IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GABRIEL FERNANDO NASSAR CURE and ALAN M. KOZARSKY, M.D., individually and on behalf of others similarly situated,

Plaintiffs

v.

INTUITIVE SURGICAL INC., INTUITIVE SURGICAL OPERATIONS, INC., and JOHN DOES 1-10,

Defendants

CIVIL ACTION NO.
1:16-CV-1948-ODE

ORDER

This personal injury case is before the Court on: Defendants' first Motion to Dismiss for Failure to State a Claim [Doc. 11], to which Plaintiffs filed a Response in Opposition [Doc. 17]; Defendants' first Motion to Strike Plaintiffs' Class Allegations [Doc. 12], to which Plaintiffs filed a Response in Opposition [Doc. 18]; Defendants' second Motion to Dismiss for Failure to State a Claim [Doc. 19], to which Plaintiffs filed a Response in Opposition [Doc. 25] and to which Defendants replied [Doc. 27]; and Defendants' second Motion to Strike [Doc. 20], to which Plaintiffs filed a Response in Opposition [Doc. 26] and to which Defendants replied [Doc. 28]. For the reasons stated below, Defendants' second Motion to Dismiss [Doc. 19] is GRANTED. All other defense motions [Docs. 11, 12, 20] are DISMISSED AS MOOT.

I. Background

On June 13, 2016, Plaintiffs Gabriel Fernando Nassar Cure and Alan M. Kozarsky ("Plaintiffs") filed their initial complaint [Doc.

1]. Plaintiffs alleged injury resulting from instruments used in mitral valve repair surgeries at Saint Joseph's Hospital of Atlanta in summer 2015. These instruments were allegedly "designed, manufactured, marketed, distributed, sold and/or introduced into interstate commerce" by Defendants Intuitive Surgical Inc., Intuitive Surgical Operations, Inc., and John Does 1-10 ("Defendants") [Id. ¶ 14]. Plaintiffs alleged that Defendants' instruments discharge metallic microemboli, which end up in a patient's brain. Plaintiffs sought damages for their own injuries, as well as class certification pursuant to Federal Rule of Civil Procedure ("Rule") 26 to represent other patients nationwide into whom Defendants' instruments were inserted during mitral valve repair surgeries in the past two years.

On August 9, 2016, Defendants filed their first Motion to Dismiss pursuant to Rule 12(b)(6) [Doc. 11] and their first Motion to Strike as to the class allegations [Doc. 12]. On August 29, 2016, Plaintiffs filed an Amended Complaint, which was almost substantively identical to their initial complaint, except that they dropped their claims for Breach of Implied and Express Warranties [Doc. 14]. The remaining counts allege strict liability for defective design and defective manufacturing; negligence for design, manufacturing, failure to warn, and infliction of emotional distress; and punitive damages.

After filing their Amended Complaint, Plaintiffs filed responses in opposition to Defendants' motions on the initial complaint [Docs. 17, 18]. On September 12, 2016, Defendants re-filed their Motion to Dismiss pursuant to Rule 12(b)(6) and their Motion to Strike as to the class allegations based on the Amended Complaint [Docs. 19, 20].

On September 29, 2016, Plaintiffs responded [Docs. 25, 26], and on October 17, 2016, Defendants replied [Docs. 27, 28].

II. Motions Pertaining to Initial Complaint

Defendants filed motions to dismiss and to strike as to Plaintiffs' initial complaint. When Plaintiffs then filed their Amended Complaint it "supersede[d]" and "bec[ame] the operative pleading in the case." Lowery v. Ala. Power Co., 483 F.3d 1184, 1219-20 (11th Cir. 2007). Therefore, the initial motions to dismiss [Doc. 11] and to strike [Doc. 12] are DISMISSED AS MOOT.

III. Motion to Dismiss (Rule 12(b)(6))

To survive a Rule 12(b)(6) motion, a plaintiff must plead "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).

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully.

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal citation omitted). Thus, a claim will survive a motion to dismiss only if the factual allegations in the complaint are "enough to raise a right to relief above the speculative level," and "a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555. While all well-pleaded facts must be accepted as true and construed in the light most favorable to the plaintiff, Powell v. Thomas, 643 F.3d 1300, 1302 (11th Cir. 2011), the Court need not accept as true plaintiff's legal conclusions, including those couched as factual allegations, Iqbal, 556 U.S. at 678. Particularly important is the requirement that a complaint contain enough factual

allegations to provide "'fair notice' of the nature of the claim" and the "'grounds' on which the claim rests." Twombly, 550 U.S. at 555 n.3.

Defendants allege that dismissal under Rule 12(b)(6) is proper in this case because Plaintiffs have simply failed to meet the pleading standard. Regarding negligence, Defendants argue that Plaintiffs have pled neither a legally cognizable injury nor causation. Regarding strict liability, Defendants argue that Plaintiffs also failed to plead deviation from design standards sufficient to show a manufacturing defect. Finally, Defendants argue that punitive damages would be improper without negligence or strict liability. The Court will address each of these arguments in turn.

A. Negligence

Plaintiffs have alleged four negligence claims against Defendants for design, manufacturing, failure to warn, and infliction of emotional distress [Doc. 14]. Because this case arises in diversity, Georgia common law provides the necessary negligence elements: "(1) a legal duty; (2) a breach of this duty; (3) an injury; and (4) a causal connection between the breach and the injury." Goodson v. Bos. Sci. Corp., No. 1:11-CV-3023-TWT, 2011 WL 6840593, at *3 (N.D. Ga. Dec. 29, 2011) (Thrash, J.) (citing Vaughan v. Glymph, 241 Ga. App. 346, 348 (Ga. Ct. App. 1999)). Defendants argue that Plaintiffs have failed to plead a legally cognizable injury and that only conclusory allegations support causation [Doc. 19-1 at 5].

Plaintiffs consistently plead damages as follows:

> Mr. Nassar, Dr. Kozarsky and the Class have suffered injuries and damages, including but not limited to the lodging of metal fragments in their brains; physical,

> neurological, and mental effects therefrom, including but not limited to emotional distress; and past medical expenses. They are also anticipated to incur future medical expenses and lose future wages.

[See generally Doc. 14].

"To recover for personal injuries under Georgia law, a plaintiff must show that he has suffered 'injury to life or limb or damage to property.'" Parker v. Wellman, 230 F. App'x 878, 881 (11th Cir. 2007) (citing Pickren v. Pickren, 265 Ga. App. 195 (Ga. Ct. App. 2004)). Such injury does not include simple exposure to a potentially harmful substance. In Boyd v. Orkin Exterminating Co., the Georgia Court of Appeals held that evidence of elevated pesticide levels in plaintiffs' children's blood could not constitute an injury. Specifically, "[a]bsent any indication that the presence of these metabolites had caused or would eventually cause actual disease, pain, or impairment of some kind," no injury could be found. 191 Ga. App. 38, 40 (Ga. Ct. App. 1989), overruled on other grounds, Hanna v. McWilliams, 213 Ga. App. 648 (Ga. Ct. App. 1994). Similarly, here, the only injury alleged is "physical, neurological, and mental effects . . . of having metallic fragments" in the brain [Doc. 14 ¶¶ 25, 31]. As in Boyd, the mere presence of a substance that may cause future issues cannot meet the standard for recovery, and Plaintiffs do not provide further details about any current injury.

Plaintiffs also allege emotional distress resulting from the metallic fragments. However, Georgia law only allows "recovery of damages for emotional distress upon a showing of '(1) a physical impact to the plaintiff; (2) the physical impact cause[d] physical injury to the plaintiff; and (3) the physical injury to the plaintiff

cause[d] the plaintiff's mental suffering or emotional distress.'" Parker, 230 F. App'x at 881 (quoting Lee v. State Farm Mut. Ins. Co., 272 Ga. 583 (Ga. 2000)). Thus, Plaintiffs cannot claim damages for emotional distress without evidence of a physical injury, which, as noted above, they fail to plead.

Furthermore, Defendants argue that Plaintiffs' Amended Complaint contains only conclusory allegations without the requisite factual detail to support a negligence finding [Doc. 19-1 at 5]. In reading the Amended Complaint, it is apparent that Plaintiffs are simply reciting the elements of each cause of action, "legal conclusion[s]," which "cannot withstand a motion to dismiss." Goodson, 2011 WL 6840593, at *3. For example, in alleging negligent design, Plaintiffs' Amended Complaint merely states that "Defendants had a duty to exercise reasonable care," "Defendants failed to exercise the ordinary care that a careful and prudent medical device manufacturer would exercise in the same or similar circumstances," and "[a]s a direct and proximate result of Defendants' negligent design" Plaintiffs suffered an injury [Doc. 14 ¶¶ 65-67]. Plaintiffs plead in almost identical language to allege negligent manufacturing [id. ¶¶ 74-76] and negligent failure to warn [id. ¶¶ 78, 80, 83].

These conclusory statements, without more, fail the necessary pleading standard. See Goodson, 2011 WL 6840593, at *3 (dismissing under Rule 12(b)(6) when plaintiffs simply pled that defendants were negligent, but "offer[ed] no facts as to how [the defendants'] devices were designed, manufactured, marketed, labeled, packaged, or sold" nor "how the [defendants] acted negligently in any of those areas"). Plaintiffs allege negligence as to "one or more instruments that would ultimately be used in mitral valve repair surgeries," but

they apparently do not know which instrument caused their injury because they fail to specify one [Doc. 14 ¶ 14]. They allege that one of these instruments was "defective in design and unreasonably dangerous" [id. ¶ 61] and had "an unreasonably dangerous manufacturing defect" [id. ¶ 70], but they offer no evidence of the specific defect at issue other than the metallic microemboli that have apparently caused no physical injury. Plaintiffs also impute knowledge--"Defendants knew or had reason to know the Instrument was defective and unsafe for use in patients" [Doc. 14 ¶ 79]--but offer no evidence to support the allegation. These statements simply constitute a recitation of the elements of negligence.

B. Strict Liability

Plaintiffs have also alleged two counts based in strict liability for defective design and defective manufacturing [Doc. 14]. Again, the Amended Complaint fails to identify which of Defendants' instruments is allegedly defective. Plaintiffs again plead only the elements of strict liability--for defective design "the Instrument . . . was defective in design and unreasonably dangerous," for defective manufacturing "the Instrument . . . was defectively manufactured and unreasonably dangerous," injury was foreseeable, and injury resulted [id. ¶¶ 41, 45-47, 50-52, 56-58]. In addition to alleging no facts to support these statements, Plaintiffs cannot seem to decide if "the production process resulted in the particular product at issue being unsafe," or if "'an entire product line . . . [should] be called into question." Gibbs Patrick Farms, Inc. v. Syngenta Seeds, Inc., No. 7:06-CV-48(HL), 2008 WL 822522, at *6 n.5 (M.D. Ga. Mar. 26, 2008) (quoting Bank v. ICI Ams., Inc. 264 Ga. 732, 732 (Ga. 1994)).

Such factually-inexact statements cannot meet the requirement that pleadings give sufficient notice of a cause of action. See Twombly, 550 U.S. at 555 n.3. From the Amended Complaint, Defendants do not know which of their instruments was supposedly defective, how they allegedly breached their duty to patients, or how an unknown defect caused Plaintiffs' alleged injury. In effect, Plaintiffs have simply pled every possible applicable cause of action by listing the elements of strict liability and negligence and pairing them with conclusory statements with no evident factual basis. The Plaintiffs' claim appears to rest entirely upon the theory that they had no metallic microemboli before surgery and one of Defendants many instruments was used, so Defendants must have done something wrong. With respect to causation in particular, such conjecture is simply insufficient to survive a Rule 12(b)(6) motion. See Barrett Props., LLC v. Roberts Capitol, Inc., 316 Ga. App. 507, 509 (Ga. Ct. App. 2012) ("A mere possibility of . . . causation is not enough . . . .").

Plaintiffs' negligence and strict liability claims must thus be dismissed and dismissed with prejudice. Defendants put Plaintiffs on notice of the issues with their first complaint, which Plaintiffs then failed to rectify in their Amended Complaint. Plaintiffs have already presumably tried and failed to fix their pleadings; the Court is unwilling to provide a second opportunity to do so.

C. Punitive Damages

Plaintiffs' Amended Complaint also seeks punitive damages [Doc. 14 at 24]. However, "punitive damages are not recoverable unless general damages have been awarded." Goodson, 2011 WL 6840593, at *6 (citing Lamb v. Salvage Disposal Co. of Ga., 244 Ga. App. 193, 196

(Ga. Ct. App. 2000)). Because the Court has found Plaintiffs' claims for negligence and strict liability without merit, punitive damages will not be awarded.

IV. Motion to Strike

Defendants also filed a Motion to Strike the class certification request in Plaintiffs' Amended Complaint. Because the Court has dismissed the claims underlying the request for certification, this motion is now moot. Thus, Defendants' Motion to Strike [Doc. 20] is DISMISSED AS MOOT.

V. Conclusion

For the reasons stated above, Defendants' second Motion to Dismiss [Doc. 19] is GRANTED. Defendants' other motions--their first Motion to Dismiss [Doc. 11], first Motion to Strike [Doc. 12], and second Motion to Strike [Doc. 20]--are all DISMISSED AS MOOT. Plaintiffs' Amended Complaint [Doc. 14] is DISMISSED WITH PREJUDICE.

SO ORDERED, this 30 day of January, 2017.

ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE