Arboleda v Microdot, L.L.C.
2016 NY Slip Op 30385(U)
March 8, 2016
Supreme Court, New York County
Docket Number: 154165/14
Judge: Shlomo S. Hagler
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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BRIGETTE ARBOLEDA and SANDRA ARBOLEDA,

Plaintiffs,

-against-

Index No. 154165/14

MICRODOT, L.L.C., DERMA-DOT LIMITED LIABILITY COMPANY, DONCOSA, INC, d/b/a DONCOSA IMAGES, JAMES COSTA, JAMES COSTABILE, and STACY L. COSTABILE,

Motion Sequence Nos.: 001 & 002

DECISION/ORDER

Defendants.

----------X

HON. SHLOMO S. HAGLER, J.S.C.:

Plaintiffs Brigette Arboleda and Sandra Arboleda ("plaintiffs") allege in their Verified Complaint that a certain hair replacement and augmentation procedure performed by defendants caused, among other things, permanent thinning hair and baldness. In Motion Sequence Number 001, plaintiffs move, pursuant to CPLR 3126, to strike the answer of defendant Derma-Dot Limited Liability Company ("Derma-Dot"), or in the alternative to compel discovery pursuant to CPLR 3124 ("First Motion").[1] Derma-Dot separately cross-moves pursuant to CPLR 3211 (a) (1), (5), and (7) to dismiss the complaint, and, pursuant to CPLR 8303-a and 22 NYCRR 130-1.1, for sanctions against plaintiffs and their counsel ("Cross-Motion"). Derma-Dot opposes plaintiffs' motion and plaintiffs oppose Derma-Dot's cross-motion.

In Motion Sequence Number 002, defendants Microdot L.L.C ("Microdot"), Doncosa,

[1]By letter, dated September 16, 2014, plaintiffs withdrew their motion to strike defendants' answer insofar as asserted against defendants Microdot L.L.C., Doncosa, Inc. d/b/a Doncosa Images, James Costa, James Costabile and Stacy L. Costabile, only [Affirmation in Opposition, Exhibit "A"].

Inc. d/b/a Doncosa Images ("Doncosa"), James Costa, James Costabile and Stacy L. Costabile (collectively the "Microdot defendants") move, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the complaint and all cross-claims asserted against them, or in the alternative, pursuant to CPLR 3212 (a), for summary judgment dismissing the complaint and all cross-claims asserted against against them ("Second Motion").[2] Plaintiffs oppose the Microdot defendants' motion. Motion Sequence Numbers 001 and 002 and the cross-motion are consolidated herein for disposition. The court has received a letter, dated February 24, 2016, notifying the court that defendant James Costabile is deceased. Accordingly, the within action is stayed as to him unless and until a proper motion for substitution is made (CPLR 1015, 1021).

Background

Plaintiffs, who are sisters, both of whom allegedly suffered from thinning hair and female pattern baldness, each entered into a "Microdot Purchase and Maintenance Agreement" (the "Agreements") with Micro-Dot, dated May 16, 2012 [Cross-Motion, Exhibits "A" and "B"], pursuant to which they would receive hair replacement and augmentation. After approximately four months of treatment from June 2012 through September 2012, plaintiffs became dissatisfied with the services that they were receiving from Microdot. In or about January 2013, commenced a small claims action in NYC Civil Court for personal injuries against Microdot LLC d/b/a Hair Restoration [Cross-Motion, Exhibits "F" & "G"]. Each plaintiff sought to recover the sum of $5,000, which represented the payments they had made under the Agreements.

On or about February 24, 2014, plaintiffs entered into a settlement with Microdot,

[2]For purposes of the instant motion, however, the term Microdot defendants does not include defendant James Costabile or Doncosa. As discussed below, the action is stayed as to James Costabile and dismissed as to Doncosa.

pursuant to which they signed identical "Release of All Claims" (the "Releases") and agreed to withdraw the small claims action, in exchange for the agreement by 'Doncosa Images Inc./Microdot LLC' to refund $500 to each plaintiff. The Releases provide in part:

> "[t]he undersigned . . . for the sole consideration of the refund of $500.00 dollars, does hereby release, acquit and forever discharge Doncosa Images Inc./Microdot LLC and its administrators, successors, assigns, insurers [*sic*], heirs from any and all claims, actions, causes of damages [*sic*], costs, loss of service, expenses and any compensation whatsoever which the undersigned now has, may have had or which may hereafter accrue on account of or in any way growing out of any and all know [*sic*] and unknown issues arising out of the contract dated May 16, 2012, to which the undersigned is a party.
>
> . . .
>
> The undersigned further represents that this Release is being executed without any threat or force or duress and that the undersigned has read and understood the terms of this Release and has carefully considered the substance of this Release and is entering into this Release on its own volition" [Cross-Motion, Exhibit "G"].

By letters, dated April 21, 2014, Microdot's counsel forwarded a check to each plaintiff, dated April 22, 2014 and April 24, 2014, respectively, in the amount of $500 pursuant to the Releases [Cross-Motion, Exhibit "H"].

In the present action, plaintiffs' Verified Complaint alleges that as a result of the Microdot process used by defendants, plaintiffs have suffered from "severe pain and suffering, financial loss, baldness, embarrassment and humiliation" (Verified Complaint, ¶6). In identical affidavits, sworn to on September 15, 2014, submitted in opposition to Derma-Dot's cross-motion, each plaintiff contends:

> "I underwent the treatments which were at times painful, but realized that they were not helping my condition, but in fact exacerbating it. I discontinued the treatment and discovered that in fact the treatments weakened my natural hair and injured my scalp causing my hair to thin even more, and my scalp to go bald further. I now have

permanent thin hair and baldness which I directly attribute to the "Microdot" and "Dermadot" processes which I underwent with the defendants" (Affirmation in Opposition to Cross-Motion, Exhibit "A").

DISCUSSION

The Verified Complaint

The Verified Complaint alleges twenty-four causes of action, the first twelve on behalf of Brigette Arboleda, and the next twelve, stated identically to the first twelve, except asserted on behalf of Sandra Arboleda. The respective causes of action are: (1) breach of contract; (2) unjust enrichment; (3) breach of warranty; (4) negligence; (5) gross negligence; (6) unauthorized practice of medicine; (7) negligence per se; (8) deceptive business practices; (9) false advertising; (10) assault and battery; (11) intentional infliction of emotional distress; and (12) negligent infliction of emotional distress [First Motion, Exhibit "A"].

Motion to Dismiss

On a motion to dismiss for failure to state a cause of action (CPLR 3211 (a) (7)), the court must accept each and every allegation as true and liberally construe the allegations in the light most favorable to the pleading party (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez,* 84 NY2d 83, 87-88 [1994]). A motion to dismiss must be denied, "if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.,* 98 NY2d 144, 152 [2002] [internal quotation marks and citations omitted]). On the other hand, while factual allegations contained in a complaint should be accorded a favorable inference, bare legal conclusions and inherently incredible facts are not entitled to preferential consideration

(*Beattie v Brown & Wood*, 243 AD2d 395, 395 [1st Dept 1997]). Where a defendant has submitted evidentiary material in support of a motion to dismiss a complaint pursuant to CPLR 3211(a)(7)...the criterion is whether the [plaintiff] has a cause of action, not whether he has stated one...." *Leon v Martinez, supra* at 88 *quoting Guggenheimer v Ginzburg, supra* at 275.

First Motion and Cross-Motion

Plaintiffs move to strike the answer of Derma-Dot for failure to provide certain discovery, and Derma-Dot cross-moves to dismiss plaintiffs' complaint. Plaintiffs allege that Derma-Dot's failure to provide discovery constitutes wilful and contumacious conduct which warrants striking of Derma-Dot's answer [First Motion, Affirmation in Support, ¶9]. In opposition to plaintiffs' motion and in support of its cross-motion, Derma-Dot attaches as Exhibit "E" to its Affirmation, Derma-Dot's responses to plaintiffs' discovery demands. Derma-Dot's motion to dismiss plaintiffs' complaint pursuant to CPLR 3211(a)(7)[3], alleges that plaintiffs have failed to state a cause of action on grounds that Derma-Dot never provided any hair services or services of any kind to plaintiffs.

Derma-Dot argues that (1) plaintiffs' motion to strike Derma-Dot's answer should be denied as Derma-Dot has fully responded to all outstanding discovery demands; (2) Derma-Dot never provided any hair services to plaintiffs; services were only provided to plaintiffs by the Microdot defendants; (3) plaintiffs have released all claims covered by the within action; and (4) the court should sanction plaintiffs and their counsel for pursuing a frivolous action, and award

[3]Derma-Dot's motion to the extent it moves pursuant to CPLR 3211(a)(1), namely that documentary evidence proves that Derma-Dot never provided services to plaintiff, has been waived [CPLR 3211(e)].

Derma-Dot's attorneys' fees and costs.

In support of its cross-motion and as to each plaintiff, Derma-Dot submits the Agreements, 'Custom Microdot Process Hair Order Form[s]' and 'Microdot Technique Technical Use Photo Release' form, both dated May 16, 2012, Microdot LLC credit card payment slips, and 'Doncosa Images Inc/The Microdot Process LLC Hair Approval Form[s]', dated June 26, 2012 and June 27, 2012 (collectively, the "Forms") [Cross-Motion, Exhibits "A"-"C"]. In opposition, plaintiffs argue that as James Costabile is president of both Microdot and Derma-Dot, it can be inferred that the corporations are alter-egos. Plaintiffs also argue that the fact that there are related court actions in which the party plaintiffs therein were allegedly treated by both Microdot and Derma-Dot proves that these entities share clients.

The evidence demonstrates that insofar as plaintiffs have commenced action against Derma-Dot, the action is directed to the wrong party. All the documentary evidence submitted by Derma-Dot, which the court can consider on a motion to dismiss pursuant to CPLR 3211(a)(7) [*Leon v Martinez, supra* 84 NY2d 83], makes no mention of Derma-Dot. The Agreements, all the Forms signed by plaintiffs and the Releases, specifically refer only to Microdot. Plaintiffs' assertion that Derma-Dot may be a proper party herein is speculative and conclusory.[4] In fact, the reply affidavit of James Costabile, sworn to on October 14, 2014, attaches both the Articles of Organization of Microdot showing Stacey Costabile to be the owner/organizer, and the Certificate of Formation of Derma-Dot showing James Cosabile to be the registered agent [Reply Affidavit to Cross-Motion, Exhibits "A" & "B"]. Said affidavit

[4]Derma-Dot is only referred to in plaintiffs' affidavits wherein they state that they underwent 'Microdot' and 'Derma-Dot' processes.

attests that Derma-Dot is a small start-up company that has no saleable product, the 'Derma-Dot' method is separate and different from the Microdot process, and that at no time did plaintiffs contract for services with Derma-Dot, "nor could they, as Derma-Dot does not currently have a service or product to offer them" [Reply Affidavit, ¶4, 5]. The fact that there are other court actions where there has allegedly been evidence that Microdot and Derma-Dot share clients, is inapposite to the instant matter. Accordingly, Derma-Dot's cross-motion to dismiss plaintiffs' Verified Complaint for failure to state a cause of action as against it is granted, and plaintiffs' motion to strike Derma-Dot's answer, is denied as moot. As such, the court need not consider Derma-Dot's alternative grounds for dismissal, namely that the Releases signed by plaintiffs release Derma-Dot from liability.

Finally, the court declines to impose sanctions against plaintiffs and their counsel. Derma-Dot has not established that plaintiffs' conduct was "without legal merit; or [was] undertaken primarily to delay or prolong the litigation or to harass or maliciously injure another; or assert[ed] material factual statements that are false (22 NYCRR 130-1.1 [c])" (*Levy v Carol Mgt. Corp.*, 260 AD2d 27, 34 [1st Dept 1999].

Second Motion

The Microdot defendants move to dismiss plaintiffs' complaint pursuant to CPLR 3211, or in the alternative for summary judgment pursuant to CPRL 3212. In opposition, plaintiffs argue that said motion must be denied given that there has been no discovery in this matter. CPLR 3212(f) permits a party opposing summary judgment to obtain further discovery when it appears that facts supporting the position of that party exist, but cannot be stated (*Terranova v Emil*, 20 NY2d 493, 497 [1967]). Under CPLR 3212(f), where facts essential to justify

opposition to a motion for summary judgment are exclusively within the knowledge and control of the movant, summary judgment may be denied. This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion (*Baron v Incorporated Vil. of Freeport*, 143 AD2d 792, 793 [2d Dept 1988]). The party invoking CPLR 3212(f) must provide a proper evidentiary basis supporting its request for further discovery (*see Ruttura & Sons Constr. Co. v Petrocelli Constr.*, 257 AD2d 614, 615 [2d Dept 1999]). Here, plaintiffs fail to identify any fact that would justify postponing decision on the summary judgment motion. Plaintiffs merely assert, without identifying any particulars, that further discovery, namely depositions, is needed as plaintiffs are "missing crucial evidence," and that discovery is needed on the issue of the relationship between the Microdot defendants and Derma-Dot[5] (*see Auerbach v Bennett*, 47 NY2d 619, 636 [1979]). This is mere speculation and surmise which is an insufficient basis to postpone decision on the summary judgment motion under the authority of CPLR 3212(f) (*id.*). In any event, the court has elected to treat Microdot's motion as a motion under CPLR §3211(a)(7), given that as discussed below, most causes of action fail as a matter of law.

Microdot argues that its motion to dismiss should be granted pursuant to CPLR 3211(a)(5), on grounds of the Releases. CPLR 3211(a) provides that "a party may move for judgment dismissing one or more causes of action asserted against him on the ground that...(5) the cause of action may not be maintained because of .... release." However, "any objection or defense based upon a ground set forth in paragrap[h]....five...of subdivision (a) is waived unless

[5]As discussed above, the court dismissed all claims against Derma-Dot pursuant to CPLR 3211(a)(7).

raised either by such motion [made before service of a responsive pleading is required] or in the responsive pleading" CPLR 3211(e).

Here, Microdot has neither raised the affirmative defense of 'release' in its answer nor moved on the grounds of 'release' prior to the time an answer was required. Microdot's nineteenth affirmative defense states that recovery by plaintiffs is barred pursuant to General Obligations Law ("GOL") section 15-108. However, the court notes that GOL 15-108 "address[es] the effect that a settlement between an injured party and a tortfeasor has on related claims by or against joint tortfeasors who do not participate in the settlement" *Chase Manhattan Bank v. Akin, Gump, Strauss, Hauer & Feld*, 309 AD2d 173, 174 [1st Dept. 2003]. The assertion by Microdot of GOL 15-108 as an affirmative defense has no applicability to the issue of whether the Releases bar plaintiffs' action as against Microdot, and as such, the affirmative defense of 'release' has been waived. In light of the court's decision that Microdot has waived the affirmative defense of 'release', the court need not examine plaintiffs' contentions that the Releases are void as having been obtained under duress.

Defendant Doncosa, Inc. d/b/a Doncosa Images

The Verified Complaint states that Doncosa is the owner of the Microdot trademark and/or service mark.[6] The Verified Complaint fails to allege a cause of action against Doncosa for trademark infringement, and as such, all causes of action against Doncosa are dismissed.

[6]The Verified Complaint references a 'Trademark Electronic Search' "annexed as Exhibit 'A'", but none of the copies of the complaint include said exhibit.

First and Thirteenth Causes of Action for Breach of Contract

Plaintiffs allege that Microdot breached the Agreements (Verified Complaint ¶¶84-88, 149-153). The Verified Complaint alleges that the parties entered into a contract with Microdot and that the "quid pro quo of the contract was that [plaintiffs] would receive thick and full hair and in exchange the defendants would receive in excess of five thousand dollars ($5,000) in cash, check and credit" (Verified Complaint ¶¶86, 151). The Verified Complaint alleges that defendants breached its obligations under the Agreements by causing [plaintiffs] to suffer from significant hair loss and permanent baldness" (Verified Complaint, ¶¶87, 152).

The requisite elements of a breach of contract claim are: existence of a contract, plaintiff's performance pursuant to the contract, defendant's breach of the contract, and damages resulting from that breach (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). "Generally, a party alleging a breach of contract must demonstrate the existence of a . . . contract reflecting the terms and conditions of their . . . purported agreement." *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 181-182 (2011) (internal quotation marks and citation omitted).

The grounds of plaintiffs' breach of contract action, namely that defendants breached their promise to provide plaintiffs with 'thick and full hair', is unavailing as the Agreements on their face contain no such representation. Accordingly, plaintiffs' first and thirteenth causes of action for breach of contract are dismissed.

Second and Fourteenth Causes of Action for Unjust Enrichment

Plaintiffs' second and fourteenth of action for unjust enrichment allege that plaintiffs each paid Microdot $5,000 but that Microdot failed to cure their thinning hair, and therefore Microdot

was unjustly enriched at plaintiffs' expense (Verified Complaint, ¶¶89-91, 154-156). The Microdot defendants move to dismiss this cause of action asserting that plaintiffs fail to allege how the defendants' were unjustly enriched at plaintiffs' expense, that plaintiffs voluntarily consented to the process and that plaintiffs, by signing the Agreements, acknowledged that the process may not meet their expectations (Second Motion, Affirmation in Support at ¶13).

To assert a legally cognizable claim of unjust enrichment, a plaintiff must allege that a benefit was bestowed ... by plaintiffs and that defendants will obtain such benefit without adequately compensating plaintiffs therefor" (*Wiener v Lazard Freres & Co.*, 241 AD2d 114, 119 [1st Dept 1998] [internal quotation marks and citation omitted]. However, "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter . . . . A 'quasi contract' only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987] [citations omitted]; *see also Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012] ["an unjust enrichment claim is rooted in the equitable principle that a person shall not be allowed to enrich himself at the expense of another [internal quotation marks and citation omitted]." Accordingly, given that plaintiffs' unjust enrichment claims arise out of the same events governed by the Agreements, plaintiffs' second and fourteenth causes of action for unjust enrichment are dismissed.

Third and Fifteenth Causes of Action for Breach of Warranty

Plaintiffs allege that the Microdot defendants gave plaintiffs express and implied

warranties[7] to induce the plaintiffs to purchase the Microdot process, and that the Microdot defendants breached their warranties as a seller causing plaintiffs to suffer "great pain, humiliation and embarrassment" (Verified Complaint ¶¶92-99, 157-164). Plaintiffs also allege that the Microdot defendants breached the 'warranty of fitness for a particular purpose.' In support of their motion to dismiss, the Microdot defendants argue that pursuant to the Agreements, the Microdot defendants made only a limited warranty with respect to the donor hair, namely, if plaintiffs were not satisfied with the donor hair, they were required to notify Microdot in writing, within fourteen days of the application appointment. If plaintiffs followed this procedure and were still not satisfied, Microdot would attempt to re-design, re-cut or reposition 'the Microdot' at no additional cost to plaintiffs ('Limited Warranty') (Second Motion, Affirmation in Support ¶14-17; Exhibit "F" at 1, ¶4). The Microdot defendants contend that plaintiffs never contacted Microdot in accordance with these Limited Warranty provisions. The Microdot defendants further argue that a breach of an implied warranty of fitness for a particular purpose (*See UCC 2-315*) is inapplicable to the instant matter as Microdot was offering a service of hair enhancement to plaintiffs and was not in the business of buying and selling goods.

As a threshold matter, the court notes that Article 2 of the UCC governs express warranties, implied warranties of merchantability and implied warranties of fitness for a particular purpose [*See UCC 2-313, 2-314, 2-315*]. However, "UCC article 2 does not apply to the provisions of [a] contract [when] it is predominately a contract for the rendition of work, labor, and services, rather than for the sale of goods" (*Amendola v Basement Waterproofing Co.*

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[7]Plaintiffs failed to specify whether or not the implied warranty referred to in paragraphs 93 - 95 (Brigette Arboleda), and 158 - 160 (Sandra Arboleda), are implied warranties of merchantability or something else.

of Flushing, 203 AD2d 403, 403 [2d Dept. 1994]. *See also Gutarts v Fox*, 104 AD3d 457 [1st Dept. 2013]; *Leighton v Lowenberg*, 103 AD3d 530, 531 [1st Dept 2013].

Here, plaintiffs' action rests upon the provision of a "service" rather than the "sale of goods." The Verified Complaint refers to the Microdot "technique" or "process", the Agreements cover the Microdot "Process", the affirmation submitted by plaintiffs in opposition refers to a "procedure" and plaintiffs' affidavits state that they underwent the Microdot "process" and allege that the "treatments" were harmful to them. Accordingly, plaintiffs' third and fifteenth causes of action for breach of warranty are dismissed.

Fourth and Sixteenth Causes of Action for Negligence

Plaintiffs allege that the Microdot defendants negligently performed the Microdot hair replacement procedure causing plaintiffs to suffer severe personal injuries, and that such negligence was not caused by plaintiffs' contributory negligence (Verified Complaint, ¶¶84-88, 149-153).[8] In order to prevail in an action premised upon negligence, plaintiffs must show that the defendant owed them a duty, that the defendant breached such duty, that such breach was the proximate cause of plaintiffs' injuries, and that plaintiffs were injured (*Salvador v New York Botanical Garden,* 71 AD3d 422, 423 [1st Dept 2010]). The Court holds that plaintiffs' allegations that the Microdot defendants negligently performed the Microdot process which caused plaintiffs to suffer, among other things, permanent baldness, is at this stage in the proceedings, sufficient to state a cause of action for negligence against said Microdot, James Costa and Stacy L. Costabile.

[8]The conclusory statement in the Verified Complaint asserting an additional claim based on the doctrine of *res ipsa loquitor*, is insufficient to support a cause of action on this ground. In any event, the reliance on the doctrine of *res ipsa loquitor* is misplaced.

Sixth and Eighteenth Causes of Action for Unauthorized Practice of Medicine

Plaintiffs allege that the Microdot defendants violated Education Law, section 6512 by inserting needles into plaintiffs' scalps and thereby practicing medicine without a license. Education Law 6521 defines the practice of medicine as "diagnosis, treating, operating, or prescribing for any human disease, pain, injury, deformity or physical condition" (Verified Complaint, ¶¶113-118, 178-183). It is a class E felony to practice or knowingly aid or abet in the unlicensed practice of medicine (Education Law 6512). Given that there is no "private right of action by an individual who sustains damages as a result of professional misconduct defined [in title VIII of the Education Law, (Education Law § 6500 *et seq)*]" *Requa v Coopers & Lybrand*, 303 AD2d 159, 159 [1st Dept 2003]), plaintiffs' sixth and eighteenth causes of action for the unauthorized practice of medicine are dismissed.

Remaining Causes of Action

Plaintiffs' fifth and seventeenth causes of action for gross negligence allege that "defendants evidenced a high degree of moral culpability [which] was so flagrant as to transcend mere carelessness" (Verified Complaint, ¶¶108-112, 173-177). Such causes of action are not viable as the Verified Complaint alleges no facts that "'smack [] of intentional wrongdoing.'" *Apple Bank for Sav. v PricewaterhouseCoopers LLP*, 70 AD3d 438, 438 [1st Dept 2010], quoting *Colnaghi, U.S.A. v Jewelers Protection Servs.*, 81 NY2d 821, 824 (1993); *see also Leighton v Lowenberg*, 103 AD3d 530, 530 [1st Dept 2013]. Accordingly, plaintiffs' fifth and seventeenth causes of action for gross negligence are dismissed.

Plaintiffs' seventh and nineteenth causes of action for negligence per se cannot be

maintained (Verified Complaint, ¶¶119-125, 184-190). Negligence per se is properly pled where a plaintiff alleges that he or she has been injured by the defendant's violation of a state statute that imposes a specific duty. *See generally Yenem Corp. v 281 Broadway Holdings*, 18 NY3d 481, 489 [2012] *citing Elliott v. City of New York*, 96 NY2d 730, 734 [2001]. Here, plaintiffs do not allege a violation of any such statute, other than Education Law 6512, as to which they have no right of action, and General Business Law ("GBL") 349 and 350 which are not applicable to the instant claims, as discussed below. Accordingly, plaintiffs' seventh and nineteenth causes of action for negligence per se are dismissed.

Plaintiffs eighth and twentieth causes of action for deceptive business practices allege that defendants' false and misleading statements and material omissions constitute deceptive business practices in violation of GBL 349 (Verified Complaint, ¶¶126-129, 191-194). GBL 349 declares "[d]eceptive acts or practices in the conduct of any business . . . in this state" to be unlawful. To state a claim for violation of GBL 349, a plaintiff must allege that the alleged violations "have 'a broad impact on consumers at large.'" *Plaza PH2001 LLC v Plaza Residential Owner LP,* 98 AD3d 89, 104 [1st Dept 2012], quoting *Thompson v Parkchester Apts. Co.*, 271 AD2d 311, 311 [1st Dept 2000]. The Verified Complaint does not allege that anyone, other than plaintiffs, has been harmed, or is likely to be harmed, by the application of the Microdot treatment. Accordingly, plaintiffs' eighth and twentieth causes of action for deceptive business practices are dismissed.

Plaintiffs' ninth and twenty-first causes of action allege that in violation of GBL 350, defendants engaged in false advertising directed at "numerous consumers," that plaintiffs detrimentally relied upon "defendants' false messages to the market" and that plaintiffs have

been injured thereby (Verified Complaint ¶¶130-134, 195-199). GBL § 350 declares "[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state" to be unlawful. "To state such a claim, a plaintiff must allege that the defendant has engaged in an act or practice that is deceptive or misleading in a material way and that plaintiff has been injured by reason thereof." (*Solomon v. Bell Atl. Corp.*, 9 AD3d 49, 52 [1st Dept. 2004] [internal quotes and citations omitted]. Plaintiffs' Verified Complaint is conclusory and fails to set forth a deceptive act or practice, and thus their GBL 350 claims are insufficient on their face. *See St. Patrick's Home for Aged & Infirm v. Laticrete Intl.*, 264 AD2d 652, 656 [1st Dept. 1999]. Accordingly, plaintiffs' ninth and twenty-first causes of action for false advertising are dismissed.

Plaintiffs' tenth and twenty-second causes of action for assault and battery allege that defendants "did intentionally assault and batter [plaintiffs]" and that plaintiffs "in no way consented to being touched by an unlicensed practitioner" (Verified Complaint, ¶¶135-141, 200-206). A claim of assault must allege that defendants "engaged in intentional physical conduct that placed plaintiff in apprehension of harmful contact." *Mitchell v New York Univ. ("NYU")*, 129 AD3d 542, 543 (1st Dept 2015), citing *Gould v Rempel*, 99 AD3d 759, 760 [2d Dept 2012]; *see also Okoli v Paul Hastings LLP,* 117 AD3d 539, 540 [1st Dept 2014]. There is no allegation herein that plaintiffs were placed in apprehension of harmful conduct. "A valid claim for battery exists when a person intentionally touches another without that person's consent." *Wende C. v United Methodist Church* , N.Y. W. Area, 4 NY3d 293, 298 [2005]. Here, plaintiffs willingly underwent the treatment and discontinued it when they noted that it was not helping their condition. As such, plaintiffs' tenth and twenty-second causes of action for assault and battery

must be dismissed.

Plaintiffs' eleventh and twenty-third, and twelve and twenty-fourth causes of action for intentional and negligent infliction of emotional distress, respectively, allege that as a result of defendants' conduct from May 2012 to September 2012, they suffered "severe emotional distress, mental anguish and wrongful penetration of mental tranquility" (Verified Complaint, ¶142-148, 207-2011 2. [*sic*]). The elements of a cause of action for intentional infliction distress are "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress" *Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]. *See McRedmond v Sutton Place Rest. & Bar, Inc.*, 48 AD3d 258, 259 [1st Dept. 2008]. A cause of action for negligent infliction of emotional distress "generally must be premised upon the breach of a duty owed to plaintiff which either unreasonably endangers the plaintiff's physical safety, or causes the plaintiff to fear for his or her own safety" *Sheila C. v Povich*, 11 AD3d 120, 130-131 [1st Dept 2004] [internal citation omitted]. With respect to either cause of action, there is simply no allegation here of "conduct by [the Microdot defendants] so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" *Id.* [internal quotation marks and citation omitted]. Accordingly, plaintiffs' eleventh and twenty-third, and twelve and twenty-fourth causes of action for intentional and negligent infliction of emotional distress, respectively are dismissed.

The court notes that, although the Agreements provide that any claim brought thereunder must be brought in the Superior Court of New Jersey, County of Bergen, the Microdot

defendants have effectively waived such requirement.

CONCLUSION

Accordingly, it is hereby,

ORDERED that, in Motion Sequence Number 001, the cross-motion of defendant Derma-Dot to dismiss the Verified Complaint pursuant to CPLR 3211(a)(7) is granted, and the Verified Complaint is dismissed as against said defendant; it is further ordered

ORDERED that the motion of plaintiffs Brigette Arboleda and Sandra Arboleda to strike Derma-Dot's answer is denied as moot; and it is further

ORDERED that, in Motion Sequence Number 002, the motion of defendants Microdot, Doncosa, James Costa, James Costabile, and Stacy L. Costabile to dismiss the `the First and Thirteenth (Breach of Contract), Second and Fourteenth (Unjust Enrichment), Third and Fifteenth (Breach of Warranty), Fifth and Seventeenth (Gross Negligence), Sixth and Eighteenth (Unauthorized Practice of Medicine), Seventh and Nineteenth (Negligence Per Se), Eighth and Twentieth (Deceptive Business Practices), Ninth and Twenty-First (False Advertising), Tenth and Twenty-Second (Assault and Battery), Eleventh and Twenty-Third (Intentional Infliction of Emotional Distress), and Twelfth and Twenty-Fourth (Negligent Infliction of Emotional Distress) causes of action is granted as to defendants Microdot, Doncosa, James Costa and Stacy L. Costabile; the motion of defendants Microdot, Doncosa, James Costa, James Costabile, and Stacy L. Costabile to dismiss the Fourth and Sixteenth (Negligence) causes of action is denied as to defendants Microdot, James Costa and Stacey L. Costabile only; and it is further

ORDERED, that the action is stayed as to defendant James Costabile; and it is further

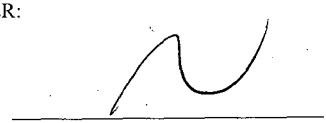
ORDERED, that the action is dismissed in its entirety as to defendant Doncosa; and it is

further

ORDERED, that the Clerk is directed to enter judgment accordingly.

Dated: March 8, 2016

ENTER:



J.S.C.

SHLOMO HAGLER
J.S.C.