SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS, PART 19
NASSAU COUNTY

LOUIS BELLERA, STEVEN BORITZ, MATTHEW CARSON, JOHN FARINA, JR., ROBERT GIORDANO, DAVID GOTTLIEB, SALVATORE GRACI, KENNETH GRIECO, JEFFREY HENDEL, JASON KALISHER, RITA KHABBAZA, ANTHONY LEMBO, BRIAN LEINECK, MICHAEL MILLER, GARRETT NENNER, DAVID PALADINO, DEAN PENNA, ROBERT RUBENSTEIN, JAMES SHIAVO, GREG SLAWINSKI and MATTHEW SOSNIK,

Plaintiff(s),

ORIGINAL RETURN DATE: 04/14/00
SUBMISSION DATE: 05/19/00
INDEX No.: 02724/00

-against-

SEYMOUR HANDLER, M.D., GARY HITZIG, M.D., JOHN SCHWINNING, M.D., HITZIG, HANDLER AND SCHWINNING, M.D., P.C. and HITZIG-SCHWINNING MEDICAL GROUP, LLC, as successor entity to HITZIG, HANDLER & SCHWINNING, M.D., P.C.,

MOTION SEQUENCE #1

Defendant(s).

The following papers read on this motion:

Notice of Motion/ Order to Show Cause..........	1-2
Answering Papers..............................	4-6
Reply...	8
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Plaintiffs' Brief.............................	7
Defendants' Brief.............................	3,9

Defendants move to enforce the September 15, 1999 order of Mr. Justice Sklar of this Supreme Court, New York County, in the matter of Abrams, et al v Hitzig, et al, Index No. 113806/97 (see defendant's Exhibit C) on the grounds that plaintiffs in this action are barred by the doctrines of collateral estoppel and the law of the case from bringing a single multi-party action and from making claim for common law fraud and/or punitive damages.

To the extent the enforcement of the September 15, 1999 order does not do so, defendants seek an order as follows: (1) pursuant to CPLR 603, severing the claims of the twenty-one separate plaintiffs

and directing plaintiff, Louis Bellera, to amend his complaint limiting his allegations to matters which involve only his claim/injuries; (2) dismissing the other twenty plaintiffs' claims with leave to replead under the terms of Mr. Justice Sklar's order without further extensions of time; (3) pursuant to CPLR 3211(a)(7), dismissing the cause of action (fourth) for common law fraud, the cause of action (sixth) for common law negligent misrepresentation, and the cause of action (seventh) for punitive damages; (4) pursuant to CPLR 3211(a)(5), dismissing the claims of plaintiffs, Rita Khabbaza ("Khabbaza") and Michael Miller ("Miller"), on the grounds of payment and release and the claims of plaintiffs, James Shiavo ("Shiavo") and Khabbaza, on the grounds the Statute of Limitations expired prior to the commencement of the New York County action[1]; and (5) pursuant to CPLR 3013 and 3024, dismissing the claims of the twenty-one plaintiffs with leave to replead under the terms and time contraints of Mr. Justice Sklar's September 15, 1999 order with any new complaints to specify the date or dates of the alleged treatment, the date or dates of the alleged malpractice along with the specific identity of which of the three physician defendants rendered treatment to each plaintiff.

This action with claims sounding in medical malpractice, fraud and breach of contract arises out of a series of hair transplant procedures performed upon plaintiffs by at least one of the three defendant physicians, who were officers, shareholders, directors and members of the New York professional corporation, defendant Hitzig, Handler and Schwinning, M.D., P.C. ("Hitzig-Handler"), with defendant, Hitzig-Schwinning, Medical Group, LLC, assuming Hitzig-Handler's liabilities, position, clients, etc. Hitzig-Handler conducted business under the name Long Island Medical Associates ("LIMA").

In the current complaint, seven causes of action are asserted on behalf of each of the twenty-one named plaintiffs as follows: first, medical malpractice; second, lack of informed consent; third, false advertising and deceptive business practices under General Business Law §§349, 350; fourth, common law fraud; fifth, breach of contract; sixth, negligent misrepresentation; and seventh, punitive damages.

Each plaintiff contends to have seen advertisements for LIMA, in which it is alleged the LIMA doctors promised the results from hair transplantation would be natural and permanent, and the person would never go bald again. The doctors stated that after treatment, a person would be free to style one's hair any way, comb

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[1] By their reply papers, defendants seek to include additional plaintiffs whose claims should be dismissed on Statute of Limitations bases.

it any way, and the hairline produced would be natural. Each of the plaintiffs contends they met with one of the individual defendants, were shown a video, were told they were good candidates for the procedure, were informed they would never go bald again, and were informed there might be a possibility of more than one procedure. Plaintiffs contend they were never informed they would need additional transplants to cover areas that would continue to bald and to cover areas that looked horrible due to scarring, redness and artificial "corn stalk" look created by the original hair plugs. Plaintiffs contend that their scalps have been damaged with lumps, bumps and scarring and their hair looks unnatural.

Where it can be fairly said that a party has had a full opportunity to litigate a particular issue, he cannot reasonably demand a second one (**Schwartz v Public Administration of the County of the Bronx**, 24 NY2d 65; **Janitschek v Trustees of Friends World College**, 249 AD2d 368).

The doctrine of collateral estoppel precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party whether or not the tribunals or causes of action are the same (**Parker v Blauvelt Fire Co.**, 93 NY2d 343).

In order for the doctrine of collateral estoppel to be invoked, the identical issue must necessarily have been decided in the prior action and be decisive of the present action, and the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination (**Kaufman v Lilly & Co., supra**; **Gilberg v Barbieri**, 53 NY2d 285).

In **Abrams, et al. v Hitzig**, plaintiffs herein were the twenty-one named plaintiffs after Abrams as the lead plaintiff. Hence, Mr. Justice Sklar's decision to sever the claims of plaintiffs herein is binding upon all courts of coordinate jurisdiction and as such other courts should not arrogate to themselves the powers of appellate review (**Dill & Dill, Inc. v Betterton**, 39 AD2d 939). Mr. Justice Sklar's decision, with no appeal taken, is the law of the case and the issue of severance should not be relitigated (**Glynwill Investments , N.V. v Shearson Lehrman Hutton, Inc.**, 216 AD2d 78).

This court rejects plaintiffs' contention that Mr. Justice Sklar's order did not determine whether in severing plaintiffs herein they were precluded from litigating their claims in a single action. Justice Sklar's use of the plural "action<u>s</u>" in the second decretal paragraph of his September 15, 1999 order can only be interpreted to direct severance of all plaintiffs from one another, especially given the June 17, 1999 memorandum decision underlying the order.

Accordingly, the claims of all plaintiffs other than those of plaintiff Bellera are severed and dismissed with leave to recommence pursuant to CPLR 205. Upon such severance and dismissal, the court should not pass upon those branches of defendants' motion which seek dismissal of the claims of the twenty plaintiffs following plaintiff Bellera (see, **Abrahams, et al. v Hitzig**, **supra**, memo decision dated June 17, 1995 at pp.5-6). Moreover, as Justice Sklar's order specifically held that no determination is made regarding the venue, validity or content of any of the claims set forth by any plaintiff other than Abrams, Justice Sklar's findings as to the validity of plaintiff Abrams' fraud causes of action are not binding upon this court.

Plaintiff Bellera's common law fraud cause of action is not subsumed within his malpractice claim. Just as statutory causes of action for deceptive trade practices (GBL §349) and false advertising (GBL §350) do not foreclose claims of lack of informed consent (**Karlin v IVF America, Inc.**, 93 NY2d 282) plaintiff Bellera should not be precluded from alleging common law fraud or negligent misrepresentation as the bases of the deception practiced upon him where it is alleged to precede treatment and cause independent harm (see, **Abbondandolo v. Hitzig**, Sup.Ct., NY Co., index #124201/97, dec. and order dated March 17, 2000 [Moskowitz, J.] n.o.r.).

Plaintiff Bellera's seventh cause of action for punitive damages is dismissed as no such distinct cause of action is recognized (**Rocanova v. Equitable Life Assur. Society of U.S.**, 83 NY2d 603, 616).

Given the manner in which the proceedings in this case were originally brought and regardless of whether or not plaintiff Bellera by his separate submissions on this motion may have sufficiently particularized his allegations,[2] he is directed to serve an amended complaint limited to the facts specific to him, identifying the relevant dates and treating doctor(s). Moreover, his fraud complaint is dismissed with leave to replead with sufficient specificity to meet the requirements of CPLR 3016(b) and CPLR 3013 respectively.

This decision constitutes the order of the court.

Dated: 8-29-00

THOMAS P. PHELAN
J.S.C.

[2] In fact, perhaps due to oversight by plaintiffs' counsel or his failure to tab exhibits and plaintiffs' affidavits, this court was simply unable to locate any affidavit by plaintiff Bellera although it found and reviewed his bill of particulars.