

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JOHN SIMMONS,

Plaintiff,

v.

SIMPSON HOUSE, INC., *et al.*,

Defendants.

CIVIL ACTION

No. 15-06636

PAPPERT, J.

April 7, 2016

MEMORANDUM

John Simmons filed this lawsuit in his own right and as the administrator of his mother's estate. He alleges that his mother, Ola Simmons, moved into Simpson House Nursing Home because she was suffering from senile psychosis and episodic incontinence. During her five-month stay there, she developed pressure sores, experienced excessive weight loss and contracted multiple infections. Ola was transferred to Prime-Roxborough Hospital where her condition continued to decline. After less than a month at Prime-Roxborough, she moved to Kindred Hospital. Ola died roughly two months later while in hospice care.

John Simmons asserts claims of negligence, wrongful death and survival, and violations of the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL") against Simpson House and Simpson House, Inc. ("Simpson House"), Prime Healthcare Services-Roxborough, LLC ("Prime-Roxborough") and Kindred Hospital-South Philadelphia and Kindred Healthcare Inc. ("Kindred"). Before the Court is Simpson House's motion to dismiss Simmons's claim under the UTPCPL. (ECF No. 74.) The Court grants the motion and dismisses Count 15 with prejudice.

I.

This case's factual background has been set out in a prior opinion. *See Simmons v. Simpson House, Inc.*, ___ F. Supp. 3d ___, No. 15-06636, 2016 WL 7209931, at *1 (E.D. Pa. Dec. 12, 2016.)

John Simmons filed his original Complaint on December 15, 2015 against Simpson House, Solis Healthcare, LLC and Prime-Roxborough, alleging negligence, wrongful death and survival. (ECF No. 1.) Defendants filed motions to dismiss for failure to state a claim. (ECF Nos. 6 & 14.) On April 21, 2016 the Court granted the motions but allowed Simmons leave to file an Amended Complaint. (ECF No. 26.)

Simmons filed an Amended Complaint against Simpson House and Prime-Roxborough on May 23, 2016. (ECF No. 29.) On June 8, 2016 Simpson House filed a motion to dismiss the Amended Complaint, in part because Simmons failed to join an indispensable party—Kindred. Two days later, Simmons filed a “Petition to Amend/Correct Caption and Complaint” and specifically sought to join Dr. Waheeda Ali and Kindred as new defendants. (ECF No. 31.)¹

On June 30, 2016 the Court denied Simmons's Petition. It directed Simmons to seek Defendants' consent or to file a proper motion for leave to amend. (ECF No. 36.) On July 8, 2016 Simmons moved for leave to file an Amended Complaint under Rule 15. (ECF No. 37.) The Court granted Simmons's motion on July 28, 2016, (ECF Nos. 31-4 & 31-5), and deemed the Amended Complaint filed as of the same date, (ECF No. 45). This was Simmons's Second Amended Complaint.²

¹ Dr. Ali filed a motion to dismiss Counts 16 and 17 in the Second Amended Complaint, (ECF No. 62), which the Court granted on November 18, 2016, (ECF Nos. 63 & 64).

² Meanwhile, Simmons filed a Writ of Summons in the Philadelphia County Court of Common Pleas on May 6, 2016. He thereafter filed a nearly identical Complaint in the state court on August

All Defendants filed motions to dismiss the Second Amended Complaint. The Court largely denied Simpson House and Prime-Roxborough's motions. (ECF Nos. 68 & 69.) The Court granted Simmons leave to amend his Complaint—*only* with respect to his claim against Simpson House under the UTPCPL. (ECF No. 69.)

Simmons filed his Third Amended Complaint on December 22, 2016. (ECF No. 70.) Simmons again violated Rule 15 by amending his Complaint without leave of Court. Instead of amending only Count 18, related to the UTPCPL claim, Simmons also added allegations to paragraphs pertaining to counts other than the UTPCPL. The Court struck these additional paragraphs from the Third Amended Complaint in a separate order and opinion. (ECF Nos. 86 & 87.) Before the Court is Simpson House's partial motion to dismiss the UTPCPL count of the Third Amended Complaint. (ECF No.74.)

II.

To survive a motion to dismiss under Rule 12(b)(6), a complaint must provide “more than labels and conclusions” or “a formulaic recitation of the elements of a cause of action.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted). “Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” *Id.* (citation omitted). While a complaint need not include detailed facts, it must provide “more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555).

11, 2016 against Simpson House, Inc., Simpson House Foundation, Prime Healthcare Services-Roxborough, LLC, Kindred Healthcare, Inc. and Kindred Hospital-South Philadelphia. Defendants removed the action to this Court on September 9, 2016. *See* (No. 16-04855, ECF No. 1).

Twombly and Iqbal require the Court to take three steps to determine whether the second amended complaint will survive Defendants' motion to dismiss. See *Connelly v. Lane Const. Corp.*, 809 F.3d 780, 787 (3d Cir. 2016). First, it must "take note of the elements the plaintiff must plead to state a claim." *Id.* (quoting *Iqbal*, 556 U.S. at 675). Next, it must identify the allegations that are no more than legal conclusions and thus "not entitled to the assumption of truth." *Id.* (quoting *Iqbal*, 556 U.S. at 679). Finally, where the complaint includes well-pleaded factual allegations, the Court "should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* (quoting *Iqbal*, 556 U.S. at 679).

III.

Simmons's Third Amended Complaint fails to state a claim; because he has had ample opportunity to amend the UTPCPL claim and has been unable to successfully do so, the Court dismisses the claim with prejudice.

A.

The purpose of the UTPCPL is to protect consumers from "fraud and unfair or deceptive business practices." *Commonwealth ex rel. Corbett v. Peoples Benefit Servs., Inc.*, 923 A.2d 1230, 1236 (Pa. Commw. Ct. 2007) (citing *Commonwealth ex rel. Creamer v. Monumental Prop., Inc.*, 329 A.2d 812 (Pa. 1974)). The underlying foundation of the UTPCPL is fraud prevention; the law "attempts to place in more equal terms seller and consumer [and is] predicated on a legislative recognition of the unequal bargaining power of opposing forces in the marketplace." *Creamer*, 329 A.2d at 816 (footnote omitted). By its own terms, the UTPCPL prohibits "unfair methods of competition or unfair or deceptive acts or practices in the conduct of any trade or commerce" and

provides a private right of action to any person who “purchases or leases goods or services primarily for personal, family, or household purposes and thereby suffers any ascertainable loss of money or property.” 73 P.S. § 201–1, –9.2(a).

A plaintiff may state a cause of action under the UTPCPL by satisfying the elements of common-law fraud³ or by otherwise alleging deceptive conduct. *Vassalotti v. Wells Fargo Bank, N.A.*, 732 F. Supp. 2d 503, 510 (E.D. Pa. 2010) (citing *Hunt v. U.S. Tobacco Co.*, 538 F.3d 217, 219 (3d Cir. 2010)). Under either theory, a plaintiff must plead the traditional common law elements of justifiable reliance and causation. *See, e.g., Hunt*, 538 F.3d at 221; *Toy v. Metro. Life Ins. Co.*, 928 A.2d 186, 202–03 (Pa. 2007); *Bennett v. A.T. Masterpiece Homes at Broadsprings, LLC*, 40 A.3d 145, 154 (Pa. Super. Ct. 2012). A plaintiff must show that “he justifiably bought the product in the first place (or engaged in some other detrimental activity) because of the [defendant’s] misrepresentation.” *Hunt*, 538 F.3d at 223 n.14; *cf. Levine v. First Am. Title Ins. Co.*, 682 F. Supp. 2d 442, 467 (E.D. Pa. 2010) (holding plaintiffs successfully alleged justifiable reliance where plaintiffs stated they would not have paid a higher premium for title insurance if they had known the actual rate). Moreover, a plaintiff must show “that his or her justifiable reliance caused ascertainable loss,” *Laidley v. Johnson*, No. 09-395, 2011 WL 2784807, at *2 (E.D. Pa. July 11, 2011), *i.e.*, that she suffered “an ascertainable loss as a result of the defendant’s prohibited action,” *Weinberg v. Sun Co., Inc.*, 777 A.2d 442, 446 (Pa. 2001).

³ The elements of common-law fraud are: “(1) misrepresentation of a material fact; (2) scienter; (3) intention by the declarant to induce action; (4) justifiable reliance by the party defrauded upon the misrepresentation; and (5) damage to the party defrauded as a proximate result.” *Hunt v. U.S. Tobacco Co.*, 538 F.3d 217, 225 n.13 (3d Cir. 2008).

B.

Simmons's complaint alleges that both Simpson House and Kindred violated the UTPCPL. Both Defendants, Simmons alleges, represented to their customers that basic care needed by residents of their facilities would be provided when, in reality, neither provided such care. (3d Am. Compl. ¶ 200.) Simmons also claims, among other things, that Defendants made deceptive and misleading statements in their marketing materials, resident assessment and care plans and regular billing statements. (*Id.* ¶¶ 217, 218 & 224.)

i.

As an initial matter, Simmons amended his UTPCPL claim beyond the authority granted by the Court. Simmons now attempts to bring this claim against Kindred in addition to Simpson House. Simmons added Kindred to the case in the Second Amended Complaint on July 28, 2016. (ECF No. 46.) In that iteration of the Complaint, however, Simmons sought to bring a UTPCPL claim only against Simpson House. On December 22, 2016, over a year after he filed the original complaint, six months after he added Kindred and after the Court disposed of various motions to dismiss the Second Amended Complaint, Simmons sought to bring a UTPCPL claim against Kindred. In so doing, Simmons amended his Complaint without leave of Court in violation of Federal Rule of Civil Procedure 15. FED. R. CIV. P. 15(a)(2).

Simmons violated Rule 15 yet again by pleading an *additional claim* within his UTPCPL claim. Within Count 15 of the Third Amended Complaint, Simmons purports to bring a claim for unjust enrichment. (3d Am. Compl. ¶ 243–46, ECF No. 70-1.) “Unjust enrichment is the retention of a benefit conferred by another, without offering

compensation, in circumstances where compensation is reasonably expected, for which the beneficiary must make restitution.” *Am. & Foreign Ins. Co. v. Jerry’s Sport Ctr., Inc.*, 2 A.3d 526, 531 n.7 (Pa. 2010) (citing BLACK’S LAW DICTIONARY (8th Ed. 2004)). “An action based on unjust enrichment is an action which sounds in quasi-contract or contract implied in law.” *Id.* (citing *Schott v. Westinghouse Elec. Corp.*, 259 A.2d 443, 448 (Pa. 1969)).

ii.

Regardless, Simmons has failed to state a claim under the UTPCPL. Simmons does not allege that Defendants made misrepresentations to Ola or John Simmons. Instead, throughout the Third Amended Complaint, Simmons alleges that Defendants made misrepresentations to “consumers,” “insurers,” “the Commonwealth,” and “residents and/or their family members.” (3d Am. Compl. ¶¶ 200, 201, 221.) This suit is not a class action, nor is it one brought by the Commonwealth of Pennsylvania on behalf of its residents. *Cf. Commonwealth v. Golden Gate Nat’l Senior Care LLC*, ___ A.3d ___, 2017 WL 1075535 (Pa. Commw. Ct. Mar. 22, 2017). It is a lawsuit brought by John Simmons, in his own right and as the administrator of his mother’s estate. Yet the Complaint *never* alleges that Simpson House or Kindred made misrepresentations to either Simmons or his mother.

Furthermore, despite alleging a UTPCPL claim against two defendants, Simmons, at times, fails to differentiate his allegations between the two, notwithstanding his contention that Simpson House and Kindred are unrelated entities that provided care to Ola Simmons during different time periods.

Finally, Simmons failed to plead that he (or his mother) justifiably relied to their detriment on Defendants' misrepresentations. This deficiency alone is fatal to his UTPCPL claim. *See, e.g., Hunt*, 538 F.3d at 221; *Toy*, 928 A.2d at 202–03; *Bennett*, 40 A.3d at 154.

IV.

Under Federal Rule of Civil Procedure 15(a), “courts may grant . . . amendments ‘when justice so requires.’” *Fraser v. Nationwide Mut. Ins. Co.*, 352 F.3d 107, 116 (3d Cir. 2004) (citing FED. R. CIV. P. 15(a)). While Rule 15 states that “leave to amend should be ‘freely given,’ a district court has discretion to deny a request to amend if it is apparent from the record that (1) the moving party has demonstrated undue delay, bad faith or dilatory motives, (2) the amendment would be futile, or (3) the amendment would prejudice the other party.” *Id.*; *see also Grayson v. Mayview State Hosp.*, 293 F.3d 103, 108 (3d Cir. 2002) (citing *Foman v. Davis*, 371 U.S. 178 (1962)). “When a party fails to take advantage of previous opportunities to amend, without adequate explanation, leave to amend is properly denied.” *Arthur v. Maersk, Inc.*, 434 F.3d 196, 204 (3d Cir. 2006). The Third Circuit Court of Appeals has left the decision of whether to grant or deny a motion for leave to amend within the sound discretion of the district court. *Cureton v. Nat’l Collegiate Athletic Ass’n*, 252 F.3d 267, 272 (3d Cir. 2001) (citations omitted).

Simmons has had ample opportunity to amend his Complaint; he has “failed to take advantage” of these “previous opportunities to amend.” *Arthur*, 434 F.3d at 204.

An appropriate order follows.

BY THE COURT:

/s/ Gerald J. Pappert
GERALD J. PAPPERT, J.