Xiaoli Fan v Sabin

2015 NY Slip Op 51346(U) (2015) | Cited 0 times | New York Supreme Court | September 21, 2015

In this action arising out of a claim that plaintiff's ex-boyfriend gave her Herpes, defendant Andrew E. Sabin ("defendant") moves for an order granting summary judgment dismissing the complaint of Xiaoli Fan ("plaintiff").

The parties first met online in 2009 on www.millionairematch.com.

According to plaintiff, she and defendant met in person on January 5, 2010, and had unprotected sex for the first time three days later on January 8, 2010. Defendant allegedly refused to use a condom that time, as well as during their 22-month relationship, despite her request. It is undisputed that before they had sexual contact, plaintiff asked defendant whether he had any sexually transmitted diseases ("STDs"), and defendant denied that he did.

On January 21, 2010, plaintiff received emergency treatment for herpes simplex virus type 2 (HSV-2 or "genital herpes") (hereinafter, "herpes"). Later that same day, plaintiff went to defendant's house in East Hampton for the weekend. It is undisputed that she did not tell defendant that she had herpes at that time;[FN2] rather, plaintiff asked him to undergo a complete test for STDs. According to defendant, the parties did not have sex until January 23, 2010 (after her diagnosis), and he wore a condom the first time they had sex.[FN3]

Defendant then provided plaintiff with a blood test report, dated February 9, 2010, indicating that patient named "0600847" tested negative for HIV and syphilis, and the parties continued their sexual relationship until the Fall of 2011 when they broke up.

Approximately a year thereafter, plaintiff, through her then attorney, sent a letter to defendant, dated September 13, 2012, notifying defendant that he had infected her with "an incurable sexually transmitted disease," and demanded resolution of the matter before the commencement of any litigation.[FN4] Shortly thereafter, plaintiff's then attorney sent a letter to defendant's counsel, dated October 8, 2012, along with a medical report dated two years prior (May 20, 2010), which indicated that plaintiff had herpes.

Consequently, this action against defendant for negligence, fraudulent misrepresentation, and fraud by concealment ensued.[FN5] Plaintiff claims that she never had genital herpes symptoms and was

never diagnosed with a genital herpes infection before meeting defendant;[FN6] defendant [*2]disputes this claim, asserting that they did not begin their sexual relationship until after she tested positive for genital herpes, and that he has never and does not have genital herpes.

In support of defendant's motion for summary judgment, defendant argues that plaintiff cannot prevail upon her negligence cause of action because plaintiff cannot demonstrate that defendant owed her any duty of care, that he breached that duty, or that defendant proximately caused plaintiff's herpes infection. Defendant claims that he tested negative for herpes three times between September 2012 and January 2013. The blood test reports of Enzo Clinical Lab dated October 10, 2012 (one of the two tests taken when he received plaintiff's then counsel's letters) (the "2012 Enzo Report") and of Quest Diagnostics dated January 19, 2013 (taken after this action was commenced) (the "2013 Quest Report"), unanimously confirm that he did not have herpes for at least a year after the parties' sexual relationship ended. Hence, plaintiff cannot prove that defendant knew or should have known that he had a communicable disease, as he did not have one. Consequently, he owed plaintiff no duty to disclose.

Defendant also argues that plaintiff cannot prevail upon her fraudulent misrepresentation and fraud by concealment causes of action. Given that defendant did not have genital herpes, plaintiff cannot prove that he had an actual awareness of an infection and, therefore, plaintiff cannot make out a prima facie claim of fraud in the context of a sexually transmitted disease. As such, plaintiff cannot demonstrate that defendant deliberately misrepresented any material fact to her, or withheld from her any material fact that he should have disclosed.

In opposition, plaintiff argues that the blood test reports on which defendant relies as evidence are inadmissible hearsay medical records. Defendant failed to provide foundational testimony for the blood test reports as required under CPLR 4518 (a), as the blood test reports lack an accompanying statement under oath from any physician or any testimony detailing the protocol followed as to how his blood sample was collected and sent to the diagnostic laboratories. Moreover, plaintiff argues that defendant's blood test reports, produced by private laboratories, are not admissible by certification under CPLR 4518 (c), which is only applicable to the records as identified in CPLR 2306 ("Hospital records; medical records of department or bureau of a municipal corporation or of the state") and 2307 ("Books, papers and other things of a library, department or bureau of a municipal corporation or of the state").

Plaintiff further argues that as documents prepared for the purpose of litigation, the blood test reports lack the indicia of reliability to be admissible under the business records exception to the hearsay rule. Defendant "underwent the blood tests, not for the purpose of diagnosis toward treatment, but solely to prove a point in the litigation" (Aff. in Opp, ¶ 34).

In addition, plaintiff cites to CPLR 3121 and 3212 (f), arguing that the Court should disregard defendant's blood tests at this stage of the litigation, because they are analogous to independent

medical examinations ("IMEs") which are conducted by a plaintiff's own physician without the participation of a defendant's physician, under circumstances where defendant is deprived a right to have his own physician conduct an IME due to a pending summary judgment motion (Aff. in Opp ¶ 15).

In any event, an issue of fact exists as to whether defendant knew or should have known that he had herpes. Plaintiff attests that she never had herpes prior to having sex with defendant. [*3]Further, defendant's ex-girlfriend, Jennifer Sohonyay ("Sohonyay") attests that she saw herpes sores on defendant's penis in 2009 (Aff. in Opp, Exh. 4).[FN7] Additionally, plaintiff attests that she also saw herpes sores on defendant's penis on at least three separate occasions, and that when she twice confronted him, defendant told her that they were caused by riding a bicycle. Plaintiff further attests that defendant observed herpes sores around plaintiff's genitals during at least one of her outbreaks in 2011, and that she even "screamed at him while pointing to [her] own genitals, whoever did this should take responsibility'" (Aff. in Opp ¶ 31). It is also undisputed, that in late summer of 2011, during dinner with friends, defendant offered one of his friends medicine for shingles, which plaintiff asserts is the same antiviral medication that treats herpes. Plaintiff alleges that defendant lied to her about being free of STDs to induce her into having unprotected sex with him.

Plaintiff also argues that defendant's blood tests lack probative value, as there are issues of fact as to the reliability of the reports. There is no authority for the proposition that a party's self-serving blood tests, which were conducted without the adverse party's participation, establish the right to judgment as a matter of law.

All of defendant's blood tests were ordered directly or indirectly by OB/GYNs, and it is counterintuitive for defendant, a male, to have gone to an OB/GYN to get his blood tested.[FN8]

And, one of the OB/GYNs, Dr. Maran, who plaintiff met at a 2010 East Hampton party with defendant, is a close personal friend of defendant and is in some way connected to each of the blood test reports submitted by defendant.[FN9] The September 2012 Park-Madison report was billed to Dr. Maran; the February 2010 Park Madison report was ordered by an OB/GYN whose office is in the same location as Dr. Maran's; and the blood test in the 2013 Quest Report was conducted at a testing center that was associated with Dr. Maran. Furthermore, the parties had agreed to take blood tests through IMEs. However, because defendant's counsel chose as the testing site, the STD Center for New York, which was associated with Dr. Maran, it was not "independent," and thus, plaintiff refused to sign the written agreement and did not get tested. Also, as to the 2013 Quest Report, "Slava Fuzayloff, M.D." which is listed (along with Mid Town Medical Group) as the "Client" therein, is used for billing purposes for lab tests ordered by physicians, including Dr. Maran, and the offices and websites of Mid Town Medical Group and STD Center NY are the same. Thus, it can be reasonably inferred that defendant enlisted his [*4]good friend Dr. Maran, "to orchestrate his blood sampling" (id. at 8, ¶ 20), by allegedly collecting his blood specimen at times when they believed that he could be safely tested without being found diagnostically positive. At a minimum, plaintiff argues,

that this inference raises questions about the reliability of the collection procedures employed in the blood tests, as well as questions about the objectivity of the blood tests.

Additionally, plaintiff argues that defendant's blood test reports are unreliable because they are missing crucial data. The 2012 Enzo Report is missing the time of day that the blood specimen was collected as required under 10 NYCRR 58-1.10 (e)(4). The 2013 Quest Report is missing the name of the ordering physician. The September 2012 Park-Madison report lists the patient's name as "Mr. Andrew" and does not contain defendant's last name.

Furthermore, defendant failed to provide qualified medical testimony interpreting the blood test results in his moving papers.

Finally, the Certificates of Record accompanying the blood tests are incomplete. The certification by Kimberly Donohue ("Donohue") of the 2012 Enzo Report fails to recite the name of the organization for which she works or list her position. The Certification by Lisette Feliciano ("Feliciano") of the 2013 Quest Report is missing her position at Quest and does not state under whose authority the she was made "Custodian of Records," which is not in and of itself a job title.

In reply, defendant maintains that the blood test reports are reliable and admissible, and claims that they were taken for purposes of diagnosis and treatment, and pursuant to the parties' agreement. Further, the timing and number of defendant's blood tests show that it was reasonable for him to make an appointment for testing in the September 2013 after first learning that plaintiff had herpes to learn if he was carrying the virus. It was reasonable for defendant to take a re-test in October 2012, in response to receiving the October 2012 letter from plaintiff's former attorney, which showed that she tested positive for herpes; to see if the prior test had been wrong; and given that defendant had had sexual relations with plaintiff before and after plaintiff's test in May 2010. According to defendant's counsel, the January 2013 (Quest) blood test was taken pursuant to the parties' counsels' previous agreement, and defendant could no longer wait for plaintiff to "stop seeing conspiracy theories. . . ." Thus, plaintiff should be equitably estopped from arguing that consideration of the 2013 Quest Report is analogous to improper IME. Moreover, defendant's attorney notes in his reply affirmation that plaintiff's former counsel was offered the opportunity to attend defendant's third blood test.

Moreover, Dr. Fuzayloff states that as to the 2013 Quest Report, he is the owner and sole practitioner of Mid Town Medical Group, that he personally draws all of his patients' blood, and that he is always the only ordering physician for blood tests. Further, although Dr. Fuzayloff shares a suite with Dr. Maran, Dr. Fuzayloff's office never submits blood for testing on behalf of any other doctor under the Mid Town Medical Group name. Additionally, Dr. Fuzayloff describes the practices and procedures of his office, pursuant to which defendant's blood was drawn and submitted to Quest, and attests that such test revealed that defendant did not have herpes "antibodies in his blood stream."

Further, the language contained in the notarized Certifications of Record from Donohue and Feliciano laid a proper foundation for the October 2012 Enzo and 2013 Quest Reports, respectively, pursuant to CPLR 4518 (a).

In reply, defendant argues that questions regarding the chain of custody pertain to the weight of the evidence rather than its admissibility. Nevertheless, any chain of custody objection with respect to defendant's Quest blood test is addressed by Dr. Fuzayloff, which confirms that, consistent with Dr. Fuzayloff's practices and procedures, defendant's identity was verified by photo identification prior to testing, and that defendant's blood was drawn by Dr. Fuzayloff, collected in a vial and labeled by hand by Dr. Fuzayloff himself, before it was sent to Quest.

Furthermore, plaintiff fails to raise an issue of material fact as to defendant's alleged knowledge of being infected with herpes, as neither plaintiff nor Sohonyay is qualified to diagnose the sores that they allegedly saw on defendant's penis. Sohonyay's affidavits are not properly before the court, as they are not accompanied by certificates of conformity, as required by CPLR 2309 (c). More importantly, Dr. Jeffrey Bruce Greene attests that the three blood tests he reviewed "conclusively show that [defendant] was not and had never been infected with" herpes as of the dates of the tests (¶ 4). Dr. Greene also confirms that once someone has been infected with genital herpes, there will always be genital herpes antibodies in that person's blood stream, which will be detected by a test for genital herpes. Moreover, "modern herpes tests (i.e., ones in use for the past 10 years) are 100% accurate in distinguishing between the two viruses, and yield no false negatives,' as the Plaintiff alleges" (id. at ¶ 9).

Finally, defendant argues that the "statement" of Dr. Karamitsos is inadmissible because "Dr. Karamitsos declined to swear to his own statements and certainty under oath" (Reply Affirmation ¶ 61). Dr. Karamitsos' statement also constitutes inadmissible hearsay, as he bases his opinions on plaintiff's own reporting of her medical and sexual history, under the unfounded assumption that everything plaintiff told him was true.

In her sur-reply, plaintiff maintains that defendant's blood test reports were undertaken in anticipation of litigation and not for care and treatment. According to Dr. Jeffrey P. Gumprecht, M.D., GYNs "rarely care for and treat male patients," and that defendant's blood tests "were ordered by or connected with" Dr. Marin " is highly suspicious" and "might raise questions about whose HSV -1/2 results were actually reported by" Park-Madison, Enzo, and Quest. (¶ 8).

In addition, defendant would have gotten tested for herpes in 2011, when he allegedly saw herpes sores on plaintiff's genitals if he were truly concerned with his health.

Defendant's blood test reports lack indicia of reliability, such as details about blood collection procedures. And, there is no explanation as to why Dr. Maran ordered the blood tests in question, or any attestation by Dr. Maran as to his association with the blood tests.

Moreover, the expert affidavits submitted by defendant for the first time in reply do not cure the absence of foundation testimony or proper certification of the September 2012 Park Madison report.

Similarly, defendant failed to cure defects as to the alleged missing information. And, Dr. Fuzayloff's affidavit in reply cannot cure the deficiencies in the certification of the 2013 Quest Report, as he did not testify "subject to cross-examination" and only "made generalized statements about his lab's general blood sampling protocol," which were not specific to herpes testing (Sur-Reply Aff. ¶ 8). Nor does Dr. Fuzayloff attest to any personal knowledge of the alleged collection of defendant's blood, or provide detailed information as to the collection procedures that were specifically used in drawing defendant's blood for testing. That Dr. Fuzayloff does not submit blood drawn by other doctors for testing, "does not preclude Dr. [*5]Maran's ordering the test and working on collecting defendant's' blood.'"

Plaintiff also argues that Dr. Greene's affidavit should not be considered because his opinions are not based on personal knowledge of the blood collected, tested or analyzed or protocols followed; the facts were not derived from a witness subject to cross-examination; and there is no evidence establishing the reliability of the blood test reports on which he relied.

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (Friedman v BHL Realty Corp., 83 AD3d 510, 922 NYS2d 293 [1st Dept 2011]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853, 487 NYS2d 316 [1985]). Thus, the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (Madeline D'Anthony Enterprises, Inc. v Sokolowsky, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012] citing Alvarez v Prospect Hosp., 68 NY2d 320, 501 NE2d 572 [1986] and Zuckerman v City of New York, 49 NY2d 557, 562 [1980]).

Once this showing is made, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR §3212 [b]; Madeline D'Anthony Enterprises, Inc. v Sokolowsky, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]). "[A]s the nonmovants, plaintiffs are entitled to all the reasonable inferences to be drawn in their favor" (Melendez v Dorville, 93 AD3d 528, 528, 940 NYS2d 259, 260 [1st Dept 2012]).

In order for plaintiff to recover under a theory of negligence, plaintiff must prove that the defendant owed a duty of care to the plaintiff that was breached, and that the breach proximately caused her injury (Solomon v City of New York, 66 NY2d 1026, 1027, 499 NYS2d 392, 489 NE2d 1294 [1985]; J.E. v Beth Israel Hosp., 295 AD2d 281, 283, 744 NYS2d 166 [1st Dept 2002]). An affirmative legal duty to disclose has been held to exist in the relationship between parties where the defendant knew or

should have known that he or she had a communicable disease (Maharam v Maharam, 123 AD2d 165, 170, 510 NYS2d 104 [1st Dept 1986]; see Plaza v Estate of Wisser, 211 AD2d 111, 118-19 [1st Dept 1995]). Public Health Law § 2307 also imposes a duty to disclose, which provides: "Any person who, knowing himself or herself to be infected with an infectious venereal disease, has sexual intercourse with another shall be guilty of a misdemeanor."

The elements of fraudulent misrepresentation are: (1) the defendant made a material false representation, (2) the defendant intended to defraud the plaintiffs thereby, (3) the plaintiff reasonably relied upon the representation, and (4) the plaintiff suffered damage as a result of his or her reliance (Swersky v Dreyer and Traub, 219 AD2d 321, 326, 643 NYS2d 33 [1st Dept 1996]).

"A cause of action for fraudulent concealment requires, in addition to the four foregoing elements [of a claim of fraudulent misrepresentation], an allegation that the defendant had a duty to disclose material information and that it failed to do so" (P.T. Bank Cent. Asia, NY Branch v ABN AMRO Bank N.V., 301 AD2d 373, 376, 754 NYS2d 245 [1st Dept 2003]).

As a preliminary matter, defendant's expert affidavits, which were submitted in his reply [*6]papers, may be considered by this Court. While arguments in support of summary judgment which made their initial appearance in reply papers are generally not considered by the court, "[t]his rule, however, is not inflexible, and a court, in the exercise of its discretion, may consider a claim or evidence offered for the first time in reply where the offering party's adversaries responded to the newly presented claim or evidence" (Kennelly v Mobius Realty Holdings LLC, 33 AD3d 380, 381-82 [1st Dept 2006]; see also Fiore v Oakwood Plaza Shopping Ctr., Inc., 164 AD2d 737, 739, 565 NYS2d 799 [1st Dept 1991], affd 78 NY2d 572, 578 NYS2d 115, 585 NE2d 364 [1991], cert denied 506 US 823, 113 S Ct 75, 121 LE 2d 40 [1992]; CPLR 2001). Here, plaintiff had an opportunity to address the merits of defendant's later-submitted documents in the form of a sur-reply. Therefore, defendant's failure initially to include all the documents did not result in prejudice to plaintiff and will be considered in the within motion.

The disposition of defendant's motion rests, in large part, upon the two blood tests reports he submitted: the 2012 Enzo Report and 2013 Quest report.

As relevant herein, the blood tests results purportedly depicting defendant's negative test results for herpes are inadmissable hearsay, unless they fall within the exception to the hearsay rule found in CPLR 4518 (Business Records) (see e.g., Lawrence County Dept. of Social Services on Behalf of Rose BB v Steve CC, 92 AD2d 1038, 461 NYS2d 557 [3d Dept 1983]).

CPLR 4518(a) provides that the blood test report "shall be admissible . . . if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter." As pertaining to the blood tests in question, a proper foundation must be laid for the

admission of a business record of the laboratory by someone with personal knowledge of the business practices and procedures of the laboratory (see In re Brooke Louise H., 158 AD2d 425 552 NYS2d 3 [1st Dept 1990]; West Valley Fire District No. 1 v Village of Springville, 294 AD2d 949 [4th Dept 2002]; Kaiser v Metropolitan Transit Auth., 170 Misc 2d 321, 648 NYS2d 248 [Supreme Court, Suffolk County 1996]). "To make this showing requires testimony from a sponsoring witness, someone from within the particular business such as the author, a records custodian or other employee who can testify as to the nature of the record keeping practices of the business" (Kaiser v Metropolitan Transit Auth., 170 Misc 2d 321, supra citing Alexander Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR C4518:2; Prince, Richardson on Evidence, § 8—306 [Farrell 11th Ed.]).

Here, Donohue's notarized Certification of the 2012 Enzo Report sufficiently states: "I am the records custodian or other qualified person . . . with authority to make this certification"; after reasonable inquiry, I believe the records produced constitute a complete set of the requested documents"; and "The records annexed hereto were made in the regular course of business, it was the regular course of business to make such records, and the records were made close in time to the event or transaction recorded." Such Certification by the records custodian of Enzo is sufficient to lay a foundation for the 2012 Enzo Report.

Therefore, the Enzo Report falls within the exception found in CPLR 4518 (a).[FN10]

Plaintiff's claim that the Enzo Report should not be admitted as a business record because it lacks indicia of reliability lacks merit. As plaintiff points out, it has been stated that documents prepared for litigation "lack the indicia of reliability necessary to invoke the business records exception to the hearsay rule" (People v Rogers, 8 AD3d 888, 780 NYS2d 393 [3d Dept 2004]). However, contrary to plaintiff's contention, it cannot be said that defendant underwent the blood tests reported in the Enzo Report "solely to prove a point in the litigation," as plaintiff urges. Defendant undertook such blood tests prior to the commencement of this action, and in response to a letter and lab report defendant received indicating that plaintiff had herpes.

And, plaintiff failed to raise an issue of fact as to the contents of the Enzo Report based on the absence of the time that the blood specimen was collected from defendant. 10 NYCRR 58-1.10(e) (Specimens: identification and examination) provides:

Although, as plaintiff points out, 10 NYCRR 58-1.10 (e) requires that the report reflect the date when the specimen was taken (here, "10/09/12"), the requirement that a time also be provided is limited to "the case of tests specified by" the Department of Health. Plaintiff failed to demonstrate that blood test at issue was the type of test specified by the Department of Health that required the recording of the time the specimen was collected.

Furthermore, that defendant's tests were ordered by an OB/GYN fails to raise an issue of fact as to

the Enzo Report's reliability. As indicated by plaintiff's expert in sur-reply, while gynecologists "rarely care for and treat male patients," there is no indication that they are forbidden from treating or never have treated men.

And, plaintiff failed to demonstrate that she and Sonhoyay have the credentials, qualifications, or expertise to support their claims that the sores they observed on defendant's penis were herpes sores.

Turning to the Enzo Report, Dr. Greene (who specializes in "infectious diseases") attests that the Enzo Report tests results show that "HSV-2 [herpes simplex virus type 2] antibodies do not appear and disappear in a person's blood, based upon whether or not the person is taking anti-viral medications or any other factor. Once infected with HSV-2, a person will always be infected in HSV-2, and HSV-2 antibodies will always be present in the person's blood stream." According to Dr. Green, the test results show that defendant "was not infected at any time . . .that he was not and had never been infected with" herpes as of the dates of the test.[FN11] Given that [*7]defendant demonstrated that the Enzo Report depicts that defendant does not, and therefore, did not have herpes as plaintiff's claims, dismissal of first cause of action for negligent transmittal of herpes claim is warranted (see Welter v Feigenbaum, 69 AD3d 412, 892 NYS2d 89 [1st Dept 2010] (stating, the issue of whether or not defendant has the virus "is relevant to—and potentially dispositive of—the action. If the test is negative, the case will be subject to dismissal. If, on the other hand, it is positive, defendant will have an opportunity to prove his affirmative defenses that he did not have the virus in 2002, or was unaware that he had it or was asymptomatic at the time of alleged transmittal to plaintiff")). In light of the above, dismissal of the remaining claims for fraudulent misrepresentation and fraud by concealment is also warranted.

It is noted that the 2013 Quest Report supports the conclusion reached. Although the blood tests referred to therein were taken after this action was commenced, the record indicates that defendant underwent this exam pursuant to the terms of a stipulation between plaintiff's former counsel and defendant's counsel (see Stipulation, dated December 19, 2012, designating "the STD Center New York, located at 274 Madison Avenue, Suite 304, New York, New York 10016" as the testing center for both parties). Feliciano's notorized Certification of the 2013 Quest Report of the test taken at said STD Center states:

Such Certification satisfies the business records exception under CPLR 4518 (a). Dr. Greene's attestation that the 2013 Quest Report shows that defendant does not, and thus did not have herpes, along with the attestation of Dr. Fuzayloff, who states the procedures and collection practices she personally undertook to collect defendant's blood specimen, likewise demonstrate defendant's entitlement to dismissal of the complaint.

Conclusion

Based on the foregoing, it is hereby

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ORDERED that defendant's motion for an order granting summary judgment dismissing the complaint of the plaintiff is granted; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.