

<b>Malik v Excelsior Med. IPA, LLC</b>
2018 NY Slip Op 31696(U)
July 13, 2018
Supreme Court, New York County
Docket Number: 652581/2017
Judge: Shlomo S. Hagler
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 17

----- X

Index No. 652581/2017

ABDUL Q. MALIK M.D. and  
ABDUL MALIK, PHYSICIAN P.C.,

Plaintiffs,

- against -

EXCELSIOR MEDICAL IPA, LLC,

DECISION AND ORDER

Defendant.

----- X

HON. SHLOMO S. HAGLER, J.S.C.:

This is an action to recover damages for, among other things, aiding and abetting fraud and breach of contract. Defendant Excelsior Medical IPA, LLC ("Excelsior") moves pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint. It also asks this Court to impose sanctions upon plaintiffs pursuant to 22 NYCRR 130-1.1.

**BACKGROUND**

In 2010, plaintiff Abdul Q. Malik, M.D. ("Dr. Malik" or "plaintiff"), a cardiologist and internist, entered into a Physician Participation Agreement with defendant Excelsior, pursuant to which Dr. Malik agreed to become a member of Excelsior's network of health care providers. Excelsior is an independent practice association ("IPA") formed for the purpose of arranging, by contract, for the delivery of health care services to enrollees of managed care organizations

("MCOs") and to be responsible for certain administrative functions such as the credentialing of health care providers, which involves ensuring that the provider's credentials are legitimate and that the provider is in good standing. Excelsior is also responsible for conducting periodic re-credentialing, as well as monthly searches in order to ensure that the health care providers in its network remain in good standing.

Excelsior enters into Physician Participation Agreements with health care providers, such as Dr. Malik, pursuant to which the health care provider agrees to render services on behalf of Excelsior to the enrollees of the MCOs that contract with Excelsior. The health care provider decides which MCO agreements to opt-into. If the MCO decides to add that provider to its network, the provider will then serve the MCO's enrollees in accordance with and for such compensation as is established in the agreement between the MCO and Excelsior. All compensation required to be paid under Excelsior's agreement with the MCO is paid directly from the MCO to the health care providers. Essentially, Excelsior acts as an intermediary through which rates are negotiated between the MCOs and the health care providers. The MCOs pay administrative fees to Excelsior on a monthly basis, based upon the number of individuals enrolled in the MCO and the providers in Excelsior's network that have opted-into the MCO's agreement with Excelsior.

On March 25, 2015, a Kings County grand jury voted to indict Dr. Malik on three counts of petit larceny, eight counts of falsifying business records in the first degree, and one count of health care fraud in the fifth degree, in connection with his alleged participation in a massive Medicaid fraud scheme that involved, among other things, billing Medicaid and Medicaid managed care providers for unnecessary medically services, or for services that were never rendered to patients. The indictment alleged that Dr. Malik co-conspired to defraud Medicaid managed care provider Amerigroup New York, LLC d/b/a Amerigroup Community Care d/b/a Health Plus ("Amerigroup"), by seeing inflated numbers of patients at a Brooklyn clinic and falsifying their medical records in order to fraudulently bill and receive payment from Amerigroup for unnecessary medically, frequently costly treatments, and by billing for patients that he never saw.

As a result of the indictment, the New York State Office of Medicaid Inspector General ("OMIG") excluded Dr. Malik and his physician group, Abdul Malik Physician, P.C. ("the P.C."), from participating in the Medicaid program, effective May 7, 2015. On May 27, 2015, Excelsior notified Dr. Malik that, as a result of his exclusion from the Medicaid program, his membership with Excelsior was "made inactive," and that Excelsior would notify all MCOs with which Dr. Malik held contracts through Excelsior of the exclusion, so that the MCOs could take appropriate measures.

On November 30, 2016, the Kings County District Attorney dismissed the indictment against Dr. Malik. On December 7, 2016, OMIG reinstated Dr. Malik and the P.C., retroactive to the date the Medicaid exclusion went into effect. On or about March 7, 2017, Excelsior reinstated Dr. Malik.

#### **THE INSTANT ACTION**

On or about May 12, 2017, Dr. Malik and the P.C. commenced this action against Excelsior, alleging that Excelsior aided and abetted the above fraud scheme by recklessly permitting third parties to misuse his name, billing credentials, and network accounts without his knowledge. Specifically, the complaint alleges that Dr. Malik's billing credentials were used without his knowledge by Ultraline Medical Testing, P.C. ("Ultraline Testing"), to submit fraudulent claims to some of Excelsior's contracting MCOs. Excelsior failed to confirm the fraudulent billing credentials or to perform any due diligence in this regard, thereby facilitating the fraud by Ultraline Testing that ultimately resulted in Dr. Malik's erroneous indictment and suspension from the Medicaid program. In addition, the complaint alleges that Dr. Malik's termination from Excelsior's network of providers violated various statutes and regulations, as well as Dr. Malik's agreement with Excelsior, because, among other things, Dr. Malik did not receive proper notice of the termination and did not receive the opportunity for a hearing.

The complaint asserts eleven causes of action. Excelsior now moves, pre-answer, to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7). It also asks this Court to impose sanctions pursuant to 22 NYCRR 130-1.1. This is one of several related actions brought by plaintiffs in connection with Dr. Malik's indictment and exclusion from the Medicaid program. This Court heard oral argument on the instant motion, in combination with oral argument in two of the related actions in which the defendants moved pursuant to CPLR 3211 to dismiss the complaint. The motions in those related actions are decided in separate decisions and orders herewith (see Decision & Order dated July 13, 2018, *Malik v Ultraline Med. Testing, P.C.*, Index No. 651250/2017 [decided herewith]; Decision & Order dated July 13, 2018, *Malik v Heritage New York IPA*, Index No. 652583/2017 [decided herewith]).

## DISCUSSION

### ***Motion to Dismiss Standard***

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction and the court must "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" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Dismissal is warranted pursuant to CPLR 3211 (a) (1)

"only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*id.* at 88; see *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). "Put differently, the documentary evidence must 'resolv[e] all factual issues as a matter of law and conclusively dispose[] of the plaintiff's claim'" (*Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 806 [2d Dept 2011], quoting *Paramount Transp. Sys., Inc. v Lasertone Corp.*, 76 AD3d 519, 520 [2d Dept 2010]; see *Fortis Fin. Servs. v Fimat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002]).

"In assessing a motion under CPLR 3211 (a) (7) . . . a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Leon v Martinez*, 84 NY2d at 88 [internal quotations marks and citations omitted]). "[U]nless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it , . . . dismissal should not eventuate" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

"It is true that in considering a motion to dismiss brought pursuant to CPLR 3211 (a) (7), the court must presume the facts pleaded to be true and must accord them every favorable inference . . . . However, factual allegations . . . that consist of bare

legal conclusions, or that are inherently incredible . . . , are not entitled to such consideration" (*Mamoon v Dot Net Inc.*, 135 AD3d 656, 658 [1st Dept 2016][internal quotations marks and citation omitted]).

### ***Aiding and Abetting Fraud***

In the first cause of action, plaintiffs seek to recover damages for aiding and abetting fraud. According to the complaint, Ultraline Testing used Dr. Malik's name and billing credentials to submit false claims to health care providers and received payments for such claims based on documents containing Dr. Malik's forged signature. Dr. Malik did not authorize or have knowledge of this fraudulent scheme. Dr. Malik never authorized Ultraline Testing to bill health insurance carriers using his name or credentials for the submission of false claims. The complaint alleges that Excelsior participated in this fraud by: "(a) failing to use reasonable care to safeguard Plaintiffs' credentialing information and to confirm that any changes submitted under Plaintiffs' name were valid; (b) failing to cross-reference fraudulent documents submitted upon information and belief by Ultraline against the valid documentation submitted by Plaintiffs; © failing to contact Plaintiffs' office to inquire whether Ultraline's documents were valid" (Complaint at 13, ¶ 80). As a result of these actions, Dr. Malik was erroneously indicted, which resulted in plaintiffs' exclusion from the



Medicaid program and numerous healthcare provider networks, causing extreme damage to plaintiffs' finances, professional and personal reputation, and relationships with patients (Complaint at 13-14, ¶ 83).

On the authority and reasoning set forth in the decision and order in the related action of *Malik v Ultraline Med. Testing, P.C.* (Index No. 651250/2017) (decided herewith), these allegations are insufficient to permit a reasonable inference as to Excelsior's knowledge of the fraud. At best, the allegations imply that Excelsior should have known of the fraud, which "is insufficient to support an aiding and abetting fraud claim" (*Lumen at White Plains, LLC v Stern*, 135 AD3d 600, 600 [1st Dept 2016]; see *Gregor v Rossi*, 120 AD3d 447, 448 [1st Dept 2014]; *Oikonomos, Inc. v Bahrenberg*, 48 Misc 3d 1228[A], 2015 NY Slip Op 51300[U] [Sup Ct Suffolk County 2015]; cf. *Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 101-102 [1st Dept 2006]). Therefore, these causes of action are dismissed pursuant to CPLR 3211(a)(7).

***Violation of Insurance Law § 4803(b) and Public Health Law § 4406-d(2)***

In the second and third causes of action, plaintiffs seek to recover damages for violation of the notification standards set forth in Insurance Law § 4803(b) and Public Health Law § 4406-d(2). Plaintiffs allege that Excelsior violated the notification standards set forth in Insurance Law § 4803(b) and Public Health Law § 4406-d(2). Based on the reasoning in this Court's decision

and order in the related action of *Malik v Ultraline Med. Testing, P.C.* (Index No. 651250/2017), plaintiffs cannot establish that the notification and review standards set forth in Insurance Law § 4803(b) and Public Health Law § 4406-d(2) applied. Therefore, these causes of action are also dismissed pursuant to CPLR 3211(a)(7).

***Violation of Public Health Law §§ 4403(6)(e)(1) and 4408(4) and Insurance Law § 4804(e)(1)***

In the fourth cause of action, plaintiffs allege that Excelsior violated Public Health Law § 4403(6)(e)(1) by not permitting Dr. Malik's patients to continue an ongoing course of treatment with him for 90 days after his disaffiliation with the network. In the fourth cause of action, plaintiffs also allege that Excelsior violated Public Health Law § 4408(4), by not providing notice to his patients undergoing an ongoing course of treatment within 15 days of his termination, informing them of the procedures for continuing care. In the fifth cause of action, plaintiffs allege that Dr. Malik's immediate termination from Excelsior's network violated the patient rights embodied in Insurance Law § 4804(e)(1).

As set forth the decision and order deciding the motions in the related action of *Malik v Ultraline Med. Testing, P.C.* (Index No. 651250/2017), these causes of action are subject to dismissal pursuant to CPLR 3211(a)(7). Public Health Law § 4403(6)(e)(1) and Public Health Law § 4408(4) clearly express that they are

intended to benefit/protect "enrollees" and Insurance Law § 4804(e)(1) clearly states that it is intended to benefit/protect "the insured." As such, these provisions do not give rise to a private right of action in favor of health care providers such as plaintiffs in this case (see generally *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 325 [1983] ["Whether a private cause of action was intended will turn in the first instance on whether the putative plaintiff is one of the class for whose especial benefit the statute was enacted"] [internal quotation marks and citation omitted]). Accordingly, fourth and fifth causes of action are dismissed.

#### ***Breach of Contract***

In the sixth cause of action, plaintiffs seek to recover damages for breach of contract based upon Excelsior's purported violation of the agreement entered into by the parties. Plaintiffs assert that such agreement stated that Dr. Malik was entitled to pre-termination notice and an appeal. By not providing him with such notice prior to termination and not providing him with an opportunity for a hearing or review, Excelsior breached the agreement.

In support of dismissing this cause of action, Excelsior asserts that once OMIG excluded Dr. Malik from the Medicaid program, Excelsior was permitted, under its agreement with Dr. Malik, to terminate Dr. Malik from the network immediately

without a hearing.

The agreement between Dr. Malik and Excelsior states:

"Notwithstanding any other provision of this Agreement the parties agree to be bound by the New York State Department of Health Standard Clauses ('Standard Clauses') which are hereby made part of this Agreement and attached as Appendix A"

(Physician Participation Agreement at 17 [Exhibit "B" to Affidavit of Ingrid Felix-Perlata, MD (in Support of Motion to Dismiss)]). Section E(5) of the Standard Clauses provides:

"Notwithstanding any other provision herein, to the extent that the provider is providing health care services to enrollees under the Medicaid Program and/or Family Health Plus, the . . . IPA retains the option to immediately terminate the Agreement when the provider has been terminated or suspended from the Medicaid Program" (*id.*, Appendix A at 26).

Since in this case, Dr. Malik was suspended from the Medicaid program, Excelsior had the option to immediately terminate the agreement with Dr. Malik. Based on the foregoing, Excelsior did not breach the agreement by immediately rendering Dr. Malik inactive without the opportunity for a hearing. Therefore the cause of action alleging breach of contract is dismissed pursuant to CPLR 3211(a)(1).

### **Negligence**

In the seventh cause of action, plaintiffs allege that Excelsior had a duty to use reasonable care to safeguard Dr.

Malik's credentialing information and to confirm that any changes submitted under his name were valid. Plaintiffs allege that Excelsior breached that duty by failing to cross-reference fraudulent documents submitted by Ultraline Testing against the valid documentation submitted by Dr. Malik and by failing to contact plaintiffs to inquire whether such documents were valid. Plaintiffs assert that as a result of Excelsior's breach, Ultraline Testing was able to submit fraudulent bills to Excelsior's contracting members, and to receive payment for those fraudulent bills under Dr. Malik's account, without Dr. Malik's knowledge or authorization. Consequently, Dr. Malik was erroneously indicted, damaging his reputation, patient relationships, and income.

In moving to dismiss this cause of action, Excelsior argues, among other things, that Dr. Malik executed a comprehensive release and covenant not to sue, exonerating Excelsior from liability for all claims relating to the data provided by Dr. Malik in his application and credentialing process. In this regard, Excelsior relies on a document entitled "Authorization, Attestation, and Release" executed by Dr. Malik in June of 2010 as part of Excelsior's application and credentialing process. This document states in relevant part:

**"Release from Liability.** I release from all liability and hold harmless Excelsior . . . for . . . acts performed in good faith and without malice unless such acts are due to the gross negligence or willful misconduct of Excelsior . . . in connection with the

gathering, release and exchange of, and reliance upon, information used in accordance with this Authorization, Attestation and Release. I further agree not to sue Excelsior . . . for . . . acts, defamation or any other claims based on statements made in good faith and without malice or misconduct of Excelsior . . . in connection with the credentialing process"

(Exhibit "C" to Affirmation of Linda J. Clark in Opposition to Excelsior's Motion to Dismiss Complaint).

"In the absence of a contravening public policy, exculpatory provisions in a contract, purporting to insulate one of the parties from liability resulting from that party's own negligence, although disfavored by the law and closely scrutinized by the courts, generally are enforced, subject however to various qualifications" (*Lago v. Krollage*, 78 NY2d 95, 99 [1991]; see *Uribe v Merchants Bank of N.Y.*, 91 NY2d 336, 341 [1998]; *Colnaghi, U.S.A. v Jewelers Protection Servs., Ltd.*, 81 NY2d 821, 823-824 [1993]). An exculpatory agreement which "expresses in unequivocal terms the intention of the parties to relieve a defendant of liability for the defendant's negligence, . . . will be enforced" (*Lago v Krollage*, 78 NY2d at 100). However, courts will view an agreement as wholly void if it "purports to grant exemption from liability for willful or grossly negligent acts or where a special relationship exists between the parties such that an overriding public interest demands that such a contract provision be rendered ineffectual" (*id.*; see *Gross v Sweet*, 49 NY2d 102, 106 [1979]; *Colnaghi, U.S.A. v Jewelers Protection Servs., Ltd.*, 81 NY2d at 824).

"Gross negligence, when invoked to pierce an agreed-upon limitation of liability in a commercial contract, must smack[ ] of intentional wrongdoing . . . . It is conduct that evinces a reckless indifference to the rights of others" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 554 [1992][internal quotation marks and citations omitted]).

Here, the language of the release plainly expresses the parties' intent to relieve Excelsior from liability resulting from negligence "in connection with the gathering, release and exchange of, and reliance upon, information" used during Excelsior's credentialing and application processes. The theory of negligence pleaded against Excelsior is predicated on its purported failure to safeguard Dr. Malik's confidential credentialing information and its purported failure to verify fraudulent documents by checking them against authentic documents gathered during the application and/or credentialing process. Therefore, the release conclusively establishes that plaintiffs have no cause of action to recover damages for ordinary negligence. Since the complaint fails to allege any facts constituting gross negligence on the part of Excelsior, or a special relationship between the parties such that an overriding public interest demands that the release be rendered ineffectual, the cause of action seeking to recover damages for negligence is dismissed.

Quoting *DeVito v New York University College of Dentistry* (145 Misc 2d 144, 146 [Sup Ct, NY County, 1989]), plaintiffs contend that if "the party seeking exculpation is in a business or profession which is either publicly regulated or providing an essential service to members of the public" a provision exonerating it from liability will be void. Plaintiffs assert that Excelsior is a highly regulated entity which provides services for the benefit of the general public. Further, they point out that the release was "contained on [Excelsior's] prepared form in a take-it-or-leave it proposition, thereby indicating the parties were not on equal footing" (Affirmation of Linda J. Clark in Opposition to Excelsior's Motion to Dismiss Complaint, at 21). Therefore, plaintiffs contend, the release should be considered void.

Plaintiffs' reliance on *DeVito* is misplaced. That case involved an exculpatory agreement between a dental clinic operated by the New York University College of Dentistry (the clinic) and the clinic's patients. The release in that case read, in relevant part: "In consideration of the reduced rates given to me by New York University, I hereby release and agree to save harmless New York University, its doctors, and students, from any and all liability arising out of, or in connection with, any injuries or damages which I may sustain while on its premises, or as a result of any treatment in its infirmaries." The court in *DeVito* determined that the release was unenforceable



on two grounds. First, the court determined that the parties had a special relationship which would make enforcement of the exculpatory clause between them against the public interest, in that the clinic was a publicly regulated entity that provided essential services to members of the public. In other words, the court considered the status of the parties - i.e., patient/clinic - to be an important factor. The court reasoned in this regard that in such relationships, "the consumer's need for the service creates an inequality in bargaining strength which enables the purveyor to insist upon a release, generally on its own prepared form, as a condition to providing the service. As in any adhesion contract a true and voluntary meeting of the minds on the terms of the agreement is unlikely" (*DeVito v New York Univ. Coll. of Dentistry*, 145 Misc 2d at 146). Second, the court determined that the wording of the release was ambiguous and not understandable to a layperson. The court concluded that the release was void in that "[t]he parties' status [was], at the very least, suspect" and "[n]o layman perusing [it] would find it immediately understandable that the signatory had contracted to accept not only injuries that might ordinarily and inevitably occur, but also any and all consequences of defendants' carelessness" (*id.* at 148).

Here, the release is not between a health care provider and a patient. Excelsior does not provide care or treat members of the public. Rather, Excelsior is in the business of

credentialing health care providers and serving as a conduit between health care providers and MCOs. Therefore, the public policy considerations at issue in *DeVito* are not implicated. Moreover, unlike the release in *DeVito*, the release at issue here does not use the term "any and all liability," but rather clearly expresses that "the limitation of liability is intended to cover negligent, as well as ordinary, acts of the party seeking to shed responsibility" (*id.* at 147). Therefore, the negligence cause of action is dismissed pursuant to CPLR 3211(a)(1).

***Violation of 11 NYCRR 86.6 and 10 NYCRR 98-1.21***

In the eighth cause of action, plaintiffs assert that Excelsior violated 11 NYCRR 86.6 and 10 NYCRR 98-1.21 by not having an "effective" fraud and abuse prevention plan. On the authority and reasoning relied upon in the decision and order in the related action of *Malik v Ultraline Med. Testing, P.C.* (Index No. 651250/2017), a violation of these regulations does not give rise to a private right of action. Therefore, this cause of action is dismissed.

***Violation of General Business Law §§ 349 and 350***

In the ninth cause of action, plaintiffs assert that Excelsior violated sections 349 and 350 of the General Business Law by engaging in deceptive practices and false advertising and seek to recover treble damages, attorneys' fees, and the costs of this litigation. Specifically, plaintiffs allege in this regard that Excelsior disseminated false and misleading information to

induce physicians to join its network of providers. Excelsior represented to the public at large that it had intimate knowledge, information, and expertise in the field of healthcare generally and more specifically with respect to IPAs. Excelsior knew, or should have known by virtue of its history and industry knowledge, of the substantial risks associated with submission of confidential personal identifiers which could be used to improperly obtain financial benefits from the submission of claims. Excelsior represented and warranted competence in fraud detection and in an effort to sell and market memberships in the network, deliberately declined and failed to advise plaintiffs of the risks of membership, including the failure to maintain confidential personal information, which could be used to improperly obtain financial benefits through the submission of claims to contracting members. On the authority and reasoning relied upon in the related decision and order in the related action of *Malik v Ultraline Med. Testing, P.C.* (Index No. 651250/2017), plaintiffs fail to state a cause of action for violation of these statutes.

#### ***RICO Claims***

In the tenth and eleventh causes of action, plaintiffs allege violations of the Federal Racketeer Influenced and Corrupt Organizations Act (18 USC § 1961 et seq) (RICO). These claims are deemed withdrawn inasmuch as plaintiffs stated in their opposition papers and at oral argument that they are withdrawing

these claims (see Plaintiffs' Mem of Law in Opp to Defendant's Mot, at 5, n1).

***Excelsior's Request for Sanctions pursuant to 22 NYCRR 130-1.1.***

Excelsior's request for the imposition of sanctions upon plaintiffs pursuant to 22 NYCRR 130-1.1 is denied. This action does not rise to the level of being "completely without merit in law," nor was it "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another" (22 NYCRR 130-1.1 [c] [1], [2]).

***Plaintiffs' Request for Leave to Re-plead***

Lastly, plaintiffs' request for leave to re-plead is denied as the complaint is deficient as a matter of law and it is not susceptible to a procedural correction.

**CONCLUSION**

In accordance with the foregoing, it is hereby

**ORDERED** that defendant's motion to dismiss the complaint is granted, and the complaint is dismissed; and it is further

**ORDERED** that defendant's request for sanctions is denied; and it is further


**ORDERED** that plaintiffs' request for leave to re-plead is denied; and it is further

**ORDERED** that the Clerk is directed to enter judgment accordingly.

The foregoing constitutes the decision and order of the Court.

Dated: July 13, 2018

ENTER:



J.S.C.

**SHLOMO HAGLER**  
J.S.C.