

Matter of Opioid Litig.
2019 NY Slip Op 31944(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

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: MOTION DATE 2/27/19 (#035)
: MOTION DATE 4/10/19 (#040)
: MOTION DATE 4/23/19 (#054)
: ADJ. DATE 4/3/19 (#035)
IN RE OPIOID LITIGATION : ADJ. DATE 4/24/19 (#054)
: Mot. Seq. #035 - MD
: Mot. Seq. #040 - MD
: Mot. Seq. #054 - MD
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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by defendants Mallinckrodt LLC and SpecGx LLC (Mot. Seq. #035), dated January 18, 2019 (including Memorandum of Law); (2) Memorandum of Law in Opposition by the plaintiffs (Mot. Seq. #035), dated March 8, 2019, and supporting papers; (3) Reply Memorandum of Law by defendants Mallinckrodt LLC and SpecGx LLC (Mot. Seq. #035), dated March 28, 2019, and supporting papers; (4) Notice of Motion by defendant Anda, Inc. (Mot. Seq. #040), dated February 5, 2019 (including Memorandum of Law); (5) Memorandum of Law in Opposition by the plaintiffs (Mot. Seq. #040), dated April 5, 2019; (6) Reply Memorandum of Law by defendant Anda, Inc. (Mot. Seq. #040), dated April 17, 2019; (7) Notice of Motion by defendant Anda, Inc. (Mot. Seq. #054), dated March 15, 2019, and supporting papers; and (8) Memorandum of Law in Opposition by the plaintiffs (Mot. Seq. #054), dated April 18, 2019 it is

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

ORDERED that the motion by defendants Mallinckrodt LLC and SpecGx LLC for an order pursuant to CPLR 3211 (a) (7), dismissing the master long form complaint and the amended short form complaints as asserted against them, is denied; and it is further

ORDERED that the motion by defendant Anda, Inc., for an order pursuant to CPLR 3211 (a) (7), dismissing as against it the master long form complaint and each of the amended short form complaints filed against it (except, implicitly, for the short form complaints filed by plaintiffs County of St. Lawrence and County of Lewis), is denied; and it is further

ORDERED that the motion by defendant Anda, Inc., for an order pursuant to CPLR 3211 (a) (7), dismissing as against it the short form complaints filed by plaintiffs County of St. Lawrence (Index No. 400002/2019) and County of Lewis (Index No. 400007/2019), is denied.

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The plaintiffs are counties and cities within the State of New York. The defendants are pharmaceutical manufacturers and distributors, as well as individuals and entities associated with Purdue Pharma L.P., Purdue Pharma, Inc., and The Purdue Frederick Company, Inc.

By way of this action, the plaintiffs seek 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. Briefly stated, the plaintiffs allege that tortious and illegal actions by the defendants fueled an opioid 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 as necessary for treatment of chronic pain if the true risks and benefits associated with such medications had been known. They also allege that the defendants' actions have forced them 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.

The plaintiffs have since 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. Among the new defendants named are Mallinckrodt plc, Mallinckrodt LLC and SpecGx LLC. In the addenda, the plaintiffs allege that Mallinckrodt plc is an Irish public limited corporation headquartered in Staines-Upon-Thames, Surrey, United Kingdom, incorporated in January 2013 for the purpose of holding the pharmaceuticals business of Covidien plc, and operated under the registered business name Mallinckrodt Pharmaceuticals, with its United States headquarters in Hazelwood, Missouri. They allege that Mallinckrodt LLC is a Delaware corporation, registered to do business in New York and headquartered in Hazelwood, Missouri, and that defendant SpecGx LLC is a Delaware limited liability company headquartered in Clayton, Missouri, and a wholly-owned subsidiary of Mallinckrodt plc. The plaintiffs further allege that Mallinckrodt plc, Mallinckrodt LLC, SpecGx LLC and their Drug Enforcement Administration (DEA) registrant subsidiaries and affiliates (collectively, Mallinckrodt) manufacture, market, sell, and distribute pharmaceutical drugs, and are the largest suppliers of opioid pain medications and among the top 10 generic pharmaceutical manufacturers in the United States. In their amended short form complaints, the plaintiffs expressly adopt as against Mallinckrodt each of the allegations and causes of action alleged against the manufacturer defendants in the master long form complaint.

Also newly named is Anda, Inc. (Anda). In the addenda, the plaintiffs allege that Anda is a

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Florida corporation registered to do business in New York, with its principal office in Olive Branch, Mississippi, and that in October 2016, it was acquired by defendant Teva Pharmaceuticals USA, Inc. They allege that Anda, through its various DEA registrant subsidiaries and affiliated entities, is the fourth largest distributor of generic pharmaceuticals in the United States and that, at all relevant times, it distributed prescription opioids throughout the United States, including in New York. In their amended short form complaints, the plaintiffs expressly adopt as against Anda each of the allegations and causes of action alleged against the distributor defendants in the master long form complaint.

As to the manufacturer defendants, the plaintiffs allege in the master long form complaint that to maximize profits, they intentionally misrepresented to the public and the medical community the risks and benefits of opioids for the treatment of chronic pain. The plaintiffs allege that, to reverse the stigma historically associated with opioid use, the manufacturer defendants developed deceptive marketing campaigns so that more patients would request opioids, more physicians would write prescriptions for them, and more healthcare insurers would pay for such treatment; those campaigns included such strategies as branded and unbranded advertisements, educational programs and materials, and detailing of physicians, that overstated the benefits of prescription opioids for chronic pain (i.e., pain lasting three or more months) and misrepresented—even trivialized—the dangers associated with their long-term use. They further allege that the manufacturer defendants sold their pharmaceutical opioids to consumers within the plaintiffs' jurisdictions.

As to the distributor defendants, the plaintiffs allege in the master long form complaint that they participated in deceptive marketing campaigns to create a false body of medical literature, to undermine information on drug labels, and to falsely portray prescription opioids as a preferred treatment option. The plaintiffs allege that the distributor defendants carried out these campaigns while disguising their roles in such marketing by funding, working through, and hiding behind professional front organizations and key opinion leaders. They allege that those representations and campaigns were material to and influenced the plaintiffs' decision to pay claims for prescription opioids, and ultimately compelled the plaintiffs to bear the costs of the ensuing opioid epidemic. The plaintiffs further allege that the distributor defendants delivered or allowed to be delivered an excessive and unreasonable amount of prescription opioids to the plaintiff counties and cities despite knowing that such substances were particularly susceptible to abuse and diversion, and that the distributor defendants failed to investigate or to take steps necessary to prevent those counties and cities from being flooded with prescription opioids.

Mallinckrodt and Anda now separately move, pre-answer, to dismiss the master long form complaint and amended short form complaints (collectively, the complaint) for failure to state a cause of action. Mallinckrodt and Anda (collectively, the defendants) argue that the plaintiffs' attempt to adopt the allegations set forth in the master long form complaint is impermissible group pleading, and fails to satisfy either the notice pleading standard set forth in CPLR 3013 or the specificity requirement set forth in CPLR 3016 (b). The defendants argue that in the court's previous decisions, where group pleading was found sufficient, the plaintiffs had set forth in the master long form complaint allegations of conduct specific to each defendant, which are absent here. They also argue that the deficiency is not cured by the plaintiffs' concerted action theory, as no facts have been pleaded regarding their involvement in any alleged scheme.

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On a motion to dismiss a complaint under CPLR 3211 (a) (7), the test is whether the pleading states a cause of action, not whether the plaintiff has a cause of action (*Sokol v Leader*, 74 AD3d 1180, 904 NYS2d 153 [2d Dept 2010]). “When assessing the adequacy of a complaint in light of a CPLR 3211 (a) (7) motion to dismiss, the court must afford the pleadings a liberal construction, accepting the allegations of the complaint as true and provide plaintiff . . . the benefit of every possible favorable inference” (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591, 808 NYS2d 573, 577 [2005] [internal quotation marks omitted]; see *Antoine v Kalandrishvili*, 150 AD3d 941, 56 NYS3d 142 [2d Dept 2017]). “Whether a plaintiff can ultimately establish its allegations in not part of the calculus in determining a motion to dismiss” (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19, 799 NYS2d 170, 175 [2005]).

The court rejects the defendants’ arguments. 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. And although CPLR 3016 (b) requires that a cause of action based in 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. Co. v New York City Tr. Auth.*, 22 NY2d 187, 292 NYS2d 98 [1968]).


Here, the plaintiffs allege that all of the defendants cooperated in an integrated scheme promoting the use of prescription opioids for chronic pain that helped give rise to the current opioid epidemic. They allege, in part, that the manufacturer defendants engaged in deceptive marketing, directed at both the medical community and the public, about the dangers and benefits of long-term opioid therapy for the treatment of chronic pain, and that the distributor defendants assisted in the unbranded marketing portion of the scheme by providing funds to front groups. Those united efforts in increasing the market for prescription opioids, the plaintiffs assert, make all manufacturer and distributor defendants subject to liability under a concerted action theory. “The theory of concerted action provides for joint and several liability on the part of all defendants having an understanding, express or tacit, to participate in a common plan or design to commit a tortious act” (*Rastelli v Goodyear Tire & Rubber Co.*, 79 NY2d 289, 295, 582 NYS2d 373, 375 [1992] [internal quotation marks omitted]; see *Ravo v Rogatnick*, 70 NY2d 305, 309, 520 NYS2d 533, 535 [1987]; *Herman v Wesgate*, 94 AD2d 938, 464 NYS2d 315 [4th Dept 1983]). As explained in the Restatement (Second) of Torts § 876, a defendant is liable for harm to a third person resulting from the tortious conduct of another if (1) it commits a tortious act in concert with or pursuant to a common design with the other, (2) it knows the other’s conduct constitutes a breach of duty and provides substantial assistance or encouragement to the other to commit such conduct, or (3) it gives substantial assistance to the other in achieving a tortious result and its own conduct, separately considered, constitutes a breach of a duty of care owed to the third person (see *Bicher v Eli Lilly & Co.*, 55 NY2d 571, 450 NYS2d 776 [1982]; see also Prosser & Keeton, Torts § 46 [5th ed 1984]). The court finds these allegations, and the inferences that can be drawn therefrom, sufficient—and sufficiently detailed—for the plaintiffs to proceed against Mallinckrodt and Anda on a

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theory of concerted action.

Mallinckrodt and Anda shall serve their answers 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



J.S.C.
HON. JERRY GARGUILO