## DCPI 395/2010

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 395 OF 2010

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BETWEEN

CHENG KIT YEE Plaintiff

and

MODERN BEAUTY SALON (HK) 1st Defendant

LIMITED

KIN YIK BIOMEDICAL 2nd Defendant

TECHNOLOGY LIMITED

KOH IK SOO Third Party

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Coram : Deputy District Judge Shipp

Date of Hearing : 19 July 2011

Date of Decision : 19 July 2011

DECISION

1. This is an application by the Defendants to strike out the Plaintiff’s claim under Order 18, Rule 19.
2. The two limbs relied on by Miss Lo, appearing on behalf of the Defendants, are: (1) the Plaintiff’s claim is scandalous, frivolous or vexatious and/or; (2) otherwise it is an abuse of process.
3. The burden on the Defendants in an application of this sort is a very high one and the test has been set out by Miss Lo quoting Mr. Justice Silke in the case of Like Soon Company Limited, CACV 21 of 1981:

“Striking out should only be done in plain and obvious cases, there should be no trial upon affidavit. Disputed facts are to be taken in favour of the party sought to be struck out. The claim must be obviously unsustainable, the pleadings inarguably bad and that it be impossible, not just improbable, for the case to succeed before a Court will strike out. If the Court does not think the matter to be clear beyond doubt or if it fails to be satisfied that there is no reasonable cause of action or that the proceedings are frivolous or vexatious then there should be no striking out. One must be careful not to drive a plaintiff from the judgment seat nor should the Court decide difficult points of law in proceedings such as this.”

1. The pleaded case of the Plaintiff was that by an oral agreement made between herself and three staff members of the 1st Defendant. The 1st Defendant agreed in the course of its business that the 1st Defendant or the 2nd Defendant acting as its agent shall provide Eye Corrections Services to the Plaintiff for the sum of HK$100,000.00.
2. The Plaintiff also pleaded 3 express terms that are said to be part of the agreement in paragraph 4 of the Statement of Claim. In the alternative, the Plaintiff says these terms are implied terms.
3. It was also pleaded in paragraph 6 of the Statement of Claim that the Defendants and their servants or agents owed a duty of care to the Plaintiff to ensure that the services provided should be safe and minimize any harm or injuries to her.
4. The Plaintiff underwent surgery in Korea on 15th November 2007. It was performed by a Korean surgeon known as Dr. Koh. The surgery was not a success and there were lumps in the lower eye lids of the Plaintiff. Her eyes seem to be of two different sizes and she suffered from pain in her eyes and eye lids from time to time.
5. The Plaintiff claims are for breach of contract and negligence against the Defendants.
6. The main ground relied on by the 1st Defendant in this application is that the Plaintiff’s claims are scandalous, frivolous or vexatious. The meaning of frivolous or vexatious has been set out quite clearly in HK Civil Procedure 2011 18/19/7 and it is not disputed.
7. The meaning is this:

“A proceeding is frivolous when it is not capable of reasoned argument, without foundation or where it cannot possibly succeed. A proceeding is vexatious when it is oppressive and/or lacks bona fides.”

1. In support of this ground, the Plaintiff relies on an exclusion clause in Clause 10 of the Rules and Regulations of the 1st Defendant which was duly acknowledged and signed by the Plaintiff.
2. This clause provides for the following:

“Any agreements made between the customer and staff of the company and the franchised company must be confirmed in a written receipt together with the company’s chop and the signature of the staff concerned and the company, the franchised companies shall not be held liable for any oral agreements made between the customer and its staff. To protect the benefits and interest of the customer, the customer is advised not to give tips to any staff of the company or the franchised companies.”

1. The question here is whether Clause 10 is an exemption clause governed by the Control of Exemption Clauses Ordinance Cap. 71. Section 7(1) of the said Ordinance provides that:

“A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence.”

1. Section 8(2)(a) provides:

“As against that party, the other cannot by reference to any contract term when himself in breach of contract, exclude or restrict any liability of his in respect of the breach except in so far as the contract term satisfies the requirement of reasonableness.”

1. It is not plain and obvious to me that the Plaintiff’s reliance on the Control of Exemption Clauses Ordnance is not capable of reasoned argument ,without foundation or where it cannot possibly succeed. In fact I find this argument quite attractive.
2. The 1st Defendant also contended that the parol evidence rule should apply. I fail to see the relevance of this rule because the agreement was an oral agreement not a written one.
3. The 1st Defendant also contends that there is no evidence from the Plaintiff to show the 1st Defendant’s involvement in the surgery. I fail to see any merit in this argument when in an application of this nature disputed facts are to be taken in favour of the parties sought to be struck out.
4. It is set out very clearly in paragraphs 7 to 34 of the Plaintiff’s affirmation, the facts and matters that involved the 1st Defendant.
5. They include the staff of the 1st Defendant introducing the Eye Correction Services to the Plaintiff and procured her to join. The staff of the 1st Defendant provided details of the Eye Correction Services to the Plaintiff and the staff of the 1st Defendant provided a booklet of Kin Yue Centre (a centre owned and managed by the 2nd Defendant) with photographs showing the possible satisfactory result of the surgery.
6. The Plaintiff says that she made a payment of HK$100,000.00 to the 1st Defendant for the Eye Correction Services. The Eye Correction Services were arranged by the 1st Defendant to be performed in Seoul Korea. And the Plaintiff was led to the clinic of Dr. Koh by someone holding a card bearing the Plaintiff’s membership number with the 1st Defendant at Inchon airport.
7. Dr. Koh, the surgeon who performed the operation, confirmed in a letter dated 19th July 2010 (in Korean and English), obtained by the Plaintiff and her friend Madam Cho, the Plaintiff had surgery arranged by the 1st Defendant on 15th November 2007 in Korea.
8. The Plaintiff lodged various complaints with the staff of the 1st Defendant in respect of the unsatisfactory result of the surgery and the staff of the 1st Defendant responded to and dealt with the complaints by, inter alia, arranging the Plaintiff to meet Dr. Koh again in Kin Yue Centre of the 2nd Defendant and offering a free surgery for the Plaintiff in Korea to be performed by Dr. Koh again.
9. Miss Lo arguing on behalf of the 1st Defendant said these facts are disputed. It is precisely that these facts are in dispute why the case should go to trial.
10. The second ground relied on is that the 2nd Defendant says there is no reasonable cause of action against it by reason of the fact that there was no contract pleaded between the Plaintiff and the 2nd Defendant and no payment was made by the Plaintiff to the 2nd Defendant.
11. The Plaintiff never pleaded there was a contract made with the 2nd Defendant. This is abundantly clear in paragraph 3 of the Statement of Claim. There was an alternative plea which pleaded that the 2nd Defendant was acting as the agent of the 1st Defendant. The Plaintiff’s claim against the 2nd Defendant is also founded in negligence as pleaded in paragraphs 6, 19 and 20 of the Statement of Claim.
12. The 2nd Defendant wanted to refer to evidence in support of this ground but they cannot do so by reason of Order 18 rule 19(2).
13. The 2nd Defendant has not shown that it is plain and obvious that the Statement of Claim does not disclose some cause of action or some question fit to be decided by a judge or a jury. Therefore I cannot accede to the 2nd Defendant’s request.
14. The summons to strike out dated 21st April 2011 is hereby dismissed. I shall hear the parties on costs.

( Colin. A. Shipp )

Deputy District Judge

Parties :

Queenie WS Ng instructed by Messrs. Jimmie KS Wong & Partners for the Plaintiff.

Gigi Lo instructed by Messrs. Eddie Lee & Co. for the Defendants.