2009 WL 10688029
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United States District Court, E.D. North Carolina.

Carla Jo GARNER, Plaintiff,
v.
Dr. Thomas VRADELIS, Carteret Obgyn Associates, P.A., Dr. John Miklos, Dr. Robert Moore, Atlanta Urogynecology Assocs., Ethicon, Inc. (d/b/a Gynecare Worldwide, now Ethicon's Women's Health and Urology), Johnson & Johnson, C.R. Bard, Inc., and unknown John/Jane Does, Defendants.

No. 4:09–CV–21–D
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Signed 08/31/2009

Attorneys and Law Firms

Carla Jo Garner, Morehead City, NC, pro se.

Reed J. Hollander, Nelson Mullins Riley & Scarborough LLP, Raleigh, NC, Stephen D. Martin, Cardinal Innovations Healthcare Solutions, Charlotte, NC, for Defendants.

ORDER

JAMES C. DEVER III, United States District Judge

***1** Carla Jo Gamer ("Garner" or "plaintiff"), who is proceeding pro se, filed suit in Carteret County Superior Court against Dr. Thomas Vradelis, Carteret OBGYN Associates, P.A., Dr. John Miklos, Dr. Robert Moore, Atlanta Urogynecology Associates, Ethicon, Inc., Johnson & Johnson, C.R. Bard, Inc., and John/Jane Does [D.E. 1–3]. Essentially, Gamer's amended complaint stems from surgery that Dr. Thomas Vradelis performed on Gamer on July 21, 2005, including problems from a TVT–O device inserted during the surgery and possibly a Bard Align Sling TVT device inserted during the same (or a subsequent) surgery. The purpose of the surgery apparently was to address urinary incontinence.

Defendants removed the action to this court [D.E. 1]. On February 20, 2009, defendants Dr. Thomas Vradelis and Carteret OBGYN Associates, P.A. filed a motion to dismiss the amended complaint [D.E. 9]. On March 10, 2009, defendants Dr. John Miklos, Dr. Robert Moore, and Atlanta Urogynecology Associates filed a motion to dismiss [D.E. 15, 18]. On April 6, 2009, defendants Ethicon, Inc. and Johnson & Johnson filed a motion to dismiss [D.E. 28]. The moving defendants contend that plaintiff has failed to state a claim upon which relief can be granted in the amended complaint. As explained below, the court grants defendants' motions to dismiss.

I.

In considering defendants' motions to dismiss, the court has applied the governing standard. See Fed. R. Civ. P. 12(b)(6). A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint. See id.; Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949–52 (2009). A court should grant a motion to dismiss under Rule 12(b)(6) if the complaint does not allege "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). "Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.' " Erickson v. Pardus, 551 U.S. 89, 93 (2007) (per curiam) (quoting Twombly, 550 U.S. at 555) (alteration in original). Accordingly, "[w]hile a plaintiff is not charged with pleading facts sufficient to prove [its] case, as an evidentiary matter, in [its] complaint, a plaintiff is required to allege facts that support a claim for relief." Bass v. E.I. DuPont de Nemours & Co., 324 F.3d 761, 765 (4th Cir. 2003); see Ashcroft, 129 S. Ct. at 1949–52. Moreover, although the court "take[s] the facts in the light most favorable to the plaintiff," it "need not accept the legal conclusions drawn from the facts [or] unwarranted inferences, unreasonable conclusions, or arguments." Giarratano v. Johnson, 521 F.3d 298, 302 (4th Cir. 2008) (quotations omitted); see Ashcroft, 129 S. Ct. at 1949–52.

On July 21, 2005, Dr. Thomas Vradelis ("Dr. Vradelis") of Carteret OBGYN Associates, P.A. ("Carteret OBGYN") performed surgery on plaintiff. During the surgery, Dr. Vradelis inserted a TVT–O device. Am. Compl. ¶¶ 1, 31, 39. Although plaintiff's amended complaint is unclear, she also appears to contend that a physician (perhaps Dr. Vradelis or possibly a subsequent treating physician) also inserted a Bard Align Sling TVT device. See id. 1–2, 41. When plaintiff awoke from the July 21, 2005 surgery, she experienced

immediate pain in her leg in the recovery room and asked Dr. Vradelis to remove the TVT–O device. Id. ¶¶ 39, 40(a). Plaintiff claims that Dr. Vradelis spoke to her in the recovery room and stated that "he must have cut a tendon or nerve" during the surgery. Id. ¶ 39. Plaintiff apparently contacted Dr. Miklos in 2006 concerning the pain that she was experiencing concerning the July 21, 2005 surgery. See Gamer Aff. ¶ 2. Thereafter, Dr. John Miklos ("Dr. Miklos") and Dr. Robert Moore ("Dr. Moore") (physicians with the Urogynecology Unit of Atlanta Urogynecology Associates) examined plaintiff. In 2006, Dr. Miklos operated on plaintiff to relieve her pain. See Defs. Miklos, Moore & Atlanta Urogynecology Assocs.' Mem. 5; Am. Compl. ¶¶ 33, 37.

***2** On June 25, 2008, plaintiff filed a motion in Carteret County Superior Court to extend the statute of limitations in a medical malpractice action pursuant to Rule 9(j) of the North Carolina Rules of Civil Procedure. See Pl.'s Resp. to Defs. Vradelis & Carteret OBGYN's Mot. to Dismiss, Ex. B. On July 9, 2008, Judge Kenneth Crow executed an order granting plaintiff's motion and extending the statute of limitations to November 12, 2008. See id. On November 12, 2008, plaintiff filed a complaint in Carteret County Superior Court alleging a products liability claim against Dr. Vradelis, Carteret OBGYN, and several other defendants [D.E. 1–3]. No summonses were issued, and no defendants were served. On January 8, 2009, plaintiff filed an amended complaint, and summonses were issued. Id. Plaintiff's amended complaint names the following defendants: Dr. Vradelis, Carteret OBGYN, Dr. Miklos, Dr. Moore, Atlanta Urogynecology Associates, Ethicon, Inc., Johnson & Johnson, C.R. Bard, Inc., and John/Jane Does. Id. The amended complaint includes four causes of action: (1) a products liability claim against Ethicon, Inc. ("Ethicon"), Johnson & Johnson, and C.R. Bard, Inc. ("Bard"); (2) a products liability failure to warn claim against all defendants; (3) a strict products liability claim against all defendants; and (4) a negligent failure to warn claim against all defendants. Id.

On February 13, 2009, Bard (with all defendants' consent) removed the action to this court. Id. On February 20, 2009, Dr. Vradelis and Carteret OBGYN filed a motion to dismiss [D.E. 9]. On March 10, 2009, Dr. Miklos, Dr. Moore, and Atlanta Urogynecology Associates filed a motion to dismiss [D.E. 15, 18]. On April 6, 2009, Ethicon and Johnson & Johnson filed a motion to dismiss [D.E. 28]. Plaintiff responded to the motions to dismiss [D.E. 39, 43, 44, 45, 46, 47], and defendants replied [D.E. 41, 48, 50].

II.

In count one, plaintiff seeks to recover, inter alia, from Ethicon and Johnson & Johnson for products liability arising from alleged design defects in the TVT–O device. See Am. Compl. ¶¶ 13–17. Ethicon and Johnson & Johnson argue that the three-year statute of limitations in N.C. Gen. Stat. § 1–52(16) bars this claim.

Under North Carolina law, a three-year statute of limitations applies to plaintiff's products liability claim. See N.C. Gen Stat. § 1–52(16): Bernick v. Jurden, 306 N.C. 435, 444–45.293 S.E.2d 405, 411–12 (1982); Harrison v. City of Sanford, 177 N.C. App. 116, 120, 627 S.E.2d 672, 676 (2006). In the amended complaint, plaintiff admits that she discovered the injury about which she now complains on July 21, 2005. See Am. Compl. 2, ¶¶ 39, 40(a). Thus, the statute of limitations began to run on that date and expired on July 21, 2008.

In opposition to this conclusion, plaintiff makes two arguments. First, she argues that the statute of limitations did not begin to run until "September 2008" when she "discovered through internet research ... [that] the TVT–O and ALIGN mesh devices themselves were defective products." Pl.'s Resp. to Defs. Ethicon & Johnson & Johnson's Mot. to Dismiss 5. Second, she argues that "the element of fraud influences the statute of limitations." Id. at 7.

As for plaintiff's first argument, a claim accrues under North Carolina law when "bodily harm to the claimant ... becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs." N.C. Gen. Stat. § 1–52(16). The clock begins to run when a person is aware (or reasonably ought to be aware) of her injury, even if she is not aware of other information concerning defendant's alleged wrongdoing. See, e.g., Pembee Mfg. Corp. v. Cape Fear Constr. Co., 313 N.C. 488, 491–93, 329 S.E.2d 350, 353–54 (1985); Shepard v. Ocwen Fed. Bank, FSB, 172 N.C. App. 475, 478, 617 S.E.2d 61, 63 (2005), aff'd, 361 N.C. 137, 638 S.E.2d 197 (2006); see also Schenkel & Shultz, Inc. v. Hermon F. Fox & Assocs., P.C., 180 N.C. App. 257, 263–64, 636 S.E.2d 835, 840 (2006), aff'd, 362 N.C. 269, 658 S.E.2d 918 (2008). In this case, plaintiff alleges that "[i]mmediately upon waking in recovery" from the surgery

on July 21, 2005, she experienced "excruciating pain" and "immediately" asked Dr. Vradelis to remove the device. Am. Compl. ¶¶ 39, 40(a). By definition, her "bodily harm" became "apparent or ought reasonably to have become apparent" on that date. See N.C. Gen. Stat. § 1–52(16). That she later did internet research concerning the devices does not alter this conclusion. Thus, plaintiff's products liability claim against Ethicon and Johnson & Johnson is time-barred.

***3** As for plaintiff's second argument, plaintiff's amended complaint fails to indicate that Ethicon or Johnson & Johnson ever made any representation to her that prevented her from timely filing suit. Accordingly, her reference to alleged fraud does not impact the statute of limitations, and her argument fails. See, e.g., Jordan v. Crew, 125 N.C. App. 712, 719–20, 482 S.E.2d 735, 739 (1997); Pembee Mfg. Corp. v. Cape Fear Constr. Co., 69 N.C. App. 505, 509–10, 317 S.E.2d 41, 43–44 (1984), aff'd, 313 N.C. 488, 329 S.E.2d 350 (1985). Thus, the court grants Ethicon and Johnson & Johnson's motion to dismiss count one for failure to state a claim upon which relief can be granted.

In count two, plaintiff seeks to recover from all defendants for products liability due to a failure to warn concerning the devices. See Am. Compl. ¶¶ 18–24. Just as N.C. Gen. Stat. § 1–52(16) bars count one, it also bars count two for the same reasons. Moreover, as to defendants Vradelis, Carteret OBGYN, Miklos, Moore, and Atlanta Urogynecology Associates, count two fails for another reason: these defendants (as medical professionals performing surgery) are not a "manufacturer" or "seller" of the devices referenced in the amended complaint. See N.C. Gen. Stat. § 99B–1(2), (4); see generally Cameron v. New Hanover Mem'l Hosp., Inc., 58 N.C. App. 414, 445–46, 293 S.E.2d 901, 920 (1982); Batiste v. Am. Home Prods. Corp., 32 N.C. App. 1, 5–7, 231 S.E.2d 269, 272–73 (1977). Notably, in order to be liable for products liability due to a failure to warn, a defendant must be a "manufacturer" or "seller." See N.C. Gen. Stat. § 99B–5. Thus, Dr. Vradelis, Carteret OBGYN, Dr. Miklos, Dr. Moore, and Atlanta Urogynecology Associates are not subject to liability under section 99B–5. Likewise, even if Georgia law applies to Dr. Miklos, Dr. Moore, and Atlanta Urogynecology Associates, the same conclusion applies. See Ga. Code Ann. § 51–1–11(b)(1), (c). Accordingly, plaintiff has failed to state a claim upon which relief can be granted against the moving defendants, and count two is dismissed.

In count three, plaintiff seeks to recover from all defendants for strict products liability. See Am. Compl. 25–37.¶¶ North Carolina, however, does not recognize strict liability in products liability actions. See N.C. Gen. Stat. § 99B–1.1; Smith v. Fiber Controls Corp., 300 N.C. 669, 678, 268 S.E.2d 504, 509–10 (1980); Bryant v. Adams, 116 N.C. App. 448, 472–73,448 S.E.2d 832, 845 (1994). Moreover, even if Georgia law applies to Dr. Miklos, Dr. Moore, and Atlanta Urogynecology Associates, the claim fails because Georgia law permits strict liability in products liability actions only against a "manufacturer" of a product. See Ga. Code Ann. § 51–1–11(b)(1); Farmex Inc. v. Wainwright, 269 Ga. 548, 549, 501 S.E.2d 802, 803 (1998). Accordingly, plaintiff has failed to state a claim upon which relief can be granted against the moving defendants, and count three is dismissed.

In count four, plaintiff seeks to recover from all defendants for negligence. See Am. Compl. ¶¶ 38–42. Essentially, plaintiff contends that defendants negligently failed to warn her concerning complications that would arise from surgically implanting the devices. See id. The moving defendants seek dismissal because count four allegedly fails to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure. Rule 9(j) states in relevant part:

> Medical malpractice.—Any complaint alleging medical malpractice by a health care provider as defined in [N.C. Gen. Stat. §] 90–21.11 in failing to comply with the applicable standard of care under [N.C. Gen. Stat. §] 90–21.12 shall be dismissed unless:
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> ***4** (1) The pleading specifically asserts that the medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the [North Carolina] Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care;
>
> (2) The pleading specifically asserts that the medical care has been reviewed by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the [North Carolina] Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint; or

(3) The pleading alleges facts establishing negligence under the existing common-law doctrine of res ipsa loquitur.

N.C.R. Civ. P. 9(j).

Plaintiff's amended complaint does not comply with Rule 9(j). Nowhere does the amended complaint state that the requisite "expert witness" has reviewed the medical care at issue in the amended complaint or state that such an "expert witness" is prepared to testify that medical care did not comply with the applicable standard of care. Likewise, the facts alleged do not support liability under the common law doctrine of res ipsa loquitur. Further, even if Georgia law applies to Dr. Miklos, Dr. Moore, and Atlanta Urogynecology Associates, the amended complaint fails to comply with Ga. Code Ann. § 9–11–9.1. Like Rule 9(j), section 9–11–9.1 requires a plaintiff pursuing a medical malpractice action to file with the complaint an affidavit of an expert competent to testify setting forth at least one negligent act and the factual basis for the claim. See Ga. Code Ann. § 9–11–9.1; Houston v. Phoebe Putney Mem'l Hosp., Inc., 295 Ga. App. 674, 676, 673 S.E.2d 54, 56 (2009). [1] Therefore, the court grants the moving defendants' motions to dismiss count four for failure to state a claim upon which relief can be granted. See, e.g., Liu v. Boyd, 294 Ga. App. 224, 225–26, 668 S.E.2d 843, 845–46 (2008); Thigpen v. Ngo, 355 N.C. 198, 202, 558 S.E.2d 162, 165 (2002); Allen v. Carolina Permanente Med. Group. P.A., 139 N.C. App. 342, 347, 533 S.E.2d 812, 815 (2000).

1 Some federal district courts in Georgia, sitting in diversity, have declined to apply section 9–11–9.1 due to a perceived conflict with Rule 8 of the Federal Rules of Civil Procedure. See Roberts v. Jones, 390 F. Supp. 2d 1333, 1337 (M.D. Ga. 2005); Baird v. Celis, 41 F. Supp. 2d 1358, 1360–61 (N.D.Ga. 1999); Boone v. Knight, 131 F.R.D. 609, 611–12 (S.D. Ga. 1990). With all due respect, this court disagrees that there is any conflict between section 9–11–9.1 and Rule 8. See Lee v. Putz, No. 1:03–CV–267, 2006 WL 1791304, at *2–*5 (W.D. Mich. June 27, 2006) (unpublished) (analyzing Michigan affidavit requirement in case removed from Michigan state court). Section 911–9.1 is a substantive state law to be applied in diversity. See, e.g., Colgan Air, Inc. v. Raytheon Aircraft Co., 507 F.3d 270, 275 (4th Cir. 2007) (per curiam); Chamberlain v. Giampapa, 210 F.3d 154, 160–61 (3d Cir. 2000). This conclusion comports with numerous decisions applying Rule 9(j) while sitting in diversity. See, e.g., Warren v. Worley, No. 5:07–CT–3109–FL, 2008 WL 4525754, at * 12–*13 (E.D.N.C. Sept. 29, 2008) (unpublished); Hairston v. Gonzales, No. 5:07–CT–3078–D, 2008 WL 2761315, at *5 (E.D.N.C. July 11, 2008) (unpublished); Estate of Williams–Moore v. Alliance One Receivables Mgmt., Inc., 335 F. Supp. 2d 636, 649 (M.D.N.C. 2004); Frazier v. Angel Med. Ctr., 308 F. Supp. 2d 671, 676–77 (W.D.N.C. 2004); Moore v. Pitt County Mem'l Hosp., 139 F. Supp. 2d 712, 713 (E.D.N.C. 2001).

***5** Finally, the court notes that plaintiff's responses to the motions to dismiss reference alleged fraud, constructive fraud, and conspiracy [D.E. 39, 43, 44, 45, 46, 47]. Plaintiff's amended complaint, however, does not include a fraud, constructive fraud, or conspiracy claim. Moreover, a response in opposition to a motion to dismiss does not act as an amendment to a complaint. See, e.g., Jolly v. Acad. Collection Serv., Inc., 400 F. Supp. 2d 851, 859–60 (M.D.N.C. 2005). Thus, the court need not address the topic of fraud, constructive fraud, or conspiracy any further. Cf. Fed. R. Civ. P. 9(b).

III.

Defendants' motions to dismiss for failure to state a claim upon which relief can be granted [D.E. 9, 15, 18, 28] are GRANTED. Count one is DISMISSED without prejudice as to all moving defendants. Count two is DISMISSED without prejudice as to Ethicon and Johnson & Johnson. Count two is DISMISSED with prejudice as to the other moving defendants. Count three is DISMISSED with prejudice as to all moving defendants. Count four is DISMISSED without prejudice as to all moving defendants.

SO ORDERED. This 31 day of August 2009.

All Citations

Not Reported in Fed. Supp., 2009 WL 10688029

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