At an IAS Term, Part 83, 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 10th day of February 2025.

PRESENT:
HON. INGRID JOSEPH,
Justice.

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SAYMA SULTANA,

Plaintiff,

-against-

LASER BAR & SPA LLC,

Defendant.

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DECISION & ORDER

Index No.: 507566/2023

Mot Seq. No. 1

The following e-filed papers read herein:	NYSEF Doc Nos.:
Notice of Motion/Affirmation/Affidavit/Memorandum of Law/Exhibits	4 – 14
Affirmation in Opposition/Exhibits	17 – 22
Reply Affirmation	24

In this action, Plaintiff Sayma Sultana ("Plaintiff") seeks damages for personal injuries allegedly sustained on or about February 25, 2022, after undergoing a laser hair removal procedure at defendant Laser Bar & Spa LLC ("Defendant"). In her complaint, Plaintiff asserts seven causes of action: (1) negligence, (2) violation of New York Education Law § 6512, (3) negligence per se, (4) res ipsa loquitur, (5) fraudulent misrepresentation, (6) breach of contract, and (7) deceptive practices pursuant to General Business Law § 349. Plaintiff's complaint was filed on March 10, 2023, and according to the affidavit of service, Defendant was served through the Secretary of State on March 24, 2023.

Defendant now moves for an order: (a) pursuant to CPLR 2004, granting Defendant an extension of time to respond to Plaintiff's complaint; (b) pursuant to CPLR 3211 (a) (1), dismissing the complaint based on documentary evidence; and (c) pursuant to CPLR 3211 (a) (7), dismissing Plaintiff's claims on the ground that they fail to state a cause of action (Mot. Seq. No. 1).

Before the Court proceeds to the substance of the instant motion, the Court notes that Plaintiff has withdrawn her causes of action alleging violation of New York Education Law § 6512,

negligence per se, deceptive business practices and fraudulent misrepresentation. Thus, to the extent that any arguments pertain to these causes of action, they are now moot, and the Court will not address them herein.

The Court will first determine the timeliness of Defendant's motion. Defendant does not dispute that service upon it was made through the Secretary of State on March 24, 2023. Defense counsel asserts that they were retained on or about May 5, 2023. Thus, at the time of counsel's retention, Defendant's time to respond had already expired. It is undisputed that defense counsel reached out to Plaintiff's counsel for an extension of time to respond. It was not until June 20, 2023, that Plaintiff's counsel returned a fully executed stipulation; however, Plaintiff's counsel deliberately crossed out the language that extended the time for Defendant to *move or otherwise respond* to the complaint. The Court finds that Plaintiff's counsel changed the terms of the stipulation unliterally such that Defendant should not be bound by its more restrictive terms. Thus, Plaintiff's argument that the motion should be dismissed as untimely is unavailing.

The Court will now proceed to the substance of Defendant's motion to dismiss. The only remaining causes of action are negligence, res ipsa loquitur and breach of contract. With respect to Plaintiff's negligence cause of action, Defendant maintains that it did not breach a duty. To the extent Plaintiff's negligence cause of action is premised on Defendant's alleged breach of a duty by failing to warn Plaintiff of the risks of laser hair removal, Defendant contends that Plaintiff signed an informed consent form, which indicates that her claimed injuries are known side effects of laser hair removal. Defendant further contends that Plaintiff's argument that it was negligent in the manner it performed the procedure because it caused scarring fails because she signed the consent form. Defendant asserts that since Plaintiff was made aware of the potential risks and her claim that she sustained one of the risks made known to her establishes that Defendant is not negligent.

Defendant similarly argues that Plaintiff's res ipsa loquitur cause of action fails because of the signed consent form, which constitutes documentary evidence contradicting Plaintiff's claim that the alleged injuries would not occur in the absence of Defendant's negligence.

Turning to Plaintiff's breach of contract claim, Defendant asserts that it must be dismissed as duplicative of her claims for negligence since both causes of action arise out of the same operative facts. Even if the Court finds that it is not duplicative, Defendant argues that Plaintiff's breach of contract claim must be dismissed because there was consideration. According to

Defendant, Plaintiff concedes that the parties performed under the contract since she admits to receiving and paying for a service she requested.

In opposition, Plaintiff argues that the consent form is unenforceable pursuant to New York State law and public policy. Even if the language in the consent form properly alerted Plaintiff to the potential for minor injuries or discomforts, Plaintiff argues that the language "cannot be said to have alerted Plaintiff that she is accepting an enhanced exposure to injury due to negligence and/or carelessness due to the failure to ordinarily, properly, and non-negligently perform any procedures" (NYSCEF Doc No. 17, ¶ 21). Plaintiff further argues that the motion is premature because discovery has not been conducted. With respect to Defendant's breach of contract argument, Plaintiff contends that its failure to proffer any contract between the parties precludes dismissal of this cause of action. Moreover, Plaintiff argues that the breach of contract claim is not duplicative because Plaintiff's injury and economic loss is distinct from the rights she could have pursuant to a contract. Turning to her res ipsa loquitur claim, Plaintiff maintains that the second degree burns she sustained are "not normally associated with the use of a laser designed to not seriously damage the skin and are not listed as a potential side effect" (*id.* at ¶ 43). In addition, Plaintiff asserts that Defendant did not demonstrate entitlement to dismissal of her negligence cause of action since it did not warn Plaintiff of all potential risks and the consent form does not absolve it of potential legal responsibility and/or liability.

In its reply, Defendant maintains that Plaintiff's breach of contract claim is duplicative of the negligence claim. Since Plaintiff's allegations are that she sustained injuries as a result of a laser hair removal procedure, Defendant avers that it is clear Plaintiff is asserting a cause of action for negligence, and not a breach of contract claim. Moreover, Defendant argues that Plaintiff's allegations is support of her breach of contract claim are the same allegations cited in support of her negligence claim. Defendant further asserts that Plaintiff cannot establish a claim for res ipsa loquitur because she signed a consent form acknowledging injuries could occur. Regarding Plaintiff's claim that the motion is premature, Defendant argues that on a motion to dismiss, the standard is whether the complaint states a cause of action.

"On a motion to dismiss the complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Breytman v Olinville*

Realty, LLC, 54 AD3d 703, 703-704 [2d Dept 2008]). "[T]he issue on a motion pursuant to CPLR 3211(a)(7) is limited to ascertaining whether the pleading states any cause of action, and not whether there is evidentiary support for the complaint" (*LoPinto v J.W. Mays, Inc.*, 170 AD2d 582, 583 [2d Dept 1991]). "The test of the sufficiency of a complaint is whether it gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments" (*Pace v Perk*, 81 AD2d 444, 449 [2d Dept 1981]).

Pursuant to CPLR 3211 (a) (1), a complaint will only be dismissed if there is documentary evidence that "utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law" (*Granada Condo. III Ass'n v Palomino*, 78 AD3d 996, 996 [2d Dept 2010]). For evidence to be considered documentary, it must be unambiguous, authentic and undisputed (*Fontanetta v Doe*, 73 AD3d 78, 86 [2d Dept 2010] [internal citation omitted]). Therefore, "affidavits, deposition testimony, [and] letters are [not considered] 'documentary evidence' within the intendment of CPLR 3211 (a) (1)" (*Granada Condo. III Ass'n*, 78 AD3d at 997).

The Court will first address Plaintiff's negligence cause of action. Defendant argues that the consent form, which Plaintiff does not contest that she signed, advised of the potential risks. The consent form states, inter alia, that:

> I fully understand that this is an electronic device which may react differently with different kinds of skin, and I accept all risks occasioned by the use of the device on me and agree to hold Laser Bar and its staff free and harmless from and against any and all claims of any and every kind from the use of the Laser on me, and waive any and all such claims, on and after the date hereinafter set forth, with respect to each and every treatment performed on me at any time . . .
>
> Skin effects may include temporary redness similar to sunburn, allergic reaction, some swelling and possibly light crusting may occur. Such side effects should resolve within a few hours to several days following treatment. Blisters, infection, and/or scarring are uncommon, but may occur. Skin effect [*sic*] are more common for indivuals [*sic*] with a history of keloids, excessive scarring or failure to wear

sun block. Hypopigmentation or hyperpigmentation is not uncommon, but rarely permanent (NYSCEF Doc No. 11).

Upon review of the complaint, the Court finds that Plaintiff has alleged each element of a cause of action for negligence. While the consent form does list various "skin effects," including scarring, there is no mention of a risk of sustaining a burn injury. Thus, it cannot be said that the consent form "utterly refutes" Plaintiff's factual allegations and "conclusively establishes a defense" (*see Granada Condo. III Ass'n*, 78 AD3d at 996). Accordingly, the portion of Defendant's motion seeking dismissal of Plaintiff's negligence cause of action is denied.

The Court next turns to Plaintiff's breach of contract cause of action, which Defendant argues is duplicative of her negligence claim. "The nature of the injury, the manner in which the injury occurred, and the resulting harm are all relevant factors in considering whether claims alleging breach of contract and tort may exist side by side" (*Bd. of Mgrs. of Beacon Tower Condominium v 85 Adams St., LLC*, 136 AD3d 680, 684 [2d Dept 2016]; *see Sommer v Fed. Signal Corp.*, 79 NY2d 540, 552 [1992]). "[W]here a plaintiff is essentially seeking enforcement of the bargain, the action should proceed under a contract theory" (*Meserole Hub, LLC v Rosenzweig*, ___AD3d___, 2025 NY Slip Op 00213, *1 [2d Dept 2025] [internal quotation marks and citations omitted]).

In her complaint, Plaintiff asserts that Defendant breached its agreement by "render[ing] such unsafe, harmful, and negligent treatment" (NYSCEF Doc No. 1, ¶ 58). There is no claim that Defendant did not perform the laser hair removal procedure; instead, Plaintiff's claim is that the way it was performed was negligent. Plaintiff is not "seeking the contractual benefit of [her] bargain" with Defendant (*see Meserole Hub, LLC*, 2025 NY Slip Op 00213, *2). Therefore, Plaintiff's breach of contract claim is duplicative of her negligence cause of action.

The Court finds that Plaintiff's res ipsa loquitur cause of action must be dismissed solely on the basis that it is not a viable separate cause of action (*see Abbott v Page Airways, Inc.*, 23 NY2d 502, 512 [1969] ["The principle that 'the thing speaks for itself' does not state a separate theory on which a plaintiff may recover for injury."]; *Keene v Marketplace*, 114 AD3d 1313, 1314 [4th Dept 2014] [affirming dismissal of cause of action alleging res ipsa loquitur "inasmuch as res

ipsa loquitur is an evidentiary doctrine, rather than a cause of action"]; *Travelers Prop. Cas. Co. of Am. v Sanco Mech., Inc.*, 126 AD3d 527, 527 [1st Dept 2015]). [1]

Accordingly, it is hereby

ORDERED, that Defendant Laser Bar & Spa LLC's motion to dismiss (Mot. Seq. No. 1) is granted to the extent that Plaintiff's fourth cause of action (res ipsa loquitur) and sixth cause of action (breach of contract) are dismissed.

All other issues not addressed herein are either without merit or moot.

This constitutes the decision and order of the Court.

HON. INGRID JOSEPH, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice

[1] While res ipsa loquitur cannot be asserted as a separate cause of action, Plaintiff may be entitled to a res ipsa loquitur charge provided that her evidence establishes the three essential elements (*see Weeden v Armor El. Co.*, 97 AD2d 197, 203 [2d Dept 1983]).