IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Vahé Sarkissian, M.D.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Proviso Family Services, an Illinois not-for-profit corporation, individually and d/b/a Resurrection Behavioral Health, Stafford C. Henry, M.D., James E. Devine, Ph.D., Teresa McKenzie, M.D., and Carl Malin, CADC, M.Div., all individually and as employees of Proviso Family Services, d/b/a Resurrection Behavioral Health,	)	No. 11 L 2111
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

A plaintiff is required to plead all facts necessary to establish each element of a cause of action, including duty, which is the foundational element to any negligence claim. In his third-amended complaint, Sarkissian has, once again, failed to identify any duty any of the defendants owed to him in any of the 11 causes of action he has pleaded. Since none of the defendants owed Sarkissian a duty, their motions to dismiss must be granted and this case dismissed with prejudice.

Facts

In 2007, Vahé Sarkissian was a third-year neurological surgery resident at Tulane Medical Center in New Orleans, Louisiana. At some point during that year, Sarkissian expressed concerns to his department chairman and to the Medical Director of the Medical Center of Louisiana about gross violations of patient care at Tulane. In June 2007, Tulane suspended Sarkissian from his position because of his complaints, which he alleges served as the basis for the defendants to damage his credibility and force him to undergo a psychiatric evaluation.

In December 2007, Sarkissian and Tulane agreed that he would undergo a psychiatric evaluation at Tulane's expense from a list of approved evaluators whose results would govern whether he would be allowed to return to the neurosurgery residency program. Sarkissian chose to be

evaluated by Resurrection Behavioral Health, located in Oak Park, Illinois. On December 12, 2007, Sarkissian voluntarily admitted himself into the Multidisciplinary Assessment Program ("MAP") at Resurrection for evaluation.

While at Resurrection, Sarkissian was evaluated by: Dr. Stafford C. Henry, a psychiatrist and the MAP medical director; Dr. James E. Devine, a staff psychologist; Dr. Teresa McKenzie, a staff physician; Carl Malin, a chaplain and the patient intake coordinator for special assessment services; and Nancy Ellis, a clinical social worker and certified drug-and-alcohol abuse counselor. Sarkissian underwent various evaluations, the results of which the four individual defendants compiled and presented in a report. In preparing the report, Sarkissian alleges that they and Resurrection:

(1) failed to adhere to the standards of care for a forensic psychiatric evaluation;

(2) failed to establish criteria for a personality disorder, including a borderline personality disorder;

(3) ignored data contradictory to that provided by Tulane;

(4) failed to take into account that Sarkissian is of Armenian descent and interview family and friends who have observed his personality characteristics and traits particular to a person of that background;

(5) subjected Sarkissian to a hostile, confrontational, and biased psychiatric evaluation;

(6) breached its duty not to traumatize Sarkissian given that there were questions of a hostile work environment and that he is Armenian;

(7) failed to treat Sarkissian with empathy or respect;

(8) failed to explore whether the Tulane neurosurgery department was a hostile work environment;

(9) failed to explore whether Tulane was using the request for a psychiatric evaluation to silence Sarkissian over his complaints of substandard care;

(10) failed to elicit opposing viewpoints as to Sarkissian's performance at Tulane;

(11) failed to conduct an objective, unbiased psychiatric evaluation;

(12) failed to investigate the potential for distorted or incorrect information submitted by Tulane;

(13) employed faulty diagnostic reasoning in the psychiatric evaluation;

(14) impugned his moral character to justify incorrect and unsubstantiated diagnoses;

(15) concluded that Sarkissian was a chronic user of narcotics without scientific or clinical basis and despite Sarkissian revealing that he had taken Vicodin for a bad tooth two months earlier; and

(16) concluded that Sarkissian was amphetamine dependent despite Sarkissian's admission that he was under psychiatric care and had been prescribed Adderall.

Resurrection provided its report to Tulane. Sarkissian alleges that the report immediately caused the Louisiana State Board of Medical Examiners to suspend him from the neurosurgical residence program on an interim basis. In addition, the National Practitioners Data Bank listed that suspension in its permanent records, making placement in another neurosurgery residency program far more difficult. The report also resulted in Tulane barring Sarkissian from its campus and medical center and terminating his alleged employment contract. Finally, the report caused the Medical Board of California to institute an administrative action that Sarkissian had to defend.

Sarkissian's third-amended complaint raises 11 causes of action against the defendants individually and in combination. Counts I-IV are for medical negligence against each of the four individual defendants based on various acts and omissions that violated applicable medical standards. Count V is a simple negligence claim against the same four defendants based on their failure to exercise reasonable care and skill in rendering an evaluation. Count VI[1] is a negligence claim against Resurrection as *respondeat superior* for the four individual defendants for failing to evaluate, diagnose, and treat Sarkissian properly according to applicable medical standards. Count VII is a tortious-interference-with-contract claim directed at the four individual defendants for making false statements about Sarkissian. Count VIII is a tortious-interference-with-prospective-economic-advantage claim directed against the four individual defendants for destroying Sarkissian's business relationship with Tulane. Count IX is a *respondeat superior* claim against Resurrection for tortious interference. Count X is a breach-of-contract claim against Resurrection for failing to enforce its policies and procedures to ensure that its employees conducted the MAP test according to applicable medical standards. Count XI is a consumer-fraud-and-deceptive-business-practices cause of action against Resurrection for using deception, fraud, false pretense, false promise, and misrepresentation in its commercial offering of its MAP examination and publication of the report.

Each defendant filed a motion to dismiss the third-amended complaint. Sarkissian filed a single brief in response to the various motions. Each defendant filed a reply brief as well as a supplemental brief citing and analyzing *Simmons v. Campion*, 2013 IL App (3d) 120562.

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[1] Sarkissian has labeled two counts as Count V. This court will refer to the first as Count V and the second as Count VI.

Analysis

A complaint must be both legally and factually sufficient to state a cause of action. To be legally sufficient, a complaint must set forth a legally recognized cause of action. A legally recognized cause of action is one that alleges facts, not conclusions, which, if proven, would establish that: (1) the defendant owed the plaintiff a duty; (2) the defendant breached the duty; and (3) the breach proximately caused the plaintiff's injury. *Iseberg v. Gross*, 227 Ill. 2d 78, 86-87 (2007); *Vaughn v. City of West Frankfort*, 166 Ill. 2d 155, 158 (1995). If any one of these elements is absent, the plaintiff has not stated a cause of action and the defendant is entitled to dismissal.

To be factually sufficient, a complaint must allege facts, not conclusions, that support a legally recognized cause of action. *People ex rel. Fahner v. Carriage Way West, Inc.*, 88 Ill. 2d 300, 308 (1981). Similarly, the complaint must allege facts, not conclusions, necessary to establish each required element of a cause of action. *Beckman v. Freeman United Coal Mining*, 123 Ill. 2d 281, 287 (1988); *In re Beatty*, 118 Ill. 2d 489, 499 (1987); *Teter v. Clemens*, 112 Ill. 2d 252, 256-57 (1986); *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 426-27 (1981). Since Illinois is a fact-pleading jurisdiction, a complaint is subject to dismissal under the Code of Civil Procedure if it fails to allege facts specifying the nature of the defendant's breach of a duty that allegedly caused the plaintiff's injury.

The defendants have filed motions to dismiss pursuant to Code of Civil Procedure section 2-619.1. 735 ILCS 5/2-619.1. A section 2-619.1 motion authorizes the filing of one pleading incorporating motions to dismiss under sections 2-615 and 2-619. *Id.* A section 2-615 motion tests a complaint's legal sufficiency, while a section 2-619 motion admits a complaint's legal sufficiency, but asserts affirmative matter to defeat the claim. *Bjork v. O'Meara*, 2013 IL 114044, ¶ 21; *Patrick Eng., Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31. Affirmative matter includes documents and affidavits attached as exhibits. 735 ILCS 5/2-619(a)(9). A court considering either motion must accept as true all well-pleaded facts and reasonable inferences arising from them, *Doe v. Chicago Bd. of Ed.*, 213 Ill. 2d 19, 23-24 (2004), but not conclusions unsupported by facts, *Pooh-Bah Enterps., Inc. v. County of Cook*, 232 Ill. 2d 463, 473 (2009). *See also Hanks v. Cotler*, 2011 IL App (1st) 101088, ¶ 17.

Counts I-IV and X-XI are decided under section 2-619 since the individual defendants rely on affirmative matter in support of their motions. Each of the remaining counts is decided under section 2-615. While all of the parties attached documents to their pleadings, those exhibits are ultimately

unnecessary since Sarkissian's pleading deficiencies, as explained below, are fundamental.

I. Medical Negligence – Counts I-IV

The threshold legal requirement in any medical negligence case is the existence of a duty owed by a physician to a patient. Such a duty arises only if there exists some sort of relationship between a physician and a patient. Conversely, "a plaintiff cannot maintain a medical malpractice action absent a direct physician-patient relationship between the doctor and plaintiff or a special relationship. . . ." *Kirk v. Michael Reese Hosp. & Med. Cntr.*, 107 Ill. 2d 507, 531 (1987). Courts have defined such a relationship as a consensual one, "in which the patient knowingly seeks the physician's assistance and in which the physician knowingly accepts the person as a patient." *Bovara v. St. Francis Hosp.*, 298 Ill. App. 3d 1025, 1030 (1st Dist. 1998), *citing Reynolds v. Decatur Mem. Hosp.*, 277 Ill. App. 3d 80, 85 (4th Dist. 1996). It is fundamental that a physician-patient relationship is based on mutual trust and confidence. *Marcin v. Kipfer*, 117 Ill. App. 3d 1065, 1067-68 (4th Dist. 1983). To determine if a physician-patient relationship exists, courts pay particular attention to whether a physician "performed a service for the benefit of the patient." *Bovara*, 298 Ill. App. 3d at 1027. Those services must be exclusively for the purpose of restoring a patient's health. *Milos v. Hall*, 325 Ill. App. 3d 180, 183 (5th Dist. 2001), *quoting Lyon v. Hasbro Indus.*, 156 Ill. App. d 649, 653 (4th Dist. 1987).

Counts I-IV can survive the defendants' motions to dismiss only if there existed a physician-patient relationship or special relationship between Sarkissian and each of the four individual defendants. They argue that no such relationship existed, and point to various documents attached as exhibits to their section 2-619(a)(9) motions. For the reasons explained below, it is plain that no physician-patient or special relationship existed between Sarkissian and any of the four individual defendants. Absent such a relationship, there existed no duty and, hence, no cause of action.

First, nowhere in his third-amended complaint does Sarkissian allege that he was a patient of any of the individually named defendants. He states obliquely that he "placed himself in the care of RESURRECTION's medical professionals," Cmplt. at ¶ 13, but that is nothing more than an unsupported factual conclusion. Sarkissian points to language in a consent form that he was "voluntarily requesting evaluation, assessment, and diagnosis," and that the evaluation "will involve various diagnostic test(s)*, procedures** and care under the direction of Dr. Stafford Henry, assistants or designees as is necessary in my physician's judgment." *Id.* at ¶ 14 & Ex. B. Resurrection's one-form-fits-all cannot control the true relationship between the parties.

Although Sarkissian agreed to the evaluation, he did so because it was the only way Tulane would consider his re-entry into the neurosurgical residency program. Additionally, Sarkissian did not request the evaluation, Tulane did. In short, even if these statements are read in a light most favorable to Sarkissian, they do not, by themselves, establish a physician-patient relationship between Sarkissian and the individual defendants.

Second, nowhere in the complaint does Sarkissian allege that he knowingly sought the defendants' assistance. As noted immediately above, the consent form states that Sarkissian voluntarily requested "evaluation, assessment and diagnosis," but, once again, that form does not and cannot overcome the substance of the relationship. It is undisputed that Sarkissian did not seek anything. Rather, Tulane required Sarkissian to undergo a fitness-for-duty examination for Tulane to consider him eligible for reinstatement into the neurosurgery residency program. Further, the fee statement makes plain, that Sarkissian knew that Tulane was paying Resurrection for its employees to conduct the examinations. Thus, any relationship that existed was a contractual one between Tulane and Resurrection and not a medical one between Sarkissian and the four individual defendants.

Third, nowhere in the complaint does Sarkissian allege that the individual defendants knowingly accepted him as a patient. Once again, the consent form contains some language that is inferentially favorable to Sarkissian, but Resurrection, not the individual defendants, created that form. Given that Sarkissian has the pleading burden to establish a physician-patient relationship, he plainly had to provide allegations that the individual defendants considered Sarkissian to be their patient.

Fourth, nowhere in the third-amended complaint does Sarkissian allege that his relationship with the defendants was based on mutual trust and confidence. Indeed, the inference is the opposite since Sarkissian had to undergo the MAP evaluation just to be considered for re-entry into the neurosurgery residency program. Further, it is impossible to infer that mutual trust and confidence existed between him and the individual defendants given his allegations of their wrongdoing and the apparently brief meetings that occurred.

Fifth, the complaint makes plain that none of the defendants performed a service for Sarkissian's benefit. That conclusion is certainly borne out by the fee statement. The conclusion is also reasonable given the nature of the MAP evaluation. The individual defendants' fitness-for-duty examination benefitted Tulane, not Sarkissian. He already thought he was fit for duty; Tulane did not. Further, there are no allegations in the

complaint from which it can be inferred that Tulane chose to spend $5,500 to $6,500 of its own money for Sarkissian's benefit rather than its own.

If a physician-patient relationship did not exist, neither did a special relationship. First, as a factual matter, Sarkissian does not allege that any sort of special relationship existed between him and any one of the individual defendants. Second, as a legal matter, employer-mandated, fit-for-duty evaluations do not fall under the rubric of "healing art" because they are not designed to restore a patient's health. *Palonis v. Jewel Food Stores, Inc.*, 383 F. Supp. 2d 1073, 1074 (N.D. Ill. 2005) (interpreting Illinois law). Rather, these evaluations are made to assist employers in determining whether an employee is fit for work. *Id.* Here, Sarkissian does not allege that the individual defendants attempted to restore his health and no inference can be made to that end.

II. Negligence – Counts V-VI

In Counts V and VI, Sarkissian claims that the defendants are liable based on a simple negligence standard for their failure to conduct a fair, unbiased, and medically sound evaluation. The defendants argue in their motions that Sarkissian's simple negligence claims fail for the same reason the medical negligence claims fail. In other words, since the individual defendants exercised subjective, medical judgment, the use of that judgment defeats any claim that they breached a duty of care as test givers under a lowered negligence standard.

The defendants' argument is defective because it conflates a medical standard of care with the standard of care required of a test giver. The defendants assume that the use of proper medical judgment must be coterminous with a fair, unbiased, and medically sound evaluation because proper medical judgment incorporates all factors on which a test giver should rely. That conclusion may be true, but at this stage of the pleadings, it argues too much by focusing on breach rather than duty.

Yet if the defendants skipped over this element, so did Sarkissian. The third-amended complaint contains a list of 16 of the defendants' acts or omissions that allegedly resulted in the flawed report that proximately caused Sarkissian's injuries. Sarkissian's problem is that he fails utterly to allege that the applicable standard of care for test givers required the defendants to account for the 16 alleged acts or omissions they made. In other words, Sarkissian provides no baseline by which this court can determine whether the MAP evaluators deviated from the standard of care to be employed by test givers under these circumstances. Without a clear delineation of what the evaluation had to include or exclude to meet the

standard of care, this analysis can go no further. This is Sarkissian's error, not the defendants because he has the burden of pleading all the factual allegations necessary to establish each element of each cause of action.

III. Tortious Interference With Contract – Counts VII

Count VII is directed against the four individual defendants for tortiously interfering with Sarkissian's contract with Tulane. The elements of such a claim are: "(1) the existence of a valid and enforceable contract between the plaintiff and another; (2) the defendant's awareness of the contract; (3) the defendant's intentional and unjustified inducement of a breach of the contract; (4) a subsequent breach by the other, caused by the defendant's conduct; and (5) damages. *Seip v. Rogers Raw Materials Fund, LP*, 408 Ill. App. 3d 434, 444 (1st Dist. 2011), *quoting Complete Conf. Coordinators, Inc. v. Kumon N.A., Inc.*, 394 Ill. App. 3d 105, 109 (2d Dist. 2009). This court does not need to address these pleading requirements as Sarkissian's error is even more fundamental.

Sarkissian fails to attach as an exhibit to his third-amended complaint a copy of his contract with Tulane – the contract under which Tulane owed him a duty. Such an omission violates the Code of Civil Procedure's requirements. 735 ILCS 5/2-606. Sarkissian apparently tries to claim the protection of the provision's exception, which allows a plaintiff to attach "an affidavit stating facts showing that the instrument is not accessible to him or her." *Id.* Sarkissian inartfully avers that he is unable to locate the employment contract, but he does not aver that it is inaccessible to him. Indeed, Sarkissian does not aver, for example, that he requested a copy of the contract from Tulane and that Tulane refused to provide one or that Tulane had destroyed its copy. Rather, Sarkissian makes no explanation at all.

Sarkissian's failure to meet his pleading burden is nothing new. Over the course of two lawsuits beginning in 2009 and in multiple iterations of his complaint, he has never once attached a copy of the executed contract. That failure, alone, is sufficient to justify dismissal of his cause of action. And unlike the situations in *Velocity Invs., LLC v. Alston*, 397 Ill. App. 3d 296, 300 (2d Dist. 2010), and *Portfolio Acquisitions, L.L.C. v. Feltman*, 391 Ill. App. 3d 642, 651, 652 (1st Dist. 2009), Sarkissian has had ample opportunity to locate the contract or explain why it remains inaccessible to him.

IV. Tortious Interference With Prospective Economic Advantage – Counts VIII & IX

Counts VIII and IX present causes of action for tortious interference with prospective economic advantage against each of the defendants. To

state such a claim, a plaintiff must plead facts establishing: (1) the plaintiff's reasonable expectation of entering into a valid business relationship; (2) the defendant's knowledge of the plaintiff's expectancy; (3) the defendant's purposeful interference that prevents the plaintiff's legitimate expectancy from ripening into a valid business relationship; and (4) damages resulting from the defendant's interference. *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 483-84 (1998); *Fellhauer v. City of Geneva*, 142 Ill. 2d 495, 511 (1991). Sarkissian cannot possibly plead this cause of action.

Sarkissian explicitly alleges in his third-amended complaint that his agreement with Tulane meant that Resurrection's MAP evaluation "would govern whether he would be allowed to return to his neurosurgery residency . . . ." Cmplt. at ¶ 2. Thus, Sarkissian cannot establish that he had a reasonable expectation of re-entering into a business relationship with Tulane, *i.e.*, rejoining the neurosurgery residency program, since he could have no reasonable expectation that Resurrection would find him fit for duty. Although he may have been convinced of outcome, his presumption is not what he bargained for with Tulane and is certainly not what he alleged in his third-amended complaint. Since Sarkissian had no reasonable expectation of a renewed business relationship with Tulane, Resurrection owed him no duty.

V. Breach of Contract – Count X

Sarkissian's breach of contract claim against Resurrection has the same foundational insufficiency as does his tortious-interference-with-contract claim, i.e., he fails to attach a copy of the executed contract as an exhibit to his third-amended complaint. 735 ILCS 5/2-606. Even if that omission could be excused, which it cannot, Sarkissian's cause of action faces an equally insurmountable hurdle – he is not a party to a contract that is enforceable against Resurrection. The elements of a cause of action for breach of contract, "include the existence of a valid and enforceable contract, performance by the plaintiff, breach of the contract by the defendant, and resultant damages or injury to the plaintiff." *Sheth v. SAB Tool Supply Co.*, 2013 IL App (1st) 110156, ¶ 68, *quoting Razor Capital v. Antaal*, 2012 IL App (2d) 110904, ¶ 30. A valid and enforceable contract requires an offer, acceptance, and consideration. *Id.*, *citing CNA International, Inc. v. Baer*, 2012 IL App (1st) 112174, ¶ 45.

Sarkissian's reliance on the fee statement to establish a valid and enforceable contract is misplaced. Sarkissian does not allege that he paid anything in consideration for the agreement. Indeed, the fee statement includes a handwritten insert (from an as-yet unknown hand) that "Dr.

Sarkissian is secondary payor." Absent any consideration paid by Sarkissian, he has no breach of contract claim.

Sarkissian also has no basis to allege that he is a third-party beneficiary to the Tulane-Resurrection agreement. (The argument is confusing from the outset because Sarkissian initially alleges that the contract at issue is the one between him and Resurrection, but only a few paragraphs later he focuses on the one between Tulane and Resurrection.) There exists a strong presumption that parties to a contract intend for it to apply only to them, and not others. *Bank of America, N.A. v. Bassman FBT, L.L.C.*, 2012 IL App (2d) 110729, ¶ 27. Consequently, "an individual not a party to a contract may only enforce the contract's rights when that contract's original parties intentionally enter into the contract for the direct benefit of the individual." *Cahill v. Eastern Benefit Systems, Inc.*, 236 Ill. App. 3d 517, 520 (1st Dist. 1992). The contract must be plain that the parties executed it for the direct benefit of a third person, not that the benefit was merely incidental. *Id.* ("The promisor's intention must be shown by an express provision in the contract identifying the third-party beneficiary.")

Sarkissian does not point to any contractual language from which it could even be inferred that he was a third-party beneficiary to the Tulane-Resurrection agreement. Additionally, he does not allege what benefit he was to have derived from that contract. Indeed, there was none; it was to determine whether he would be permitted to re-enter the neurosurgery residency program. Since Sarkissian lacked third-party-beneficiary status to any agreement he identifies, Resurrection did not owe him a contractual duty for any purpose.

VI. Consumer Fraud and Deceptive Business Practices Act – Count XI

Sarkissian's final cause of action is directed at Resurrection under the Illinois Consumer Fraud and Deceptive Business Practices Act. To succeed on such a statutory claim, a plaintiff must plead that the defendant: (1) committed a deceptive act, such as misrepresenting or concealing a material fact; (2) intended to induce the plaintiff to rely on the deception; and (3) deceived the plaintiff in the course of trade or commerce. *Tucker v. Soy Capital Bk. & Trust Co.*, 2012 IL App (1st) 103303, ¶ 47, *citing Brody v. Finch Univ. of Health Sciences/The Chicago Med. Sch.*, 298 Ill. App. 3d 146, 157 (2d Dist. 1998), *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 501 (1996), *Siegel v. Levy Org. Dev. Co.*, 153 Ill. 2d 534, 542 (1992)). "The . . . Act is intended to protect consumers, borrowers and business persons against fraud, unfair methods of competition, and other unfair and deceptive business practices." *Zazove v. Pelikan, Inc.*, 326 Ill. App. 3d 798, 808 (1st

Dist. 2002). As defined by the act, a "consumer" is, "any person who purchases or contracts for the purchase of merchandise not for resale in the ordinary course of his trade or business but for his use or that of a member of his household." 815 ILCS 505/1(e).

Under no possible reading of the third-amended complaint could Sarkissian be classified as a "consumer." He neither purchased from nor contracted with Resurrection for merchandise. Rather, Tulane purchased Resurrection's services to conduct a MAP evaluation. Since Sarkissian was not a consumer as defined by the statute, Resurrection owed him no statutory duty and, hence, Sarkissian has no cause of action.

CONCLUSION

This is Sarkissian's third-amended complaint in his second lawsuit filed since 2009. Sarkissian has, once again, failed to plead adequately any cause of action against any one of the defendants. These fundamental pleading errors have continued despite explicit direction from past judges as to what inadequacies Sarkissian needed to rectify. Sarkissian has either failed to understand the critical nature of these deficiencies or been unable to muster the facts necessary to overcome his past mistakes. Enough is enough. It is not this court's job to provide a lesson in pleading practice. At this point, Sarkissian has exhausted his opportunities to plead a viable complaint.

IT IS ORDERED:

1. The defendants' motions to dismiss are granted; and
2. This case is dismissed with prejudice.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

JAN 15 2014

Circuit Court 2075