

Halpern v New York State Catholic Health Plan, Inc.
2016 NY Slip Op 32269(U)
November 1, 2016
Supreme Court, New York County
Docket Number: 163044/2015
Judge: Charles E. Ramos
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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ROBERT HALPERN INDIVIDUALLY, AND ON BEHALF
OF ALL OTHER SIMILARLY SITUATED,

Plaintiffs,

Index No. 163044/2015

- against -

NEW YORK STATE CATHOLIC HEALTH PLAN, INC.,
D/B/A FIDELIS CARE,

Defendant.

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Hon. C. E. Ramos, J.S.C.:

In motion sequence 001, Defendant New York State Catholic Health Plan, Inc., D/B/A Fidelis Care ("Fidelis") moves to dismiss the complaint of plaintiff Robert Halpern ("Halpern") in its entirety, pursuant to CPLR 3211 (a)(1) and (7).

For the reasons set forth below, the Court grants Fidelis' motion to dismiss on the ground that Mr. Halpern failed to state a cause of action under General Business Law §§ 349 and 350.

Background

According to the complaint, Mr. Halpern is a resident of New York County (Complaint, ¶ 1). Health Republic was a health plan in the New York State, Official Health Plan Marketplace (the "Marketplace") (*id.* at ¶ 5). Mr. Halpern and his wife were enrolled as a couple in Health Republic until November 30, 2015, when Health Republic ceased operations in New York State (*id.* at ¶¶ 5, 6). On November 20, 2015, the Marketplace told Mr. Halpern and his wife that they had been auto-enrolled in Fidelis as of

December 2015 (*id.* at ¶ 7). On January 1, 2016, Mr. Halpern and his wife enrolled as a couple with Oscar Health Insurance (*id.* at ¶ 11).

Fidelis is a health insurer that has a statewide network of providers for its Marketplace plans (*id.* at ¶¶ 2, 12). If a member uses an in-network doctor or other health care provider (the "Participating Providers"), the plans will pay for some or all of the costs of the covered medical services (*id.* at ¶ 12). In December 2015, Mrs. Halpern was seeking the care of a doctor specializing in obstetrics and gynecology (the "Specialist") and Mr. Halpern was assisting her in finding such a Specialist (*id.* at ¶ 13).

The Fidelis website states that its "Find A Provider" resource is "[t]he most current way to view the listing of more than 67,000 quality providers in our network across New York State" (*id.* at ¶ 15). Fidelis website's search function allows anyone to search for Participating Providers (*id.* at ¶ 17). The search function allows one to filter results by the doctor's name, address, phone, provider type, age range of patients, specialty, hospital affiliation, language(s), whether the doctor is board certified, and whether the office is wheelchair accessible (*id.* at ¶¶ 18, 20). The search function returns a maximum of 250 results for a given search (*id.* at ¶ 19).

On December 9, 2015, Mr. Halpern conducted a search for a

board certified Specialists within three miles of his zip code (*id.* at ¶ 22). The search produced a list of 216 results (the "List"), consisting of in-network Specialists purportedly meeting the searching conditions (*id.* at ¶ 23). However, the List actually contains information of only thirty different doctors, whose last names began with "A"s, "B"s, and "C"s, because most doctors appear multiple times on the List with their telephone numbers and addresses repeated (*id.* at ¶¶ 24, 34). Mr. Halpern believed that he could consult the Fidelis Care Provider Directory for his county to obtain a more complete list of provider by mail (*id.* at ¶ 35).

Mr. Halpern used the telephone numbers provided on the List to contact those doctors, and found that the List contains doctors who do not accept Fidelis and that some of the telephone number for the doctors' offices were incorrect (*id.* at ¶¶ 28-30). In December 2015, Mr. Halpern commenced this action against Fidelis, and alleged Fidelis violated General Business Law §§ 349 and 350 (*id.* at ¶¶ 42, 46). In the complaint, Mr. Halpern alleged that he suffered injuries as follows:

"(a) he would have sought another plan for December 2015 if he had known that defendant's online provider directory is largely inaccurate and duplicative; (b) in order to find a participating provider it was necessary for him to independently verify each listing in the online provider directory; and © it was difficult if not impossible to compare defendant's provider network to that of other plans when selecting a plan for 2016" (*id.* at ¶ 41).

Discussion

Fidelis moves to dismiss the complaint in its entirety based on a defense founded upon documentary evidence and for a failure to state a cause of action.

In deciding a motion to dismiss under CPLR § 3211(a)(7), the court must consider whether there can be a legally cognizable cause of action based on the allegations (*Ackerman v 305 East 40th Owners Corp.*, 189 AD2d 665, 666 [1st Dept 1993]). The facts alleged in the pleadings are assumed to be true, and the court must accord a plaintiff the benefit of every possible favorable inference (*id.*).

General Business Law §§ 349 (h) and 350-e provide a private right of action to "any person who has been injured" by deceptive practices or false advertising in the conduct of any business. To state a claim under General Business Law §§ 349 and 350, plaintiff must allege three elements, that: (1) defendant was engaged in consumer-oriented conduct; (2) the conduct was material misleading; and (3) plaintiff suffered actual injury (*Koch v Acker, Merrall & Condit Co.*, 18NY3d 940, 941 [2012]; see *Small v Lorillard Tobacco Co.*, 94 NY2d 43, 55 [1999]). Justifiable reliance by the plaintiff is not required on General Business Law §§ 349 and 350 claims (18 NY3d 940 at 941). The issue here is whether Mr. Halpern alleged a legally cognizable injury in his complaint.

The injury caused by the alleged material deceptive act or

practice is required to be actual, if not pecuniary, to impose compensatory damages (94 NY2d 43 at 56). In *Lorillard Tobacco*, plaintiffs consumers alleged that defendants tobacco companies "deceived them about the addictive properties of cigarettes and fraudulently induced them to purchase and continue to smoke cigarettes" (*id.* at 50). Plaintiffs alleged that they suffered injury because they would not have purchased cigarettes if they knew that nicotine was addictive (*id.* at 56). Plaintiffs argued that the injury was not addiction; however, the injury was defendants' deception, which "prevented them from making free and informed choices as consumers" (*id.*). The court held that plaintiffs failed to assert a legally cognizable injury, and reasoned as follows:

"[p]laintiffs' definition of injury is legally flawed. Their theory contains no manifestation of either pecuniary or 'actual' harm; plaintiffs do not allege that the costs of cigarettes was affected by the alleged misrepresentation, nor do they seek recovery for injury to their health as a result of their ensuing addiction" (*id.*)

Here, Mr. Halpern failed to allege an actual injury. Mr. Halpern alleged that he would enroll into another plan if he knew of Fidelis' fraudulent practices, and that the deceptive practice prevented him from comparing Fidelis' plan with other insurers. Those arguments are same as presented by the plaintiffs in *Lorillard Tobacco*, whereas both essentially stated that the injury they suffered was a prevention of "making free and informed choices as consumers" (94 NY2d 43 at 56). This

prevention of free choices is neither pecuniary nor actual injury for General Business Law §§ 349 and 350 claims (*id.*). Mr. Halpern did not allege that the costs of the insurance plan was affected by the alleged fraudulent practice, and his wife neither suffered health injury nor had additional expenses even if the List was alleged deceptive.


Mr. Halpern's argument that he suffered injury because he had to independently verify each result in the List to find participating providers is also not plausible. This allegation of injury does not manifest either pecuniary or actual injury. Mr. Halpern did find eight Specialists within three miles of his zip code from the List generated by Fidelis website. In addition, Mr. Halpern believed that he could obtain a more complete list of Participating Providers by contacting the Fidelis Care Provider Directory for his county. Therefore, Mr. Halpern's failure to assert any legally cognizable injury in his complaint warrants dismissal.

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss is granted.

DATED: November 1, 2016

ENTER:



CHARLES E. RAMOS