[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HELEN E. FREEDMAN PART 39

Justice

Index Number : 603776/2003
ALLSTATE INSURANCE
VS
BUZIASHVILI, ALEX
Sequence Number : 007
_ DISMISS

T

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
MAY 10 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: May 7, 2007

H E Freedman
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

IF MOTION IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

----------x

ALLSTATE INSURANCE COMPANY, et al. ,
Plaintiffs,

Index No. 603776/03

-against-

ALEX BUZIASHVILI, et al.,
Defendants.

----------x

FREEDMAN, J.:

This is an 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 Lloyd Berns, Esq., Berns & Castro, Esqs. and Berns & Associates (the Berns 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.

The Berns defendants rely on the decision and order of the court, dated June 23, 2005 (filed June 28, 2005) (the Fuld Decision), which granted the motion by defendants Moshe Fuld, Esq. and Moshe D. Fuld, P.C. (the Fuld defendants) to dismiss the Complaint as against them. The Berns defendants contend that they are in the same positions as were the Fuld defendants, and that the Complaint as against them must be dismissed.

For the reasons discussed below, the motion to dismiss is granted.

BACKGROUND

Since the background facts and applicable law were recited and analyzed in the Fuld decision, substantial portions of this decision are similar. The facts are again summarized as follows:

Plaintiffs' claim 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 allegedly 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 PC's), all owned, operated, and/or controlled by the Principals. According to plaintiffs, the Principals formed Parallel PCs to fraudulently induce plaintiffs to pay insurance benefits, by illegally purchasing the names and licenses of licensed health care professionals. Plaintiffs allege that the Principals, through their illicit ownership of the Parallel PCs and their formation of phony management companies, paid "runners" to stage accidents and to bribe police personnel to recruit patients who were not injured. They then 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.

The law firm of Berns and Castro, Esqs. was hired some four years after the scheme was alleged to have commenced. The allegations against Berns are similar to those against Fuld. They are as follows:

Plaintiffs specifically accuse defendants of, 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., and violating New York General Business Law (GBL) § § 349, et seq.

The Berns defendants are described as "No-Fault Collection Attorneys," who allegedly: (a) 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; (b) earned attorneys' fees in violation of a no-fault regulations; and (c) 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 to represent the Parallel PCs in the arbitrations, but had no contact with the paper owners of the Parallel P.C.'s and never conducted an inquiry as to the parties' real identities or relationships; and (d) submitted "fraudulent medical records and documents relating to, inter alia, neurological testing, nerve block injections and acupuncture" in the no-fault arbitrations. Plaintiffs accuse the defendants of actionable RICO and fraudulent conduct for their alleged participation in, the affairs of their own "association-in-fact" enterprise, and specific conduct in connection with the affairs of the "Parallel Medical Network Enterprise" (consisting primarily of certain medical PCs and medical management companies, and a payroll company).

The Complaint contains certain additional allegations, to wit, that upon information and belief: (a) the Berns defendants shared an office with Parallel Management (Complaint, ¶ 354); (b) the Berns defendants "authorized Parallel Management to maintain its office stationery on [Parallel Management's] computer system and to generate correspondence and collection letters to insurance companies. . . " (Complaint, ¶ 356); and (c) the Berns defendants "advised the Principals how to conceal the fraudulent scheme from insurers, including

preparing statements to be submitted to insurance companies, as well as drafting lease agreements and corporate documents relating to the criminal enterprise herein" (Complaint, ¶ 358).

Five of the 36 causes of action set forth in the Complaint are directed against all defendants, including the Berns defendants. They are: engaging in a "pattern" of "racketeering activity" with the Parallel Medical Network Medical Enterprise in violation of 18 USC § 1962 (c) (1st cause of action); conspiring to violate RICO in violation of 18 USC § 1962 (d) (21st cause of action); committing common-law fraud (23rd cause of action); and violating GBL § 349 (31st cause of action). Plaintiffs seek to permanently enjoin defendants from further submitting any such claims to plaintiffs (32nd cause of action).

In the nineteenth cause of action the Berns defendants are denominated as an enterprise, but no specific claim is made against them. It states 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 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 Berns & Castro 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, ¶¶ 553-559).

It is not disputed that the Berns defendants were no-fault collection attorneys, hired four years after the inception of the alleged scheme, who were retained only after the benefits sought were contested by the carrier, and only after a request by the medical provider was denied.

Although on a motion to dismiss, all of the allegations of a complaint must be presumed to be true (*Guggenheimer v. Ginzburg*, 43 NY2d 268 (1977)) where, the facts set forth in the complaint are insufficient to establish claims, those claims may be dismissed. *Perl v. Smith Barney, Inc.*, 230 AD2d 644 (1st Dept. 1996).

The First Cause of Action (RICO Violation) - 18 U.S.C. § 1962(c)

With respect to the first cause of action, the defendants maintain that the Complaint alleges nothing more than the traditional and customary provision of legal services by them, and that the Complaint fails to plead a RICO enterprise distinct from the pattern of racketeering activity and/or that the defendants participated in the "operation and management" of the alleged RICO enterprise. Plaintiffs argue that the allegations in the Complaint pertaining to the defendants adequately state that they played an essential and direct role in the affairs of the enterprise and participated in the management and direction of the RICO enterprise.

To state a RICO violation claim, it must be alleged "(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]). A plaintiff must also 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]. 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].

To satisfy the "participation" pleading requirement, the United States Supreme Court, in Reves v Ernst & Young (507 US 170 [1993]), held that a violation of section 1962 (c) occurs only through "participat[ion] 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, 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). In Biofeedtrac, Inc. v Kolinor Optical Enterprises & Consultants, S.R.L., 832 F Supp 585, 590 [ED NY 1993] the United States District Court for the Eastern District of New York, relying on Reves, held that an attorney who knowingly assisted an enterprise in the 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 - - That Court stated, "liability under § 1962 (c) may not be imposed on one who merely 'carries on' or 'participates' in an enterprise's affairs. " In Baumer v Pachl, 8 F3d 1341, 1344-45 [9th Cir 1993] the Ninth Circuit held that an 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." In University of Maryland at Baltimore v Peat, Marwick, Main & Co., 996 F2d 1534, 1539 [3d Cir 1993] the Third Circuit stated ["(s)imply because one provides goods or services that ultimately benefit the enterprise does not mean that one becomes liable under RICO," and in Nolte v Pearson, 994 F2d 1311, 1317 [8th Cir 1993] the Eighth Circuit found that attorneys who prepared allegedly false

opinion letters and informational memoranda regarding a program had not participated in the operation or management of an enterprise. Other cases including Redtail Leasing, Inc. v Bellezza, 1997 WL 603496, at *5 [SD NY 1997] holding a "defendant does not 'direct' an enterprise's affairs under § 1962 (c) merely by engaging in wrongful conduct that assists the enterprise," and Gilmore v Berg, 820 F Supp 179, 183 [D NJ 1993] holding an 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", also rejected RICO claims.

Plaintiffs' contend that the allegations in the Complaint pertaining to the Berns defendants (primarily paragraphs 364 to 371), adequately state that the Berns defendants played an essential and direct role in the affairs of the enterprise. They contend that the Complaint satisfies the Reves v Ernst & Young "operation and management" test, or, alternatively, the participation requirement announced in Reves v Ernst & Young, supra does not apply because the Berns defendants were "insiders" to the alleged RICO enterprise; RICO liability is properly sought because the Berns defendants are alleged to have done far more than merely provide legal services for the alleged RICO enterprise; and (e) the pleadings satisfy the particularity requirements of CPLR 3016 (b).[1]

The Berns defendants submit that the allegations in the Complaint that they at one time shared an office with Parallel and allowed it to use Berns' stationery do not provide

[1] Although plaintiffs bring to the court's attention a criminal plea and order of disbarment of Lloyd Berns and Eugene Castro, plaintiffs fail to submit any evidence showing that the facts which supported said plea are related to the conduct complained of by the Berns defendants in the Complaint.

enough to satisfy the pleading requirements for stating a claim for a RICO violation and do not cure the Complaint's lack of specificity, which CPLR 3016 requires.[2]

Applying the law as set forth above to the facts alleged, here, the first cause of action fails to state a cause of action. First, the pleading lacks the required specificity in tying the Berns defendants to the alleged RICO violations and/or to any alleged pattern of racketeering activity. Second, The allegations in the Complaint pertaining to the Berns defendants fails to attribute specific misrepresentations or omissions to the Berns defendants that would support a RICO cause of action because it does not plead sufficient facts concerning their alleged involvement in the scheme that would meet the Reves "operation or management" test. The Complaint contains, at most, conclusory allegations that defendants provided legal services in connection with an alleged enterprise.

Although plaintiffs allege that the Berns defendants participated in the management and direction of the RICO enterprise, this allegation is conclusory. Such allegations

---

[2] In his affidavit, sworn to November 13, 2006, Lloyd Berns specifically denies various allegations in the Complaint, and contends that these allegations of the Berns defendants' alleged activities and their relationship to the alleged criminal enterprise, are frivolous, fabricated, and unsupported. Among other things, Berns specifically denies: (a) that the Berns defendants advised the principals on how to conceal the alleged fraudulent scheme from insurers (13[a]); that the Berns defendants ever drafted or negotiated lease agreements on behalf of or for the alleged criminal enterprise (13[b]); that the Berns defendants ever drafted or negotiated corporate documents on behalf of or for the alleged criminal enterprise (13[c]); that the Berns defendants ever knowingly pursued no-fault claims which they knew to be fraudulent in any respect (13[d]); that the Berns defendants ever sold their name and license to the principals to facilitate the billing fraud (13[e]). However, the court will not consider these allegations since, on a motion to dismiss "[t]he court is not authorized to assess the merits of the complaint or any of its factual allegations, but only to determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action"(Skillgames, L.L.C. v Brody, 1 AD3d 247, 250 [1st Dept 2003] citing Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]; see also Kempf v Magida, 37 AD3d 763 [2d Dept 2007]).

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). The facts in this case bear no similarity to those present in cases in which a RICO cause of action against attorneys was sustained. (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 Berns defendants' motion to dismiss the first cause of action is granted.

The 21st Cause of Action (RICO Conspiracy)

The 21st cause of action, which alleges that defendants engaged in a RICO conspiracy in violation of 18 USC § 1962 (d), fails to state a cause of action as against the Berns defendants, for the same reasons set forth in the Fuld decision, namely that: (a) "[s]ince the Complaint fails to state a claim for a substantive RICO violation by these defendants, the RICO conspiracy claim must likewise be dismissed (see Manax v McNamara, 842 F2d 808, 812 [5th Cir 1988])," and (b) the cause of action lacks specific allegations of a conscious agreement by the defendants, does not attribute specific misrepresentations or omissions to the defendants, and does not set forth a factual basis that would give rise to an inference of fraudulent intent (citing Abbott v Herzfeld & Rubin, P.C., 202 AD2d 351 [1st Dept 1994]).

The 23rd Cause of Action (Common-Law Fraud)

The 23rd cause of action, which purports to state a claim for common-law fraud, is also insufficient for lack of specificity.

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, devised and perpetrated a criminal scheme to steal insurance proceeds from plaintiffs by knowingly submitting fraudulent claims in no-fault arbitrations, and that the 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 Berns defendants knew or should have known of defendants' fraudulent activity are also unsupported. In this regard, neither the fact that the Berns 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 wrongful behavior or complicity in the other defendants' alleged wrongful activities.

While a court may not apply CPLR 3016 (b) so strictly as to require specific details of all fraudulent behavior (Oxford Health Plans (N.Y.), Inc. v BetterCare Health Care Pain Management & Rehab PC, 305 AD2d 223 [1st Dept 2003]), there must be enough to

ascertain facts constituting the alleged fraud (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]). The allegations here do not meet those criteria.

31st Cause of Action (GBL § 349)

A GBL § 349 claim cannot be maintained because the alleged misconduct was not directed at consumers, but rather, at insurance companies (see e.g. New York Univ. v Continental Ins. Co., 87 NY2d 308 [1995]; Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A., 85 NY2d 20 [1995]) (Fuld Order at *10).

32nd Cause of Action (Injunctive Relief)

Since none of the substantive causes of action has been sustained, injunctive relief is not warranted.

Sanctions

Defendants' request for the imposition of sanctions pursuant to 22 NYCRR 130-1.1 is denied because plaintiffs in opposing this motion to dismiss have not engaged in the type of frivolous conduct that calls for the imposition of sanctions.

CONCLUSION

It is ORDERED that the motion by defendants Lloyd Berns, Esq., Berns & Castro, Esqs. and Berns & Associates for an order dismissing the complaint as against them is granted; and it is further

ORDERED that the complaint is dismissed as against defendants Lloyd Berns, Esq., Berns & Castro, Esqs. and Berns & Associates 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 the request by defendants Lloyd Berns, Esq., Berns & Castro, Esqs. and Berns & Associates 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: May 4, 2007

ENTER:

Helen E. Freedman, J.S.C.