SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 63

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HIGH DEFINITION MRI, P.C.

Plaintiff,

-against- Index No. 650720/13

THE ALLSTATE CORPORATION, et al.,

Defendants.

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THE ALLSTATE CORPORATION, et al.,

Third-Party Plaintiffs,

-against- Index No. 595617/15

HIGH DEFINITION MRI, P.C., et al.,

Third-Party Defendants.

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ELLEN M. COIN, J.:

This third-party action arises out of a payment dispute between defendants/third-party plaintiffs The Allstate Corporation, Allstate Insurance Company, Allstate Property and Casualty Insurance Company, Esurance Insurance Company, Encompass Insurance Company of America s/h/a Encompass Insurance Company, and Allstate New Jersey Insurance Company (collectively, Allstate) and plaintiff/third-party defendant High Definition MRI, P.C. (High Definition) that occurred in 2007.

High Definition, a radiology practice that performed magnetic resonance imaging (MRI) scans on patients who have been in automobile accidents, submitted claims for reimbursement under New York's No-Fault law for services rendered to insureds of Allstate. Allstate refused to pay for 1,823 scans due to its belief that High Definition was fraudulently incorporated and

ineligible for payment, as described in the 2005 Court of Appeals decision in *State Farm Mut. Auto. Ins. Co. v Mallela* (4 NY3d 313 [2005]). In the main action, High Definition seeks a declaration that it is lawfully incorporated and entitled to payment under the No-Fault law. It also seeks to recover the amounts due from Allstate for the 1,823 claims that Allstate failed to pay, including interest and statutory fees.

Motion sequence nos. 003, 004 and 006 are consolidated for disposition. In motion sequence no. 003, third-party defendants Colin Halpern (Halpern), MedTrx Capital, LLC, MedTrx Collection Services, LLC and MedTrx Healthcare, LLC (collectively, MedTrx) move, pursuant to CPLR 3211 (a) (5) and (7), for dismissal of the third-party complaint as against them on the ground of statute of limitations.

In motion sequence no. 004, third-party defendant Neil Magnus, the former CEO of MedTrx, also moves for dismissal of the third-party complaint on the same ground as that asserted by MedTrx.

In motion sequence no. 006, third-party defendant Jeffrey Chess, M.D., also moves for dismissal of the third-party complaint as time-barred.

For the reasons set forth below, the motions to dismiss the third-party complaint are granted.

FACTS

Background

Dr. Jeffrey Chess formed High Definition as a professional corporation in late 2006. Dr. Chess is its sole owner. The radiology practice was active from January 2007 to September 2007, when High Definition ceased the treatment of patients because insurance companies

stopped paying for patient services.

Even before Allstate stopped paying High Definition in 2007, Allstate knew that Dr. Chess was formerly the reading radiologist of another medical practice that Allstate and other insurance companies claimed was fraudulently incorporated, Andrew Carothers M.D., P.C. (ACMDPC). Allstate alleges that High Definition is a continuation of ACMDPC, relying on the facts that the two practices operated at the same locations; acquired their respective interests in those locations from third-party defendant Hillel Sher; and utilized the same claims processing company, MedTrx.

Procedural History

On March 1, 2013, High Definition filed the initial complaint against Allstate, alleging breach of contract and seeking a declaratory judgment. High Definition alleged that Allstate improperly sought corporate documentation in its No-Fault verification requests to support its belief that High Definition was fraudulently incorporated, just as Allstate alleged of ACMDPC. High Definition sought declaratory relief that it is not fraudulently incorporated.

On May 3, 2013, Allstate moved to dismiss, arguing that High Definition did not state claims for breach of contract or a declaratory judgment. Oral argument on Allstate's motion focused on whether a justiciable controversy existed in 2007 as to Allstate's assertion of the fraudulent incorporation defense (*see* 12/4/13 transcript of oral argument at 3-4 [aff of David N. Wynn, exhibit B]). High Definition responded that Allstate raised the non-waivable defense in 2007 by seeking examinations under oath (EUOs) directed to High Definition's corporate statute and formation (*id.* at 4, 12-15). Justice Saliann Scarpulla dismissed the pleading without prejudice, granting leave to High Definition to replead in order allege facts showing that the

fraud defense had been raised (*id.* at 16-17). The court warned Allstate that if High Definition showed that Allstate sought verification of corporate status, it would hold that a justiciable controversy exists as to High Definition's incorporation, and Allstate's misuse of No-Fault verification (*id.* at 19-20).

On February 7, 2014, High Definition filed a second amended verified complaint (Wynn Aff., Ex. C), addressing the court's order regarding the prior pleading. The complaint described Allstate's practice of using EUOs to seek information on High Definition's corporate status (complaint, ¶¶ 56-61). To illustrate, High Definition attached to the complaint a June 15, 2007 letter from Allstate's counsel to High Definition (the 2007 Allstate Letter), stating that Allstate would pay "absolutely no no-fault bills" until Dr. Chess appeared for an EUO pertaining to High Definition's corporate status and relationships with "other corporations, both professional and non-professional" (Wynn Aff., Ex A to Ex C).

On Allstate's second motion to dismiss, this court found that the complaint "with attachments, states all of the elements for causes of action for a declaratory judgment and breach of contract claim" (4/29/15 transcript of oral argument at 13-14 [Wynn aff, Ex E]). After the court sustained the complaint, on August 27, 2015, Allstate filed its answer with counterclaims and commenced the third-party action.

Allegations in the Third-Party Action

In the third-party action, Allstate seeks to assert 12 new causes of action against High Definition and 13 new parties (Wynn Aff., Ex A). The allegations include violations of the Racketeering Influence and Corrupt Organizations statute (RICO) and of New York Penal Law § 460.2 [sic], as well as claims of common-law fraud and restitution. The essence of the third-

party complaint is that the third-party defendants other than Dr. Chess are non-medical professionals who improperly own, control and operate the High Definition medical practice (third-party complaint ¶¶ 2, 254). Allstate alleges a fraud pursuant to which High Definition and the other third-party defendants submitted claims to Allstate that falsely identify Dr. Chess as the practice owner (*id.*, ¶ 3).

Allstate alleges that High Definition was incorporated on October 26, 2006 (*id.*, ¶¶ 33, 232). Allstate alleges that High Definition operated at locations that formerly housed ACMDPC and other radiology practices that previously had employed Dr. Chess as reading radiologist, using the same equipment (*id.*, ¶¶ 18, 19, 34, 233, 239, 252). Allstate further alleges that High Definition purchased the equipment and rented the facilities from Hillel Sher and his various corporate entities (the Sher defendants), the same individual and entities that leased the equipment and facilities to ACMDPC (*id.*, ¶¶ 18-19, 234, 241, 257, 287, 307). In addition, Allstate alleges that High Definition entered into financing, billing and collection agreements with MedTrx (the Agreements), similar to agreements MedTrx had with ACMDPC (*id.*, ¶¶ 18, 22, 35, 48, 54, 119, 12, 310). Allstate describes the Agreements as intended to permit the third-party defendants to "siphon profits" from High Definition, and mask their ownership and control of High Definition (*id.*, ¶¶ 255, 269, 271-72, 286, 324).

Allstate alleges that High Definition began treating patients in January 2007 and continued for only nine months, but invoiced in excess of $1,815,000 for MRI scans on Allstate's insureds (*id.*, ¶¶ 14, 120, 218; counterclaims, ¶ 14). Allstate alleges that MedTrx "and/or their employees, at the direction of their owners and/or officers, created the billing that was to be submitted to Allstate for reimbursement of MRI services that were allegedly performed" (third-

party complaint, ¶ 341). Allstate also alleges that MedTrx mailed the bills to Allstate (*id.*, ¶ 345). Allstate alleges neither any professional services rendered after 2007, nor any operative actionable conduct by any of the moving third-party defendants within the past six years.

Allstate alleges that Halpern owns MedTrx, which employs Magnus, Wayne Hickey and Noah Buddy (*id.*, ¶¶47, 53, 58, 63). Allstate further alleges that the owners, officers and employees caused MedTrx to enter into the Agreements (*id.*, ¶ 325). Allstate further alleges that through a financing agreement, MedTrx made loans to High Definition secured by an interest in High Definition's accounts receivable (*id.*, ¶¶ 314-315). MedTrx filed a UCC financing statement on January 8, 2007, and renewed it on November 1, 2014 (*id.*, ¶¶ 120, 315-17). Allstate characterizes the security interest as a sale of accounts receivable, even though a sale is not consistent with the filing of a UCC statement (*id.*, ¶ 314). Allstate alleges that the MedTrx entities had billing agreements with ACMDPC whose terms included a fee per bill, and that the collection agreement had a fee based on a percentage of collections (*id.*, ¶ 319).

Allstate alleges that the fraudulent scheme was a continuation of the one involving ACMDPC that resulted in litigation beginning in 2006 and a trial in 2008. Allstate was an active participant in the ACMDPC litigation (*id.*, ¶¶ 15-17). Based on discovery in the ACMDPC litigation, Allstate admits to having learned of the continuation of the alleged scheme in 2007 (*id.*, ¶¶ 310-312). It admits that through discovery, in 2007 it knew of ACMDPC's financing, billing and collections agreements with MedTrx, and that High Definition had entered into similar agreements (*id.*). Allstate also alleges that via discovery in the ACMDPC litigation, it had determined that Dr. Chess's MRI interpretations were suspicious (*id.*, ¶ 248).

Allstate further admits that in 2007 "it began an investigation into High Definition to

determine whether the P.C. was actually owned, operated and/or controlled by laypersons," by seeking verification from High Definition (*id.*, ¶¶ 263-265; *see also* 2007 Allstate Letter).

Allstate has voluntarily discontinued this action with prejudice against third-party defendants Wayne Hickey and Noah Buddy (*see* Wynn aff, exhibit G).

On May 26, 2016, Allstate filed an amended third-party complaint, which contains largely the same allegations as the original third-party complaint, and removes causes of action for enterprise corruption and punitive damages. By letter dated June 7, 2016, counsel for moving third-party defendants requested that their motions to dismiss on statute of limitations grounds be deemed applicable to the amended third-party complaint, as authorized by *Sage Realty Corp. v Proskauer Rose* (251 AD2d 35 [1st Dept 1998]).

DISCUSSION

Although on a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), "the pleading is to be afforded a liberal construction," and "the facts as alleged in the complaint [are presumed] as true" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *see also Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]), "'factual claims [that are] either inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration'" (*Mark Hampton, Inc. v Bergreen*, 173 AD2d 220, 220 [1st Dept 1991] [citation omitted]; *see also Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233 [1st Dept 1994]).

Construing the amended third-party complaint in the generous matter to which it is entitled, this court nevertheless concludes that the third-party defendants' motions to dismiss must be granted, as the third-party claims are barred by the applicable statutes of limitations.

The complaint, answer, counterclaims and Allstate's amended third-party complaint,

together with the record presented in this action, including prior proceedings in this court, establish that all conduct supporting the third-party action occurred more than eight years before Allstate filed the third-party complaint. Further, it is clear that Allstate knew of the alleged wrongful conduct since June 2007, if not earlier (*see* Allstate letter dated November 2, 2007; Ex I to Wynn Reply Aff [2007 Allstate Letter]). Specifically, Allstate alleges that High Definition is a continuation of a fraudulent scheme involving ACMDPC (amended third-party complaint ¶¶ 15-21). Allstate litigated ACMDPC's fraudulent incorporation from 2006 to 2008, and in that litigation obtained discovery concerning Dr. Chess, High Definition, and MedTrx (*id.*, ¶¶ 17, 301, 303).

In 2007, Allstate admittedly knew of the connection between Dr. Chess, High Definition and ACMDPC. Allstate knew that Dr. Chess was ACMDPC's reading radiologist; that ACMDPC and High Definition operated from the same three practice locations; that both physician owners had acquired their interests in the practice facilities from the Sher defendants; and that both had agreements with MedTrx (*id.*, ¶¶ 237, 242, 303). Based on these facts, Allstate sent the 2007 Allstate Letter seeking EUOs from High Definition regarding its corporate formation and agreements. The relevant factual chronology is as follows:

- ACMDPC was formed in late 2004 by Dr. Carothers, who subsequently entered into turnkey leases with Sher for three practice locations.
- ACMDPC began active operations in 2005 with Dr. Chess as its reading radiologist.
- ACMDPC retained MedTrx to perform claims processing services for it submissions to no-fault carriers, including Allstate (*id.*, ¶ 236).

- In late 2005, ACMDPC encountered cash flow problems when no-fault carriers, including Allstate, stopped paying for patient services, citing fraudulent activities. ACMDPC initiated collection actions which the carriers, including Allstate, defended on the grounds of fraud.

- ACMDPC stopped treating patients due to carrier nonpayment of claims, and stopped paying its three radiology facilities.

- Dr. Chess formed High Definition in the fall of 2006 (*id.*, ¶¶ 32, 221).

- After incorporating, High Definition acquired the medical facilities formerly leased to ACMDPC (*id.*, ¶¶ 82-83, 307).

- High Definition retained MedTrx to perform claim processing services (*id.*, ¶ 13).

- In January 2007, High Definition began operating at the three practice locations previously operated by ACMDPC. Dr. Chess read the scans performed by High Definition (*id.*, ¶¶ 18, 111, 307).

- Based on the ACMDPC litigation, in 2007 Allstate learned that Dr. Chess incorporated High Definition and began operating at the same locations as ACMDPC (*id.*, ¶¶ 301-305). Allstate opened an investigation into High Definition (*id.*, ¶¶ 6, 252).

- Between January and September 2007, High Definition billed Allstate in excess of $1,815,000. Allstate alleges that it made $283,344.86 in payments during that time (*id.*, ¶¶ 14, 24; counterclaims ¶ 39).

- In November 2007, Allstate wrote to High Definition that it would not pay claims until High Definition appeared for an EUO regarding its corporate formation. Allstate acknowledged its fraud investigation, demanded High Definition supply corporate records and appear for EUOs, referenced its theory of the continuation of ACMDPC's fraud, and cited the *Mallela* decision (2007 Allstate Letter; third-party complaint, ¶¶ 6, 252).

- By September 2007, High Definition ceased active treatments of patients. No additional patient encounters occurred and the practice ceased billing shortly thereafter (complaint, ¶¶ 14; amended third-party complaint ¶¶ 14, 207; *see* Exhibit A).

By seeking corporate records from Dr. Chess relating to a defense of fraudulent incorporation, Allstate raised the issue of fraud in 2007.

The 2007 Allstate Letter specifically states that:

> "Please be advised that [Bruno, Gerbino & Soriano LLP] has been retained by [Allstate] as part of its investigation into the eligibility of [High Definition] to receive No-Fault reimbursements. . . . [High Definition] has an obligation to cooperate . . . and provide any and all information to assist [Allstate] in the investigation into [High Definition's] eligibility to receive No-Fault reimbursements. . . . [High Definition is] directed to the controlling case of *State Farm v Mallela*, 4 NY3d 313 (NY 2005), wherein the Court of Appeals held that medical facility that is not properly incorporated and owned by a medical professional is not entitled to receive No-Fault reimbursements"

(2007 Allstate Letter at 1, 4; Ex I to Wynn Reply Aff).

Finally, the amended third-party complaint explicitly acknowledges that in 2007 "Allstate began an investigation into High Definition to determine whether the P.C. was actually owned, operated, and/or controlled by laypersons" (amended third-party complaint, ¶252).

Accordingly, it is plain that in 2007, Allstate was on notice of the alleged fraudulent conduct between High Definition, MedTrx, and others, and, thus, that Allstate's claims accrued in 2007.

In opposition to the motion, Allstate repeatedly argues that even though it was aware of the relationship among High Definition, ACMDPC and MedTrx, it only "suspected" fraud, but did not have "knowledge" of the alleged fraud at the time of the ACMDPC litigation and trial.

Allstate claims that it only learned the key information that converted its "suspicions" into a bona fide claim from a 2013 transcript of an examination before trial of third-party defendant Irina Vayman, which confirmed that High Definition was nothing more than a continuation of ACMDPC (Allstate memorandum at 4).

However, when Allstate identifies the information that it ascertained from Vayman's testimony (*see* opposition memorandum at 10-11), it is clear that it knew all of this information by July 2008. For example, Allstate knew that Vayman worked for ACMDPC as its office manager; and that Vayman worked for High Definition beginning in 2007, at the same offices and doing the same work as for ACMDPC, including authority over High Definition's bank accounts (*see* ACMDPC trial tr at 2796-2874 and 1240-1241 [Wynn reply aff, exhibits N and O]). Allstate also knew that Vayman viewed High Definition as a continuation of ACMDPC (*see id.* at 329-30 [Wynn reply aff, exhibit P]).

Moreover, in 2008, during summation in the fraudulent incorporation trial of ACMDPC, counsel representing more than 50 defendant insurance carriers, including Allstate, proclaimed to the jury that High Definition was a fraud and a continuation of the same scheme by ACMDPC, and specifically mentioned Vayman:

> "I want to talk to you briefly about High Definition. At the tail end of this whole gig with these advance acknowledgments, I showed to you a signature of Irina Vayman on a company called High Definition MRI. That was before Carothers was even out the door and here is MedTrx loaning to the next step on the train, High Definition, and we told you, we show to you that was Dr. Chess' company. So it was Dr. Schepp; then it was Dr. Carothers; then it was Dr. Chess at High Definition. Train keeps running right along"

(trial transcript at 2855-2856, *In the Matter of Andrew Carothers, M.D., P.C. v Insurance*

Companies Represented by Bruno, Gerbino & Soriano, LLP, index No. 2217/06 [Civ Ct, Richmond County July 17, 2008] [Wynn reply aff, exhibit M]).

Allstate's contention that it only had a suspicion of fraud is also belied by the standard for obtaining verification of a no-fault claim. Under the No-Fault regulations, Allstate must have a "specific objective justification" for seeking *Mallela* discovery as part of claim verification, and "it generally may do so only in circumstances where it has a founded belief that the provider is guilty of behavior 'tantamount to fraud'" (*Gegerson v State Farm Ins. Co.*, 27 Misc 3d 1207[A], 2010 NY Slip Op 50604[U], *1-3 [Dist Ct, Nassau County 2010]). Allstate's 2007 EUO letters repeatedly demanded that "the owner of High Definition MRI, P.C." appear to answer questions regarding "the status of High Definition MRI, P.C.'s corporate entity' and the relationship of the professional corporation with any and all other corporations, both professional and non-professional" (2007 Allstate Letter).

Thus, Allstate's argument, that it had only a fleeting general suspicion and could not conduct an investigation in 2007 and 2008, is completely contradicted by the record. It is plain that Allstate knew about its alleged injury and believed it had been defrauded in 2008, but failed to act for more than seven years. Applying these facts, and as set forth more fully below, all of Allstate's causes of action are time-barred. Because Allstate filed the third-party complaint on August 27, 2015, nearly eight years after High Definition ceased active operations and billing, the pleading must be dismissed with prejudice.

RICO Claims (Eighth, Ninth and Tenth Causes of Action)

Allstate alleges that third party-defendants have knowingly conducted and/or participated in the conduct of High Definition's affairs through a pattern of racketeering activity.

The applicable statute of limitations for RICO claims is four years (*Matter of Merrill Lynch Ltd. Partnerships Litigation.*, 154 F3d 56, 58 [2d Cir 1998]). For Civil RICO claims, courts employ a two-step analysis to determine the timeliness of the pleading:

> "[T]he first step in the statute of limitations analysis is to determine when the plaintiff sustained the alleged injury for which the plaintiff seeks redress. The court then determines when the plaintiff 'discovered or should have discovered the injury and begin[s] the four-year statute of limitations period at that point.' As a general matter, 'the limitations period does not begin to run until [a plaintiff] ha[s] actual or inquiry notice of the injury'"

(*Koch v Christie's Intl. PLC*, 699 F3d 141, 150-151 [2d Cir 2012] [citation omitted]).

As to the first prong, it is clear that Allstate suffered its alleged injury in 2007, nine years ago, by paying High Definition $238,344.86. Although Allstate argues that the limitation period did not begin to accrue on its RICO causes of action until it received the Vayman transcript, the court rejects this argument. It is clear that the RICO injury is suffered when the loss is incurred and the amount of damage are "clear and definite" (*Matter of Merrill Lynch Ltd. Partnerships Litigation*, 154 F 3d at 59 [creditor was held to suffer its injury when it made its investment in partnerships that were fraudulent at the time the investment was made]; *see also Rio Tinto PLC v Vale*, 2015 WL 7769534, *5 [SD NY 2015] [plaintiff suffered injury when loss became definite, i.e., when mining rights at issue taken, and not when plaintiff concluded that rights taken by fraud]). Similarly, Allstate's alleged injury was its payment to an allegedly fraudulent High Definition.

As to the second prong, notice of the injury does not require notice of the full extent of the RICO scheme (*Rotella v Wood*, 528 US 549, 555-556 [2000] [discovery of pattern of racketeering activity not relevant to determination of accrual of cause of action]). All that needs

to be shown is "storm warnings," i.e., information sufficient to prompt an inquiry (*World Wrestling Entertainment, Inc. v Jakks Pac., Inc.*, 328 Fed Appx 695, 697 [2d Cir 2009]. Storm warnings are circumstances that "'would suggest'" to a person of "'ordinary intelligence the probability that she has been defrauded,'" and therefore "give[] rise to a duty of inquiry" (*Lentell v Merrill Lynch & Co.*, 396 F 3d 161, 168 [2d Cir] [citation omitted], *cert denied* 546 US 935 [2005]; *see also Jakks*, 328 Fed Appx at 697 [storm warnings rule applied in securities fraud cases is applicable in RICO cases]).

When a plaintiff heeds storm warnings and pursues an investigation, the RICO claim accrues "when a reasonably diligent investigation would have revealed the injury to a person of reasonable intelligence" (*Koch*, 699 F3d at 153). Thus, "once there are sufficient 'storm warnings' to trigger the duty to inquire, and the duty arises," the statute of limitations begins to run (*id.*).

Here, Allstate not only had "storm warnings" as a result of the discovery in the ACMDPC case, but it also acted upon them by opening an investigation into High Definition, and then stopping payment of High Definition's claims. Hence, the RICO claims expired in 2011.

In opposition to the motion, Allstate argues that prior to obtaining the Vayman transcript, its investigation would not have revealed the injury to a person of reasonable intelligence, because High Definition would not appear for an EUO. This assertion does not comport with the record. First, it ignores the fact that Dr. Chess agreed to appear for an EUO (letters of Jeremy Greenstein dated 10/2/2007, 12/10/2007, 1/23/2008; Ex J to Wynn Reply Aff). Secondly, it is clear that Allstate could have done more than request an EUO. It could have deposed Dr. Chess, or called him as a witness at the ACMDPC trial, as Allstate knew that Dr. Chess was

ACMDPC's reading radiologist. Allstate's view that it was entitled to halt its investigation, despite having suspicions, is contrary to law (*see Rio Tinto*, 2015 WL 7769534 at *7 [dismissing as untimely claim by plaintiff mining company alleging RICO conspiracy to steal plaintiff's mining rights; plaintiff had sufficient notice of claim when notified that rights had been rescinded and aware that competitors had been trying to obtain rights, including through bribery]; *Koch*, 396 F 3d at 153 [affirming dismissal of RICO claims as untimely where plaintiff had suspicions of fraud, hired lawyers and experts to investigate, and then did nothing for five years]).

Similarly, here Allstate had a strong belief that ACMDPC, MedTrx, Sher and Dr. Chess engaged in fraudulent acts. It had lawyers investigating the entities and individuals in the ACMDPC litigation in 2007 and 2008. It had its special investigation unit working with its counsel to conduct a separate investigation of High Definition in 2007. However, it failed to bring its claims for seven years, long after the claims accrued. As such, the RICO claims must be dismissed as time-barred.

Common-Law Fraud (Third Cause of Action)

A common-law fraud claim must be filed within six years of the injury, or within two years of when the plaintiff discovered, or should have discovered, the fraud with reasonable diligence, whichever is longer (*Sargiss v Magarelli*, 12 NY3d 527, 532 [2009]; *Ghandour v Shearson Lehman Bros.*, 213 AD2d 304, 305 [1st Dept 1995]; CPLR 213 [8]; CPLR 203 [g]).

"'The test as to when the fraud should with reasonable diligence have been discovered is an objective one'" (*Gutkin v Siegal*, 85 AD3d 687, 688 [1st Dept 2011] [citation omitted]). Inquiry notice "turns on whether the plaintiff was 'possessed of knowledge of facts from which [the fraud] could be reasonably inferred'" (*Sargiss*, 12 NY3d at 532 [citation omitted]; *see also*

Watts v Exxon Corp., 188 AD2d 74, 76 [3d Dept 1993] ["In order to start the limitations period regarding discovery, a plaintiff need only be aware of enough operative facts 'so that, with reasonable diligence, she could have discovered the fraud'"] [citation omitted]). "'[W]here the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, and shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him'" (*Gutkin*, 85 AD3d at 688 [citation omitted]; *cf. Salinger v Projectavision, Inc.*, 972 F Supp 222, 229 [SD NY 1997] ["The plaintiffs need not be able to learn the precise details of the fraud, but they must be capable of perceiving the general fraudulent scheme based on the information available to them"]).

As with the RICO claim, the fraud claim accrued no later than the fall of 2007, when High Definition ceased treating patients and billing, and is thus barred by the statute of limitations.

In opposition to the motion, Allstate relies on the same Vayman transcript as confirming the "mere suspicions" of fraud that it had in 2007 and 2008. Allstate claims to have sued within two years of its discovery of the alleged fraud. However, under New York law the two-year discovery rule is "measured from the time of discovery of facts constituting the fraud or from the time such facts could have been discovered with reasonable diligence" (*TMG-II v Price Waterhouse & Co.*, 175 AD2d 21, 22 [1st Dept 1991]). "'A plaintiff need not be on notice of the entire fraud to trigger the duty of inquiry'" but rather "must simply possess 'sufficient operative facts ... which indicate[] that further inquiry should be pursued to determined whether [s]he had been defrauded" (*Hopkinson v Estate of Siegal*, 2011 WL 1458633, *5 [SD NY 2011], *affd* 470

Fed Appx 35 [2d Cir 2012] [citations omitted]; *see e.g. TMG-II*, 175 AD2d at 22-23 [two-year period began when IRS investigation of Price Waterhouse general partner became public, "put[ting] the plaintiffs on notice and creat[ing] a duty of inquiry"]; *see also Shapiro v Hersch*, 182 AD2d 403, 404 [1st Dept 1992] [two-year discovery rule for fraud barred action based on claim that tax shelter offering was sham, although investor allegedly did not know of fraud until tax return audited, where "the underlying facts of the fraud were well publicized in 1985 and 1986, and, with due diligence, could have been discovered by the plaintiff at that time"]).

Here, Allstate was involved in the investigation of ACMDPC, in which Dr. Chess figured largely, and learned all of the facts regarding Dr. Chess, High Definition and MedTrx that were available in that litigation. That record put Allstate on inquiry notice, which it failed to act upon.

Accordingly, the third cause of action for fraud is barred by the statute of limitations.

Declaratory Judgment (First and Seventh Causes of Action)

The applicable statute of limitations for Allstate's declaratory judgment causes of action hinges upon the substance underlying the claims. Allstate seeks a declaration that High Definition was fraudulently incorporated, pursuant to 11 NYCRR 65-3.16 (a) (12)(First Cause o f Action). Causes of action based upon a statutory framework have a three-year statute of limitations (CPLR 214 [2]).

When a declaratory judgment action has no prescribed limitations period, the court must "examine the substance of that action" to determine if the claim could have been made in some more traditional form (*Solnick v Whalen*, 49 NY2d 224, 229 [1980]). If so, then the limitations period for that other action applies (*id.* at 230). The rule prevents a plaintiff from circumventing the shorter period by "denominating the action one for declaratory relief" (*New York City Health*

& Hosps. Corp. v McBarnette, 84 NY2d 194, 201 [1994]).

Allstate's causes of action were asserted as causes of action under 11 NYCRR 65-3.16 (a) (12), which created "a cause of action against a fraudulently incorporated medical service corporation to recover assigned first-party no-fault benefits which were paid by the insurer to such medical service corporation" (*Metroscan Imaging, P.C. v GEICO Ins. Co.*, 13 Misc 3d 35, 40 [App Term, 2d Dept 2006]; *Mallela*, 4 NY3d at 322 [prior to promulgation of 11 NYCRR 65-3.16 (a) (12), common law would not permit recovery of payments made by insurance carriers]). Under CPLR 214 (2), such cause of action, therefore, is subject to a three-year limitations period for liability arising from a statute.

The declaratory judgment cause of action accrues when the "injury is sustained" and "all of the facts necessary to sustain the cause of action have occurred, so that a party could obtain relief in court" (*Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex*, 87 NY2d 36, 43 [1995]). No discovery rule applies to statutes of limitations under CPLR 214 (2) for liability arising from a statute (*Corsello v Verizon N.Y., Inc.*, 18 NY 3d 777, 789-90 [2012]).

Allstate sustained its alleged injury – the payment to High Definition – in 2007. All of the alleged wrongful conduct that contributed to the injury occurred in 2007. Accordingly, the declaratory judgment claims are barred by the statute of limitations and must be dismissed.

Restitution (Second Cause of Action)

Allstate's restitution/unjust enrichment claim is also time-barred. Allstate claims entitlement to restitution of $238,344.86 that it paid to High Definition, based upon High Definition's alleged fraudulent incorporation, as defined by 11 NYCRR 65-3.16 (a) (12). Allstate's alleged injury occurred nine years ago, in 2007. Since the cause of action accrued

upon the last of Allstate's payments, it expired regardless of whether the restitution is based upon a tort (three years), contract (six years) or statutory claim (three years).

As with declaratory judgment actions, to determine the applicable statute of limitations for restitution claims, courts look to "'the reality, and the essence of the action and not its mere name'" (*Bunker v Bunker*, 80 AD2d 817, 818 [1st Dept 1981] [citation omitted]; *see Spinale v Tenzer Greenblatt, LLP*, 309 AD2d 632, 632 [1st Dept 2003] [court applied three-year statute of limitations on claims denominated as restitution and unjust enrichment as based on same allegations as causes for legal malpractice]).

Because the substance of Allstate's restitution claim is fraudulent incorporation under the statutorily created 11 NYCRR 65-3.16 (a) (12) cause of action, the three year limitations period applies (CPLR 314 [2]). Thus, Allstate's restitution claim accrued at the time of High Definition's last bill (*see Kaufman v Cohen*, 307 AD2d 113, 127 [1st Dept 2003] ["a claim for unjust enrichment accrues upon occurrence of the alleged wrongful act giving rise to restitution"]). Accordingly, the claim is time-barred.

Although Allstate argues that the declaratory judgment and restitution actions are subject a six-year limitations period, it makes no difference, as both causes of action expired in 2014, at the latest.

Equitable Estoppel

Finally, Allstate argues that the statute of limitations should be equitably tolled.

New York applies federal equitable tolling rules for federal claims (*O'Hara v Bayliner*, 89 NY2d 636, 646-647, *cert denied* 522 US 822 [1997]; *Shared Communication Servs. of ESR, Inc. v Goldman, Sachs & Co.*, 38 AD3d 325, 325 [1st Dept 2007]). With respect to the federal

RICO claims, a plaintiff seeking to apply equitable tolling must establish that it exercised due diligence during the entire period to be tolled, the concealment prevented discovery of the claim within the limitations period, and the defendants wrongfully concealed material facts relating to their wrongdoing (*Rio Tinto*, 2015 WL 7769534 at *8). "'A plaintiff attempting to apply fraudulent concealment must plead each of these elements with particularity as required by Rule 9 (b) of the Federal Rules of Civil Procedure'" (*id.* [citation omitted]).

Allstate does not plead or argue that it exercised due diligence during "the entire period to be tolled." Accordingly, equitable tolling does not apply to the RICO claims.

For the state law claims, equitable estoppel to preclude a statute of limitations defense is only available where the plaintiff establishes that "it is the defendant's affirmative wrongdoing . . . which produced the long delay between the accrual of the cause of action and the institution of the legal proceeding." Allstate must show that specific actions by the defendant kept it from timely filing suit due to its "reasonable reliance on deception, fraud or misrepresentations by the defendant" (*Putter v North Shore Univ. Hosp.*, 7 NY3d 548, 553 [2006]; *see also Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 491 [2007] [equitable estoppel only "'triggered by some conduct on the part of the defendant after the initial wrongdoing,'" and "the later fraudulent misrepresentation must be for the purpose of concealing the former" conduct] [citation omitted]).

Here, Allstate makes no particularized allegations of misrepresentation for the purpose of inducing it not to litigate, much less any culpable conduct subsequent to any alleged "initial wrongdoing." Indeed, Allstate does not allege that MedTrx or High Definition took any action, deceptive or otherwise, between the end of the ACMDPC trial and the end of the limitations period. Thus, Allstate fails to meet its burden to establish grounds for equitable tolling.

Magnus' Motion to Dismiss

Third-party defendant Neal Magnus moves for dismissal of the third-party complaint as against him on the same grounds as the MedTrx motion. Allstate contends that the motion must be denied, as Magnus has waived the right to assert any statute of limitations argument because he failed to timely answer or file a responsive pleading after being served with the third-party summons and complaint.

The court rejects this argument. Magnus specifically asserted, in his affidavit in support of the motion, that "*I have never been served copies of the prior pleadings in this action*" (Magnus aff, ¶ 9 [emphasis in original]). In any event, it would be a waste of this court's time and resources to deny dismissal of Magnus' motion, as the amended third-party complaint is clearly barred by the statute of limitations.

Chess' Motion to Dismiss

Third-party defendant Jeffrey Chess, M.D., moves for dismissal of the third-party complaint against him on the ground of the statute of limitations. Like the other movants, Chess requests that his motion to dismiss be applied to Allstate's subsequently-filed Amended Third-Party Complaint.

The sole cause of action asserted against Chess that is not encompassed by the court's determination thus far is the Sixth Cause of Action, predicated on Chess' alleged failure to appear for examinations in violation of 11 NYCRR § 65-1.1 and 65-3.5(e). This cause, predicated on statutory frameworks, is barred by the three-year statute of limitations (CPLR § 214[2]).

To the extent that Dr. Chess offers substantive grounds for dismissal, the court need not

consider these in light of its determination that this third-party action is time-barred.

The court has considered the remaining claims, and finds that they are either moot or without merit.

Accordingly, it is

ORDERED that the motion of third-party defendants Colin Halpern, MedTrx Capital, LLC, MedTrx Collection Services, LLC and MedTrx Healthcare, LLC to dismiss the amended third-party complaint herein (motion sequence no. 003) is granted, and the amended third-party complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the motion of third-party defendant Neal Magnus to dismiss the amended third-party complaint herein (motion sequence no. 004) is granted, and the amended third-party complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the motion of third-party defendant Jeffrey Chess, M.D., to dismiss the amended third-party complaint herein (motion sequence no. 006) is granted, and the amended third-party complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the third-party action is severed and continued as to the remaining third-party defendants.

Dated: October 5, 2016

ENTER:

Ellen M. Coin, A.J.S.C.