovets of his newly

[2] Omitted from this summary is plaintiff's narration of Chernovets's treatment of the vertical wound on his left leg during his September 1, 2020 visit to SCAS (Complaint, ¶ 24). Plaintiff "still [has] some residual discoloration from [that left-leg] [w]ound, and the scarring and discoloration [on his left leg] were even more pronounced [seven months later] on [July 3, 2021]" (*id.*). The Court's omission is in the interest of brevity, rather than to minimize plaintiff's health concerns.

developed (or secondary) rash on his left abdominal/ribcage area (*id.*, ¶ 35). Chernovets rejected plaintiff's complaint that the clotrimazole/betamethasone caused (or could have caused) the secondary rash, as she "stubbornly insisted that . . . [the rash] [had been] caused by some other allergens unrelated to [the] clotrimazole-betamethasone" (*id.*). A week later on his follow-up visit to SCAS on July 10, 2021, plaintiff reminded Chernovets of his still-unresolved secondary rash which had not "improve[d] since [the July 3, 2021] [v]isit" (*id.*, ¶ 38). According to plaintiff, "Chernovets continued to stubbornly insist that [his] secondary rash [had not been] caused by [the] clotrimazole-betamethasone, but by some [undefined] 'autoimmune disorder,' despite the fact that this secondary rash was clearly localized around the area where [the] clotrimazole-betamethasone was applied" (*id.*). At the conclusion of the July 10, 2021 visit, Chernovets "insisted that [plaintiff consult] . . . an immunologist and a rheumatologist, because the secondary rash was caused by an 'autoimmune disorder'" (*id.*). "When [plaintiff] asked Chernovets to refer [him] to an immunologist and a rheumatologist [for a consultation], [she] replied[,] 'Not with your insurance' (*id.*). Fortunately, the secondary rash "resolved on its own shortly after [he had] stopped applying [the] clotrimazole-betamethasone" (*id.*).

During the relevant period, plaintiff was insured by (among other plans) HealthFirst. According to plaintiff, "Chernovets apparently wasn't happy with the reimbursement . . . from Healthfirst for [his] treatments" (*id.*). To obtain a higher than permitted insurance reimbursement from HealthFirst, plaintiff alleges that defendants

misrepresented his medical history, as well as the nature and complexity of their medico-surgical procedures, as more fully set forth in the margin.[3]

(NYSCEF Doc. No. 456, as permitted by order, dated March 15, 2023 at NYSCEF Doc. No. 394).

Determination of Defendants' Motions/Cross Motions

Failure to State a Cause of Action (CPLR 3211 [a] [7])

"In considering a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the allegations in the complaint should be accepted as true, and the motion should be granted only if the facts as alleged do not fit within any cognizable legal theory" (*Young v Brown*, 113 AD3d 761, 761 [2d Dept 2014]).

Under this standard, the complaint fails to state a cause of action for common-law fraud, negligence, and negligent infliction of emotional distress because such claims are all essentially redundant of his medical malpractice claim. The Court's rationale is three-fold. First, each of his non-malpractice claims is based on the same alleged (mis)conduct as his medical malpractice claim (*i.e.*, defendants' allegedly substandard diagnosis and treatment of his skin conditions). Second, each non-malpractice claim will depend for

[3] *See* Complaint, ¶¶ 36, 43, 45, 47, 48 (each alleging a single instance of misstatement of plaintiff's history of presenting illness); ¶ 39 (another instance of misstatement of his history of presenting illness, albeit coupled with a non-existent diagnosis); ¶ 37 (two discrete instances of misstatement of his history of presenting illness); ¶¶ 46 and 49 (each alleging an omission of a key element of his history of presenting illness); ¶ 38 (improper use of the curettage and electrodesiccation to remove the left ring-finger lesion instead of using a cheaper and less-invasive shave biopsy); ¶ 30 (performance of non-existent acne surgery).

proof on the same expert evidence as the malpractice claim. Third and finally, each non-malpractice claim seeks recovery for the same injury to plaintiff (rather than to HealthFirst) as the malpractice claim.

Common-Law Fraud. As a general rule, "[i]t is only when the alleged fraud occurs separately from and subsequent to the [medical] malpractice that a plaintiff is entitled to allege and prove a cause of action for intentional tort, and then only where the fraud claim gives rise to damages separate and distinct from those flowing from the [medical] malpractice" (*Coopersmith v Gold*, 172 AD2d 982, 984 [3d Dept 1991] [internal citation omitted]). Thus, "[w]hen a doctor [or other healthcare provider] actively conceals his or her own malpractice by subsequently making a material and knowing misrepresentation to the patient, on which the patient relies to his or her detriment, the patient may assert separate causes of action to recover damages for malpractice and fraud, as long as the damages sustained as a result of the fraud are distinct from the damages sustained as a result of the malpractice" (*Giannetto v Knee*, 82 AD3d 1043, 1045 [2d Dept 2011]; *see also Simcuski v Saeli*, 44 NY2d 442, 451-452 [1978]; *Atton v Bier*, 12 AD3d 240, 241 [1st Dept 2004]).

Here, plaintiff has not alleged that he suffered any damages from defendants' alleged fraud, which damages were separate from those caused by their alleged medical malpractice (*see Giannetto*, 82 AD3d at 1045; *see also Atton*, 12 AD3d at 241; *Abraham v Kosinski*, 305 AD2d 1091, 1092 [4th Dept 2003]; *Ruggiero v Powers*, 284 AD2d 593, 595 [3d Dept 2001], *lv dismissed* 97 NY2d 638 [2001], *rearg denied* 97 NY2d 700 [2002]; *Luciano v Levine*, 232 AD2d 378, 379 [2d Dept 1996]).

Negligence. In distinguishing whether conduct may be deemed malpractice or negligence, "[t]he critical factor is the nature of the duty owed to the plaintiff that the defendant is alleged to have breached" (*Caso v St. Francis Hosp.*, 34 AD3d 714, 714 [2d Dept 2006]). "[A] claim sounds in medical malpractice when the challenged conduct constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician" (*Pacio v Franklin Hosp.*, 63 AD3d 1130, 1132 [2d Dept 2009] [internal quotation marks omitted]; *see also Bleiler v Bodnar*, 65 NY2d 65, 72 [1985] ["a negligent act or omission by a nurse that constitutes medical treatment . . . constitutes malpractice"]).

Here, the additional claims put forth in this case (*i.e.*, the alleged overbilling of plaintiff's insurance plan) would not be actionable in the absence of the alleged substandard diagnosis and treatment forming the basis of his medical malpractice claim (*see Annunziata v Quest Diagnostics Inc.*, 127 AD3d 630, 631 [1st Dept 2015]). Defendants' billing infractions (as alleged by plaintiff) indisputably bear a substantial relationship to the rendition of medical diagnosis and treatment. Moreover, while a medical facility's conduct may be actionable as ordinary negligence "where the alleged negligent act may be readily determined by the trier of the facts based on common knowledge" (*Coursen v New York Hosp.-Cornell Med. Ctr.*, 114 AD2d 254, 256 [1st Dept 1986]), this is not the case here, given that plaintiff, to prove his claim, must proffer expert testimony concerning the standard of care for the medico-surgical diagnosis and treatment of his skin conditions (*see B.F. v Reproductive Med. Assoc. of NY, LLP*, 136 AD3d 73, 80 [1st Dept 2015], *affd* 30 NY3d 608 [2017]).

Negligent Infliction of Emotional Distress. A claim for negligent infliction of emotional distress may not be asserted if it is "essentially duplicative of tort or contract causes of action" (*Wolkstein v Morgenstern*, 275 AD2d 635, 637 [1st Dept 2000]). "The circumstances under which recovery may be had for purely emotional harm are extremely limited and, thus, a cause of action seeking such recovery must generally be premised upon a breach of a duty owed directly to the plaintiff which either endangered the plaintiff's physical safety or caused the plaintiff fear for his or her own physical safety" (*Lancellotti v Howard*, 155 AD2d 588, 589-590 [2d Dept 1989]; *see also Creed v United Hosp.*, 190 AD2d 489, 491 [2d Dept 1993]).

Here, although "plaintiff may recover damages for any pecuniary loss suffered as a result of . . . defendants' negligence, [he] has no legally cognizable cause of action against . . . defendants to recover for psychic harm resulting from the[ir] [alleged] misdiagnosis and treatment" (*Lancellotti*, 155 AD2d at 589; *see Herman v Kveton-Cattani*, 123 AD3d 1093, 1095 [2d Dept 2014]; *Berrios v Our Lady of Mercy Med. Ctr.*, 20 AD3d 361, 363 [1st Dept 2005]).

Statute-of-Limitations Defense (CPLR 3211 [a] [5])

Inasmuch as the Court has determined that only the medical malpractice claim survives Chernovets's and SCAS's respective motions/cross motions to dismiss, the Court need not address – and, therefore, denies as moot – the remaining branches of their motions/cross motions which are for dismissal of the portions of plaintiff's claims which are predicated on the allegations of intentional conduct (*i.e.*, fraud).

Determination of Plaintiff's Motions

Request for Dismissal of Affirmative Defenses

Plaintiff's motion for an order dismissing each defendant's respective affirmative defenses is denied with leave to renew, as more fully set forth in the decretal paragraphs below.

Request for Sanctions for Filing a Medical Note

Plaintiff additionally moves for the imposition of sanctions (and ancillary relief) as predicated on the allegedly improper filing of a two-page typewritten note (authored by Chernovets) reflecting his visit to SCAS on September 1, 2021 (NYSCEF Doc. No. 600). The document in question omits (by way of redaction) all confidential personal information pertaining to plaintiff, in accordance with 22 NYCRR § 202.5 (e) (1). No further redaction to (or sealing of) the document in question is necessary. Plaintiff's request for the imposition of sanctions and for ancillary relief must, therefore, be denied (*see e.g.* 22 NYCRR § 216.1; *Kelly D. v Niagara Frontier Tr. Auth.*, 177 AD3d 1261, 1264 [4th Dept 2019]).

The Court has considered the parties' remaining contentions and finds them unavailing.

Conclusion

Based on the foregoing, it is

ORDERED that in Seq. No. 12, Chernovets's cross motion for dismissal of the verified complaint is granted to the extent that plaintiff's common-law fraud, negligence, and negligent infliction of emotional distress (as such claims are pleaded in the first,

second, and third causes of action, respectively, in his verified complaint) are dismissed as against her, and the remainder of her cross motion is denied; and it is further

ORDERED that in Seq. No. 17, SCAS's motion for dismissal of the verified complaint is granted to the extent that plaintiff's common-law fraud, negligence, and negligent infliction of emotional distress (as such claims are pleaded in the first, second, and third causes of action, respectively, in his verified complaint) are dismissed as against it, and the remainder of the motion is denied; and it is further

ORDERED that there being no viable claims for common-law fraud, negligence, and negligent infliction of emotional distress as against Chernovets and SCAS, such claims are likewise dismissed, sua sponte, as against the nonmoving (and remaining) defendant Fuzaylova; and it is further

ORDERED in Seq. No. 2, plaintiff's motion for an order dismissing each defendant's respective affirmative defenses is denied with leave to renew after completion of discovery and the filing of a note of issue/certificate of readiness; and it is further

ORDERED in Seq. No. 16, plaintiff's motion for the imposition of sanctions and for ancillary relief is denied in its entirety; and it is further

ORDERED that this action shall proceed as against all three defendants solely on plaintiff's remaining claim which is for medical malpractice (as pleaded in the fourth cause of action in his verified complaint); and it is further

ORDERED that to reflect the correct medical title of defendant Chernovets as an RN/NP-FH, the caption is amended to read in its entirety as follows:

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ZURAB KAKUSHADZE,

Plaintiff,

-against-

Index No. 523468/22

SKIN CANCER & AESTHETIC SURGERY, P.C., RN-NP/FH HELEN CHERNOVETS-VERGILIS, and MARIYA FUZAYLOVA,

Defendants.

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; and it is further

ORDERED that Chernovets's counsel is directed to electronically serve a copy of this decision/order with notice of entry on the pro se plaintiff and on the other parties' respective counsel, and to electronically file an affidavit of service thereof with the Kings County Clerk.

This constitutes the decision/order of the Court.

ENTER,

J. S. C.

HON. ELLEN M. SPODEK

FILED
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