SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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MEGAN CARRERA,

Plaintiff,

DECISION and ORDER
Index No. 803679/2021E

-against-

AUSTIN G. WILSON, D.M.D., JANET C. BODEY, D.D.S., and MANHATTAN ORAL FACIAL SURGERY, LLC,

Defendants.

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Doris M. Gonzalez, J.

Defendants move to dismiss Count 1 (violation of New York consumer protection laws by defendant MANHATTAN ORAL FACIAL SURGERY, LLC ["MOFS"]), Count 2 (violation of New York consumer protection laws by defendant Janet C. Bodey), Count 5 (negligent hiring against defendant MOFS), and Count 6 (negligent supervision against defendant MOFS) of the complaint pursuant to CPLR 3211.

The complaint alleges causes of action for dental malpractice, as well as various causes of action based on deceptive consumer advertising under G.B.L. §349 (Counts 1 and 2) and negligent hiring and supervision (Counts 5 and 6). It is alleged that prior to October 7, 2019, the plaintiff was advised by nonparty Dr. Do, her dentist, that plaintiff had impacted wisdom teeth, and that "due to the complicated nature of the extraction, removal should be undertaken by an oral surgeon."

The complaint alleges that an "oral surgeon" is an oral or maxillofacial surgeon who has completed at least an additional four years of training after dental school, primarily in a hospital-

based surgical environment. The complaint further alleges that Dr. Do "based on representations made by defendant MOFS on the website to the New York public and consumers as aforesaid and on representations made by said defendant to him as aforesaid... referred plaintiff to defendant MOFS for extraction of the aforementioned teeth by what he reasonably believed would be a highly qualified oral surgeon."

In October 2019, plaintiff presented at the offices of defendant MOFS for the extraction of the two impacted wisdom teeth. Defendant Wilson, who is alleged to be an ordinary dentist who graduated less than two years before treating plaintiff, performed the extraction. Plaintiff alleges dental malpractice as against Dr. Wilson in undertaking the surgical extraction despite lacking the necessary qualifications, and improperly performing the extraction, resulting in a broken jaw and other injuries to the plaintiff.

Manhattan Oral Facial Surgery, L.L.C. (MOFS) is a Domestic Professional Service Limited Liability Company created March 31, 2009. As alleged in the complaint, its website describes its operations as "a multi-location, patient focused, full scope practice of oral and maxillofacial surgeons with expertise that includes dental alveolar extractions, apicoectomy, exposure and bonding for orthodontic treatment, frenectomies, biopsies, pathology, facial trauma, corrective jaw surgery and wisdom tooth removal... Our surgeons have attained their distinguished degrees from accredited programs, and they are licensed in dental and IV sedation/general anesthesia. Many of our doctors have hospital privileges and have additional fellowship training. All our doctors continue to teach in an academic setting and hold continued education in high regard. In addition, some of our doctors are dual trained medical doctors as well." The website states, according to the complaint, that MOFS provides "[h]ighly qualified oral and maxillofacial surgeons, specializing in oral and maxillofacial surgery."

Defendants argue, as to the counts alleging false advertising, that the practice of oral surgery, as alleged by plaintiff, is included within the scope of practice of dentistry. They argue that Dr. Wilson was fully licensed as a general dentist to remove the impacted wisdom teeth, and no further degree was required. There was, defendants argue, no misrepresentation to the public concerning Dr. Wilson's credentials. Further, the defendants contend that to the extent the defendants engaged in "puffery," this type of exaggeration or hyperbole is not actionable. They maintain that they did not guarantee the results of a treatment or procedure, set forth misleading statistics or success rates, or omit disclosing the risks of a medical procedure.

In addition, defendants argue that in order to support a claim under G.B.L. §349, the plaintiff must allege actual injury as a result of the alleged deceptive act. The claimed deception cannot itself be the only injury (*Bildstein v. MasterCard Int'l., Inc.*, 329 F. Supp.2d 410, 415 [S.D.N.Y. 2004]), and the actual injury must also be independent of another cause of action (*Spagnola v. Chubb Corp.*, 574 F.3d 64, 74 [2d Cir. 2009]).

As to negligent hiring and retention, the defendants argue that generally, where an employee is acting within the scope of his or her employment, the employer is liable for the employee's negligence under a theory of respondeat superior and the plaintiff may not proceed with a cause of action to recover damages for negligent hiring and retention.

Lastly, the defendants argue that punitive damages are not warranted, and that Counts III and IV of the complaint, alleging malpractice, should be dismissed due to plaintiff's failure to timely file a Certificate of Merit.

In opposition, plaintiff maintains that misrepresentations made to a medical service provider (such as Dr. Do) who subsequently transmits those misrepresentations to patients, for the patient's consideration of said misrepresentations, is sufficient to sustain a claim under GBL

§ 349, although the party to whom the misrepresentation was initially made (i.e., a medical service provider or hospital) would not be a "consumer" under the statute. Plaintiff thus contends that the conduct of defendants MOFS and Bodey in making said misrepresentations on its website, and to Dr. Do and other dentists in the NYC area, which misrepresentations had "a broader impact on consumers at large" was indeed consumer-oriented. Plaintiff maintains that cumulative effect of the MOFS name, the MOFS website, and misrepresentations by defendant Bodey to Dr. Do and to other dentists in and around New York City implied that MOFS provided qualified oral surgeons, whereas in fact these advertisements were false and misleading. These representations were not puffery, plaintiff argues, but were specific and testable, and within the realm of statements that can be proven true or false.

In the context of a motion to dismiss the complaint, the Court must "accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88, 638 N.E.2d 511, 614 N.Y.S.2d 972 [1994]). "It is well established that affidavits and other evidentiary materials are admissible to support a motion to dismiss pursuant to CPLR 3211 (a) (7) . . . , and it is equally well established that such affidavits and materials will warrant dismissal under that provision if they establish conclusively that [the] plaintiff has no cause of action" (*Jeanty v State of New York*, 175 AD3d 1073, 1074, 107 N.Y.S.3d 799 [4th Dept 2019], *lv denied* 34 NY3d 912 [2020] [internal quotation marks omitted]).

Specifically, with respect to GBL § 349, "[a] plaintiff must allege that: (1) the defendant's conduct was consumer-oriented; (2) the defendant's act or practice was deceptive or misleading in a material way; and (3) the plaintiff suffered an injury as a result of the

deception…Thus, to avoid dismissal, plaintiffs must adequately plead each of these elements." (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Co.*, 37 N.Y.3d 169, 176, 150 N.Y.S.3d 79, 84, 171 N.E.3d 1192 [2021] [internal citations omitted].)

As a threshold matter, it is noted that defendants do not argue that the consumer-oriented claims are barred because they arise in the context of a dental malpractice claim. The Court of Appeals definitively resolved this issue in *Karlin v. IVF Am., Inc.* (93 N.Y.2d 282, 712 N.E.2d 662, 690 N.Y.S.2d 495 [1999].) In *Karlin*, the plaintiffs alleged that the defendants, who provided in vitro fertilization treatments, engaged in fraudulent and misleading conduct by disseminating false success rates and misrepresenting health risks associated with IVF. The complaint included a claim for medical malpractice based on lack of informed consent, as well as deceptive business practice claims under Gen. Bus. Law §§ 349 and 350. The Second Department dismissed the consumer fraud claims, finding that extending such claims to the providers of medical services would lead to a drastic change in basic tort. The Court of Appeals reversed, finding that consumer fraud claims were independent of a claim of lack of informed consent, and in a proper case may exist along with or without a claim of lack of informed consent. The Court held:

> "[T]he interests at stake in an action under the General Business Law are distinctly different from the interests involved in a suit for professional malpractice. Thus, while physicians providing information to their patients in the course of medical treatment may be afforded the benefits of Public Health Law § 2805-d, when they choose to reach out to the consuming public at large in order to promote business--like clothing retailers, automobile dealers and wedding singers who engage in such conduct--they subject themselves to the standards of an honest marketplace secured by General Business Law §§ 349 and 350." (*Karlin v. IVF Am., Inc.*, 93 N.Y.2d 282, 294, 712 N.E.2d 662, 668, 690 N.Y.S.2d 495, 501[1999].)

In view of *Karlin*, defendants do not and cannot justly argue that the application of GBL § 349 is barred by the fact that this action also seeks damages for dental malpractice. However,

defendants do argue that the allegations in the complaint would "require this Court to expand the scope of G.B.L. §349 to apply to non-disclosure of largely irrelevant information in connection with the rendition of dental services, thereby supplanting P.H.L. § 2805(d) and undermining the New York State legislature's clear intent." This action however, does not turn on whether a cause of action for lack of informed consent could be predicated on the failure of Dr. Wilson to reveal that he was merely a general dentist with less than two years of experience. Rather, wholly independent of any theoretical claim which might be based on lack of informed consent, the issue presented is whether plaintiff has sufficiently alleged that the defendant engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice. (*See Orlander v. Staples, Inc.*, 802 F.3d 289, 300 [2d Cir. 2015].)

Defendants argue that their conduct was not "consumer-oriented" because plaintiff does not allege that she viewed or was even aware of the website upon which her dentist allegedly relied in referring her to MOFS. A similar claim was rejected in *Icahn Sch. of Med. at Mt. Sinai v. Health Care Serv. Corp.* (234 F. Supp. 3d 580, 586-587 [SDNY 2017].) In that case, a hospital alleged that defendant misrepresented the amount it would pay to the hospital before treatment, and that this information was relayed to the patients during pretreatment consultations so that patients could determine whether to proceed with treatment. Because the consumer ultimately relied upon the information, the court found that consumer-oriented conduct was sufficiently pleaded. (*See also, Karlin, supra*, 93 N.Y.2d at 292-93 [holding that plaintiffs had stated a claim under GBL § 349 where defendants made misrepresentations to patients and others, "including physicians who refer patients to the IVF America programs."]) Here, similarly,

it is alleged that Dr. Do, the plaintiff's dentist, saw and relied upon the defendants' allegedly false representations in referring the plaintiff for treatment to the defendants.

Defendants argue that a general dentist may perform tooth extractions, and that in essence defendant Dr. Wilson was fully licensed as a general dentist to remove the impacted wisdom teeth, and no further degree was required. Whether or not this is true, the allegations of the plaintiff are sufficient to plead that defendant MOFS, by cleverly crafting its website, clearly implied that MOFS only provides highly qualified oral and maxillofacial surgeons to perform its surgical procedures, including extraction of teeth. Beyond mere puffery, defendants advertised that defendant MOFS was a "full scope practice," that it was comprised of "oral and maxillofacial surgeons" who were skilled in complex procedures, including "wisdom tooth removal," and these professionals had sufficient professional "expertise" to qualify "all of [MOFS] doctors … to teach in an academic setting."

A reasonable consumer would readily understand these advertising claims as meaning that the defendants were oral surgeons as commonly understood, i.e., that they were oral and maxillofacial surgeon who has completed at least an additional four years of training after dental school, primarily in a hospital-based surgical environment, as alleged in the complaint.[1] These statements as pleaded satisfy the "objective definition of deceptive acts and practices" which requires that the offending representations or omissions be "limited to those likely to mislead a

[1] While the defendants argue that a general dentist may perform oral surgery, they do not seriously contest this definition of an "oral surgeon" which is found in the complaint. To the extent that the defendants argue that the plaintiff is relying on a "personal definition" of an oral surgeon, they do not present any evidentiary or legal materials to contest the accuracy of the plaintiff's allegations that oral surgeons complete additional training in order to practice oral surgery, beyond the training required for general dentistry. In other words, they do not contest the common understanding as alleged in the complaint that an oral surgeon has an advanced degree beyond that of an ordinary dentist, and that these oral surgeons are more qualified to perform complicated tooth extractions than general dentists.

reasonable consumer acting reasonably under the circumstances." (*Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 26, 647 N.E.2d 741, 744, 623 N.Y.S.2d 529, 532 [1995]; see also, *Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d 330, 344, 725 N.E.2d 598, 704 N.Y.S.2d 177 [1999] [conduct falls within statute when it is "likely to mislead a reasonable consumer acting reasonably under the circumstances"].)

Defendants argue that the plaintiff has not sufficiently pleaded an injury. They argue that the actual injury must be independent of another cause of action, citing *Bildstein v. MasterCard Int'l., Inc.* (329 F. Supp.2d 410, 415 [S.D.N.Y. 2004]) and *Spagnola v. Chubb Corp.* (574 F.3d 64, 74 [2d Cir. 2009]). However, *Bildstein* merely states that "the claimed deception cannot itself be the only injury." (*Bildstein v. MasterCard Int'l Inc.*, 329 F. Supp. 2d 410, 415 [2004], citing (*Small v Lorillard Tobacco Co.*, 94 N.Y.2d 43, 56, 720 N.E.2d 892, 698 N.Y.S.2d 615 [1999] ["[A]n act of deception, entirely independent or separate from any injury, is not sufficient to state a cause of action under a theory of fraudulent concealment" [id. at 57].) Similarly, *Spagnola* does not state that the actual injury must be independent of any other cause of action, but rather, that case holds that a monetary sufficient to satisfy the requirements of § 349 must be independent of a loss caused by the alleged breach of contract. (*Spagnola v. Chubb Corp.*, 574 F.3d 64, 74 [2009].) Accordingly, the alleged actual injuries are sufficiently pleaded.

The defendants argue that punitive damages are not warranted. Plaintiff seeks punitive damages only in connection with her claims against defendants MOFS and Janet Bodey for violations of GBL §349. "An award of punitive damages is warranted where the conduct of the party being held liable 'evidences a high degree of moral culpability, or where the conduct is so flagrant as to transcend mere carelessness, or where the conduct constitutes willful or wanton negligence or recklessness' " (*Pellegrini v Richmond County Ambulance Serv., Inc.*, 48 AD3d

436, 437, 851 NYS2d 268 [2d Dept. 2008], quoting *Buckholz v Maple Garden Apts.*, LLC, 38 AD3d 584, 585, 832 NYS2d 255 [2d Dept. 2007]). On a motion to dismiss under CPLR 3211 (a) (7) motion to dismiss, all of the plaintiff's allegations must be accepted as true. At the pleading stage herein, the alleged conduct (deceiving the public into submitted to substandard dental care) may be considered to be " 'so flagrant as to transcend mere carelessness' " (*Pellegrini v Richmond County Ambulance Serv., Inc.*, 48 AD3d at 437, quoting *Buckholz v Maple Garden Apts., LLC*, 38 AD3d at 585). Consequently, the plaintiff's claim for punitive damages should not be dismissed.

As defendants argue, the claims for negligent hiring and retention are not sufficiently pleaded, as the defendants are liable under respondeat superior. The defendants by their argument concede that defendant Wilson was acting within the scope of his authority.

Lastly, the Court notes that as defendant Body is alleged to be a principal of MOFS. The complaint alleges that defendant Body "personally represented herself, directly to individual dental offices and dentists in and around New York City, including to Dr. Do, that defendant MOFS was an office consisting of highly qualified oral and maxillofacial surgeons, specializing in oral and maxillofacial surgery." At this juncture, these allegations are sufficient to plead a cause of action against defendant Body directly.

As to the malpractice claims, plaintiff timely filed a Certificate of Merit together with the Verified Complaint, pursuant to CPLR §3012-A.

Accordingly, it is

ORDERED that the motion is granted only to the extent of dismissing Count 5 (negligent hiring against defendant MOFS) and Count 6 (negligent supervision against defendant MOFS), and it is further

ORDERED that the defendants are directed to interpose an answer to the complaint within 20 days after service of a copy of this Order with Notice of Entry thereon.

This is the Decision and Order of the Court.

Dated: 12/15/2021

Doris M. Gonzalez, J.S.C.