Schecter v Bosley Med. Group, P.C.
2013 NY Slip Op 32146(U)
September 4, 2013
Supreme Court, New York County
Docket Number: 150200/09
Judge: Joan Lobis
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Lobis Justice PART 6

Schecter, Evan

- v -

Bosley Medical

INDEX NO. 150200/09

MOTION DATE 6/25/13

MOTION SEQ. NO. 08

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	E-file: 117-132
Answering Affidavits — Exhibits	172-203
Replying Affidavits	207

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION and Order

Dated: 9/4/13

JOAN B. LOBIS J.S.C.

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

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

----------X

EVAN SCHECTER,

Plaintiff,

Index No. 150200/09

-against-

Decision and Order

THE BOSLEY MEDICAL GROUP, P.C.,
THE BOSLEY MEDICAL GROUP, P.C., d/b/a
BOSLEY MEDICAL NEW YORK,
BOSLEY MEDICAL NEW YORK, and
DAVID ALPETER, JR.,

Defendants.

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

Motion sequence numbers 007 and 008 are consolidated for disposition. Defendants The Bosley Medical Group, P.C., (sequence number 007) and David Alpeter, Jr., M.D. (sequence number 008) move pursuant to Rule 3212 of the Civil Practice Law and Rules for summary judgment. Plaintiff Evan Schecter opposes the motions. For the following reasons, the motions are granted in part and denied in part.

This medical malpractice action involves Evan Schecter's hair transplant procedure by Dr. David Alpeter, Jr., on January 25, 2008, at Bosley Medical Group (BMG). Mr. Schecter began losing his hair in his mid-thirties, approximately ten years prior to his first hair transplant procedure. He had a receding hairline and was balding at the crown of his head. Mr. Schecter first learned about BMG, a national provider of hair restoration services, through their television infomercials. In addition, Mr. Schecter watched an informational DVD and read a brochure provided by BMG.

On November 30, 2006, Mr. Schecter presented to a BMG office in Melville, New York for a consultation, and he was referred to Dr. Alpeter at BMG's New York City office. Dr. Alpeter took the patient's medical history, conducted a physical examination, and diagnosed Mr. Schecter's hair loss pattern as Androgenic Alopecia (AGA) Category 6 on the Hamilton Norwood classification scale. On December 8, 2006, the patient underwent his first hair transplant procedure by Dr. Alpeter. Dr. Alpeter placed 2,800 hair grafts into Mr. Schecter's hairline and crown. The procedure concluded without complication, and the surgery resulted in minimal scarring.

On November 28, 2007, Mr. Schecter scheduled a second hair transplant procedure to be performed on January 25, 2008. Dr. Alpeter explained that it is common for a patient to require a second hair transplant procedure to increase hair density, and Mr. Schecter testified that he was aware that he would likely require a second procedure to achieve his desired density. On January 24, 2008, Mr. Schecter came in for an examination. Dr. Alpeter testified that he conducted a physical examination of plaintiff's scalp and hair, and he observed that the donor scar from the prior procedure measured approximately 1-2 millimeters (mm) in width, although the medical chart does not reflect this information. Dr. Alpeter also testified that Mr. Schecter had adequate scalp laxity and hair density to withstand a second hair transplant procedure, and he planned to place 3,000 additional grafts into Mr. Schecter's hairline and crown.

On January 25, 2008, Mr. Schecter came in for the procedure. His hairline and crown were photographed, and Dr. Alpeter marked the areas for anesthesia and hair graft placement. The

plaintiff was sedated, and his scalp was anesthetized. Using a double blade at an angle, Dr. Alpeter excised a narrow donor strip measuring 32 centimeters (cm) in length and 1 cm in width. He further testified that he closed the donor incision using a running suture.

Later in the day, Dr. Alpeter informed Mr. Schecter that the donor strip only yielded 2,500 follicles for grafting, which were fewer than the planned goal of 3,000 grafts that Dr. Alpeter considered to be optimal. Harvesting more grafts required an additional incision. According to Dr. Alpeter, he excised an additional piece of tissue measuring 4 cm in length by 2 mm in width, from the center of the original donor strip. Dr. Alpeter then made the recipient sites with a drill and placed the hair grafts into those sites. He ultimately placed 2,860 grafts into Mr. Schecter's hairline and crown. The patient was discharged after receiving post-operative instructions.

That night, Mr. Schecter spoke with Dr. Alpeter and complained of excessive bleeding and pain. Dr. Alpeter instructed Mr. Schecter to apply pressure, which slowed the bleeding. The bleeding continued to the following day, however, and Mr. Schecter returned to BMG to see Dr. Alpeter. Dr. Alpeter confirmed that the bleeding came from the donor site. He examined plaintiff's head, but Dr. Alpeter found no signs of infection. Dr. Alpeter instructed Mr. Schecter to cleanse the wound with hydrogen peroxide and to continue to apply pressure. The bleeding continued for an additional week. Mr. Schecter returned for another visit on February 12, 2008, and Dr. Alpeter noted that the donor site showed signs of improvement. On March 11, 2008, the patient complained of a wide scar and hair and skin loss in the area of the donor site. Dr. Alpeter determined that the patient was experiencing shock loss in the donor area. Dr. Alpeter noted that Mr. Schecter felt depressed

about his hair and instructed plaintiff to return in April. Mr. Schecter, however, did not return to BMG, and his hair did not stop falling out until two months after the surgery.

Plaintiff commenced this action on December 18, 2009, alleging that Dr. Alpeter negligently performed the hair transplant procedure on January 25, 2008, and failed to obtain plaintiff's informed consent. Plaintiff alleges that BMG is vicariously liable for Dr. Alpeter's action, and, as a result of the alleged malpractice, plaintiff developed a permanent scar.

Defendants move for summary judgment to dismiss all causes of action, which are considered in turn. BMG and Dr. Alpeter first seek to dismiss plaintiff's medical malpractice cause of action. In support of his motion, Dr. Alpeter submits his own affidavit. He indicates that he obtained his medical degree from Wake Forest University in 1986 and has been a board certified General Surgeon since 1992. As a general surgeon, he is trained and experienced in preoperative evaluations, surgical techniques, surgical risks and complications, and postoperative management. In 2004, Dr. Alpeter became interested in hair transplant procedures, and from July 2004 to October 2004, he completed BMG's training for hair transplant procedures. Dr. Alpeter states that he was trained in the preoperative, perioperative, and postoperative aspects of a hair transplant procedure through didactic instruction, direct observation of hair transplant procedures, and actual performance of the procedures.

Dr. Alpeter opines that he complied with the applicable standards of medical practice in the planning and performance of plaintiff's hair transplant surgery on January 25, 2008. He states

that the plaintiff did not have any medical history that contraindicated him for hair transplant procedure or that placed him at an increased risk for scarring. He maintains that plaintiff's scar is an acceptable and expected consequence of the surgery. Dr. Alpeter asserts that he used proper technique by excising the donor strip at an angle to avoid transection of the hair follicles and by making a narrow strip to avoid undue tension. He states that he exercised good judgment in excising a small piece of tissue from the center of the original donor piece after he had determined that the number of hair grafts fell short of 3,000, and that he conducted the second procedure and closed the area without undue tension. He further opines that the plaintiff's widened scar developed despite Dr. Alpeter's proper planning and use of surgical techniques. He posits that this injury may occur as a result of the patient's own poor healing response or genetic disposition to scarring.

BMG submits the expert affirmation of Michael L. Reed, M.D., a physician licensed in New York and board certified in Dermatology. Dr. Reed opines with a degree of medical certainty that the treatment rendered to Mr. Schecter on January 24 through March 11, 2008, was within the acceptable standard of care. Dr. Reed states that Dr. Alpeter properly determined that Mr. Schecter was a candidate for a second hair transplant and carefully performed the surgery. He notes that Dr. Alpeter used his clinical judgment to determine which course of action to take. The expert states that the plaintiff's post-operative instructions and care were proper.

In opposition, the plaintiff argues that summary judgment should be denied due to outstanding issues of facts. Plaintiff submits the expert affidavit of a physician, who is licensed to practice in New York and board certified in General Surgery and Plastic Surgery. After reviewing

the documents in the case, the expert opines in relevant part that Dr. Alpeter removed excessive skin in the donor area, which caused necrosis to the skin and a widened scar due to the reduced blood flow and oxygen to the area. Plaintiff's expert explains that necrosis is not an ordinary risk of a hair transplant procedure and results from excessive pulling of the scalp. The expert opines that the standard of care before harvesting a donor strip is to examine the scalp for hair density and laxity to ensure that the donor area is capable of donating that hair and can be closed without excessive tension. Plaintiff's expert notes that the medical chart lacks any documentation of the examination of the patient's hair density and scalp laxity. The expert further states that the medical chart does not indicate how Dr. Alpeter closed the incision after the second procedure.

In reply, the defendants argue that the plaintiff's expert affirmation is speculative. BMG submits a supplemental expert affirmation from Dr. Reed, who opines in relevant part that no standardized test or examination exist to determine and document how much scalp laxity a patient's head exhibits.

In considering a motion for summary judgment, this Court reviews the record in the light most favorable to the non-moving party. E.g., Dallas-Stephenson v. Waisman, 39 A.D.3d 303, 308 (1st Dep't 2007). A movant must support the motion by affidavit, a copy of the pleadings, and other available proof, including depositions and admissions. C.P.L.R. Rule 3212(b). The affidavit must recite all material facts and show, where a defendant is the movant, that the cause of action has no merit. Id. This Court may grant the motion if, upon all the papers and proof submitted, it is established that the Court is warranted as a matter of law in directing judgment. Id. It must be

denied where facts are shown "sufficient to require a trial of any issue of fact." Id.

In a medical malpractice case, to establish entitlement to summary judgment, a physician must demonstrate that he did not depart from accepted standards of practice or that, even if he did, he did not proximately cause injury to the patient. Roques v. Noble, 73 A.D.3d 204, 206 (1st Dep't 2010). In claiming treatment did not depart from accepted standards, the movant must provide an expert opinion that is detailed, specific and factual in nature. E.g., Joyner-Pack v. Sykes, 54 A.D.3d 727, 729 (2d Dep't 2008). Expert opinion must be based on the facts in the record or those personally known to the expert. Roques, 73 A.D.3d at 206. The expert cannot make conclusions by assuming material facts not supported by record evidence. Id. Defense expert opinion should specify "in what way" a patient's treatment was proper and "elucidate the standard of care." Ocasio-Gary v. Lawrence Hosp., 69 A.D.3d 403, 404 (1st Dep't 2010). A defendant's expert opinion must "explain 'what defendant did and why.'" Id. (quoting Wasserman v. Carella, 307 A.D.2d 225, 226 (1st Dep't 2003)). Conclusory medical affirmations or expert opinions that fail to address a plaintiff's essential factual allegations are insufficient to establish prima facie entitlement to summary judgment. 73 A.D.3d at 206. Once a defendant establishes a prima facie case, a plaintiff must then rebut that showing by submitting an affidavit from a medical doctor attesting that the defendant departed from accepted medical practice and that the departure proximately caused the alleged injuries. Id. at 207.

Dr. Alpeter met his prima facie burden by opining that, after determining that Mr. Schecter had adequate scalp laxity and hair density, he appropriately excised the donor strip and

closed the donor area. Plaintiff, however, rebuts this showing by presenting issues of fact regarding whether plaintiff's scalp was adequately screened for laxity to prevent excessive tension during closure. The lack of documentation of what Dr. Alpeter regarded as adequate laxity further complicates the defendants' position. Plaintiff's expert disputes that the plaintiff suffered from shock loss, which is temporary in nature, and opines that the plaintiff suffered from necrosis, which is a permanent injury. Plaintiff's expert especially disputes the necessity and appropriateness of Dr. Alpeter's performance of the second excision on January 25 to obtain additional hair grafts, since it posed an increased risk of scarring. Due to conflicting expert statements, summary judgment on the medical malpractice cause of action must be denied.

Defendants also seek to dismiss the plaintiff's cause of action for lack of informed consent. Defendants argue that the plaintiff understood the risks of the hair transplant procedure on January 25, 2008, having undergone a previous procedure two years earlier. Defendants further state that Mr. Schecter executed an informed consent form, which specifically warned of hair loss and detectable scarring.

In opposition, however, the plaintiff argues that the informed consent form was inadequate, since it only warned about temporary hair loss and scarring and did not warn about necrosis. Plaintiff's expert further states that the second procedure on January 25, 2008, required a second consent form, including an explanation of the increased risks of performing that surgery, such as greater hair loss and scarring. The expert adds that Dr. Alpeter did not discuss the alternatives available to Mr. Schecter after the first donor strip returned short of 3,000 grafts, which

included postponement of the procedure. The expert further adds that Mr. Schecter was incapacitated by the sedatives administered for the procedures and was incapable of giving informed consent.

In reply, defendants dispute that the second excision on January 25, 2008, required a distinct informed consent form. Defendants regard the subsequent procedure to be an "intraoperative modification of the second procedure," for which informed consent was already procured.

A defendant moving for summary judgment on a lack of informed consent claim must demonstrate that the plaintiff was informed of the alternatives to and the reasonably foreseeable risks and benefits of the treatment, and "that a reasonably prudent patient would not have declined to undergo the [treatment] if he or she had been informed of the potential complications[.]" Koi Hou Chan, 66 A.D.3d 642, 643 (2d Dep't 2009); see also Public Health Law § 2805-d(1). Here, the failure to warn of necrosis does not render the informed consent form executed by Mr. Schecter ineffectual. Plaintiff's expert does not dispute that necrosis is an unexpected consequence of hair transplantation and is an unforeseeable risk of the procedure. Nor does plaintiff dispute the authenticity of "Information and Consent to Operate for Hair Transplantation" form, which bears plaintiff's signature and which warned of the risk of detectable scarring. Plaintiff's expert, however, creates issues of fact regarding whether the informed consent given was adequate in describing the risks of scarring or whether a separate informed consent was required for the second excision on January 25, 2008, in light of the alternatives to undergoing the second excision, the increased risk

it posed, and plaintiff's sedated mental state. Summary judgment on the lack of informed consent cause of action must be denied.

BMG further seeks to dismiss the plaintiff's vicarious liability claim on the grounds that Dr. Alpeter was an independent contractor, citing to the Independent Contractor agreement between Dr. Alpeter and BMG. In opposition, the plaintiff maintains that there are issues of fact as to whether BMG actually employed Dr. Alpeter, thereby warranting the denial of summary judgment on this claim. Plaintiff argues that BMG controlled Dr. Alpeter and held Dr. Alpeter out as its agent. Plaintiff points to BMG's three-month training, during which Dr. Alpeter was supervised by BMG's Assistant Medical Director. Plaintiff states that BMG controls the states in which Dr. Alpeter is licensed and his choice of insurance and type of coverage. Plaintiff argues that Dr. Alpeter has little control over his schedule and which patients he treats, and that BMG sets the price of the transplant procedure and maintains the patients' files at its California office. Plaintiff also argues that BMG continuously referred to its doctors as "Bosley physicians" in its written and video materials, in which Dr. Alpeter appears, and refers to the hair transplant process as the "Bosley experience." Plaintiff further adds that Dr. Alpeter's business card contains BMG's name, website, and credentials. Plaintiff explains that he sought treatment from BMG, and not Dr. Alpeter individually, and remitted payment only to BMG.

In reply, BMG argues in relevant part that it exercises no control over Dr. Alpeter, because Dr. Alpeter makes all treatment decisions independently, without supervision from BMG, has discretion over which instruments he will use, and gives the postoperative instructions that he

deems appropriate. BMG explains that Dr. Alpeter rents office space from BMG, receives a 1099 tax form instead of a W2, and can elect which five-day period he desires to work, either Tuesday through Saturday or Monday through Friday. BMG further adds that Dr. Alpeter maintains his own professional corporation.

An entity that retains an independent contractor is usually not liable for the contractor's acts and omissions, since that entity "has no right to control the manner in which the work is to be done." Kleeman v. Rheingold, 81 N.Y.2d 270, 273–74 (1993). In general, whether an employment relationship exists is based on whether the retaining party exercises control over the means utilized to produce the results or over those results. Chuchuca v. Chuchuca, 67 A.D.3d 948, 950 (2d Dep't 2009). A contract's recitation that one is an independent contractor "is not dispositive." Araneo v. Town Bd. for Town of Clarkstown, 55 A.D.3d 516, 518–19 (2d Dep't 2008). Whether one is an employee or an independent contractor is usually an issue for the trier of fact. Carrion v. Orbit Messenger, 82 N.Y.2d 742, 744 (1992). In making this distinction, all the details of the parties' arrangement must be examined. Araneo, 55 A.D.3d at 518. Some of the factors relevant in determining control are whether the contractor could engage in other work, paid his or her own taxes, was on a fixed schedule, could set his or her own hours, was given fringe benefits, furnished the materials needed for their work, paid his or her own expenses, was free to compete with the retaining entity, and was on the retaining entity's payroll. See, e.g., O'Brien v. Spitzer, 7 N.Y.3d 239, 243 (2006); Barak v. Chen, 87 A.D.3d 955 (2d Dep't 2011).

Here, although the contract between BMG and Dr. Alpeter labels Dr. Alpeter as an

independent contractor, there remain issues of fact regarding the true nature of the employment relationship between the parties. Numerous factors suggest that BMG exercises control over Dr. Alpeter. Under the Independent Contractor Agreement, BMG reserves the right to use and display Dr. Alpeter's name, image, qualifications, and biography in its marketing materials. BMG can further redesignate Dr. Alpeter's primary office as it deems fit. BMG requires Dr. Alpeter to be licensed in all the states in which it operates and reimburses Dr. Alpeter for the licensing fees incurred. BMG adjusts Dr. Alpeter's patients' charges at its sole discretion. BMG prohibits Dr. Alpeter from rendering any hair restoration services to non-BMG patients. BMG further requires Dr. Alpeter to submit to a complete and thorough physical examination at BMG's expense. In addition, BMG required Dr. Alpeter to complete a mandatory three-month training, during which he was supervised and observed, and after which he was recommended to provide services for BMG. In light of these issues of fact, BMG's application to dismiss the claims of its vicarious liability for Dr. Alpeter's actions is denied.

Any liability for negligence by BMG will be determined by a jury considering whether BMG is vicariously responsible for any negligence of Dr. Alpeter in performing the procedures on January 25, 2008 and obtaining informed consent. Plaintiff has not set forth any independent negligent acts by BMG's staff, and, accordingly, any such claims are dismissed. Any negligent training claim is not supported by any non-conclusory statements of what training BMG should have given to its staff and how such negligent training proximately caused plaintiff's injury. See Dobroshi v. Bank of Am., N.A., 65 A.D.3d 882 (1st Dep't 2009). No where does plaintiff's expert opine about why a board certified surgeon would require additional training to perform

BMG's method for hair transplantation.

Defendants further seek summary judgment on the claims that the defendants' advertising contains false and deceptive claims prohibited by Section 350 of the New York General Business Law and Section 6530(27)(a)(i-iii) of the New York Education Law. Defendants argue that these claims cannot be considered by the Court because they have not been raised in plaintiff's complaint; rather, they have been asserted in the Supplemental Bill of Particulars and in plaintiff's expert disclosure. Defendants argue that these claims must be specifically plead. See Jurado v. Kalache, 93 A.D.3d 759 (2d Dep't 2012). Notwithstanding that argument, the defendants argue that even if the Court considers these claims to be properly interposed without the need for an amended complaint, plaintiff fails to raise any triable issues for a jury. The conduct complained of fails to rise to the level of deceptive practices that are actionable. Plaintiff argues that the Court has the authority to consider statutory violations even if not specifically plead and that the instances enumerated in their papers raise factual issues that are separate from the claim of malpractice and negligence.

While the complaint has not been amended to include the cause of action for violations of the General Business Law, the merits of the claim will be considered. The plaintiff has failed to set out sufficient facts that support that Bosley's advertising was deceptive in a material way resulting in injury to Mr. Schecter. Scott v. Bell, 282 A.D.2d 180 (1st Dep't 2001). It is not disputed that BMG advertised in New York, that some of doctors in the advertisements were osteopathic physicians,[1] and that the reference to specialty training may have misled the public as to the

[1] In New York, osteopathic physicians are licensed to practice medicine as physicians.

physicians' credentials. But, the plaintiff does not explain how any of these representations were material in his choice to use BMG. Lee Bosley's lack of a current license to practice medicine in New York may mean he has violated Section 350-b of the General Business Law if he is not licensed to practice medicine in another jurisdiction. There is no indication, however, that there was any reliance by Mr. Schecter on whether Lee Bosley was licensed to practice medicine in New York in choosing a BMG office. Dr. Alpeter previously performed a hair follicle transplant on plaintiff in 2006. Plaintiff returned to Dr. Alpeter for another procedure in January 2008. Plaintiff has failed to identify any deceptive practices or advertisements by either defendant, which would give rise to a claim for damages to Mr. Schecter.

Section 6530 of the Education Law, which plaintiff cites, defines professional misconduct. As such it lays out conduct that may lead to disciplinary charges for physicians. One of the activities listed as professional misconduct is advertising or soliciting for patronage that is not in the public interest. Education Law § 6530(27). The Office of Professional Medical Conduct (OPMC) as established under the Public Health Law is responsible for the investigation and discipline of complaints against physicians for professional misconduct. The proper forum for charging violations of professional conduct is with the OPMC. It is not the basis for an independent cause of action against either defendant in this medical malpractice lawsuit.

Accordingly, it is

ORDERED that the portion of defendants' motions seeking to dismiss plaintiff's

claims sounding in negligent training and false advertising is granted; it is further

ORDERED that the remainder of the motions is denied; and it is further

ORDERED that the parties shall appear for a pre-trial conference on Tuesday, October 8, 2013, at 10:00 a.m.

Dated: Sept. 4, 2013

ENTER:

JOAN B. LOBIS, J.S.C.