SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

KAREN FELD,

Plaintiff,

v

INGER SHEINBAUM,

Defendant.
_____/

Case No. 2008 CA 002002 B

Hon. Lynne Leibovitz

Next Event: Deadline for Filing Motions, 10/20/2008

PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS

Plaintiff Karen Feld, by and through her undersigned counsel, Steven Gremminger, submits this memorandum in opposition to the motion to dismiss filed by the Defendant. Plaintiff will demonstrate herein that Defendant has misstated and misapplied longstanding rules of pleading and recent case law, that the Amended Complaint contains well-pleaded claims for relief, and that therefore Defendant's motion should be denied.[1]

This case arises out of Plaintiff's engagement of Defendant to provide Registered Nursing services during Plaintiff's recovery from brain surgery. The rules of this Court require a "short and plain statement of the claim showing that the pleader is entitled to relief." SCR Rule 8(a). Defendant's memorandum in support of her motion is based entirely on a complete misrepresentation of the scope and effect of the Supreme Court's

[1] Although her motion is characterized as a motion to dismiss pursuant to Rule 12, Defendant incorporates numerous references to evidence, such as deposition testimony, extrinsic to the pleadings. Because Defendant has not complied with the requirements of Rule 56, Plaintiff will respond to the motion on the terms that it was presented. However, should the Court treat the instant motion as one for summary judgment, it must nevertheless be denied. As will be shown herein, at best Defendant has established that there are questions of fact raised by the Amended Complaint and her assertions in her memorandum.

2007 decision in Bell Atlantic v. Twombly, 127 S.Ct. 1955 (2007). Using that case as a springboard, Defendant's counsel urges this Court to find that his and his client's contentions are fact, and to discount Plaintiff's allegations in the Amended Complaint. This flawed reasoning is flatly inconsistent with the legal standard applicable to a motion to dismiss both before and after Twombly, and undermines all of the arguments Defendant asserts entitle her to dismissal of each count of the Amended Complaint. Plaintiff will accordingly not attempt to address every point in the motion to dismiss. Instead, Plaintiff will begin with a proper analysis of Twombly and then turn to each cause of action.

1. Twombly Does Not Alter The Basic Analysis For Rule 12 Motions

Defendant has vastly overstated the intent and effect of the Court's decision in Twombly. Factually, the case involved a putative class action alleging Sherman Act violations. Section 1 of the Act outlaws any restraint of trade effected by a "contract, combination, or conspiracy." The plaintiffs alleged parallel conduct on the part of the former local Bell operating companies which had the effect of decreasing competition, but only generalized allegations of a conspiracy inferred from this conduct. Thus, the question before the Court was whether such allegations were sufficient to plead a violation of the Act.

In holding that they were not, the Court was influenced by the "costs of modern federal antitrust litigation and the increasing caseload of the federal courts…." __ U.S. at __, 127 S.Ct. at 1967. Furthermore, the Court followed its precedent which held that "[w]hile a showing of parallel 'business behavior is admissible circumstantial evidence from which the fact finder may infer agreement,' it falls short of 'conclusively establish[ing] agreement or ... itself constitut[ing] a Sherman Act offense.'" __ U.S. at

__, 127 S.Ct. at 1964 (citations omitted). None of these considerations finds an analogue in the present case.

Defendant is correct that the Court rejected its prior statement in Conley v. Gibson, 355 U.S. 41, 47 (1957), that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove "no set of facts" in support of its claim. Twombly, __ U.S. at __, 127 S.Ct. at 1969. However, the Court also made clear that this represented a change in the law applicable to Rule 12 motions:

> Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and "that a recovery is very remote and unlikely."

__ U.S.__, 127 S.Ct at 1965 (footnote omitted, emphasis supplied). From this language it is clear that contrary to the assumption underlying Defendant's challenge to the Amended Complaint, this Court must take Plaintiff's allegations as true and resolve all inferences therefrom in favor of the Plaintiff.

Any doubt that these long held principles are still the law in this Court should have been erased by the Court of Appeals' decision in Luna v. A.E. Engineering Services, LLC, 938 A.2d 744 (D.C. 2007). In reversing the dismissal of the plaintiff's complaint for failing to state a claim, the court, relying on Twombly, stated

> We-like the trial court-are obliged to "accept its factual allegations and construe them in a light most favorable to" the plaintiffs. If the complaint "adequately states a claim" when thus viewed, "it may not be dismissed based

> on a ... court's assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder."

Luna, 938 A.2d at 748 (footnotes omitted). Of significance in light of the Defendant's liberal use of her deposition testimony and argument of her counsel, the Court of Appeals admonished that a motion to dismiss for failure to state a claim "may not rely on any facts that do not appear on the face of the complaint itself." Using language remarkably relevant to the Defendant's memorandum in support of the present motion, the court observed that "[b]y denying Luna's allegations, the motion to dismiss the claims against Ellison merely 'raised a factual defense which had nothing to do with the legal sufficiency of Appellant's complaint.'" Id. at 748-49 (citation omitted).

Thus, notwithstanding the Twombly decision, Defendant's motion must be denied if the well-pleaded allegations of the Amended Complaint, taken as true and given the benefit of reasonable inferences, establish entitlement to relief. Plaintiff will show below that is precisely the case with respect to each of her claims for relief.

2. The Court Has Already Held That Plaintiff Has Pleaded A Claim For Return Of Property

Count I of the Amended Complaint involves Defendant's failure to return to Plaintiff important papers that Plaintiff gave to Defendant before and during the time when Plaintiff worked for Plaintiff as her Registered Nurse. Certain of the papers that Plaintiff provided were actually returned, but most were not—including a copy of Plaintiff's medical directive in favor of the Defendant. Plaintiff does not allege any specific damage from this impermissible retention by Defendant—only that her potential harm is continuing. Amended Complaint ¶¶ 41-42. From the bench on August 22, the Court held that Plaintiff had made out a cause of action for return of property even

though she did not identify any particular damage other than her interest in having the property returned.

Defendant's grounds for asking the Court to dismiss this count is based entirely on her assertion that she is "left to speculate" as to the documents which are the subject of this claim. Motion at 4-5.[2] However, paragraph 40 of the Amended Complaint specifies that the documents comprised "confidential medical information" given to the Defendant by Plaintiff or her doctors. Even if that were not sufficient, any question as to the identity of the documents forming the basis for this claim was eliminated by Plaintiff's response to Defendant's interrogatories, which specifically identified ten documents, including Plaintiff's medical directives, lists of medicines and foods to which Plaintiff is allergic, and a list of medical contact information.[3]

Even if Defendant had been entitled to a more definite statement had she timely filed a motion, the interrogatory answer long ago cured any defect in Plaintiff's pleading. There is therefore no basis whatsoever to dismiss Count I of the Amended Complaint.

3. Defendant's Denial of a Contract is Ineffective to Defeat Plaintiff's Claims and Contradicts Defendant's Own Pleadings

Nowhere is Defendant's logic more dubious than in her argument challenging the breach of contract claim in the Amended Complaint. Defendant argues that the court should dismiss Plaintiff's claim because, she says, there was no meeting of the minds necessary to formation of a contract. Defendant bases this conclusion on nothing other

[2] Defendant also improperly relies on her having demanded retaining the property at her deposition. While this may raise an issue of fact for trial, it is not a permissible basis to dismiss Plaintiff's claim.

[3] Thus, contrary to the counsel's argument, Plaintiff has identified the documents that are missing, alleged how defendant came into possession of those documents, and alleged that she has a legally recognizable interest in them. Compare Motion at 5 with Amended Complaint at ¶¶ 40-42. Plaintiff has not attached her interrogatory responses to this memorandum; should the Court so request, they will be promptly filed.

than her denials of, and her counsel's assertions regarding the plausibility of, the allegations in the Amended Complaint. Motion at 6-7.

There are several problems with line of reasoning. First, it is directly in conflict with Twombly and Luna, supra, which require the Court to consider all well-pleaded allegations of the Amended Complaint as true. Paragraphs 6, 8, 10, 12, 25, 26, 43, and 44 allege with specificity the terms of the oral agreement between the parties. That there may be factual disputes as to these terms is an improper basis to dismiss this cause of action. At most they represent defenses which the Court of Appeals has held have "nothing to do with the legal sufficiency" of Plaintiff's Amended Complaint. Luna, 938 A.2d at 748-49. Were Defendant's argument to prevail, enforcing contracts, particularly oral contracts, would be problematic: such claims would automatically be threatened with dismissal were the defendant to deny any material term.

Finally, and this is quite astonishing given Defendant's instant motion, in her Answer and Counterclaim and again in her Amended Answer and Counterclaim, Defendant herself pleads that there was a contract. In her counterclaim filed less than three weeks ago, Defendant alleged that "Inger Sheinbaum and Karen Feld entered into an oral agreement whereby Karen Feld agreed to pay Inger Sheinbaum for services rendered during her convalescence from a medical procedure at a rate of $45 per hour." Answer to Amended Complaint and Counterclaims at ¶ 10.[4] Defendant cannot have it both ways.

In short, both parties to the case allege that an oral agreement existed between them. Even were that not the case, the Amended Complaint alleges all of the factual

[4] Compare this allegation with paragraph 6 of the Amended Complaint: "Plaintiff agreed to pay Defendant $45.00 per hour, or $1,080.00 per 24 hour day, for nursing services."

elements of a contract claim. Defendant's motion to dismiss Count II of the Amended Complaint must be denied.

4. Plaintiff's Claims Alleging Fraud Are Legally Sufficient

Defendant's motion addresses together the three counts of the Amended Complaint alleging fraud (Counts III, IV, and VII). As is the case with the entirety of Defendant's motion, her challenge to Plaintiff's fraud claims impermissibly relies on the argument of counsel ("Plaintiff knew when she filed the Amended Complaint that Ms. Sheinbaum had experience as a healthcare giver in many locations around the world." Motion at 10) and extrinsic evidence raising issues of fact (Defendant "gave sworn testimony" in her interrogatory responses and at her deposition regarding her Danish education…). Id. A proper evaluation of the Amended Complaint, however, confirms that all three fraud counts contain particular allegations supporting each element of Plaintiff's fraud claims.

Plaintiff alleges that she retained Defendant as a private duty nurse to care for her, both in the hospital and thereafter at her home. Amended Complaint at ¶ 6. Defendant represented herself to be an experienced Registered Nurse. The Amended Complaint specifically alleges the representations made by the Defendant. Id. at ¶¶ 5-7 and 9. Plaintiff alleges that she relied on Defendant's resume, which is attached to the Amended Complaint.[5] Id. Plaintiff alleges that she relied on Defendant's business card, which also is attached to the Amended Complaint.[6] Id. Plaintiff alleges that these

[5] Defendant's resume is Exhibit A to the Complaint and the Amended Complaint. Defendant states in her Memorandum at page 10 that "Exhibit A is only a part of Mrs. Sheinbaum's resume that Plaintiff attached to the original complaint." If Defendant is claiming that the resume is incomplete, or that Exhibit A has additional pages that Plaintiff has apparently not seen or described, it was incumbent on Defendant to produce in discovery, in response to Plaintiff's Request for Production, and she did not do so. More importantly, the resume provides the Defendant notice as to the representations which form the basis of Plaintiff's fraud claims.

[6] Defendant's business card is attached to the Amended Complaint as Exhibit B. Like her resume, the card represents Defendant to be a Registered Nurse.

representations were a material inducement to her engagement of Defendant, and otherwise that she justifiably relied on Defendant's representations. Id. ¶¶ 7, 28, 46, 48, and 55.

Plaintiff alleges that these representations were false, specifying the particular fraudulent oral and written statements, and were made with the intention that Defendant rely on them. Id. at ¶¶ 29-35, 46, 48, and 55. Finally, Plaintiff has alleged the specific physical injuries that she has suffered and that such injuries were caused by the Defendant's failure to act in a manner consistent with the qualifications she fraudulently claimed to have. Id. at ¶¶ 11, 16, 18, 19, and 39.

In sum, Plaintiff has alleged with particularity each of the elements necessary to prosecute her fraud claims against the Defendant. Hercules & Co. v. Shama Restaurant Corp., 613 A.2d 916, 923 (D.C 1992). For purposes of resolution of the present motion, each such allegation must be taken as true. Defendant's factual assertions to the contrary serve only to raise issues of fact, and cannot be considered in support of her motion to dismiss. Luna, supra.[7] Defendant's motion to dismiss Counts III, IV, and VII of the Amended Complaint must therefore be denied.

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[7] For instance, Defendant relies on her interrogatory responses and deposition testimony to assert that she informs patients that she is a "Danish educated Registered Nurse." Motion at 10. For the reasons stated above, this assertion has no bearing on Defendant's motion. Even if it were to be considered by the Court, being a "Danish educated Registered Nurse" provides no defense to, for instance, the DC and other state statutes specifying who can legally hold oneself out as a Registered Nurse in those jurisdictions. See, e.g., D.C. Code § 3-1210 (requiring DC board certification of anyone holding themselves out as a Registered Nurse in the District), and particularly § 3-1210.07, which provides that any person who violates any provision of this chapter shall, upon conviction, be subject to imprisonment not to exceed 1 year, or a fine not to exceed $10,000, or both. Moreover, Defendant's own husband testified in his deposition that he has never heard his spouse tell anyone that she is a "Danish educated Registered Nurse." Defendant's assertions do nothing more than suggest that there may be questions of fact regarding her representations to Plaintiff, but they do not call into question the sufficiency of Plaintiff's fraud claims, which is apparent from the pleadings.

5. Plaintiff's Negligence Claim is Well-Pleaded

Defendant's assertions with respect to Count V of the Amended Complaint are no more apposite to the law applicable to the motion than the rest of her memorandum. Here again Defendant has done nothing more than deny Plaintiff's specific allegations, argue that some are not plausible, and question the extent of the Defendant's duty to the Plaintiff. As has been demonstrated above, none of these assertions answers the question whether Plaintiff has alleged facts which, if true, would entitle her to relief.[8]

First, Defendant claims that Plaintiff has failed to adequately allege in her complaint that Defendant was the proximate cause of her injuries. Motion at 14. However, as but one example of Defendant's negligent acts proximately causing the Plaintiff injury, paragraphs 17 through 20 of the Amended Complaint allege that Defendant, who had been hired serve as Plaintiff's patient advocate, failed to prevent an improper catheter from being administered to Plaintiff and then ignored Plaintiff's complaints that she was in pain. Plaintiff alleges that Defendant's conduct contributed to and exacerbated her injuries. Id. at ¶¶ 17, 20. These allegations are sufficient to entitle Plaintiff to relief. In response, Defendant denies being present when the catheter was administered, asserts that the acts of hospital personnel represent a superseding cause, and questions the relative extent of the Defendant's duty versus that of the hospital. Motion at 14-15. As has become a familiar refrain, while these assertions suggest there may be questions of fact surrounding Plaintiff's negligence claim, they do not negate the sufficiency of Plaintiff's claim.

[8] For the first time in her brief Defendant concedes that allegations in a complaint are sufficient if the defendant is apprised of "the nature of the cause of action being asserted against him." Motion at 14 (citing Rodriquez v. Doral Mortgage Corp., 57 F.3d 1168, 1171 (1st. Cir. 1995)). The specificity with which Defendant challenges Plaintiff's negligence claim belies any contention that Amended Complaint has not so apprised the Defendant.

Defendant next contends that Plaintiff has failed to identify the duty allegedly breached by the Defendant. Defendant's grounds for this assertion are flawed, however. First, she contends that Plaintiff "failed to specify the discharge instructions" with which Defendant failed to comply. Motion at 15. However, Plaintiff has not made any allegation based on her discharge instructions; instead Plaintiff relies on Defendant's several breaches of the parties' agreement, including failing to stay with Plaintiff when needed, permitting plaintiff to be administered medications and foods to which she is allergic, and the aforementioned failures with respect to the catheter. Amended Complaint at ¶¶ 15-20, 23-25, and 39. Recognizing this, Defendant falls back on her denials of a valid contract. Motion at 15. However, Plaintiff has already demonstrated beyond doubt that she has sufficiently alleged the existence of a valid contract between the parties. See discussion at 5-7, supra.

The foregoing establishes that Plaintiff has alleged her entitlement to relief on the basis of Defendants' negligence, and Defendant's motion to dismiss Count V of the Amended Complaint must be denied.

6. Plaintiff Has Sufficiently Alleged Defendant's Gross Negligence

Defendant's challenge to Count VI of the Amended Complaint has two purported bases: first, that Plaintiff has failed to specify Defendant's criminal behavior, and, second, that the conduct alleged by Plaintiff is not "wanton, willful, or reckless." Motion at 16. Both assertions are without merit.

First, the Amended Complaint at paragraph 56 specifically states that holding oneself out as a licensed health professional in the District violates section 3-1210 of the District of Columbia Code. Plaintiff further alleges that the Defendant held herself out to be a Registered Nurse in the District without having obtained the appropriate certification.

Amended Complaint at ¶¶ 30, 37. Thus, Plaintiff has identified the statute which Defendant allegedly violated as well as the conduct of Defendant which constitutes the violation. Defendant cannot reasonably contend that she has insufficient notice of the nature of the claims against her.

Second, the Amended Complaint contains plain allegations from which the trier of fact may conclude the Defendant's actions constitute gross negligence. Defendant misrepresented her qualifications and accepted engagement to care for a Plaintiff recovering from brain surgery. Amended Complaint at ¶ 6. Not only was Defendant's conduct fraudulent and criminal, but Plaintiff certainly has alleged sufficient facts to permit a jury to assess whether Defendant acted with conscious indifference to Plaintiff's rights and safety. See Duggan v. District of Columbia, 783 A.2d 568, 569 (D.C. 2001), rehearing granted en banc, 797 A.2d 1233 (D.C. 2002), reversed on other grounds, 884 A.2d 661 (D.C. 2005)[9].

Because Plaintiff has already established that the Amended Complaint contains a well-pleaded cause of action for negligence, she is entitled to proceed on her claims of gross negligence.

7. Plaintiff is Entitled to Punitive Damages on Several of Her Claims

In seeking to dismiss Count VIII of the Amended Complaint seeking punitive damages, Defendant argues only that Plaintiff has not alleged facts sufficient to state a claim for "gross fraud." However, Plaintiff has already demonstrated that she is entitled to proceed with her claim of fraud and that she has alleged conduct amounting to gross

[9] Although not germane to the instant motion, discovery has already revealed egregious conduct on the part of the Defendant, who has not had any formal training as a nurse for over 30 years and has admitted to declining to sit for nursing boards because of her concern that she would not pass the tests.

negligence, and it is well-settled that punitive damages are available under both theories. See Railan v. Katyal, 766 A.2d 998, 1013 (D.C. 2001); Wagman v. Lee, 457 A.2d 401, 405 (D.C. 1983), cert. denied, 464 U.S. 849 (1983). Moreover, Plaintiff has alleged that Defendant engaged in criminal conduct and "fixed her relationship with Plaintiff on order to perpetrate a fraud," (Amended Complaint at ¶ 58), which has been held to support an award of punitive damages. Railan, supra, 766 A.2d at 1013. Finally, for the reasons set forth below, the Amended Complaint sets out a valid claim for relief under the Consumer Protection Procedures Act ("CPPA"), DC Code §12-3901 et seq., which expressly permits recovery of punitive damages.

Accordingly Defendant's motion to dismiss Count VIII of the Amended Complaint must be denied.[10]

8. The Amended Complaint States a CPPA Claim

Defendant asserts that the Amended Complaint contains "no specific facts" describing Defendant's conduct which allegedly violated the CPPA. Motion at 18. In so arguing, Defendant focuses only on paragraph 61 of the Amended Complaint; however, Plaintiff incorporated its prior allegations into Count IX of the Amended Complaint, and those allegations are more than adequate to provide Defendant notice of Plaintiff's claims.

It is beyond serious argument that Plaintiff has alleged facts sufficient to support her CPPA claim. In Banks v. District Of Columbia Department of Consumer and Regulatory Affairs, 634 A.2d 433, 438 (D.C. 1993), cert. denied, 513 U.S. 820 (1994),

[10] Plaintiff has avoided the thorny question whether punitive damages are an independent claim for relief or merely a subset of the damages available under other causes of action. Since Plaintiff has shown that she has sufficiently pleaded a factual and legal basis for an award, that question may be left for another day.

the Court of Appeals found that conduct constituting the unauthorized practice of law violated several provisions of the CPPA. Holding oneself out as a licensed attorney when in fact one is not admitted to the bar is not materially different from holding oneself out as a Registered Nurse when in fact one has not been so certified by the DC Health Occupations Board. The Amended Complaint plainly alleges that the Defendant represented herself to be a Registered Nurse despite the fact that she has never fulfilled the District's—or any other U.S. jurisdiction's—requirements for that title. Amended Complaint at ¶¶ 6, 7, 39-31, and 35.

Plaintiff has alleged that Defendant's conduct described above violated DC Code § 28-3904, which proscribes various acts or omissions "whether or not any consumer is in fact misled, deceived, or damaged thereby...." Amended Complaint at ¶ 61. The Amended Complaint alleges specific acts of Defendant which are proscribed by DC Code §§ 28-3904(a), (b), (d), (e), and (f). Amended Complaint at ¶¶ 6, 7, 39-31, and 35. For example, subsection (b) of the CPPA provision identified above includes one who "represent[s] that the person has a sponsorship, approval, status, affiliation, certification, or connection that the person does not have." Id. Certainly the Amended Complaint alleges conduct by the Defendant which falls squarely within this section.

The Amended Complaint also cites DC Code ¶ 28-3905, which creates a private right of action in favor of a "person...seeking relief from the use by any person of a trade practice in violation of a law of the District of Columbia...." Id. at (k)(1). Amended Complaint at ¶ 61. As noted above, holding oneself out as a Registered Nurse in the District of Columbia without certification by the DC Health Occupations Board is a violation of District Law. DC Code § 3-1210.03(r). Amended Complaint at ¶¶ 30, 31, 37, 57, and 61. Therefore, Plaintiff has alleged specific conduct on the part of the

Defendant, that such conduct violated the CPPA and other District laws, and that Defendant is liable to the Plaintiff for her specified damages under, inter alia, the CPPA. There is no basis for this Court to dismiss Plaintiff's CPPA claim.

Conclusion

For all of the foregoing reasons, Plaintiff respectfully requests that the Defendant's Motion To Dismiss the Amended Complaint be denied.

October 13, 2008

Respectfully submitted,

_____/s/_____

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Certificate of Service

I certify that I caused a true and correct copy of the foregoing Plaintiff's Opposition To Defendant's Motion To Dismiss to be electronically served on Dwight D. Murray, Esquire, counsel to the Defendant.

October 13, 2008

_____/s/_____
Steven M. Oster

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
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Calendar 11

[PROPOSED] ORDER

Upon consideration of the Defendant's Motion to Dismiss and the Plaintiff's opposition thereto, and Court being advised in the premises and for good cause shown,

IT IS HEREBY ORDERED that the Defendant's Motion to Dismiss is DENIED.

SO ORDERED this ___ day of October, 2008.

_____
Hon. Lynne Leibovitz
Associate Judge

Counsel:

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Steven M. Oster
Counsel to Plaintiff Karen Feld (eService)

Dwight D. Murray
Counsel to Defendant Inger Sheinbaum (eService)