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New York Law Journal

March 10, 2004, Wednesday

SECTION: DECISION OF INTEREST; Vol. 231; Pg. 19

LENGTH: 2198 words

HEADLINE: Decision of Interest;
New York Supreme Court, New York County;
Deceptive Practices, False Advertising Claims Stated in **Lasik** Eye Surgery Malpractice Action

BODY:
Justice Carey

Gabbay v. Mandel - Motion by defendants Eric R. Mandel, M.D., Eric R. Mandel, M.D., P.C., and New York **Lasik** Vision Correction to dismiss the sixth and seventh causes of action pursuant to CPLR 3211[a][7], and cross motion by the plaintiff to compel certain discovery.

Facts & Procedural Posture

The plaintiff commenced the instant action against the defendants to recover damages for, among other things, medical malpractice based upon the defendants' alleged negligence in determining to perform and performing **Lasik** surgery on the plaintiff's eyes. The plaintiff also asserted claims for violations of General Business Law §§[349 and 350, which create private rights to recover damages for deceptive business practices and false advertising.

With respect to the claims premised on General Business Law §§[349 and 350, the plaintiff alleged:

81. That at all times pertinent hereto, the defendants employed extensive public marketing and public advertising to promote their **LASIK SURGERY** services, all of which were aimed at the general public.
82. That the aforementioned advertising displayed and/or used one or more of the corporeal defendants' names and/or images, and included one or more of the aforementioned business names and/or business phone numbers of the defendants.
83. That the aforementioned advertising and marketing was deceptive and misleading in material ways.
84. That the aforementioned advertising and marketing was false and deceptive in material ways, and same was known to be false and deceptive by defendants, and/or each of them.
85. That the aforementioned advertising contained misrepresentations that had the effect of deceiving and misleading members of the general public, more particularly, the plaintiff.
86. That defendants' consumer oriented conduct was deceptive and misleading in a material way, in violation of §§[349 and 350 of the General Business Law .
87. That as a result of the foregoing, the plaintiff has [sustained] damage[s] .

No public advertisements or marketing schemes were particularized in the plaintiff's original bills of particulars. n1

Defendants Eric R. Mandel, M.D., Eric R. Mandel, M.D., P.C., and New York **Lasik** Vision Correction move to dismiss, pursuant to CPLR 3211[a][7], the plaintiff's seventh cause of action which is to recover damages for violations of General Business Law §§[349 and 350. n2 The moving defendants essentially maintain that dismissal of this cause of action is warranted because the complaint failed to state a cause of action with respect to General Business Law §§[349 or 350, or, alternatively, because it failed to satisfy the pleading requirements of CPLR 3013 ["Particularity of statements generally"], and CPLR 3016[b] ["Particularity [of pleading] in specific actions; Fraud or mistake"]. Regarding their argument concerning CPLR 3013, these defendants contend that the plaintiff failed to allege that the moving defendants' medical practice and/or advertising had a broad impact on consumers in New York. With respect to their argument concerning CPLR 3016[b], the moving defendants maintain that the detailed pleading requirement of this rule is applicable to claims under General Business Law §§[349 and 350 because these statutes relate to deceptive and misleading conduct.

In opposition, the plaintiff argues that his seventh cause of action asserts claims under both General Business Law §§[349 and 350. The plaintiff also argues that the special pleading requirement of CPLR 3016[b] is inapplicable to the aforementioned sections of the General Business Law.

In support of his opposition, the plaintiff submits his own affidavit in which he averred, among other things, that he recalled hearing radio advertisements on WCBS radio in which Dr. Mandel boasted of the ease, safety and success rate of **Lasik** surgery. The plaintiff also averred that he recalled seeing printed advertisements of Dr. Mandel regarding **Lasik** surgery in newspapers and/or magazines, and brochures concerning the same in his office. The plaintiff stated that a large jar, filled with prescription eye glasses, was stationed in the reception area of the moving defendants' office, which gave the plaintiff the impression that he could "be among those people who could give their glasses away after **Lasik** [surgery]." The plaintiff also stated that a videotape touting the ease, safety and effectiveness of **Lasik** surgery was played in the reception area of the moving defendants' office.

In addition to his opposition to the moving defendants' motion, the plaintiff cross-moves to compel the defendants to provide outstanding discovery requests and to proceed with the required depositions.

Analysis

Initially, the court will address the moving defendants' argument that the complaint failed to state causes of action under General Business Law §§[349 and 350. "In considering a motion to dismiss, a court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts [McGill v. Parker, 179 AD2d 98, 105 [1st Dept. 1992]; see also Cron v. Hargro Fabrics, Inc., 91 NY2d 362, 366 [1998]; Morone v. Morone, 50 NY2d 481, 484 [1980]]. The court is not authorized to assess the merits of the complaint or any of its factual allegations, but only to determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action [see e.g. Guggenheimer v. Ginzburg, 43 NY2d 268, 275 [1977]]. However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration [Caniglia v. Chicago Tribune-New York News Syndicate, Inc., 204 AD2d 233 [1st Dept. 1994]]" [Skillgames, LLC v. Brody, 1 AD3d 247 [1st Dept. 2003]].

To state a cause of action under General Business Law §[349, which proscribes deceptive business practices, the plaintiff must allege that: [1] a defendant was engaged in "consumer oriented" conduct, [2] the conduct was deceptive or misleading in a material way, and [3]

the plaintiff was injured because of that conduct [see e.g. *Gaidon v. Guardian Life Ins. Co.*, 94 NY2d 330, 344 [1999]; *Drizin v. Sprint Corp.*, ___AD2d___, 2004 NY Slip Op 00206 [Jan. 15, 2004; 1st Dept.]; *Andre Strishak & Assoc., P.C. v. Hewlett Packard Co.*, 300 AD2d 608 [2d Dept. 2002]]. To state a cause of action under General Business Law §[350, which prohibits false advertising, the plaintiff must allege that an advertisement: [1] had an impact on consumers at large, [2] was deceptive or misleading in a material way, and [3] resulted in injury to the plaintiff [see e.g. *Andre Strishak & Assoc., P.C. v. Hewlett Packard Co.*, supra]. In the case at bar, the plaintiff alleged that the moving defendants were engaged in consumer-related activity that effected consumers at large, utilized tactics that were deceptive and misleading in material respects, disseminated advertising, through various mediums, that was false in material respects, and injury resulting from the moving defendants' business practices and advertising. Thus, the plaintiff's seventh cause of action states claims under both General Business Law §[§[349 and 350 [see e.g. *Karlin v. IVF America, Inc.*, 93 NY2d 282 [1999]; cf. *Soule v. Norton*, 299 AD2d 827 [4th Dept. 2002]].

The moving defendants' contention that the seventh cause of action must be dismissed because it failed to comport with the special pleading requirement of CPLR 3016[b] is without merit. That rule, which requires detailed pleading of the wrong in actions based on misrepresentation, fraud, mistake, wilful default, breach of trust, or undue influence, does not apply to claims premised upon violations of General Business Law §[§[349 and 350 [see *Joannou v. Blue Ridge Ins. Co.*, 289 AD2d 531 [2d Dept. 2001]].

With respect to the moving defendants' argument that the plaintiff's claims under General Business Law §[§[349 and 350 must be dismissed because the plaintiff failed to satisfy the pleading requirements of CPLR 3013, that rule provides that "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action ." Thus, a complaint passes the hurdle imposed by CPLR 3013 if the allegations in the complaint give notice to the defendant of the plaintiff's claims [see *Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C3013:2*; see also e.g. *Foley v. D'Agostino*, 21 AD2d 60 [1st Dept. 1964]]. n3

Here, the complaint, as supplemented by the supplemental bill of particulars and the plaintiff's affidavit, gave sufficient notice to the moving defendants of the nature of the plaintiff's claims under General Business Law §[§[349 and 350. Moreover, the contents of the advertisements broadcast over the radio which the plaintiff allegedly heard may be in the possession of the moving defendants [see 12 NYCRR 325- 1.16[f][subdivision of State administrative code provision requiring physicians to retain broadcasted copies of advertisements for a period of not less than one year following transmission of broadcast].

However, while sufficient notice of the nature of the plaintiff's claims under General Business Law §[§[349 and 350 may be gleaned from the documents in the record, sufficient notice of the time frame within which the plaintiff purportedly heard and saw advertisements of the moving defendants may not. The complaint, supplemental bill of particulars and the plaintiff's affidavit, are all silent on the issue of when, or during what time period, the plaintiff heard the radio advertisements and saw the printed advertisements. Therefore, in order to enable the moving defendants to prepare their defense, the court will order the plaintiff to provide a second supplemental bill of particulars specifying the time period during which the plaintiff heard and saw the broadcasted and printed advertisements [see generally *Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C3013:12*].

With regard to the cross motion of the plaintiff, a conference must be held to establish the status of required and requested discovery, and, thereat, a firm timetable will be set for disclosure of outstanding items. Therefore, as the court intends to address the plaintiff's requests at the conference, the cross motion is denied without prejudice to renew.

Conclusion

Based upon the foregoing, it is hereby

ORDERED that the motion of defendants Eric R. Mandel, M.D., Eric R. Mandel, M.D., P.C., and New York **Lasik** Vision Correction, is granted to the extent that the plaintiff, within thirty days of the service of this order with notice of entry upon counsel for the plaintiff, must file and serve a second supplemental bill of particulars specifying the time period during which the plaintiff heard and saw the broadcasted and printed advertisements, and the remainder of the motion is denied; and it is further,

ORDERED that the plaintiff's cross motion is denied without prejudice to renew; and it is further,

ORDERED that counsel for each of the parties are to appear before the court on March 5, 2004, at the New York County Courthouse, 111 Centre Street, Room 948, Part 40D, 9:30 am, for a compliance conference at which a firm timetable for disclosure of outstanding discovery items will be set.

n1 After the moving defendants made the instant motion, the plaintiff served a supplemental bill of particulars containing some specifics with regard to his claims under General Business Law §§349 and 350. The information particularized in the supplemental bill of particulars is consistent with the plaintiff's affidavit submitted in opposition to the motion.

n2 The moving defendants also sought dismissal of the plaintiff's claim for punitive damages pursuant to CPLR 3211[a][7]; however, this claim has been withdrawn pursuant to a stipulation.

n3 The complaint, to satisfy CPLR 3013, must also plead the material elements of the plaintiff's claims [see Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C3013:3]. As addressed above, the plaintiff alleged all of the material elements of claims under General Business Law §§349 and 350. n

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