

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: HON. JOHN P. DUNNE, Justice

TRIAL/IAS, PART 8

**ASHLEY ANDREE, an infant by her mother
and natural guardian, CHRISTINE ANDREE, as Assignee,
of EDWARD WRIGHT, M.D. and
EDWARD WRIGHT, M.D., individually**

Plaintiff

Index No. 7059/04

Motion Seq. 1 and 2

Motion submission: 10/7/05

Motion to dismiss

-against-

**RITA DEMOPOULOS, M.D.
LEWIS, JOHS, AVALLONE, AVILES & KAUFMAN, LLP,
DEBORAH AVILES and MEDICAL LIABILITY
MUTUAL INSURANCE COMPANY**

Defendants

**LEWIS, JOHS, AVALLONE, AVILES & KAUFMAN, LLP,
DEBORAH AVILES, and RITA DEMOPOULOS, M.D.**

Third-party Plaintiffs

-against-

**WINTHROP-UNIVERSITY HOSPITAL ASSOCIATION,
a/k/a WINTHROP UNIVERSITY HOSPITAL,**

Third-Party Defendant

RITA DEMOPOULOS, M.D.

Second Third-party Plaintiff

-against-

**WINTHROP-UNIVERSITY HOSPITAL ASSOCIATION
a/d/a/ WINTHROP UNIVERSITY HOSPITAL**

Second Third-Party Defendant

The following papers read on this motion:

Notice of Motion and cross-motion.....XX

Affirmation.....X

Reply.....X

Motion by third-party defendant Winthrop University Hospital for an order pursuant to CPLR 3211(a)(1), (5), &(7), dismissing the third-party complaints herein on the grounds that defenses are grounded upon documentary evidence and collateral estoppel, and that they fail to state a cause of action, is granted as hereinafter provided. The application to amend Winthrop's answer to assert a defense of collateral estoppel is denied as moot. The cross-motion by the defendant law firm and its partner, Deborah Aviles, to amend their answer to add a cross-claim against defendant Dr. Demopoulos, is granted without opposition.

On July 4, 1989, plaintiff Ashley Andree was born with various injuries alleged to be the result of medical malpractice on the part of her mother's physician, Dr. Edward Wright, and Winthrop Hospital. She commenced an action against them in 1994, which went to trial in 1998. At trial, counsel for Dr. Wright called as a defense witness Dr. Rita Demopoulos, who testified that the slides of plaintiff's mother's placenta, prepared at the time of her birth, showed a "pre-term

dysmature placenta servicing a fetus suffering from chronic intrauterine ischemic."

This testimony was to be central to Dr. Wright's defense that his conduct was not the cause of the plaintiff's injuries.

On cross-examination Dr. Demopoulos' testimony was significantly impeached through cross-examination during which she admitted that she was familiar with the hospital's number identification system and that the number -92- on the slides in evidence signified a 1992 birth, not a 1989 birth. It turned out that the slides in evidence, which had been provided by Winthrop Hospital to Dr. Demopoulos, the expert witness hired by Dr. Wright's counsel, contained the placenta from the 1992 birth of plaintiff's brother, Christopher, which was in fact a normal birth. Thereafter, a jury rendered a substantial award to the plaintiff, and against Dr. Wright. The hospital was already out of the case at the time. The Court declined to order a mistrial or set aside the verdict because Winthrop's error in delivering the wrong slides to Dr. Demopoulos could have easily been discovered by the defense team with the exercise of due diligence. That decision was upheld on appeal. Dr. Wright has since assigned any causes of action, which he may have against his trial attorneys and Dr. Demopoulos, to the plaintiff who commenced this action in 2004 against Dr. Wright's former attorneys and Dr. Demopoulos, for negligence and breach of contract in failing to use due diligence in the

performance of their responsibilities. These defendants, in turn, have commenced two third party actions against Winthrop Hospital alleging negligent misrepresentation and fraud in providing to Dr. Demopoulos the wrong slides in the prior action. Winthrop now moves to dismiss the third-party complaints and for leave to amend their answer to contain a defense of collateral estoppel, alleging that the issue of due diligence was resolved in the post trial motion practice in the prior action.

While third-party defendant Winthrop has waived its right to move to dismiss upon the grounds set forth in CPLR 3211 (a)(1) and (5), the motion to dismiss pursuant to CPLR 3211(a)(7) is proper and timely. (See CPLR 3211[e]). In determining a motion to dismiss pursuant to CPLR 3211(a)(7), the pleadings are to be liberally construed. (*New York Civil Liberties Union v. State*, 4 NY3d 175) . The Court must determine whether, accepting as true, the factual allegations of the complaint (*Kevin Spence & Sons, Inc. v. Boar's Head Provisions Company*, 5 AD3d 352), and according the plaintiff the benefit of all favorable inferences which may be drawn therefrom, the plaintiff can succeed upon any reasonable view of the facts stated. The issue is whether the proponent of the pleading has a cause of action, not whether he or she has stated one. (*Rochdale Village, Inc. v. Zimmerman*, 2 AD3d 827; *Montes Corp. v. Charles Freihofers*

Baking Co., Inc., 791 N.Y.S.2d 834, 2005 N.Y. Slip Op. 02632 [NYAD 2 Dept. Apr 04, 2005]). The Court must, therefore, determine whether the facts alleged in the complaint fit within some legal theory upon which recovery may be had. (*P.T. Bank Central Asia v. ABN AMRO Bank N.V.*, 301 AD2d 373). In assessing a motion under CPLR 3211(a)(7), the Court may consider affidavits submitted by the plaintiff to remedy any defects in the complaint. (*Leon v. Martinez*, 84 NY2d 83). Unlike a motion for summary judgment, on a motion to dismiss, the plaintiff has no obligation to demonstrate evidentiary facts to support the allegations contained in the complaint. (*Stuart Realty Co. v. Rye Country Store, Inc.*, 296 AD2d 455)

It is well settled that a cause of action based on negligent misrepresentation requires proof that a defendant had a duty to use reasonable care to impart correct information due to a special relationship existing between the parties, that the information was false, and that a plaintiff reasonably relied on the information. (*Fresh Direct, LLC v. Blue Martini Software, Inc.*, 7 AD3d 487; *Fleet Bank v. Pine Knoll Corp.*, 290 AD2d 792; *Lyons v. Medical Malpractice Ins. Ass'n*, 286 AD2d 711; *Grammar v. Turits*, 271 AD2d 644). There must also be a causal connection between the defendant's conduct and the injuries complained of. (*Cohen v. Paul*, 11 AD3d 502) As noted by the Court in *Megally v. LaPorta*, 253

AD2d 35:

Where the acts of third persons intervene between the defendants' conduct and the plaintiff's injury, liability turns on whether the intervening act is a normal or foreseeable consequence of the situation created by the defendants' negligence (see, *Derdiarian v Felix Contr. Corp.*, supra, at 315; *Parvi v City of Kingston*, 41 NY2d 553, 560; *Smith v County of Nassau*, 232 AD2d 474). If the intervening act is extraordinary under the circumstances, unforeseeable in the normal course of events, or independent of the defendants' conduct, it may be a superseding act which breaks the causal nexus.

To plead a prima facie case of fraud, the plaintiff must allege, with particularity, a material misstatement, known by the perpetrator to be false, made with an intent to deceive, upon which the plaintiff reasonably and justifiably relies, and as a result of which he sustains damages. (*Rotterdam Ventures, Inc. v. Ernst & Young LLP*, 300 AD2d 963; *Ruse v. Inta-Boro Two-Way*

Radio Taxi Assoc., Inc., 166 AD2d 641)

An essential element of both theories, that is negligent misrepresentation and fraud, is the justifiable reliance by the plaintiff on the representations made, in this case that the slides provided by Winthrop related to the birth of Ashley Andree. (*Kimmell v. Schaefer*, 89 NY2d 257; *Murphy v. Kuhn*, 90 NY2d 266; *Yanas v. Albany Medical Center Hosp.*, 294 AD2d 769; *General Elec. Capital Corp. v. U.S. Trust Co. of New York*, 238 AD2d 144) As noted by the Court in *IFD Const. Corp. v. Corddry Carpenter Dietz and Zack*, 253 AD2d 89:

In the face of its contractual obligations and responsibilities to the contrary, IFD, as a matter of law, cannot be heard to say that it reasonably relied upon any alleged misrepresentations. (See, *General Elec. Capital Corp. v. United States Trust Co.*, 238 AD2d 144, *supra*.) IFD was under a duty to inspect the work site and the soil conditions for itself. (See, *Barsotti's, Inc. v Consolidated Edison Co.*, 245 AD2d 178; see also, *Costanza Constr. Corp. v City of Rochester*, 147 AD2d 929, appeal dismissed 74 NY2d 715, 83 NY2d 950, rearg denied 84 NY2d 851; *Bilotta Constr. Corp. v Village of*

Mamaroneck, 199 AD2d 230.) " '[W]here a party has means available to him for discovering, "by the exercise of ordinary intelligence ", the true nature of a transaction he is about to enter into, "he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations" [citation omitted].' " (*Ittleson v Lombardi*, 193 AD2d 374, 376, quoting *East End Owners Corp. v Roc-East End Assocs.*, 128 AD2d 366, 370-371.)

In other words, where a party has the means available to him for discovering, by the exercise of "ordinary intelligence", the true nature of a transaction, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by the misrepresentations of another. (*Ittleson v. Lombardi*, 193 AD2d 374)

Applying these principles to the rather unique case at bar, the Court concludes that the third-party complaints fail to state a cause of action sounding in either fraud or negligent misrepresentation as against the third-party defendant, Winthrop Hospital. In the first place, it is doubtful that Winthrop had the kind of

special relationship with the third-party plaintiffs which would give rise to the duty of care as set forth in the above cited case law. (See also *Goldfine v. DeEsso*, 309 AD2d 895) The cases generally involve relationships of trust whereas the parties herein were co-defendants.

Secondly, and significantly, the complaints fail to allege that the third-party plaintiffs reasonably and justifiably relied upon the erroneous representation by Winthrop that the slides provided to Dr. Demopoulos were the correct slides, and, in fact, under the peculiar circumstances of this case, no such claim could be made. The error which occurred here could have been easily detected had the law firm and the expert they hired, Dr. Demopoulos, done what they were supposed to do with the slides, to wit, examined them. Dr. Demopoulos admitted that she was familiar with the hospital's numbering system and that it was clear that they related to a 1992 birth, not a 1989 birth.

Thirdly, Dr. Demopoulos testified that she had examined the slides and that they depicted a fetus in distress when in fact the slides depicted a normal birth. The Court deems such patently false testimony as an intervening factor which was the true cause of the dilemma in which third-party plaintiff's have found themselves. There was no way in which Winthrop could have foreseen that the slides would **not** be examined before trial and that the expert to whom they were

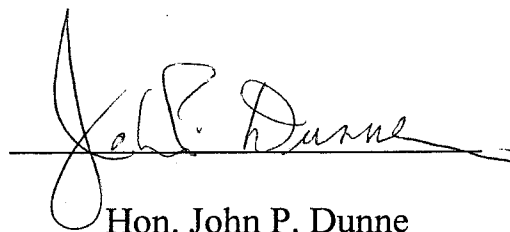
sent would testify to their significance **without** examining them. That the slides were not examined before trial, despite being in the expert's possession for over year and a half, is but the more charitable of the two inferences which the Court can draw from the facts herein, the other of course being that they did examine the slides and that the expert testified falsely nevertheless.

Accordingly, the motion to dismiss the third-party complaints must be granted and the third-party complaints are dismissed as they fail to state a cause of action against third-party defendant Winthrop Hospital. The application by Winthrop to amend its answer is denied as moot.

The cross-motion by the defendant law firm and its partner, Deborah Aviles, to amend their answers to include a cross-claim against Dr. Demopoulos is granted without opposition and pursuant to CPLR 3025(b) which provides that such leave shall be freely granted.

It is so ordered.

October 17, 2005



Hon. John P. Dunne

ENTERED

OCT 25 2005

NASSAU COUNTY
COUNTY CLERK'S OFFICE