Quality Health Mgt., Inc. v Healthfirst PHSP, Inc.
2019 NY Slip Op 32137(U)
July 18, 2019
Supreme Court, Kings County
Docket Number: 511345/2018
Judge: Debra Silber
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

---x

QUALITY HEALTH MANAGEMENT, INC., d/b/a QUALITY LABORATORY SERVICES,

Plaintiff,

-against-

HEALTHFIRST PHSP, INC., HEALTHFIRST HEALTH PLAN, INC., and HEALTHFIRST INSURANCE COMPANY, INC.,

Defendants.

---x

DECISION / ORDER

Index No. 511345/2018
Motion Seq. No. 2
Date Submitted: 5/9/19

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' Healthfirst PHSP, Inc., Healthfirst Health Plan, Inc., and Healthfirst Insurance Company, Inc.'s, motion to dismiss pursuant to CPLR § 3211(a)(7).

Papers	NYSCEF Doc.
Amended Notice of Motion, Affirmation and Exhibits Annexed....	72-75
Affirmation in Opposition and Exhibits Annexed.....	76-79
Reply Affirmation.....	82

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

In this action for damages arising from, *inter alia*, the termination of a contract between [participating provider] Quality Health Management, Inc. d/b/a Quality Laboratory Services (hereinafter "plaintiff" or "QLS") and [insurance company] Healthfirst PHSP, Inc., Healthfirst Health Plan, Inc., and Healthfirst Insurance Company, Inc (hereinafter "defendants"), plaintiff asserts causes of action for (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) violations of Insurance Law § 3324-a; (4) violations of Public Health Law § 4406-d; (5) antitrust

violations under General Business Law § 340; (6) prima facie tort and (7) for a declaratory judgment with regard to outstanding claims that defendants did not pay. Plaintiff has asserted in the complaint, *inter alia*, that defendant has improperly refused to pay for many thousands of blood tests plaintiff performed, as well as a claim with regard to the defendants' termination of the parties' business relationship/contract.

Defendants move, pre-answer, to dismiss plaintiff's First (partially), Second, Fifth, Sixth and Seventh Causes of Action. At oral argument, the court noted that the Seventh Cause of Action is moot, as a result of the court's August 15, 2018 order, so that cause of action is dismissed. The court declined to dismiss the branch of the first cause of action which alleges that putting plaintiff on "pre-payment review status" was a breach of the contract. This is the only part of the First Cause of Action (for breach of contract) which defendants seek to dismiss. The court also orally denied the branches of the defendants' motion addressed to the plaintiff's Second Cause of Action, for breach of the implied covenant of good faith and fair dealing, and the Sixth Cause of Action, for prima facie tort. The branch of the motion which seeks to dismiss the Fifth Cause of Action, Gen Bus Law § 340 (commonly referred to as "the Donnelly Act"), was taken on submission after oral argument and decision was reserved. For the reasons which follow, this branch of defendants' motion is granted.

Defendants contend that the complaint is deficient as plaintiff did not sufficiently plead what is required for a claim arising under Gen Bus Law § 340. In their "Memorandum of Law in Support," defendants argue that the plaintiff has failed to "plead the existence of a conspiracy or a reciprocal relationship [between two or more parties]... [and fails to] allege that any such conspiracy actually resulted in a restraint of

trade... [and that plaintiff] does not properly identify a relevant market." (NY St Cts Elec Filing [NYSCEF] Doc No. 27 at Pages 8-12). Defendants cite various decisions which apply heightened pleading standards for these claims. *Id.* It is for these reasons, defendant maintains, that plaintiff's claim under the Donnelly Act should be dismissed.

Defendants first argue that the complaint does not provide sufficient details regarding the alleged reciprocal relationship between the defendants and plaintiff's competitors, defendants' other participating laboratory providers, LabCorp and Quest Diagnostic (NYSCEF Doc No. 27). Defendants rely on the holdings in *Lopresti v Massachusetts Mut. Life Ins. Co.* (5 Misc 3d 1006(A) [Sup Ct Kings Co 2004], *affd* 30 AD3d 474 [2d Dept 2006] [a "plaintiff must do more than make a 'bare bones' allegation that such a conspiracy exists" and a plaintiff must allege "facts to support the existence of a conspiracy"]). Defendants contend that plaintiff has made only conclusory statements regarding the possibility of a conspiracy, which is insufficient due to the absence of any factual support. (NYSCEF Doc No. 27). Defendants claim that plaintiff only pleads that defendants' actions were a part of a conspiracy due to "the possibility" that Healthfirst intended to use its market pull to influence plaintiff's competitors to offer more favorable pricing to defendants and/or that termination of the contract with plaintiff will lead to a decrease in the quality of lab services to defendants' clients. (*Id.*)

Alternatively, defendants maintain that plaintiff did not adequately allege facts which establish that the applicable market was affected by defendants' actions, and that only the plaintiff was adversely affected. (*Id.*) Defendants claim that the plaintiff's allegations in this case are similar to those in *Lopresti*, where the court held that the pleading did not establish that the defendant hospital's decision to reduce the number of

retirement investment advisors available to its employees from 17 to 2 was "sufficiently unreasonable to be considered a restraint of trade under the Donnelly Act." (Id.) Defendants aver that Healthfirst removed plaintiff, one of its three participating providers, from the provider network, based upon "the conclusions by two of its committees" that plaintiff had committed fraud, and not because of a conspiracy or an intention to restrain trade or limit competition.

Finally, defendants argue that the plaintiff does not identify a relevant market in their pleadings. (*Id.*) Defendants state that "[a] relevant product market must include all products that are reasonably interchangeable and all geographic areas in which such reasonable interchangeability occurs," and that "[t]he plaintiff must explain why the market it alleges is in fact the relevant, economically significant product market." (*Id.*) Here, defendants accuse plaintiff of being too underinclusive, because plaintiff defines the market solely as Healthfirst's client base, thereby ignoring all of the other health insurance companies which plaintiff is a participating provider for, in New York City and in Nassau and Suffolk Counties. (*Id.*) Additionally, defendants rely on a decision from the U.S. District Court that establishes that "the preferences of a single purchaser cannot define a product market" (*City of New York v Group Health*, 2010 US Dist LEXIS 60196 [SD NY 2010], *affd* 649 F3d 151 [2d Cir 2011]), which establishes that Healthfirst's clients alone are not enough to establish a relevant market as is required by the statute. Defendants claim that the "[f]ailure to plead a legally sufficient product market is grounds for dismissal."

Defendants argue that any of these reasons are grounds for dismissal of the plaintiff's Donnelly Act Claim.

In response, plaintiff contends that the Second Circuit in *Wacker v JP Morgan Chase & Co.*, (2017 WL 442366, 678 Fed Appx 27 [2d Cir 2017]), held that anti-trust cases do not have a heightened pleading standard, which is a more recent case than those defendants cite, and that this court should find federal precedent to be highly persuasive in the application of the Donnelly Act. Additionally, plaintiff argues that dismissal of anti-trust cases prior to discovery should be done rarely, citing a Second Circuit decision, *Todd v Exxon Corp.* (275 F3d 191, 198 [2d Cir 2001]). Based on these holdings, plaintiff believes that its complaint is sufficient to establish a claim under the Donnelly Act. (NYSCEF Doc No. 79).

Additionally, plaintiff disputes the defendants' analogy between this case and the holdings in *Lopresti* (5 Misc 3d 1006(A) [2004]) *and Creative Trading Co., Inc. v Larkin-Pluznick-Larkin*, Inc. (75 NY2d 830 [1990]), with regard to the pleading standard for Donnelly Act claims. (NYSCEF Doc No. 79). Plaintiff argues that the plaintiffs in those cases did not specify which parties were a part of the anticompetitive conspiracy, and that is why the complaints were dismissed. (*Id.*) Here, plaintiff maintains that the complaint specifies the identity of the two parties that they allege to be part of the conspiracy. (*Id.*)

As for the "restraint of trade" requirement, plaintiff contends that it is properly pled in their complaint. (*Id.*) Plaintiff points to *New York Medscan LLC v New York Univ. Sch. of Med.* (430 F Supp 2d 140, 148 [SD NY 2006]) which states that the antitrust acts were also intended to prevent a decline in quality. (*Id.*) Plaintiff thus maintains that the complaint properly pleads the risk of decreasing the number of laboratories used by Healthfirst and the subsequent negative effect this would have on the quality of

diagnostic and laboratory services. (NYSCEF Doc No. 79).

Finally, plaintiff argues that dismissing the complaint based on Healthfirst's contention that the relevant market plaintiff identifies is underinclusive would be incorrect. (*Id.*) Plaintiff argues that "'market definition is a deeply fact-intensive inquiry, and [the court] should 'hesitate to grant motions to dismiss for failure to plead a relevant market.'" (*Todd v Exxon Corp.*, 275 F3d at 200.) Plaintiff notes that in *City of New York v Group Health Inc.*, (649 F3d at 156 [2d Cir 2011]), a case which defendants rely on, summary judgment was granted dismissing the antitrust claim after discovery, unlike this pre-answer motion. (NYSCEF Doc No. 79).

Standard of Review

In determining a motion to dismiss pursuant to CPLR 3211 (a)(7), the court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v Daimler Chrysler Corp.*, 292 AD2d 118 [1st Dept 2002]). On such a motion, the court must accept as true the factual allegations of the complaint and accord the plaintiff all favorable inferences which may be drawn therefrom (*Dunleavy v Hilton Hall Apartments Co., LLC*, 14 AD3d 479, 480 [2d Dept 2005]); *see also Leon v Martinez,* 84 NY2d 83, 87–88 [1994]; *Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]); *Dye v Catholic Med. Ctr. of Brooklyn & Queens,* 273 AD2d 193 [2nd Dept 2000]).

The standard of review on such a motion is not whether the party has artfully drafted the pleading, "but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained." (*Offen v Intercontinental Hotels Group*, 2010 NY Misc. LEXIS 2518 [2010] quoting *Stendig, Inc. v Thorn Rock Realty Co.,* 163 AD2d 46 [1st Dept 1990]; *see also Leviton Manufacturing*

Co., Inc. v Blumberg, 242 AD2d 205 [1st Dept 1997]; *Feinberg v Bache Halsey Stuart*, 61 AD2d 135, 137-138 [1st Dept 1978]; *Edwards v Codd*, 59 AD2d 148, 149 [1st Dept 1977]). If the plaintiff can succeed upon any reasonable view of the allegations, the complaint may not be dismissed. (*Dunleavy v Hilton Hall Apartments Co. LLC,* 14 AD3d 479, 480 [2d Dept. 2005]; *Board of Educ. of City School Dist. of City of New Rochelle v County of Westchester,* 282 AD2d 561, 562 [2001]). The role of the court is to "determine only whether the facts as alleged fit within any cognizable legal theory." (*Dee v Rakower*, 112 AD3d 204 [2d Dept 2013], *citing Leon v Martinez, 84* NY2d 83 at 87 [1994]).

Discussion

"An antitrust claim under the Donnelly Act, General Business Law § 340 et seq., or under its essentially similar federal equivalent, § 1 of the Sherman Act, 15 USCS § 1 et seq., must allege both a concerted action by two or more entities and a consequent restraint of trade within an identified relevant product market" (*Global Reinsurance Corp. U.S. Branch v Equitas Ltd.*, 18 NY3d 722 [2012]). To plead a cause of action for a Donnelly Act claim, the plaintiff must: "(1) Identify the relevant product market; (2) identify a conspiracy or reciprocal relationship between two or more parties; (3) describe the nature and effects of the conspiracy; (4) describe how the economic impact of the conspiracy restrained trade in the market in question or could restrain trade in the market in question. Merely claiming or even proving a form of monopoly does not demonstrate a violation of the statute without concomitant establishment of the relevant market factors" (*Benjamin of Forest Hills Realty, Inc. v Austin Sheppard Realty, Inc.*, 34 AD3d 91 [2d Dept 2006]). "The failure to allege any one of these elements is fatal to the

claim" (*Lopresti v Massachusetts Mutual Life Ins. Co.*, 5 Misc 3d 1006(A) [Sup Ct Kings Co 2004]). Additionally, "[f]or antitrust purposes, a relevant market consists of both a product market -- those commodities or services that are reasonably interchangeable, and a geographic market -- the area in which such reasonable interchangeability occurs. The plaintiff must explain why the market it alleges is in fact the relevant, economically significant product market" (*Benjamin of Forest Hills Realty, Inc. v Austin Sheppard Realty, Inc.*, 34 AD3d 91, 95 [2d Dept 2006]). Finally, plaintiff must allege an injury to the market as a whole and not merely an adverse effect upon the plaintiff in order to state a cognizable claim under General Business Law § 340 (*Id.* at 97).

Defendants contend that plaintiff's complaint is deficient, while plaintiff argues that its allegations are sufficient to justify moving forward with discovery. Plaintiff acknowledges that there is a lack of facts in its complaint but argues that conclusory allegations of law are sufficient. (Tr at 5). However, the court in *Lopresti* held that a plaintiff's Donnelly Act claim is not sufficiently pled if it is just comprised of conclusory allegations of unfair business practices that are not supported by facts. Additionally, it holds that any of the necessary elements of a claim which are not supported by facts is fatal to the claim.

Although plaintiff argues that *Lopresti* is distinguishable and should not apply here, the court finds that argument to be unconvincing. Plaintiff incorrectly believes that the complaint in that action did not specify the conspiring parties. Both complaints name the alleged conspiring parties. (*Id.*) In both cases, the plaintiff(s) alleged that the defendant and the 2 remaining firms were conspiring to eliminate competition. (*Id.*). Both complaints identified the relevant product market as the clients of a single

business. (*Id.*) Additionally, *Lopresti* has been cited and used in the application of the Donnelly Act by the Second Department in *Benjamin of Forest Hills Realty, Inc. v Austin Sheppard Realty, Inc.* (34 AD3d 91 [2006]). *Lopresti* is sufficiently similar to justify its application here.

Other courts have similarly held that, "[c]onclusory allegations of conspiracy are legally insufficient to make out a violation of the Donnelly Act." (*Yankees Entertainment & Sports Network, LLC v Cablevision Sys. Corp.*, 224 F Supp 2d 657 [SDNY 2002]). "The complaint must further allege facts to support the existence of a conspiracy." *(A&P v Town of E. Hampton*, 997 F Supp 340, 352 [ED NY 1998]). Based on these holdings, it is the opinion of the court that the complaint must provide sufficient factual allegations to support the plaintiff's claims.

Here, plaintiff's complaint begins by stating, with respect to the relevant market: (NYSCEF Doc No.1 at Pages 17-18).

> 88. The product market in this action is the market for clinical laboratory services within the Healthfirst network. That market includes everything from generic blood tests to toxicology screening and confirmation testing, which QLS is licensed to perform. This product market encompasses all of Healthfirst's 1.2 million members and thousands of participating medical providers that outsource blood testing.
>
> 89. The geographical scope of the market for clinical laboratory services within the Healthfirst network is the City of New York, Nassau County, and Suffolk County.

Even if this court looks at these allegations in the light most favorable to the non-movant, the above statements amount to nothing more than conclusory allegations of law. The "Relevant Market" requirement is not properly pled. Plaintiff does not dispute the absence of a relevant market in their complaint and, instead, requests that the court condone this and allow the case to move forward with discovery, so a relevant market

can be identified. As defendants state in their reply, plaintiffs argue that the relevant market is comprised of Healthfirst's clients who require diagnostic testing in certain areas of New York. (NYSCEF Doc No. 82). There are no facts presented to support this allegation. Additionally, plaintiff fails to allege the absence of interchangeable products or firms, such as other insurance providers with other client bases that can be tapped by plaintiff, thus limiting the market only to the clients of Healthfirst. Healthfirst is one of many insurance companies serving the New York area.

Defendants also point out that a case cited by the plaintiff explicitly states that it is appropriate to dismiss a complaint where a plaintiff "attempts to limit a product market to a single brand, franchise, institution or comparable entity that competes with potential substitutes" *citing Todd v Exxon Corp.* (275 F3d 191, 200 [2d Cir 2001]). Defendants also note that the Second Department in *Benjamin of Forest Hills Realty, Inc. v Austin Sheppard Realty, Inc.* (34 AD3d 91 [2d Dept 2006]) held that dismissal of a complaint was justified where a plaintiff's alleged market was comprised of only the business of one firm. Thus, due to the under inclusiveness of the relevant market and the absence of factual support for plaintiff's allegations, the first requirement, identification of the relevant product market, is improperly pled.

The next requirement, identification of a conspiracy, and the third, to describe the nature and effects of it, and the fourth, regarding the restraint of trade, are all similarly threadbare in plaintiff's complaint. The complaint alleges:

> 90. Upon information and belief, Healthfirst and Quest and LabCorp are conspiring to shrink the competition of clinical laboratory service providers within the Healthfirst network. Indeed, the ultimate goal of the conspiracy is to render Quest and LabCorp the exclusive providers of clinical laboratory services within the Healthfirst Network.

91. This exclusive relationship grants Healthfirst the leverage to demand lower prices for clinical laboratory testing, while providing Quest Diagnostic and LabCorp with a higher volume of business, thereby increasing their revenue.

92. This conspiracy requires the elimination of competition from smaller clinical laboratories, such as QLS. As a result of the limitation of competition, the quality of clinical laboratory testing within the Healthfirst network will decrease. Medical providers and patients who rely on the speedy reliable service provided by labs such as QLS will be left with slower moving monopolies, having an effect on both patient care and quality of life.

93. Upon information and belief, Healthfirst terminated QLS in furtherance of this scheme to restrain competition within the Healthfirst network and grant monopolies to Quest and LabCorp. (NYSCEF Doc No.1 at Page 18).

The second requirement is not supported by any facts that indicate that the defendant is conspiring with plaintiff's competitors. Plaintiff merely assumes that the contract termination was malevolent in nature. The third requirement, to describe the nature and effects of the possible conspiracy, is stated in conclusory fashion only. Furthermore, the third requirement is not met with plaintiff's claim that there will be a consequential decline in quality. The complaint argues that an increase in the number of clients at LabCorp and Quest will necessarily lead to lower quality of services but provides no facts to support this statement or to disprove the theory that LabCorp and Quest could hire more people and handle more clients. Defendants also point out the absence of any evidence manifesting a decrease in quality over the past 14 months since plaintiff's contract was terminated. With regard to the fourth requirement, the complaint is similarly deficient. Plaintiff has contracts for services with many other insurance companies. There is no case, statute, rule or regulation that requires an insurance company to offer a choice of more than two firms for lab services to its clients. Thus, the second, third and fourth requirements are met with only barebones allegations with no factual support.

Based on the absence of necessary details, this cause of action must be dismissed under CPLR 3211 (a) (7). Three of the four requirements have only been asserted with conclusory allegations of law with no factual support. Under both the federal and state standards for pleading an antitrust claim, this is insufficient.

Accordingly, the defendants' motion is granted with regard to the Fifth and Seventh causes of action, which are dismissed, and denied as to the remainder of the complaint. If plaintiff has obtained information in the past year since this action was commenced which would fill in the missing factual allegations, plaintiff may move for leave to amend its complaint.

Defendants shall answer the complaint within 30 days.

The parties shall appear in the Intake Part on September 6, 2019 for a Preliminary Conference.

This shall constitute the decision and order of the court.

Dated: July 18, 2019

ENTER:

Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court