

<b>Matter of Opioid Litig.</b>
2019 NY Slip Op 31831(U)
June 21, 2019
Supreme Court, Suffolk County
Docket Number: 400000/2017
Judge: Jerry Garguilo
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E-FILE

SHORT FORM ORDER

INDEX No. 400000/2017

SUPREME COURT - STATE OF NEW YORK
NEW YORK STATE OPIOID LITIGATION PART 48 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

IN RE OPIOID LITIGATION
MOTION DATE 4/10/19 (#045)
MOTION DATE 4/23/19 (#057)
ADJ. DATE 4/24/19 (#057)
Mot. Seq. #045 - MD
Mot. Seq. #057 - MD

- County of Broome v. Purdue Pharma L.P.
County of Clinton v. Purdue Pharma L.P.
County of Columbia v. Purdue Pharma L.P.
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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by defendants Beverly Sackler, Richard S. Sackler, and Jonathan D. Sackler (Mot. Seq. #045), dated February 19, 2019, and Memorandum of Law; (2) Memorandum of Law in Opposition by the plaintiffs (Mot. Seq. #045), dated April 5, 2019, and supporting papers; (3) Reply Memorandum of Law by defendants Beverly Sackler, Richard S. Sackler, and Jonathan D. Sackler (Mot. Seq. #045), dated April 17, 2019; (4) Notice of Motion by defendants Beverly Sackler, Richard S. Sackler, and Jonathan D. Sackler (Mot. Seq. #057), dated April 15, 2019, and Memorandum of Law; (5) Memorandum of Law in Opposition by the plaintiffs (Mot. Seq. #057), dated April 18, 2019, and supporting papers; and (6) Reply Memorandum of Law by defendants Beverly Sackler, Richard S. Sackler, and Jonathan D. Sackler (Mot. Seq. #057), dated April 22, 2019; it is

**ORDERED** that these motions are hereby consolidated for purposes of this determination; and it is

**ORDERED** that the motion by defendants Beverly Sackler, Richard S. Sackler, Jonathan D. Sackler, as alleged trustees of the alleged Raymond Sackler Trust, for an order pursuant to CPLR 3211 (a) (7) and (8), dismissing as against the alleged Raymond Sackler Trust the master long form complaint and amended short form complaints filed by each of the above-named plaintiffs, except for County of Herkimer, City of New York, County of Lewis, County of Montgomery, County of St. Lawrence, County of Washington, and City of New York, is denied; and it is further

**ORDERED** that the motion by defendants Beverly Sackler, Richard S. Sackler, Jonathan D. Sackler, as alleged trustees of the alleged Raymond Sackler Trust, for an order pursuant to CPLR 3211 (a) (7) and (8), dismissing as against the alleged Raymond Sackler Trust the master long form complaint and amended short form complaints filed by County of Herkimer, County of Lewis, County of Montgomery, County of St. Lawrence, and County of Washington, and City of New York, is denied.

The plaintiffs, counties and cities within the State of New York, commenced this action to recover damages for harm allegedly caused by false and misleading marketing campaigns promoting opioid medications as safe and effective for long-term treatment of chronic pain, and by the sale and distribution of those medications in such counties and cities. The defendants are pharmaceutical manufacturers, distributors, and physicians, as well as individuals and entities associated with Purdue Pharma L.P., Purdue Pharma, Inc., and The Purdue Frederick Company, Inc. (collectively, Purdue). Briefly stated, the plaintiffs allege that the defendants committed tortious and illegal acts that created a public health crisis within their municipalities, causing them to spend millions of dollars in payments for prescription opioids for employees and Medicaid beneficiaries that would have not been approved if the true risks and benefits associated with such medications had been known. They also allege that due to the defendants' wrongful conduct, which included flooding the market with more prescription opioids

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than the legitimate market required, they have been forced to pay the costs of implementing opioid treatment programs for residents, purchasing prescriptions of naloxone to treat prescription opioid overdoses, combating opioid-related criminal activities, and other such expenses arising from the crisis.

In October 2017, the plaintiffs filed their master long form complaint, alleging seven causes of action. The first cause of action alleges deceptive business practices in violation of General Business Law § 349, and the second cause of action alleges false advertising in violation of General Business Law § 350. The third cause of action asserts a common-law public nuisance claim, the fourth cause of action asserts a claim for violation of Social Services Law § 145-b, and the fifth cause of action asserts a claim for fraud. The sixth cause of action is for unjust enrichment, and the seventh cause of action is for negligence.

Subsequently, the plaintiffs filed amended short form complaints asserting claims against additional defendants not named in the master long form complaint, together with addenda setting forth factual allegations supporting the claims against those defendants. The new defendants include prescription opioid manufacturers, as well as wholesale and retail opioid distributors. Also newly named as defendants are Richard S. Sackler, Jonathan D. Sackler, Beverly Sackler, David A. Sackler, Ilene Sackler Lefcourt, Kathe A. Sackler, Mortimer D.A. Sackler, Theresa Sackler (collectively, the Sacklers), and the Trust for the Benefit of Members of the Raymond Sackler Family (the Trust). The Sacklers, the Trust, and certain other new defendants, namely, Rhodes Technologies, Rhodes Technologies Inc., Rhodes Pharmaceuticals L.P., Rhodes Pharmaceuticals, Inc., Purdue Pharmaceuticals L.P., The P.F. Laboratories, Inc., and Stuart Baker, an executive of Purdue and other Purdue-related entities, collectively are referred to in the addenda as the Purdue-Related Additional Defendants. The plaintiffs allege that the Trust is a “50% direct or indirect beneficial owner of Purdue and the Purdue-Related Additional Defendants and the recipient of 50% of the profits from the sale of opioids by Purdue and the Purdue-related Additional Defendants.” According to the plaintiffs, the Sacklers, through their beneficial ownership and control of Purdue and all of its associated entities, implemented and oversaw the deceptive marketing strategies and misinformation campaigns used to perpetuate the alleged scheme at the heart of this action, with the overriding purpose of enriching themselves through the sale of narcotics. Richard Sackler, Jonathan Sackler, and Beverly Sackler are named as defendants in their capacities as directors of Purdue and the Purdue-related entities, and as the alleged trustees of “one or more trusts that beneficially own and control Purdue and the Purdue-Related Additional Defendants.”

Defendants Richard Sackler, Jonathan Sackler, and Beverly Sackler, in their alleged capacities as trustees of the Trust (collectively, the Trustees), now move for an order pursuant to CPLR 3211, dismissing the claims brought against the Trust on the grounds that it is not a jural entity, and that there are no allegations in the addenda that it committed any wrongdoing or was unjustly enriched at the plaintiffs’ expense. The Trustees also assert that the claims interposed against them as trustees must be dismissed, because the addenda do not include allegations about their place of residence or their conduct that support the exercise of personal jurisdiction over them “in their capacity as trustees.” The Trustees further contend that the addenda are devoid of allegations of misconduct committed by them “in their capacity as trustees” that support any of the seven causes of action asserted against them.

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CPLR 3013 requires, in pertinent part, only that statements in a pleading “be sufficiently particular to give the court and parties notice” of the transactions and occurrences to be proved. When a party moves pursuant to CPLR 3211 (a) (7) for dismissal based on the failure to state a cause of action, the initial test is whether the pleading states a cause of action, not whether the plaintiff has a cause of action (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182 [1977]; *Sokol v Leader*, 74 AD3d 1180, 1180-1181, 904 NYS2d 153 [2d Dept 2010]). A court must determine whether, accepting the facts as alleged in the pleading as true and according the plaintiff the benefit of every favorable inference, those facts fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972 [1994]). However, “conclusory averments of wrongdoing are insufficient to sustain a complaint unless supported by allegations of ultimate facts” (*Muka v Greene County*, 101 AD2d 965, 965, 477 NYS2d 444 [3d Dept], *appeal dismissed* 64 NY2d 645, 485 NYS2d 1032 [1984]; *see DiMauro v Metropolitan Suburban Bus Auth.*, 105 AD2d 236, 483 NYS2d 383 [2d Dept 1984]; *Greschler v Greschler*, 71 AD2d 322, 422 NYS2d 718 [2d Dept 1979], *mod on other grounds* 51 NY2d 368, 434 NYS2d 194 [1980]), and “bare legal conclusions are not presumed to be true, nor are they accorded every favorable inference” (*Breytman v Olinville Realty, LLC*, 54 AD3d 703, 704, 864 NYS2d 70 [2d Dept 2008], *lv dismissed* 12 NY3d 878, 883 NYS2d 173 [2009]). And while CPLR 3016 (b) requires that a complaint alleging fraud “must sufficiently detail the allegedly fraudulent conduct, that requirement should not be confused with unassailable proof of fraud. Necessarily, then, [the mandate of CPLR] 3016 (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, 492, 860 NYS2d 422, 425 [2008]). Even in fraud, a plaintiff is not required to allege specific details of an individual defendant’s participation where those details are peculiarly within the defendant’s knowledge (*id.*; *Jered Contr. Corp. v New York City Tr. Auth.*, 22 NY2d 187, 194, 292 NYS2d 98 [1968]).

The Trustees’ contention that the Trust is not a jural entity that can sue or be sued is predicated on the law governing traditional trusts. Traditionally, the transfer of legal or equitable title of trust property by the settlor to the trustee for the purpose of carrying out the settlor’s intentions, with the trustee empowered to maintain, use or distribute such property for the benefit of the beneficiaries, was recognized in the law as creating a fiduciary relationship between the settlor and the trustee, not a distinct jural entity (*see Americold Realty Trust v Conagra Foods*, \_\_\_ US \_\_\_, 136 S Ct 1012 [2016]; *see also* Restatement [Third] of Trusts § 2 [2003]). Thus, legal proceedings against traditional trusts are brought against the trustees in their own names (*see Americold Realty Trust v Conagra Foods*, \_\_\_ US \_\_\_, 136 S Ct 1012). However, the use of the label “trust” in a pleading does not, as defense counsel argues, require the court to assume it denotes a traditional trust used to make gratuitous transfer of assets (*see SPV-LS, LLC v Bergman*, 2019 WL 2257244, 2019 US Dist LEXIS 7298 [ED NY, Jan. 14, 2019]; *France v Thermo Funding Co., LLC*, 989 F Supp 2d 287 [SD NY 2013]), as trusts routinely are employed for business purposes, generally to make profits and manage risks, and now dominate certain types of businesses and financial transactions (*see* Myron Kove et al., *The Law of Trusts and Trustees* § 247 [3d ed]; Steven L. Schwarcz, *Commercial Trusts as Business Organizations: Unraveling the Mystery*, 58 Bus Law 559 [2003]).

Commonly referred to as a Massachusetts business trust or an unincorporated business organization, a business trust is attractive to investors, particularly those concerned with preserving

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assets, because it can be structured to avoid many of the statutory and regulatory requirements governing corporations, and the beneficiaries retain their interest in the trust property against any creditors of the trustee, even if the trustee becomes insolvent or bankrupt (Restatement [Second] of Trusts § 12; see Steven L. Schwarcz, *Commercial Trusts as Business Organizations: Unraveling the Mystery*, 58 Bus Law 559). In New York, a business trust is defined as “any association operating a business under a written instrument of declaration of trust, the beneficial interest under which is divided into shares represented by certificates” (General Associations Law § 2 [2]), and has long been recognized as a distinct legal entity (see *Brown v Bedell*, 263 NY 177 [1934]; *Crehan v Megargel*, 234 NY 67 [1922]). “A business trust is something separate and apart from the members who compose it” (*Brown v Bedell*, 263 NY 177, 189). There is a long legal history of distinguishing between traditional trusts and business trusts (see e.g. *Morrissey v Commissioner of Internal Revenue*, 296 US 344, 56 S Ct 289 [1935]; see also Comment, Massachusetts Trusts, 37 Yale L J 1103 [1928]), and lawsuits have been brought in New York against the trustees of a business trust, as well as against the trust itself (see e.g. *Greenspun v Lindley*, 36 NY2d 473, 369 NYS2d 123 [1975]; *Iturrino v Brisbane S. Setauket, LLC*, 135 AD3d 907, 23 NYS3d 386 [2d Dept 2016]; *McDonnell v Wal-Mart Stores, Inc.*, 133 AD3d 1350, 19 NYS3d 455 [4th Dept 2015]; *Rottenberg v Pfeiffer*, 59 AD2d 756, 398 NYS2d 703 [2d Dept 1977]).

The conclusory assertion by defense counsel that the allegations in the addenda regarding the Trust “meet the ‘essential elements’ of a traditional trust” is rejected. As mentioned earlier, the addenda identify the Trust as a “50% direct or indirect beneficial owner of Purdue and the Purdue-Related Additional Defendants and the recipient of 50% of the profits from the sale of opioids by Purdue and the Purdue-Related Additional Defendants.” The addenda also allege that Purdue Pharma, L.P., Purdue Pharma Inc., and The Purdue Frederick Company, Inc., are part of a “worldwide group of associates companies[,] all of which are controlled, directly or indirectly[,] through family trusts and holding companies”; that the Mortimer Sackler Family and the Raymond Sackler Family jointly manage and control “all of the associated companies” that those two families own; that Purdue is “part of a complicated web of entities through which the Sackler families operate”; and that Richard Sackler, Jonathan Sackler, and Beverly Sackler served as trustees of “one or more trusts that beneficially own and control Purdue and the Purdue-Related Additional Defendants.”

Absent from the addenda are allegations about the nature and purpose of the Trust, the identities of the trustees of the Trust, the powers given to such trustees, the exercise of such powers by the trustees, and the powers of the beneficiaries over the management of the Trust, and the Trustees offer no elucidation on the subject. Highlighting the paucity of information about the Trust, the memorandum of law submitted in support of the instant motion states “[t]he Alleged Trust does not, by this motion, concede that the alleged ‘Raymond Sackler Trust’ is a properly named defendant, or that any trust exists with that name.” In opposition to the motion, the plaintiffs reassert their claims that the Sackler family created a multinational, “byzantine” business structure to shield assets from potential creditors while maintaining control over Purdue and other Sackler-owned pharmaceutical businesses, and that the Trust is part of the “tangled web” of business entities having an ownership interest in Purdue.

As explained by the Court of Appeals in *Brown v Bedell*,

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The true test [of a business trust] seems to be to determine whether the relation between the parties is that of principal and agent or trustee and beneficiary; whether the subscribers are separated from direct interest ownership and control of the property and affairs of the trust. A trustee is a principal, not an agent in the management of the trust property . . . The trustees should, therefore, be a self-perpetuating body, owning the property of the syndicate, with all the powers of control over it. The shareholders should have no rights except to receive dividends and share in the final distribution when the business is wound up . . . The court should be solicitous to gather the object and purpose of the parties from the language of their contract rather than from formulas applied in other cases. Such formulas must not mislead us into the belief that the essential thing to be determined is the question of management. It should not be solicitous to give corporate advantages without incorporation . . . or to extend the Massachusetts business trust doctrine of exemption from liability beyond properly defined lines.

(*id.* at 186-189). To determine whether a commercial arrangement is, in fact, a business trust, the court must examine the ways in which the trustees conduct the responsibilities entrusted to them under the trust agreement and whether they are free from the control of the shareholders (*id.* at 187). The plaintiffs' failure to specify the nature of the Trust in the addenda, therefore, does not require that the court assume it is a traditional trust not amenable to suit or that only trustees thereof are proper defendants (*see generally Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 860 NYS2d 422). Under liberal pleading standards—particularly under the circumstances where, as here, the plaintiffs allege the defendants created a sprawling, intricate structure of related commercial entities to conduct business and to shield assets from potential creditors—the court finds there is no basis for defense counsel's argument that the court must assume, for purposes of a CPLR 3211 (a) (7) motion, that a defendant trust is a traditional trust, rather than an unincorporated business entity. Clearly, a plaintiff drafting a complaint is not required to know at the pleading stage such facts as the nature of a business trust, where the trust entity was organized, and the roles of the trustees of such entity. The application to dismiss the action against the Trust on the basis that it is not a jural entity amenable to being sued in its own name, therefore, is denied.

As to the Trustees' claim of lack of personal jurisdiction, if a defendant challenges the propriety or adequacy of service of a summons and complaint under CPLR 3211 (a) (8), it is the plaintiff's burden to prove, by a preponderance of the evidence, that jurisdiction over the defendant was obtained by proper service of process (*e.g. Aurora Loan Servs., LLC v Gaines*, 104 AD3d 885, 962 NYS2d 316 [2d Dept 2013]). The plaintiff, however, is not required to allege in the complaint the basis for personal jurisdiction (*Fishman v Pocono Ski Rental*, 82 AD2d 906, 440 NYS2d 700 [2d Dept 1981]), and to withstand a pre-answer motion to dismiss, the plaintiff need only demonstrate that facts "may exist" to support the exercise of jurisdiction over the defendant (CPLR 3211 [d]; *Peterson v Spartan Indus.*, 33 NY2d 463, 354 NYS2d 905 [1974]; *Ying Jun Chen v Lei Shi*, 19 AD3d 407, 796 NYS2d 126 [2d Dept 2005]).

The Trustees argue that there are no allegations in the addenda supporting a basis for the court

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exercising personal jurisdiction—general or specific—over them in their alleged capacity as trustees. Moreover, the memorandum of law in support of the instant motion begins with the statement “Plaintiffs purport to sue the alleged ‘Raymond Sackler Trust’ (the ‘Alleged Trust’),” and identifies Richard Sackler, Jonathan Sackler, and Beverly Sacker as the “Alleged Trustees.” As discussed above, it also states that the “Alleged Trust does not, by this motion, concede that the alleged ‘Raymond Sackler Trust’ is a properly named defendant, or that any trust exists in that name.” The plaintiffs acknowledge that a question exists as to the identity and type of the trust or trusts that allegedly hold an interest in Purdue, and state in their opposing memorandum of law that they “intend to sue the Connecticut trust described by Purdue Pharma Inc.” in a court document it filed in 2004 in the United States District Court, District of South Carolina, in the action *Franz v The Purdue Pharma Company*, civil action number 04-22055-25.

The function of the courts is to determine actual legal controversies (*Mills v Green*, 159 US 651, 16 S Ct 132 [1895]; *Matter of Self Insurer’s Assn. v State Indus. Commn.*, 224 NY 13, 16). “It is a fundamental principle of our jurisprudence that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case before the tribunal” (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 713, 431 NYS2d 400, 402 [1980]). Under the constitutional principle of separation of powers, a court may not issue a judicial decision that “can have no immediate effect and may never resolve anything” (*New York Pub. Interest Research Group v Carey*, 42 NY2d 527, 531, 399 NYS2d 621, 623 [1977]), because “[t]he giving of such [advisory] opinions is not the exercise of the judicial function” (*Cuomo v Long Is. Light. Co.*, 71 NY2d 349, 354, 525 NYS2d 828, 830 [1988]). Here, as the identity and jural status of the Trust presently are unknown, as are the identities and roles of the trustees of such trust, a question exists whether there is justiciable controversy between the plaintiffs and the Trustees. Accordingly, to avoid an advisory opinion that would “bind no one and settl[e] nothing” (*id.* at 357, 525 NYS2d at 832 [internal quotation marks omitted]), the branch of the motions seeking a determination whether the court has personal jurisdiction over the Trustees shall be held in abeyance pending a determination as to the identity and status of the Trust and its trustees.

Finally, the Trustees contend that all claims against them must be dismissed under CPLR 3211 (a) (7), because the addenda do not contain any factual allegations of deceptive acts or other misconduct committed by them “in their capacities as trustees of the alleged trust.” Similarly, they argue the addenda fail to state a cause of action against the Trust, because there are no factual allegations supporting the plaintiffs’ assertion that it “knowingly aided, abetted, participated in and benefitted from the wrongdoing of Purdue.”

In opposition, the plaintiffs point out the allegations in the addenda that the Trust, the Trustees and the other Sackler defendants exercised control over Purdue and the Purdue-related businesses; that Richard Sackler, Jonathan Sackler, and Beverly Sackler acted as directors and trustees for the one or more trusts that own and control Purdue and the Purdue-related business entities; and that Richard Sackler, Jonathan Sackler, and Beverly Sackler, as well as the Trust, through its trustees, “knowingly aided, abetted, participated in, and benefitted from the wrongdoing of Purdue as alleged in the complaint.” They further assert that it is clear from the allegations in the addenda that Richard Sackler,



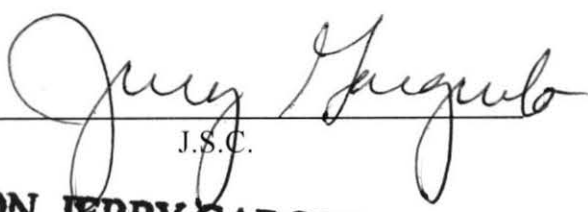
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Jonathan Sackler, and Beverly Sackler are being sued for acts they allegedly committed in their capacities as directors of Purdue and the Purdue-related businesses, and as trustees of the trust or trusts which allegedly own Purdue.

As with the issue of personal jurisdiction, in view of the questions regarding the identity and status of the Trust and its trustees, the court declines at this time to determine whether the allegations in the addenda are sufficient to state legal claims against the Trust and the Trustees for deceptive business practices, fraudulent misrepresentations, unjust enrichment, and negligence. Rather, such determination shall be held in abeyance pending a determination as to the identity and status of the Trust and its trustees.

The Trustees shall serve their answer(s) to the complaint within 10 days after the date on which this order is uploaded on the NYSCEF site (*see* CPLR 3211 [f]).

Dated: June 21, 2019

  
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J.S.C.  
**HON. JERRY GARGUILO**