

**State of N.Y. ex rel. Cavallino Consulting LLC v  
Stryker Corp.**

2020 NY Slip Op 31102(U)

May 1, 2020

Supreme Court, New York County

Docket Number: 100825/2018

Judge: James E. d'Auguste

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. JAMES EDWARD D'AUGUSTE PART IAS MOTION 55EFM**

*Justice*

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STATE OF NEW YORK *ex rel.* CAVALLINO CONSULTING  
LLC,  
Plaintiffs,

**INDEX NO.** 100825/2018

**MOTION DATE** 11/20/2019

-against-

**MOTION SEQ. NO.** 002

STRYKER CORPORATION, a Michigan corporation; and  
STRYKER SALES CORPORATION, a Michigan corporation,

**DECISION + ORDER  
ON MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document numbers (Mot. Seq. No. 002) 7 through 23

were read on this motion to/for DISMISS

Upon the foregoing documents, the motion to dismiss is granted.

In this *qui tam* action brought on behalf of the State of New York,<sup>1</sup> defendants Stryker Corporation and Stryker Sales Corporation (collectively, “Stryker”) move for an order, pursuant to CPLR 3211(a)(1) and (a)(7), dismissing plaintiff-relator Cavallino Consulting LLC’s (“Cavallino”) complaint in its entirety with prejudice on the grounds that the complaint fails to plead the essential elements of falsity and materiality, and the complaint fails to state the violations of the New York False Claims Act (N.Y. Fin. Law §§ 187 *et seq.*) (“FCA”) with particularity. Cavallino alleges that defendants Stryker Corp. and Stryker Sales Corp., a medical equipment and supplies company and its subsidiary, respectively, have knowingly submitted and caused to be submitted false and fraudulent claims for payment by various hospitals owned and

<sup>1</sup> The Attorney General of the State of New York has declined to intervene in this matter and filed a declination notice pursuant to New York State Finance Law (“Finance Law”) Section 190(2)(f). Thus, this action is being pursued solely by Cavallino.

operated by the State of New York (“State Hospitals”) in violation of Finance Law Sections 189(1)(a) and 189(1)(g).

The standard for a motion to dismiss, pursuant to CPLR 3211, permits the complaint to be given a liberal construction. *People v. Sprint Nextel Corp.*, 41 Misc. 3d 511, 515 (Sup. Ct. N.Y. County 2013) (Sherwood, J.). “The court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine whether the facts as alleged fit within any cognizable legal theory.” *Id.* Further, “the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.” *Id.* (quoting *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994)). Dismissal is warranted under CPLR 3211(a)(7) when the allegations do not fit “any cognizable legal theory.” *Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 141 (2017).

Stryker contracts with certain State Hospitals through the Group Purchasing Organization (“GPO”) MedAssets. As a GPO, MedAssets assists State Hospitals<sup>2</sup> to realize savings by aggregating purchasing volume and then use that leverage to negotiate discounts with Stryker. The State Hospitals purchase a large percentage of their medical goods and services through MedAssets pursuant to MedAssets' contracts with Stryker (the “MedAssets-Stryker contracts”). The MedAssets-Stryker contracts, annexed as exhibits to the complaint (NYSCEF Doc. No. 10, Exs. 2-5) explicitly state, with regard to payment for shipping, that “Supplier (a) must ship the Product F.O.B. Origin and prepay all shipping costs, and (b) may charge the Customer for shipping if the shipping costs are listed as a separate line item on the invoice.” *Id.* Ex. 2, at 5; *id.* Ex. 3, at 6; *id.* Ex. 4, at 5; *see also id.* Ex. 5, at 7. One contract in particular states that “[i]f any

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<sup>2</sup> The following State Hospitals are members of MedAssets: Jacobi Medical Center, SUNY Downstate Medical Center/University Hospital, Glens Falls Hospital, Harlem Hospital, Stony Brook University Hospital.

Customer requests overnight or expedited delivery (e.g., air freight, express delivery, etc.) for any Product, then Supplier: (y) must ship the Product and prepay all shipping costs; and (z) may charge the Customer for the costs of special handling if those costs are listed as a separate line item on the invoice.” *Id.* Ex. 5, at 7.

Cavallino alleges that from at least 2011 to the present, Stryker knowingly submitted invoices for payment for shipping costs to various State Hospitals that were false. Specifically, Stryker received substantial discounts from shipping carriers for using expedited shipping, ranging from 35% to 65% off of their regular rate, and, instead of charging the State Hospitals the actual discounted shipping cost, Stryker billed the non-discounted “list price” and kept the difference between the two rates. Cavallino also alleges, in the alternative, that by receiving more money from the State Hospitals than they were entitled to, and then not returning these funds to the State Hospitals, Stryker knowingly concealed, avoided, or decreased an obligation to pay money to the State Hospitals in violation of the FCA.

However, Cavallino’s claims, as alleged in the complaint, fail to plead any actual false claim. The clause quoted above from the MedAssets-Stryker contracts do not require Stryker to only charge the State Hospitals the actual costs of shipping and, as such, Stryker is not required to pass along any discount savings it receives to the State Hospitals. A plain reading of the contract clause allows Stryker to charge shipping costs so long as they are stated as a separate line item on the invoice, apart from any charge for the equipment and supplies that are sold to the State Hospitals, and there is no allegation in the complaint that Stryker failed to list any shipping costs as a separate line item. Also lacking is any evidence of fraud on behalf of Stryker. Further, there is no indication that Stryker ever warranted to the State Hospitals to only charge them the actual costs of shipping and thus, there is no violation of the FCA. *See New York ex rel.*

*Khurana v. Spherion Corp.*, No. 15 Civ. 6605, 2016 WL 6652735, at \*15 (S.D.N.Y. Nov. 10, 2016) (holding that the plaintiff failed to allege a violation under the FCA where the plaintiff did not allege that the defendant “made any ‘specific representations about the goods or services provided’”).<sup>3</sup> These contracts were clearly negotiated by sophisticated business entities<sup>4</sup> and if it was their intention for Stryker to only be reimbursed for the actual shipping costs, the word “actual” could have been inserted into the contracts. Because the complaint does not identify any actual contractual provision that Stryker violated or any violation of the FCA, the motion is granted, and the action is dismissed.

To the extent that the complaint could be read to suggest that the MedAssets contracts contain an implied obligation by Stryker to charge for only its actual costs of shipping, which would require it to pass along the discount it receives for using expedited shipping to the State Hospitals, this reading of the complaint would still not amount to an FCA violation. In support of this Court’s interpretation of the contract language, the complaint lacks any factual allegations indicating that Stryker actually knew or believed it was violating any contractual obligations it had with respect to shipping costs or that it intentionally ignored or otherwise recklessly disregarded the existence of such an obligation to charge the State Hospitals only the actual shipping cost. Stryker’s alleged failure to charge for actual costs of shipping would at best be a

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<sup>3</sup> The FCA was designed to follow the federal False Claims Act, “and therefore it is appropriate to look toward federal law when interpreting the New York act.” *State ex rel. Seiden v. Utica First Ins. Co.*, 96 A.D.3d 67, 71 (1st Dep’t 2012).

<sup>4</sup> The MedAssets-Stryker contracts contain a section entitled “Contracting Process” explaining that, *inter alia*, “[a]s a part of its contracting process, MedAssets engages a number of committees comprised of MedAssets customers to provide advice, and recommend the clinical criteria and business requirements to which the contract must adhere.” NYSCEF Doc. No. 10, Ex. 3, at 4.

misinterpretation of the contract language and the appropriate litigation would be a lawsuit by the State Hospitals against Stryker for breach of contract, not a FCA *qui tam* action.

Accordingly, Stryker’s motion is granted. The Clerk is directed to enter judgment dismissing the complaint with prejudice, but without costs or disbursements. This constitutes the decision and order of this Court.

5/1/2020

DATE



JAMES EDWARD D'AUGUSTE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE