Floyd v Feygin
2018 NY Slip Op 33136(U)
December 4, 2018
Supreme Court, Kings County
Docket Number: 507458/17
Judge: Bernard J. Graham
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At an IAS Term, Part 2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4th day of December, 2018.

PRESENT:

HON. BERNARD J. GRAHAM,
Justice.

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ALVIN FLOYD,

Plaintiff,

- against -

LAZAR FEYGIN, M.D., MICHAEL TAITT, M.D., NEVA SOLOMON, F.N.P., MARIE NAZAIRE, P.A., PAUL MCCLUNG, M.D., JUAN CABEZAS, P.A., ALEC BROOK-KRASNY, PARKVILLE MEDICAL HEALTH P.C., QUALITY HEALTHCARE MANAGEMENT, INC., DUANE READE, INC., ACTAVIS PHARMA, INC., AND ALLERGAN, PLLC,

Defendants.

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AMENDED DECISION

Index No. 507458/17

The following e-filed papers read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	7, 9-16 38-40 58-60 67-72 73-77 79-82 109-111
Opposing Affidavits (Affirmations)	46-50 97-102 126-131 103-108 85-90 121-125 115-120
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Upon the foregoing papers, in this action by plaintiff Alvin Floyd (plaintiff) against defendants Lazar Feygin, M.D. (Dr. Feygin), Michael Taitt, M.D. (Dr. Taitt), Neva Solomon, F.N.P. (Nurse Practitioner Solomon), Marie Nazaire, P.A. (PA Nazaire), Paul McClung,

M.D. (Dr. McClung), Juan Cabezas, P.A. (PA Cabezas), Alec Brook-Krasny (former Assembly Member Brook-Krasny), Parkville Medical Health, P.C. (Parkville), Quality Healthcare Management, Inc. (Quality), Duane Reade, Inc. (Duane Reade), Actavis Pharma, Inc. (Actavis), and Allergan, PLLC (Allergan), Actavis moves, under motion sequence number one, for an order dismissing plaintiff's fifth cause of action for negligence, sixth cause of action for lack of informed consent, and seventh cause of action for vicarious liability as against it. Former Assembly Member Brook-Krasny moves, under motion sequence number four, for an order, pursuant to CPLR 3211 (a) (7), dismissing plaintiff's second cause of action for unjust enrichment, third cause of action for fraud, sixth cause of action for lack of informed consent, and seventh cause of action for vicarious liability as against him. Quality cross-moves, under motion sequence number five, for an order, pursuant to CPLR 3211 (a) (7), dismissing plaintiff's first cause of action for malpractice, second cause of action for unjust enrichment, third cause of action for fraud, sixth cause of action for lack of informed consent, and seventh cause of action for vicarious liability as against it. PA Cabezas moves, under motion sequence number seven, for an order, pursuant to CPLR 3211 (a) (7), dismissing plaintiff's second cause of action for unjust enrichment and third cause of action for fraud as against him. PA Nazaire cross-moves, under motion sequence number eight, for an order, pursuant to CPLR 3211 (a) (7), dismissing plaintiff's second cause of action for unjust enrichment and third cause of action for fraud as against her. Nurse Practitioner Solomon cross-moves, under motion sequence number nine, for an

order, pursuant to CPLR 3211 (a) (7), dismissing plaintiff's second cause of action for unjust enrichment and third cause of action for fraud as against her. Dr. Feygin and Dr. Taitt cross-move, under motion sequence number ten, for an order dismissing plaintiff's second cause of action for unjust enrichment and third cause of action for fraud as against them.

FACTS AND PROCEDURAL BACKGROUND

On April 7, 2017, seven government agencies served indictments on 13 individuals in connection with a massive scheme to defraud Medicaid and Medicare of millions of dollars, to illegally sell prescriptions for opioid painkillers, and to commit money laundering. Two indictments filed by the Office of Special Narcotics Prosecutor center on three medical clinics in Brooklyn, which were additionally charged, one of which is Parkville, a medical clinic located at 198 Foster Avenue, Suite B, in Brooklyn, New York. The indictments contain a combined 477 charges.

The charges and indictments arose following a long-term wiretap investigation called "Operation Avalanche," which began in 2013. The "Operation Avalanche" investigation was conducted by the Special Narcotics Prosecutor's Prescription Drug Investigation Unit, the Drug Enforcement Administration's (DEA's) Long Island District Office-Tactical Diversion Squad (LIDO-TDS), the Brooklyn District Attorney's Office, the Office of the Inspector General for the U.S. Department of Health and Human Services, the New York City Department of Investigation, the New York City Human Resources Administration and the New York State Health Department's Bureau of Narcotic Enforcement. DEA's LIDO-TDS

is comprised of agents and officers of the DEA, Port Washington Police Department, Nassau County Police Department, Suffolk County Police Department, Rockville Centre Police Department and the Internal Revenue Service. Investigative techniques used in "Operation Avalanche" included physical surveillance, interviews with patients and former employees, a series of Russian-language wiretaps, analysis of medical records, consultations with medical and insurance industry experts, and a review of financial records associated with the medical clinics and other related corporate entities.

Dr. Feygin and Dr. McClung were charged with running Parkville and two other medical clinics that allegedly defrauded Medicaid and Medicare by billing for millions of dollars in unnecessary medical tests. Dr. Feygin, Dr. McClung, and a series of doctors, physician's assistants, and nurse practitioners in their employment, including Dr. Taitt, PA Nazaire, and PA Cabezas, were charged with illegally providing patients with prescriptions for Oxycodone, an addictive opioid painkiller with a high resale value on the black market, for no legitimate medical purpose, in order to induce these patients to submit to these unnecessary medical tests, which the clinics billed to Medicaid and Medicare. The investigation revealed that beginning in 2012, these doctors, physician's assistants, and nurse practitioners allegedly unnecessarily prescribed large quantities of Oxycodone to large numbers of patients and ordered unnecessary medical procedures.

At the outset of the long-term investigation, the DEA's Long Island District Office and Special Narcotics investigators identified a group of "doctor shoppers," or individuals

who sought to illegally obtain prescribed controlled substances, operating in the New York metropolitan area. Agents learned that these "doctor shoppers" frequented two Brooklyn clinics owned by Dr. Feygin, one of which was Parkville. Parkville and the other clinic served as highly prolific Oxycodone "pill mills," or medical practices that made money by illegally selling prescriptions.

The investigation revealed that Parkville and a clinic run by Dr. McClung with PA Cabezas, namely, PM Medical P.C., which allegedly engaged in the same pattern of criminal activity as Parkville, along with a third clinic, LF Medical P.C., owned by Dr. Feygin, gained reputations throughout New York City as locations where Oxycodone prescriptions were relatively easy to obtain. Dr. Feygin and the other indicted staff members of Parkville and LF Medical P.C. were allegedly responsible for prescribing over 3.7 million Oxycodone pills between early 2012 and early 2017 and ordering reimbursed procedures, generating over $16 million in revenue. PM Medical P.C.'s practitioners prescribed over 2.6 million pills between mid-2013 and early 2017, and ordered reimbursed procedures, generating more than $8 million in revenue.

Quality owned and operated a clinical medical laboratory in the business of providing medical treatment to patients called Quality Laboratory Service, which was located at 1523 Voorhies Avenue, 2nd Floor, in Brooklyn, New York. This laboratory testing company was utilized by Dr. Feygin's clinics, including Parkville. Former Assembly Member Brook-Krasny was a New York State Assembly Member and the chief financial officer of, and

consultant to Quality. According to a press release by the Office of the Special Narcotics Prosecutor for the City of New York, Bridget G. Brennan, Special Narcotics Prosecutor, beginning in late 2016, the lion's share of drug urinalyses ordered by Dr. Feygin's clinics was handled by former Assembly Member Brook-Krasny, using his affiliation with Quality. Former Assembly Member Brook-Krasny was charged with directing unnecessary laboratory testing of specimens sent from Parkville and LF Medical P.C. for which Quality, through its laboratory services, was reimbursed by Medicaid and Medicare.

Former Assembly Member Brook-Krasny is further charged with arranging for laboratory test results from Quality to be altered so as to remove contraindications for prescribing opioids. For example, patients prescribed opioids are instructed not to consume alcohol because of a high risk of overdose, and the urinalysis testing of patients at Dr. Feygin's clinics routinely came back positive for alcohol. The investigation revealed that former Assembly Member Brook-Krasny, rather than preventing these patients from receiving opioid prescriptions or switching them to a non-opioid pain reliever, arranged to systematically delete the alcohol-related results so that the doctors would be willing to continue writing prescriptions for opioids to them.

According to the verified complaint of the Special Narcotics Prosecutor of the City of New York, from at least April 2012 until April 7, 2017, Dr. Feygin and the practitioners employed at Parkville conspired to sell and did sell prescriptions for controlled substances, including Oxycodone, at Parkville and the other medical clinics, and former Assembly

Member Brook-Krasny provided medical testing services, through Quality, in furtherance of this conspiracy at various times. Dr. Feygin and the practitioners employed at Parkville allegedly committed massive health care fraud by performing and ordering the performance of wholly unnecessary medical tests and procedures, and by providing false representations and omitting material information from health insurance companies, including Medicaid managed care organizations. These medically unnecessary test and procedures were allegedly performed upon patients at Dr. Feygin's clinics, who were effectively sold controlled substance prescriptions, principally for Oxycodone, in exchange for their submission to the testing. This resulted in the reimbursement of millions of dollars to Parkville by Medicare and Medicaid. Dr. Feygin allegedly regularly laundered money unlawfully obtained by his clinics by distributing these criminal proceeds to various co-conspirators at various times.

This alleged conspiracy scheme resulted in the prescription of millions of Oxycodone pills, despite Dr. Feygin and the practitioners employed at Parkville and Dr. Feygin's other medical clinics allegedly knowing or having reason to know that certain patients were not taking the pills they were prescribed, that certain patients sold their pills, and that certain patients tested positive for street drugs and alcohol which could prove extremely dangerous in combination with Oxycodone or other prescription painkillers. The investigation revealed that Oxycodone prescriptions were routinely written for no legitimate medical purpose, that patients received only cursory medical examinations, or had no examinations at all, and contraindications for opioid drugs were systematically ignored.

Dr. Feygin, Dr. Taitt, PA Nazaire, Dr. McClung, PA Cabezas (collectively, the medical provider defendants), and former Assembly Member Brook-Krasny were arrested on April 7, 2017, and criminally charged. Dr. Feygin was charged with the criminal sale of a prescription for a controlled substance, health care fraud in the first degree, and grand larceny in the first degree, and the other indicted medical provider defendants face similar charges. Former Assembly Member Brook-Krasny was charged with felony conspiracy, health care fraud, and bribery. Parkville and Quality were also criminally indicted.

Plaintiff alleges that he went to Parkville for medical complaints, and was prescribed opioid pain medications. Plaintiff further alleges that he continued to be prescribed opioid pain medications, mainly Oxcyodone, during his visits to Parkville, which took place over the more than four-year period from December 1, 2012 through April 7, 2017. Plaintiff asserts that he was thereby caused to become addicted and remain addicted to opioid pain medications. Plaintiff claims that the opioids that he was prescribed had no legitimate medical purpose.

Actavis is a generic drug manufacturer, which manufactures the pain killer, Oxycodone. Duane Reade is the pharmacy at which plaintiff filled his opioid prescriptions. Neither Actavis nor Duane Reade was implicated in the criminal investigation and they have not been criminally charged in any way.

On April 14, 2017, plaintiff filed this action against the medical provider defendants, as well as Assembly Member Brook-Krasny, Quality, Duane Reade, Actavis, and Allergan.

Plaintiff's complaint asserts a first cause of action for medical malpractice against Dr. Feygin, Dr. Taitt, Nurse Practitioner Solomon, PA Nazaire, Dr. McClung, PA Cabezas, Parkville, and Quality, a second cause of action for unjust enrichment against former Assembly Member Brook-Krasny and Quality, a third cause of action for fraud and deceit against Dr. Feygin, Dr. Taitt, Nurse Practitioner Solomon, PA Nazaire, Dr. McClung, PA Cabezas, Parkville, former Assembly Member Brook-Krasny and Quality, a fourth cause of action for negligence against Duane Reade, a fifth cause of action for negligence against Actavis and Allergan, a sixth cause of action for lack of informed consent against all defendants, and a seventh cause of action for vicarious responsibility against all defendants.

Dr. Feygin, Dr. Taitt, PA Cabezas, PA Nazaire, Nurse Practitioner Solomon, and Duane Reade have interposed answers to plaintiff's complaint. PA Nazaire, Nurse Practitioner Solomon, and Duane Reade have also asserted cross claims against other defendants. While it is alleged in plaintiff's complaint that Allergan owns and operates Actavis, this is denied by Actavis, which asserts that plaintiff incorrectly alleges that Allergan is its parent company. It appears that Allergan has not been served herein.

On June 12, 2017, Actavis filed its instant motion. Thereafter, former Assembly Member Brook-Krasny, Quality, PA Cabezas, Nurse Practitioner Solomon, and Dr. Feygin and Dr. Taitt filed their respective motions and cross motions. Duane Reade filed a motion to dismiss plaintiff's sixth and seventh causes of action as against it, under motion sequence number six, on September 29, 2017. Inasmuch as Duane Reade, Quality, Actavis, and former

Assembly Member Brook-Krasny were not medical practitioners who could be held liable for lack of informed consent, pursuant to Public Health Law § 2805-d, and since they could not be held vicariously liable for any act of the other defendants, by an order dated November 3, 2017, signed by the court and counsel for the parties, plaintiff's sixth cause of action for lack of informed consent and seventh cause of action for vicarious liability were withdrawn by plaintiff as against Duane Reade, Quality, Actavis, and former Assembly Member Brook-Krasny. Since Duane Reade moved solely to dismiss plaintiff's sixth and seventh causes of action, its motion was completely resolved by that order. In addition, Actavis' motion, former Assembly Member Brook-Krasny's motion, and Quality's cross motion, to the extent that they seek dismissal of plaintiff's sixth and seventh causes of action, are rendered moot.

DISCUSSION

Actavis' Motion

As noted above, plaintiff's sixth and seventh causes of action as against Actavis have already been withdrawn by plaintiff in the signed order dated November 3, 2017. Thus, the court must only address the remaining branch of Actavis' motion, which seeks dismissal of plaintiff's fifth cause of action for negligence as against it.

Plaintiff's negligence claim has nothing to do with the design or manufacture of Oxycodone or the warnings that accompany it, and plaintiff has not asserted a strict products liability claim against Actavis. Rather, plaintiff's claim for negligence as against Actavis is based on Actavis' allegedly turning a "blind eye" to the alleged misconduct of the medical

provider defendants. Plaintiff asserts that there were obvious "red flags" that the medical provider defendants were operating a "pill mill," but Actavis, as the manufacturer of Oxycodone, continued to allow its Oxycodone, which is highly addictive, to be provided and prescribed to the medical provider defendants' patients, including him.

Plaintiff alleges that Actavis had a duty to ensure that its Oxycodone product was not being prescribed, dispensed, and used in a fraudulent and harmful manner. Plaintiff further alleges that Actavis breached its duty by failing to take appropriate action to stop and prevent Oxycodone from being prescribed for fraudulent and illegal purposes, and by failing to maintain effective controls against having prescriptions for Oxycodone being written where such prescriptions were not for legitimate medical purposes. Plaintiff also claims that Actavis breached its duty by failing to design, implement, and operate a system to disclose suspicious orders of Oxycodone, and by failing to establish, implement, and follow an abuse and diversion detection program consisting of internal procedures designed to identify potential suspicious prescriptions of Oxycodone. Plaintiff claims that he suffered injuries by improperly receiving Oxycodone and becoming addicted to it.

Plaintiff contends that Actavis, in the marketing and selling of its Oxycodone, tracks the amount of pills being sold to different locations and medical providers, and, therefore, it had actual knowledge of the criminal enterprise perpetrated by the medical provider defendants. Plaintiff asserts that Actavis and other pharmaceutical companies regularly engage in "prescription tracking" through companies, such as IMS Health Corp., which is

a market research organization that provides sales and marketing information to the pharmaceutical and healthcare industries. Plaintiff states that IMS Health Corp. allows a pharmaceutical company to track with precision the types, amounts, and frequency of prescriptions for every provider. Plaintiff avers that IMS Health Corp.'s sales tracking reports were available to Actavis on a weekly, monthly, and quarterly basis, and allowed Actavis to track the movement of its products in the United States through all retail channels of distribution, including direct sales by Actavis and indirect sales through its drug wholesale customers, such as AmerisourceBergen, McKesson, and Cardinal Health.

Plaintiff alleges that Actavis keeps a close eye on how many pills a doctor or practice is prescribing. Plaintiff asserts that Actavis is required to report any suspicious prescribing of Oxycodone, pursuant to both the federal Controlled Substances Act (21 USC § 801 *et seq.*) and its New York State law equivalent, 10 NYCRR 80.22, and that Actavis has failed to do so.

In support of its motion, Actavis argues that plaintiff's negligence cause of action against it is, in effect, an attempt to privately enforce the Controlled Substances Act. Actavis asserts that plaintiff lacks the authority to regulate its conduct in this regard or to enforce the Controlled Substances Act since Congress has committed enforcement of the Controlled Substances Act exclusively to the Attorney General and the Department of Justice.

It has been held that pursuant to its plain terms, the Controlled Substances Act "'is a statute enforceable only by the Attorney General and, by delegation, the Department of

Justice'" (*Smith v Hickenlooper*, 164 F Supp 3d 1286, 1290 [D Colo 2016], *affd sub nom. Safe Streets All. v Hickenlooper*, 859 F3d 865 [10th Cir 2017], quoting *Schneller ex rel. Schneller v Crozer Chester Med. Ctr.*, 387 F Appx 289, 293 [3d Cir 2010], *cert denied* 562 US 1287 [2011]). Based on the regulatory structure of the Controlled Substances Act, "federal courts have uniformly held that the [Controlled Substances Act] does not create a private right of action" (*Smith*, 164 F Supp 3d at 1290; *see also McCallister v Purdue Pharma L.P.*, 164 F Supp 2d 783, 793 [SD W Va 2001] [finding no private cause of action under the Controlled Substances Act]). The manufacture, distribution, and dispensing of opioids is comprehensively regulated by the Controlled Substances Act, and the DEA is "the primary federal agency responsible for the enforcement of the Controlled Substances Act" (DEA, Practitioner's Manual 4 [2006]).

10 NYCRR Part 80, entitled "Rules and Regulations of Controlled Substances," is New York's version of the Controlled Substances Act. 10 NYCRR 80.122 provides that "[i]t shall be the duty of the department [of health] to enforce all of the provisions of article 33 of the Public Health Law and all of the rules, regulations and determinations made thereunder." It does not set forth a private right of action.

Plaintiff argues, in opposition to Actavis' motion, that its negligence claim against Actavis is not preempted by the Controlled Substances Act or its New York equivalent, 10 NYCRR Part 80. Plaintiff concedes that there is no private right of action to enforce Actavis' record keeping and report obligations under the Controlled Substances Act or New

York law. Plaintiff asserts that federal preemption does not apply because he is not seeking an injunction or mandate that Actavis be enjoined from acting or compelled to act. Plaintiff states that he is not seeking relief under these statutes, but, rather, is referring to these statutes to show that they created a responsibility that Actavis failed to meet. Plaintiff points to 22 NYCRR 80.22, which provides as follows:

> "The licensee [i.e., the manufacturer of the controlled substance] shall establish and operate a system to disclose to the licensee suspicious orders for controlled substances and inform the department [of health] of such suspicious orders. Suspicious orders shall include, but not be limited to, orders of unusual size, orders deviating substantially from a normal pattern, and others of unusual frequency."

However, pursuant to both the federal Controlled Substances Act and New York State regulations, Actavis' sole duty with respect to its manufacture and distribution of opioids was to collect and record data, and make reports to federal and state agencies (*see* 21 CFR 1300 *et seq.*; 10 NYCRR 80.1 *et seq.*). Although these regulations define circumstances that trigger reports to federal or state agencies, there is nothing within these regulations that requires a manufacturer to stop or restrict its distribution of opioids (*see* 21 CFR 1310.05; 10 NYCRR 80.22). Furthermore, the distributions of Oxycodone at issue here were being made pursuant to purportedly valid prescriptions by licensed physicians (*see* 21 CFR 1310.05 [f] [4]; 10 NYCRR 80.22). Thus, Actavis had no duty to control the prescribing, dispensing, and use of its Oxycodone.

Rather,

> "'[i]t is the duty of the prescribing physician to know the characteristics of the drug he [or she] is prescribing, to know how much of the drug he [or she] can give [the] patient, to elicit from the patient what other drugs the patient is taking, to properly prescribe various combinations of drugs, to warn the patient of any dangers associated with taking the drug, to monitor the patient's dependence on the drug, and to tell the patient when and how to take the drug'" (*Brumaghim v Eckel*, 94 AD3d 1391, 1394 [3d Dept 2012], quoting *Jones v Irvin*, 602 F Supp 399, 402 [SD Ill 1985]; *see also Abrams v Bute*, 138 AD3d 179, 187 [2d Dept 2016], *lv denied* 28 NY3d 910 [2016]).

The drug manufacturer's duty is only to "to notify the physician of any adverse effects or other precautions that must be taken in administering the drug" (*Brumaghim*, 94 AD3d at1394 [internal quotation marks omitted]). There is no claim by plaintiff that Actavis breached that duty. Rather, it is plaintiff's claim that the medical provider defendants prescribed Oxycodone to him without him having any legitimate medical need for it.

While the reporting referred to in 21 CFR 1310.05 and in 10 NYCRR 80.22 must be made to the Special Agent in Charge of the DEA Divisional Office, and the Department of Health, respectively, the DEA Special Agent in Charge of the U.S. DEA's New York Division, and the New York State Health Department Commissioner were involved in the governmental investigation which began in 2013, within one year of 2012, when the illegal operations started, and which ultimately led to the arrests of most of the defendants. Thus, the government was aware of the opioid prescriptions and was undertaking an investigation regardless of any reporting by Actavis.

Furthermore, when there is an intervening act which is intentional or criminal in nature, the liability of an original tortfeasor is generally "severed, unless such intentional or criminal intervention was reasonably foreseeable" (*Bikowicz v Sterling Drug*, 161 AD2d 982, 984 [3d Dept 1990]). Plaintiff argues that the intervening criminal acts of defendants did not break the causal chain because Actavis should have foreseen the consequences of its alleged negligence in not detecting and preventing the illegal prescriptions of Oxycodone that were dispensed by Parkville for five years. This argument is rejected. The operation of the "pill mill" was an intervening act which was of an extraordinary and criminal nature so as to break any causal nexus between any reporting requirement on the part of Actavis and plaintiff's addiction to Oxycodone. Indeed, it took a four-year investigation by seven government agencies to fully uncover the illegal "pill mill" scheme.

Plaintiff argues that he needs discovery to obtain information which is exclusively within Actavis' possession and control. However, since Actavis did not breach any duty owed to plaintiff, plaintiff has not shown how discovery could possibly lead to any relevant evidence. Consequently, plaintiff's fifth cause of action for negligence as against Actavis must be dismissed (*see* CPLR 3211 [a] [7]).

Former Assembly Member Brook-Krasny's Motion

As noted above, plaintiff's sixth cause of action for lack of informed consent and seventh cause of action for vicarious liability as against Assembly Member Brook-Krasny have already been withdrawn by plaintiff in the signed order dated November 3, 2017. Therefore, the court must only address the remaining branches of former Assembly Member Brook-Krasny's motion, which seek dismissal of plaintiff's second cause of action for unjust enrichment and third cause of action for fraud.

"The elements of a cause of action to recover for unjust enrichment are '(1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered'" (*GFRE, Inc. v U.S. Bank, N.A.*, 130 AD3d 569, 570 [2d Dept 2015], quoting *Mobarak v Mowad*, 117 AD3d 998, 1001 [2d Dept 2014]). Plaintiff argues that he has pleaded these elements. Plaintiff states that he has alleged that former Assembly Member Brook-Krasny was unjustly enriched because he benefitted financially from the prescription of opioid pain medications to him, without a legitimate medical purpose. Plaintiff further states that this was at his expense because he was caused to suffer from drug addiction. Plaintiff also states that it is against equity and good conscience to permit former Assembly Member Brook-Krasny to retain what is sought to be recovered.

Plaintiff's unjust enrichment claim, however, is predicated on his allegation that former Assembly Member Brook-Krasny worked with Quality to falsify medical tests and results to ensure that patients could continue to be prescribed opioid painkillers, and that

former Assembly Member Brook-Krasny profited financially from doing so. Former Assembly Member Brook-Krasny, in support of his motion, points out that plaintiff does not specifically allege, in his complaint, that he had lab work performed by Quality or the nature of this lab work. Furthermore, even if it assumed that Parkville had lab work performed by Quality for plaintiff, plaintiff does not allege that his results were altered.

Plaintiff's second cause of action for unjust enrichment merely generally alleges that former Assembly Member Brook-Krasny altered test results to continue to prescribe opioid pain medications, without a legitimate medical purpose, "to patients such as the plaintiff." While plaintiff argues that the terms "patients such as plaintiff" was meant to include him as one of the patients whose lab results were altered, the alterations in which former Assembly Member Brook-Krasny was allegedly involved, as disclosed by the investigation, consisted of deleting the fact that urinalysis results for patients came back positive for alcohol, which could cause a high risk of overdose and would, therefore, indicate that opioids should not be prescribed. However, plaintiff does not allege that his urinalysis results were altered. Plaintiff also does not allege that he drank alcohol or that he took any other drugs which would have contraindicated a prescription of opioids, so as to require an alteration of his test results to continue to be prescribed opioids. In addition, plaintiff does not claim that he ever overdosed due to mixing alcohol and opioids. Thus, plaintiff has not sufficiently alleged that former Assembly Member Brook-Krasny, through Quality, altered his test results. While plaintiff also refers to unnecessary tests performed on patients, plaintiff also

does not allege what unnecessary test former Assembly Member Brook-Krasny, through Quality, had performed on him.

Furthermore, unjust enrichment "is a quasi contract theory of recovery" and "although privity is not required for an unjust enrichment claim . . . a claim will not be supported unless there is a connection or relationship between the parties that could have caused reliance or inducement on the plaintiff's part" (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011], *affd* 19 NY3d 511 [2012]; *see also Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]). Here, plaintiff does not adequately allege a connection or relationship between him and former Assembly Member Brook-Krasny that could have caused reliance or inducement on the part of plaintiff with respect to his addiction to opioid drugs.

While plaintiff claims that former Assembly Member Brook-Krasny was unjustly enriched at his expense by profiting from opioid prescriptions resulting from the alleged altering of test results, plaintiff does not allege that he provided any direct compensation to former Assembly Member Brook-Krasny. Any payment to Quality and, thus, to Assembly Member Brook-Krasny, would have been made by Medicaid, Medicare, or a health insurance company. Therefore, since there was no payment made by plaintiff, plaintiff cannot recoup payments obtained by former Assembly Member Brook-Krasny, through Quality, based on a theory of unjust enrichment (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009], *rearg denied* 12 NY3d 889 [2009]).

Thus, plaintiff's conclusory allegations fail to adequately allege that former Assembly Member Brook-Krasny was unjustly enriched at his expense. Consequently, dismissal of plaintiff's second cause of action for unjust enrichment as against former Assembly Member Brook-Krasny is warranted (*see* CPLR 3211 [a] [7]).

With respect to former Assembly Member Brook-Krasny's motion, insofar as it seeks dismissal of plaintiff's third cause of action for fraud, it is noted that "[t]he elements of a cause of action to recover damages for fraud are a material misrepresentation of fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff, and damages" (*Summit Dev. Corp. v Interstate Masonry Corp.*, 140 AD3d 1152, 1153 [2d Dept 2016]). Assuming that former Assembly Member Brook-Krasny falsified a test result as to plaintiff, plaintiff cannot claim that he reasonably relied on his test results to determine whether or not he should be prescribed opioids since doctors prescribe opioids, not patients. While former Assembly Member Brook-Krasny is criminally charged with conspiring to fraudulently alter lab testing results to facilitate the prescription of controlled substances to patients of Dr. Feygin's clinics and to commit health care fraud and plaintiff claims that he reasonably relied on his test results in continuing to take opioids, plaintiff does not allege what test he took, what his particular test results were or would have been if not altered, or that he was aware of his test results. Furthermore, the health care fraud referred to in the criminal charges refers to illegally billing Medicare and Medicaid, rather than a fraud committed against plaintiff.

Moreover, pursuant to CPLR 3016 (b), where a cause of action is based upon fraud, the circumstances constituting the wrong is required to "be stated in detail." Where a cause of action alleging fraud merely recites the elements of fraud and provides "only bare and conclusory allegations, without any supporting detail," it fails to satisfy the requirements of CPLR 3016 (b) and must be dismissed (*Stein v Doukas*, 98 AD3d 1024, 1026 [2d Dept 2012]). Here, plaintiff, in paragraph 251 of his complaint, only alleges that the defendants, collectively as a group of medical providers, in which former Assembly Member Brook-Krasny is included, "falsified medical testing and results related to [him] to continue to prescribe [him] opioid pain medications, despite a legitimate medical purpose." Plaintiff fails to specify what material representation, if any, was made to him by former Assembly Member Brook-Krasny. Thus, plaintiff's third cause of action for fraud lacks the requisite particularity required by CPLR 3016 (b) to sustain a fraud claim against former Assembly Member Brook-Krasny. Consequently, dismissal of plaintiff's third cause of action for fraud as against former Assembly Member Brook-Krasny is mandated (*see* CPLR 3211 [a] [7]).

Quality's Cross Motion

As set forth above, plaintiff's sixth cause of action for lack of informed consent and seventh cause of action for vicarious liability as against Quality have already been withdrawn by plaintiff in the signed order dated November 3, 2017. Therefore, the court must only address the remaining branches of Quality's cross motion, which seek dismissal of plaintiff's

first cause of action for malpractice, second cause of action for unjust enrichment, and third cause of action for fraud.

In order to state a viable cause of action for medical malpractice, "a physician-patient relationship must exist that gives rise to a duty of care . . . and the absence of such a relationship precludes the cause of action" (*Pizzo-Juliano v Southside Hosp.*, 129 AD3d 695, 697 [2d Dept 2015]). Quality contends that it had no physician-patient relationship with plaintiff upon which a medical malpractice claim can be predicated. Quality asserts that it is a clinical laboratory and, as such, it only provided information to medical providers for the diagnosis, prevention, or treatment of diseases or impairments. Quality further asserts that plaintiff was not its patient, and that it did not prescribe any opioid pain medications to plaintiff, but, rather, only plaintiff's physicians and other medical providers at Parkville prescribed opioid pain medications to plaintiff. Quality argues that since it neither examined plaintiff nor prescribed medication to him, it cannot be held liable to plaintiff for malpractice.

It is well established, however, that laboratories can be liable for malpractice when a negligent act or omission by it "'bears a substantial relationship to the rendition of medical treatment by a licensed physician'" (*Annunziata v Quest Diagnostics Inc.*, 127 AD3d 630, 631 [1st Dept 2015], quoting *Bleiler v Bodnar*, 65 NY2d 65, 72 [1985]). "Laboratory services . . . performed at the direction of a physician are an integral part of the process of rendering medical treatment," and, therefore, "a claim stemming from the rendition of such services is a medical malpractice claim" (*Annunziata*, 127 AD3d at 631; *see also Spiegel v*

Goldfarb, 66 AD3d 873, 874 [2d Dept 2009], *lv denied* 15 NY3d 711 [2010]). Thus, if the laboratory services performed by Quality bore a substantial relationship to the rendition of the medical treatment provided to plaintiff, it could conceivably state a viable claim for malpractice.

Plaintiff's malpractice claim, however, is based on conclusory allegations lacking in factual support, in contravention of CPLR 3013. While plaintiff generally alleges that Quality ordered unnecessary tests and falsified results to ensure patients, such as him, would continue to be prescribed opioid pain medications, only a physician and not a laboratory, would be responsible for ordering tests. Furthermore, plaintiff does not specifically allege what test Quality performed on him and what test result of his was falsified by Quality. While the investigation by the government indicated that urinalysis results were altered where patients abused alcohol or other drugs since this could result in an overdose if Oxycodone were prescribed, plaintiff, as previously discussed, does not allege that he consumed alcohol or other drugs, so that his urinalysis results had to be altered in order for him to be prescribed Oxycodone, or that he ever suffered any overdose. Thus, plaintiff has failed to state a viable claim for malpractice against Quality, and plaintiff's first cause of action for malpractice as against Quality must be dismissed (*see* CPLR 3211 [a] [7]).

As to plaintiff's second cause of action for unjust enrichment and third cause of action for fraud as against Quality, it is noted that these claims are the same as those alleged against former Assembly Member Brook-Krasny based upon his affiliation with and control over

Quality. Thus, plaintiff's second cause of action for unjust enrichment and third cause of action for fraud as against Quality must be dismissed for the same reasons, as set forth above, that dismissal of these claims must be granted with respect to former Assembly Member Brook-Krasny (*see* CPLR 3211 [a] [7]).

PA Cabezas' Motion, PA Nazaire's Cross Motion, Nurse Practitioner Solomon's Cross Motion, and Dr. Feygin and Dr. Taitt's Cross Motion

PA Cabezas, in his motion, and PA Nazaire, Nurse Practitioner Solomon, Dr. Feygin, and Dr. Taitt, in their respective cross motions, all seek dismissal of plaintiff's second cause of action for unjust enrichment and third cause of action for fraud as against them. Plaintiff, in his complaint, as noted above, has also asserted a first cause of action for medical malpractice as against PA Cabezas and PA Nazaire (as physician's assistants), Nurse Practitioner Solomon, Dr. Feygin, and Dr. Taitt.

It is well established that a plaintiff cannot plead a claim for unjust enrichment in conjunction with a medical malpractice claim where the same events give rise to both causes of actions (*see Gotlin v Lederman*, 367 F Supp 2d 349, 360 [ED NY 2005], *affd* 483 Fed Appx 583 [2d Cir 2012]). Here, the same events give rise to both plaintiff's unjust enrichment cause of action and his medical malpractice cause of action. Thus, plaintiff's second cause of action for unjust enrichment is encompassed by his allegations of medical malpractice, and it is, therefore, duplicative of his first cause of action for medical malpractice (*see Carofino v Forester*, 450 F Supp 2d 257, 266 [SD NY 2006]; *Karlin v IVF Am.*, 239 AD2d 560 [2d Dept 1997], *affd as mod on other grounds*, 93 NY2d 282 [1999],

rearg denied 93 NY2d 989 [1999]). Consequently, plaintiff's second cause of action for unjust enrichment must be dismissed as against PA Cabezas, PA Nazaire, Nurse Practitioner Solomon, Dr. Feygin, and Dr. Taitt (*see Gotlin*, 367 F Supp 2d at 360).

With respect to plaintiff's third cause of action for fraud, it is well established that a plaintiff alleging a malpractice cause of action can only allege a claim for fraud "when the alleged fraud occurs separately from and subsequent to the malpractice," and "then only when the fraud claims gives rise to damages separate and distinct from those flowing from the malpractice" (*Coopersmith v Gold*, 172 AD2d 982, 984 [3d Dept 1991]). Plaintiff claims that these defendants intentionally made misrepresentations to him regarding his need for opioid drugs, the addictive nature of opioid drugs, and the dangers of opioid drugs. Plaintiff does not provide any facts, in his complaint, as to the reason why he went to Parkville or what medical condition he had for which he allegedly believed the opioid drugs were being prescribed to him by these defendants. Plaintiff further claims that these defendants continued to prescribe and treat him with opioid drugs, to his detriment, and solely for their profit. Thus, plaintiff's claim of fraud is based on the same allegations upon which he predicates his first cause of action for medical malpractice.

While these defendants were criminally charged (other than Nurse Practitioner Solomon) with health care fraud, the health care fraud that was allegedly perpetrated was Medicaid and Medicare fraud based on these defendants' billing of Medicaid and Medicare for unnecessary services. Plaintiff's claim of fraud does not relate to these defendants'

illegal billing practices, but, rather, it is based on defendants' causing him to becoming addicted to opioid drugs, which involves the same events that give rise to his medical malpractice claim.

Moreover, the injuries which plaintiff claims arose from these defendants' alleged fraud are the same as those alleged by plaintiff as resulting from his first cause of action for medical malpractice (*see Simcuski v Saeli*, 44 NY2d 442, 452 [1978]; *Brenner v Milhorat*, 95 AD3d 812, 812 [2d Dept 2012]; *Giannetto v Knee*, 82 AD3d 1043, 1045 [2d Dept 2011]; *McNamara v Droesch*, 49 AD3d 511, 511 [2d Dept 2008]; *Giannetto v Knee*, 82 AD3d 1043, 1045 [2d Dept 2011]; *Abraham v Kosinski*, 305 AD2d 1091, 1092 [4th Dept 2003]; *Karlin*, 239 AD2d at 561; *Luciano v Levine*, 232 AD2d 378, 379 [2d Dept 1996]; *Spinosa v Weinstein*, 168 AD2d 32, 42 [2d Dept 1991]). Although plaintiff has alleged, in his complaint, that he is entitled to punitive damages based on his fraud claim, this does not render plaintiff's fraud claim to be distinct from his malpractice claim. Plaintiff sustained no injuries or resulting damages flowing from the alleged fraud that were separate and distinct from those caused by the alleged medical malpractice (*see Abraham*, 305 AD2d at 1092; *Bellera v Handler*, 284 AD2d 488, 490 [2d Dept 2001]). Thus, dismissal of plaintiff's third cause of action for fraud as against PA Cabezas, PA Nazaire, Nurse Practitioner Solomon, Dr. Feygin, and Dr. Taitt must be granted (*see* CPLR 3211 [a] [7]).

CONCLUSION

Accordingly, Actavis' motion, former Assembly Member Brook-Krasny's motion, Quality's cross motion, PA Cabezas' motion, PA Nazaire's cross motion, Nurse Practitioner Solomon's cross motion, and Dr. Feygin and Dr. Taitt's cross motion are granted in their entireties. Plaintiff's remaining claims are severed and continued against the remaining defendants.

This constitutes the decision and order of the court.

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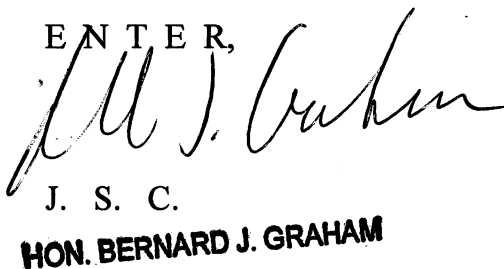

J. S. C.

HON. BERNARD J. GRAHAM

KINGS COUNTY CLERK
FILED
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