

CAC/rs
7562-87995

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
CATHERINE KASSENOFF, Individually, and As Mother
and Natural Guardian of C.K. and J.K., Infants Under the Age
of Eighteen,

**AFFIRMATION IN
SUPPORT OF MOTION**

Plaintiffs,

Index No.: 67296/2021

-against-

SUSAN ADLER,

Defendant.
-----X

C O U N S E L O R S :

CONRAD A. CHAYES, JR., ESQ., an attorney duly admitted to practice law
before the Courts of the State of New York, hereby swears and affirms the following to be true
under penalties of perjury and Rule 2106 of the Civil Practice Law and Rules:

1. I am a member of the law firm of MARTIN CLEARWATER & BELL^{LLP}, attorneys-of-
record for the moving Defendant, **SUSAN ADLER, PSY.D.** s/h/a “SUSAN ADLER”. As such, I am
fully familiar with the facts and circumstances underlying the present application, by virtue of
my direct participation therein and my review of the file maintained by my office.

2. The instant Affirmation is most respectfully submitted in support of the within
Motion, which application seeks an Order of this Court:

- A. Pursuant to CPLR §3211(a)(3) and CPLR §1201, dismissing the First, Second, Third, and Fourth Causes of Action of Plaintiff’s Complaint as against **SUSAN ADLER, PSY.D.** (s/h/a “SUSAN ADLER”), in their entirety and with prejudice, as **CATHERINE KASSENOFF** lacks legal capacity to commence suit on behalf of Infants, “**C.K.**” and “**J.K.**”; and,
- B. Pursuant to CPLR §3211(a)(7), dismissing the Plaintiff’s Fourth Cause of Action as against **SUSAN ADLER, PSY.D.** (s/h/a “SUSAN ADLER”), in its entirety and with prejudice,

insofar as asserted by **CATHERINE KASSENOFF** individually, for failure to state a cause of action; and,

C. Pursuant to CPLR §3211(a)(7), dismissing the Plaintiff's Fifth and Sixth Causes of Action as against **SUSAN ADLER, PSY.D.** (s/h/a "SUSAN ADLER"), in their entirety and with prejudice, for failure to state a cause of action.

3. The instant application also seeks such other and further relief in favor of the moving Defendant that the Court deems just, equitable, and proper under the circumstances.

PRELIMINARY STATEMENT

4. While Plaintiff has not filed a Certificate of Merit with her unverified Complaint, this is an action sounding in professional malpractice, arising out of **DR. ADLER'S** treatment of two Infant children in connection with a contentious divorce proceeding involving **MS. KASSENOFF**. While the Plaintiff purports to have the authority to commence this action on behalf of Infants, **C.K.** and **J.K.**, **MS. KASSENOFF** is without any legal authority to do so. Plaintiff lacks legal and physical custody over **C.K.** or **J.K.**, who are in the sole legal custody of their father, Allan Kassenoff.

5. In fact, the Westchester County Supreme Court has held that **MS. KASSENOFF** is forbidden from having any contact with **C.K.** and **J.K.**, a one-mile stay-away order of protection has been issued against **MS. KASSENOFF** in favor of **C.K.** and **J.K.**, and **MS. KASSENOFF** is without any legal custody over the Infants. As such, Plaintiff lacks the requisite capacity to commence an action on behalf of **C.K.** and **J.K.** as a matter of law.

6. The claims brought by **MS. KASSENOFF** individually must also fail. By virtue of her lack of legal custody or decision-making authority on behalf of the Infants, **MS. KASSENOFF** violated the contract and cannot hold **DR. ADLER** to its terms. Notwithstanding, the contract does

not guarantee any treatment result, nor does the contract contain any guarantees regarding potential treatment methods to be pursued or avoided.

7. Finally, with regard to the Plaintiff's claim for negligent infliction of emotional distress, **MS. KASSENOFF** has not suffered, much less alleged, any physical harm or fear of imminent physical harm. Accordingly, the Plaintiff's claims brought in her individual capacity must also be dismissed.

EXHIBITS

8. The following exhibits are annexed in further support of the within Affirmation and opposition submitted on behalf of Defendant, **DR. ADLER**:

Exhibit A: Plaintiff's Summons with Notice;

Exhibit B: Defendant's Notice of Appearance and Demand for Complaint;

Exhibit C: Plaintiff's [unverified] Complaint;

Exhibit D: August 17, 2020 Decision & Order of the Hon. Justice Quinn Koba; and,

Exhibit E: November 18, 2021 Decision & Order of the Hon. Justice Lubell.

RELEVANT PROCEDURAL HISTORY

9. This professional negligence action was commenced with the filing of the Plaintiff's Summons with Notice with the Clerk of the Supreme Court, Westchester County, on December 9, 2021. Exhibit A.

10. Defendant, Susan Adler, appeared by way of a Notice of Appearance and Demand for Complaint served by the office on January 4, 2022. Exhibit B.

11. Thereafter, on January 24, 2022, Plaintiff filed her unverified Complaint, which alleges six causes of action as against **DR. ADLER**:

A. Professional negligence, on behalf of **C.K.** and **J.K.** (¶158);

- B. Negligence, on behalf of **C.K.** and **J.K.** (§173);
- C. Breach of fiduciary duty, on behalf of **C.K.** and **J.K.** (§189);
- D. Breach of contract, on behalf of **C.K.**, **J.K.**, and **KASSENOFF** (§203);
- E. Fraudulent inducement, on behalf of **KASSENOFF** (§227); and,
- F. Negligent infliction of emotional distress, on behalf of **KASSENOFF** (§235).

See, Exhibit A.

12. Prior to the commencement of this action, the Hon. Nancy Quinn Koba, J.S.C. of the Supreme Court, Westchester County, ruled that Plaintiff's former husband, Allan Kassenoff, be awarded *sole legal and physical custody of the Infants, C.K. and J.K.*, by Decision & Order dated August 17, 2020 and entered August 18, 2020. Exhibit C. That Decision & Order also directed that **CATHERINE KASSENOFF** was not to communicate with **C.K.** or **J.K.**, whether by telephone, mail, email, text, online chats, or other electronic means. Exhibit C.

13. On July 6, 2021, Justice Quinn Koba heard arguments on an application for interim relief on behalf of Allan Kassenoff and thereafter issued a temporary order of protection that directed, among other things, **CATHERINE KASSENOFF** to stay away from the Infants, the martial residence, the Infants' school, camps, and after-school activities. Exhibit D; see also, Supreme Court, Westchester County, Docket No. 58217/2019, at NYSCEF Doc. No. 1426.

14. More recently, by Decision & Order dated and entered November 18, 2021 in connection with the divorce proceeding, the Hon. Lewis J. Lubell, J.S.C. of the Supreme Court, Westchester County, held that "To the extent the Stay-Away Order has created a hardship on [**CATHERINE KASSENOFF**] in terms of her living arrangements, that hardship is self-inflicted." The stay-away order against **MS. KASSENOFF** was to remain in effect. Exhibit D.

15. Upon information and belief, there have been no subsequent rulings in the divorce action providing **MS. KASSENOFF** any legal custody over Infants, **C.K.** and **J.K.**, nor has the Court's stay-away order precluding her from contacting **C.K.** and **J.K.** been vacated. Thus, the Plaintiff herein remains without any physical or legal custody over the Infants, and lacks the requisite standing to commence any legal action on behalf of the two Infants.

ARGUMENTS

16. When a party moves under CPLR § 3211(a)(7) for dismissal based on a failure to state a cause of action, the test is whether the pleading states a cause of action, not whether the plaintiff has a cause of action. Sokol v. Leader, 74 A.D.3d 1180 (2d Dept. 2010). The Court must determine whether, accepting the facts as alleged in the pleading as true and according the plaintiff the benefit of every favorable inference, those facts fit within any cognizable legal theory. Leon v. Martinez, 614 N.Y.S.2d 972 (1994). "Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss." EBC I v. Goldman Sachs & Co., 799 N.Y.S.2d 170 (2005).

17. Nevertheless, bare legal conclusions and factual claims which are flatly contradicted by the record are not presumed to be true. Dinger v. Cefola, 133 A.D.3d 816, 817, (2d Dept. 2016); see also, Parola, Gross & Marino, P.C. v. Susskind, 43 A.D.3d 1020, 1021 (2d Dept. 2007); Daub v. Future Tech Enter., Inc., 65 A.D.3d 1004, 1005 (2d Dept. 2009).

I. PLAINTIFF, CATHERINE KASSENOFF, LACKS THE LEGAL STANDING TO COMMENCE OR MAINTAIN ANY ACTION ON BEHALF OF INFANTS, "C.K." AND "J.K.", AS SHE IS NOT THE INFANTS' LEGAL OR PHYSICAL GUARDIAN, WARRANTING DISMISSAL OF THE FIRST, SECOND, THIRD, AND FOURTH CAUSES OF ACTION ON BEHALF OF THE INFANTS

18. It is axiomatic that absent appointment of a guardian *ad litem*, "*an infant shall appear* by the guardian of his property or, if there is no such guardian, *by a parent having legal*

custody, or, if there is no such parent, by another person or agency having legal custody, or, if the infant is married, by an adult spouse residing with the infant, a person judicially declared to be incompetent shall appear by the committee of his property, and a conservatee shall appear by the conservator of his property.” See, N.Y. CPLR §1201 (emphasis added).

19. The term “legal custody” incorporates both physical custody and a judicial decree awarding custody to a person. Otero on Behalf of Otero v. State, 602 N.Y.S.2d 501 (Ct. Claims 1993); see also, Villafane v. Banner, 387 N.Y.S.2d 183 (Sup. Ct. 1976).

20. Here, it is uncontroverted that Plaintiff, CATHERINE KASSENOFF, lacks both legal custody (Allan Kassenoff has sole legal custody of the Infants) and physical custody (Allan Kassenoff has sole physical custody of the Infants), pursuant to the rulings of the Supreme Court, Westchester County, dating back to August of 2020. Exhibit D; Exhibit E.

21. *Accordingly, Plaintiff is without legal capacity to commence and maintain this action on behalf of Infants, C.K. and J.K.*, warranting dismissal of the First, Second, and Third Causes of Action, together with that portion of the Fourth Cause of Action purported to have been brought on their behalves. See, N.Y. CPLR §§1201, 3211(a)(3).

II. PLAINTIFF’S FOURTH CAUSE OF ACTION FOR BREACH OF CONTRACT MUST BE DISMISSED PURSUANT TO CPLR §3211(A)(7) ON THE BASES THAT THE CONTRACT GUARANTEES NO TREATMENT RESULTS, THAT PLAINTIFF IS NO LONGER A PARTY TO THE CONTRACT, AND BECAUSE THE CAUSE OF ACTION FOR BREACH OF CONTRACT IS IMPERMISSIBLY DUPLICATIVE OF THE MEDICAL MALPRACTICE CLAIMS

22. Plaintiff’s Fourth Cause of Action alleges breach of contract on behalf of the Infants and Plaintiff KASSENOFF individually. For the reasons set forth at Point I above, the Plaintiff is without any standing to commence any claim on behalf of **C.K.** or **J.K.**, Infants. As to the breach of contract claim brought on behalf of Plaintiff, **CATHERINE KASSENOFF**, individually, dismissal is also warranted.

A. The Contracts Are Not Enforceable by the Plaintiff, As CATHERINE KASSENOFF is Without Sole or Joint Legal Custody of Infants C.K. and J.K.

23. The Contracts annexed to Plaintiff's Complaint each set forth in no uncertain terms that "In order to authorize mental health treatment for your child, *you must have either sole or joint legal custody of your child.*" Exhibit C at 39 and 47, respectively (emphasis added).

24. Plaintiff, CATHERINE KASSENOFF, has neither legal nor physical custody of Infants, C.K. and J.K.. Exhibit D. Thus, Plaintiff has materially breached the Contracts, is without the authority to authorize or prohibit any mental health treatment for C.K. and J.K., is no longer a party to the Contract by virtue of her material breach of its terms, and further, is without standing to seek recourse pursuant to the Contracts, which Plaintiff concedes were for the benefit of the Infants. Exhibit C at ¶205.

B. The Contracts Do Not Guarantee Any Treatment Modality, Nor Guarantee Any Treatment Results

25. A breach of contract claim in relation to the rendition of medical services will withstand a test of legal sufficiency only when based upon an express promise to affect a cure or to accomplish some definite result. Catapano v. Winthrop Univ. Hosp., 19 A.D.3d 355, 355 (2d Dept. 2005). See also, Chaff v. Parkway Hosp., 205 A.D.2d 571 (2d Dept. 1994); Nicoleau v. Brookhaven Memorial Hospital, 201 A.D.2d 544 (2d Dept. 1994); Dodes v. North Shore Univ. Hosp., 149 A.D.2d 455 (2d Dept. 1989); Monroe v. Long Is. Coll. Hosp., 84 A.D.2d 576 (2d Dept. 1981); Robins v. Finestone, 308 N.Y. 543 (1955).

26. A review of the Contracts also reveals that they *do not* expressly promise to affect a cure nor guarantee any definite result. Exhibit C at 34-49.

27. In fact, *the Contracts state just opposite*. To wit, "[T]here are *no guarantees* as to what you will experience." Exhibit C at 35, 43 (emphasis added).

C. Plaintiff KASSENOFF'S Cause of Action for Breach of Contract is Impermissibly Duplicative of the Professional Malpractice Claim

28. As set forth above, a breach of contract claim in relation to the rendition of medical services will withstand a test of legal sufficiency only when based upon an express promise to affect a cure or to accomplish some definite result. Catapano v. Winthrop Univ. Hosp., 19 A.D.3d 355, 355 (2d Dept. 2005); see also, Point II-B, above.

29. Review of the Plaintiff's Fourth Cause of Action purporting to sound in breach of contract (Exhibit C at ¶¶203-226) confirms that the allegations arise solely out of the Defendant's treatment of Infants, **C.K.** and **J.K.**. Plaintiff claims breaches of the Contracts arising from **DR. ADLER** "failing to evaluate the needs of the Children" (¶206), utilizing "reprogramming therapy" and charging the Plaintiff for same (¶209), and so on. Exhibit C.

30. Further, with the Infants as the beneficiaries of the Contracts (Exhibit C at ¶205), Plaintiff has failed to allege any damages on her part arising from the psychotherapeutic treatment rendered by the Defendant apart from those alleged damages which are claimed to have resulted in injuries or damages to the Infants. As Plaintiff lacks legal custody of the Infants, she is without standing to commence an action on their behalf, for the reasons set forth at Point I, above.

III. PLAINTIFF'S FIFTH CAUSE OF ACTION MUST BE DISMISSED AS IMPERMISSIBLY DUPLICATIVE OF THE PROFESSIONAL NEGLIGENCE CLAIMS, WHICH PLAINTIFF IS WITHOUT STANDING TO PROSECUTE

31. It has long been held by the Appellate Courts of the State of New York that a plaintiff may not bring a fraud claim which is duplicative of the plaintiff's cause of action for medical or dental malpractice. To wit, "In order to have a separate cause of action for fraud, he must show that the *personal injuries caused by the fraud are different from those caused by the malpractice.*" Harkin v. Culleton, 156 A.D.2d 19 (1st Dept. 1990), lv. dismissed 76 N.Y.2d 936 (emphasis added).

32. Further, the Court of Appeals and Appellate Divisions have held that mere nondisclosure or concealment by a physician does not serve as the basis for a distinct cause of action in fraud. Simcuski v. Saeli, 44 N.Y.2d 442, 452 (1978). See also, e.g., Golia v. Health Ins. Plan of Greater N.Y., 6 A.D.2d 884, 885 (2d Dept. 1958) aff'd 7 N.Y.2d 931 (1960) (causes of action purported to sound in breach of contract and fraud properly dismissed as duplicative of malpractice claim, no matter how they may be labeled); Ranalli v. Breed, 251 A.D. 750 (2d Dept. 1937) aff'd 277 N.Y. 630 (1938); Conklin v. Draper, 229 A.D. 227, 230 (1st Dept. 1930) aff'd 254 N.Y. 620 (1930) (“the demand for damages...coupled with the allegations which are consistent only with a malpractice action, may fortify the conclusion that such an action is for malpractice only”).

33. Plaintiff’s Fifth Cause of Action (Exhibit C at ¶¶227-234) alleges that **DR. ADLER** intentionally concealed purported conflicts of interests that would “inappropriately influence and compromise her ability to exercise *professional judgment* and *render treatment*” to the Infants. Exhibit C at ¶228 (emphasis added). Whether **DR. ADLER** properly exercised professional judgment in her treatment of the Infants is a question of medical/professional malpractice.

34. Further, as set forth in Point II-B, above, there were no guarantees made regarding treatment of the children, and the Contracts are without any guarantees as to what treatment modalities would or would not be utilized in **DR. ADLER’S** treatment of **C.K.** and **J.K.**.

35. Notwithstanding, Plaintiff **KASSENOFF** is without the legal standing to seek to enforce the Contracts given the Court’s determination (Exhibit D) Plaintiff is without legal or physical custody of the children. See, Point II-A, above.

36. Accordingly, the Plaintiff’s Fifth Cause of Action fails to state a claim upon which relief can be granted, warranting dismissal pursuant to CPLR §3211(a)(7).

IV. PLAINTIFF'S SIXTH CAUSE OF ACTION FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS FAILS TO SET FORTH ANY PHYSICAL HARM, FEAR OF PHYSICAL HARM, OR OUTRAGEOUS CONDUCT, WARRANTING DISMISSAL PURSUANT TO CPLR §3211(A)(7)

37. Historically, New York Courts do not recognize emotional injury, if it was not accompanied with physical manifestations. Howell v. New York Post Co., 81 N.Y.2d 115, 121 (1993). Accordingly, “the requirements of the rule [regarding claims of infliction of emotional distress] are rigorous, and difficult to satisfy.” Id. at 122.

38. The elements of an action for infliction of emotional distress are a duty owed to plaintiff, a breach of that duty, and that the breach exposes him or her to an unreasonable risk of bodily injury or death. The cause of action generally accrues to persons who witness the severe injury and death of a close family member, while within the “zone of danger”. Bovsun v. Sanperi, 61 N.Y.2d 219, 473 N.Y.S.2d 357 (1984).

39. In this vein, claims seeking recovery for negligent or intentional/reckless infliction of emotion distress require allegations of extreme and outrageous conduct. *See*, Howell, supra; *see also*, Capellupo v. Nassau Health Care Corp., 97 A.D.3d 619 (2d Dept. 2012); Sheila C. v. Povich, 11 A.D.3d 120, 130 (1st Dept. 2004); Deak v. Back Farms, LLC, 34 A.D.3d 1212 (4th Dept. 2006). The alleged conduct must be “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” Sheila, supra at 130-131; *see also*, Fischer v. Maloney, 43 N.Y.2d 553 (1978). This conduct must be clearly alleged in order to survive a motion to dismiss. Id.; *see also*, Dillon v. City of New York, 261 A.D.2d 34 (1999).

40. At Bar, the allegations in the Sixth Cause of Action on the behalf of CATHERINE KASSENOFF, individually, does not set forth any duty owed to the Plaintiff, who was not a patient of DR. ADLER’S, and does not claim that this Defendant’s conduct endangered her physically in

any way or caused her to fear for her own safety. Further, Plaintiff fails to proffer any allegations or factual basis to support a claim that the moving Defendant's conduct was outrageous, extreme, beyond all possible bounds of decency, intolerable, or atrocious. See, Sheila, supra.

CONCLUSION

41. As set forth fully above, the Plaintiff is without legal standing to pursue any claims on behalf of the Infants, **C.K.** and **J.K.**, in light of the rulings of the Supreme Court, Westchester County, stripping her of all legal and physical custody of the Infants. As such, Plaintiff **KASSENOFF** cannot commence or maintain any legal action on the behalves of Infants, **C.K.** and **J.K.** As such, Plaintiff's First, Second, Third, and Fourth Causes of Action must be dismissed as a matter of law.

42. As to that portion of the Fourth Cause of Action, sounding in breach of contract, brought by Plaintiff **KASSENOFF** individually, same must also be dismissed. The Plaintiff herself is without standing to seek enforcement of the Contracts given her lack of legal and physical custody of the Infants. Further, the Contracts do no guarantee any treatment modality or specific result. Thus, the purported breach of contract claim on behalf of Plaintiff **KASSENOFF** individually is impermissibly duplicative of the professional malpractice claim, which she is without standing to pursue as she was not a patient of **DR. ADLER**.

43. Similarly, the Fifth Cause of Action calls into question **DR. ADLER'S** professional judgment in her treatment of the Infants, and as such must be dismissed as duplicative of the professional malpractice claim. Notwithstanding, Plaintiff is no longer a party to the Contracts, which did not guarantee any treatment modality or specific result.

44. Finally, the Plaintiff's Sixth Cause of Action for negligent infliction of emotional distress fails to allege any physical harm to the Plaintiff or fear of physical harm suffered by the Plaintiff, warranting dismissal as a matter of law.

WHEREFORE, it is most respectfully requested that the Court grant the moving Defendant the relief sought herein and issue an Order:

- A. Pursuant to CPLR §3211(a)(3) and CPLR §1201, dismissing the First, Second, Third, and Fourth Causes of Action of Plaintiff's Complaint as against **SUSAN ADLER, PSY.D.** (s/h/a "SUSAN ADLER"), in their entirety and with prejudice, as **CATHERINE KASSENOFF** lacks legal capacity to commence suit on behalf of Infants, "C.K." and "J.K."; and,
- B. Pursuant to CPLR §3211(a)(7), dismissing the Plaintiff's Fourth Cause of Action as against **SUSAN ADLER, PSY.D.** (s/h/a "SUSAN ADLER"), in its entirety and with prejudice, insofar as asserted by **CATHERINE KASSENOFF** individually, for failure to state a cause of action; and,
- C. Pursuant to CPLR §3211(a)(7), dismissing the Plaintiff's Fifth and Sixth Causes of Action as against **SUSAN ADLER, PSY.D.** (s/h/a "SUSAN ADLER"), in their entirety and with prejudice, for failure to state a cause of action; together with,
- D. Granting such other and further relief in favor of this Defendant as this Court may deem just, equitable, and proper.

Dated: New York, New York
February 14, 2022



CONRAD A. CHAYES, JR., ESQ.

DOCUMENT SPECIFICATIONS STATEMENT

I hereby certify, pursuant to Uniform Rules for the Supreme Court and the County Courts, §202.5 and §202.8-b:

Format. The foregoing document was prepared on a computer using Microsoft Word.

Type. A proportionally-spaced typeface was used, as follows:

Name of typeface: Times New Roman

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Word Count. The total number of words in the foregoing **Affirmation in Support**, inclusive of point headings and footnotes and exclusive of the caption, signature block, and this Document Specifications Statement is 3,484.

Dated: New York, New York

February 14, 2022



CONRAD A. CHAYES, JR., ESQ.