SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2115-21

JOHN SACCHI, individually and on behalf of all others similarly situated,

Plaintiff-Respondent,

v.

QUEST DIAGNOSTICS INCORPORATED,

Defendant-Appellant,

and

RAMONA WELDON,

Defendant.

———————————————————

Argued March 1, 2023 – Decided March 16, 2023

Before Judges Haas and Fisher.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-1503-20.

Michael T. Hensley argued the cause for appellant (Bressler, Amery & Ross, PC, attorneys; Diana C. Manning, Michael T. Hensley, and Andrea L. Bonvicino, on the briefs).

Stephen J. Simoni argued the cause for respondent (Simoni Consumers Class Action Law Offices c/o Jardim, Meisner & Susser, PC, attorneys; Stephen J. Simoni, on the brief).

PER CURIAM

In this appeal, we consider whether plaintiff John Sacchi adequately stated a claim upon which relief may be granted and, if not, whether his amended complaint should be dismissed or whether he should be given a further opportunity to plead a cognizable cause of action. We conclude that the lack of clarity and cohesiveness in the amended complaint warrants that plaintiff be compelled to replead, but we also conclude there are some counts in the amended complaint that do not state a claim on which relief may be granted, and as to those, we reverse the order denying defendant Quest Diagnostics Incorporated's motion to dismiss.

Plaintiff filed this action on his own behalf and on behalf of others similarly situated, alleging he is "a Senior Citizen adult male stroke survivor and Medicare beneficiary who received [in October 2019] multiple apparent [m]isdirected [n]otifications for lab tests" from Quest "that may not have been

ordered by one or more of his treating prescribers." Plaintiff offered these operative allegations, Quest's alleged refusal to produce to plaintiff what he claims is "protected healthcare information," and other communications between the parties, as the factual basis for his seven pleaded causes of action: a violation of the Consumer Fraud Act; a violation of the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA); negligence per se; negligence; breach of contract and breach of the implied covenant of good faith and fair dealing; breach of contracts to process payments from third parties and respond to billing inquiries; and breach of contract not to retaliate for the filing of a HIPAA complaint.[1]

The trial judge denied Quest's motion to dismiss under Rule 4:6-2(e), for reasons expressed in a written opinion, and we granted Quest's motion for leave to appeal to consider Quest's arguments that:

> I. PLAINTIFF FAIL[ED] TO ALLEGE HE SUFFERED ACTUAL DAMAGES.
>
> II. PLAINTIFF FAILED TO PLEAD A COGNIZABLE CLAIM UNDER THE NEW JERSEY CONSUMER FRAUD ACT.

[1] The HIPAA complaint referred to in the seventh claim was that which was filed with, and apparently is still pending before, the Secretary of the Department of Health and Human Services.

A. The Amended Complaint Failed to Allege An Ascertainable Loss.

B. Plaintiff Fail[ed] to Plead Quest Induced Him To Engage In A Consumer Transaction.

C. Quest Is A "Learned Professional" Rendering Claims Against It Under the CFA Meritless.

D. Plaintiff Fail[ed] to Plead Fraud With Specificity.

III. PLAINTIFF CANNOT STATE A CLAIM UNDER HIPAA OR THE HIPAA PRIVACY RULE.

A. HIPAA and the HIPAA Privacy Rule Do Not Provide Plaintiff With A Private Right Of Action.

B. HIPAA and the HIPAA Privacy Rule Do Not Create A Duty For Claims Of Negligence Nor Negligence Per Se.

IV. PLAINTIFF'S FIFTH, SIXTH AND SEVENTH CAUSES OF ACTION FOR BREACH OF CONTRACT MUST BE DISMISSED FOR LACK OF CONTRACTUAL RELATIONSHIP BETWEEN PLAINTIFF AND QUEST.

A. Quest Does Not Owe Plaintiff A Contractual Duty To Respond To Inquiries Regarding An Appointment Reminder.

B. Plaintiff's Claim For Retaliation Is Barred By The Rules of Court And The Litigation Privilege.

In denying Quest's motion, the trial judge relied on correct legal principles. The judge acknowledged her obligation to assume the truth of the pleader's allegations, see Craig v. Suburban Cablevision, 140 N.J. 623, 625 (1995), and to deny the motion unless, having searched the pleading in depth and with liberality, a "fundament of a cause of action" could not be found "even from an obscure statement," see Printing Mart v. Sharp Elec. Corp., 116 N.J. 739, 746 (1989).

The problem, as suggested by the judge's written decision, is the lack of clarity with which plaintiff has attempted to assert his claims. While a motion to dismiss suggests the trial judge's need to "search the pleading" to determine whether a cause of action may be found therein, the standard to be applied also presupposes a pleading that carefully and clearly expresses the allegations upon which each claim is based. Because the factual aspects of the amended complaint largely consist of the detailed factual history of the various communications between these parties – but often without focus or relation to the causes of action alleged – we deem it appropriate to mandate that plaintiff be required to replead certain of his causes of action; others we dismiss with prejudice.

Briefly, we observe that the impetus for the complaint appears to have been the alleged unsolicited scheduling of a diagnostic test that plaintiff never

underwent. That event appears to have then triggered plaintiff's demand for the information possessed by or relied on by Quest to generate the scheduled test, and that evolved further into a demand by plaintiff for any medical records or information in Quest's possession that relate to plaintiff. The dispute seems to be more about plaintiff's attempt to know why the test was scheduled, how it came to be scheduled, and by whom, rather than – as alleged in the amended complaint – a claim that Quest breached a standard of care or otherwise attempted to defraud plaintiff.

From these and other facts, we are able to conclude that some of the counts of the amended complaint do not state a claim on which relief may be granted. Our response to the other counts is that plaintiff should be required to replead his legal theories and provide specific factual allegations as to each of those theories of recovery separately, rather than through reference or rephrasing of the story of the parties' communications.

In explaining our decision, we address each of the counts of the amended complaint.

I

Plaintiff's first count alleges a violation of the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -227. It is not at all clear what plaintiff asserts are the

unconscionable or deceptive acts or practices that form the basis of this count of the amended complaint. In seeking dismissal and in now arguing that the denial of its motion was erroneous, Quest argues that plaintiff's allegations are lacking in the following ways: they do not suggest an ascertainable loss, Zaman v. Felton, 219 N.J. 199, 222 (2014); the fraud alleged has not been described with the specificity required by Rule 4:5-8(a); and the CFA does not apply to learned professionals, Macedo v. Dello Russo, 178 N.J. 340, 346 (2004). These and perhaps other issues warrant consideration but, until plaintiff poses his CFA claim or claims in a more coherent fashion, it cannot yet be determined whether plaintiff has failed to plead sufficient facts to overcome these obstacles.

For example, there is no doubt that, as a private litigant, plaintiff is obligated to plead an ascertainable loss, even if he seeks or obtains only injunctive or declaratory relief. Robey v. Sparc Grp., LLC, __ N.J. Super. __, __ (App. Div. 2023) (slip op. at 13) (citing Weinberg v. Sprint Corp., 173 N.J. 233, 251 (2002)). This requires more than just a bald utterance that an ascertainable loss has been suffered; plaintiff's allegations must be sufficiently clear for the judge to ascertain what that loss may be and whether there is an arguable basis for the factfinder to conclude such a loss was sustained.

Second, for the reasons already expressed, there is certainly detail and specificity in plaintiff's complaint but because all that transpired between plaintiff and Quest is mostly heaped together in a single section labeled "factual allegations," with a referral to that section and a brief restatement of those allegations in the first count, it cannot be said whether plaintiff has complied with Rule 4:5-8(a). That is, as suggested earlier in this opinion, it is not sufficient for a pleader to assert every single fact or event that transpired between the parties and then leave it to the court to determine which of those facts may or may not support the cause of action. Plaintiff must be required to file an amended complaint that compartmentalizes in each surviving count those facts that support the claim asserted, rather than referring, in each count, to all the factual allegations gathered in a single place. Once such an amended complaint is produced, the trial judge will be in a better position to determine whether the CFA claim has been stated with the particularity required by Rule 4:5-8(a).

And, while our Supreme Court recognizes a "learned professional" exception to CFA claims, Macedo, 178 N.J. at 346; see also Finderne Mgmt. Co. v. Barrett, 402 N.J. Super. 546, 566-67 (App. Div. 2008), more than a claim to that status will suffice to insulate the defendant. As the Court stated in Macedo,

learned professionals are entitled to insulation from CFA liability only when they "are operating in their professional capacities." 178 N.J. at 345-46. To understand whether this exception to CFA liability applies in any case, the court must be able to understand the nature of the alleged fraudulent or deceptive practice and whether it may be fairly said to have arisen while the defendant was operating in a professional capacity. It is premature – particularly in light of the uncertainty about the nature of the claim – to attempt to decide the application of the learned professional exception here.

II

Plaintiff's second count asserts a violation of the HIPAA privacy rule or HIPAA itself or both. This claim does not state an actionable claim because it is well established that Congress did not create a private cause of action for a violation of HIPAA or its regulations. See Payne v. Taslimi, 998 F.3d 648, 660 (4th Cir. 2021); Meadows v. United Servs., Inc., 963 F.3d 240, 244 (2d Cir. 2020); Stewart v. Parkview Hosp., 940 F.3d 1013, 1015 (7th Cir. 2019); Dodd v. Jones, 623 F.3d 563, 569 (8th Cir. 2010); Seaton v. Mayberg, 610 F.3d 530, 533 (9th Cir. 2010); Wilkerson v. Shinseki, 606 F.3d 1256, 1267 n.4 (10th Cir. 2010); Acara v. Banks, 470 F.3d 569, 572 (5th Cir. 2006). Congress deliberately delegated the authority to enforce HIPAA and its regulations to the Secretary of

the Department of Health and Human Services and, therefore, should be understood as having declined to create a private cause of action here. Meadows, 963 F.3d at 244.

Since plaintiff's second count of his amended complaint asserts such a cause of action, it cannot be maintained and must be dismissed with prejudice. The third count, which alleges "negligence per se," must suffer the same fate. In that count plaintiff alleges that Quest "breached, and continue[s] to breach, the statutory duty [it] owe[s] to [p]laintiff [and others] as required by the HIPAA Privacy Rule and implementing regulations." That count must be dismissed because it merely relabels the allegation in the second count that Quest violated HIPAA, as to which there is no cognizable, private cause of action.

III

Plaintiff asserts in his fourth count that Quest "breached, and continue[s] to breach, the duty [it] owe[s] to [p]laintiff to conduct its appointment scheduling system in a manner that minimizes the possibility of [m]isdirected [n]otifications and change its company-wide policy that refuses to provide [p]rotected [h]ealth [i]nformation as required by the HIPAA Privacy Rule." We do not at this time determine whether these allegations support a cognizable cause of action. Even though, as stated in the prior section, plaintiff may not sue

for a violation of HIPAA or its regulations, we do not foreclose the use of those laws and regulations to inform any duty or standard of care that Quest may have owed plaintiff. We also do not decide at this time whether the alleged mistaken or misguided scheduling of a test creates or imposes a duty on Quest.

We believe the better course with this count is to give plaintiff the opportunity to replead with greater clarity than can presently be found in the amended complaint.

IV

Plaintiff's fifth count asserts a breach of contract and a breach of the implied covenant of good faith and fair dealing, and the sixth count asserts a breach of "contracts to process payments from third parties and respond to billing inquiries." These counts must be dismissed because there is nothing in plaintiff's allegations to suggest that the parties entered into a contract or otherwise had a meeting of the minds about any of these undertakings. To the contrary, plaintiff has alleged that Quest somehow scheduled an unwanted lab test. The only bill plaintiff claims to have received was dependent on the completion of the lab tests, which never occurred. These circumstances may give rise to causes of action, but they do not now – in their present state – suggest a breach of the contract or contracts described.

A claim alleging a breach of contract presupposes the existence of a contract. Similarly, plaintiff cannot assert a claim that Quest breached the implied covenant of good faith and fair dealing that is contained in all New Jersey contracts, see R.J. Gaydos Ins. Agency, Inc. v. Nat'l Consumer Ins. Co., 168 N.J. 255, 276 (2001), without demonstrating the existence of a contract. That a party attempts to form a contract with another through, as alleged here, the mysterious scheduling of an unwanted test, does not suggest that the two parties mutually agreed to engage in a relationship and an exchange of promises. The thrust of plaintiff's complaint is that Quest attempted to form such a relationship but plaintiff certainly appears to refute that this ever came to fruition. If there is no contract, there can be no breach of contract.

Although the allegations do not support this claim or claims, we do not foreclose plaintiff the opportunity to replead in this regard on some alternative theory.

V

In his seventh count, plaintiff alleges that Quest "breached, and continue[s] to breach, the contractual and statutory duty [] owe[d] to [p]laintiff to ***not*** retaliate against him for complaining about Quest's violations of the HIPAA Privacy Rule" (bold and italic type in the original). This claim is based

on Quest's referral of the matter to the Attorney General because it believed – as Quest argues in its merits brief – that plaintiff and his attorney "manufactured" these claims – as demonstrated by the allegation that the contact information Quest used to schedule the test is the contact information for plaintiff's attorney – "in an attempt to extort" a settlement from Quest.

Quest argues that the criminal referral it made, as well as its letters to plaintiff seeking his voluntary withdrawal of the action pursuant to N.J.S.A. 2A:15-59.1 and Rule 1:4-8, fall within the "litigation privilege." See, e.g., Loigman v. Twp. Comm., Middletown, 185 N.J. 566, 587 (2006); Hawkins v. Harris, 141 N.J. 207, 216 (1995). We agree that the actions taken by Quest in reliance on its rights under N.J.S.A. 2A:15-59.1 and Rule 1:4-8 are not actionable; indeed, plaintiff does not argue otherwise in his merits brief. We also agree with Quest that plaintiff's claim that Quest breached a contract to not retaliate may not be based on the fact that Quest made the criminal referral. Again, plaintiff's brief contains no response to Quest's arguments about the seventh count.

To be clear, we do not now decide whether or when a criminal referral may be actionable by way of a tort theory, since plaintiff has not pleaded such a claim. Plaintiff has alleged a breach of a contract, and even a liberal

interpretation of the amended complaint does not suggest the existence of a contract not to retaliate.

* * *

For these reasons, we affirm in part and reverse in part the trial court order that denied Quest's motion to dismiss. We affirm the order insofar as it denied the motion to dismiss as to the first and fourth counts, but reverse insofar as the order denied the motion to dismiss the second, third, fifth, sixth and seventh counts. In remanding for further proceedings, we direct the court to first enter an order requiring plaintiff to replead the two counts that we have not dismissed with greater clarity; Quest is not foreclosed from again moving to dismiss for failing to state a claim on which relief may be granted.

Affirmed in part; reversed in part; and remanded for further proceedings in conformity with this opinion. We do not retain jurisdiction.