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

PRESENT: Eileen Bransten PART 6

0106831/2003

NEUBERGER, ERIC
VS
BARRON, RODNEY S.

INDEX NO. 106831/03

MOTION DATE 2/1/05

MOTION SEQ. NO. 02

SEQ 2

SUMMARY JUDGMENT

MOTION CAL. NO. 07

The following papers, numbered 1 to 3 were read on this motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum

FILED
MAR 17 2005
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 3-14-05

EILEEN BRANSTEN J.S.C.
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART SIX

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ERIC NEUBERGER

Plaintiff,

-against-

Index No. 106831/03
Motion Date: 02/01/05
Motion Seq. No.: 002

RODNEY S. BARRON,
RODNEY S. BARRON, M.D.,
A MEDICAL CORPORATION d/b/a
THE BARRON CENTERS MEDICAL
ASSOCIATES,

Defendants.

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PRESENT: EILEEN BRANSTEN, J.

Pursuant to CPLR 3212, defendants Rodney S. Barron, Rodney S. Barron, M.D. ("Dr. Barron"), and The Barron Centers Medical Associates ("Center") move for summary judgment dismissal of the action commenced by plaintiff Eric Neuberger ("Mr. Neuberger"). Plaintiff opposes this motion and argues that it is untimely.

Background

In November of 2000, Mr. Neuberger began researching penile enlargement surgery on the internet and looked at the websites of at least five physicians, including Dr. Barron's. Defendants' Memorandum of Law in Support of Motion ("Law Memo."), at 3. After looking at Dr. Barron's website, he contacted the Center and spoke with Howard Josephson ("Mr. Josephson"), a member of Dr. Barron's staff with no medical training and whose

salary was commensurate with the number of patients he retained. Plaintiff's Affirmation in Opposition ("Opp."), at ¶ 7. According to Mr. Neuberger, Mr. Josephson did not advise him that impotence was a risk of penile enlargement surgery, only that there was a slight risk of temporary loss of sensation and infection. Opp., at ¶ 8.

Several weeks before the surgery, the Center sent Mr. Neuberger a Patient Handbook, which stated, "your actual gain depends on your own internal anatomy and is not something we can accurately predict *** there can be no guarantee of a perfect result." Defendants' Affirmation in Support of Motion ("Aff."), Ex. H, at 2.

On January 5, 2001, Dr. Barron performed penis enlargement surgery on Mr. Neuberger at the Center. Defendants' Affirmation in Support of Motion ("Aff."), at ¶ 6. Immediately before surgery, Mr. Neuberger signed a "Consent for Operation" and a "Consent for Penile Augmentation Surgery," which stated that he had discussed the most likely risks and complications of the surgery with the doctor. Aff., at ¶¶ 7,8; *see also*, Aff., Exs. F,G. Specifically, the "Consent for Penile Augmentation Surgery" stated, "As with any genital surgery, sexual dysfunction is possible post-operatively. Should this occur, it will most likely be temporary." Aff., Ex. G, at ¶ 6(h). It also stated, "The increase in length with erection may not be the same as the flaccid increase. The length of the erect penis immediately after the operation may be less than before. This is generally temporary ***."

Aff., Ex. G, at ¶ 6(e). Mr. Neuberger stated that he read, understood and signed both of these consent forms. Aff., Ex. D, at 70,75-76 (Deposition of Mr. Neuberger).

In July of 2001, Mr. Neuberger began experiencing a loss of sensation in his penis and an inability to maintain an erection. Opp., Ex. E, at 79. On June 1, 2002, sixteen months after the surgery, Mr. Neuberger first complained to Dr. Barron of pain and burning in his penis and a bend in his erection. Aff., at ¶ 16. He also stated that before the surgery he could engage in intercourse approximately thirty to fifty times a month and that after the surgery, he was only able to engage in intercourse once a month. Law Memo., at 6. Dr. Barron responded that Mr. Neuberger's complaint had nothing to do with the augmentation surgery, hypothesized that Mr. Neuberger had injured himself during sex, and prescribed an anti-inflammatory medication. Aff., at ¶ 16.

In January of 2003, Mr. Neuberger presented to Brett Mellinger, M.D. ("Dr. Mellinger"), a urologist, who prescribed Viagra to help Mr. Neuberger maintain an erection. Aff., at ¶ 17. Dr. Mellinger also performed a Duplex Doppler study to test Mr. Neuberger's ability to achieve and sustain an erection, the results of which were abnormal. Opp., at ¶ 9.

In this medical malpractice action, commenced on April 9, 2003, Mr. Neuberger claims that defendants negligently performed penile augmentation surgery on him and caused him to become impotent. Opp., at ¶ 8. Plaintiff states that as a result of defendants'

negligence, he has suffered mental anguish, been forced to drop out of school and experienced a deterioration of his musical ability. *Id.*

On June 30, 2004, plaintiff filed the Note of Issue. Opp., at ¶ 2. Pursuant to the Preliminary Conference Order, defendants' summary judgment motion was due within sixty days of that date, on August 30, 2004. Opp., Ex. A, at 6.

On October 27, 2004 – two months after the deadline for summary judgment passed – defendants made this motion for summary judgment. Opp., at ¶ 2. They assert that the motion should be accepted as timely because their current attorneys were not the ones who attended the preliminary conference and were not given a copy of the Preliminary Conference Order, which required that summary judgment motions be made no later than sixty days from the filing of the note of issue. Defendants' Affirmation in Reply ("Reply"), at ¶¶ 6-12.

In support of dismissal of the complaint, defendants filed this motion for summary judgment. They argue that they did not depart from accepted standards of medical care in treating Mr. Neuberger, they properly informed him of the risks of benefits of surgery, and made no misrepresentations to him. Aff., at ¶ 22.

Defendants rely on the affidavit E. Douglas Whitehead, M.D., F.A.C.S. ("Dr. Whitehead"), a physician board-certified in Urology. Affidavit of Dr. Whitehead ("Whitehead Aff."), at ¶ 3. Dr. Whitehead opines that Mr. Neuberger's urological concerns

were not caused by the surgery because they occurred seventeen months later, too far after the surgery. Whitehead Aff., at ¶ 34. He also concludes that even if a needle came in contact with the area of Mr. Neuberger's penis responsible for erections, the corpora cavernosa tissue, it would not have caused Mr. Neuberger to suffer erectile dysfunction. Whitehead Aff., at ¶ 37. Dr. Barron states, moreover, that Mr. Neuberger could have injured himself during vigorous sexual intercourse if the graft became severed from the tunica albuginea. Whitehead Aff., at ¶¶ 39,41. Finally, he states that Mr. Neuberger is psychologically unable to maintain an erection and that his erectile dysfunction was not caused by defendants' negligence. Whitehead Aff., at ¶¶ 40,43.

With respect to plaintiff's lack-of-informed-consent claim, Dr. Whitehead concludes that Mr. Neuberger knowingly consented to the surgery because he signed the consent forms after Dr. Barron and Mr. Josephson told him of the risks of surgery. Whitehead Aff., at ¶¶ 11,13,15,16. He also states that although there are no peer-reviewed studies concluding that penile augmentation surgery is safe and effective, there are no peer-reviewed studies demonstrating that it is dangerous or ineffective either. Whitehead Aff., at ¶ 32.

With regard to plaintiff's General Business Law claim, defendants submit the deposition transcript of Mr. Neuberger in which he states that he did not maintain a copy of the website, nor could he remember any specific details to distinguish the Center's website from other websites. Aff., at ¶ 5.

Mr. Neuberger opposes this motion, arguing that defendants departed from accepted standards of medical care and that the consent forms were insufficient because Dr. Barron never personally discussed the risk of impotency with him. Opp., at ¶ 8. He also states that he did not really provide informed consent because the consent forms were given to him only minutes before surgery and if he had refused to sign the forms, he would have lost $2,500 of his $3,300 deposit. Opp., at ¶ 8; *see also*, Opp., Ex. D , at 71 (Deposition of Dr. Barron).

In opposition to the motion, Mr. Neuberger submits the affirmation of a physician board-certified in Urology. Opp., Ex. F, at ¶ 1. The doctor opines, after reviewing all the records and testimony in this case, that defendants departed from accepted standards of medical care in performing penile augmentation surgery on Mr. Neuberger. Opp., Ex. F, at ¶ 5. Specifically, the doctor states that penile augmentation surgery is not accepted by urological surgeons and the American Urological Association states that the safety or efficacy of the surgery has not been demonstrated. Opp., Ex. F, at ¶ 2. Additionally, the doctor concludes that Mr. Neuberger's urological complaints arose as a result of defendants' negligence in performing the surgery. Opp., Ex. F, at ¶ 3. Further, the doctor opines, based on the date of the onset of impotence and Mr. Neuberger's intermittent ability to perform, that Dr. Barron departed from good and accepted medical practice in inserting surgical

needles into the corpora cavernosa, and that his failures proximately caused Mr. Neuberger to suffer impotency. Opp., Ex. F, at ¶ 5.

With regard to plaintiff's claim of lack of informed consent, the doctor opines that it is bad medical practice to require patients to forfeit deposits if they decide not to sign consent forms, especially when those forms are presented for the first time shortly before surgery. Opp., Ex. F, at ¶ 4. Additionally, Mr. Neuberger submits the deposition transcript of Dr. Barron, in which he stated that he never advised Mr. Neuberger that permanent sexual dysfunction could result from the surgery and told him that he would see an increase in the length of his penis in both the erect and flaccid state. Opp., Ex. D, at 82,106.

Finally, with respect to his General Business Law and fraud claims, Mr. Neuberger argues that the Center's website fraudulently led him to believe that penile augmentation surgery would increase his confidence. Opp., at ¶ 11.

Analysis

Timeliness of Motion

A party must show "good cause" before a court can entertain a late motion for summary judgment. CPLR 3212(a); *Brill v. City of New York*, 2 N.Y.3d 648, 652 (2004); *see also*, *Keeley v. Berley Realty Corp.*, 271 A.D.2d 299, 301 (1st Dep't 2000); *Rosario v. D.R. Kenyon & Son, Inc.*, 258 A.D.2d 265 (1st Dep't 1999).

Here, defendants have presented "good cause" for their failure to timely move for summary judgment. Their current attorneys were unaware of the sixty-day-from-the-note-of-issue-deadline imposed by the Court because their prior attorneys did not give them a copy of the Preliminary Conference Order.

Of course, defendants' attorneys should have secured a copy of the Preliminary Conference Order. Their neglect in doing so constitutes law office failure since the attorneys can be faulted for failing to keep track of the applicable orders and deadlines. *Cf. Nunez v. Resource Warehousing and Consolidation*, 6 A.D.3d 325, 327 (1st Dep't 2004). Law office failure, under the circumstances, satisfies the "good cause" requirement for entertaining a late summary judgment motion and has been deemed a "reasonable excuse" for purposes of vacating a party's default. *Id.* The lateness of this summary judgment motion will not in any way delay trial of the action and the law office failure is a satisfactory explanation for the movants' two-month delay. Because a trial is not imminent and there will be not be prejudice to "litigants who had already devoted substantial resources to readying themselves for trial," *Brill v. City of New York*, 2 N.Y.3d, at 433, the Court will consider the untimely motion.

Summary Judgment

Summary judgment is a "drastic remedy" that should not be granted if there is any doubt as to the existence of a triable issue. *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978); *see also Greenidge v. HRH Constr. Corp.*, 279 A.D.2d 400, 403 (1st Dep't 2001); *DuLuc v. Resnick*, 224 A.D.2d 210, 211 (1st Dep't 1996). Indeed, because summary disposition serves to deprive a party of its day in court, relief should not be granted if an issue of fact is even "arguable." *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1991).

Further, "on a defendant's motion for summary judgment, opposed by plaintiff, [the court is] required to accept the plaintiff's pleadings as true, and [its] decision 'must be made on the version of the facts most favorable to [plaintiff].'" *Byrnes v. Scott*, 175 A.D.2d 786, 786 (1st Dep't 1991).

The proponent of a summary judgment motion has the burden of making a *prima facie* showing of entitlement to judgment as a matter of law. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Once the movant has made this showing, the burden then shifts to the opponent of summary judgment to establish, through competent evidence, that there is a material issue of fact that warrants a trial. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d, at 324.

In a medical malpractice action, the opponent of summary judgment must present evidence that defendant physician departed from good and accepted medical practice, *Lyons*

v. McCauley, 252 A.D.2d 516 (2d Dep't 1998), and that defendants' wrongful conduct proximately caused plaintiff's injuries. *Hoffman v. Pelletier*, 6 A.D.3d 889 (3d Dep't 2004); *Hanley v. St. Charles Hosp. and Rehabilitation Ctr.*, 307 A.D.2d 274 (2d Dep't 2003). If the non-movant submits an admissible affidavit from a competent medical expert showing the existence of a triable issue of fact as to whether defendants were negligent, summary judgment must be denied. *See, Cooper v. St. Vincent's Hosp.*, 290 A.D.2d 358 (1st Dep't 2002); *Dellert v. Kramer*, 280 A.D.2d 438 (1st Dep't 2001); *Morrison v. Altman*, 278 A.D.2d 135 (1st Dep't 2000); *Avacato v. Mount Sinai Med. Ctr.*, 277 A.D.2d 32 (1st Dep't 2000).

Here, with regard to the claim that defendants negligently performed penile augmentation surgery on Mr. Neuberger, both parties have submitted expert medical evidence sufficient to support their respective conflicting positions. The parties' submissions make clear that there are material disputed issues, specifically, whether Dr. Barron's alleged failures proximately caused Mr. Neuberger's erectile dysfunction. To be sure, Drs. Barron and Whitehead insist that there were no departures that proximately caused Mr. Neuberger's injuries, and plaintiff's expert urges that there was. The issue of which expert is correct is for the jury to decide after a trial. *Santiago v. Brandeis*, 309 A.D.2d 621 (1st Dep't 2003). Defendants' motions do not definitively establish that there was no

malpractice. Therefore, their motion for summary judgment with respect to plaintiff's claim of medical malpractice must be denied.

Informed Consent

To establish a claim of lack of informed consent under Public Health Law § 2805-d, plaintiff must demonstrate that, "(1) the defendant physician failed to disclose the material risks, benefits, and alternatives to the contemplated medical procedure which a reasonable medical practitioner under similar circumstances would have disclosed ***, and (2) a reasonably prudent person in the patients position would not have undergone the procedure if he or she had been fully informed." *Dunlop v. Sivaraman*, 272 A.D.2d 570, 570-71 (2d Dep't 2000); *see also*, *Benfer v. Sachs*, 3 A.D.3d 781, 783 (3d Dep't 2004).

Here, defendants have made a *prima facie* showing of entitlement to judgment as a matter of law by submitting the affidavit of Dr. Whitehead, who opines that defendants properly obtained Mr. Neuberger's informed consent because Dr. Barron discussed the risks of the procedure and had Mr. Neuberger sign two consent forms. Whitehead Aff., at ¶¶ 12-16,38. In opposition, Mr. Neuberger submits the affidavit of a physician who concludes that defendants' informed consent procedures were inconsistent with good and accepted medical practice because they were conducted by an unlicensed individual, Dr. Barron only spoke

to Mr. Neuberger after he had paid his deposit, and Dr. Barron failed to advise him of the risk of impotency. Opp., Ex. F, at ¶ 4.

These submissions make clear that there are material disputed issues, specifically, whether Dr. Barron properly obtained informed consent from Mr. Neuberger prior to the surgery. In the end, defendants have not met their burden of proving that there is no issue of fact as to whether defendants failed to obtain Mr. Neuberger's informed consent. Therefore, their motion for summary judgment must be denied as to that claim.

General Business Law Violations

General Business Law § 349 prohibits "deceptive acts and practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 24 (1995). To recover, a plaintiff must demonstrate that the defendant engaged in an act or practice that was deceptive or misleading and that it caused actual harm. *Stutman v. Chemical Bank*, 95 N.Y.2d 24, 29 (2000); *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d, at 25.

General Business Law § 350 prohibits false advertising. *Andre Strishak & Associates v. Hewlett Packard Co.*, 300 A.D.2d, at 609. To recover under this statute, a plaintiff must

prove that the advertisement "(1) had an impact on consumers at large; (2) was deceptive or misleading in a material way, and (3) resulted in injury." *Id.*

Under both sections, an act is deceptive if it is "likely to mislead a reasonable consumer acting reasonably under the circumstances." *Andre Strishak & Associates v. Hewlett Packard Co.*, 300 A.D.2d 608, 609 (2d Dep't 2002). Courts have specifically held that there is no blanket exemption for medical providers from the applicability of these provisions. *See, e.g., Karlin v. IVF America, Inc.*, 93 N.Y.2d 282, 291 (1999), *rearg. denied* 93 N.Y.2d 989.

Here, plaintiff has made no claim that defendants' advertisements and representations were "likely to mislead a reasonable consumer acting reasonably under the circumstances." *Andre Strishak & Associates v. Hewlett Packard Co.*, 300 A.D.2d, at 609. Therefore, his claim must be dismissed and defendants' motion for summary judgment is granted as to plaintiff's General Business Law claims.

Fraud

"To make out a prima facie case of fraud, the complaint must contain allegations of a representation of material fact, falsity, scienter, reliance and injury." *Small v. Lorillard Tobacco Company, Inc.*, 94 N.Y.2d 43, 57 (1999). To claim medical malpractice and fraud, the plaintiff must prove that the fraud occurred "separately from and subsequent to the

malpractice" and the damages are "separate and distinct from those flowing from the malpractice." *Abbondandolo v. Hitzig*, 282 A.D.2d 224, 225 (1st Dep't 2001).

Here, defendants argue that plaintiff cannot maintain a separate cause of action for fraud because it is "part and parcel" of his medical malpractice claim. Aff., at ¶ 22(e); *see*, *Abbondandolo v. Hitzig*, 282 A.D.2d, at 225. Indeed, Mr. Neuberger is not claiming that defendants misrepresented or omitted a material fact *other* than the fact that he could suffer impotency as a result of the surgery. This allegation is already part of Mr. Neuberger's claim of lack of informed consent. Furthermore, Mr. Neuberger has not alleged any damages arising solely out the fraud that are not also the result of defendants' alleged medical malpractice. Therefore, defendants are entitled to summary judgment dismissal of the fraud claim.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is denied as to plaintiff's claims of medical malpractice and lack of informed consent; and it is further

ORDERED that defendants' motion for summary judgment is granted as to plaintiff's claims of General Business Law violations and fraud.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
March 14, 2005

ENTER

Hon. Eileen Bransten

NOTICE OF APPEARANCE

March 14, 2005

Case Name: *Neuberger v. Barron*

Index Number: 106831/03

Nature of Appearances: Settlement Conference **May 24, 2005 at 10:00 a.m.**

Date & Time: If it has not already been done, Plaintiffs are to immediately (within 10 days) make a demand for settlement purposes. Defendants are to consider the demand. Adequate time has been afforded to enable defendants to investigate settlement of the case. The parties are to appear prepared for substantive, serious settlement discussions and if the case does not settle should be prepared for a July 6, 2005 trial date. The parties and witnesses should clear their calendars for the July 6, 2005 trial. If the July 6, 2005 date does not work for anyone, an alternative July 2005 date should be discussed by counsel as soon as possible and counsel is to inform the Court of the lack of feasibility of the scheduled date and propose an alternate trial date within 14 days of this Notice.

Unless an earlier trial date is assigned, the July 6, 2005 date should be used for purposes of CPLR 3101(d) expert exchange. Pursuant to the Preliminary Conference Order Plaintiff should exchange expert information no later than 45 days before July 6, 2005 and defendants no later than 30 days before the 6th.