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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

AMANDA VAN BRAKLE
Plaintiff

CLEVELAND CLINIC FOUNDATION
Defendant

Case No: CV-20-936348

Judge: JOHN P O'DONNELL

JOURNAL ENTRY

DEFENDANT THE CLEVELAND CLINIC FOUNDATION'S MOTION TO DISMISS THE AMENDED COMPLAINT, FILED 11/03/2020, IS DENIED.

O.S.J.

Judge Signature Date

1/14/2021

01/14/2021

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

AMANDA VAN BRAKLE, *etc.*	)	**CASE NO. CV 20 936348**
	)	
Plaintiff	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs.	)	**JUDGMENT ENTRY DENYING THE DEFENDANT'S MOTION TO DISMISS THE AMENDED COMPLAINT**
	)	
THE CLEVELAND CLINIC FOUNDATION	)	
	)	
Defendant.	)	

John P. O'Donnell, J.:

Plaintiff Amanda van Brakle filed an amended complaint against the defendant The Cleveland Clinic Foundation alleging violations of the Ohio Consumer Sales Practices Act. The amended complaint seeks not only individual relief for van Brakle, but also certification as a class action for all others similarly situated under Rule 23 of the Ohio Rules of Civil Procedure.

The Cleveland Clinic Foundation has now moved under Civil Rule 12(B)(6) to dismiss the amended complaint for failure to state a claim upon which relief can be granted. The motion is fully briefed and, for the reasons given below, is denied.

THE FACTS

A court considering a motion to dismiss under Civil Rule 12(B)(6) is obligated to accept as true the facts set forth in the complaint and reasonable inferences therefrom. *Kish v. Magyar*, 11th Dist. No. 2015-A-0059, 2016-Ohio-7355, ¶24. Accordingly, this summary of the amended complaint's allegations assumes the events happened as van Brakle describes them.

Amanda van Brakle went to a Cleveland Clinic facility in Lakewood on August 24, 2018, for radiology imaging services,[1] apparently on the order of Habibeh Gitiforooz, M.D.[2] No physician, however, was involved in administering the imaging test.

At no time before the services were provided did the Cleveland Clinic inform her that she was entitled to an estimate of the cost of the procedure nor was she given any estimate of the cost.

Upon the defendant's request, at the appointment van Brakle made a $25 payment toward the total cost of the service. She was not given a receipt for that payment. Over time, van Brakle made more partial payments so that eventually she paid $288 toward the bill for the August 24 service. Yet the Cleveland Clinic never provided receipts for those payments nor did it apply all of the payments to the balance owed for the August 24 radiology services, instead crediting them to a balance owed for different services. By the end of 2018 the defendant retained a debt collector to pursue van Brakle for full payment of an overinflated balance due for the August 24 service.

THE CAUSES OF ACTION

Ohio's CSPA is codified at section 1345.01 *et seq*. of the Ohio Revised Code. The law applies to "consumer transactions," defined to include a service to an individual for purposes that are primarily personal, and it prohibits a corporation engaged in the business of consumer transactions from committing unfair or deceptive acts in connection with such a transaction. See R.C. 1345.01(A) and 1345.02(A).

[1] Her amended complaint does not describe the particular service but it is assumed to be an x-ray, ultrasound, CT scan, MRI or other imaging test.
[2] See amended complaint, page 13, ¶61.

Pursuant to R.C. 1345.01(A), the CSPA does not cover transactions between physicians and patients, but that exception does not expressly include hospitals or clinics, both of which are not mentioned anywhere in R.C. Chapter 1345.

The amended complaint has two causes of action. Count one alleges that the defendant's failure to provide receipts violated the Ohio CSPA. Count two claims a CSPA violation for the Cleveland Clinic's failure 1) to notify patients of their right to a pre-service estimate and 2) to provide such an estimate.

The CSPA does not define "unfair" and "deceptive" acts, but the law does authorize the attorney general to maintain a record of court judgments and the attorney general's opinions that declare specific acts or practices as violations of the statute, and to adopt substantive rules – published in Chapter 109:4 of the Ohio Administrative Code – defining specific acts or practices as violations of the statute. Once a practice has been so declared to be unfair or deceptive, then R.C. 1345.09(F)(2) provides for recovery of attorney's fees if the act was knowingly committed. The plaintiff's amended complaint alleges that the Cleveland Clinic was on notice through the regulations codified in the O.A.C. that its practices were unfair or deceptive and therefore van Brakle seeks attorney's fees in addition to damages. She is also asking that the Cleveland Clinic be enjoined from continuing the unfair and deceptive practices.

THE DEFENDANT'S MOTION TO DISMISS

By its motion to dismiss, the Cleveland Clinic gives several reasons why the amended complaint should be dismissed. The defendant's overarching justification for dismissal is that the service it provided to van Brakle is not a "consumer transaction" covered by the CSPA since R.C. 1345.01(A) excludes transactions between "physicians" and their patients.

Second, the clinic claims that the sections of the Ohio Administrative Code the plaintiff relies on to support her claim that the clinic's practices were unfair or deceptive do not apply to the provision of medical imaging services.

Third, the defendant posits that a separate part of the Ohio Revised Code – section 5162.80 – required medical providers to provide a pre-service good faith estimate of the charge for the service that is less detailed than what the administrative code requires, and so the administrative rule has no application to van Brakle's transaction because the legislature did not delegate to the attorney general any authority to regulate "medical billing."

Fourth, the clinic claims that the conduct alleged in the amended complaint that does not fall within a rule or statute – namely, the clinic's failure to credit van Brakle with a payment she made – is neither unfair, deceptive or unconscionable as contemplated by the CSPA because there is no way that van Brakle could have been misled about the services she had received by the fact that the clinic wasn't crediting her for money paid.

Last, the defendant argues that even if other portions of the amended complaint withstand its motion to dismiss, this case cannot be pursued as a class action because the plaintiff has not alleged facts showing that the clinic was on notice that its conduct was deceptive or unconscionable, and such notice is a necessary predicate to potential class liability.

DISCUSSION

The CSPA does not exclude transactions between patients and hospitals or clinics

R.C. 1345.01 provides, in pertinent part:

> (A) "Consumer transaction" means … a service… to an individual for purposes that are primarily personal, family, or household... "*Consumer transaction*" *does not*

include transactions between … attorneys, *physicians*, or dentists *and their* clients or *patients*[.]

(Emphasis in italics added.)

Unquestionably, then, the CSPA does not cover a physician's provision of service to a patient. But the amended complaint does not allege that the plaintiff was provided service by a physician. In fact, at page 8, paragraph 32, of the amended complaint, van Brakle specifically avers that "[t]he transaction between van Brakle and the CCF was not a transaction between a patient and physician."

It is a settled principle of statutory construction that words used in a statute are to be given their plain and ordinary meaning. *Plush v. City of Cincinnati*, 1st Dist. No. C-200030, 2020-Ohio-6713, ¶21. The plain and ordinary definition of "physician" in the context of the CSPA is "a person skilled in the art of healing." *Chiropractic Clinic of Solon v. Kutsko*, 92 Ohio App. 3d 608, 611 (8th Dist. 1994). "Physician" has also been defined as a practitioner of medicine; a person duly authorized or licensed to treat diseases; and one lawfully engaged in the practice of medicine. *Id.* What these definitions have in common is that they all apply only to an individual person, i.e. a human being. The Cleveland Clinic Foundation is not a human being; it is a corporate entity clearly outside of the definition of "physician" as commonly understood.

Not only does the plain language of the statutory exemption not include hospitals and clinics, but The Cleveland Clinic misapprehends the decisional authority it cites for the proposition that hospitals and clinics are beyond the CSPA's reach.

According to the defendant, in *Chiropractic Clinic of Solon*, supra, The Eighth District Court of Appeals held that a clinic composed of physicians is exempt from the CSPA. Yet a reading of that case reveals no such holding.

Chiropractic Clinic of Solon began when a chiropractic clinic sued its patient to collect on an unpaid bill. Both sides agreed that the bill was for treatment provided by a chiropractor. The defendant filed a counterclaim under the CSPA, which the clinic moved to dismiss "on the grounds that chiropractic treatments are not 'consumer transactions' subject to the CSPA." *Id.*, 610. The trial court granted the motion to dismiss and the consumer/patient appealed. The court of appeals noted that the "issue presented by the instant case is whether licensed doctors of chiropractic are 'physicians' as that term is used" in the CSPA. *Id.* Thus, the CSPA was held inapplicable to the transaction in that case because chiropractors were deemed to be within the statutory definition of "physician" and not because the clinic itself was considered to be covered by the physician exception to the CSPA. Here, unlike in *Chiropractic Clinic of Solon*, there is no allegation that any kind of physician provided service to van Brakle.

The Cleveland Clinic also cites to *Reuss v. First Financial Collection Co.*, S.D. Ohio 1-08-CV-697, 2009 U.S. Dist. LEXIS 115624, in support of the proposition that a "group of physicians" is exempt from the CSPA. Yet the case says no such thing. *Reuss* was a lawsuit by a patient of Qualified Emergency Specialists, Inc. against QESI and its collection agency for the unlawful collection of a debt that no longer existed. The complaint included a CSPA cause of action.

QESI moved for summary judgment on the CSPA claim based on the physician exemption in R.C. 1345.01(A). In its opinion, the court acknowledged that the Eighth District Court of Appeals, in 1994, held that a law firm, as an entity, is not subject to the CSPA because of the attorney exemption. The judge then mused:

> If an attorney is exempt, and a group of attorneys is exempt, and a physician is exempt, why is not a group of physicians exempt? *Reuss*, *6.

The court found the answer to its question in another precedent that rejected the application of the physician exemption to non-physicians, including "a service provider such as a hospital." *Foster v. D.B.S. Collection Agency*, 463 F. Supp. 2d 783, S.D. Ohio No. 01-CV-514 (2006). Thus, in *Reuss*, a summary judgment was actually denied to a medical service provider making the exact argument that The Cleveland Clinic makes here.

A hospital or clinic is not unambiguously excluded from the Ohio Administrative Code's rules

As mentioned, the amended complaint describes the unfair or deceptive trade practices as The Cleveland Clinic's failure to abide by requirements of the Ohio Administrative Code. In particular, van Brakle cites to O.A.C. 109:4-3-05 and 109:4-3-07.

In summary, the relevant parts of O.A.C. 109:4-3-05 provide that it is a deceptive act for the supplier[3] of a service 1) to fail to notify a consumer that she has a right to an estimate for any service that will cost more than twenty-five dollars and 2) to fail to provide an estimate upon request. Additionally, O.A.C. 109:4-3-07 prohibits a supplier from accepting a deposit without giving the consumer a receipt.

The Cleveland Clinic asserts that "nothing in [the language of the rules] indicates or even suggests that the regulations apply to medical billing for health care providers." Motion to dismiss, p. 7.

Chapter 109:4 of the Ohio Administrative Code consists of the procedural and substantive rules adopted by Ohio's attorney general under the rulemaking authority set forth in R.C. 1345.05(A). The purpose of the rules is to define with reasonable specificity unfair and deceptive acts and practices under the CSPA. O.A.C. 109:4-3-01(A)(2)(a).

In other words, the rules apply to consumer transactions.

[3] A "supplier" includes a corporation effecting a consumer transaction. R.C. 1345.01(B) and (C).

As already explained, the Ohio Revised Code does not exempt hospitals and clinics from the CSPA. Therefore, the O.A.C.'s substantive regulations covering consumer transactions must also apply to hospitals and clinics.

Yet the defendant argues that estimates and receipts can't possibly be produced by health care providers because cost of a service "is contingent upon which services are ultimately provided over the course of treatment" and whether insurance will cover the cost. Mtn. to dismiss, p. 7. But here, the plaintiff alleges she went to the defendant for an imaging test. It appears the test was by an out-patient appointment and not in an emergency. It is reasonable to infer that the test was of a kind frequently performed by the hospital. Keeping in mind that the service van Brakle was provided was only the administration of the exam, and not the interpretation of the images produced by it, this is the very definition of a routine test and there is nothing about it that prevented the Cleveland Clinic from knowing its approximate cost in advance and offering van Brakle a pre-service estimate based on that anticipated cost.

And the possibility that insurance would pay the hospital's bill doesn't change anything. If van Brakle went to the Cleveland Clinic on August 24 uncertain whether her health insurance carrier would cover all or some of the imaging services then the clinic simply had to inform her of the estimated cost to her assuming insurance did not apply. The Cleveland Clinic could also have calculated the cost to her assuming insurance did apply. Or, for this non-emergency service, The Cleveland Clinic could have insisted that the existence or not of insurance be determined with certainty before scheduling the procedure. Moreover, by giving van Brakle a pre-service estimate on the assumption that insurance would not cover the cost – the worst-case scenario from her perspective – the defendant could satisfy its O.A.C. obligation by assuring that

the ultimate cost *to her*, barring complications or an unrealistically low estimate, would never exceed the estimate.

Ultimately, The Cleveland Clinic assesses fees to patients or insurance carriers or both, and – especially at this stage of the lawsuit – there is no evidence to show that the assessments that are apparently only made *after* a service is rendered cannot just as easily be made *before* the service is provided.

The "medical billing" statute at R.C. 5162.80 does not exempt the Cleveland Clinic from the CSPA or the O.A.C.

As further support for its claim that the CSPA and the Ohio Administrative Code's rules do not apply to it, The Cleveland Clinic argues that Ohio's legislature chose to regulate "medical billing" through the 2015 enactment of R.C. 5162.80, and the O.A.C. does not apply because it is in "conflict with" that statute (mtn. to dismiss, p. 9).

There are two problems with this argument.

Initially, in February 2020, R.C. 5162.80 was found to be unconstitutional because it was enacted without the requisite minimum separate considerations by the legislature. *Cmty. Hosps. & Wellness Ctrs. v. State*, 6th Dist. No. WM-19-001 and 002, 2020-Ohio-401. If the statute is not enforceable because it is unconstitutional then it cannot "conflict with" and preempt the rules in the O.A.C.

Additionally, if it were still enforceable, there is no reason to conclude that R.C. 5162.80 was intended to preclude any other regulation of hospitals' pre-service obligations to provide their patients with a cost estimate. R.C. 5162.80 provides, in pertinent part:

> A provider of medical services … shall provide in writing, before … services or procedures are provided, a reasonable, good-faith estimate of all of the following for the

provider's non-emergency … services or procedures:…The amount the provider will charge the patient or the consumer's health plan issuer for the … service or procedure[.]

Contrary to the Cleveland Clinic's argument that the kind of estimate described here is vastly different from the estimate required by O.A.C. 109:4-3-05(A)(1), the statute and the rule place essentially the same burden on the hospital: the statute requires a "good-faith estimate" of "the amount the provider will charge the patient" and the rule obligates the hospital – only upon request after notification of the right to get an estimate –to provide "the anticipated cost of the service." On the bare evidentiary record here I cannot find such a difference between the two requirements as to find a purpose in the statute to preclude the application of the rule to hospitals.

A plaintiff is permitted the opportunity to prove that a practice not previously declared as unfair or deceptive by case law, statute or rule is, in fact, unfair or deceptive

The defendant also argues that van Brakle's claim that its failure to apply her deposits to the bill for radiology services, as she intended, cannot support a claim for a CSPA violation because it is not set out in either the CSPA or the O.A.C. as an unfair or deceptive act, nor could it have possibly misled her about the nature of the service the defendant provided to her. (See, generally, mtn. to dismiss, p. 11-13.)

The CSPA itself sets forth very few *per se* unfair or deceptive trade practices. To name a few: the failure of a supplier to have the requisite license or registration (R.C. 1345.02(G)); certain conduct by a hearing aid dealer or audiologist (R.C. 1345.31); non-compliance with R.C. 1345.76 concerning the sale of a car bought back by the manufacturer because of a warranty violation or R.C. 1345.81 concerning the use of original replacement parts in car repair; and violations of R.C. 1345.91 through 1345.93 governing the sale and repair of assistive devices for people with disabilities. Moreover, R.C. 1345.02(B) lists ten practices that are deceptive, but explicitly states that the list does not limit the scope of unfair or deceptive trade practices. In other words, the law

anticipates that it is impossible to foresee every consumer transaction that may be unfair or deceptive, leaving that determination to the finder of fact.

The amended complaint's allegations do not defeat the possibility of class relief

Where a supplier has committed an unfair or deceptive trade practice, R.C. 1345.09(B) allows for a consumer to pursue a class action as follows:

> Where the violation was an act or practice declared to be deceptive or unconscionable by rule adopted under division (B)(2) of section 1345.05 of the Revised Code before the consumer transaction on which the action is based, or an act or practice determined by a court of this state to violate section 1345.02, 1345.03, or 1345.031 of the Revised Code and committed after the decision containing the determination has been made available for public inspection under division (A)(3) of section 1345.05 of the Revised Code, the consumer may . . . recover damages or other appropriate relief in a class action under Civil Rule 23, as amended.

Thus, there are only two circumstances which would allow for the possibility of a class action. First, if the conduct alleged by the plaintiff was an act declared by Ohio's attorney general to be deceptive or unconscionable through the adoption of a substantive rule in the Ohio Administrative Code. Second, if an Ohio court has found that the act or practice complained of is unfair, deceptive or unconscionable.

In interpreting this statute, The Ohio Supreme Court said:

> A consumer may qualify for class-action certification under Ohio's Consumer Sales Practices Act only if the defendant's alleged violation of the Act is substantially similar to an act or practice previously declared to be deceptive by one of the methods

identified in R.C. 1345.09(B). *Marrone v. Philip Morris USA, Inc.*, 110 Ohio St. 3d 5, 2006-Ohio-2869, syllabus.

In this case, van Brakle argues that the "receipt rule" at O.A.C. 109:4-3-07 constitutes a declaration by the Ohio Attorney General sufficient to notify The Cleveland Clinic that the conduct alleged in this case was deceptive or unconscionable.

O.A.C. 109:4-3-07 was adopted by the attorney general under the statutory authority of R.C. 1345.05 and it was in effect well before 2018. The rule says that it "shall be a deceptive act or practice in connection with a consumer transaction for a supplier to accept a deposit unless . . . at the time of the initial deposit the supplier [provides] to the consumer a dated written receipt." This exact conduct is alleged in the amended complaint to support the claim that the defendant did not properly credit payments, with the implication that a proper receipt would have allowed van Brakle – and the other members of the proposed class – to see that payments were not being applied to the correct account. Accepting these contentions as true, they are sufficient to support a class action claim.

CONCLUSION

Upon a consideration of the defendant's motion to dismiss the amended complaint, the plaintiff's brief in opposition to the motion, the defendant's reply brief in support of the motion, and the relevant statutes, rules and case law, the motion to dismiss is denied.

IT IS SO ORDERED.

Judge John P. O'Donnell

1/14/2021
Date