SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAKOTA D. RAMSEUR** **PART** **34M**

Justice

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MICHELLE SCHWARTZ,

Plaintiff,

- v -

OSHMAN & MIRISOLA, LLP, THE OSHMAN FIRM, THEODORE OSHMAN

Defendant.

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INDEX NO. 155780/2023

MOTION DATE 11/13/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42

were read on this motion to/for DISMISSAL.

In June 2023, plaintiff Michelle Schwartz commenced this legal malpractice action against her previous attorneys, defendants Oshman & Mirisola LLP, The Oshman Firm, and Theodore Oshman. Plaintiff alleges that they committed professional malpractice while representing her in a class action lawsuit and a separate individual lawsuit against the manufacturer of the generic prescription drug that had allegedly caused her to suffer severe, adverse side effects. In Motion Sequence 001, defendants move to dismiss pursuant to CPLR 3211 (a) (1) and (a) (7), which plaintiff opposes in its entirety. For the following reasons, the motion is granted and plaintiff's complaint is dismissed.

BACKGROUND

In or around 2001, Dr. Steven Rubin started prescribing plaintiff Reglan (the brand drug of metoclopramide) or a generic version of the drug manufactured by PLIVA, Inc. to treat her gastroparesis. Metoclopramide was first approved by the Food and Drug Administration ("FDA") in 1980 pursuant to a New Drug Application ("NDA") as a "short-term (4-12 weeks) therapy for adults with symptomatic documented gastroesophageal reflux who fail to respond to conventional therapy." (*See* NYSCEF doc. no. 15, 1987 Physicians' Desk Reference for Reglan; NYSCEF doc. no. 17 at 26, Dr. David Feigal Expert Report dated 10/11/2019.) In 1988, the FDA approved PLIVA's Abbreviated New Drug Application ("ANDA") to manufacture a generic metoclopramide. To be approved pursuant to an ANDA, the generic drug must be bioequivalent to the FDA-approved brand drug, the administration, dosage form, and strength of the generic must be identical, and the information contained on its label must be the same. (NYSCEF doc. no. 17 at 16.)

Since Reglan was first approved by the FDA, its brand label/package insert has contained a warning that using metoclopramide could cause tardive dyskinesis, a neurological disorder that is potentially irreversible and causes the individual to suffer involuntary, repetitive movements. Specifically, the label warned that "[b]oth the risk of developing the syndrome and the likelihood that it will become irreversible are believed to increase with the duration of treatment and the total cumulative dose." (NYSCEF doc. no. 15.) In addition, the section of the label entitled "Doses and Administration" warns that "[t]herapy longer than 12 weeks has not been evaluated and cannot be recommended." (*Id*.) There is no dispute that PLIVA's generic drug label contained these two warnings throughout the entire period of time that plaintiff was taking this medication. In 2004, the FDA approved a change in the Reglan label as applied for by the owner of its NDA. The language added to the "Indication and Usage" section states, "the use of Reglan tablets is recommended for adults only. Therapy should not exceed 12 weeks in duration." (NYSCEF doc. no. 17 at 24.) Similar language was also included in the "Doses and Administration" section. Even though the changes were made to Reglan, PLIVA did not update its generic drug's label/package insert to reflect the FDA-approved changes.

Litigation Against Metoclopramide Makers

In 2009, the FDA required both Reglan and generic metoclopramide manufacturers to include a "black box warning" that the use of the drug could cause tardive dyskinesia if taken for longer than 12 weeks. Thereafter, plaintiffs throughout the country brought class action suits in various state courts, alleging that the makers metoclopramide had undersold the risk of significant neurological disorders in taking metoproclamide. In *Pliva, Inc. v Mensing* (564 U.S. 604 [2011]), the Supreme Court found that these plaintiffs' state-law claims against *generic manufacturers* were preempted by federal law under the Supremacy Clause to the extent that state-law failure-to-warn statutes required generic drugs to provide more stringent, safer warning labels. To the Court, since generic drug manufactures are required by FDA regulations to maintain identical labels as their brand counterparts, it would be impossible for them to change its label (even to strengthen a warning) in response to state-law tort suits. (*Id*. at 618-619.) In *In Re Reglan Litigation*, the New Jersey Supreme Court found that the class claims of nearly 1,000 users of generic metoclopramide manufacturers were *not* preempted as in *Mensing* because the generic manufacturers like PLIVA had not, in fact, matched their labels to that of the brand. (226 N.J. 315, 335-338 [2016].)

The Underlying Claims and Present Action

In her complaint, plaintiff alleges that, in 2009, she approached defendants to represent her in litigation against the makers of Reglan/Metoclopramide after she started suffering from neurological disorders including tardive dyskinesis due to her longtime use of the drug from 2001 to 2009. (NYSCEF doc. no. 1 at ¶ 10, 14; NYSCEF doc. no. 21, plaintiff's medication history.) She alleges that she joined a class action against both Reglan and the generic manufacturers. As a class member, she acknowledges that she was a part of a global settlement against the brand maker of Reglan (NYSCEF doc. no. 1 at ¶¶ 25,75, 115) but alleges that she was pressured by defendants into opting out of the settlement with PLIVA—one of only eight individuals (out of approximately 6,000) to do so (*id*. at ¶ 26-28.) In her affidavit, she avers that defendants informed her they would no longer represent her if she did not opt out and that they

would have a chance of a greater recovery if she did. (NYSCEF doc. no. 33 at ¶ 4, Schwartz affidavit.)

In 2019, plaintiff commenced an individual action against PLIVA and various other generic manufacturers in the Superior Court of New Jersey, Middlesex County. (*See In Re Reglan Litigation, Schwartz v Wyeth, LLC, et al.,* Doctet No. Mid-L-010457-14.) In May, counsel for the drug companies deposed Dr. Rubin. In relevant part, Rubin could not recall whether he had ever reviewed the label/package insert for Reglan or the Physicians' Desk Reference entry for Reglan (NYSCEF doc. no. 19 at 55-56, Rubin dep. transcript); could not recall whether he reviewed such materials for generic metoclopramide (*id*. at 57-58); stated that he had not reviewed written materials about metoclopramide put out by PLIVA and that he did not recall having ever read a package insert from PLIVA (*id*. at 63-64); and testified that he "did not believe" that he had relied upon any package insert from PLIVA prior to prescribing plaintiff (*id*. at 65.) [1] In plaintiff's own deposition, in response to the question "If Dr. Rubin had told you that metoclopramide therapy longer than 12 weeks had not been evaluated and cannot be recommended"—the warning that PLIVA's label contained at all relevant times—"would you have taken metoclopramide?," plaintiff answered "no." (NYSCEF doc. no. 18 at 108, plaintiff dep. transcript.)

In May 2019, as plaintiff's counsel against PLIVA and non-party Wyeth (another generic drug manufacturer), defendants filed a third amended short form complaint. Given the decisions in *PLIVA v Mensing* and *In Re Reglan Litigation*, plaintiff's only cause of action against these generic manufacturers was for failure to warn premised on PLIVA's failure to adopt the 2004 label changes to match the brand's label. In October 2020, PLIVA filed a motion for summary judgment, which the Court granted with prejudice on November 2, 2020. (NYSCEF doc. no. 11, underlying notice of motion for summary judgment; NYSCEF doc. no. 28, NJ Superior Court Order dismissing complaint.) Plaintiff alleges—and defendants admit—that they did not file an opposition to PLIVA's summary judgment motion. (NYSCEF doc. no. 1 at ¶ 34; NYSCEF doc. no. 7 at 47, Isaacson affidavit in support of motion.) Approximately one year later, defendants moved to vacate the Dismissal Order that had been entered. In PLIVA's opposition, it noted that defendants had reached out to its counsel requesting its consent to vacate the Dismissal Order two weeks after the decision but took no action for another ten months. (NYSCEF doc. no. 30, PLIVA opp. to vacate dismissal.) Ultimately, the court denied said motion as well. (NYSCEF doc. no. 31, Order denying vacating dismissal.)

In the instant action, plaintiff alleges that defendants committed malpractice in failing to oppose PLIVA's summary judgment motion (NYSCEF doc. no. 1 at ¶ 47, 51, 86, 96, and 124) and to timely file a motion to vacate (*id*. at ¶ 42, 48, 87, 97, 125). In addition, in her opposition to this motion, plaintiff indicates that, if defendants were aware that she could not win her case against PLIVA (the position that defendant's take in this motion), then it was also malpractice for them to advise her to opt out of the global settlement against PLIVA in the first place. (*See* NYSCEF doc. no. 27 at ¶ 5-7.)

[1] The Court has not reviewed Rubin's entire deposition as defendants have only included sections favorable to it in support of its motion. The Court has also not reviewed the entirety of plaintiff's deposition for the same reason.

In this motion sequence, defendants move to dismiss plaintiff's complaint pursuant to CPLR 3211 (a) (1) and (a) (7), arguing that plaintiff cannot establish that their conduct was the proximate cause of any loss she sustained since, in their view, she cannot demonstrate—for numerous reasons—that she would have obtained a favorable judgment against PLIVA in the underlying action. Plaintiff's opposition, as will be discussed below, does little if anything to refute this argument; instead, plaintiff essentially contends that it is premature to dismiss her claim pre-answer since no discovery has been taken and plaintiff is allegedly not in possession of her entire file from defendants. (*See* NYSCEF doc. no. 27 at ¶ 37, 50, 54, 55.) Since this argument has no merit, the Court must dismiss plaintiff's complaint.

DISCUSSION

On a motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7), courts afford the pleadings a liberal construction, accept the facts as alleged in the complaint as true, and give the plaintiff the benefit of every possible favorable inference. (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015].) The Court is not required to accept factual allegations that consist of bare legal conclusions or that are inherently incredible. (*Mamoon v Dot Net Inc.*, 135 AD3d 656, 658 [1st Dept 2016].) A courts' inquiry is limited to assessing the legal sufficiency of the plaintiff's pleadings; accordingly, its only function is to determine whether the facts as alleged fit within a cognizable legal theory. (*JF Capital Advisors*, 25 NY3d at 764; *Skill Games, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003].)

To plead a malpractice cause of action, the plaintiff must set forth three elements: (1) the negligence of the attorney(s); (2) that the negligence was the proximate cause of the loss sustained; and (3) actual damages. (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007]; *Bishop v Maurer*, 33 AD3d 497, 498 [1st Dept 2006].) In demonstrating the attorney's negligence, the plaintiff must plead facts that show the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession. (*McCoy v Feinman*, 99 NY2d 295, 301-302 [2002].) Further, to establish proximate causation, plaintiff must demonstrate that "but for" the attorney's negligence, plaintiff would have prevailed in the matter at issue and would not have sustained any ascertainable damages. (*Leder v Spiegel*, 31 AD3d 266, 268 [1st Dept 2006]; *Lieblich v Pruzan*, 104 AD3d 462, 462-463 [1st Dept 2013] [finding motion court properly dismissed the legal malpractice claim as the plaintiffs failed to "meet the 'case within a case' requirement, demonstrating that but-for the attorney's conduct the client would have prevailed.]") This "case within a case" requirement sets a high bar for recovery: plaintiff must prove the hypothetical outcome of the underlying litigation and then the attorney's malpractice in connection with that litigation. (*See Lindenman v Kreitzer*, 7 AD3d 30, 34 [1st Dept 2004].)

Even recognizing that the Court is required to give plaintiff the benefit of every favorable inference, plaintiff's complaint is entirely devoid of facts demonstrating she would have prevailed against PLIVA absent defendant's failure to oppose the motion or their failure to seek leave to vacate the Dismissal Order within a reasonable amount of time. With respect to her underlying individual claim against PLIVA for failing to make the requisite changes to their label, the *only* facts alleged are that defendants insisted her case would be stronger if she pursued

an individual claim (NYSCEF doc. no. 1 at ¶27); defendants filed an amended complaint in 2019 (*id*. at 30); they failed to oppose the motion for summary judgment, for which a dismissal order was entered (*id*. at ¶ 34, 35); and they waited nearly a year to move for leave to vacate, at which point the New Jersey court denied their motion (*id*. at ¶ 39, 40). Indeed, the complaint is even silent concerning the very brand label change in 2004 that was the foundation for her sole claim against PLIVA.

The absence of facts demonstrating a viable underlying claim is particularly significant considering the voluminous evidence that defendant has provided that suggests plaintiff *could not* have succeeded. Plaintiff would have to demonstrate under New Jersey law that the two warning on PLIVA's label from 1988 through 2009—that (1) metoclopramide therapy lasting longer than 12 weeks had not been evaluated and cannot be recommended, and (2) both the risk of developing the syndrome and the likelihood that it will become irreversible are believed to increase with the duration of treatment and the total cumulative dose—were inadequate to warn plaintiff's doctor of the foreseeable risk of tardive dyskinesis. [2] This, despite the fact PLIVA, in the underlying action, submitted an unrebutted expert report from Dr. Feigal that the FDA did not consider the 2004 label changes to be "new or significant" (NYSCEF doc. no.17 at 31) and plaintiff herself admitted in her deposition that such a warning, had she been informed of it, would have been sufficient to dissuade her from taking Reglan (NYSCEF doc. no. 18 at 108).

In addition, defendants point out that Dr. Ruben testified that he did not review PLIVA's label/package insert when prescribing her metoclopramide. Assuming the portions of his transcript not included on this motion do not contradict this testimony, under New Jersey law, the causal relationship between PLIVA's failure to warn of the risk of tardive dyskinesis and plaintiff's injury would have broken by Dr. Ruben's conduct. (*See Perez v Wyeth Labs. Inc.*, 161 NJ 1, 28 [1999] ["A manufacturer who fails to warn…may nevertheless be relieved of liability under the learned intermediary doctrine if the prescribing physician either did not read the warning at all, and thus did not rely on any information from the manufacturer or if the physician was aware of the risk from another source"].) Since plaintiff has failed to plead facts that plausibly demonstrate she would have obtained a favorable judgment on the merits in her underlying complaint against PLIVA, let alone sufficient facts to overcome the various barriers to recovery that defendants have cited, plaintiff has not pled a cause of action for legal malpractice and the complaint is dismissed. Lastly, notwithstanding plaintiff's contention in her letter to the Court (NYSCEF doc. no. 41, plaintiff letter to judge dated 11/13/2023), neither defendants nor the Court have treated this motion as one for summary judgment as she contends. As such, plaintiff's argument that this motion to dismiss is premature is without merit.

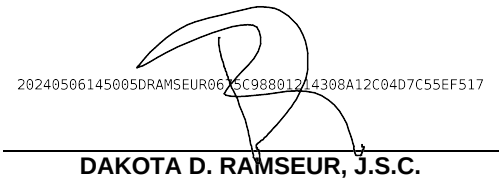
Accordingly, for the foregoing reasons, it is hereby

ORDERED that defendants Oshman & Mirisola LLP, The Oshman Firm, and Theodore Oshman's motion to dismiss pursuant to CPLR 3211 (a) (7) is granted and the complaint is dismissed without prejudice; and it is further

[2] New Jersey Law follows the learned intermediary doctrine such that a drug manufacturer does not have the duty to warn the patient of the dangers involved in taking the prescription but instead has the duty to warn the patient's doctor. (*See Goodson v CR Bard, Inc.*, 2018 WL 13770652 at *14 [Superior Ct. App. Div. 2018].)

ORDERED that counsel for defendants shall serve a copy of this order, along with notice of entry on all parties within twenty (20) days of entry.

This constitutes the Decision and Order of the Court.



5/3/2024
DATE

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:	X	**CASE DISPOSED**			**NON-FINAL DISPOSITION**			
	X	**GRANTED**		**DENIED**	**GRANTED IN PART**		**OTHER**	
APPLICATION:		**SETTLE ORDER**			**SUBMIT ORDER**			
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**			**FIDUCIARY APPOINTMENT**		**REFERENCE**	