

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

YUSUF ABDULAZIZ, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
CITY OF PHILADELPHIA, et al.	:	NO. 00-5672

MEMORANDUM AND ORDER

HUTTON, J.

June 26, 2001

Presently before this Court are the Defendant Albert M. Kligman, M.D.'s Motion to Dismiss Plaintiff's Complaint or, in the alternative, Motion for a More Definite Statement (Docket No. 5), and the Plaintiff's response thereto (Docket No. 8).

I. BACKGROUND

On October 17, 2000, the Plaintiffs, former inmates of Holmesburg prison in Philadelphia, Pennsylvania, filed the instant complaint in the Court of Common Pleas of Philadelphia County. In their complaint, the Plaintiffs accuse the City of Philadelphia, University of Pennsylvania (PENN), Johnson and Johnson, Dow Chemical Company, Albert M. Kligman, M.D. (Defendant Kligman), and Ivy Research Labs, Inc. of performing medical testing on prisoners of Holmesburg prison from January, 1961 until December, 1974. See Pl.'s Compl. ¶¶ 12, 24, 25, 35, 44, 53, 62. According to the Plaintiffs' allegations, they consented to the testing and signed waivers based upon fraudulent misrepresentations by the Defendants.

See Pl.'s Compl. ¶ 13, 17, 28, 30, 46, 55, 64. As a result of their participation, the Plaintiffs were caused physical and psychological injury, and were paid a minimal amount while the Defendants reaped large profits. See Pl.'s Compl. ¶ 12, 16, 22, 27, 30, 31, 35, 36, 37, 39, 45, 48, 51, 54, 57, 63, 66. The Plaintiffs allege that Defendant Kligman is a medical doctor specializing in dermatology who was an employee of Penn during the time period in which the human medical studies were conducted and was the individual responsible for conducting the program at the prison. See Pl.'s Compl. ¶ 53.

On November 7, 2000, this action was removed from the Court of Common Pleas of Philadelphia County to this Court. On December 7, 2000, Defendant Kligman responded to the complaint with the instant motion. In his motion, Defendant Kligman asserts that the complaint is so vague that a meaningful response cannot be formulated thereby requiring dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Alternatively, Dr. Kligman requests that this Court order the Plaintiffs to amend their complaint pursuant to Rule 12(e) of the Federal Rules of Civil Procedure to provide more details of the alleged misconduct. The Plaintiffs assert that the complaint adequately sets forth causes of action against Dr. Kligman for: (1) negligence, (2) lack of informed consent, (3) accounting, (4) fraud, and (5) unjust enrichment.

II. DISCUSSION

When considering a motion to dismiss a complaint for failure to state a claim under Rule 12(b)(6), this Court must "accept as true the facts alleged in the complaint and all reasonable inferences that can be drawn from them. Dismissal under Rule 12(b)(6) . . . is limited to those instances where it is certain that no relief could be granted under any set of facts that could be proved." Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990) (citing Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988)). The Federal Rules of Civil Procedure do not require detailed pleading of the facts on which a claim is based, they simply require "a short and plain statement of the claim showing that the pleader is entitled to relief," enough to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." See Fed. R. Civ. P. 8(a)(2) (West 2001); see also Conley v. Gibson, 355 U.S. 41, 47 (1957). A motion for a more definite statement under Federal Rule of Civil Procedure 12(e) is only "appropriate when the pleading is 'so vague or ambiguous that the opposing party cannot respond, even with a simple denial, in good faith, without prejudice to himself.'" Sun Co., Inc. v. Badger Design & Constructors, Inc., 939 F.Supp. 365, 374 (E.D.Pa. 1996).

A. Negligence

The Plaintiffs purport to have asserted a claim for negligence. Under Pennsylvania law¹, "[t]he basic elements of any negligence claim remain a duty, breach of the duty, actual loss or harm and a causal connection between the breach and the harm." Redland Soccer Club v. Dept. of the Army of the United States, 55 F.3d 827, 851 n.15 (3d Cir. 1995). In their complaint, the Plaintiffs allege that Defendant Kligman is the person in charge of the human medical experimentation program at Holmesburg prison. See Pl.'s Compl. ¶ 53. The complaint then goes on to discuss sixteen ways in which Defendant Kligman was negligent in his execution of that position. See Pl.'s Compl. ¶¶ 54(a)-(p). In addition, the Plaintiffs allege that, as a result of this negligence, they were harmed physically and psychologically. See Pl.'s Compl. ¶ 54. The Court finds that these allegations are sufficient to "give the defendant fair notice" of a negligence claim and the facts which support it.

B. Lack of Informed Consent

The Plaintiffs allege that Dr. Kligman was negligent in "[p]ermitting Plaintiffs to be tested without their informed consent." See Pl.'s Compl. ¶ 54(k). In Pennsylvania, an informed consent action lies in battery and cannot be supported based on a

¹ From the information before the Court at this time, it appears that Pennsylvania law applies. The parties have not argued otherwise.

negligence theory. See Morgan v. MacPhail, 704 A.2d 617, 620 (Pa. 1997); Shaw v. Kirschbaum, 653 A.2d 12, 15 (Pa. Super. Ct. 1994). In addition, a physician must obtain informed consent from a patient before performing a surgical or operative procedure but not in situations involving non-surgical procedures. See Morgan, 704 A.2d at 619. In the instant case, there are no allegation that a surgical or operative procedure was performed. Instead, the allegations surround the testing of medications and chemicals on the patients. See Pl.'s Compl. ¶¶ 52-55. Based upon these factual allegations, the Plaintiffs cannot support a claim for lack of informed consent.

C. Unjust Enrichment

The Plaintiffs claim that the complaint sufficiently sets forth a cause of action for unjust enrichment. To establish a claim of unjust enrichment a plaintiff must show that they have conferred a benefit on the defendant, the defendant has appreciated the benefits, and the defendant has accepted and retained the benefits making it inequitable for him to retain the benefits without payment of value to the plaintiff. See Allegheny Gen. Hosp. v. Philip Morris, Inc., 228 F.3d 429, 447 (3d Cir. 2000). In the complaint, the Plaintiffs allege that the Defendant Kligman fraudulently induced them into participating in the medical testing, Defendant Kligman reaped huge profits from the testing, and they were grossly underpaid for their participation in the

testing. See Pl.'s Compl. ¶¶ 57-59. Defendant Kligman argues that the Plaintiffs are barred from a claim of unjust enrichment because they were paid pursuant to a written contract and Pennsylvania law states that "the quasi-contractual doctrine of unjust enrichment [is] inapplicable when the relationship between the parties is founded on a written agreement or express contract." Hershey Foods Corp. v. Chapek, 828 F.2d 989, 999 (3d Cir. 1987). While Defendant Kligman is correct in his statement of Pennsylvania law, it is not clear that the parties agreement was governed by an express contract. In addition, if there was an express contract or written agreement, the Plaintiffs' allegations of fraud indicate that they intend to contest the validity of any such agreement. For the purposes of the Defendant Kligman's motion under Rule 12(b)(6), the Court finds that the Plaintiffs have put forth allegations which could support a claim for unjust enrichment.

D. Fraud

The Plaintiffs assert that the complaint contains allegations sufficient to support a claim of fraud. To make out a claim for fraud in Pennsylvania, the Plaintiff must show "(1) a representation []; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intention of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) a resulting injury

proximately caused by the reliance." Gibbs v. Ernst, 647 A.2d 882, 889 (Pa. 1994); see also Cooney v. Booth, 198 F.R.D. 62, 66 (E.D.Pa. 2000). In their complaint, the Plaintiffs allege that "Defendant Kligman fraudulently represented to Plaintiffs that they would benefit financially from the human medical testing and that the chemicals and medicines used were harmless." See Pl.'s Compl. ¶ 57. These allegations sufficiently set forth that there was a representation; the nature of the chemicals being tested would certainly be considered material to the transaction at hand; that the representation was done purposely by the Defendant to mislead the Plaintiffs; that the Plaintiffs justifiably relied on the misrepresentation; and the Plaintiffs were injured as a result of that reliance. The Court finds that the allegations set forth a cause of action for fraud.

The Defendant argues that the allegations of fraud are not specific enough to meet the pleading requirements of Federal Rule of Civil Procedure 9(b). Rule 9(b) provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." Fed. R. Civ. P. 9(b) (West 2001). The purpose of Rule 9(b) is "to place the defendant on notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior." Seville

Indus. Machinery Corp. v. Southmost Machinery Corp., 742 F.2d 786 (3d Cir. 1984), cert. denied, 469 U.S. 1211, 105 S.Ct. 1179, 84 L.Ed.2d 327 (1985). As long as there is precision and some measure of substantiation in the allegations, the complaint must stand. See Seville, 742 F.2d at 791. Although date, place, or time allegations will provide precision, substantiation, and notice, "nothing in the rule requires them." Id. In the instant complaint, the Plaintiffs do make clear the what (misrepresentations about the financial benefit and the chemicals and medicines), when (between 1960 and 1974), and where (Holmesburg Prison) of the alleged fraud. Certainly, Defendant Kligman is aware of whether he took part in the medical testing, whether he told the subjects that the chemicals were harmless, and whether he told the subjects they would benefit financially when he knew they it was untrue. The Court finds that the allegations of fraud are sufficient to satisfy the pleading requirements of Rule 9(b) and survive the Defendant's motion to dismiss.

E. Accounting

The Plaintiffs also assert that their complaint sets forth a valid claim for an accounting. "An accounting is an essentially equitable remedy, the right to which arises generally from the defendant's possession of money or property which, because of some particular relationship between himself and the plaintiff, the defendant is obliged to surrender." American Air Filter Co. v.

McNichol, 527 F.2d 1297, 1300 (3d Cir. 1975). Pennsylvania courts have held that an accounting is improper unless a fiduciary relationship exists between the parties, there are allegations of fraud, there are mutual or complicated accounts, or there is no adequate remedy at law. See Rock v. Pyle, 720 A.2d 137, 142 (Pa. Super. Ct. 1998). The Plaintiffs' complaint does, in fact, contain allegations of fraud. For that reason, the Court finds that there is a possibility that an accounting will be appropriate and will not dismiss this claim at this time.

F. Federal Rule of Civil Procedure 9(f)

In one last attack on the complaint, Defendant Kligman argues that the complaint fails to satisfy the pleading requirements of Federal Rule of Civil Procedure 9(f). Rule 9(f) states that "[f]or the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter." Fed. R. Civ. P. 9(f) (West 2001). It is generally understood that "Rule 9(f) does not require the pleader to set out specific allegations of time and place; it merely states the significance of these allegations when they actually are interposed." 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1309 (2d ed. 1990); see also Borrell v. Weinstein Supply Corp., No.CIV.A.94-2857, 1994 WL 530102, at *8 n.4 (E.D.Pa. Sept. 27, 1994). Defendant Kligman's argument attacks the lack of specific time allegations but does not

implicate any of the allegations actually set forth by the Plaintiffs. Therefore, the Court rejects Defendant Kligman's reliance on Rule 9(f).

III. CONCLUSION

For the foregoing reasons, the Court denies the Defendant Kligman's motion to dismiss as it relates to the Plaintiffs' claims for negligence, unjust enrichment, fraud, and an accounting and grants the motion to dismiss as it relates to a claim based upon a lack of informed consent. In addition, as the Court has found that the complaint sufficiently informs Defendant Kligman of the claims against him, the Court denies his motion for a more definite statement pursuant to Federal Rule of Civil Procedure 12(e).

An appropriate Order follows.

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O R D E R

AND NOW, this 26th day of June, 2001, upon consideration of the Defendant Albert M. Kligman, M.D.'s Motion to Dismiss Plaintiff's Complaint or, in the alternative, Motion for a More Definite Statement (Docket No. 5), and the Plaintiff's response thereto (Docket No. 8), IT IS HEREBY ORDERED that the Defendant's motion is **DENIED IN PART and GRANTED IN PART.**

IT IS FURTHER ORDERED that:

1. Defendant's motion to dismiss the Plaintiffs' claims for negligence, unjust enrichment, fraud, and an accounting is **DENIED;**
2. Defendant's motion to dismiss the Plaintiffs' claim based upon a lack of informed consent is **GRANTED;**
3. Plaintiffs' claim based upon a lack of informed consent is **DISMISSED;** and
4. Defendant's motion for a more definite statement is **DENIED.**

BY THE COURT:

HERBERT J. HUTTON, J.