

**Fleischer v Zhang**

2023 NY Slip Op 32984(U)

August 28, 2023

Supreme Court, New York County

Docket Number: Index No. 100163/2022

Judge: Kathy J. King

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHY J. KING PART 06

Justice

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GEORGETTE FLEISCHER,
Plaintiff,

INDEX NO. 100163/2022

MOTION DATE 05/12/2022

MOTION SEQ. NO. 002

- v -

JOHN J. ZHANG, M.D., ZITAO LIU, M.D., ZHANG
MEDICAL, P.C. D/B/A NEW HOPE FERTILITY CENTER,
NEW HOPE FERTILITY CENTER, INC., ZHUO LU, PH.D.,
HUI LIU, PH.D, DARWIN LIFE, INC., and DOES 1-10,

DECISION + ORDER ON
MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 5, 11, 12, 13, 14, 15,
16, 17, 18, 19, 21

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, defendants John J. Zang, M.D., Zitao Liu, M.D., Zhang
Medical, P.C. d/b/a New Hope Fertility Center, New Hope Fertility Center, Inc., Darwin Life,
Inc., Zhuo Liu, Ph.D., Hui Liu, Ph.D. and Darwin Life, Inc. ("Defendants") seek dismissal of the
plaintiff's second, third, fourth, fifth, seventh, eighth, ninth, tenth, eleventh and twelfth causes of
action of plaintiff's complaint, pursuant to CPLR § 3211(a)(7); and pursuant to CPLR §
3211(a)(5), dismissing plaintiff's third and seventh causes of action as time-barred by the statute
of limitations applicable to intentional tort actions; and dismissing plaintiff's complaint against
Darwin Life, Inc., as an improper party to this action. Pro se plaintiff, Georgette Fleischer,
opposes the motion.

Plaintiff commenced this action setting forth twelve causes of action, to wit: medical
malpractice, ordinary negligence, intentional infliction of emotional distress, concealment,
intentional misrepresentation, lack of informed consent, battery, breach of contract, implied

covenant of good faith and fair dealing, restitution and unjust enrichment, violation of the Deceptive Practices Act, fraud and fraudulent concealment.

Plaintiff's complaint alleges, *inter alia*, that while undergoing an in vitro fertilization procedure in an unsuccessful attempt to conceive a second child, defendants committed medical malpractice by predisposing her to a greater risk for blood clots and hypertension. Plaintiff further claims that she suffered psychological and emotional distress as a result of the failed in vitro fertilization procedure, because she was not told that the donor sperm used was not viable, and that she suffered financial damages associated with the procedure. Plaintiff further alleges that defendants deprived her of the opportunity to provide her daughter with a genetically related sibling.

### **DISCUSSION**

In considering a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7), a court “must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Lubonty v U.S. Bank N.A.*, 159 AD3d 962, 963 [2d Dept 2018], quoting *Wells Fargo Bank N.A. v E & G Dev. Corp.*, 138 AD3d 986 [2d Dept 2016] [internal quotation marks omitted]; *see also TMCC, Inc. v Jennifer Convertibles, Inc.*, 176 AD3d 1135 [2d Dept 2019]).

### **SECOND CAUSE OF ACTION – ORDINARY NEGLIGENCE**

Plaintiff's second cause of action alleges, in sum and substance, that defendants breached their duty to plaintiff “to exercise reasonable care in their treatment of Plaintiff...and that [the] duty...arises out of the common doctor-patient relationship and/or the common law duty of reasonable care...” The allegations are nearly identical to those contained in plaintiff's first

cause of action for medical malpractice, which also claims that defendants' duty to plaintiff arises out of the "common law doctor-patient relationship."

"The distinction between ordinary negligence [i.e., duty, breach, proximate cause and damages] and malpractice turns on whether the acts or omissions complained of involve a matter of medical science or art requiring special skills not ordinarily possessed by lay persons or whether the conduct complained of can instead be assessed on the basis of the common everyday experience of the trier of the facts" (*Jeter v New York Presbyt. Hosp.*, 172 AD3d 1338, 1339-1340 [2d Dept 2019], quoting *Miller v Albany Med. Ctr. Hosp.*, 95 AD2d 977 [3d Dept 1983] [internal quotation marks omitted]).

Thus, a cause of action will sound in medical malpractice "when the challenged conduct constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician" (172 AD3d at 1339-1340, quoting *Weiner v Lenox Hill Hosp.*, 88 NY2d 784 [1996] [internal quotation marks omitted]).

Here, plaintiff's first cause of action based on medical malpractice and her second cause of action based on ordinary negligence are nearly identical, allegedly arising from the doctor-patient relationship, involving issues of medical science requiring special skills not ordinarily possessed by lay persons. Thus, plaintiff's second cause of action for ordinary negligence must be dismissed as duplicative of the medical malpractice claim, and must be dismissed.

### **THIRD CAUSE OF ACTION – INTENTIONAL INFLECTION OF EMOTIONAL DISTRESS**

Defendants seek dismissal of plaintiff's third cause of action based on CPLR § 3211(a)(7) for failure to state a cause of action. Further, defendants seek dismissal of this cause of action with prejudice, pursuant to CPLR § 3211(a)(5), asserting that it is time-barred by the applicable statute of limitations for intentional torts, which is one year. (*see* CPLR § 215(3)).

The essential elements of a claim for intentional infliction of emotional distress are: 1) extreme and outrageous conduct; 2) an intent to cause or disregard of a substantial probability of causing severe emotional distress; 3) a causal connection between the conduct and the injury; and 4) the resultant severe emotional distress (*see Lau v S&M Enters.*, 72 AD3d 497 [1st Dept 2010]).

“The existence of extreme and outrageous conduct is also a necessary element for a claim of negligent infliction of emotional distress” (*id.* at 498).

In the case at bar, the complaint does not allege the necessary elements of a cause of action for intentional infliction of emotional distress, as it does not allege defendants’ extreme and outrageous conduct, except in the most conclusory terms. Significantly, the plaintiff’s allegations are speculative, and include “the potential crime of having experimented with Plaintiff’s donor sperm and/or donor eggs... and that the defendants knowingly, willfully and maliciously “shattered Plaintiff’s deepest desire, to give her little daughter a full genetic sibling...” The plaintiff does not allege that her physical safety was at risk or that she was caused to fear for it, and she does not clearly allege the extreme and outrageous conduct by the defendants. Viewing the allegations of the complaint in a light most favorable to the plaintiff, the conduct alleged was not so egregious as to sustain the cause of action for intentional infliction of emotional distress (*see Melendez v City of New York*, 171 AD3d 566[1<sup>st</sup> Dept 2019]; *Misek-Falkoff v International Bus. Machs. Corp.*, 162 AD2d 211 [1<sup>st</sup> Dept 1990]). As such, plaintiff’s third cause of action must be dismissed, pursuant to CPLR § 3211(a)(7), for failure to state a cause of action for intentional infliction of emotional distress.

In any event, this cause of action is time-barred, as a one-year statute of limitations applies for this intentional tort (*see CPLR § 215(3); Misek-Falkoff v International Bus. Machs. Corp.*, 162 AD2d 211). According to the complaint, the last date of medical care and treatment

took place on January 2, 2021, and the claim was therefore required to have been asserted in the complaint no later than January 3, 2022<sup>1</sup>. Plaintiff commenced the instant action on February 15, 2022, more than one month after the applicable statute of limitations period ended. Thus, the claim is time-barred, having been commenced beyond the expiration of the applicable statute of limitations period, and is dismissed with prejudice, pursuant to CPLR § 3211(a)(5).<sup>2</sup>

**FOURTH CAUSE OF ACTION (FRAUDULENT CONCEALMENT);  
FIFTH CAUSE OF ACTION (INTENTIONAL MISREPRESENTATION); AND  
TWELFTH CAUSE OF ACTION (FRAUD AND FRAUDULENT INDUCEMENT)**

Plaintiff's fourth, fifth and twelfth causes of action must be dismissed, pursuant to CPLR § 3211(a)(7). As an initial matter, plaintiff has failed to plead with particularity, the necessary elements of a fraud cause of action, which are subject to the pleading requirements of CPLR § 3016(b). The essential elements of a cause of action sounding in fraud are a misrepresentation or a material omission of fact which was false and known to be false by the defendant, made for the purpose of inducing the other party to rely upon it; justifiable reliance of the other party on the misrepresentation or material omission; and injury (*Nissan Motor Acceptance Corp. v Scialpi*, 94 AD3d 1067 [2d Dept 2012]). The complaint also fails to particularize the alleged fraud attributable to each defendant as required by CPLR § 3016(b).

Further, plaintiff has failed to allege and prove a cause of action for common-law fraud that occurred "separately from and subsequent to the malpractice" and that the fraud gave "rise to damages separate and distinct from those flowing from the malpractice" (*Abbondandolo v Hitzig*, 282 AD2d 224, 225 [1st Dept 2001]). In *Simcuski v Saeli*, 44 NY2d 442, 451 (1978), the

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<sup>1</sup> General Construction Law § 25-a (1) provides that "[w]hen any period of time, computed from a certain day...ends on a Saturday, Sunday or public holiday, such act may be done on the next succeeding business day... Since the statute of limitations period ended on Sunday, January 2, 2022, plaintiff was required to file the complaint the next day, January 3, 2022, in order for it to be deemed timely.

<sup>2</sup> A dismissal with prejudice applies to statute of limitations since it is considered a dismissal on the merits of the claim (see *Matter of Dentsply Sirona, Inc. Shareholders Litig.*, 191 AD3d 404 [1<sup>st</sup> Dept 2021]).

Court of Appeals held that the necessary elements of a fraud cause of action in the context of a medical malpractice action are: “knowledge on the part of the physician of the fact of his malpractice and of his patient’s injury in consequence thereof, coupled with a subsequent intentional, material misrepresentation by him to his patient known by him to be false at the time it was made, and on which the patient relied to his damage...” (*see also Atton v Bier*, 12 AD3d 240, 241 [1<sup>st</sup> Dept 2004]). A fraud cause of action will not be permitted where the fraud claim “is based upon the same underlying allegations as the malpractice claim and seek essentially the same relief,” and is merely “duplicative” of the malpractice causes of action (12 AD3d at 242). Moreover, plaintiff’s fourth cause of action for concealment must be dismissed, since a physician’s concealment of alleged malpractice is insufficient to sustain a separate cause of action for common-law fraud (*see Spinosa v Weinstein*, 168 AD2d 32 [2d Dept 1991]).

Here, the gravamen of the malpractice claims appears to be based on the defendants’ failure to successfully implant a viable embryo to allow her to have a second child. The fraud claims and the alleged malpractice are intertwined, and are not separate and distinct from one another, and plaintiff has failed to set forth the necessary elements for a fraud cause of action in conjunction with a malpractice claim. In addition, the alleged injuries arising from the fraud and malpractice claims are the same and not separate and distinct. Therefore, since plaintiff has failed to show that the alleged fraud was independent of the malpractice, the fourth, fifth and twelfth causes of action sounding in fraud must be dismissed.

#### **SEVENTH CAUSE OF ACTION – BATTERY**

Defendants correctly argue that this intentional tort is barred by the one-year statute of limitations, pursuant to CPLR § 215(3). The battery cause of action should have been brought no later than January 3, 2022, and therefore the claim is untimely based on plaintiff’s

commencement of this action on February 15, 2022, more than one month after the limitations period expired (*see Messina v Alan Matarasso, M.D., F.A.C.S., P.C.*, 284 AD2d 32 [1<sup>st</sup> Dept 2001]). Thus, this cause of action is dismissed with prejudice, pursuant to CPLR § 3211(a)(5).

As to the merits of the battery claim, to recover damages, “a plaintiff must prove that there was bodily contact, made with intent, and offensive in nature” (*see Thaw v North Shore Univ. Hosp.*, 129 AD3d 937, 939 [2d Dept 2015]), quoting *Cotter v Summit Sec. Services, Inc.*, 14 AD3d 475 [2d Dept 2005] [internal quotation marks omitted]).

Plaintiff claims defendants “forced” her to undergo unnecessary procedures without her consent. Defendants submit plaintiff’s medical records showing that she consented to the procedures, and in any event, this claim is duplicative of her sixth cause of action, which defendants are not seeking to dismiss, alleging lack of informed consent. Based on the foregoing, plaintiff’s seventh cause of action must be dismissed.

**EIGHTH CAUSE OF ACTION - BREACH OF CONTRACT; AND NINTH CAUSE OF ACTION- BREACH OF IMPLIED COVENANT OF GOOD AITH AND FAIR DEALING**

It is well-established that “where a cause of action lies in medical malpractice, a breach of contract action is legally redundant, and may not be pursued unless plaintiff can prove that, within the context of medical treatment, defendant expressed a specific promise to effect a cure or to accomplish some definite result” (*see Scalisi v New York Univ. Med. Ctr.*, 24 AD3d 145, 147 [1st Dept 2005]).

Plaintiff’s eighth cause of action alleges “[t]he writings prepared and produced by Defendants for Plaintiff’s signatures are contracts by reason of instinct with an obligation.” Plaintiff does not allege what “writings” were relied upon. It goes on to allege that “Defendants’ obligations on the contracts were, in consideration of Plaintiff’s payments, to implement a plan to give Plaintiff a first child, and then a second child genetically related to the first.” Plaintiff



claims that defendants “tendered the beginning of their performance by retrieving 23 eggs from the donor...thereby promising to render complete performance of Defendants’ obligations on the parties’ contracts.” Plaintiff alleges she has performed her obligation by paying the defendants approximately \$90,000.

Even assuming *arguendo* that plaintiff’s eighth cause of action were not redundant of her malpractice claim, she has failed to plead that defendants expressed a specific promise to accomplish a definite result. In conclusory fashion, plaintiff alleges that defendants’ obligations under the contracts were to “implement a plan to give Plaintiff a first child, and then a second child genetically related to the first.” However, this allegation does not express a specific promise by the defendants, but rather plaintiff’s speculative assertion of what she believes defendants’ obligations were under a purported contract. As such, plaintiff’s eighth cause of action must be dismissed, as it is “legally redundant” to her medical malpractice claim (*see Scalisi v New York Univ. Med. Ctr.*, 24 AD3d at 147).

#### **TENTH CAUSE OF ACTION - UNJUST ENRICHMENT**

To state a claim for unjust enrichment, a plaintiff must show “that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered” (*Nasca v Greene*, 216 AD3d 648, 650 [2d Dept 2023], quoting *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173 [2011] [internal quotation marks omitted]). A claim will not be supported unless there is a connection or relationship between the parties that could have caused reliance or inducement on the plaintiff’s part (16 NY3d at 182-183). “The theory of unjust enrichment lies as a quasi-contract claim” (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 [2005]), which “is an obligation

imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned” (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]).

The complaint fails to indicate that there was a relationship between the plaintiff and the defendants other than as a patient, who was given medical care and was billed for services rendered by the defendants. In fact, there are virtually no facts alleged under this cause of action, except for a conclusory statement that “Defendants’ conduct as alleged herein has unjustly enriched Defendants at Plaintiff’s expense.” Thus, the complaint fails to allege the essential elements of a cause of action for unjust enrichment, and the claim must be dismissed.

**ELEVENTH CAUSE OF ACTION - VIOLATION OF DECEPTIVE PRACTICES**  
**GBL § 349**

The requisite elements of a cause of action for violation of GBL § 349 are: “(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” (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co.*, 37 NY3d 169, 176 [2021]). A plaintiff bringing a claim under GBL § 349 “must demonstrate an impact on consumers at large – something that a physician’s treatment of an individual patient typically does not have...” (*Karlin v IVF America, Inc.*, 93 NY2d 282, 294 [1999]). Further, “an act or practice is consumer-oriented when it has a broader impact on consumers at large” (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co., Inc.* 37 NY3d at 177, quoting *Oswego Laborers’ Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20 [1995]).

The Court finds that plaintiff’s cause of action based on a violation of GBL § 349, is palpably insufficient as a matter of law. The complaint alleges, among other things, that “defendants’ acts in misleading and deceiving Plaintiff and other members of the public about

their donor recipient and in vitro fertilization programs and their success rates are material deceptions in that they were relied upon by others...” and “was relied upon by Plaintiff and other persons similarly situated, to their detriment.” Plaintiff’s complaint fails to allege or demonstrate how consumers at large, and not just the plaintiff, were impacted by defendants’ alleged material misrepresentations and false statements, or how consumers, other than the plaintiff, were deceptively lured into medical treatment by defendants. As such, plaintiff’s cause of action based on GBL § 349 must be dismissed.

### **PLAINTIFF’S CLAIMS FOR PUNITIVE DAMAGES**

In a medical malpractice action, punitive damages are allowed only where there is “aggravation or outrage, such as spite or malice, or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of other that the conduct may be called wilful or wanton” (*Dupree v Giugliano*, 20 NY3d 921, 924 [2012], quoting *Prozeralik v Capital Cities Communications*, 82 NY2d 466 [1993] [internal quotation marks omitted]). “The standard for an award of punitive damages is that a defendant manifest evil or malicious conduct beyond any breach of professional duty” (20 NY3d at 924). Here, the allegations constituting medical malpractice against the defendants in the complaint do not rise to the level of “manifest evil” or “malicious conduct”, and therefore plaintiff’s punitive damages claims are dismissed (id.).

### **DEFENDANT’S MOTION FOR DISMISSAL OF THE COMPLAINT AS TO DARWIN LIFE, INC.**

Defendant Darwin Life, Inc. (“Darwin”), seeks dismissal of the complaint, arguing that it is not a proper party to this action. In support thereof, it submits the affidavit of Dr. John Zhang, a part-owner, who attests that Darwin is a research facility, and did not provide any treatment to the plaintiff. However, a review of Darwin’s verified answer reveals that Darwin did not assert

an affirmative defense that it is not a proper party to the action. Pursuant to CPLR § 3018(b), “[a] party shall plead all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading...” In failing to raise the defense that it is not a proper party in a timely pre-answer motion to dismiss the complaint, or to assert such defense in its answer, Darwin has waived the defense (see Costa v Finke, 162 AD2d 936 [3d Dept 1990]). Therefore, that branch of defendant Darwin’s motion seeking dismissal as an improper party is denied.

Accordingly, it is hereby

**ORDERED**, that defendants’ motion is granted, to the extent that plaintiff’s second, third, fourth, fifth, seventh, eighth, ninth, tenth, eleventh and twelfth causes of action are dismissed, pursuant to CPLR § 3211(a)(7); and it is further

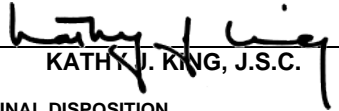
**ORDERED**, that plaintiff’s third and seventh causes of action are barred by the one-year statute of limitations applicable to intentional torts, as set forth in CPLR § 215(3), and are dismissed with prejudice, pursuant to CPLR § 3211(a)(5); and it is further

**ORDERED**, that plaintiff’s claims for punitive damages are dismissed; and it is further

**ORDERED**, that the branch of defendants’ motion seeking dismissal of the plaintiff’s

complaint as to defendant Darwin Life, Inc. is denied.

This constitutes the decision and order of the Court.

8/28/2023 DATE	 KATHY J. KING, J.S.C.			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>