Moreno v M&H Zuckerbraun, LLC

2026 NY Slip Op 31689(U)

April 14, 2026

Supreme Court, New York County

Docket Number: Index No. 156832/2021

Judge: Lynn R. Kotler

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYNN R. KOTLER** **PART** **08**

Justice

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RAFAEL MORENO,

Plaintiff,

- v -

M&H ZUCKERBRAUN, LLC, KEY FOOD SUPERMARKETS, KEY FOOD CO-OP, 1239 FOOD CORP.,

Defendants.

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INDEX NO. 156832/2021

MOTION DATE 01/15/2026

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113

were read on this motion to/for DISMISSAL.

BACKGROUND

Plaintiff commenced this personal-injury action to recover for injuries he sustained to his neck, back and right shoulder on November 25, 2019, when he allegedly tripped and fell on a sidewalk abutting the premises located at 1239 St. Nicholas Avenue in Manhattan. Defendants Key Food Supermarkets, Key Foods Co-Op, and 1239 Food Corp. ("Moving Defendants") now move to dismiss plaintiff's complaint for perpetuating fraud on the court or, in the alternative, for leave to amend their answer pursuant to CPLR 3025(b) to assert fraud-based counterclaims. Plaintiff opposes the motion. The motion is denied.

DISCUSSION

1. Moving Defendants Fail to Show Fraud on the Court

"Fraud on the court involves willful conduct that is deceitful and obstructionistic, which injects misrepresentations into the judicial process 'so serious that it undermines . . . the integrity of the proceeding'" (*CDR Creances S.A.S. v Cohen*, 23 NY3d 307, 318 [2014], quoting *Baba Ali v State of New York*, 19 NY3d 627, 634 [2012]). A party alleging fraud on the court "must establish by clear and convincing evidence that the offending 'party has acted knowingly in an attempt to hinder the fact finder's fair adjudication of the case and his adversary's defense of the action'" (*id.* at 320, quoting *McMunn v Memorial Sloan-Kettering Cancer Ctr.*, 191 F.Supp.2d 440, 445 [S.D.N.Y. 2002]). Fraud on the court may warrant the extreme remedy of dismissal, but only where the evidence establishes that the offending party's conduct is "particularly egregious,

characterized by lies and fabrications in furtherance of a scheme designed to conceal critical matters from the court and the non-offending party" (*id.* at 321).

In support of their motion, Moving Defendants submit the following evidence: (1) plaintiff's medical records and IME report, which reflect conflicting assessments and diagnoses of plaintiff's injuries, particularly as between plaintiff's treatment providers, who diagnosed spinal injuries warranting surgery, and the emergency department personnel who treated plaintiff after his fall, who diagnosed only muscle pain based on negative radiologic findings (*compare* NYSCEF Doc. Nos. 82 at 3, 9-13; 85 at 3, 6 *with* NYSCEF Doc. No. 81 at 40, 111-16, 136-38); (2) plaintiff's deposition transcript and his employment and criminal history records, which reflect inconsistencies between plaintiff's sworn testimony and the documentary evidence regarding his criminal and employment background (*compare* NYSCEF Doc. No. 75 at 15:3-9, 77:8-78:21 *with* NYSCEF Doc. Nos. 76 at 6, 13-14; 88); (3) a video of plaintiff's fall and a biomechanics expert report opining that plaintiff's fall was volitional (NYSCEF Doc. Nos. 77-78); and (4) a copy of the first amended complaint in an unrelated federal action, in which plaintiff's former counsel[1] and some of his treatment providers[2] are named as alleged participants in a fraudulent scheme to obtain kickbacks for manufacturing trip-and-fall claims and overtreating injuries (NYSCEF Doc. No. 74). Moving Defendants also submit documents and decisions from various authorities that negatively implicate plaintiff's treatment providers (NYSCEF Doc. Nos. 71-73).

Contrary to Moving Defendants' contentions, the evidence submitted is insufficient to establish that plaintiff acted knowingly to hinder the fair adjudication of the case or Moving Defendants' defense of this action. At most, Moving Defendants identify inconsistencies and anomalies in the evidence that may eventually be relevant to the fact-finder's credibility determinations, but are insufficient to support a finding of fraud, particularly given that plaintiff offers "plausible alternative explanations for [the] discrepancies in testimony [and] evidence" (*CDR Creances S.A.S.*, 23 NY3d at 320 [internal quotation marks omitted]). Further, the unproven allegations of fraud against plaintiff's counsel and certain of his medical treatment providers in the unrelated federal action, which does not concern plaintiff's accident or the medical treatment provided to him, do not constitute clear nor convincing evidence that plaintiff himself has perpetrated fraud on the court in this case *(cf. Broughton v 553 Marcy Ave. Owners LLC*, 238 AD3d 536, 537 [1st Dept. 2025]; *Linares v City of New York*, 233 AD3d 479, 480 [1st Dept. 2024]). As such, Moving Defendants' motion is denied to the extent it seeks to dismiss plaintiff's complaint for perpetrating fraud on the court.

2. <u>Moving Defendants' Counterclaim is Insufficiently Pleaded</u>

Moving Defendants seek leave to amend their answer to assert a fraud counterclaim against plaintiff and four of his treatment providers—Kevin Weiner, M.D. ("Weiner"), Felix

[1] Subin Associates, LLP.
[2] All Boro Medical Rehabilitation, Kolb Radiology, Kevin Weiner, M.D., and Felix Karafin, M.D.

Karafin, M.D. ("Karafin"), Gbolahan Okubadejo, M.D. ("Okubadejo"), and Thomas Kolb, M.D. ("Kolb")—as well as counterclaims of aiding-and-abetting fraud and violation of General Business Law ("GBL") § 349 as against Weiner, Karafin, Okubadejo, and Kolb. They premise these proposed counterclaims on allegations that plaintiff's complaint in this action is based on misrepresentations regarding the occurrence of his trip and fall accident—which plaintiff is alleged to have faked—and his resulting injuries—which plaintiff, aided by the named treatment providers, is likewise alleged to have invented and/or greatly exaggerated.

"Leave to amend pleadings . . . should be freely given, and denied only if there is prejudice or surprise resulting directly from delay, 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 and citations omitted]; *see MBIA Ins. Corp. v Greystone & Co.*, 74 AD3d 499, 499 [1st Dept. 2010]).

"The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the [party asserting the claim] and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). A fraud claim must also be pleaded with particularity pursuant to CPLR 3016(b) to clearly inform the party against whom the claim is asserted of the complained-of incidents (*id.*). A party alleging fraud must therefore plead facts sufficient '"to establish the elements of the cause of action'" and "permit a 'reasonable inference' of the alleged misconduct" (*id.*, quoting *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008]). '"[I]n certain cases, less than plainly observable facts may be supplemented by the circumstances surrounding the alleged fraud'" (*id.*, quoting *Pludeman*, 10 NY3d at 493).

With respect to the proposed fraud counterclaim, the court need not address the sufficiency of Moving Defendants' allegations with respect to the elements of knowing falsity and intent because the proposed counterclaim necessarily founders on its failure to adequately plead the remaining elements of the claim. Moving Defendants do not allege facts sufficient to demonstrate, or from which it can be reasonably inferred, that they relied on plaintiff's alleged misrepresentations regarding his accident and injuries. Indeed, the record makes clear that Moving Defendants "ha[ve] not, in fact, relied on plaintiff's alleged misrepresentations, but instead ha[ve] denied them in [their] answer and throughout the litigation" (*Breton v Dishi*, 234 AD3d 432, 432 [1st Dept. 2025]; *see Republic of Kazakhstan v Chapman*, 217 AD3d 515, 517 [1st Dept. 2023]). "Nor d[o] [Moving Defendants] plead damages with sufficient particularity, alleging only that [they] ha[ve] incurred significant sums in defending th[is] action" (*Breton*, 234 AD3d at 433).

"A [party] alleging an aiding-and-abetting fraud claim must allege the existence of the underlying fraud" (*Oster v Kirschner*, 77 AD3d 51, 55 [1st Dept. 2010]), and, thus, "a cause of action alleging aiding and abetting fraud cannot lie without the underlying fraud having been

sufficiently pleaded" (*Goldberg v KOSL Bldg. Grp., LLC*, 236 AD3d 995, 997 [2nd Dept. 2025]; *see Simon v FrancInvest, S.A.*, 178 AD3d 436, 437 [1st Dept. 2019]). As such, the insufficiency of Moving Defendants' proposed fraud counterclaim is necessarily also fatal to the proposed counterclaim for aiding-and-abetting fraud.

The proposed GBL § 349 counterclaim is likewise patently devoid of merit. A party asserting a deceptive business practices claim under GBL § 349 must allege that the challenged act or practice was consumer-oriented, materially misleading, and resulted in actual injury to the party asserting the claim (*see Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000]). As already discussed, other than non-actionable litigation costs (*see Breton*, 234 AD3d at 433), Moving Defendants do not allege any actual injury resulting from the purported conduct of plaintiff's treatment providers. Nor do Moving Defendants adequately allege consumer-oriented conduct, as their claim that the medical treatment rendered to plaintiff for his allegedly invented injuries was "part of a larger pattern of conduct, not unique to this lawsuit, and which are routinely used to inflate bodily injury claims" is based solely on the unproven allegations in the unrelated federal action (*see Broughton*, 238 AD3d at 537; *Linares*, 233 AD3d at 480).

Accordingly, it is

ORDERED that the motion of defendants Key Food Supermarkets, Key Foods Co-Op, and 1239 Food Corp. is denied; and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.

4/14/2026
DATE

LYNN R. KOTLER, J.S.C.

CHECK ONE:		CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
		GRANTED	[X] DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE