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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39

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ALLSTATE INSURANCE COMPANY, et al. ,
Plaintiffs,

Index No. 603776/03

-against-

ALEX BUZIASHVILI, et al.,
Defendants.

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FREEDMAN, J.:

In this action by automobile insurance carriers against certain companies, their principals, and their attorneys, who allegedly conspired to commit no-fault insurance fraud with respect to the provision of medical- and health care-related services, defendants Moshe Fuld, Esq. and Moshe D. Fuld, P.C. (the Fuld defendants) move for an order: (a) pursuant to CPLR 3211 (a) (7) and 3016 (b), dismissing the complaint, dated December 3, 2003 (the Complaint) as against them; and (b) pursuant to 22 NYCRR 130-1.1, imposing sanctions against plaintiffs.

For the reasons discussed below, the motion is granted to the extent that the Complaint is dismissed as against the Fuld defendants.

BACKGROUND

The gist of plaintiffs' claim is that they have paid out nearly $34 million in fraudulent no-fault benefit claims to the individual defendants (referred to in the Complaint as Principals), who are alleged to have constructed a "medical mill" consisting of a network of billing management companies, dummy and shell management companies, a phony payroll service, and a host of sham medical clinics (referred to in the Complaint as Parallel PCs), all owned, operated, and/or controlled by the Principals. According to

plaintiffs, the formation of the Parallel PCs was accomplished by illegally purchasing the names and licenses of licensed health care professionals, and was part of the Principals' fraudulent scheme. Plaintiffs further allege that the Principals: (a) through their illicit ownership of the Parallel PCs and their formation of phony management companies (b) paid "runners" to stage accidents and to bribe police personnel to recruit patients who were not injured; (c) manufactured false, fictitious, forged, and otherwise fraudulent medical bills, reports, and other documentation for examinations, treatments, and tests that were never rendered or were medically unnecessary; and that (d) these actions were all designed to fraudulently induce plaintiffs to pay insurance benefits.

In the Complaint, plaintiffs accuse defendants of, among other things, violating the United States Racketeer Influenced and Corrupt Organizations Act (RICO), 18 USC § § 1961, 1962 (c) and (d), and 1964 (c), committing common-law fraud, violating New York Public Health Law § § 238-a, et seq. (anti-kickback statute), and New York General Business Law (GBL) § § 349, et seq. (deceptive business practices).

The Fuld defendants are described in the Complaint, not as Principals, but instead as "No-Fault Collection Attorneys." Plaintiffs allege, in paragraphs 364 to 371 of the Complaint, that: (a) the Fuld defendants pursued no-fault claims in arbitration on behalf of the Parallel PCs that they knew were based on fraud, and submitted fraudulent documents in connection therewith, thereby facilitating defendants' fraudulent scheme (¶ ¶ 364 - 365); (b) the Fuld defendants earned attorneys' fees in excess of those permitted by law for representation in no-fault matters (¶ 366); and (c) the Fuld defendants must be charged with having acted "in concert with and in furtherance of the scheme to defraud . .

. [and] advanced claims that [they] knew were grounded in fraud" because they were retained by Parallel Management (rather than by the "paper owners" of the Parallel PCs) to represent the Parallel PCs in the arbitrations, but had no contact with the "paper owners," and never conducted an inquiry as to the parties' real identities or relationships (¶¶ 367 - 369, 371); and (d) all of the submissions by the Fuld defendants in the no-fault arbitrations "contained fraudulent medical records and documents relating to, inter alia, neurological testing, nerve block injections and acupuncture" (¶ 370). Additionally, in paragraphs 562 to 570 of the Complaint, plaintiffs accuse the Fuld defendants of actionable RICO and fraudulent conduct for their alleged participation in, and conducting of, the affairs of the enterprise, as well as in the "Parallel Medical Network Enterprise" (consisting primarily of certain medical PCs and medical management companies, as well as a payroll company), and for an association-in-fact enterprise.

Five of the 36 causes of action set forth in the Complaint are directed against all defendants, including the Fuld defendants, to wit:

1st cause of action - engaging in a "pattern" of "racketeering activity" with the Parallel Medical Network Medical Enterprise in violation of 18 USC § 1962 (c) (Complaint, ¶¶ 381-399)[1]

21st cause of action - conspiring to violate RICO in violation of 18 USC §

[1] In the context of the first cause of action, the Complaint recites that the Fuld defendants "represented the Parallel PCs in their efforts to collect payment from insurers, in general, and Plaintiffs, in particular, for claims they knew were fraudulent" (Complaint, ¶ 387).

1962 (d) (Complaint, ¶¶ 571-576) [2]

23rd cause of action - state common-law fraud (Complaint, ¶¶ 603-618)

31st cause of action - violation of GBL § 349 (Complaint, ¶¶ 672-676)

32nd cause of action - a permanent injunction enjoining defendants from further submitting any such claims to plaintiffs (Complaint; ¶¶ 677-688)

Also, although no relief is sought against the Fuld defendants in the 20th cause of action, the allegations therein denominate Moshe D. Fuld, P.C. as a "mini-enterprise" (18 USC § 1262 [c]), stating, among other things, that "[a]s a part of the pattern of racketeering activity, and for the purpose of executing the scheme and artifice to defraud . . . Defendants Fuld and the Parallel PCs caused mailings to be made . . . in furtherance of a scheme or artifice to defraud the Plaintiffs, and to induce them to issue checks to the Moshe D. Fuld, P.C. enterprise based upon materially false and misleading information," and that "[e]ach submission of a fraudulent claim constitutes a pattern of racketeering activity within the meaning of 18 USC § 1961 (5)" (Complaint, ¶¶ 562-570).

In support of their motion to dismiss, the Fuld defendants deny any wrongful conduct. They contend that, despite plaintiffs' fanciful embellishments, they were simply no-fault collection attorneys who pursued certain unspecified claims on behalf of certain medical entities by commencing, in the normal course of business, no-fault arbitration proceedings as permitted under New York's No-Fault Law and Regulations. They stress

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[2] In paragraph 574, plaintiffs accuse various defendants, including the Fuld defendants, of intentionally filing false claims and supporting documentation with plaintiffs.

that they were "collection," not "billing" attorneys, and that they were retained only after the benefits sought were contested by the carrier, and only after a request by the medical provider was denied.

In opposition to the motion, plaintiffs reiterate the allegations found in the Complaint, i.e., that: (a) the Fuld defendants prepared and submitted fraudulent claims in arbitration through, and for the benefit of, the enterprise; (b) the Fuld defendants negotiated their role in the scheme directly with the Principals, who actually had no legitimate interest in the Parallel PCs; (c) the Fuld defendants profited through their participation in the scheme, through payments made directly to them by plaintiffs, which payments exceeded the fees permitted under the no-fault law; and (d) the Fuld defendants decided which strategies should be pursued in furtherance of the fraudulent scheme.

DISCUSSION

The Fuld defendants seek dismissal of all of the causes of action asserted against them herein on the grounds that they fail to state a cause of action and/or they lack the necessary particularity. Plaintiffs counter that the allegations are sufficiently pleaded and detailed to withstand a motion to dismiss. In examining the sufficiency of these causes of action, the court limits its analysis to whether the subject causes of action set forth a claim against these moving defendants only.

With respect to the first cause of action, the Fuld defendants contend that plaintiffs: (a) fail to plead a RICO enterprise distinct from the pattern of racketeering activity; (b) fail to plead that the Fuld defendants participated in the "operation and management" of the alleged RICO enterprise; and (c) plead only that the Fuld defendants

acted in the traditional and customary manner of providing legal services to defendants.

To state a claim for a RICO violation, one must allege "(1) that the defendant (2) through the commission of two or more acts (3) constituting a 'pattern' (4) of 'racketeering activity' (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an 'enterprise' (7) the activities of which affect interstate or foreign commerce " (Moss v Morgan Stanley Inc. , 719 F2d 5, 17 [2d Cir 1983], cert denied 465 US 1025 [1984]). Furthermore, a plaintiff must allege and prove "the existence of an enterprise which is 'separate and distinct from the alleged pattern of racketeering activity'" (Goldfine v Sichenzia , 118 F Supp 2d 392, 400 [SD NY 2000] [citation omitted]). Since the RICO statute is such a potent weapon, the court must strive to "flush out frivolous RICO allegations at an early stage of the litigation" (Schmidt v Fleet Bank, 16 F Supp 2d 340, 346 [SD NY 1998] [citation and internal quotation marks omitted]).

To satisfy the "participation" pleading requirement, the United States Supreme Court, in Reves v Ernst & Young (507 US 170 [1993]), held that one violates section 1962 (c) only if s/he "participate[s] in the operation or management of the enterprise itself" (id. at 185). Mere participation in the activities or affairs of the enterprise is insufficient - "some part in directing the enterprise's affairs" is required (id. , emphasis in original). The Supreme Court, in Reves, thus held that accountants who had over-valued an asset on a corporation's balance sheet, thereby incorrectly representing the corporation as solvent, but had no part in directing the enterprise's affairs, did not violate section 1962 (c) (id.; see Biofeedtrac, Inc. v Kolinor Optical Enterprises & Consultants, S.R.L., 832 F Supp 585, 590 [ED NY 1993] [attorney who knowingly assisted enterprise in execution of

a fraudulent scheme by providing legal services and advice could not be held liable under section 1962 (c) because his role was, at all times, limited to the provision of legal services, and did not extend to operation or management of enterprise - - "liability under § 1962 (c) may not be imposed on one who merely 'carries on' or 'participates' in an enterprise's affairs"]; see also Baumer v Pachl, 8 F3d 1341, 1344-45 [9th Cir 1993] [attorney who only provided legal services to a corporation did not participate in operation or management of enterprise regardless of whether he performed those services "well or poorly, properly or improperly"; University of Maryland at Baltimore v Peat, Marwick, Main & Co., 996 F2d 1534, 1539 [3d Cir 1993] ["(s)imply because one provides goods or services that ultimately benefit the enterprise does not mean that one becomes liable under RICO"]; Nolte v Pearson, 994 F2d 1311, 1317 [8th Cir 1993] [attorneys who prepared allegedly false opinion letters and informational memoranda regarding a program had not participated in the operation or management of an enterprise]; Redtail Leasing, Inc. v Bellezza, 1997 WL 603496, at *5 [SD NY 1997] ["(a) defendant does not 'direct' an enterprise's affairs under § 1962 (c) merely by engaging in wrongful conduct that assists the enterprise"]; Gilmore v Berg, 820 F Supp 179, 183 [D NJ 1993] [attorney who allegedly prepared false private placement memoranda regarding a limited partnership did not conduct the affairs of the enterprise because he did not "direct[ ] the legal entities he represented to engage in particular transactions"]).

Without addressing every argument asserted by the Fuld defendants in support of their request for dismissal of this cause of action, the court grants the motion to dismiss this claim. First, the pleading lacks the required specificity in tying the Fuld

defendants to the alleged RICO violations and/or to any alleged pattern of racketeering activity. In fact, a review of the allegations in the Complaint pertaining to the Fuld defendants confirms that the Complaint fails to attribute specific misrepresentations or omissions to the Fuld Defendants in either the RICO or the state common-law fraud claims to support either of these causes of action. Nor does the Complaint plead sufficient facts concerning the Fuld defendants' alleged involvement in the scheme to meet the Reves "operation or management" test. The Complaint contains, at most, allegations suggesting that the Fuld defendants provided legal services in connection with an alleged enterprise.

Plaintiffs' contention that the allegations in the Complaint pertaining to the Fuld defendants (primarily paragraphs 364 to 371 thereof), adequately state that the Fuld defendants played an essential and direct role in the affairs of the enterprise is rejected. Although plaintiffs allege that the Fuld defendants participated in the management and direction of the RICO enterprise, this allegation and others like it, are conclusory and without any factual support. As discussed above, such allegations are insufficient to satisfy the "participation" requirement (see e.g. Biofeedtrac, Inc. v Kolinor Optical Enters. & Consultants, S.R.L., 832 F Supp 585, supra). Moreover, the facts in this case bear no similarity to those present in the cases where a RICO cause of action was determined to have been stated against attorneys (see e.g. Jinaran Land Corp. v Shahbazi, 247 AD2d 263, 264 [1st Dept 1998] ["the complaint did not merely allege that [the attorney defendant] acted as attorney, but that he was a participant in the activity in his capacity as an officer of several of the corporations utilized in the alleged scheme"]; Napoli v United States, 32 F 3d 31 [2d Cir 1994], cert denied 513 US 1110 [1995]; In re American Honda Motor Co.,

Inc. Dealerships Relations Litigation, 941 F Supp 528, 560 [D Md 1996]).

Accordingly, the motion to dismiss the first cause of action is granted.

In the 21st cause of action, plaintiffs allege that all named defendants engaged in a RICO conspiracy in violation of 18 USC § 1962 (d). Since the Complaint fails to state a claim for a substantive RICO violation by the Fuld defendants, the RICO conspiracy claim as against the Fuld defendants must likewise be dismissed (see Manax v McNamara, 842 F2d 808, 812 [5th Cir 1988]). Moreover, this cause of action is deficient regarding the Fuld defendants because it lacks specific allegations of a conscious agreement, does not attribute specific misrepresentations or omissions to the Fuld defendants, and does not set forth a factual basis that would give rise to an inference of fraudulent intent (see Abbott v Herzfeld & Rubin, P.C., 202 AD2d 351 [1st Dept 1994]).

Plaintiffs fare no better with respect to the common-law fraud cause of action. It is well settled that, "[i]n an action to recover damages for fraud, the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (Lama Holding Co. v Smith Barney Inc., 88 NY2d 413, 421 [1996], citing New York Univ. v Continental Ins. Co., 87 NY2d 308, 318 [1995] and Channel Master Corp. v Aluminum Ltd. Sales, 4 NY2d 403 [1958]). CPLR 3016 (b) requires specificity as to each of these elements (Kaufman v Cohen, 307 AD2d 113 [1st Dept 2003]).

Although plaintiffs contend that the defendants, including the Fuld defendants, devised and perpetrated a criminal scheme to steal insurance proceeds from

plaintiffs by knowingly submitting fraudulent claims in no-fault arbitrations, and that the Fuld defendants played an essential, active, and direct role in the scheme to defraud, these allegations are conclusory and lack sufficient particularity to satisfy the requirements of CPLR 3016 (b). Plaintiffs' repeated recitations that the Fuld defendants knew or should have known of defendants' fraudulent activity are also unsupported. In this regard, neither the fact that the Fuld defendants allegedly charged a contingency fee, nor the fact that they never "met" the actual owners of the Parallel PCs, provides a basis for presuming the Fuld defendants' wrongful behavior or their complicity in the other defendants' alleged wrongful activities.

Thus, although a court should not apply CPLR 3016 (b) so strictly where it is impossible to state in detail all the circumstances of the fraud (id.; Oxford Health Plans (N.Y.), Inc. v BetterCare Health Care Pain Management & Rehab PC, 305 AD2d 223 [1st Dept 2003]), here, the fraud cause of action lacks "'additional detail concerning the facts constituting the alleged fraud'" with respect to the Fuld defendants (see Abbott v Herzfeld & Rubin, P.C., 202 AD2d 351, supra, quoting Credit Alliance Corp. v Arthur Andersen & Co., 65 NY2d 536, order amended 66 NY2d 812 [1985]). Accordingly, the 23rd cause of action is dismissed as against the Fuld defendants.

The 31st cause of action purports to state a cause of action under GBL § 349. This cause of action cannot be maintained, either. The misconduct alleged here was not directed at consumers, but rather, at insurance companies. The alleged misconduct does not implicate the consumer protection statute (see e.g. New York Univ. v Continental Ins. Co., 87 NY2d 308, supra; Oswego Laborers' Local 214 Pension Fund v Marine Midland

Bank, N.A., 85 NY2d 20 [1995]), and is therefore dismissed as against the Fuld defendants.

Since none of the substantive causes of action can be sustained against the Fuld defendants, it follows that the 32nd cause of action (for injunctive relief) is likewise dismissed as against them.

A court, in its discretion, may impose financial sanctions upon any party or attorney who engages in frivolous conduct in a civil action. (22 NYCRR 130-1.1). Conduct is frivolous if it is completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law or if it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another (22 NYCRR 130-1.1 [c] [1] and [2]). The fact that the court has dismissed the causes of action against the Fuld defendants does not necessarily mean that those causes of action were frivolous (see e.g. Northern Adirondack Cent. School Dist. v L.H. La Plante Co., Inc., 229 AD2d 764, 766 [3d Dept 1996]; Cruz v Amsterdam Housing Authority, 174 Misc 2d 189 [Sup Ct, Albany County 1997]). The Fuld defendants have not sufficiently demonstrated that plaintiffs engaged in the sort of conduct that calls for the imposition of sanctions, and, accordingly, the application is denied.

CONCLUSION

It is ORDERED that the motion by defendants Moshe Fuld, Esq. and Moshe D. Fuld, P.C. for an order dismissing the complaint as against them is granted; and it is further

ORDERED that the complaint is dismissed as against defendants Moshe Fuld, Esq. and Moshe D. Fuld, P.C. and the Clerk is directed to enter judgment in favor of said

defendants with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that defendants Moshe Fuld, Esq. and Moshe D. Fuld, P.C. request for the imposition of sanctions against plaintiffs is denied; and it is further

ORDERED that the action is severed and the remainder shall continue against the remaining defendants.

Dated: June 23, 2005

ENTER:

Helen E. Freedman, J.S.C.