

**Dietl v Oz**

2013 NY Slip Op 32402(U)

October 3, 2013

Sup Ct, New York County

Docket Number: 152423/13

Judge: Saliann Scarpulla

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Saliann Scarpulla
Justice

PART 19

Frank Dietl

INDEX NO. 152423/13

Dr. Mehmet Oz, M.D., Zoco
Producers, L.L.C., et al.

MOTION DATE 6/19/13

MOTION SEQ. NO. 004

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

Notice of Motion/Order to Show Cause - Affidavits - Exhibits No(s).

Answering Affidavits - Exhibits No(s).

Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is determined in
accordance with the accompanying decision/order.
This constitutes the decision and order of the Court.

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

Dated: 10/3/13

Saliann Scarpulla J.S.C.
SALIANN SCARPULLA

- 1. CHECK ONE: CASE DISPOSED
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X

FRANK DIETL,

Plaintiff,

Index No.: 152423/13  
Submission Date: 6/19/13

-against-

DR. MEHMET OZ, M.D., ZOCO PRODUCTIONS, L.L.C,  
NBC STUDIOS, L.L.C., SONY PICTURES TELEVISION  
INC., HARPO PRODUCTIONS, INC., THE DR. OZ  
SHOW,

**DECISION AND ORDER**

Defendants.

-----X

For Plaintiff:  
Aidala & Bertuna, P.C.  
546 Fifth Avenue, 6<sup>th</sup> Floor  
New York, NY 10036

For Defendants:  
Berke-Weiss & Pechman LLP  
488 Madison Avenue, 11<sup>th</sup> Floor  
New York, NY 10022

Papers considered in review of the motion to dismiss:

- Notice of Motion . . . . . 1
- Aff in Opposition . . . . . 2
- Aff in Reply . . . . . 3

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, defendants Dr. Mehmet Oz., M.D. (“Dr. Oz”), Zoco Productions, L.L.C. (“Zoco”), Sony Pictures Television Inc. (“Sony”), Harpo Productions, Inc. (“Harpo”), and The Dr. Oz Show (“Dr. Oz Show”) (collectively referred to as “the defendants”) move to dismiss the complaint pursuant to CPLR §3211(a)(7).<sup>1</sup>

---

<sup>1</sup> As per stipulation executed by the parties on June 3, 2013, the claims asserted against defendant NBC Studios, L.L.C. have been withdrawn.

Plaintiff Frank Dietl (“Dietl”) commenced this action in or about March 2013. According to the allegations of the complaint, on April 17, 2012, 76 year old Dietl was watching an episode of the Dr. Oz Show, in which Dr. Oz was providing viewers with an at-home remedy to cure sleeplessness due to cold feet. Specifically, Dr. Oz suggested that viewers could put uncooked rice into a pair of socks, warm the socks in a microwave, and then place the socks on their feet and go to bed. Dietl tried the at-home remedy, and fell asleep. Dietl, who suffers from neuropathy and diminished sensation in his lower extremities due to diabetes, was caused to sustain second and third degree burns on both of his feet. In his complaint, Dietl alleged that defendants breached their duty to instruct the audience as to the proper procedure for the at-home remedy, and breached their duty to warn against any reasonably foreseeable risk of harm to a person attempting such home remedy.

The defendants now move to dismiss the complaint pursuant to CPLR §3211(a)(7), first arguing that a television talk show and its host do not owe a duty of care to a general television audience, and in any event, Dr. Oz properly warned viewers by stating that they should not let the rice get “too hot, just warm.” They next argue that they did not owe a specific duty to warn Dietl, and, in any event, he was aware that he could be susceptible to injury due to his medical condition.

In opposition, Dietl submits an affidavit in which he avers that he trusted Dr. Oz as if he was his own physician. He maintains that if Dr. Oz had advised that viewers who

suffered from conditions involving the feet should not try this at-home remedy, Dietl would have taken extra precautions or not tried the remedy at all. Dietl maintains that he and Dr. Oz had a quasi physician-patient relationship.<sup>2</sup> He argues that the defendants breach their duty of care owed to the audience by providing negligent medical advice. He explains that defendants negligently failed to instruct and warn the audience of the dangers related to the at-home remedy if not properly prepared, and the dangers involved if the audience had prior medical conditions.

### **Discussion**

On motion to dismiss pursuant to CPLR §3211(a)(7), the pleading is to be afforded a liberal construction. The court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118, 121 (1<sup>st</sup> Dept. 2002). The court must consider whether the proponent of the pleading has a cause of action, not only whether he has stated one. *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994).

The threshold question in any negligence action is whether the alleged tortfeasor owes a duty of care to the injured party. *Sheila C. v. Povich*, 11 A.D.3d 120, 125 (1<sup>st</sup> Dept. 2004). Courts must "fix the duty point by balancing factors, including the

---

<sup>2</sup> At oral argument before this court on June 19, 2013, counsel for Dietl stated, "we're not asking the court to fashion a quasi physician-patient relationship. That was nothing more than a sign or a signpost given to what we believe this is...we're asking for, it's a straight negligence theory of duty owed by [] Dr. Oz and Dr. Oz show to the audience."

reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability." *Palka v. Servicemaster Management Servs. Corp.*, 83 N.Y.2d 579, 586 (1994). In determining the orbit of duty, the courts must bear in mind the precedential and consequential effects of their rulings and limit the legal consequences of wrongs to a controllable degree. *Lauer v. City of New York*, 95 N.Y.2d 95, 100 (2000).

Here, the court finds that the complaint does not state a cause of action for negligence against the defendants. Specifically, there is no factual basis for Dietl's claim that defendants breached a duty of care allegedly owed to Dietl. There was no direct or quasi physician-patient relationship between Dr. Oz and Dietl, sufficient to establish a duty of care. *See generally Ellis v. Peter*, 211 A.D.2d 353 (2<sup>nd</sup> Dept. 1995). Dietl has pointed to no authority that would lead this court to find a duty of care between a television talk-show host and his vast home-viewing audience, and Dietl fails to convince this court that creating such a duty would be sound public policy. Further, Dietl was well aware of his own medical condition, and the possibility that he could be susceptible to injury because of the diminished sensation in his legs. While the injuries sustained by

Dietl were serious and unfortunate, there is no basis alleged for his claim against the defendants.

In accordance with the foregoing, it is hereby

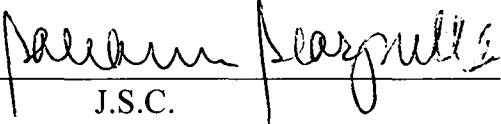
ORDERED that defendants Dr. Mehmet Oz., M.D., Zoco Productions, L.L.C., Sony Pictures Television Inc., Harpo Productions, Inc., and The Dr. Oz Show's motion to dismiss the complaint pursuant to CPLR §3211(a)(7) is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: New York, New York  
October 3, 2013

ENTER:

  
\_\_\_\_\_  
J.S.C.  
**SALIANN SCARPULLA**