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 3rd day of April, 2025.

PRESENT:
HON. INGRID JOSEPH,
Justice.

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ZURAB KAKUSHADZE,

Plaintiff,

-against-

SKIN CANCER & AESTHETIC SURGERY, P.C., IRENE VERGILIS-KALNER, ARKADY KALYUZHNY,

Defendants.

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DECISION & ORDER

Index No.: 500196/2023

Mot. Seq. No. 1

The following e-filed papers read herein:[1]	NYSEF Doc Nos.:
Notice of Motion/Affirmation in Support/Exhibits.....	18 – 36
Affidavit in Opposition/Exhibits.....	104 – 141
Affirmation in Reply.....	142

Plaintiff Zurab Kakushadze ("Plaintiff") commenced this action against Defendants Skin Cancer & Aesthetic Surgery, P.C. ("SCAS"), Irene Vergilis-Kalner ("Vergilis-Kalner") and Arkady Kalyuzhny ("Kalyuzhny") (collectively, "Defendants"),[2] asserting causes of action for (1) fraud, (2) violation of New York General Business Law § 349 (a), (3) violations of New York Judiciary Law § 487, and (4) a declaratory judgment.[3] The crux of Plaintiff's action concerns medical records requested from SCAS on July 18, 2022, that were allegedly not provided in electronic form and were incomplete.

Defendants move for an order: (i) pursuant to CPLR 3012 (b), dismissing Plaintiffs' Complaint on the grounds that it was not timely served within 20 days after their Demand for a Verified Complaint; or alternatively, (ii) pursuant to CPLR 3211 (a) (7), dismissing Plaintiff's causes of action (Mot. Seq.

[1] The Court will not consider Plaintiff's supplemental affidavit and exhibits filed after oral argument was heard and the motion fully submitted.
[2] In his verified complaint, Plaintiff asserts that SCAS is a medical practice located at 2727 Ocean Parkway, Suite L1 in Brooklyn, New York. Plaintiff further asserts that Vergilis-Kalner is the president of, owner of, and sole medical doctor at SCAS. Plaintiff also claims that Kalyuzhny is an attorney and practice manager at SCAS. (NYSCEF Doc No. 23).
[3] In his opposition to the motion, Plaintiff stated that his fourth cause of action for a declaratory judgment is moot (NYSCEF Doc No. 104, ¶ 81).

No. 1). Plaintiff opposes the motion.[4] The Court will address each prong of Defendants' motion separately.

In their motion seeking dismissal under CPLR 3102 (b), Defendants concede that SCAS was served with the Summons with Notice through the Secretary of State on January 4, 2023. They assert that on February 3, 2023, SCAS filed a Notice of Appearance and a Demand for a Verified Complaint. While Plaintiff did file a complaint on January 20, 2023, Defendants argue that this was not filed in response to a SCAS's Demand for a Verified Complaint or in response to the Notice of Appearance. Thus, Defendants aver that Plaintiff did not timely serve his complaint, as required by CPLR 3012 (b).

In opposition, Plaintiff argues that the statute is silent as to the deadline to electronically file a complaint. Once SCAS's counsel consented to e-filing, Plaintiff contends that she was automatically served with the complaint. In addition, Plaintiff argues that he informed counsel, via email on February 3, 2023, that the complaint was previously e-filed and provided her with the relevant NYSCEF document number. In reply, Defendants maintain that Plaintiff did not follow the procedure outlined in CPLR 3012 (b) because the complaint was not served after the written demand was made.

As an initial matter, the Court notes that CPLR 3012 (b) provides that the "court upon motion *may* dismiss the action if service of the complaint is not made" in compliance with this subsection (CPLR 3012 [b] [emphasis added]). Pursuant to CPLR 2001, "the court may permit a mistake, omission, defect or irregularity . . . to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded" (CPLR 2001). The Court of Appeals advised the following:

> In deciding whether a defect in service is merely technical, courts must be guided by the principle of notice to the defendant--notice that must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections (*Ruffin v Lion Corp.*, 15 NY3d 578, 582 [2010] [internal quotation marks and citations omitted]).

Here, it is undisputed that Plaintiff's Verified Complaint was already e-filed at the time SCAS's counsel field a Notice of Appearance and Demand for Complaint. Plaintiff's alleged failure to serve the complaint in response to SCAS's Demand for Complaint "assuming *arguendo* there was a requirement that plaintiff do so although the complaint was already e-filed, is at worst, the kind of 'technical, nonprejudicial' mistake that occurs during the commencement phase of an action, including some aspects of service of process that could be disregarded pursuant to CPLR §2001" (*Hobbins v Linden Ctr. for*

[4] Plaintiff filed a cross-motion seeking, inter alia, an extension of time to oppose Defendants' motion (Mot. Seq. No. 3). At oral argument, this motion was withdrawn.

Nursing & Rehabilitation, 2023 NY Slip Op 32658[U], *4-5 [Sup Ct, Kings County 2023] [emphasis in original]). Accordingly, that branch of Defendants' motion seeking dismissal under CPLR 3102 (b) is denied.

The Court now turns to the remaining portion of Defendants' motion seeking dismissal under CPLR 3211 (a) (7). "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]). "Moreover, '[a] court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and upon considering such an affidavit, the facts alleged therein must also be assumed to be true'" (*Canzona v Atanasio*, 118 AD3d 837, 838 [2d Dept 2014], citing *Kopelowitz & Co., Inc. v Mann*, 83 AD3d 793, 797 [2d Dept 2011]).

"[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 Second Department has held that

> Where . . . evidentiary material is submitted and considered on a motion pursuant to CPLR 3211 (a) (7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact claimed by the plaintiff to be one is not a fact at all, and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate (*YDRA, LLC v Mitchell*, 123 AD3d 1113, 1114 [2d Dept 2014]).

"[A]ffidavits submitted by a defendant will almost never warrant dismissal under CPLR 3211 unless they establish conclusively that [the plaintiff] has no cause of action" (*Sokol v Leader*, 74 AD3d 1180, 1182 [2d Dept 2010] [internal quotation marks and citations omitted]).

The Court will first discuss Plaintiff's cause of action for fraud. "The elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages" (*Introna v Huntington Learning Ctrs., Inc.*, 78 AD3d 896, 898 [2d Dept 2010]). "To plead reliance, the plaintiff [is] required to allege that [he or she] was induced to act or refrain from acting to [his or her] detriment by virtue of the false representation" (*Ideal Steel Supply Corp. v Anza*, 63 AD3d 884, 884 [2d Dept 2009]). "All of the elements of a fraud claim must be supported by factual allegations

containing the details constituting the wrong in order to satisfy the pleading requirements of CPLR 3016(b)" (*GFRE, Inc. v U.S. Bank, N.A.*, 130 AD3d 569, 571 [2d Dept 2015]).

According to Defendants, Plaintiff's fraud claim is based on allegations that they failed to provide complete medical records in electronic form and that they "intentionally and fraudulently" failed to appear in the medical malpractice action Plaintiff commenced against them. Defendants first address Plaintiff's allegation that Defendants made a misrepresentation when they informed him that they could not supply him with electronic records because of HIPAA with the intent to deceive him. In his affirmation, Kalyuzhny states that SCAS was unable to provide Plaintiff with electronic records because of the HIPAA Security Rule and at the time of Plaintiff's request, SCAS did not have a secure means in which to deliver Plaintiff's records electronically. Contrary to Plaintiff's contention that federal law required SCAS to provide electronic records, Defendants submit that the relevant federal law came into effect after Plaintiff made his request. Kalyuzhny further explains that upon receiving a request for medical records, it is SCAS's custom and practice to only provide records concerning medical care, which does not include billing records, referrals and other documents Plaintiff alleges were missing. Accordingly, Defendants argue that Plaintiff "failed to demonstrate that SCAS made misrepresentation [*sic*] regarding providing him with medical records and that SCAS did so with intent to deceive" him (NYSCEF Doc No. 19, ¶ 20). Defendants also argue that Plaintiff cannot establish that he justifiably relied on SCAS's representations or that he has been harmed since he has already received the requested medical records.

Defendants next address Plaintiff's allegations that they "intentionally and fraudulently" failed to appear in the medical malpractice action. Defendants maintain that Kalyuzhny's representation that SCAS did not have counsel on October 21, 2022, was not a lie. Instead, Kalyuzhny believed that SCAS would also be represented by counsel, and only became aware that this was not true when Plaintiff filed a default motion in the medical malpractice action. Upon contacting the insurance carrier, Defendants assert that representation was extended to SCAS on October 25, 2022. In addition, Defendants argue that "it is unclear in what way plaintiff relied on or was damaged by these events" (NYSCEF Doc No. 19, ¶ 25).

In his opposition, Plaintiff argues that Defendants have failed to establish that he has no cause of action. Plaintiff asserts that Kalyuzhny's statements regarding why SCAS was unable to provide electronic copies of his medical records are lies. Plaintiff argues that by failing to respond to his Notice to Admit in the medical malpractice action, SCAS admitted to sending some records via an unencrypted email. Plaintiff maintains that he is entitled to receive his complete medical records in electronic form, pursuant to HIPAA. Plaintiff further asserts that Defendants' counsel and Kalyuzhny lied about SCAS's

insurance coverage and about SCAS providing him with complete medical records in paper form. Moreover, Plaintiff insists that he justifiably relied on and was injured by Defendants' misrepresentations. Since Kalyuzhny misrepresented that SCAS was not covered by insurance and had no legal counsel, Plaintiff alleges that he "spent countless additional hours of [his] time" and incurred substantial service costs because he had to serve papers on the New York Secretary of State (NYSCEF Doc No. 104, ¶ 62). With respect to Defendants' alleged misrepresentations regarding their ability to send medical records in electronic form, Plaintiff asserts that he "had to spend additional hours of [his] time and incur[red] additional costs in filing complaints with agencies . . . and motions in [the medical malpractice action]" (*id.*).

In reply, Defendants contend that Plaintiff did not present any concrete factual allegations to support a cause of action for fraud. According to Defendants, they did not lie about SCAS's insurance coverage information and did not fraudulently fail to appear in the medical malpractice action. Defendants admit that, on occasion, they did provide patients, including Plaintiff, a single document via email. However, Defendants maintain that there is no evidence of fraud.

In his complaint, Plaintiff states that Defendants' "[r]epresentations were made with scienter, the intent to deceive [him]" (complaint ¶ 41). Thus, the complaint merely "alleges fraudulent intent in a bare and conclusory manner without any supporting detail" (*Phoenix Life Ins. Co. v Town of Oyster Bay*, 186 AD3d 763, 767 [2d Dept 2020]). Even after consideration of his affidavit in opposition, the Court finds that Plaintiff failed to proffer any factual allegations of Defendants' intent with respect to the transmission of electronic records. Regarding Defendants' alleged representation that they did not have insurance coverage, in his affidavit, Plaintiff states that SCAS defaulted to intentionally delay prosecution of the medical malpractice action. Accepting this as true, Plaintiff has failed to adequately allege justifiable reliance and damages therefrom. In his affidavit, Plaintiff avers in a vague and conclusory manner that he "had to spend countless additional hours of [his] time" and had to serve SCAS in the medical malpractice action via the Secretary of State (NYSCEF Doc No. 104, ¶ 62). However, whether or not SCAS was represented by counsel, service is required on the corporation by either the Secretary of State or through a designated agent. Plaintiff has not alleged that SCAS's counsel would have accepted service on its behalf. Therefore, the Court finds that Plaintiff has failed to state a cause of action for fraud.

The Court next turns to the portion of Defendants' motion seeking to vacate Plaintiff's second cause of action for violations of New York General Business Law ("GBL") § 349. Under GBL § 349 (a), "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state" are unlawful. A plaintiff asserting a GBL § 349 cause of action "must allege

that: (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] ["*Himmelstein*"]). The Court of Appeals noted that under GBL § 349, "what matters is whether the defendant's allegedly deceptive act or practice is directed to the consuming public and the marketplace" (*id.* at 177). Thus, "private contract disputes which are unique to the parties do not fall within the ambit of the statute" (*Flax v Lincoln Natl. Life Ins. Co.*, 54 AD3d 992, 995 [2d Dept 2008]). "In determining whether a representation or omission is a deceptive act, the test is whether such act is likely to mislead a reasonable consumer acting reasonably under the circumstances" (*Andre Strishak & Assoc., P.C. v Hewlett Packard Co.*, 300 AD2d 608, 609 [2d Dept 2002] [internal citations and quotation marks omitted]).

According to Defendants, this cause of action fails because Plaintiff is "unable to demonstrate that the acts he complains of effects consumers at large" (NYSCEF Doc No. 19, ¶ 29). Instead, Defendants assert that Plaintiff's "complaints involve a single transaction that was unique to him" (*id.*). Defendants also assert that Plaintiff is unable to prove actual injury. According to Defendants, Plaintiff was at most inconvenienced by not receiving his medical records in electronic form.

In his opposition, Plaintiff asserts that he is a consumer and that "SCAS's deceptive practices where [*sic*] not just directed at or limited to me, but were elevated into SCAS's 'custom and practice'" (NYSCEF Doc No. 104, ¶ 65). Plaintiff further asserts that he has "pleaded that Defendants' acts and practices of providing only paper copies of medical records and limiting them to 'office notes' . . . were deceptive or misleading in material way [*sic*]" (*id.* at ¶ 73). Moreover, Plaintiff maintains that he has been injured by Defendants' deception in that he had to spend additional hours of his time and had to incur additional costs in filing complaints with agencies and motions in the medical malpractice action (*id.*).

In reply, Defendants maintain that Plaintiff has failed to present factual allegations to support the elements of a cause of action for violation of GBL § 349. According to Defendants, Plaintiff has not shown that their alleged acts or practices affect consumers at large and has not proven an actual injury. Defendants further argue that presenting a paper copy of office notes in response to a patient's request for their records is not deceptive or misleading in a material way.

Accepting Plaintiff's factual allegations as true and according them every possible inference, the complaint states a cause of action for violation of GBL § 349. Contrary to Defendants' contention, the Court finds that Plaintiff has sufficiently alleged that their conduct was consumer-oriented and deceptive or misleading in a material way. Moreover, Plaintiff's allegations that he incurred additional costs is

sufficient to plead damages under GBL § 349 (*see Wilner v Allstate Ins. Co.*, 71 AD3d 155, 166-67 [2d Dept 2010], abrogated on other grounds by *Hobish v AXA Equit. Life Ins. Co.*, — NE3d —,2025 NY Slip Op 00183 [2025]).

Lastly, the Court addresses that portion of Defendants' motion seeking to vacate Plaintiff's third cause of action asserting that Kalyuzhny violated New York Judiciary Law § 487. Under Judiciary Law § 487 (1), an attorney who is "guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party . . . forfeits to the party injured treble damages, to be recovered in a civil action" (Judiciary Law § 487 [1]). "Relief pursuant to Judiciary Law § 487 is not lightly given . . . , and requires a showing of egregious conduct or a chronic and extreme pattern of behavior on the part of the defendant attorneys" (*Kaufman v Moritt Hock & Hamroff, LLP*, 192 AD3d 1092, 1093 [2d Dept 2021] [internal citations and quotation marks omitted]). "A cause of action alleging a violation of Judiciary Law § 487 must be pleaded with specificity" (*Betz v Blatt*, 160 AD3d 696, 698 [2d Dept 2018]).

In their motion, Defendants argue that Kalyuzhny is the Practice Manager at SCAS who also happens to be an attorney. Since Kalyuzhny was not acting in his capacity as an attorney, Defendants contend that § 487 does not apply. Even if it did apply, Defendants maintain that this cause of action fails because Plaintiff cannot establish that Kalyuzhny engaged in intentional deceit.

In opposition, Plaintiff asserts that he is bringing this cause of action for Kalyuzhny's acts and fraud in the medical malpractice action as an attorney. In particular, Plaintiff avers that Kalyuzhny acted as an attorney for SCAS before Hall Booth Smith, P.C. was retained by the insurance carrier. According to Plaintiff, in opposing his motion for a default in the medical malpractice action, SCAS claimed that its default was a result of law office failure. Since Hall Booth Smith, P.C. was not retained until after the default motion was filed, Plaintiff asserts that the "law office failure" is by Kalyuzhny.

In reply, Defendants argue that Kalyuzhny is not acting as an attorney in the medical malpractice action. With respect to the law office failure, Defendants assert that it relates to administrative actions of the insurance carrier, not Kalyuzhny. Further, Defendants maintain that Plaintiff has not pled facts showing Kalyuzhny was engaged in intentional deceit or an extreme pattern of legal delinquency.

Assuming arguendo that Kalyuzhny was acting as SCAS's attorney during his communications with Plaintiff, the Court finds that Plaintiff failed to plead "sufficient facts to demonstrate an intent to deceive the court or any party" (*Schiller v Bender, Burrows and Rosenthal, LLP*, 116 AD3d 756, 759 [2d Dept 2014]; *Grasso v Guarino*, 227 AD3d 872, 873 [2d Dept 2024]).

Accordingly, it is hereby

ORDERED that Defendants' motion to dismiss (Mot. Seq. No. 1) is granted to the extent that Plaintiff's first cause of action (fraud) and third cause of action (New York Judiciary Law § 487) 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.

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