SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

----------X

AMERICAN TRANSIT INSURANCE COMPANY, a Subsidiary of AMERICAN T, INC.,

Plaintiff,

- against -

Index No. 159505/14

DECISION & ORDER

MOT SEQ NOS.

001, 002, 003, 005

PETER D. ALBIS, D.C., REUVEN ALON aka ROB ALON, DIANA BEYNIN, D.C., NACHMY BRONSTEIN, D.C., RONALD A. HAYEK, D.C., MARK HEYLIGERS, D.C., TODD KOPPEL, M.D., MARGARITA MOSHE, REGINA MOSHE aka REGINA LEVIYEV, M.D., YAN MOSHE aka YAN LEVIYEV, RAMKUMAR PANHANI, M.D., DIPTI R. PATEL, D.C., LEONID SHAPIRO, M.D., ADVANCED SPINAL CARE REHABILITATION, PA, ALBIS CHIROPRACTIC CARE, P.C., AXIS CHIROPRACTIC CARE, P.C., CITIMED SERVICES, P.A., CITIMEDICAL I, P.L.L.C., COLUMBUS IMAGING CENTER, L.L.C., DRUGS R US PHARMACY, INC, DYNAMIC SURGERY CENTER, L.L.C., DYNASTY MEDICAL CARE, P.C., EXCEL SURGERY CENTER, L.L.C., GARDEN STATE PAIN MANAGEMENT, P.A., METRO PAIN SPECIALISTS PROFESSIONAL CORPORATION, PREMIER HEALTH CHOICE CHIROPRACTIC, P.C., UNION WELLNESS CENTER, L.L.C., JOHN DOES 1-3, and ABC CORPS 1-3

Defendants.

----------X

NANCY M. BANNON, J.:

I. INTRODUCTION

In this action for fraud, violation of General Business Law § 349, unjust enrichment, and for declaratory relief, defendants Metro Pain Specialists Professional Corporation (Metro Pain) and Leonid Shapiro, M.D. (Shapiro) move to dismiss the complaint as asserted against them (MOT SEQ 001) on the grounds that the action is barred by the doctrine of res judicata (CPLR 3211[a][5]) and that it fails to state a cause of action (CPLR 3211[a][7]). Defendants Columbus Imaging Center, L.C.C. (Columbus Imaging) and Reuven Alon aka Rob Alon (Alon) (MOT SEQ 002), Drugs R Us Pharmacy, Inc. (Drugs R Us) and Margarita Moshe (M. Moshe) (MOT SEQ 003) and Dynamic Surgery Center, L.L.C. (Dynamic), Excel Surgery Center, L.L.C. (Excel), Citimed Services, P.C. (Citimed), Citimedical I, P.L.L.C (Citimedical), Yan Moshe aka Yan Leviyev (Y. Moshe) and Regina Moshe aka Regina Leviyev, M.D. (R. Moshe) (MOT SEQ 005) move for the same relief. The plaintiff opposes the motions. The motions are granted in part.

II. BACKGROUND

Plaintiff American Transit Insurance Company, a subsidiary of American T, Inc. (American), a health insurer, alleges that

defendants are financially-related individuals and entities that engaged in a complex no-fault insurance fraud scheme, whereby they referred patients to one another in order to profit from such referrals rather than reasons related to the medical needs of the patients involved. American asserts that pursuant to this scheme, patients were unnecessarily transported to New Jersey for services in order to bill unnecessary facility fees that could deplete much, or all, of the patients' insurance coverage, and received needless tests, prescriptions, surgeries and treatments in order to inflate billing. American alleges that defendants misrepresented the injuries and medical findings of patients, falsified test results and operative reports, and fraudulently billed American for services that were never rendered, not rendered as billed, were fictitious, medically unnecessary, and/or if performed as billed could have injured patients. American further alleges that as part of the scheme, defendants used property leases to exchange funds and paid or received kickbacks in exchange for patient referrals.

American commenced the instant action against defendants to recover a sum in excess of $5,603,996.83 in payments that defendants allegedly received for fraudulent billing and costs incurred as a result of such billing in the past six years, plus $1 million in punitive damages, as well as declaratory relief. The complaint contains four causes of action – fraud (first cause of action),

violation of General Business Law § 349 (second cause of action), unjust enrichment (third cause of action), and a request for a judgment declaring that American has no obligation to pay pending no-fault claims submitted by defendants, which total in excess of $28 million (fourth cause of action).

III. DISCUSSION

A. Res Judicata

CPLR 3211(a)(5) permits a party to move, pre-answer, to dismiss a cause of action based on the doctrine of res judicata. "In New York, res judicata, or claim preclusion, bars successive litigation based upon the same transaction or series of connected transactions if: (i) there is a judgment on the merits rendered by a court of competent jurisdiction, and (ii) the party against whom the doctrine is invoked was a party to the previous action, or in privity with a party who was." Matter of People v Applied Card Sys., Inc., 11 NY3d 105, 122 (2008). The party seeking to assert the doctrine "must show the existence of a prior judgment on the merits." Ricatto v Mapliedi, 133 AD3d 737, 738 (2nd Dept 2015); see Miller Mfg. Co. v Zeiler, 45 NY2d 956, (1978).

Here, the moving defendants assert that the doctrine of res judicata bars this action based on prior litigation and/or arbitration awards. Although "prior arbitration awards may be given

preclusive effect in a subsequent judicial action by operation of the doctrines of res judicata and collateral estoppel," (Diorio v Ossining Union Free School Dist., 96 AD3d 710, 711 [2nd Dept. 2012]; see Kern v Excelsior 57th Corp., LLC, 77 AD3d 500 [1st Dept. 2010]), the moving defendants fail to demonstrate the existence of, or even identify, a prior arbitration award. Nor do they demonstrate that "a judgment on the merits exists between the same parties involving the same subject matter." Ricatto v Mapliedi, supra. As such, they are not entitled to dismissal of the complaint on res judicata grounds.

B. Failure to State a Cause of Action

On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, "the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff…the benefit of every possible favorable inference. Whether a…plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." AG Capital Funding Partners, L.P. v State St. Bank & Trust Co., 5 NY3d 582, 591 (2005) (internal quotation marks and citations omitted). "In this procedural posture, the allegations of a complaint, supplemented by a plaintiff's additional submissions, if any, must be given their most favorable intendment." Arrington v New York Times Co., 55 NY2d 433, 442 (1982). A motion to dismiss made

pursuant to CPLR 3211(a)(7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states a legally cognizable cause of action. Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, 38 AD3d 34, 38 (2nd Dept. 2006). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss. Id.

1. First Cause of Action – Fraud

"The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages. A claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016(b)." Eurycleia Partners, LP v Seward & Kissel, LLP, 12 NY3d 553, 559 (2009) (internal citations omitted). Section 3016(b) provides, in relevant part, that "[w]here a cause of action or defense is based upon…fraud…the circumstances constituting the wrong shall be stated in detail" CPLR 3016(b). "This requirement is to inform a defendant of the acts that the plaintiff is complaining about." Epiphany Community Nursery Sch. v Levey, 171 AD3d 1, 9 (1st Dept. 2019). "Although there is certainly no requirement of unassailable proof at the pleading stage, the

complaint must allege the basic facts to establish the elements of the cause of action." Eurycleia Partners, LP v Seward & Kissel, LLP, supra. The Court of Appeals has "held that CPLR 3016(b) is satisfied when the facts suffice to permit a reasonable inference of the alleged misconduct." Id.; see Epiphany Community Nursery Sch. v Levey, supra.

"[S]ection 3016 (b) should not be so strictly interpreted 'as to prevent an otherwise valid cause of action in situations where it may be "impossible to state in detail the circumstances constituting a fraud." Lanzi v Brooks, 43 NY2d 778, 780 [1977], *quoting* Jered Contr. Corp. v New York City Tr. Auth., 22 NY2d 187, 194 (1968). Thus, where concrete facts 'are peculiarly within the knowledge of the party' charged with the fraud (Jered Contr. Corp., supra), it would work a potentially unnecessary injustice to dismiss a case at an early stage where any pleading deficiency might be cured later in the proceedings. See CPC Intl. v McKesson Corp., 70 NY2d 268, 285-286 (1987); Houbigant, Inc. v Deloitte & Touche LLP, 303 AD2d 92, (1st Dept. 2003).

Here, the moving defendants contend that American has failed to plead fraud with the heightened particularity required by CPLR 3016(b). They assert that the complaint does not allege facts sufficient to support a claim that American justifiably relied upon

any misrepresentation by the moving defendants or that American suffered a monetary injury as a result. They also argue that although the complaint alleges that American reasonably and justifiably relied upon material misrepresentations that led it to making payments to defendants and incurring expenses as a result, it does not identify a single payment that American made voluntarily, or that was paid upon a misrepresentation by any defendant. Furthermore, the moving defendants contend that American's ability to verify claims under the no-fault statute and regulations preclude it from satisfying the justifiable reliance element.

The moving defendants also argue that the complaint fails to plead the existence of a financial relationship between them in violation of any applicable New York or New Jersey statute. They assert in this regard that American relies solely on the familial relationships that exist between some of the defendants without any substantive facts of alleged wrongdoing. The moving defendants argue that there are no factual allegations in the complaint as to the illegal referral scheme and not a single example of a kickback and that American fails to identify a single illegal referral between financially related entities or a single example of the payment of a kickback made in exchange for a referral.

In opposition, American argues that the moving defendants are seeking to apply CPLR 3016(b) too strictly and that the circumstances constituting the misconduct are sufficient detailed given (i) the complicated nature of the scheme (ii) that many of the facts constituting the alleged fraud are in the sole possession of the moving defendants and (iii) that defendants went to considerable lengths to conceal the scheme their relationships. Thus, much of the information is uniquely within their knowledge. American also points out that the moving defendants omit any mention of specific allegations in the complaint that defendants billed for unnecessary facility fees, submitted fraudulent operative reports claiming injuries that did not exist, and services that were never provided, and that some of the services not only lacked necessity, but could have injured the patients involved. Further, the complaint also alleges that defendants made material misrepresentations, including that such services were necessary, that defendants made material omissions regarding the financial relationship between them, and that referrals were made between financially related parties. American asserts that under any view of common-law fraud, these facts, supported by specifics pleaded in the complaint, state a cause of action for common-law fraud.

Contrary to the defendants' contention, the complaint sufficiently pleads the necessary particulars to state a claim that

defendants engaged in a no-fault insurance fraud scheme, whereby they misrepresented that they were entitled to payments from American based upon falsified test results and operative reports, services that were never rendered, not rendered as billed, were fictitious, and/or medically unnecessary. In addition, the complaint alleges that many patients were transferred to certain facilities and subjected the same course of treatment regardless of necessity in order to inflate billing. The complaint alleges that as a result, American was damaged by making payments that it was not otherwise required to make. With respect to each of the moving defendants, the complaint makes ample factual, not merely conclusory, allegations that they participated in the scheme described by submitting fraudulent bills, and/or referring patients to one another in order to profit from such referrals without regard for the interests of the patients involved. The complaint also identifies numerous examples of bills submitted to American illustrating the foregoing. In some of the examples provided, American alleges that its insureds were unnecessarily subjected to risks of anesthesia, which included the risk of death. These practices, according to American, were part of a large-scale pattern of abusive billing.

Further, the complaint alleges that defendants made, or accepted, referrals in violation of Public Health Law § 238-a

because of "financial relationships" between the referring parties, that defendants concealed the improper referral relationships, and therefore misrepresented, with respect to such claims, that they were entitled to payment. That section of the Public Health Law provides that a practitioner is prohibited from:

> "making a referral to a health care provider where the referring practitioner (or immediate family member of such practitioner) has a 'financial relationship' with the health care provider (Public Health Law § 238-a[1][a]). A 'financial relationship' is defined in section 238(3) of the Public Health Law as 'an ownership interest, investment interest or compensation arrangement.' Critically, a 'compensation arrangement' means 'any arrangement involving any remuneration between a practitioner, or immediate family member, and a health care provider' (Public Health Law § 238-a[5][a]), but does not include 'payments for the rental or lease of office space' if there is a lease that meets specific enumerated requirements, *i.e.*, is in writing, for a term of at least one year, with a rent consistent with fair market value and not based upon the volume or value of any referrals, and would be commercially reasonable even if no referrals were made (Public Health Law § 238-a[5][b][i])."

Stephen Matrangalo, DC, PC v Allstate Ins. Co., 31 Misc. 3d 129(A) (1st Dept. 2011).

The moving defendants assert that there is a lack of proof regarding the alleged financial relationships between them sufficient to warrant the invalidation of any referral pursuant to Public Health Law § 238-a. They make a similar argument with respect to the allegations that defendants billed for unnecessary

procedures and falsified test results and diagnosis. In this regard, the moving defendants contend that American cannot rely on such allegations without proof by way of, for example, independent medical examinations. They assert that it is the insurance carrier's burden to prove the existence of medical necessity. However, on this motion, this argument is misplaced as the court must accept American's factual allegations as true. See Leon v Martinez, 84 NY2d 83 (1994). Whether American "will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss." Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, supra. A motion under CPLR 3211 (a)(7) must be denied "unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it." Guggenheimer v Ginzburg, 43 NY2d 268, 275 (1977). The moving defendants have not made such a showing.

Some of the moving defendants contend that the complaint must be dismissed insofar as asserted against them because there are no allegations contained in the complaint that they submitted a bill for no-fault benefits to American. This contention is also without merit. Given their most favorable intendment, the allegations in American's complaint sufficiently state a cause of action against

all of the moving defendants. Specifically, the complaint includes allegations from which it may be inferred that all of the defendants had an understanding to participate in the scheme allegedly designed to obtain no-fault reimbursement from American for, among other things, medically unnecessary services and/or services that were never provided, or not provided as billed, and that all of the defendants derived a benefit from the scheme. See Rastelli v Goodyear Tire & Rubber Co., 79 NY2d 289, 295 (1992)("The theory of concerted action provides for joint and several liability on the part of all defendants having an understanding, express or tacit, to participate in a common plan or design to commit a tortious act.").

The moving defendants' position that American is precluded from claiming justifiable reliance because it had the ability to verify any fraudulent claims is also unavailing. In this regard, the moving defendants point out that pursuant to the no-fault regulations, an insurer may request additional verification to process a claim "within 15 business days of receipt of the prescribed verification forms" (11 NYCRR 65-3.5 [b]) and "is entitled to receive all items necessary to verify the claim directly from the parties from whom such verification was requested" (11 NYCRR 65-3.5 [c]). The moving defendants assert that since American had the right to request verification when necessary before paying a claim, American cannot now argue that it was justified in relying

upon any alleged misrepresentations included in their billing – for example, that they misrepresented the injuries and medical findings of patients, falsified test results and operative reports, did not accurately reflect the services actually provided, and/or misrepresented the medical necessity of certain services.

In Allstate Ins. Co. v Valley Physical Med. & Rehab., P.C., the United States District Court for the Eastern District of New York rejected a similar argument, reasoning as follows:

> "Nor is the Court persuaded by Defendants' argument that Allstate's status as a sophisticated insurer and the verification process provided by New York's No-Fault regulations mean that Allstate cannot claim it relied on the materials it received from the defendants or that such reliance was reasonable. Reliance is not a matter appropriately decided on a motion to dismiss. Merely having the means available to inquire does not preclude reliance; the critical factor is the existence of a reason for further inquiry [which] is highly fact dependent."

Allstate Ins. Co. v Valley Physical Med. & Rehab., P.C., 2009 WL 3245388, *5, (ED NY, Sept. 30, 2009, No. 05-5934 (DRH/MLO). As the moving defendants point out, a federal District Court decision is not binding on this court. However, the moving defendants do not set forth any binding authority to the contrary, nor do they offer a basis for rejecting the District Court's reasoning, which this court finds persuasive. See also Lincoln Gen. Ins. Co. v Alev Med. Supply, Inc., 30 Misc 3d 60, 62 (2nd Dept. 2011)("an opinion issued by the New York State Department of Insurance specifically states that the

No-Fault Law 'is in no way intended and should not serve as a bar to subsequent actions by an insurer for the recovery of fraudulently obtained benefits from a claimant, where such action is authorized under the auspices of any statute or under common law'"), quoting Ops Gen Counsel NY Ins Dept (Nov. 29, 2000); Fair Price Med. Supply Corp. v Travelers Indem. Co., 9 Misc 3d 76, 79-80 (2nd Dept. 2005) affd, 42 AD3d 277 (2nd Dept. 2007), aff'd, 10 NY3d 556 (2008).

The moving defendants' contention that the fraud claim fails to adequately plead the element of damages is also without merit. The moving defendants assert that American fails to allege what portion of the $5,603,996.83 in damages is attributable to any of the named defendants. They assert that presumably, if American paid the monies claimed, then surely American must know to whom and in what amount each of these payments were made. The moving defendants also emphasize that while the complaint alleges that certain defendants submitted bills that did not accurately reflect the services rendered, for services that were unnecessary and/or in violation of the fee schedule, the complaint fails to elucidate whether such claims were actually paid by American, or if paid, whether such payment was made as a result of an arbitral or judicial determination as to the merits of the billing.

In opposition, American contends that the total amount paid by it is clearly set forth in the complaint which, at this juncture, is sufficient. It need not specify which defendant is responsible for what portion of the damages. American contends that in a case like this alleging a complicated scheme, it is difficult to attribute damages to each party without discovery. The moving defendants assert in reply that American is missing the crux of their position, which they assert is that American has not alleged any damages because it fails to identify a single claim that it paid is not barred by res judicata.

However, as discussed above, this argument fails because they have not identified any arbitral/judicial determinations or other evidence of "a judgment on the merits . . . between the same parties involving the same subject matter." Ricatto v Mapliedi, supra.

2. Second Cause of Action - General Business Law § 349

General Business Law § 349 (a) states: "Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." "As enacted in 1970, the statute entrusted sole enforcement power to the Attorney-General. A decade later, the Legislature added a private right of action for 'any person who has been injured by reason of any violation of this section,' allowing

injunctive relief and damages, as well as reasonable attorney's fees (General Business Law § 349 [h])." Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, 85 NY2d 20, 24 [1995]). The statute "is directed at wrongs against the consuming public." Id. "Private contract disputes, unique to the parties [do] not fall within the ambit of the statute" Id. at 25. "The…defendant's acts or practices must have a broad impact on consumers at large…If a plaintiff meets this threshold, its prima facie case may then be established by proving that defendant is engaging in an act or practice that is deceptive in a material way and that plaintiff has been injured by it." New York Univ. v Continental Ins. Co., 87 NY2d 308, 320 (1995). Therefore, "[a] plaintiff under section 349 must prove three elements: first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act." Stutman v Chemical Bank, 95 NY2d 24, 29 (2000). The Court of Appeals has stated that the deceptive acts or practices contemplated by the statute are "limited to those likely to mislead a reasonable consumer acting reasonably under the circumstances." Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, supra. "[C]onsumers are those who purchase goods and services for personal, family or household use." Medical Socy. of State of N.Y. v Oxford Health Plans, Inc., 15 AD3d 206, 207 (1st Dept. 2005).

Here, the moving defendants contend that American does not have standing to bring a General Business Law § 349 claim against them because it does not even allege that it is a "consumer" who has been misled by a deceptive practice. They argue in this regard that the claimed loss under this cause of action arises solely as a result of injuries sustained by another party. While American alleges that defendants' actions have the potential of eroding and insured's available benefits, driving up the cost of insurance by increasing premiums, and putting patients at risk, an insurer does not suffer any damages as a result of these injuries. Rather, these alleged injuries are sustained by another party. In other words, even assuming, arguendo, that insurance premiums go up and patient risk increases as a result of allegedly fraudulent diagnosis and treatments, only those paying premiums and the patients who receive such treatment suffer actual damages, not American. The moving defendants assert that American's concern for other people's money and wellbeing is insufficient to establish standing under section 349.

In so arguing, the moving defendants rely on UnitedHealthcare Servs., Inc. v Asprinio, (49 Misc 3d 985 [Sup Ct, Westchester County 2015]), wherein UnitedHealthcare Services, Inc. (United), a health insurer, sought to enjoin David Asprinio, MD, an orthopedic trauma surgeon, and his medical group (hereinafter together "Asprinio"),

who did not participate in United's provider network, from seeking to collect professional fees from United's insureds in excess of the payments made by United for the services rendered by Asprinio – a practice known as "balance billing." United asserted, among other things, a cause of action under General Business Law § 349, based upon the allegation that that Asprinio entered into a scheme to deceive United and the general consuming public through a pattern of submitting false and misleading insurance claims to United in which Asprinio misrepresented the charges for services it rendered to patients. United alleged that when rendering services to United's insureds, Asprinio inflated the charges in order to maximize the amount it would receive from United and that the charges were excessive, manifestly unconscionable, and overreaching. United claimed that Asprinio's practices were aimed at the consuming public at large and had a broad impact on consumers by, among other things, contributing to the increase in insurance premiums and increased health care costs. United contended that this conduct was intended to mislead and defraud it and to induce it to overpay Asprinio.

Justice Alan D. Scheinkman denied United's motion for a preliminary injunction enjoining Asprinio from engaging in "balance billing" directed at United's members. As is relevant here, Justice Scheinkman determined that United was not likely to succeed

on the merits of its section 349 cause of action, for the reasoning as follows:

> "In determining whether a representation or an omission is a deceptive act, the test is whether such act is likely to mislead a reasonable consumer acting reasonably under the circumstances…
>
> Here, even assuming that the challenged balance billing practice is consumer-oriented, United is not likely to succeed in showing that it has standing to raise this issue. General Business Law § 349 (h) provides standing to 'any person who has been injured by reason of any violation of this section.' And while courts have determined that standing is not limited to consumers and have afforded standing to direct competitors, it is well settled that standing does not exist 'when the claimed loss arises solely as a result of injuries sustained by another party…United was not itself alleged to be a consumer of the medical services provided by defendants; rather, it is a large, sophisticated insurance company which has agreed to indemnify its insureds for certain of their medical costs under specified terms and conditions.
>
> To the extent that [Asprinio] filed claims with United, United did not receive them as a consumer of the medical services provided by Asprinio, but as part of its business activities as a health insurer…
>
> To the extent [United] is claiming that [Asprinio] misrepresented the charges to the United member by charging excessive rates in order to maximize the reimbursement they received from United, such allegedly deceptive acts were not directed at the consumer but rather to a large institutional provider of health insurance or, even more indirectly to the plan sponsors who might see their premiums increase. Such conduct cannot be viewed as consumer related…
>
> United [also] has not shown it is likely to succeed in establishing that it suffered any damages as a result of any misleading billing by [Asprinio]. United has refused to pay the allegedly excessive portion of the charges. The

> patient has not paid it either. And, even if she did, United has not shown how that would cause it to suffer any concrete loss and it would not confer standing on United in any event because standing does not exist when the claimed loss arises solely as a result of injuries sustained by another party. While United articulates general theories of potential impacts to its business (loss of reputation, loss of goodwill, etc.), it has not provided any evidence that it has actually sustained any such loss to date or that it will sustain such losses absent a preliminary injunction"

Id. at 996-997 (internal quotation marks and citations omitted).

The instant case is distinguishable from *Aspirino* because American is alleging that it sustained actual losses as a result of defendants' conduct. Nevertheless, there are significant similarities between the cases. First, as with United, American is not itself alleged to be the consumer of the medical services provided by defendants under the General Business Law § 349 cause of action. American did not receive the claims filed by defendants as a consumer of the services provided to patients, "but as part of its business activities as a health insurer." Id. at 997. Indeed, as noted above, the deceptive acts or practices contemplated by the statute are "limited to those likely to mislead a reasonable consumer acting reasonably under the circumstances." Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, supra.

Furthermore, while American has sufficiently pleaded "consumer-oriented" conduct within the meaning of section 349, American's

losses are indirect or derivative of those suffered by those consumers, which the Court of Appeals has held, are barred under General Business Law § 349 (h). See City of New York v Smokes-Spirits.Com, Inc., 12 NY3d 616, 623 (2009) ("allegations of indirect or derivative injuries will not suffice"); Blue Cross & Blue Shield of N.J., Inc. v Philip Morris USA Inc., 3 NY3d 200, 207 (2004) ("derivative actions are barred" under General Business Law ' 349 [h]). The claimed injury under American's section 349 cause of action is that the public at large will suffer damages in the form of increased premiums and that some of American's insureds received potentially harmful, unnecessary treatment. American's alleged losses (i.e., paying claims associated with the harmful, unnecessary treatments) is indirect because had the allegedly deceived consumers not been improperly induced into receiving such treatments, then American would not have suffered such losses. While American also claims losses in the form of paying inflated fees for certain services and for services never rendered, that deception was not "directed at the consumer but rather to a large institutional provider of health insurance." UnitedHealthcare Servs., Inc. v Asprinio, supra; see also Allstate Ins. Co. v Bogoraz, 818 F Supp 2d 544, 552 (ED NY 2011) ("it is unclear how defendant's deceptive acts have had a broad impact on consumers at large. One of the purposes of the statute is to protect an honest marketplace where trust

prevails between buyer and seller. Neither party is a consumer of goods or services of the other. Moreover, as Allstate is legally bound to pay legitimate claims for no-fault benefits, these services are not freely negotiable on the open market. Although plaintiff has adequately alleged fraud and unjust enrichment as discussed above, they have not shown how the facts alleged have a broader impact on consumers at large, and therefore has not met the threshold requirement to state a claim pursuant to Gen. Bus. § 349"); but see Allstate Ins. Co. v Lyons, 843 F Supp 2d 358, 376 (ED NY 2012) ("so long as the conduct is consumer-oriented, even a defendant's business competitor may bring a claim under § 349, provided the competitor is incidentally harmed by the defendant's deceptive conduct…Here, the defendants' scheme is alleged to have unlawfully stripped millions of dollars from Allstate, which has likely increased the premiums of consumers. In light of the resulting burden on the public — a broad impact on consumers at large — I conclude that defendants' alleged misrepresentations were sufficiently consumer-oriented to fall within the ambit of § 349"); Allstate Ins. Co. v Rozenberg, 590 F Supp 2d 384, 394-395 (ED NY 2008) ("The fact that the Defendants alleged scheme would almost certainly result in higher premiums for insurance consumers is sufficient, at this stage, to show that the alleged fraud had ramifications for the public at large").

Finally, although section 349(h) provides that "any person" may pursue a claim under the statute, 'any person' has been limited to the typical consumer and business competitors." Deer Consumer Prods., Inc. v Little Group, 37 Misc 3d 1224(A), *14 (Sup Ct, New York County 2012, Edmead, J.), *quoting* Securitron Magnalock Corp. v Schnabolk, 65 F3d 256 (2nd Cir. 1995); see City of New York v Smokes-Spirits.Com, Inc., 12 NY3d at 624 n 3 (noting that "there is some legislative history supporting the position that business competitors have standing under the statute"). Here, American "is neither a consumer nor business competitor" of the moving defendants. Consumer Prods., Inc. v Little Group, supra. Thus, American lacks standing to state a claim against the moving defendants under General Business Law § 349 and this cause of action is dismissed as asserted against the moving defendants.

3. Third Cause of Action - Unjust Enrichment

Turning to the cause of action seeking damages for unjust enrichment,

> "[t]he theory of unjust enrichment lies as a quasi-contract claim and contemplates an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties. An unjust enrichment claim is rooted in the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another. Thus, in order to adequately plead such a claim, the plaintiff must allege that (1) the other party was enriched, (2) at that party's expense, and (3) that it

> is against equity and good conscience to permit the other party to retain what is sought to be recovered."

Georgia Malone & Co., Inc. v Rieder, 19 NY3d 511, 516 (2012). The moving defendants assert that this cause of action should be dismissed because American failed to put them on notice of the monetary amount they are each alleged to have been enriched, its theory of how each defendant was unjustly enriched, and what circumstances would warrant repayment of any sum by the moving defendants to American. They further contend that American does not identify a single bill which is claimed to have been paid unjustly.

Contrary to these contentions, American sufficiently states a cause of action for unjust enrichment by alleging that defendants were enriched at American's expense by the receipt of payments to which they were not entitled, and that it is against good conscience and equity for the moving defendants to retain the payments. The complaint also provides numerous examples of fraudulent billing. Although there are no explicit allegations as to what portion of the payments American allegedly made for fraudulent billing in the past six years was received by each of the moving defendants, accepting the "facts as alleged in the complaint as true" and according American "the benefit of every possible favorable inference" (Leon, supra at 87-88), it is reasonable to infer that all of the moving defendants benefitted from the scheme described in the complaint.

See State Farm Mut. Auto. Ins. Co. v CPT Med. Servs., P.C., 2008 WL 4146190, *16, (ED NY, Sept. 3, 2008, 04 CV 5045 [ILG]); AIU Ins. Co. v Olmecs Med. Supply, Inc., 2005 WL 3710370, *14-15, (ED NY, Feb. 22, 2005, No. CV-04-2934 [ERK]).

4. Fourth Cause of Action - Declaratory Relief

Finally, in the fourth cause of action, American seeks a judgment declaring that it has no obligation to pay pending no-fault claims submitted by defendants, which total in excess of $28 million. The moving defendants assert that the complaint fails to set forth a cause of action for declaratory relief because it does not identify a single impermissible claim that is presently pending, or on what basis such claim is impermissible. The moving defendants also assert that American's reference to pending claims in excess of $28 million is inconsequential inasmuch as $28 million divided by the 27 named defendants, over a period of six years, amounts to less than $20,000 in annual billing per provider, which is not outside the realm of what one would expect with respect to the services provided. These contentions are not grounds to dismiss A cause of action requesting a declaratory judgment under CPLR 3211.

> "Pursuant to CPLR 3001, '[t]he supreme court may render a declaratory judgment ... as to the rights and other legal relations of the parties to a justiciable controversy' (CPLR 3001). '[T]he demand for relief in the complaint shall specify the rights and other legal relations on which a declaration is requested' (CPLR 3017[b]). A motion to dismiss the complaint

> in an action for a declaratory judgment presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration. Thus, where a cause of action is sufficient to invoke the court's power to render a declaratory judgment . . . as to the rights and other legal relations of the parties to a justiciable controversy, a motion to dismiss that cause of action should be denied."

DiGiorgio v 1109-1113 Manhattan Ave. Partners, LLC, 102 AD3d 725, 728 (2nd Dept. 2013).

Here, American has alleged facts sufficient to invoke this court's power to render a judicial declaration as to whether it is required to make payment on pending claims based on, among other things, defendants making and/or receiving referrals from providers they had financial relationships with and did not properly disclose, submitting claims in violation of the fee schedule, and billing for services that were unnecessary or not provided as billed. A declaration of this nature would resolve an actual controversy between the parties. Whether American is entitled to a favorable declaration in this regard is not at issue on this motion.

IV. CONCLUSION

Accordingly, it is hereby,

ORDERED that the motions of defendants Metro Pain Professional Corporation and Leonoid Shapiro, M.D. (MOT SEQ 001), Columbus Imaging Center LLC and Reuven Alon (MOT SEQ 002), Drugs R Us Pharmacy Inc., and Margarita Moshe (MOT SEQ 003), and Dynamic Surgery Center LLC, Excel Surgery Center LLC, Citimed Service PC, Citimedical I PLLC, Yan Moshe, and Regina Moshe (MOT SEQ 005), to dismiss the complaint pursuant to CPLR 3211(a)(5) and (a)(7) insofar as asserted against them, are granted to the extent of dismissing the second cause of action for violation of General Business Law § 349 insofar as asserted against them, and the motions are otherwise denied.

This constitutes the Decision and Order of the Court.

Dated: May 4, 2020

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

ENTER: _____

J.S.C.