Farber v Reproductive Medicine Assoc. of N.Y., LLP
2013 NY Slip Op 33232(U)
December 12, 2013
Supreme Court, New York County
Docket Number: 800405/11
Judge: Joan B. Lobis
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[* 1]

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

PRESENT: LOBIS Justice PART 6

FARBER, B.F., ET AL.

-v-

REPRODUCTIVE MEDICINE ASSOCIATES OF NEW YORK, LLP, ET AL.

INDEX NO. 800405/11

MOTION DATE 10/15/13

MOTION SEQ. NO. 02

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	3-5
Replying Affidavits	6

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

DEC 18 2013

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

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

Dated: 12/12/13

ERIKA M. LOBIS J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

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B.F. and STEVEN FARBER, a married couple, individually and as parents and natural guardians on behalf of their minor child, M.F.,

Plaintiffs,

-against-

REPRODUCTIVE MEDICINE ASSOCIATES OF NEW YORK, LLP, AND ALAN COPPERMAN, M.D.,

Defendants.

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Index No. 800405/11

Decision, Order and Judgment

JOAN B. LOBIS, J.S.C.:

This case arises out of the failure of Defendants Reproductive Medicine Associates of New York, LLP, and Alan Copperman, M.D., to screen an egg donor for Fragile X syndrome before implantation of the donor's fertilized egg. Defendants move pursuant to Rule 3211 of the Civil Practice Law and Rules in motion sequence numbers 2 and 3 to dismiss the claims brought by Plaintiffs' B.F. and Steven Farber, individually, and as parents on behalf of their son, M.F. Defendants seek dismissal on the grounds that certain claims are untimely and certain claims fail to state a cause of action. For purposes of this decision, order and judgment, those motions have been consolidated. Plaintiffs cross-move for disclosure sanctions, based upon outstanding disclosure, including production of documents and depositions. As set forth below, Plaintiffs' cross-motion is granted in part and denied in part, and Defendants' motions to dismiss are granted in part, and denied in part.

M.F. and his fraternal twin brother were born on September 25, 2009, at New York Hospital, Weill Medical Center. They had been conceived through in vitro fertilization provided by

Dr. Alan Copperman at Reproductive Medicine Associates of New York, LLP. Their parents, B.F. and Steven Farber, used RMA's services to successfully fertilize eggs of an anonymous donor with the sperm of Steven Farber.

In May 2010, Mrs. Farber was contacted by Dr. Copperman. He informed her that the twins potentially had a genetic disorder known as Fragile X Syndrome. Later that month, tests confirmed that M.F. had a full-mutation of the Fragile X chromosome.

M.F. has significant disability. He suffers from frequent attacks of tension and irritation, constantly bites his hands, lacks ability to process information quickly, has very poor fine motor skills, has problems with balance and motor planning, and is experiencing delayed developmental milestones. At the time that the complaint was filed in this action, when M.F. was 23 months old, after a full year of therapies, he was nonverbal with significant sensory issues. He was receiving therapies for several hours a day, five times per week. The complaint further alleges that special services will be required for M.F.'s education. He will need multiple medications for the rest of his life, and he most likely will not be able to live independently.

The Farbers first began treating at RMA for in vitro fertilization services at the end of February 2008. They planned to use Mr. Farber's sperm and were deciding whether to use eggs harvested from Mrs. Farber or whether to use an egg donor. They repeatedly asked Dr. Copperman if there was testing of egg donors for birth defects. Mr. Farber works with special needs children and was particularly concerned about that issue. They were told tests were conducted to the extent available and that all donors were healthy. In deciding whether to proceed with in vitro fertilization

through RMA, the Farbers were provided marketing materials, including a power point presentation and a folder with handouts. In reliance on these materials, they chose to proceed with a donor egg rather than using ones from Mrs. Farber.

On October 21, 2008, the Farbers were offered an egg donor. They accepted the following week, with each implantation costing $14,000. They were repeatedly assured that the donor was healthy. They received a recipient letter, a booklet, a handout, and consent forms.

On December 13, 2008, the Farbers signed consents for the in vitro fertilization procedure and for the egg donation. The next month the donor's eggs were retrieved, fertilized and implanted into Mrs. Farber. Her pregnancy was confirmed on January 30, 2009. On March 12, 2009, the Farbers were discharged from RMA to the care of Mrs. Farber's obstetrician/gynecologist.

At the behest of her doctor, in May 2009, Mrs. Farber contacted RMA to determine if the donor had been tested for certain conditions, including Fragile X Syndrome. At the time, Mrs. Farber did not know the meaning of that term. She was told the donor had not been screened for these conditions. Following this information, Mrs. Farber's doctor ordered additional tests from the Jewish Panel on Mr. Farber. The pregnancy was without complications.

Dr. Copperman's papers indicate that in late February 2010 he was notified that the Farbers' egg donor had tested positive for the Fragile X trait. Several months later, in May, he telephoned Mrs. Farber with the news. That conversation prompted her to test M.F.

Plaintiffs filed a summons and complaint against Dr. Copperman and RMA on December 7, 2011. Among other things, the complaint attests that Fragile X Syndrome is the most common source of mental retardation in males, and a simple test for under $200 to detect the trait has been readily available since 1992. The complaint alleges twelve causes of action against the Defendants. Cause of Action No. 1, fraudulent concealment, alleges that the Defendants withheld information that the egg donor had not been screened for Fragile X Syndrome and that the donor was a Fragile X carrier. Cause of Action No. 2, medical malpractice, claims that Defendants departed from proper standards of care in withholding that information in providing in vitro fertilization treatment to the Farbers. Cause of Action No. 3, negligence, alleges that the Defendants failed to promulgate rules and procedures for testing and failed to warn the Plaintiffs that testing was not routinely conducted. Cause of Action No. 4, fraud, relates that Defendants misrepresented their testing protocols in their written materials and falsely represented facts regarding screening procedures. Cause of Action No. 5, negligent misrepresentation, refers to misrepresentations in the Defendants' brochures and other written materials as inducements to get Plaintiffs to avail themselves of Defendants' services. Cause of Action No. 6, breach of contract, alleges that the parties entered into a contract for a suitable donor in exchange for good and valuable consideration and that Defendants breached that contract. Cause of Action No. 7, breach of contract/third-party beneficiary asserts the same claims on behalf of the infant, M.F., as third-party beneficiary to that contract. Cause of Action No. 8, breach of express warranty of merchantability, alleges that the Defendants breached their warranty of merchantability regarding both the donor's egg and the embryo created from that egg. Cause of Action No. 9, breach of implied warranty of merchantability, raises similar issues regarding implied warranties for sale and use of the donor egg. Cause of Action No. 10, breaches of express and implied warranties/third-party beneficiary, asserts

these claims relating to the donor egg and embryo on behalf of the infant, M.F., as third-party beneficiary to those warranties. Cause of Action No. 11, failure to warn under products liability theory, alleges that despite Defendants' representation that the donor egg was safe and free from any genetic defects, the egg was a defective and unreasonably dangerous product sold in the stream of commerce to Plaintiffs, as foreseeable users. Lastly Cause of Action No. 12, negligent infliction of emotional distress, claims that Plaintiffs sustained severe emotional distress through Defendants' negligence and through M.F.'s Fragile X Syndrome. As relief, Plaintiffs are requesting, in pertinent part, punitive damages.

Following the filing of Plaintiffs' complaint, in January 2013, RMA and Copperman joined issue. In their answers they preserved the affirmative defense of statute of limitations and also raised the issue of failure to state a claim. On November 27, 2012, I ordered Dr. Copperman to appear for his deposition on or before January 23, 2013, and RMA's witness to be deposed by February 22, 2013. When that did not occur, on February 26, 2013, I ordered Dr. Copperman to be deposed on or before April 5, 2013, and RMA's deposition to be conducted by June 1, 2013. And on April 16, 2013, when depositions for Dr. Copperman and RMA had still not been conducted, I ordered Dr. Copperman's deposition be conducted on or before May 15, 2013, and RMA witnesses' deposition to be conducted by July 15, 2013. In my order of April 16, I further ordered Defendants to respond to outstanding document requests. The day before the adjourned deadline for Dr. Copperman's deposition was to expire, Defendants brought these motions to dismiss and admonished Plaintiffs that disclosure is stayed under Rule 3214 of the Civil Practice Law and Rules. Notwithstanding incomplete disclosure in this case, Defendants have selectively attached extrinsic evidence to their motions for an accelerated judgment, including their depositions of Plaintiffs,

which were conducted in October 2012 and January 2013.[1]

The law favors disposition of controversies on the merits. E.g., Pagan v. Estate of Anglero, 22 A.D.3d 285, 286 (1st Dep't 2005). In reviewing motions to dismiss, it is axiomatic that this Court reviews the record in the light most favorable to the non-moving party and accords that party the benefit of every possible favorable inference. E.g., Leon v. Martinez, 84 NY.2d 83, 88 (1994); see also AG Capital Funding Partners, L.P. v. State Street Bank and Tr., 5 N.Y.3d 582, 590-91 (2005) (moving party must show documentary evidence conclusively refutes plaintiff's allegations); id. at 476 (any deficiencies in complaint may be amplified by supplemental pleadings and other evidence).

Defendants raise two grounds in moving to dismiss Plaintiffs' causes of action: certain claims are untimely under Rule 3211(a)(5) of the Civil Practice Law and Rules, and certain claims fail to state a cause of action under Subsection (a)(7) of that Rule. Specifically, Defendants claim that the statute of limitations has expired on Causes of Action Nos.s 2, 3, 6, and 7, respectively, Plaintiffs' medical malpractice, negligence, breach of contract, and breach of contract/third-party beneficiary claims. Defendants further claim that all the causes of action fail to state a cause of action other than Cause of Action No. 2, medical malpractice, and that punitive damages are not appropriate in this action.

Plaintiffs oppose the Defendants' motions to dismiss. In opposing those motions,

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[1]RMA erroneously identifies Mrs. Farber's deposition as that of "MF."

Plaintiffs contend that the Defendants' statute of limitations claims are unfounded. They point out that controlling case law provides that M.F.'s date of birth triggers the statute of limitations in this action, which was within two and one-half years of filing of the claim for medical malpractice, and the other challenged claims all have longer statutes of limitation. Plaintiffs further contend that their claims beyond medical malpractice state independent causes of action. Moreover, Plaintiffs argue that any accelerated judgment on these causes of action would be premature since Defendants have yet to be deposed and owe additional disclosure documents, including marketing materials. In cross-moving for disclosure violations, Plaintiffs ask this Court to strike Defendants' answers or alternatively compel the Defendants to produce the missing documentation and appear for depositions.

In opposing Plaintiffs' cross-motion for disclosure sanctions, Defendants produce certain materials and claim that this limited production resolves Plaintiffs' cross-motion. Defendant Copperman further claims that marketing materials are "irrelevant," because Mrs. Farber initiated contact with RMA based on a friend's recommendation. Defendant Copperman attaches an affidavit to bolster his contentions and uses deposition testimony of the Plaintiffs to argue that no standard of care has been breached.

This Court first considers Defendants' claim that several of Plaintiffs' causes of action are untimely. See CP.L.R. Rule 3211(a)(5). As a rule, medical malpractice actions must be brought within two and one half years of the act, omission or failure of which the plaintiff is complaining. C.P.L.R. § 214-a. Exceptions apply, however. For example, where there is continuous treatment for the same condition that gave rise to the complaint, the action may be

brought within two years and six months of the last treatment. Id. In actions like this one, arising out of injury to an infant, appellate authority provides that the infant's and parents' cause of actions accrue upon the birth of the infant. LaBello v. Albany Med. Ctr. Hosp., 85 N.Y.2d 701, 707-08 (1995); Ciceron v. Jamaica Hosp., 264 A.D.2d 497, 498 (2d Dep't 1999).[2] In this case, M.F. was born on September 25, 2009, and the summons and complaint was filed on December 7, 2011. See C.P.L.R. § 304(a), (c). It is uncontroverted that the shortest statute of limitations at issue in this case is the two-and-one-half- year statute of limitations. See C.P.L.R. § 214(5) (three-year statute of limitations for negligence claims). Accordingly, Plaintiffs' claims are timely.

This Court next considers those branches of the Defendants' motions to dismiss various causes of action of Plaintiffs' complaint for failure to state a cause of action. See C.P.L.R. Rule 3211(a)(7). As an initial matter, I note that Plaintiffs have cross-moved for sanctions or to compel Defendants to comply with outstanding disclosure orders seeking, among other things, marketing materials, and depositions of Defendants. See C.P.L.R. §§ 3126(3), 3124, 3211(d).

Rule 3101 of the Civil Practice Law and Rules mandates, in pertinent part, that there shall be "full disclosure of all matter material and necessary in the prosecution" of an action. In this case, Defendants' motion for accelerated judgment has been submitted before any of Defendants' depositions have been able to have been conducted and while the Defendants have allegedly refused

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[2]In opposing Defendants' motions to dismiss, Plaintiffs deny Defendants' claim that M.F. is suing for wrongful life. This Court also notes that Defendants have failed to cite to any specific language in the complaint to support their contention. Moreover, the law barring that theory of recovery is well-established. E.g., Alquijay v. St. Luke's-Roosevelt Hosp. Ctr., 63 N.Y.2d 978, 979 (1984).

to comply with numerous disclosure orders. Rule 3211(d) makes plain that where facts are unavailable to a party opposing a motion for accelerated judgment this Court may deny that motion to permit disclosure to be had.

In this case, there is no doubt that given the allegations in Causes of Action Nos. 1, 3, and 4-6, for fraudulent concealment, negligence, fraud, negligent misrepresentation, and breach of contract, respectively, the Defendants must be deposed to ascertain what they knew, said, and did as well as when in the course of these events. Indeed RMA's response suggests that in determining Plaintiffs' cross motion that its outstanding depositions be allowed to be conducted within 45 days of notice of entry of this Court's order. Notably, Defendants do not challenge whether Plaintiffs' claims are well-pleaded, rather, Defendants attach selective portions of the record and contend that these items of extrinsic evidence warrant dismissal. Moreover, the marketing materials and other documents provided to Plaintiffs are plainly discoverable for the Plaintiffs' reliance arguments, regardless of whether Plaintiffs initially contacted RMA based on a friend's recommendation and not based on any brochure. By example, Copperman concedes that he knew the donor was a carrier of the Fragile X trait as of February 2010, months before he notified Mrs. Farber of that information. It would be an abuse of discretion for this Court to dismiss the action at this stage of the litigation based on the Defendants' one-sided recounting of the events that transpired in this case. E.g., Marcus v. Hemphill Harris Travel Corp., 193 A.D.2d 543, 544 (1st Dep't 1993) (claims sufficiently pleaded on their facts should not have been dismissed particularly where plaintiffs had not been accorded opportunity to complete discovery relating to critical facts in exclusive possession of defendants); see also Anonymous v. High Sch. for Envtl. Studies, 32 A.D.3d 353, 358 (1st Dep't 2006) (finding defendants abused Article 31 of the Civil Practice Law and Rules and requiring full

disclosure of any facts bearing on controversy that will help in trial preparation regardless of burden of proof).[3] Thus, Defendants' challenges for failure to state a cause of action regarding Cause of Action No. 1, fraudulent concealment, Cause of Action No. 3, negligence, Cause of Action No. 4, fraud, Cause of Action No. 5, negligent misrepresentation, and Cause of Action No. 6, breach of contract, are denied as premature.

In denying the Defendants' motions to dismiss on Causes of Action Nos. 1 and 3-6, this Court concomitantly grants in part Plaintiffs' motion to compel disclosure of the discovery sought in this Court's numerous orders. In addition to this Court's determination to compel the materials discussed above, the following items need clarification by Defendants. First, while this Court agrees that Defendants need not produce documentation of policies and procedures for testing that were implemented after the events in this case, see, for example, Brooks v. Southhampton Hospital, 200 A.,D.2d 530, 530-31 (1st Dep't 1994), Defendants should have produced those in place prior to or at the time of the events in this case, and must do so within 45 days of service of this order with notice of entry. Next RMA has yet to respond to items 2 or 3 of Plaintiffs' demand dated May 14, 2012, pertaining to payments and written materials provided to the Farbers' egg donor. In producing documentation regarding the donor's status as a Fragile X carrier, RMA improperly redacted the date information. That error must be rectified within 14 days of notice of entry of this order, and within that same deadline RMA must clarify whether any additional documentation relating to the donor's status as a carrier exists, and if so, produce that. Based on discrepancies in Plaintiffs' files relating to correspondence with Defendants and those items of

[3]Defendants have not sought any affirmative relief such as a protective order preventing disclosure sought by Plaintiffs. See, e.g., C.P.L.R. § 3103.

correspondence produced purporting to reflect the universe of relevant correspondence, Plaintiffs have established a basis to depose an RMA witness regarding electronic storage, which deposition shall be conducted within 45 days of service of notice of entry of this order. Lastly, those items sought in paragraph 43 of Plaintiffs' reply to RMA's opposition to Plaintiffs' cross-motion should be produced and any purportedly privileged items withheld should be listed in a privilege log that is produced to Plaintiffs within 60 days of service with notice of entry of this order. Upon completion of these disclosure steps, the parties shall stipulate that these steps have been taken, and the remaining Defendant depositions shall be conducted within 60 days from the date of the stipulation.

This Court next takes up Plaintiffs' remaining claims, Causes of Action Nos. 7-12, and finds that Defendants' motions to dismiss those causes of action for failure to state a claim are warranted. I address these in turn. As an initial matter, this Court notes that Plaintiffs have not opposed dismissing Cause of Action No. 7, breach of contract/third-party beneficiary, or Cause of Action No. 12, negligent infliction of emotional distress. Those causes of action for which opposition does lie, Causes of Action Nos. 8-11, all rely on the premise that the human tissue in this case, the donated egg, is a good. Plaintiffs fail to cite any New York authority supporting that contention, however. At most, New York law does not prohibit that tissue's donation and authorizes reimbursement for expenses incurred in that donation process. E.g., Pub. Health Law § 4307.

Lastly, this Court considers Defendants' argument that Plaintiffs' claim for punitive damages should be dismissed. Punitive damages are not an independent claim. As a form of relief,

they flow from action that is wilful, wanton or reckless. E.g., Home Ins. Co. v. Am. Home Prods. Corp.,75 N.Y.2d 196, 204 (1990). In this case Plaintiffs allege causes of action that may warrant punitive damages, including, for example, Cause of Action No. 1, fraudulent concealment, and Cause of Action No. 4, fraud. Defendants' challenges to those causes of action as failing to state causes of action have been denied as premature. Any striking of that form of relief from the complaint, therefore, is similarly premature. Accordingly, it is

ORDERED that Plaintiffs' cross-motion for disclosure sanctions is granted in part as described above; it is further

ADJUDGED that Defendants' motions to dismiss are granted in part to the extent that Causes of Action Nos. 7-12 of Plaintiffs' complaint are dismissed; it is further

ORDERED that Defendants' motions to dismiss are denied on all other remaining causes of action; it is further

ORDERED that Defendants' motion to strike punitive damages is denied; and it is further

ORDERED that the parties shall appear for a status conference on Tuesday, February 25, 2014, at 9:30 am.

Dated: December 12, 2013

ENTER:

JOAN B. LOBIS, J.S.C.