

DOCKET NO: HHDCV206136500S

SUPERIOR COURT

SAKON, JOHN ALAN  
V.  
SMITH, LINDA S Et AlJUDICIAL DISTRICT OF HARTFORD  
AT HARTFORD

5/15/2023

ORDERORDER REGARDING:  
02/24/2023 149.00 MOTION TO STRIKE

The foregoing, having been heard by the Court, is hereby:

ORDER:

## INTRODUCTION

On February 24, 2023, the defendant moved to strike all six counts of the plaintiff's second amended complaint dated January 3, 2023 (dkt. entry no. 147), and the corresponding prayers for relief. The plaintiff filed his opposition memorandum on February 26, 2023. The court conducted oral argument on the motion at a remote hearing on May 15, 2023.

## DISCUSSION

"The purpose of a motion to strike is to contest ... the legal sufficiency of the allegations of any complaint ... to state a claim upon which relief can be granted.... A motion to strike challenges the legal sufficiency of a pleading, and, consequently, requires no factual findings by the trial court.... [The court takes] the facts to be those alleged in the complaint ... and [] construe[s] the complaint in the manner most favorable to sustaining its legal sufficiency.... Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied." *Fort Trumbull Conservancy, LLC v. Alves*, 262 Conn. 480, 498, 815 A.2d 1188 (2003) (Citations omitted; internal quotation marks omitted.) "A motion to strike is properly granted if the complaint alleges mere conclusions of law that are unsupported by the facts alleged." *Id.* (Internal quotation marks and citation omitted.)

1. Count One – Breach of Contract. The plaintiff has alleged the essential elements of a breach of contract claim. The motion to strike count one is therefore denied.

2. Count Two – Unintentional [sic] Infliction of Emotional Distress. The plaintiff did not allege the elements of a negligent infliction of emotional distress claim. See *Stancuna v. Schaffer*, 122 Conn. App. 484, 490, 998 A.2d 1221 (2010) (plaintiff must plead and prove that "(1) the defendant's conduct created an unreasonable risk of causing the plaintiff emotional distress; (2) the plaintiff's distress was foreseeable; (3) the emotional distress was severe enough that it might result in illness or bodily harm; and (4) the defendant's conduct was the cause of the plaintiff's distress.") (internal quotation marks omitted.) The motion to strike count two is therefore granted.

3. Count Three – Breach of [Fiduciary] Duty. The essential elements of a claim of breach of fiduciary duty are: "[1] [t]hat a fiduciary relationship existed which gave rise to . . . a duty of loyalty . . . an obligation . . . to act in the best interests of the plaintiff, and . . . an obligation . . . to act in good faith in any matter relating to the plaintiff; [2] [t]hat the defendant advanced his or her own interests to the detriment of the plaintiff; [3] [t]hat the plaintiff sustained damages; [and] [4] [t]hat the damages were proximately caused by the fiduciary's breach of his or her fiduciary duty." (Internal quotation marks omitted.) *Rendahl v. Peluso*, 173 Conn. App. 66, 162 A.3d 1 (2017). The plaintiff did not allege the

existence of a fiduciary relationship between himself and the defendant, only a contractual one. The motion to strike count three is therefore granted.

4. Count Four – Failure to Disclose. The fourth count of the plaintiff’s complaint alleges that the defendant was negligent in failing to disclose to the plaintiff the circumstances of her own divorce, and how her divorce could have interfered with her performing her duties under their agreement and lead to a biased evaluation. The court understands this count to sound in negligence (not, as the defendant suggests, negligent misrepresentation). The plaintiff has alleged the essential elements of a negligence action. See *Right v. Breen*, 277 Conn. 364, 371-72, 890 A.2d 1287 (2006) (“[the] essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury”) (internal quotation marks and citation omitted.) The motion to strike count four is therefore denied.

5. Count Five – Fraud. The plaintiff alleges that the defendant fraudulently misrepresented her credentials by claiming that she practiced “forensic” psychology and that he relied on her misrepresentations to his detriment. “It is well settled that the essential elements of fraud are (1) a false representation was made as a statement of fact; (2) it was untrue and known to be untrue by the party making it; (3) it was made to induce the other party to act upon it; and (4) the other party did so act upon that false representation to his injury.” (Internal quotation marks omitted.) *Leonard v. Commissioner of Revenue Services*, 264 Conn. 286, 296, 823 A.2d 1184 (2003). The plaintiff has sufficiently alleged a cause of action for fraudulent misrepresentation. The motion to strike count five is therefore denied.

6. Count Six – Unfair Trade Business Practices [sic]. The court understands count six to allege a violation of the Connecticut Unfair Trade Practices Act (CUTPA). CUTPA provides that “[n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.” General Statutes § 42-110b (a). “Accordingly, to prevail in a private cause of action under CUTPA, a plaintiff must establish that the defendant has (1) engaged in unfair methods of competition or unfair or deceptive acts or practices (2) in the conduct of any trade or commerce (3) resulting in (4) an ascertainable loss of money or property, real or personal, by the plaintiff.” (Citation omitted.) *Kent Literary Club of Wesleyan University at Middletown v. Wesleyan University*, 338 Conn. 189, 257 A.3d 874 (2021). Connecticut courts have adopted the so-called “cigarette rule” established by the Federal Trade Commission for determining when a practice is unfair: “(1) [W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—in other words, it is within at least the penumbra of some [common-law], statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers [competitors or other businesspersons].... All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three. ... Thus a violation of CUTPA may be established by showing either an actual deceptive practice ... or a practice amounting to a violation of public policy.” (Internal quotation marks omitted.) *Cenatiempo v. Bank of America, N.A.*, 333 Conn. 769, 790, 219 A.3d 767 (2019), citing *Ulbrich v. Groth*, 310 Conn. 375, 409, 78 A.3d 76 (2013). CUTPA is a broad remedial statute and is to be construed liberally. *Id.*, 791.

The defendant correctly notes that although health care providers are subject to CUTPA, “only the entrepreneurial or commercial aspects of the profession are covered. . . .” *Rumbin v. Baez*, 52 Conn. App. 487, 489-90, 727 A.2d 744 (1999). “[T]he touchstone of a legally sufficient CUTPA claim against a health care provider is an allegation that an entrepreneurial or business aspect of the provision of services aside from medical competence is implicated, or aside from medical malpractice based on the adequacy of staffing, training, equipment or support personnel. Medical malpractice claims recast as CUTPA claims cannot form the basis for a CUTPA violation.” *Id.*, 490.

In the present case, the plaintiff does not allege that the defendant committed malpractice, but rather that she, among other things, breached the contract by overbilling and providing an evaluation that was so untimely that it was useless, induced the plaintiff to hire her by misrepresenting her credentials as a forensic psychologist, and failed to disclose her pending divorce and the potential for bias in her evaluation. These allegations involve the entrepreneurial aspects of the defendant’s practice. The motion

to strike count six is therefore denied.

## CONCLUSION

For the foregoing reasons, the motion to strike counts two and three, and the corresponding prayers for relief, is granted. The motion to strike counts one, four, five and six is denied.

Judicial Notice (JDNO) was sent regarding this order.

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Judge: STUART D ROSEN

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