

Appel-Hole v Wyeth-Ayerst Labs.

2014 NY Slip Op 33170(U)

November 21, 2014

Supreme Court, New York County

Docket Number: 105122/09

Judge: Charles E. Ramos

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION
-----X
CLARA APPEL-HOLE and ALAN HOLE,

Plaintiffs,

-against-

Index No.
105122/09

WYETH-AYERST LABORATORIES, A DIVISION
OF AMERICAN HOME PRODUCTIONS CORP.,
AMERICAN HOME PRODUCTS CORP., WYETH
LABS, INC., and INTERNEURON PHARMACEUTICALS,
INC.,

Defendants.

PARKER & WAICHMAN, LLP et al.,
-----X

Parker & Waichman, LLP et al.,

Intervenor Plaintiffs,

-against-

PAUL J. NAPOLI, GERALD KAISER, MARC J.
BERN, MARIE KAISER NAPOLI, NAPOLI, KAISER
& ASSOCIATES LLP, NAPOLI, KAISER, BERN LLP,
NAPOLI, KAISER, BERN & ASSOCIATES LLP, LAW
OFFICES OF MARC JAY BERN, P.C., and NAPOLI,
KAISER & BERN, P.C.,

Intervenor Defendants.

-----X

Hon. Charles E. Ramos, J.S.C.:

In motion sequence 006, defendants Paul J. Napoli, Gerald
Kaiser, Marc J. Bern, Napoli, Kaiser & Associates LLC, Napoli,
Kaiser, Bern LLP, Napoli, Kaiser, Bern & Associates LLP, Law
Offices of Marc Jay Bern, P.C., and Napoli, Kaiser & Bern, P.C.
(together, the Intervenor Defendants) move to dismiss the third

amended intervenor complaint filed March 29, 2013, partially dismissing the complaint pursuant to CPLR 3211, and striking certain allegations contained therein.

Background

For a full recitation of the factual background in this action, see this Court's decision in the *Matter of New York Diet Drug Litig.*, 15 Misc 3d 1114(A) (Sup Ct, NY County 2007) and *In re New York Diet Drug Litig.* (47 AD3d 58 [1st Dept 2008]).

This action arises out of the settlement of mass tort litigation known as *New York Diet Drug Litigation*. In the original action (Original Action),¹ plaintiffs asserted claims of personal injury due to the ingestion of "fen-phen" diet drugs.

In November 2001, the Original Action was settled, and the settlement approved by a predecessor court, by Justice Helen Freedman. At or around this time, the concern was raised that the settlement and disbursements obtained had been manipulated and misallocated by settling counsel, defendants herein, Napoli Bern & Kaiser, LLP (NKB), to clients other than those referred to by Parker & Waichman, LLP (P&W). At the time that P&W referred clients, NKB agreed to represent them and to share attorneys' fees with P&W.

Shortly after approval of the settlement, P&W commenced an action against NKB alleging misrepresentations in connection with

¹ The original action bears the index number 700000/98.

that settlement, entitled *P&W v Napoli*, and bearing the index number 605388/01 (P&W Action). This Court largely dismissed the action on the ground that P&W lacked standing to assert claims of breach of contract between the referred clients and NKB, and because it constituted a collateral attack on the settlement, which was affirmed (*Parker & Waichman*, 29 AD3d 396 [1st Dept 2006]). A claim for an accounting remains in the pending P&W Action.

In 2003, P&W and 389 of its referred clients commenced another, closely related action entitled *Abramova v Napoli*, and bearing the index number 601332/03 (Abramova Action). This action is stayed while most of the referred clients pursue their claims in this action.

In 2006, P&W and proposed intervenor plaintiffs sought the Court's permission to commence this action against NKB and its three named partners, Paul Napoli, Gerald Kaiser, and Marc Bern, in order to assert claims for fraud and violation of Judiciary Law § 487. The Court granted the motion to intervene, which was subsequently affirmed (*New York Diet Drug Litig.*, 47 AD3d 586 [1st Dept 2008]) (Intervenor Action). The intervenor plaintiffs are individual clients and representatives of deceased clients formerly represented by NKB and previously referred by P&W.

P&W alleges that NKB committed fraud to deprive it of its contractual share of attorneys' fees, by deliberately allocating

more settlement funds to its own direct clients than to comparable referred cases in order to minimize fee-splitting with P&W, and assessed bogus disbursements and expenses to the referred clients, which decreased the net settlement amount used to calculate P&W's fees.

In April 2009, the intervenor plaintiffs served an initial complaint. NKB moved to dismiss the complaint, which was granted by this Court. The intervenor plaintiffs were permitted to file an amended complaint remedying the defects in the initial complaint.

In May 2010, the intervenor plaintiffs filed an amended complaint. NKB again moved to dismiss, which was subsequently withdrawn without prejudice to re-file after the intervenor plaintiffs filed the second amended complaint.

In December 2010, intervenor plaintiffs filed the second amended complaint naming Marie Kaiser Napoli (MK), as an additional defendant. MK is an attorney, a member of NKB, and the wife of defendant Paul Napoli. Subsequently, the Intervenor Defendants moved to dismiss the second amended complaint. In July 2012, the Court granted the motion to the extent of dismissing all claims against Marie Kaiser and permitted the intervenor plaintiffs to remedy the deficiencies in pleading. For reasons set forth in this Court's record, the motion was grant in part and denied in part (see Order, mot seq 06). The

remainder of the motion, which seeks to strike allegations in Appendix A to the third amended intervenor complaint, was reserved for submission, and is disposed of in accordance with the following memorandum decision.

Discussion

This Court previously found that each of the intervenor plaintiffs' prior complaints were deficient because they did not include sufficiently particular allegations. According to intervenor defendants, these deficiencies persist with respect to 135 intervenor plaintiffs, who fail to include the "who, what, where and when" of the alleged misrepresentation, and do not meet the particularity required by CPLR 3016 (b).

"The purpose of section 3016 (b)'s pleading requirement is to inform a defendant with respect to the incidents complained of ... Critical to a fraud claim is that a complaint allege the basic facts to establish the elements of the cause of action. Although under section 3016 (b) the complaint must sufficiently detail the alleged fraudulent conduct, that requirement should not be confused with unassailable proof of fraud. Necessarily, then, section 30-16 (b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct" (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486 [2008]).

The Court has reviewed the allegations contained in Exhibit A annexed to the third amended intervenor complaint that the

intervenor defendants maintain do not meet the heightened pleading standards of CPLR 3016 (b).

For instance, the third amended intervenor complaint alleges that John Bagaglio repeatedly expressed dissatisfaction with the settlement amount being offered via NKB, and requested that NKB renegotiate a better settlement offer. Nonetheless, in a series of communications with John Bagaglio, NKB misrepresented that he "had no case," that his case faced "serious consequences" if he did not return the release form and accept the settlement amount being offered, and that he would "get nothing" if his case went to court. NKB also allegedly misled him concerning the settlement procedure, how the settlement offer was arrived at, and falsely put him in fear of losing any potential recovery if he did not accept a lower settlement amount, which the complainant relied upon in accepting a low settlement amount.

The allegations of the remaining intervenor plaintiffs which defendants maintain are insufficient contain either a greater or lesser level of detail, describing the manner in which the defendants misrepresented how each individual settlement was arrived at, and how plaintiffs were pressured into settling the case based on terms which were false.

Taking the allegations in the light most favorable to the plaintiffs, the Court concludes that, under the circumstances, sufficient facts are alleged to permit a fact-finder to infer

that the intervenor defendants falsely represented how each settlement was arrived at and the settlement process itself. True, with respect to many of the complainants, intervenor plaintiffs have not alleged specific details of each individual intervenor defendants' conduct. Nonetheless, the third amended intervenor complaint alleges the basic facts to establish the elements of fraud, and adequately informs the defendants of the complained-of incidents (see *Eurycleia Partners, L.P., Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]).

Intervenor defendants' contention that plaintiffs should have included copies of the letter referred to in the third amended intervenor complaint which contains some of the alleged misrepresentations, is without merit. No discovery has been exchanged in this action, and the statutory requirement that "the circumstances constituting the wrong shall be stated in detail" (CPLR 3016 [b]) "should not be confused with unassailable proof of fraud" (*Pludeman*, 10 NY3d 486).

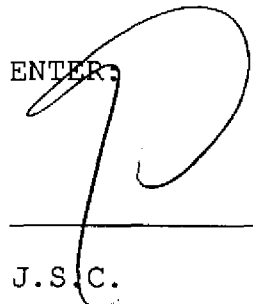
Accordingly, it is hereby

ORDERED that motion sequence 006 is denied in its entirety, and defendants are directed to serve an answer to the third amended intervenor complete within 20 days of service of this order with notice of entry.

The parties are directed to contact the Part Clerk to schedule a preliminary discovery conference in this matter.

Date: November 21, 2014

ENTER:

A large, stylized handwritten signature in black ink, appearing to be 'C. Ramos', written over a horizontal line.

J.S.C.

CHARLES E. RAMOS