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IN THE SUPERIOR COURT OF ATHENS-CLARKE COUNTY  
STATE OF GEORGIA

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BEVERLY LOGAN, CLERK  
CLARKE COUNTY, GEORGIA

MERCER L. COX, *et al.*  
Plaintiff,

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CIVIL ACTION NO: \_\_\_\_\_

DOCKET INITIALS

vs.

SU-04-CV-2161-S

ATHENS REGIONAL MEDICAL  
CENTER, INC.,  
Defendant.

ORDER

The above-styled case has come before the Court on Defendant's Motion to Dismiss. Having considered all pleadings submitted by the parties, as well as oral argument by counsel, it is hereby **ORDERED** that the Defendant's Motion to Dismiss be **GRANTED**.

BACKGROUND

The Plaintiffs filed a class action suit against Athens Regional Medical Center, Inc. ("Athens Regional") seeking monetary damages, injunctive and other equitable relief. (Am. Compl., p.1) Athens Regional is an Athens-based healthcare provider. It is classified as a charitable, tax-exempt nonprofit hospital system (Am. Compl., ¶ 4). Plaintiffs received treatment from Athens Regional.

Plaintiffs allege that Athens Regional charges uninsured patients grossly inflated rates for medical care as compared to the rates assessed for insured patients and patients with Medicaid and Medicare (Am. Compl., ¶ 1). Plaintiffs further allege that Athens Regional engages in these discriminatory practices despite the fact that it is a non-profit organization (Am. Compl., ¶ 4). Additionally, Plaintiffs contend that Athens Regional utilizes abusive collection practices in seeking to obtain payments for medical services (Am. Compl., ¶ 3). Finally, Plaintiffs argue that Athens Regional breached the contracts entered into with Plaintiffs that were signed at the time Plaintiffs were admitted to the

hospital by failing to charge a fair rate for medical services, and Athens Regional breached its statutory and common law duties.

Patients at Athens Regional must sign the Athens Regional Admission Consent Form prior to receiving treatment. The Consent Form reads in part:

In consideration of hospital services rendered to the patient, I jointly or severally, do hereby agree to pay Athens Regional Medical Center any and every account presented to me, or us jointly and severally, for said service or services in accordance with the rates and terms of the hospital (Am. Compl., ¶ 71).

Athens Regional charges insurance companies and other third-party payors a discounted rate for services, and charges uninsured patients a "standard," or non-discounted rate. The Consent Form does not inform patients of this disparity prior to treatment (Am. Compl., ¶ 71).

The specific causes of action brought by Plaintiffs include breach of contract, implied right of action, violation of the Georgia Uniform Deceptive Trade Practices Act (UDTPA), unjust enrichment or constructive trust, request for injunctive or declaratory relief, fraudulent concealment/misrepresentation, constructive fraud, negligent misrepresentation, breach of fiduciary duties, and negligence and negligence per se.

Plaintiff Mercer L. Cox sought treatment from Athens Regional in July of 2004 for a burn on his hand. Mr. Cox was charged \$941.60 for his treatment. He has made several payments to Athens Regional (Am. Compl., ¶¶ 36, 38, 40). Plaintiff Kimberly Hogland also sought treatment from Athens Regional. In September of 2003, Athens Regional obtained a judgment against Ms. Hogland for \$3,421.00 (Am. Compl., ¶ 43). Plaintiff Keith Hambrick received a physical examination and outpatient surgery. He applied for financial assistance from Athens Regional but was denied. His bills totaled approximately \$8,500.00. He has made payments on these bills (Am. Compl., ¶¶ 44, 45). Plaintiff Mary Sue Cox received treatment in the emergency room related to her diabetes. She was billed \$2,386.00 (Am. Compl., ¶¶ 47, 48). Plaintiff John Wilson was treated at Athens Regional. He underwent a cardiac catheterization procedure. His bills totaled over \$14,000 (Am. Compl., ¶ 49). All five Plaintiffs were uninsured at the time that they received treatment from Athens Regional, and all five Plaintiffs signed the Athens Regional Admissions Consent Form.

Plaintiffs initially filed their Complaint on November 11, 2004. Athens Regional filed an Answer, Counterclaim, and Motion to Dismiss on December 27, 2004. On March 8, 2005, Plaintiffs filed an Amended Complaint, following which Athens Regional filed an Answer and Counterclaim on March 15, 2005. Oral argument was heard on the Motion to Dismiss on March 25, 2005.

## ANALYSIS

### **A. Breach of Contract**

Plaintiffs signed a contract which reads in pertinent part:

In consideration of hospital services rendered to the patient, I jointly or severally, do hereby agree to pay Athens Regional Medical Center any and every account presented to me, or us jointly or severally, for said service or services in accordance with the rates and terms of the Hospital (Am. Compl., ¶ 71).

Since the contract fails to specify a price, Plaintiffs allege that there was an implied duty under the contract for Athens Regional to charge “no more than a fair and reasonable charge” (Am. Compl., ¶ 73), and that Athens Regional breached the contract when it charged rates that were “unfair, unreasonable, and discriminatory” that “bear no relation to the actual cost of providing such services” (Am. Compl., ¶ 74).

A contract is breached by “a party to [the contract] who is bound by its provisions to perform some act towards its consummation and who, without legal excuse on his part, and through no fault of the opposite party, declines to do so.” Douglas v. McNabb Realty Co., 78 Ga. App. 845 (1949). It is clear that Athens Regional had an express duty to render hospital services to the Plaintiffs, and it fully complied with that duty. Plaintiffs had a duty to pay for the services rendered. It is also clear from the terms of the contract that Athens Regional was to determine the rates to be charged for the services.

Plaintiffs’ breach of contract claim is based on the assertion that the express terms of the contract are to be modified by implied terms of reasonableness and of good faith and fair dealing. Plaintiffs allege that Athens Regional did not fill its obligation to charge rates in compliance with these implied terms, and that therefore Athens Regional breached its contract.

There is a duty of reasonableness for open price terms under Georgia's Commercial Code. "A price to be fixed by the seller or by the buyer means a price for him to fix in good faith." O.C.G.A. § 11-2-305(2). However, Commercial Code provisions apply to sale of goods and not to service contracts. There is no authority in Georgia that imputes the implied duty of reasonableness to the express terms of service contracts. Therefore, it is not the duty of the Courts to determine whether the rates charged were reasonable. Furthermore, this contract does not contain an open term with regard to pricing, as hospitals are required by law to furnish patients, upon request, with a written summary of charges for services rendered. O.C.G.A. § 31-7-11(a).

Plaintiffs also allege that Athens Regional breached its duty of good faith and fair dealing in charging the Plaintiffs inflated and discriminatory rates; in charging Plaintiffs higher rates than those charged to its insured patients or Medicare patients; and in using abusive collection practices to collect the charges from Plaintiffs (Am. Compl., ¶ 76).

There is a duty of good faith and fair dealing under Georgia's Commercial Code. "Every contract or duty within this title imposes an obligation of good faith in its performance or enforcement." O.C.G.A. § 11-1-203. Courts have held that "every contract . . . includes the implied duty of good faith." Fowler v. Smith, 230 Ga. App. 817 (1998). Unlike the implied duty of reasonableness, this duty applies to service contracts and sale of goods contracts. Camp v. Peetluk, 262 Ga. App. 345, 350 (2003).

Athens Regional did not breach its duty of good faith. "...It is possible to so draw a contract as to leave decisions absolutely to the uncontrolled discretion of one of the parties and in such a case the issue of good faith is irrelevant." MacDougald Const. Co. v. State Hwy. Dept., 125 Ga. App. 591, 594 (1972). "There can be no breach of an implied covenant of good faith where a party to a contract has done what the provisions of the contract expressly give him the right to do." Automatic Sprinkler Corp. v. Anderson, 243 Ga. 867, 868 (1979). The terms of the contract demonstrate that only Athens Regional was to determine the rates to be charged. It did what it was expressly permitted to under the contract. Therefore, it is impossible for Athens Regional to have breached its implied duty of good faith.

Since Athens Regional performed its duties according to the express terms of the contract, and because it did not breach any implied term of the contract, there is no valid breach of contract action.

## **B. Implied Right of Action**

Plaintiffs assert that they have implied rights of action against Athens Regional under O.C.G.A. § 48-5-40(5) and O.C.G.A. § 31-7-77 because Athens Regional used discriminatory pricing practices. This assertion is without merit because neither Code section creates a duty for Athens Regional.

First, Plaintiffs claim that O.C.G.A. § 48-5-40(5) requires Athens Regional to devote its income from paying patients to charitable purposes. This section of the revenue and taxation title of the Georgia code provides a definition of "Institutions of purely public charity," "nonprofit hospitals," and "hospitals not operated for the purpose of private or corporate profit and income." The terms are defined as:

such institutions or hospitals which may have incidental income from paying patients when the income, if any, is devoted exclusively to the charitable purpose of caring for patients who are unable to pay and to maintaining, operating, and improving the facilities of such institutions and hospitals, and when the income is not directly or indirectly for distribution to shareholders in corporations owning such property or to other owners of such property. O.C.G.A. § 48-5-40(5).

Since this is merely a definition, it does not give rise to any duty. In addition, the definition does not require income to be used for the sole "charitable purpose of caring for patients who are unable to pay," as Plaintiffs assert, but instead includes other uses for income such as "maintaining, operating, and improving the facilities of such institutions and hospitals." O.C.G.A. § 48-5-40(5).

Second, Plaintiffs claim that Athens Regional has a duty to "fix rates and charges" consistent with the Hospital Authorities Act and O.C.G.A. § 31-7-77 according to the "Lease and Transfer Agreement" between Athens Regional and the Hospital Authority of Clarke County. This argument fails because O.C.G.A. § 31-7-77 does not give any duty to the hospital. The code section states, "No authority shall operate or construct any project for profit." Clearly, the Code section refers only to the rights and duties of the Hospital Authority. Furthermore, Plaintiffs are neither parties nor third party

beneficiaries of the obligations created within the agreement. Culbertson v. Fulton-Dekalb Hosp. Auth., 201 Ga. App. 347, 349 (1991) (*rev'd on other grounds*, Lemons v. Walton County Hosp. Auth., 212 Ga. App. 369 (1994)).

Since neither Code section cited creates a duty for Athens Regional, Plaintiffs have no implied right of action against Athens Regional.

### **C. Georgia Uniform Deceptive Trade Practices Act**

Plaintiffs allege that Athens Regional engaged in deceptive trade practices by charging “inflated” rates (Am. Compl., ¶ 89). Specifically, they allege that Athens Regional violated O.C.G.A. § 10-1-372(11) and (12), which provide:

A person engages in a deceptive trade practice when, in the course of his business, vocation, or occupation, he:

(11) makes false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions

(12) engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.

The Uniform Deceptive Trade Practices Act is not applicable to this type of lawsuit. The Act was enacted to provide a remedy “to persons likely to suffer pecuniary harm for conduct involving either misleading identification of business or goods or false or deceptive advertising” (Uniform Deceptive Trade Practices Act, prefatory note (1964)). There is no conduct alleged on the record regarding misleading identification or deceptive advertising.

More specifically, Athens Regional did not violate O.C.G.A. § 10-1-372(11). This Code section was enacted to “prevent sellers from ‘luring customers with dubious representations that prices have been ‘slashed’ by large percentages, sometimes said to be forced by ‘going out of business,’ ‘removal,’ or ‘fire sales.’” . . . The goal of the statute is the protection of consumers from overreaching and fraud on the part of the sellers.” HLD Enterprises Inc. v. Michelin North America, Inc., 2004 WL 2095739 (2004). There is no indication in the record that Athens Regional made any statement concerning price reductions to Plaintiffs, let alone the type of price-slashing statement that would be sufficient to demonstrate deceptive trade practice under this statute.

Finally, Athens Regional did not violate O.C.G.A. § 10-1-372(12). The statute has not been interpreted by the Georgia Courts. However, similar statutes have been interpreted in other jurisdictions. The Court of Appeals in Minnesota interpreted the statute as requiring Plaintiffs to show that the Defendant's actions must "create a likelihood of confusion or misunderstanding as to the source, affiliation, origin, or characteristics of the goods or services . . . offered." Ford Motor Credit Co. v. Majors, 2005 WL 1021551 (2005). Plaintiffs' allegations are regarding the rates charged, and not the services offered. Therefore, this claim fails as well.

#### **D. Unjust Enrichment/Constructive Trust**

Plaintiffs' claim of unjust enrichment must fail because of the existence of a contract between the individual plaintiffs and Athens Regional (Am. Compl., ¶ 70). Georgia law is clear that the existence of a contract bars any claim of unjust enrichment. Prvor v. CCEC, Inc., 257 Ga. App. 450, 452 (2002). Consequently, Plaintiffs are not entitled to the remedy of constructive trust based on a claim of unjust enrichment.

#### **E. Fraud/Constructive Fraud**

Plaintiffs allege that Athens Regional has defrauded them by hiding the actual prices that Plaintiffs would be required to pay for medical services (Am. Compl., ¶ 107), and through their billing practices (Am. Compl., ¶112). In an allegation of fraud, a plaintiff must show some evidence in support of all five elements thereof in order to survive a motion for failure to state a claim on which relief may be granted. Lanier Home Ctr., Inc v. Underwood, 252 Ga. App. 745, 748 (2001). Specifically, a plaintiff must show: (1) a false representation made by the defendant, (2) knowledge of the false representation (scienter), (3) an intention to induce plaintiff to act or refrain from acting in reliance by plaintiff, (4) justifiable reliance by the plaintiff, and (5) damage to the plaintiff. Keller v. Henderson, 248 Ga. App. 526, 527 (2001).

Plaintiff has not alleged that Athens Regional intended to induce the Plaintiffs to receive treatment at their facility through the alleged misrepresentations or concealment. At best, Plaintiffs allege that Athens Regional intended to obtain more governmental and insurance industry subsidies and more direct profits from uninsured patients (Am.

Compl., ¶ 112). This is not sufficient to allege that Athens Regional's hidden pricing plan was intended to induce the Plaintiffs to act, but rather alleges that the pricing plan was intended to induce the government and insurance industry to act.

Additionally, Plaintiffs' Amended Complaint contains no allegation of a specific misrepresentation. Plaintiffs state, "Athens Regional also has falsely represented to Plaintiffs and the Class that, even if not given charity care, they would only be charged "fair," "reasonable," "just," and/or "customary" rates for any services and supplies they received. In fact, Plaintiffs and the Class were charged anything but "customary" or "reasonable" rates" (Am. Compl., ¶ 110). Plaintiffs have failed to allege, however, that Athens Regional has charged Plaintiffs anything other than the standard rates for the services they received. As such, the rates were "customary," and this Court finds no claim for Fraudulent Misrepresentation.

For the above-stated reasons, Plaintiffs have failed to adequately plead the required elements of Fraudulent Misrepresentation or Concealment and therefore, this allegation is without merit.

Plaintiffs' constructive fraud claim likewise fails. According to O.C.G.A. § 23-2-51(b), "Constructive fraud consists of any act of omission or commission, contrary to legal or equitable duty, trust, or confidence justly reposed, which is contrary to good conscience and operates to the injury of another." Additionally, constructive fraud is an equitable claim, and does not provide for a claim for damages. Blakey v. Victory Equip. Sales, Inc., 259 Ga. App. 34, 38 (2002). Constructive fraud is legal fraud without knowledge or scienter. Seckinger-Lee Co. v. Allstate Ins. Co., 32 F.Supp.2d 1348 (1998). Since Plaintiffs have failed to adequately allege a specific misrepresentation made by Athens Regional, the constructive fraud claim fails as well.

#### **F. Negligent Misrepresentation**

The essential elements of negligent misrepresentation are "(1) the defendant's negligent supply of false information to foreseeable persons, known or unknown; (2) such persons' reasonable reliance upon that false information; and (3) economic injury proximately resulting from such reliance." Marquis Towers, Inc v. Highland Group, 265 Ga. App. 343, 346 (2004)(citing Hardaway Co. v. Parsons, Brinckerhoff, Ouade &



Douglas, Inc., 267 Ga. 424, 426(1) (1997)). Plaintiffs have not alleged with particularity any specific fraudulent representations made by Athens Regional. Further, Plaintiffs have failed to demonstrate any reasonable reliance on the alleged misrepresentations. Plaintiffs have not alleged that they were charged anything more than the standard rates for the services rendered. As such, this claim must also fail.

#### **G. Breach of Fiduciary Duties**

Plaintiffs allege that Athens Regional, as a nonprofit charity hospital, breached a fiduciary duty owed to Plaintiffs as indigent patients by charging inflated and discriminatory rates (Am. Compl., ¶ 137). This Court is aware of no duty under Georgia law in which a hospital becomes a fiduciary. Plaintiffs do not base their arguments in Georgia law, but on persuasive authority. Even though a duty such as the one Plaintiffs describe has been established in New Jersey, this is not sufficient to establish such a duty in the state of Georgia. Under Georgia law, a hospital owes a duty of reasonable care to its patients, but not a fiduciary duty.

For the above-stated reasons, Plaintiffs have failed to adequately plead Breach of a Fiduciary Duty, and as such, this allegation is without merit.

#### **H. Negligence**

Plaintiffs allege that Athens Regional has acted negligently by utilizing discriminatory pricing tactics (Am. Compl., ¶ 142). In any claim of negligence, a Plaintiff must allege evidence of the four common elements: a duty that was breached by the Defendant, which caused damages to the Plaintiff. John Crane, Inc. v. Jones, 278 Ga. 747, 751 (2004).

This Court finds no common law duty imposed on hospitals, regardless of non-profit status, that requires hospitals to have an equivalent pricing plan for insured and uninsured patients. Although there may be damages in this case, without a duty, there can be no breach of that duty, nor causation based on the breach. As such, the other elements of negligence notwithstanding, Plaintiffs have failed to show a valid duty under Georgia law, and have not adequately plead Negligence. Therefore, this allegation is without merit.

### **I. Negligence Per Se**

Plaintiffs allege that Athens Regional is in violation of O.C.G.A. § 31-7-77, and as such has violated a statutory duty. Specifically, Plaintiffs allege that “no hospital ‘shall operate or construct any project for profit,’” and that the “hospital ‘shall fix rates and charges consistent with this declaration of policy . . .’” (Pl.’s Mem. in Opp’n to Mot. to Dismiss the Compl, p. 27)(citing O.C.G.A. § 31-7-77).

O.C.G.A. § 31-7-77 applies specifically to hospital authorities, not hospitals. O.C.G.A. § 31-7-77 (2004). Furthermore, an “Authority”, or “Hospital Authority” as defined in the chapter means any public corporation created by this article. O.C.G.A. § 31-7-71(2) (2004).

Athens Regional is a hospital supervised by the Clarke County Hospital Authority. This statute which Plaintiffs attempt to travel under is aimed at the state-created Hospital Authority, not individual hospitals. As such, this statute is not applicable, and Defendant has not violated a statutory duty.

For the above-stated reasons, Plaintiffs have failed to adequately plead Negligence Per Se, as such, this allegation is without merit.

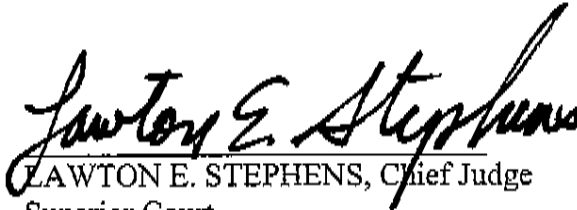
### **J. Injunctive/Declaratory Relief**

Finally, Plaintiffs assert a claim for declaratory and injunctive relief ordering Athens Regional to stop “charging the Plaintiffs and the Class inflated and discriminatory rates for medical care; charging the Plaintiffs and the Class a higher amount for medical services than its insured patients for the same services; and utilizing aggressive, abusive, and harassing collection practices such as collection lawsuits, liens, and garnishments to collect grossly inflated medical debt from the Plaintiffs and the Class” (Am. Compl., ¶ 105). Since each of Plaintiffs’ claims are hereby dismissed, they are not entitled to relief in the form of an injunction or declaration.

CONCLUSION

For the foregoing reasons, Plaintiffs' Complaint fails to state a claim upon which relief may be granted. Therefore, Defendant's Motion to Dismiss is hereby **GRANTED** and Plaintiffs' Complaint is dismissed with prejudice.

SO ORDERED this 20<sup>th</sup> day of July, 2005.

  
LAWTON E. STEPHENS, Chief Judge

Superior Court  
Western Judicial Circuit

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