

Rothkranz v Unlimited Care, Inc.
2024 NY Slip Op 35073(U)
September 3, 2024
Supreme Court, Westchester County
Docket Number: Index No. 56371/2024
Judge: Damaris E. Torrent
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
LINDZY ROTHKRANZ, on behalf of herself and all
others similarly situated,

Plaintiff,

-against-

UNLIMITED CARE, INC.,

Defendant.

-----X
DAMARIS E. TORRENT, A.J.S.C.

DECISION AND ORDER

Index No.: 56371/2024

Motion Date: 06/11/2024

Seq. No. 3

The following papers numbered 1 to 4 were read on defendant’s motion for an order dismissing the complaint pursuant to CPLR 3211:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion / Memorandum of Law	1 – 2
Memorandum of Law in Opposition	3
Reply Memorandum of Law	4

Upon the foregoing papers, the motion is granted.

This putative class action arises out of an alleged data breach in which unauthorized individuals may have gained access to certain personally identifiable information (PII) and protected health information (PHI) of defendant’s employees. The unverified amended complaint (complaint) alleges that plaintiff is a former employee of defendant whose PII/PHI was exposed in the alleged breach. The complaint asserts causes of action for negligence, breach of implied contract, unjust enrichment, breach of fiduciary duty, and violation of GBL § 349.

By Notice of Motion filed on April 22, 2024, defendant seeks an order dismissing the complaint pursuant to CPLR 3211, asserting that plaintiff lacks standing, and that the complaint

fails to plead facts sufficient to establish the elements of any of the asserted causes of action. Plaintiff opposes the motion by submission of a memorandum of law, in which plaintiff contends that she has suffered numerous injuries as a result of the exposure of her information, including “lost time and effort, emotional injuries, invasions of privacy, increased risk of fraud and identity theft, and property damage to her PII/PHI” (Opposition Memorandum at 3, *citing* complaint at ¶¶ 37-43). Plaintiff further contends that she has sufficiently pleaded the elements of each of the causes of action asserted in the complaint.

In reply, defendants contend that none of the injuries alleged by plaintiff are sufficient to plead an injury in fact, and thus that plaintiff failed to meet her burden to establish her standing. Defendant contends that plaintiff’s reliance on federal court cases from around the country is misplaced, as numerous New York courts have considered similar allegations and found them insufficient to establish standing. In the event that the Court finds plaintiff established standing, defendants reiterate their contention that none of the causes of action asserted in the complaint state a claim upon which relief can be granted.

The Court has fully considered the submissions of the parties.

“On a defendant’s to dismiss the complaint based upon the plaintiff’s alleged lack of standing, the burden is on the moving defendant to establish, *prima facie*, the plaintiff’s lack of standing” (*BAC Home Loans Servicing, LP v Rychik*, 161 Ad3d 924, 925 [2d Dept 2018]). “To defeat a defendant’s motion, the plaintiff has no burden of establishing its standing as a matter of law; rather, the motion will be defeated if the plaintiff’s submissions raise a question of fact as to its standing” (*U.S. Bank Natl. Assn. v Clement*, 163 AD3d 742, 743 [2d Dept 2018] [citation omitted]). “Standing is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that

satisfies the other justiciability criteria” (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 761 [1991]). To establish standing, a plaintiff must allege “the existence of an injury in fact” (*id.* at 772).

The complaint alleges that plaintiff has suffered the following injuries: (1) “significant time and effort” spent “monitoring her accounts”; (2) “anxiety, sleep disruption, stress, fear and frustration”; (3) “exposure (and likely theft) of her PII/PHI”; (4) “damages to and diminution in the value of her PII/PHI”; and (5) “imminent and impending injury arising from the substantially increased risk of fraud, misuse, and identity theft” (complaint at ¶¶ 37-41). For the reasons set forth below, these allegations, and plaintiff’s opposition to the instant motion, are insufficient to raise a question of fact as to plaintiff’s standing.

While the reported cases are few, New York courts evaluating claims arising out of data breaches such as those alleged here have all found that the plaintiffs lacked standing. “An alleged injury will not confer standing if it is based on speculation about what might occur in the future or what future harm might be incurred” (*Greco v Syracuse ASC, LLC*, 218 AD3d 1156, 1157 [4th Dept 2023]). “Perhaps most importantly, plaintiff has not alleged that any of the information purportedly accessed by the unknown third party has actually been misused” (*id.* at 1158). In the absence of contrary authority from the Second Department, this Court is bound by the holding in *Greco* that the absence of any allegation that the compromised information has been used defeats a plaintiff’s claim of standing.

“In cases like these, where there are no allegations of actual or attempted misuse of the compromised personal information, ‘a temporal component may factor into determining whether a threatened harm is sufficient for standing’” (*Keach v BST & Co. CPAs, LLP*, 71 Misc3d 1204[A] [Sup Ct, Albany County, 2021] [finding lack of standing where 16 months passed without misuse

of information]; quoting *Smahaj v Retrieval-Masters Credit Bureau, Inc.*, 69 Misc3d 597, 602 [Sup Ct, Westchester County 2020] [finding lack of standing where approximately 2 years passed without incident]). “A lengthy passage of time without any suspicious activity weighs against finding an injury in fact” (*Smahaj*, 69 Misc3d at 602; see also *Manning v Pioneer Sav. Bank*, 56 Misc3d 790 [Sup Ct, Rensselaer County, 2016] [finding lack of standing where approximately 18 months passed without incident]).

In the matter at bar, the data breach is alleged to have occurred on February 16, 2023, and no incidents of misuse of the compromised information were reported at the time of the filing of plaintiff’s opposition to the instant motion on May 28, 2024, more than fifteen months later. Furthermore, insofar as plaintiff alleges that she has suffered injury in the form of time and effort spent monitoring her accounts, “we conclude that such mitigation efforts cannot confer standing absent a sufficiently concrete injury-in-fact legitimizing or warranting such efforts. A plaintiff cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending” (*Greco*, 218 Ad3d at 1158 [internal quotation marks and citation omitted]).

Finally, plaintiff cites, and the Court’s research revealed, no New York case holding that vague allegations of “anxiety, sleep disruption, stress, fear and frustration” (complaint at ¶ 38) in an unverified complaint are sufficient to raise a question of fact as to standing in a data breach case. Insofar as plaintiff would have the Court apply standards set forth in federal cases, the Court notes that plaintiff’s pleading on the issue of emotional injury essentially quotes from the complaint in *Whitfield v ATC Healthcare Servs., LLC*, 2023 US Dist Lexis 147602; 2023 WL 5417330 [EDNY 2023]). However, *Whitfield* is so strikingly dissimilar to the matter at bar that the District Court’s analysis unhelpful, as the plaintiff in that matter had her identity stolen four

times and her debit card and bank account had been compromised, while the plaintiff in this matter has alleged no such harm.

Accordingly, it is hereby

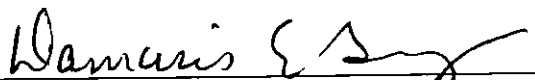
ORDERED that the motion is granted, and the complaint is dismissed; and it is further

ORDERED that, within ten (10) days of the date hereof, defendant shall serve a copy of this Decision and Order, with notice of entry, upon plaintiff, and shall file proof of said service via NYSCEF.

The foregoing constitutes the Decision and Order of the Court.

Dated: September 3, 2024
White Plains, New York

ENTER:


HON. DAMARIS E. TORRENT, A.J.S.C.

FILED VIA NYSCEF