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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

MARTHA MARTINEZ,

Plaintiff and Appellant,

v.

DEN-MAT CORPORATION et al.,

Defendants and Respondents.

H039477

(Santa Clara County

Super. Ct. No. CV208104)

Plaintiff Martha Martinez sued her dentist, Dr. Ardeshir Salem, as well as Den-Mat Corporation and Den-Mat Holdings LLC (collectively, Den-Mat), for injuries sustained when Dr. Salem installed cosmetic veneers on her teeth. She alleged, among other things, that Den-Mat made misrepresentations and engaged in false advertising about its Lumineer brand of tooth veneers. Martinez appeals from the trial court's grant of Den-Mat's motion for judgment on the pleadings.

We conclude that the trial court properly granted the motion, and we will affirm the judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Allegations

Martinez filed a complaint against Dr. Salem and Den-Mat alleging the following: In 2008, Martinez consulted with Dr. Salem about cosmetically restoring her teeth with

Lumineers, a brand of tooth veneers manufactured by Den-Mat. Dr. Salem gave Martinez a Lumineers brochure that had been produced and distributed by Den-Mat. The brochure contained statements such as “Lumineers Can Make Everyone’s Smile More Beautiful Without Removing Painful Tooth Structure,” “Ask for Lumineers By Name,” “No drilling, shots, or pain,” “No removal of sensitive tooth structure,” “Safe for sensitive patients,” and “Lumineers can even bond to existing crowns and bridgework without having to replace them.”

In reliance on the brochure, Martinez asked Dr. Salem to install Lumineers on her teeth. But Dr. Salem did not install Lumineers. Instead, the complaint alleges, he installed another brand of veneers: “While SALEM represented to Plaintiff that she was getting Lumineers with all the benefits as advertised by DEN-MAT, SALEM secretly and without disclosing to Plaintiff provided Plaintiff with a different brand of veneers. As a consequence, Plaintiff was subjected to extensive removal of sensitive tooth structure without her knowledge.” Martinez also alleges that she suffered drilling, shots, and pain during the procedure. And she alleges that she learned Dr. Salem had not installed Lumineers when she subsequently visited another dentist.

B. Procedural Background

Martinez’s complaint alleged eight causes of action: (1) breach of contract; (2) intentional and/or negligent misrepresentation; (3) negligent supervision; (4) false advertising; (5) breach of express warranty (against Dr. Salem only); (6) breach of implied warranty (against Dr. Salem only); (7) breach of fiduciary duty (against Dr. Salem only); and (8) unlawful business practices.

Den-Mat moved for judgment on the pleadings. On July 16, 2012, the trial court granted the motion and dismissed all claims as to Den-Mat except for Count Three (negligent supervision). The court granted leave to amend as to Count Eight (unlawful business practices) and Count Two for the claim of intentional (but not negligent) misrepresentation, but granted the motion without leave to amend as to the other Counts .

Martinez subsequently dismissed without prejudice Count Three (negligent supervision) as to Den-Mat, and she declined to amend any of the dismissed claims she was granted leave to amend.

II. DISCUSSION

Martinez contends the trial court erred in granting Den-Mat's motion for judgment on the pleadings with respect to her claims of intentional/negligent misrepresentation, false advertising, and unlawful business practices. We conclude the court properly granted the motion as to each of these claims.

A. *Legal Standards*

A defendant's motion for judgment on the pleadings may be granted if "The complaint does not state facts sufficient to constitute a cause of action against that defendant." (Code Civ. Proc., § 438, subd. (c)(1)(B)(ii).) The grounds for the motion must appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice. (Code Civ. Proc., § 438, subd. (d).) Courts "will not close their eyes to situations where a complaint contains allegations of fact inconsistent with attached documents, or allegations contrary to facts which are judicially noticed." (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.) "The court does not, however, assume the truth of contentions, deductions or conclusions of law." (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.)

"In an appeal from a motion granting judgment on the pleadings, we accept as true the facts alleged in the complaint and review the legal issues de novo. 'A motion for judgment on the pleadings, like a general demurrer, tests the allegations of the complaint or cross-complaint, supplemented by any matter of which the trial court takes judicial notice, to determine whether plaintiff or cross-complainant has stated a cause of action. [Citation.] Because the trial court's determination is made as a matter of law, we review the ruling de novo, assuming the truth of all material facts properly pled.' [Citation.]"

(*Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 166; see also *Ludgate Ins. Co. v. Lockheed Martin Corp.* (2000) 82 Cal.App.4th 592, 602.)

B. *Intentional or Negligent Misrepresentation*

Intentional misrepresentation is also known as fraud. “The well-known elements of a cause of action for fraud are: (1) a misrepresentation, which includes a concealment or nondisclosure; (2) knowledge of the falsity of the misrepresentation, i.e., scienter; (3) intent to induce reliance on the misrepresentation; (4) justifiable reliance; and (5) resulting damages. [Citation.] The same elements comprise a cause of action for negligent misrepresentation, except there is no requirement of intent to induce reliance. [Citation.] In both causes of action, the plaintiff must plead that he or she actually relied on the misrepresentation. [¶] Each element in a cause of action for fraud or negligent misrepresentation must be factually and specifically alleged. [Citation.] The policy of liberal construction of pleadings is not generally invoked to sustain a misrepresentation pleading defective in any material respect. [Citation.] Thus, the mere assertion of ‘reliance’ is insufficient. The plaintiff must allege the specifics of his or her reliance on the misrepresentation to show a bona fide claim of actual reliance. [Citation.]” (*Cadlo v. Owens-Illinois, Inc.* (2004) 125 Cal.App.4th 513, 519.)

Martinez’s complaint lists several representations Den-Mat made in its brochure, but she specifically alleges only two false representations: “DEN-MAT knew or should have known that the foregoing representations were false in that not everyone can benefit from Lumineers and that a dentist like SALEM does not have to provide Lumineers even if Lumineers are requested by name.” But as set forth in the complaint, the corresponding statements in the brochure were that “LUMINEERS can make *everyone’s* smile more beautiful,” and “Ask for LUMINEERS by name.” (Italics added.)

As to the statement that Lumineers “can make everyone’s smile more beautiful,” this statement “amounts to a general statement of opinion, not a positive assertion of fact.” (*Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816, 835.) “ ‘The law is quite clear

that expressions of opinion are not generally treated as representations of fact, and thus are not grounds for a misrepresentation cause of action. [Citations.] Representations of value are opinions. [Citation.]’ ” (*Ibid.*, quoting *Neu–Visions Sports, Inc. v. Soren/McAdam/Bartells* (2000) 86 Cal.App.4th 303, 308.) Such statements amount to mere sales puffery. (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 111.)

As to the statement “Ask for LUMINEERS by name,” this is not a statement of fact, and cannot be considered true or false for purposes of a claim of misrepresentation. To the extent Martinez contends that this statement constituted a “false promise”—the promise that Lumineers would be provided if she asked for them—this claim also fails. “[O]ne must *specifically allege* and prove, among other things, that the promisor did not intend to perform at the time he or she made the promise and that it was intended to deceive or induce the promisee to do or not do a particular thing.” (*Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 159, italics added.) The complaint makes no such allegation, and a false promise claim cannot be based on negligent misrepresentation. “Simply put, making a promise with an honest but unreasonable intent to perform is wholly different from making one with no intent to perform and, therefore, does not constitute a false promise . . . we decline to establish a new type of actionable deceit: the negligent false promise.” (*Ibid.*)

Martinez argues that the complaint alleges other false statements, citing to the allegation that “Plaintiff was further deceived by the representations that Lumineers did not involve drilling, shots or pain, that there was no removal of tooth structure and that Lumineers were safe for sensitive patients.” But her complaint does not allege that these representations were false—only that Martinez was “further deceived” by them. The latter does not necessarily imply the former; one can be deceived by a true statement, depending on how the statement is received. Indeed, according to the complaint, Martinez was allegedly deceived by the manner in which Dr. Salem used the brochure. By providing the brochure, Dr. Salem allegedly misled Martinez into believing she would

receive Lumineers, and hence that she would suffer no drilling or removal of tooth structure. Martinez was thereby deceived by the manner in which the brochure was allegedly used, not the truth or falsity of the brochure itself

Martinez further contends that Den-Mat owed a duty to provide warnings not only with respect to its own Lumineers product, but also with respect to generic tooth veneers from other manufacturers. For this claim, she relies on *Conte v. Wyeth, Inc.*, (2008) 168 Cal.App.4th 89 (manufacturer of name brand drug owed duty to use due care when providing product warnings, and duty extended to patients who used generic form of the same drug). But her complaint contains no such allegations; she raises this theory for the first time on appeal. Accordingly, we reject this argument. (*Beroiz v. Wahl* (2000) 84 Cal.App.4th 485, 498, fn. 9 [appellants may not raise a factually novel legal theory of liability on appeal]; *Richmond v. Dart Industries, Inc.* (1987) 196 Cal.App.3d 869, 874 [“A party is not permitted to change his [or her] position and adopt a new and different theory on appeal.”].)

Because Martinez failed to allege any actionable misrepresentation, either intentional or negligent, the trial court properly granted the motion for judgment on the pleadings with respect to this claim.

C. *False Advertising*

California’s false advertising law (§ 17500 et seq.) makes it “unlawful for any person, . . . corporation . . ., or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services . . . or to induce the public to enter into any obligation relating thereto, to make or disseminate . . . before the public in this state, . . . in any newspaper or other publication . . . or in any other manner or means whatever . . . any statement, concerning that real or personal property or those services . . . which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading. . . .” (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 950.) To state a claim based on false advertising or promotional

practices, the plaintiff must show that “members of the public are likely to be deceived.” (*Id.* at p. 951.) A “reasonable consumer” standard applies when determining whether a given claim is misleading or deceptive. (*Lavie v. Procter & Gamble Co.* (2003) 105 Cal.App.4th 496, 512-513.) Courts do not apply “a ‘least sophisticated consumer standard,’ absent evidence that the ad targeted particularly vulnerable customers.” (*Id.* at p. 504.) “A ‘reasonable consumer’ is ‘the ordinary consumer acting reasonably under the circumstances’ [citation], and ‘is not versed in the art of inspecting and judging a product, in the process of its preparation or manufacture. . . .’ ” (*Colgan v. Leatherman Tool Group, Inc.* (2006) 135 Cal.App.4th 663, 682 [quoting 1A Callmann on Unfair Competition, Trademarks and Monopolies (4th ed. 2004), § 5:17, p. 5-103].)

Martinez’s claim of false advertising fails for the same reason her claim for misrepresentation fails. She only alleges two false representations—the same as those described above: “that not everyone can benefit from Lumineers and that a dentist like SALEM does not have to provide Lumineers even if Lumineers are requested by name.” For the reasons set forth above, the alleged misrepresentations are not “untrue or misleading,” a necessary element of a false advertising claim. As to the claim that the statement “Ask for LUMINEERS by name” is an implied promise that any dentist must provide Lumineers on request, no reasonable consumer could draw such an inference.

Martinez contends the trial court erred by applying the “reasonable consumer” standard because, as a prospective dentistry patient, she was a member of a vulnerable class by law. Her complaint makes no such allegation, and the only authority she cites for this proposition is the American Dental Association Code of Ethics, which sets forth duties of honesty and trustworthiness. But this ethics code applies only to dentists, not companies like Den-Mat. Martinez also contends she should have been permitted to allege evidence, apart from her status at law, that she was a member of a vulnerable class. But the relevant question is not whether she personally is a member of a vulnerable class; the issue is whether “*the ad targeted* particularly vulnerable customers.” (*Lavie v.*

Procter & Gamble Co., *supra*, 105 Cal.App.4th at p. 504, italics added.) Martinez does not argue that she could allege additional facts showing the ad targeted vulnerable customers, so she has not met her burden of showing that the court erred in denying leave to amend. We therefore find this claim without merit.

D. *Unlawful Business Practices*

The Unfair Competition Law (UCL) prohibits “unfair competition,” which is defined as “any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by [California’s false advertising law].” (Bus. & Prof. Code, § 17200, et seq.) “Because section 17200 is written in the disjunctive, a business act or practice need only meet one of the three criteria—unlawful, unfair, or fraudulent—to be considered unfair competition under the UCL.” (*Buller v. Sutter Health* (2008) 160 Cal.App.4th 981, 986.)

The trial court concluded that this count incorporated Martinez’s false advertising claim, in which case this claim fails for the same reason: it fails to allege any untrue or misleading statements. Martinez argues on appeal that the claim could also be based on her negligent or intentional misrepresentation claims. Even if that were the case, the claim suffers from the same defect.

The count as set forth in the complaint alleges that the defendants violated Business and Professions Code section 1680 by advertising dental services “free from pain.” Martinez argues that her claim is actionable apart from whether Den-Mat made any false statements because the Den-Mat brochure advertises painless dental services.

Business and Professions Code section 1680 provides, in relevant part: “Unprofessional conduct by a person licensed under this chapter is defined as, but is not limited to [¶] (1) The advertising to guarantee any dental service, or to perform any dental operation painlessly.” The complaint does not allege that Den-Mat is “a person licensed under this chapter,” and Martinez does not contend Den-Mat is such a person. Rather, Martinez argues that Dr. Salem violated this provision, and Den-Mat’s brochure

“indicates approval” of Dr. Salem through the statement, “Ask your dentist today.” Martinez contends that this approval violates Civil Code section 1770, subdivision (a), which provides, in relevant part: “The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful: [¶] (5) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he or she does not have.” Martinez contends Den-Mat violated this provision by representing that Dr. Salem was approved to advertise painless dentistry.

The statement “Ask your dentist today” appears in the context of a “Q&A” section at the end of the brochure.¹ The brochure poses the hypothetical question, “What if I have questions?” to which it provides the answer: “If you have further questions, ask your dentist today or visit www.lumineers.com.” This statement cannot be construed as representing that Dr. Salem was approved to advertise painless dentistry. We find this claim without merit, and we conclude the trial court properly granted Den-Mat’s motion on this claim.

Having found that the trial court properly granted the motion for judgment on the pleadings as to each of Martinez’s claims, we conclude that the trial court did not err.

E. DISPOSITION

The judgment is affirmed.

¹ This fact was not alleged in the complaint, but the trial court granted Martinez’s motion to take judicial notice of the brochure.

MÁRQUEZ, J.

We concur:

RUSHING, P.J.

PREMO, J.