IN THE CIRCUIT COURT
TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, ILLINOIS

ROBERT C. SCHMITT, on behalf of himself and all others similarly situated,

Plaintiff,

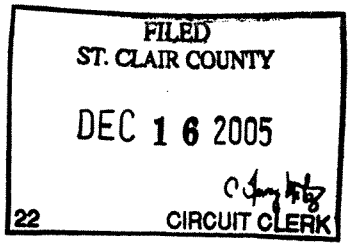
v.

ST. ELIZABETH'S HOSPITAL SISTERS OF THE THIRD ORDER OF ST. FRANCIS, d/b/a ST. ELIZABETH'S HOSPITAL,

Defendant.

Hon. Lloyd A. Cueto

Case No. 05 L 0186



ORDER OF DISMISSAL

This case coming to be heard on the motion of Defendant, St. Elizabeth's Hospital of the Hospital Sisters of the Third Order of St. Francis (incorrectly sued as St. Elizabeth's Hospital Sisters of the Third Order of St. Francis, d/b/a St. Elizabeth's Hospital) (hereinafter referred to as "St. Elizabeth's"), to dismiss the Complaint pursuant to Sections 2-615 and 2-619 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615 and 619, oral argument having been taken on December 5, 2005, and the Court being duly advised, it is hereby ordered that this case be DISMISSED, WITH PREJUDICE, for the reasons outlined below.

Under Section 2-619.1 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-619.1, a party may combine Section 2-615 and 2-619 motions to dismiss. Both types of motions to dismiss attack the sufficiency of the complaint to state a cause of action upon which relief can be granted. See Weatherman v. Gary-Wheaton Bank of Fox Valley, N.A., 186 Ill. 2d 472, 491

not admitted. E.g., Village of South Elgin v. Waste Management of Illinois, Inc., 348 Ill. App. 3d 929, 930-31 (2d Dist. 2004); Unterschuetz v. City of Chicago, 346 Ill. App. 3d 65, 68-69 (1st Dist. 2004). While the complaint's factual allegations are interpreted in the light most favorable to the plaintiff, factual deficiencies may not be cured by liberal construction. Lagen v. Balcor Co., 274 Ill. App. 3d 11, 16 (2d Dist. 1995).

A Section 2-619(a)(9) motion differs in that it presents affirmative matters that avoid the legal effect of a plaintiff's claim. E.g., Turner v. 1212 S. Michigan Partnership, 291 Ill. Dec. 476, 483 (1st Dist. 2005). Section 2-619(a)(9) thereby furnishes a mechanism for the disposition of issues of law and easily proved issues of fact and, as such, it amounts essentially to a summary judgment procedure. Id. Thus, a Section 2-619 motion should be granted if, after construing the documents supporting the motion in the light most favorable to the opposing party, there are no disputed issues of fact and the affirmative matter negates the plaintiff's cause of action completely or refutes critical conclusions of law or conclusions of material, unsupported fact. Id. Once a defendant satisfies its initial burden going forward on the Section 2-619(a)(9) motion to dismiss by demonstrating entitlement to judgment, the burden then shifts to the plaintiff, who must establish that the affirmative defense asserted either is unfounded as a matter of law or requires the resolution of an essential element of material fact before it is proven. Id. at 483-84.

Plaintiff Robert C. Schmitt ("Schmitt") was a patient at St. Elizabeth's on August 28, 2004. Complaint at 12, 35. According to Schmitt, he had no medical insurance at that time. Id. at 12, 38. Schmitt alleges that at that time he signed an agreement with St. Elizabeth's wherein he agreed "to pay for services rendered 'in accordance with the regular rates and

terms' of St. Elizabeth['s]." Id.__ at 20, 35, 52, 53.[1] St. Elizabeth's treated Schmitt in its emergency room for injuries sustained to his right foot. Id. at 35. St. Elizabeth's then billed Schmitt $580.00 for this treatment.[2] Schmitt alleges that this amount was "unreasonable, excessive, and inflated." Id. at 1, 6, 7, 57. From this, Schmitt forms three claims -- one for a breach of contract based on the agreement noted above, and two under the Illinois Consumer Fraud and Deceptive Business Practice Act, 815 ILCS 505/1 et. seq., ("ICFA").

While Plaintiff strenuously asserts that St. Elizabeth's charges for the services it provided to Schmitt (and maybe even the charges for all services rendered to all uninsured patients) are "unreasonable, excessive, and inflated," this Court need not make any such determination. That is because Plaintiff's fatal problem is that, even if his assertions are true, he could still not establish all of the necessary elements for the claims alleged in the Complaint.

With respect to the breach of contract claim in Count I, Plaintiff's fatal flaw is the lack of performance by him under any contract. In order to allege a breach of contract claim, a party must allege the existence of a contract, performance of all conditions precedent, breach by the defendant, and damages. Martin-Trigona v. Bloomington Federal Savings & Loan Association, 101 Ill. App. 3d 943 (1st Dist. 1981). Plaintiff has failed to allege that he has paid any amount to St. Elizabeth's, or even offered to pay any amount, or that St. Elizabeth's

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[1]The Complaint actually alleges that some entity named "Memorial made Plaintiff sign a series of forms including an obligation to pay all medical expenses." Complaint at ¶ 35. The Court assumes this to be a typographical error on Plaintiff's part.

[2]Again, the Complaint actually alleges that Memorial did this billing. Complaint at ¶ 35.

has undertaken any collection activities against him. And Plaintiff has also failed to rebut the affidavit submitted by St. Elizabeth's on this point. Nor has Plaintiff alleged any valid excuse for lack of performance, let alone the bases thereof. Thus, dismissal is proper under both Section 2-615 and 2-619.

Indeed, if this were a collection action brought by St. Elizabeth's against Schmitt, Schmitt has already conceded enough to establish liability for his failure to pay St. Elizabeth's for treatment that he concedes he received. Then, assuming some appropriate affirmative defense was raised by Schmitt, the Court might have cause to look into whether St. Elizabeth's charges for its services were reasonable. Alternatively, if this were a declaratory judgment action against St. Elizabeth's where Plaintiff (and perhaps the purported class) sought to pay St. Elizabeth's for treatment, then the "reasonableness" of St. Elizabeth's charges might come into play. But this case is neither. Accordingly, because St. Elizabeth's has not breached any contract with Schmitt, the breach of contract claim in Count I must be dismissed.

Plaintiff's ICFA claims are similarly flawed. To adequately plead a private cause of action for violation of Section 2 of the ICFA, a plaintiff must allege:

(1) a deceptive act or practice by the defendant;
(2) the defendant's intent that the plaintiff rely on the deception;
(3) the occurrence of the deception in the course of conduct involving trade or commerce; and
(4) actual damage to the plaintiff
(5) proximately caused by the deception.

Oliveira v. Amoco Oil Company, 201 Ill. 2d 134, 149 (2002) (citing Zekman v. Direct American Marketers, Inc., 182 Ill. 2d 359, 373 (1990)). Again, one of Schmitt's fatal errors is

that he has failed to even plead all of the required elements. Because Plaintiff has failed to allege that he has paid any amount to St. Elizabeth's, or even offered to pay any amount, or that St. Elizabeth's has undertaken any collection activities against him, he has no actual damages, and thus cannot state a claim under the ICFA. Thus, again, without the existence of all the necessary elements of an ICFA claim, there is no reason to move on to any question of the "reasonableness" of St. Elizabeth's charges.

The ICFA claims also have other flaws that merit their dismissal. Plaintiff alleges no actual misrepresentation regarding charges, and no facts creating a duty on the part of St. Elizabeth's to disclose any more details about its charges before treatment. And, of course, St. Elizabeth's does disclose its charges to any and all patients that it bills. Although, as noted above, Plaintiff asserts that the charges are "unreasonable, excessive, and inflated," this is not enough to state an ICFA claim. Even "charging an unconscionably high price is generally insufficient to establish a claim for unfairness under the Consumer Fraud Act." Saunders v. Michigan Avenue National Bank, 278 Ill. App. 3d 307, 313 (1st Dist. 1996). And Plaintiff alleges nothing further to overcome this obstacle. Plaintiff only alleges some form of price discrimination, between insured and uninsured patients, but price discrimination is not actionable under the ICFA. See Laughlin v. Evanston Hospital, 133 Ill. 2d 374 (1990); Perrin v. Pioneer National Tile Ins. Co., 83 Ill. App. 2d 664 (1st Dist. 1980); and American Top English, Inc. v. Lexicon Marketing, No. 03C7021, 2004 WL HO3695, at *5 (N.D. Ill. June 21, 2004).

WHEREFORE, Counts I, II, and III of the Complaint are dismissed, with prejudice.

Ordered,

By: _____
Hon. Lloyd A. Cueto

Dated: Dec. 16, 2005