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

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Douglas G. Greenwood,

Index No.
805111/2017

Plaintiff,

DECISION and ORDER

- against -

Mot. Seq. 1

Kevin Tehrani, M.D., Aristocrat Plastic Surgery, PC, and Suneva Medical, Inc.,

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

Presently before the court is defendant, Suneva Medical, Inc.'s ("Suneva" or "moving defendant"), motion for an order pursuant to CPLR §3211(a)(7) dismissing all claims asserted against Suneva in the Complaint. Plaintiff, Douglas G. Greenwood ("Plaintiff" or "Greenwood"), opposes the motion to dismiss.

This is an action for medical malpractice. Greenwood filed his Verified Complaint on March 21, 2017 against defendants Kevin Tehrani, MD ("Dr. Tehrani"), Aristocrat Plastic Surgery PC ("Aristocrat Plastic Surgery"), and Suneva Medical, Inc. Suneva was served with the Complaint on April 12, 2017.

As alleged in the Complaint, Greenwood "received care and treatment from the defendants" on October 8, 2014. The defendants were allegedly "careless, negligent, and departed from good and accepted medical practice in the care and treatment rendered to the plaintiff." Greenwood asserts two causes of action against all defendants. The first cause of action, for negligence, alleges that defendants "deviated from accepted standards of medical practice in rendering care and treatment to the plaintiff", and "were negligent, careless, and unskillful in the care, treatment and services they rendered to the plaintiff." The second cause of action, for lack of informed consent, alleges that defendants "failed to disclose to the

plaintiff the risks and benefits of the treatment rendered and failed to advise the plaintiff of the alternatives thereto, and thereby deprived the plaintiff of the information necessary to make a knowledgeable evaluation of her (sic) medical condition and to give informed consent."

The allegations against Suneva are that moving defendant is "the manufacturer of a facial filler brand name 'Artefill' [that] employed, supervised and controlled certain representatives who provide information and/or instructions to physicians utilizing Artefill and other products." Suneva's agents or employees "on one or more occasions ... were present while treatment was being rendered to the plaintiff by defendants Tehrani and Aristocrat;" "provided information, advice, instruction and counsel related to the care and treatment rendered" and "had a duty to ensure that the product, Artefill, was used and administered in a safe, indicated manner ... and according to their own guidelines and the guidelines of administrative agencies and bodies including but not limited to the Food and Drug Administration."

CPLR § 3211 provides, in relevant part, that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . (7) the pleading fails to state a cause of action[.]" CPLR § 3211(a)(7). In determining whether dismissal is warranted for failure to state a cause of action, 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 into any cognizable legal theory." (*Leon v. Martinez,* 84 NY2d 83, 614).

A party injured as a result of a defective product, may seek to recover against a manufacturer based on theories of a breach of a promise express or implied, negligence, or strict products liability. (*Voss v. Black Mfg. Co.*, 59 N.Y.2d 102 [1983]). A party may bring a claim, either in negligence or strict liability, against the manufacturer on the grounds that "the product is defective because of a mistake in manufacturing or because of an improper design or because of the manufacturer failed to provide adequate warnings regarding the use of the product." (*Voss v. Black Mfg. Co.*, 59 N.Y.2d 102, 106-107 [1983]). This includes claims against manufacturers of medical devices. (*Fane v. Zimmer*, 927 F. 2d 124, 128 [2d Cir. 1991]).

To establish a claim for failure to warn, a plaintiff must allege "that the product did not contain adequate warnings and that the inadequacy of those warnings was the proximate cause of the injuries." (*Mulhall v. Hannafin*, 45 A.D.3d 55, 58 [1st Dept 2007]). The manufacturer's duty "under New York law, is to warn the medical community, not the patient of the product's risk." (*Mulhall*, 45 A.D. 3d at 58). Those warnings "are intended for the physician, whose duty it is to balance the risks against the benefits of various drugs and treatments and to prescribe them and supervise their effects." (*Martin v. Hacker*, 83 N.Y.2d 1, 9 [1993] [citations omitted]). The physician takes on the role of an "informed intermediary" between the manufacturer and the patient. (*Id.*). "As is the case with prescription drugs [as set forth in *Martin v. Hacker*], 'the manufacturer of a medical device does not have a duty to directly warn a patient of risks associated with the device, but instead discharges its duty by providing the physician with sufficient information concerning the risks of the device.'" (*Prohaska v. Sofamor, S.N.C.*, 138 F. Supp. 2d 422, 444 [W.D.N.Y. 2001]) [citations omitted]). "Lack of informed consent is not a theory of liability upon which an injured person may sue the manufacturer of a defective product." (*Salva v. Blum*, 277 A.D. 2d 985, 985 [4th Dep't 2000]).

Plaintiff's Complaint does not allege that Artefill, the device manufactured by Suneva, was "defective because of a mistake in manufacturing or because of an improper design." (*Voss*, 59 N.Y. 2d at 106-107). Rather, the allegations against Suneva stem from Suneva's agents' alleged failure to ensure that Greenwood's physician used the device in "a safe, indicated manner … and according to their own guidelines and the guidelines of administrative agencies and bodies including but not limited to the Food and Drug Administration." However, while the manufacturer of a medical device has a duty to warn a patient's physician of the risks associated with the device, the manufacturer is not responsible for how the physician uses the device and renders the medical care. (*See Prohaska*, 138 F. Supp. 2d at 444 ("Nor is a manufacturer responsible for how a learned intermediary conducts his business"], *quoting Lawrence v. Sofamor*, S.N.C. No. 95-cv-1507, 1999 WL 59289, at *4 [N.D.N.Y. Aug. 2, 1999]). Additionally, Plaintiff's Complaint lacks any allegations connecting Suneva's actions or omissions to Plaintiff's alleged injuries. As such, Greenwood fails to allege causation, a necessary element of a negligence claim.

Wherefore, it is hereby

ORDERED that defendant Suneva Medical Inc.'s motion to dismiss to dismiss all claims asserted against Suneva Medical Inc. in the Complaint is granted; and it is further

ORDERED that the action is severed and dismissed as against defendant Suneva Medical, Inc., and the Clerk is directly to enter judgment accordingly.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: September 15, 2017

Eileen A. Rakower, J.S.C.