

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA  
Civil Division**

<b>KAREN FELD</b>	)	
<b>Plaintiff,</b>	)	<b>Case No. 2008 CA 002002 B</b>
	)	
<b>v.</b>	)	<b>Judge Leibovitz</b>
	)	
<b>INGER SHEINBAUM</b>	)	<b>Calendar 11</b>
<b>Defendant.</b>	)	
_____	)	

**ORDER**

This matter is before the court on Defendant’s Motion to Dismiss and plaintiff’s opposition. For the reasons stated below, the court will deny the Motion.

This case arises from allegations that plaintiff hired defendant to provide nursing and other care to her following surgery. Plaintiff alleges that defendant falsely represented to her that she was a licensed, registered nurse although she was not, and that plaintiff hired defendant in reliance upon these representations. Plaintiff further alleges that defendant breached the contract between the parties for her provision of services, in that she did not provide the quality or duration of care contracted for. Plaintiff alleges that defendant’s care of plaintiff was negligent and that plaintiff suffered physical injury as a result. Plaintiff also alleges that defendant kept papers belonging to plaintiff despite plaintiff’s demands for their return. In her Amended Complaint, Plaintiff has alleged causes of action in Return of Property (Count I); Breach of Contract (Count II); Fraudulent Inducement (Count III); Fraudulent Misrepresentation (Count IV); Negligence (Count V); Gross Negligence (Count VI); Fraud (Count VII); Punitive Damages (Count VIII); and violations of the Consumer Protection Procedures Act (“CPPA”)(Count IX).

In the instant motion, defendant seeks dismissal of the Amended Complaint

pursuant to Rule 12(b)(6), for failure to state a claim. Although defendant argues as to each Count of plaintiff's complaint that plaintiff has failed to state sufficient facts to support her claims, the court disagrees. In almost every instance, defendant herself has cited the language in plaintiff's complaint that establishes the sufficiency of the allegations at this stage and compels a denial of the instant Motion.

The filing of a motion to dismiss pursuant to Rule 12(b)(6) does not call upon plaintiff to offer proof. Rather, in considering the sufficiency of the complaint, the trial court is obliged to “accept its factual allegations and construe them in a light most favorable to” the plaintiffs. Luna v. A.E. Eng'g Servs., LLC, 938 A.2d 744 (D.C. 2007) (quoting Chamberlain v. American Honda Fin. Corp., 931 A.2d 1018, 1023 (D.C. 2007)).

All that is required of the complaint is “a short and plain statement of the claim showing that the pleader is entitled to relief.” Super. Ct. Civ. R. 8(a)(2). Such a statement must simply “give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.” Conley v. Gibson, 355 U.S. 41, 47 (1957). The Supreme Court recently has clarified that “plaintiff's obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1964-65 (U.S. 2007). The Court nevertheless recognized in Bell that, “when a complaint adequately states a claim, 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.” Id. at 1969 n.8. “Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.” Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); see also Sarete, Inc. v. 1344

U St. Ltd. P'ship, 871 A.2d 480, 497 (D.C. 2005) (“[A] complaint [should not] be dismissed under Rule 12(b)(6) on the ground that no evidence has been offered by Plaintiffs since we take the facts alleged in the complaint as true, and the presentation of evidence to counter a Rule 12(b)(6) motion is not required.” (internal quotations, citation, and editing omitted)); Vincent v. Anderson, 621 A.2d 367, 372 (D.C. 1993) (“The Rule is designed to test solely the legal sufficiency of the complaint.”).

Applying the analysis above to the instant case, the court concludes that plaintiff has sufficiently pleaded the elements of each cause of action.

### Count I

In Count I, plaintiff essentially pleads a claim for conversion of her property. She claims that defendant took and retained papers belonging to plaintiff and failed to return them upon demand. Defendant argues that plaintiff only states that defendant retained some of her papers, and that her failure to specify which papers were kept is fatal to her claim. The court disagrees; the facts pleaded sufficiently put defendant on notice of the claim at this stage.

In addition, defendant claims that plaintiff testified at deposition, contrary to this allegation, that all her papers were returned to her. This argument must be reserved for a motion for summary judgment, and is not relevant here. “A defendant raising a 12(b)(6) defense cannot assert any facts which do not appear on the face of the complaint itself.”

Washkoviak v. Sallie Mae, 900 A.2d 168, 177-178 (D.C. 2006).

### Count II

Under District of Columbia law, “for an enforceable contract to exist, there must be both (1) agreement as to all material terms, and (2) intention of the parties to be

bound.” Kramer Associates v. IKAM, Ltd., 888 A2d 247, 251 (D.C. 2005)(citations omitted). Plaintiff alleges, among other details, that the agreement between the parties was that defendant would be employed to provide nursing care upon agreed terms of compensation, that the care must be 24-hour care during plaintiff’s hospitalization, and that defendant failed to provide the quality or duration of the care she contracted to provide, causing plaintiff injury. Defendant argues that plaintiff’s acceptance of defendant’s absence while hospitalized, and the unreasonableness of the expectation that defendant provide 24-hour care render plaintiff’s allegations insufficient to plead a cause of action in breach of contract. The court disagrees and concludes that the allegations in the complaint, taken in the light most favorable to plaintiff, establish a breach of contract.

#### Counts III, IV and VII

Defendant accurately states the legal elements which must be pleaded to claim fraud in each of these three counts. Defendant argues that although plaintiff claims defendant misrepresented herself as a registered, licensed nurse, she fails to acknowledge that defendant was a licensed nurse in Denmark, or to state specifically what defendant said when misrepresenting her status. The court concludes that plaintiff’s allegations are nevertheless sufficient to plead misrepresentation of a material fact, and that the factual argument defendant makes as to the materiality of her licensing status will be a question for a finder of fact. Finally, defendant argues that plaintiff’s allegation that she suffered “detriment, harm and ongoing physical injuries,” coupled with her description of the infection caused by catheterization of her in the hospital at a time when defendant left her unattended, do not sufficiently allege damage resulting from plaintiff’s reliance upon

defendant's alleged misrepresentations. The court disagrees and concludes that these allegations are sufficiently detailed to withstand a motion to dismiss under Rule 12(b)(6).

#### Counts V and VI

In Count V, plaintiff alleges negligence and in Count VI plaintiff alleges gross negligence. Defendant argues that plaintiff insufficiently pleads a breach of a duty of care owed by defendant to plaintiff and therefore that her negligence claim must be dismissed. However, defendant concedes that "plaintiff alleged in her Amended Complaint that Ms. Sheinbaum owed a duty of care to the plaintiff in performing her duties pursuant to the agreement between the parties," and that "plaintiff also alleged that defendant's acts and omissions breached her duty to plaintiff and were a direct and proximate cause of plaintiff's ongoing injuries." (Motion at 13). Plaintiff details in her Amended Complaint the manner in which she alleges defendant neglected her duties and the injuries plaintiff sustained as a result.

Defendant argues that defendant cannot be blamed for conduct of hospital personnel when she was not present, and that plaintiff fails to describe discharge instructions that would define the standard of care applicable to defendant's conduct once plaintiff was discharged from the hospital. Neither argument is persuasive. First, plaintiff specifically alleges that defendant failed to remain with plaintiff as required by their agreement while she was hospitalized and that because of her failure to do so, she failed to prevent hospital personnel from injuring her. Although a jury might be persuaded to take defendant's view of the circumstances, at this stage plaintiff has pleaded injuries proximately caused by defendant's departure from the standard of care. Second, plaintiff need not specify discharge instructions in her complaint to adequately

plead defendant's departure from the standard of care required of a nurse providing post-operative services to a patient. The court concludes plaintiff has sufficiently pleaded negligence.

To establish gross negligence, plaintiff must allege that defendant engaged in bad faith conduct, or a gross deviation from the ordinary standard of care that would support a finding of "wanton, willful and reckless disregard or conscious indifference to the rights and safety of others." Duggan v. District of Columbia, 783 A.2d 563, 568-569 (D.C. 2001). Taken in the light most favorable to plaintiff, plaintiff's allegations establish that defendant misrepresented her licensing status in order to induce plaintiff to hire her, and abandoned plaintiff knowingly in breach of a contract to care for her at a time when she was essentially incapacitated in a hospital. This, coupled with allegations that defendant knowingly retained plaintiff's property, would permit a reasonable juror to conclude that defendant acted with the requisite bad faith to establish gross negligence.

#### Count VIII

For the same reasons, the court concludes that, at this stage, plaintiff has pleaded facts upon which a reasonable juror could find that defendant acted with malice and will therefore deny the motion to dismiss the claim for punitive damages.

#### Count IX

Count IX alleges that defendant violated CPPA, at D.C. Code Sections 28-3904 and 3905. Defendant argues that plaintiff failed to plead sufficient facts to support a claim under these sections. Defendant appears to complain that plaintiff has not stated which subsection of the statute plaintiff relies upon in seeking relief. For the reasons stated in plaintiff's Opposition at page 13, the court concludes that, taking all of

plaintiff's factual allegations in the light most favorable to her, plaintiff sufficiently pleads a CPPA violation in her Amended Complaint. The court will deny the motion to dismiss this Court.

For all of the foregoing reasons, it is this 21<sup>st</sup> day of October, 2008,

**ORDERED** that Defendant's Motion to Dismiss is **DENIED**.

A handwritten signature in black ink, appearing to read 'Lynn Leibovitz', with a long horizontal line extending to the right.

Lynn Leibovitz  
Associate Judge  
(Signed in Chambers)

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