Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Miranda M. Malone and Kaitlyn P. Malone, infants, by their father and natural guardian, James P. Malone,

Plaintiffs,

-against-

County of Suffolk, Richard Dormer, former Commissioner of the Suffolk County Police Department, Haven Drugs, Inc., Vinoda Kudchadkar, as Owner, Chairman and/or Chief Executive Officer, Stan Xuhui Li, MD, and certain doctors who prescribed narcotics to David Laffer, currently unknown but identified as John Does 1-5, Abbott Laboratories and John Does 6 - 10, manufacturers and distributors of prescription narcotics, including hydrocodone, and Ralph Taccetta,

Defendants.

Index No.: 04112/2012

Attorneys/Parties [See Rider Annexed]

Motion Sequence No.: 001; MG
Motion Date: 5/29/12
Submitted: 8/1/12

Motion Sequence No.: 002; MG
Motion Date: 6/13/12
Submitted: 8/1/12

Motion Sequence No.: 003; MD
Motion Date: 7/9/12
Submitted: 8/1/12

Upon the following papers numbered 1 to 41 read upon this motion by defendant Abbott Laboratories to dismiss the complaint against it; application by Suffolk County defendants to dismiss the complaint against them; application by defendant Stan Xuhui Li, MD to dismiss the complaint against him: Notice of Motion and supporting papers, 1 - 9; Notice of Cross Motion and supporting papers, 19 - 23; 32 - 35; Answering Affidavits and supporting papers, 10 - 13; 24 - 29; 36 - 39; Replying Affidavits and supporting papers, 14 - 18; 30 - 31; 40 - 41; it is

ORDERED that this motion by defendant Abbott Laboratories (Abbott) for an order pursuant to CPLR 3211(a)(7) dismissing the amended verified complaint of plaintiffs Miranda M. Malone and Kaitlyn P. Malone, infants, by their father and natural guardian, James P. Malone, is granted; and it is further

ORDERED that the separate motion by defendants County of Suffolk and Richard Dormer, former Commissioner of the Suffolk County Police Department, for an order dismissing the amended verified complaint against them is granted, the action is severed and shall continue against the remaining defendants, and the caption is amended accordingly; and it is further

ORDERED that the separate motion by defendant Stan X. Li, M.D., sued in this action as Stan Xuhui Li, M.D., (Dr. Li), for an order dismissing the amended verified complaint is denied.

This action has its genesis in particularly tragic and disturbing quadruple murders. On June 19, 2011, David Laffer shot and killed four people while robbing the Haven Drugs pharmacy in Medford, New York. One of the victims was plaintiffs' decedent Jamie Taccetta. Laffer was arrested, charged and ultimately convicted on his plea of guilty to robbery and murder in the first degree. He is currently serving four consecutive life sentences.

Plaintiffs commenced this action for recovery of damages for the alleged conscious pain and suffering and wrongful death of Taccetta. It is alleged in the verified amended complaint that "the reason for the murders was that David Laffer was attempting to steal thousands of prescription narcotics" because he was a drug abuser "who regularly used prescription narcotics, including hydrocodone, in an unauthorized manner." It is also asserted that Abbott manufactures prescription narcotics, including hydrocodone under the brand name Vicodin, and it is claimed that Abbott "had a duty to the general public not to manufacture, sell, distribute, and advertise a highly addictive prescription narcotic that has a high potential for dependence." Plaintiffs also claim that Abbott had a duty to the general public to ensure that pharmacies and physicians would not prescribe or over-prescribe its products to drug addicts, and that it allegedly failed "to safeguard the general public from the harmful, addictive effects of [its] product." Plaintiffs also contend that Abbott is liable for creating a public nuisance by manufacturing and marketing prescription narcotics and in failing "to prevent drug addict and criminal Laffer from re-filling his stash of prescription narcotics. . ."

On a motion to dismiss the complaint for failure to state a cause of action, the court must determine whether, accepting as true the factual averments of the complaint and granting plaintiffs every favorable inference which may be drawn from the pleading, plaintiffs can succeed upon any reasonable view of the facts stated (***Bartlett v Konner***, 228 AD2d 532, 644 NYS2d 550 [2d Dept 1996]). In considering a case in which the facts "clearly elicit a visceral response, and '[t]he human desire that there should be some recovery for this tragedy is understandable' (***Eiseman v State of New York***, 70 NY2d 175, 185, 511 NE2d 1128, 518 NYS2d 608 [1987])" it has been recognized that emotion can not govern the determination of legal liability (*see* ***Fox v Marshall***, 88 AD3d 131, 135, 928 NYS2d 317 [2d Dept 2011]).

To prove a *prima facie* case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of her injuries (***Fox v Marshall***, *supra* at 88 AD3d 135, citing ***Pulka v Edelman***, 40 NY2d 781, 358 NE2d 1019, 390 NYS2d 393 [1976]; ***Gordon v Muchnick***, 180 AD2d 715, 579 NYS2d 745 [1992]). In considering whether plaintiffs have asserted legally cognizable claims against Abbott, the Court must consider whether Abbott owed a legal duty to plaintiffs and, if so, whether the factual allegations in the amended complaint support the contention that it violated that duty. "Absent a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm" (***Safa v Bay Ridge Auto***, 84 AD3d 1344, 1345-1346, 924 NYS2d 535 [2d Dept 2011], quoting ***532 Madison Ave. Gourmet Foods v Finlandia Ctr.***, 96 NY2d 280, 289, 750 NE2d 1097, 727 NYS2d 49 [2001]).

It has been said that "[T]he threshold question in any negligence action is: does defendant owe a legally recognized duty of care to plaintiff?" (***Hamilton v Beretta U.S.A. Corp.***, 96 NY2d 222, 232, 750 NE2d 1055, 727 NYS2d 7 [2001]). In the absence of duty, there is no breach and without a breach there is no liability (***Pulka v Edelman***, 40 NY2d 781, 782, 358 NE2d 1019, 390 NYS2d 393 [1976], citing ***Kimbar v Estis***, 1 NY2d 399, 405). Courts have recognized that a plaintiff must show that a defendant owed not merely a general duty to society but a specific duty to the injured party, for "without a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm" (***Hamilton v Beretta U.S.A. Corp.***, *supra* at 96 NY2d 232, quoting ***Lauer v City of New York***, 95 NY2d 95, 100, 733 NE2d 184, 711 NYS2d 112 [2000]).

A defendant "generally has no duty to control the conduct of third persons so as to prevent them from harming others, even where as a practical matter defendant can exercise such control" (***Hamilton v Beretta U.S.A. Corp.***, *supra* at 96 NY2d 233, quoting ***D'Amico v Christie***, 71 NY2d 76, 88, 518 NE2d 896, 524 NYS2d 1 [1987]). Under ordinary circumstances, therefore, a party is under no duty to anticipate and prevent criminal conduct by others. Thus, in ***Elsroth v Johnson & Johnson***, 700 F Supp 151, 163 (SDNY 1988), where plaintiff sued the manufacturer of Tylenol after decedent was poisoned by a third party's tampering of the drug, it was held that the drug manufacturer had no duty to make its product packaging more tamper-resistant. Likewise, courts have been unwilling to hold firearm or ammunition manufacturers liable for the consequences of gun violence. Faced with a claim arising out of the tragic criminal misuse of gun ammunition, it was held that there exists no duty upon a manufacturer of a non-defective product to anticipate various possible unlawful acts through the misuse of that item (*see* ***McCarthy v Olin Corp.***, 119 F3d 148 [2d Cir 1997]). Accordingly, New York does not impose a duty upon a manufacturer to refrain from the lawful distribution of a non-defective product, nor will the Courts of this state hold a manufacturer liable for the criminal conduct of a third party over which it had no control (*see* ***Forni v Ferguson***, 232 AD2d 176, 648 NYS2d 73 [1st Dept 1996]).

A public nuisance consists of conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all in a manner such as to offend public morals, interfere with use by the public of a public place or endanger or injure the property, health,

safety or comfort of a considerable number of persons (***Copart Industries, Inc. v Consolidated Edison Co.***, 41 NY2d 564, 568, 362 NE2d 968, 394 NYS2d 169 [1977]). The Courts of this state have determined that a public nuisance claim can not proceed against manufacturers of lawful products, such as handguns, that are placed in the stream of commerce lawfully where harm is caused by the criminal activity of intervening third parties (*see* ***People v Sturm, Ruger & Co.***, 309 AD2d 91, 761 NYS2d 192 [1st Dept 2003]). While the circumstances that gave rise to this action are terribly tragic, New York law does not support a tort action against the manufacturer of a lawful and non-defective product for injury caused by third parties who criminally misuse the product. There is no allegation in this action that defendant Abbott failed to manufacture its drugs in accordance with specifications, nor is there any allegation that Abbott failed to provide necessary warnings to Vicodin users. Even if public nuisance law were stretched to encompass the lawful distribution of lawful products, the amended complaint would fail because it does not allege that defendant Abbott exercised sufficient control over the source of the interference with the public right. Furthermore, to the extent that plaintiffs rely on the Grand Jury Report dated April 17, 2012 as support for their claims, it is noted that the Report makes no findings whatsoever against Abbott of any specific culpable conduct. As a matter of law, Abbott can not be held liable for the intervening criminal acts of Laffer.

Turning to the issue of whether the complaint sets forth a cause of action upon which relief may be granted against the Suffolk County Police Department or against its former Commissioner, Richard Dormer (County defendants), the Court will accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see* ***Rozell v Milby***, 98 AD3d 960, 951 NYS2d 74 [2d Dept 2012], citing ***Matter of Walton v New York State Dept. Of Correctional Servs.***, 13 NY3d 475, 921 NE2d 145, 893 NYS2d 453). The framework for such analysis is set forth in ***Valdez v City of New York***, 18 NY3d 69, 960 NE2d 356, 936 NYS2d 587 [2011]), in which the rationale for dismissal of negligence actions against municipalities is explained. Considering the claim asserted on behalf of a shooting victim who contended that New York City was liable for having failed to arrest the assailant after allegedly having been notified of his threats, the Court noted that "[g]overnment action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general" (***Valdez v City of New York***, *supra* at 18 NY3d 76-77, quoting ***McLean v City of New York***, 12 NY3d 194, 203). Thus, if plaintiffs can not demonstrate that defendants owed the requisite special duty of care, there can be no liability on the part of the County defendants.

It is alleged in the complaint in January 2011 the Suffolk County Police Department investigated a complaint by Palma Laffer, David Laffer's mother, that there had been unauthorized withdrawals of money from her bank account. While police detectives were at the Laffer home, they learned that David Laffer allegedly had admitted to his mother to making the unauthorized withdrawals. It is also alleged that during the course of the investigation, David Laffer told the police that there were licensed firearms in the home registered to Laffer and his mother. Plaintiffs allege that the County defendants "had a duty to remove the said weapons permit(s) and guns." It

is claimed that Laffer used one of those firearms to commit the murders approximately five months later.

To establish that there existed a special relationship between plaintiffs' decedent and the police sufficient to supply the requisite special duty of care, plaintiffs are required to allege facts sufficient to show that there was: (1) an assumption by the County defendants, through promises or actions, of an affirmative duty to act on behalf of the plaintiffs' decedent; (2) knowledge on the part of the County's agents that inaction could lead to harm; (3) some form of direct contact between the County's agents and the injured party; and (4) that party's justifiable reliance on the County's affirmative undertaking (*see* ***Valdez v City of New York,*** *supra* at 18 NY3d at 80, citing ***Cuffy v City of New York,*** 69 NY2d 255, 260, 505 NE2d 937, 513 NYS2d 372 [1987]). The absence of factual allegations in the amended complaint addressing the foregoing factors demonstrates that, as a matter of law, plaintiffs can not demonstrate that the County defendants owed a special duty to the plaintiffs' decedent.

In addition to the foregoing, the amended complaint fails to assert sufficient facts to support any claim that the County defendants violated the plaintiffs' decedent's civil rights. The allegations are insufficient as a matter of law to support a claim that the County's alleged failure to investigate and remove weapons from Laffer resulted from official municipal policy or custom (*see* ***Monell v Department of Social Serv.,*** 436 US 658, 98 SCt 2018, 56 LEd2d 611 [1978]; *see also* ***Leftenant v City of New York,*** 70 AD3d 596, 895 NYS2d 88 [1st Dept 2010]).

Plaintiffs seek recovery of damages for pain and suffering of decedent and wrongful death against Dr. Li upon allegations that he "prescribed approximately 2,500 narcotics pills to David Laffer between 2009 and 2010" and that Dr. Li "knew or should have known that prescribing narcotics to a drug addict would increase David Laffer's dependency on said narcotics and therefore result in drastic attempts to procure said narcotics by David Laffer, including robbery of pharmacies/drug stores and the murder of those inside" and that Dr. Li "recklessly disregarded his obligation and duty not to over-prescribe narcotics to a narcotics abuser. . ." It is also alleged that Dr. Li "created a public nuisance in allowing drug addict and criminal Laffer to have access to the prescription narcotics and to fail to prevent drug addict and criminal Laffer from re-filling his stash of prescription narcotics . . ." It appears that plaintiffs make no claim that Dr. Li is liable in medical malpractice; to the extent that such a claim is asserted, however, the absence of a doctor/patient relationship between plaintiffs and defendant precludes a cause of action based on medical malpractice (*see* ***Fox v Marshall,*** 88 AD3d 131, 135, 928 NYS2d 317 [2d Dept 2011]).

A duty of reasonable care owed by a tortfeasor to a plaintiff is elemental to any recovery in negligence (***Fox v Marshall,*** *supra* at 88 AD3d 135, citing ***Pulka v Edelman,*** 40 NY2d 781, 358 NE2d 1019, 390 NYS2d 393 [1976]). The question of whether a defendant owes a duty of care to another person is a question of law for the court (***Citera v County of Suffolk,*** 95 AD3d 1255, 1258, 945 NYS2d 375 [2d Dept 2012]). While generally there is no duty to control the conduct of third persons to prevent them from causing injury to others, the Court of Appeals has recognized that there is a duty to control the conduct of others where there is a special relationship, such as a relationship

between defendant and a third person whose actions expose plaintiff to harm such as would require the defendant to attempt to control the third person's conduct, or a relationship between the defendant and plaintiff requiring defendant to protect the plaintiff from the conduct of others (***Citera v County of Suffolk,*** *supra* at 95 AD3d 1259, citing ***Purdy v Public Administrator of County of Westchester,*** 72 NY2d 1, 526 NE2d 4, 530 NYS2d 513). Applying these principles, the Appellate Division, Second Department, has found that an outpatient psychiatric treatment facility did not have the authority or ability to exercise control over a patient's conduct so as to give rise to a duty to protect the decedent (*see* ***Citera v County of Suffolk,*** *supra*, 95 AD3d 1255), but a residential substance abuse and mental health facility which gave a patient a pass to leave the facility may owe a duty in negligence to protect the public where it had knowledge that the patient could be a danger to himself and others (*see* ***Fox v Marshall,*** 88 AD3d 131, 928 NYS2d 317 [2d Dept 2011]).

The Courts of this state have been wary of expanding the obligation of duty but have determined that the issue must be resolved on a case-by-case basis. "[J]udicial resistance to the expansion of duty grows out of practical concerns both about potentially limitless liability and about the unfairness of imposing liability for the acts of another. A duty may arise, however, where there is a relationship either between defendant and a third-person tortfeasor that encompasses defendant's actual control of the third person's actions or between defendant and plaintiff that requires defendant to protect plaintiff from the conduct of others" (***Zane v Corbett,*** 82 AD3d 1603, 1611, 919 NYS2d 625 [4th Dept 2011], quoting ***Hamilton v Beretta U.S.A. Corp.,*** 96 NY2d at 233, 750 NE2d 1055, 727 NYS2d 7 [2001]).

Applying the foregoing principles, the courts have held in numerous cases that a medical provider did not have a duty to the general public to control the conduct of a patient and were not liable for failure to intervene to protect others (*see*, e.g., ***Purdy v Public Administrator of the County of Westchester,*** 72 NY1, 526 NE2d 4, 530 NYS2d 513 [1988]). The allegations in this action against Dr. Li, however, are that he recklessly and affirmatively contributed to the addiction of David Laffer which allegedly motivated Laffer's murderous spree. Put another way, and viewing the allegations of the amended complaint in a light most favorable to plaintiffs, it appears that plaintiffs claim that Dr. Li created a risk of harm to the general public by providing the means through which Laffer became addicted and dependent upon hydrocodone, and that Dr. Li knew or should have known that there was a risk that Laffer would engage in criminal conduct in a desperate need to feed his addiction. The allegations are that Dr. Li engaged in conduct that recklessly caused a substantial risk of harm not only to Laffer but also to the public welfare. Thus, in this case, the duty to the community at large does not arise through an obligation to control the actions of Laffer. Rather, the duty may arise through an obligation to refrain from over-prescribing addictive drugs in an irresponsible and potentially criminal manner. It may be found that Dr. Li breached his duty to the general public and, more particularly, to the plaintiffs' decedent, through the irresponsible dispensing of controlled substances to an addict and the reckless disregard for the consequences of that addiction (*see* ***Williams v Beemiller, Inc.,*** ___ AD3d ___, 952 NYS2d 333 [4th Dept 2012]).

The license to write prescriptions for opioid drugs carries with it important responsibilities. Here, plaintiffs claim that Dr. Li recklessly and negligently prescribed opioid substances to Laffer

without taking necessary precautions. The claims in this case are distinguishable from those cases in which a medical provider is alleged to have failed to perceive a risk of danger and failed to exercise control to prevent harm to others. Instead, plaintiffs in this case contend that Dr. Li recklessly helped to create the danger by feeding Laffer's addiction. The distinction is significant. In the opinion of this Court, under certain factual circumstances there exists a duty to the general public not to supply prescriptions to maintain an addict or habitual user of controlled substances. A medical provider may owe a duty to protect the public from the actions of a drug addict and he may be found to have breached that duty if he creates or maintains the addiction through his own egregious conduct. At this stage of the proceedings, plaintiffs should be afforded the opportunity to proceed against Dr. Li to explore through discovery proceedings the level of his alleged involvement, if any, in Laffer's addiction and whether Dr. Li knew or had reason to know that Laffer presented a risk of harm to himself or others. Accordingly, the motion for dismissal of the complaint against Dr. Li is denied.

Dated: November 16, 2012

HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION

RIDER

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