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STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

DR. GREGORY DYKES and DEBBIE DYKES

Plaintiffs

MEMORANDUM DECISION

vs.

Index No. 4984/07

SMITHKLINE BEECHAM CORPORATION,
GLAXOSMITHKLINE and
DAVID LICHTER, M.D.

Defendants

BEFORE: **HON. JOHN M. CURRAN, J.S.C.**

APPEARANCES:

DIPPEL & DAVIS
Attorneys for Plaintiff
William Kenneth C. Dipple, Esq., of Counsel

LYNN TILLOSTON & PINKER, LLP
Attorneys for Plaintiff
Christopher J. Schwegmann, Esq., of Counsel

ROACH, BROWN, McCARTHY & GRUBER, P.C.
Attorneys for Defendant David Lichter, M.D.
Mark R. Affronti, Esq., of Counsel

CURRAN, J.

Defendant David Lichter, M.D. has moved to dismiss the complaint pursuant to CPLR § 3211 on the basis that plaintiffs have failed to state a cause of action. According to Dr. Lichter, since most of plaintiffs' damages were the result of gambling - - an alleged illegal activity - - the cause of action must be dismissed.

Plaintiff Gregory Dykes, M.D. was diagnosed with early onset of Parkinson's disease in or about the year 2000. At that time, Dr. Dykes sought treatment for this condition

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from Dr. Lichter. As part of the treatment plan, Dr. Dykes was prescribed Mirapex, a dopamine agonist which stimulates certain receptors in the brain. After a period of time on this medication, Dr. Dykes was changed to an alternative dopamine agonist, Requip. According to the complaint, the use of Requip resulted in compulsive gambling by Dr. Dykes causing financial and psychological damage to plaintiffs.[1] Plaintiffs allege Dr. Lichter was negligent in prescribing this medication as and when he did given the publicized risks of such a prescription.

On this motion, Dr. Lichter asserts that a plaintiff cannot rely upon an illegal act or found any claim upon his engagement in a crime or illegal activity, thereby necessitating dismissal of this action (citing *Reno v D'Javid*, 42 NY2d 1040 [1977]). Stated another way, "where a plaintiff has engaged in unlawful conduct, the courts will not entertain suit if the plaintiff's conduct constitutes a *serious* violation of the law and the injuries for which the plaintiff seeks recovery are the *direct* result of that violation" (*Alami v Volkswagen of Am., Inc.*, 97 NY2d 281 [2002], citing *Manning v Brown,* 91 NY2d 116, 120 [1997]; *Barker v Kallash,* 63 NY2d 19 [1984]). Indeed, "when this test is met, recovery is precluded at the very threshold of the plaintiff's application for judicial relief" (*Alami*, 97 NY2d at 285, citing *Barker,* 63 NY2d at 26). Thus, in order to prevail on this motion, Dr. Lichter must establish that the activity engaged in by Dr. Dykes (i.e. compulsive internet gambling) is illegal.

In support of his argument that internet gambling is illegal, Dr. Lichter relies primarily on the New York State Constitution, Penal Law and General Obligations Law. According to Dr. Lichter, the New York State Constitution contains an express prohibition against any kind of gambling not authorized by the state legislature. Dr. Lichter also contends

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[1] It should be noted that co-defendants Smithkline Beecham Corporation and Glaxosmithkline, the manufacturers of Requip, have previously settled with plaintiffs.

that unauthorized gambling is prohibited by Penal Law § 225.00 (pertaining to "Gambling Offenses") as well as General Obligations Law § 5-401 (pertaining to "Illegal Wagers, Bets and Stakes").

More specifically, Article 1, Section 9 of the Constitution provides:

> except as hereinafter provided, no lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature, the net proceeds of which shall be applied exclusively to or in aid or support of education in this state as the legislature may prescribe, and except pari-mutuel betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government, shall hereafter be authorized or allowed within this state.

In relevant part, Penal Law § 225.00 (which defines the terms for gambling offenses) provides that "a person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance . . . upon an agreement or understanding that he will receive something of value in the event of a certain outcome" (Penal Law § 225.00 [2]).

Finally, General Obligations Law § 5-401 states that "all wagers, bets or stakes, made to depend on any race, upon any gaming by lot or chance, or upon any lot, chance, casualty, or unknown or contingent event whatever, shall be unlawful." The Fourth Department also has held that "[g]ambling is contrary to the public policy of the State" (*People v Whitcomb*, 273 AD 610 [4th Dept 1948]).

Dr. Lichter contends that the gambling engaged in by Dr. Dykes constitutes illegal activity for which he cannot recover in tort. In the absence of any case directly addressing this situation, Dr. Lichter relies primarily upon the trial court decision in *People v*

World Interactive Gaming, 185 Misc 2d 852 [Sup Ct, NY County, July 22, 1999] to support his argument that internet gambling is in fact illegal.

In *World Interactive Gaming*, the central issue was whether the State of New York could enjoin a foreign corporation legally licensed to operate a casino offshore from offering gambling to internet users in New York. In response to the proceeding, defendants argued that the court lacked subject matter jurisdiction, and that internet gambling falls outside the scope of New York State gambling prohibitions, because the gambling occurs outside of New York State. In finding subject matter jurisdiction, the court observed that under New York penal law, "if the person engaged in gambling is located in New York, then New York is the location where the gambling occurred" (*World Interactive Gaming*, 185 Misc 2d at 859). Further, in granting the relief sought by the Attorney General, which included an injunction, the court found that defendants' conduct fell within the scope of New York's prohibition against gambling and was in violation of New York Penal Law in that defendants "persisted in continuous illegal conduct directed toward the creation, establishment, and advancement of unauthorized gambling" (*World Interactive Gaming*, 185 Misc 2d at 861). Thus, Dr. Lichter concludes that the internet gambling engaged in by Dr. Dykes also is illegal activity.

All of the cases relied upon by defendant, including *World Interactive Gaming*, or which otherwise conclude that gambling is illegal in New York, are based on facts not involved here. In those cases, the focus is on gambling intentionally engaged in at a commercial level. This is not the situation here where Dr. Dykes alleges his compulsive behavior is attributable to the negligent prescription of Requip causing him to become a player in gambling, but not as a commercial or professional enterprise.

The statutes and the courts support this distinction with respect to "players" under New York law as opposed to those engaged in a commercial enterprise. Under the Penal Law, "player" is defined as "a person who engages in any form of gambling solely as a contestant or bettor, without receiving or becoming entitled to receive any profit therefrom other than personal gambling winnings . . . " (Penal Law § 225.00 [3]). Notably, New York Penal Law

§ 225.00 (4) provides that "a person advances gambling activity when, **acting other than as a player**, he engages in conduct which materially aids any form of gambling activity" (emphasis added). Similarly, Penal Law § 225.00 (5) provides that "a person profits from gambling activity when, **other than as a player**, he accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he participates or is to participate in the proceeds of gambling activity" (emphasis added). Likewise, Penal Law § 225.00 (9) states that "book-making means advancing gambling activity by unlawfully accepting bets from members of the public **as a business, rather than in a casual or personal fashion**, upon the outcomes of future contingent events" (emphasis added).

Additionally, the specific gambling offenses identified in Penal Law Article 225 deal with the promotion of gambling (Penal Law §§ 225.05, 225.10), possession of gambling records (Penal Law §§ 225.15, 225.20, 225.25) and possession of gambling devices (Penal Law §§ 225.30, 225.32), and the cases cited thereunder deal with participation in such activities on a professional or commercial level. None of the cases involve prosecution of an individual engaging in gambling on his own behalf (*see e.g. People v Marconi*, 27 Misc 2d 348 [Buffalo City Ct 1961]; *People v Melton*, 152 Misc 2d 649 [Sup Ct, Monroe County 1991]).

As noted by the dissent in *People v Davidson* (291 AD2d 810 [4th Dept 2002]), "[i]t has been consistently held that casual gambling is not a crime and that casual gamblers are not criminals" (citing *People v Stein,* 280 AD 176, 178 [1st Dept 1952] ["A mere player is guilty of no crime"], *affd* 304 NY 834 [1952], *rearg denied* 305 NY 566 [1953]; *People v Solomon,* 296 NY 220, 222 [1947] ["casual betting or gaming by individuals--as distinguished from betting or gambling as a business or profession--is not a crime"]; *Watts v Malatesta,* 262 NY 80, 82 [1933] ["casual betting or gaming by individuals ... is not a crime"]; *People v Bright,* 203 NY 73, 76 [1911] [same]; *People v Stedeker,* 175 NY 57, 62 [1903] ["ordinary betting has never been made a crime"]; *People v Melton,* 152 Misc 2d at 651 ["Throwing dice is gambling but participating in gambling of this nature as a casual player is not a crime"]).

Based on these cases, and the absence of any authority from Dr. Lichter, it would be improper to conclude as a matter of law that the conduct engaged in by Dr. Dykes as a "player" is, in itself, illegal conduct barring recovery in tort. Moreover, the view that individual players are outside the scope of these statutes is supported by looking to federal decisions where the defendants in gambling cases are typically those who have been charged with racketeering, book-making, and other similar charges often associated with organized crime (*see United States v Gotti*, 459 F 3d 296, 340-341 [2d Cir 2006]; *Grosso v United States*, 390 US 62, 64-65 [1968]; *United States v Kaczowski*, 114 F Supp 2d 143 (WD NY 1999]).

Further, there are cases in New York and elsewhere in which individual players or groups of players brought actions to recover money lost in relation to internet gambling where the legality of the actions of the players themselves was not addressed. More importantly, those cases establish a precedent allowing an individual gambler to bring suit for recovery of gambling losses generally (*see Segal v Bitar*, 2012 US Dist LEXIS 10812 [SD NY

2012]; *Uebler v Boss Media AB*, 363 F Supp 2d 499 [ED NY 2005]; *Wong v PartyGaming Ltd.*, 589 F 3d 821 [6th Cir 2009]; *but see Kelly v First Astri Corp.*, 72 Cal App 4th 462 [1999]).

The parties agree that this is a case of first impression. The Court therefore should focus on fundamentals. This is a tort action seeking damages for personal injuries. In that context, the purpose of an award of tort damages is to restore the aggrieved party to the position that he or she held prior to injury (*see McDougald v Garber*, 73 NY2d 246 [1989]). The measure of such damages may include conscious pain and suffering and economic losses.

Here, the measure of damages is largely premised on economic loss but the nature of the injury is still personal to Dr. Dykes in the form of compulsive behavior. This is different from the cases generally referring to gambling losses which arise in a contractual or statutory context involving conduct intentionally and voluntarily engaged in by at least one of the parties. There, the nature of the injury is the economic loss itself where here the nature of the injury is personal and behavioral, resulting in measurable economic loss.

For all of these reasons, the Court concludes that the defense of illegality is inapplicable here. The statutes do not encompass the conduct compulsively engaged in by Dr. Dykes and the nature of the personal injuries here make this situation distinguishable from the contractual and statutory authorities pertaining to illegal gambling activities voluntarily undertaken. The motion is therefore denied. Settle Order.

Dated: June 29, 2012

HON. JOHN M. CURRAN, J.S.C.