

PRESENT: Hon. HON. CHARLES E. RAMOSPART 53

Justice

ANONYMOUS

- v -

CUS

INDEX NO.

604804/99

MOTION DATE

MOTION SEQ. NO.

009

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: ☒ Yes ☐ NoUpon the foregoing papers, it is ordered that ~~this motion~~

*the decision dated November 26, 2003
is hereby vacated and superceded by this
decision and order.*

FILED

DEC 10 2003

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO

JUSTICE

DATED: _____

Dated: 12/9/03Check one: ☐ FINAL DISPOSITIONHON. CHARLES E. RAMOS J.S.C.☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION

-----X
ANONYMOUS, on behalf of himself and all others
similarly situated,

Plaintiff,

Index No. 604804/99

- against -

Corrected Opinion
and Order

CVS CORPORATION, CVS COLUMBUS PLACE, L.L.C.,
TRIO DRUGS CORP. and GERALD HINDERSTEIN,

Defendants.

-----X

Charles Edward Ramos, J.S.C.:

In motion sequence 008, plaintiff moves pursuant to CPLR 2221 to reargue this Court's Decision and Order of February 27, 2003. In motion sequence 009, defendants CVS Corporation and CVS Columbus Place L.L.C. (CVS) move and defendants Trio Drugs Corp. (Trio) and Gerald Hinderstein cross-move pursuant to CPLR 3212 to dismiss plaintiff's claims.

The background of this action is fully discussed in the Decisions and Orders of March 1, 2001 and March 28, 2001 and shall not be repeated here. However, some procedural history is necessary. Plaintiff originally brought eleven causes of action against the defendants: (1) against all defendants for violation of prescription refill transfer regulations, 8 NYCRR §63.6(a)(8); (2) against all defendants for violation of Public Health Law §18(6); (3) against Trio and Hinderstein for breach of fiduciary duty; (4) against CVS for inducing breach of fiduciary duty; (5) against Trio for breach of implied contractual duty of confidentiality; (6) against CVS for tortious interference with implied contractual duties; (7) against Trio and Hinderstein for

violation of Public Health Law Article 27-F; (8) against CVS for violation of Public Health Law Article 27-F; (9) against Trio and Hinderstein for negligence in the disclosure of confidential information; (10) against all defendants for violation of General Business Law § 349; and (11) against all defendants for injunctive relief, preventing further disclosure of confidential patient information without notice and consent, requiring the return of all information to the patients, deletion of information from the CVS database and barring CVS from purchasing or receiving confidential prescription information from independent pharmacies or pharmacists without prior notice and consent.

In its decision and order of March 1, 2001, this court dismissed plaintiff's first, second, seventh and eighth causes of action based upon Public Health Law and 8 NYCRR §63.6(a)(8). The claims for breach of fiduciary duty and negligence against Trio and Hinderstein, breach of implied contractual duty against Trio, inducement of breach of fiduciary duty and tortious interference with implied contractual duties against CVS, and violation of General Business Law §349 and injunctive relief against all defendants, survived. All these claims have as their basis, 8 NYCRR §29.1(a) and b(8) which define the duty of health care professionals, including pharmacists, to keep personally identifiable information confidential. Further, in the class certification order of February 27, 2003, the court held that in order to maintain this action, as a class action, plaintiff must

opt to pursue only nominal damages and injunctive relief, which plaintiff did.

Reargument

The motion to reargue is granted and upon reconsideration this Court stands by its original decision. The Court in its decision and order of February 27, 2003, held that individual inquiries would be necessary to determine if CVS induced each individual independent pharmacy into breaching the implied duty of confidentiality. Plaintiff argues that the Court overlooked his General Business Law §349 claim in its decision and order, limiting plaintiff's class. Plaintiff contends the court only addressed the issue of CVS's inducement of Trio to withhold notice and consent to the sale of the prescription information. However, plaintiff explains that inducement is not an element of a General Business Law §349 claim because inducement is the intentional procuring of a breach of contract or duty and intent is not required under §349, citing *People v General Electric Co.*, 302 AD2d 314 (1st Dept 2003).

The threshold element of a §349 claim is a deceptive practice. *Stutman v Chemical Bank*, 95 NY2d 24 (2000). It is uncontroverted that CVS was not a party to the implied contracts or fiduciary duty between the independent pharmacies and its customers and that CVS had no duty to inform the customers of the file-buy transaction, or to acquire consent.¹ Therefore, since

¹In fact, until the transaction was completed CVS would not even know the identities of the customers.

CVS had no duty to give notice or acquire consent, the lack of notice and consent cannot be a deceptive act on the part of CVS. It is also uncontroverted that Education Law §6812 authorizes a discontinuing pharmacy to sell its prescription records to another registered pharmacy, and 8 NYCRR § 29.1(a) and (b) (8) only prescribe disclosure of personal information without consent. Therefore, the purchase of the records in and of itself is not deceptive act on the part of CVS (as stated above CVS has no duty to give notice or acquire consent). The only alleged act on the part of CVS that could be considered deceptive is its inducement of the independent pharmacies not to provide notice, which is exactly what this Court determined, in its decision and order of February 27, 2003, which would require individual inquires into each individual transaction.²

Summary Judgment

CPLR 3212(b) provides that a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." Summary judgment is warranted where the movant has tendered sufficient evidence to establish entitlement to such relief. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985). Failure to provide sufficient evidence requires denial of the motion, regardless of the sufficiency of the opposing

²Although both parties address the issue of damages on reargument, the issue will be fully discussed in the summary judgment portion of this decision.

papers. *Id.* at 853. Once a movant has made such a showing, the party opposing the motion has the burden of producing evidentiary proof sufficient to raise triable issues of fact. *Zuckerman v City of New York*, 49 NY2d 557 (1980). Speculations as to what would "doubtless" appear at the trial are patently inadequate to establish the existence of a factual issue. *Id.* at 563. It is elementary that conclusory assertions will not defeat summary judgment. *Freedman v Chemical Constr. Corp.*, 43 NY2d 260, 264 (1977). To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. *DeMenna & Sons, Inc. v City of New York*, 301 NY 118 (1950). This drastic remedy should not be granted where there is a doubt as to the existence of triable issues or where the issue is "arguable." *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). Issue finding, rather than issue determination, is the key in summary judgment cases. *Id.* at 404. It is not enough that the party opposing summary judgment insinuates that there might be some question with respect to a material fact in the case but it is imperative that the party demonstrate, by evidence in admissible form, that an issue of material fact exists. *Ellen v Lauer*, 210 AD2d 87, 90 (1st Dept. 1994).

Further, under CPLR 3212 (b) when one party moves for summary judgment any party is entitled to summary judgment and the court may grant such a judgment without the necessity of a cross-motion. "Thus, a motion for summary judgment, irrespective of by whom it is made, empowers a court . . . to search the

record and award judgment where appropriate." *Grimaldi v Pagan*, 135 AD2d 496 (2d Dept 1987).

Fiduciary Duty

All the remaining claims turn on the existence and scope of a pharmacist's fiduciary duty to its customers. It is undisputed that Trio sold its records to CVS without prior notice to its customers. Therefore, the threshold issue of this action is whether the duty of a pharmacy to keep its patients information confidential is violated when a pharmacy sells its customers' prescription information without prior notice to or consent of its customers. Plaintiff argues that there are questions of fact as to the scope of a pharmacy's duty of confidentiality. However, "the existence and scope of an alleged tortfeasor's duty is, in the first instance, a legal question for determination by the court." *DiPonzio v Riordan*, 89 NY2d 578 (1997).

As for the existence of the duty, this Court has already determined that there exists a fiduciary duty between a pharmacist and its customers.

"It is true that the same level of dependency typically found in a physician-patient relationship is not involved in a pharmacist-customer relationship. However, in order for customers to receive reliable advice from their pharmacist, they must disclose the most personal kind of information not generally required in other transactions involving the sale of a product and they are often the last health care professional a patient may have contact with before treatment, i.e., pharmaceutical drugs are administered. Contrary to defendants' contentions, the prescription decision and the therapeutic relationship with the physician do not always end once a customer

reaches a pharmacy. Because pharmacists have a certain amount of discretion, and an obligation to collect otherwise confidential medical information, the Court must find that customers can reasonably expect that the information will remain confidential. This conclusion is supported by 8 NYCRR § 29.1(a) and (b)(8) which governs the conduct of health care professionals, including pharmacists, and provides that it is unprofessional conduct to 'reveal personally identifiable facts, data, or information obtained in a professional capacity without the prior consent of the patient or client, except as authorized or required by law.'

Anonymous v CVS, 188 Misc 2d 616 (New York County 2001).

Defendants make several arguments as to why this particular transaction, i.e. a file-buy, does not fall within the scope of the duty as defined by the statute, and thus not a violation of it. First, defendants argue that it is undisputed that CVS never accessed the records so no duty of confidentiality has been breached. Defendants cite *Madden v Creative Services, Inc.*, 84 NY2d 738 (1995) for the proposition that there is no liability where a defendant has accessed and reviewed confidential information but not made any use of it. However, the issue in *Madden* is altogether different from the situation in this case. *Madden*, specifically addressed the issue of a third party breach of confidential information, i.e. civil liability of a trespasser who accessed confidential information. Moreover, the action in this case is premised on a violation of a fiduciary relationship, which *Madden* acknowledges may give rise to liability, citing a number of cases, including *Doe v Roe*, 93 Misc 2d 201 (Sup. Ct., New York County 1977) which held that "[t]here can be little

doubt that under the law of the State of New York and in a proper case, the contract of private parties to retain in confidence matter which should be kept in confidence will be enforced by injunction and compensated in damages."

Second, defendants argue that if CVS had purchased all of Trio's stock and kept the Trio name that the transaction would be essentially the same, but not a breach of duty. However, this argument is irrelevant. The issue of what duties a pharmacy has to its customers in the case of a change of ownership is not before this court. Prior to this litigation, the scope of duty a pharmacy had to its customers when transferring records was undefined. The duties in a stock sale are similarly undefined. It is circular reasoning to use one to establish the acceptability of the other.

Third, defendants argue that the transfer of prescription records from one pharmacy to another without prior notice and consent of customers is not a violation of 8 NYCRR § 29.1(a) and (b)(8) because it has been the custom and practice of the industry to transfer the records without prior notice and consent. It is uncontroverted that this has been the custom and practice of the industry. "Proof of customary practice within a particular trade is admissible to establish a standard of care." *Frence v Ehrenfeld* 180 AD2d 895 (3d Dept 1992). However, none of the cases cited by CVS address the issue of when an industry's custom and practice runs counter to a statutory duty. The statutes 8 NYCRR § 29.1(a) and (b)(8) proscribe the disclosure of

personally identifiable facts, data or information without prior consent unless "authorized or required by law". It is unquestionable that the transfer of prescription records discloses personally identifiable facts.

Additionally, a fiduciary duty established by statute will override the doctrine of custom and practice. "[B]y practice and custom . . . they had the right to do this **unless forbidden by statute**, and if the legislature intended to prohibit a widespread practice and establish a new rule, it was its duty to say so clearly and unmistakably in the statute (emphasis added)" *People v Title Guarantee & Trust Co.*, 227 NY 366 (1919). Sections 29.1(a), (b)(8) prevent the disclosure of personal information without consent, except as authorized or required by law. This is clear and unambiguous and it expressly includes pharmacists.

Defendants, also argue that Education Law §6812(1) specifically allows for the sale or transfer of these records from one pharmacy to another. However, Education Law §6812(1) merely authorizes the sale or transfer of prescription records from one pharmacy to another, it is silent on whether consent is required for the transfer. Moreover, this Court has already held that "[n]othing in Education Law § 6812(1) indicates that the legislature intended to extinguish a pharmacist's duty of confidentiality and fiduciary duty, which might otherwise exist (See, McKinney's Cons. Laws of N.Y., Book 1, Statutes § 74, where a statute is silent, the court must assume that the legislature

intentionally omitted what is not included)." *Anonymous v CVS*, 188 Misc 2d at 623.³

Finally, defendants argue that this particular transaction, i.e. the selling of pharmaceutical records from one pharmacy to another upon closing, is not a violation of NYCRR §29.1(a), (b)(8) and therefore not a breach of fiduciary duty, because a series of statutes when read together authorize a closing pharmacy to give its records to another pharmacy intact. Sections 29.1(a) and b(8) do allow for the disclosure of personally identifiable information when authorized or required by law. Education Law §6810(5) provides that:

"Records of all prescriptions filled or refilled shall be maintained for a period of at least five years and upon request made available for inspection and copying by a representative of the department."

Public Health Law §3370(3) provides:

"Every record, including prescriptions [for controlled substances], required to be kept under this article shall be maintained at the premises where the licensed activity is conducted."

8 NYCRR 29.7(a)(7) provides:

"Unprofessional conduct shall include . . .
[f]ailure to number prescriptions

³CVS argues that the court has previously held in its decision and order of March 28, 2001 that "whether the duty of confidentiality is a legal one depends not on the conduct of the individual customers but on the practices followed by pharmacists." Therefore, CVS concludes that the custom and practice was not to inform and receive consent is sufficient to dismiss the action. However, the March 28th decision and order was on a class certification motion and therefore it did not inquire into the merits of plaintiff's case. See *Brandon v Chefetz*, 106 AD2d 162 (1st Dept 1985).

consecutively and file them in a numerical or other form which provides for ready retrieval of the prescriptions[.]”

8 NYCRR 29.7(a)(8) provides:

“Unprofessional conduct shall include . . . [f]ailure to maintain in a form which provides for ready retrieval of prescriptions a daily record of all prescriptions filled and refilled which identifies clearly the practitioner who ordered the prescription, the patient for whom the prescription is intended, the signature or readily identifiable initials of the pharmacist who filled or refilled the prescription , and the number assigned to the prescription where applicable.”

None of the above statutes specifically requires the transfer of a pharmacies records to another pharmacy. The requirements are that the original records be kept, and available for inspection by various authorities. Defendant’s claim that Public Health Law §3370(3) requires that records be kept at another pharmacy is not clear from the statute. It merely says that the records must be kept “where the licensed activity is conducted”. It is silent as to the disposition and maintenance of the records when a pharmacy discontinues the licensed activity.

Defendants further claim that the New York State Board of Pharmacy expressly interprets these statutes to require the transfer of records to another pharmacy because all pharmacies that discontinue their practice are required to complete a “Discontinuance of Pharmacy Registration” form and submit it to the board. The form provides: “Files should be transferred to a local pharmacy since there should be no interruption in the

patients receiving their medications." It is noteworthy that defendants maintain that the records **must** be transferred to another pharmacy, while the form merely says "**should**". Moreover, defendants claim that the purpose of the transfer is to maintain the integrity of the records for inspection by authorities, while the form clearly states that the transfer is for the convenience of patients, i.e. no interruption of their receiving medication. None of the above regulations are sufficient to override the duty of confidentiality expressed in 8 NYCRR § 29.1(a) and (b) (8). Defendants' further claim that the records must be contained in numerical order and therefore cannot be split up is not expressly stated in the above statutes. In fact, 8 NYCRR 29.7(a) (7) states that the records should be kept in numerical or "**other form**" which provides for ready retrieval. The transfer of records without prior notice and consent is a violation of 8 NYCRR § 29.1(a) and (b) (8) and a breach of a pharmacy's fiduciary duty to its customers. Therefore, based upon the uncontroverted evidence, defendants cannot establish as a matter of law that these file-buy transactions do not fall within the scope of a pharmacist's duty of confidentiality to its patients, and summary judgment is granted for plaintiff on his third cause of action for breach of fiduciary duty.

Mr. Hinderstein argues that the breach of fiduciary claim should be dismissed against him based upon corporate protection limiting the liability of the corporate owners, citing *Morris v Dept. of Taxation*, 82 NY2d 135 (1993) is unavailing. The

fiduciary duty is not only owed between a pharmacy and its customers, but also a pharmacist and his customers. "A corporate officer who participates in the commission of a tort may be held individually liable, regardless of whether the officer acted on behalf of the corporation in the course of official duties and regardless of whether the corporate veil is pierced." *American Express Travel Related Services Co. v North Atlantic Resources, Inc.*, 261 AD2d 310 (1st Dept 1999). Therefore, Mr. Hinderstein's motion to dismiss the breach of fiduciary duty claim against him is denied.

Breach of Implied Contract

Defendants' arguments regarding custom and practice are also raised in their arguments against implied contractual duty. Implicit in defendants' argument is that the long standing custom of pharmacists to sell their records without consent and notice upon closing, means that there could be no "meeting of the minds". Generally "[a]n implied contract is valid only upon the same principles as an express contract; there must be a meeting of the minds, a mutual assent." *Leggett & Co. v Feldman* 150 Misc 24 (City Ct, Kings County 1934). However, "[t]he courts recognize . . . two classes of implied contracts. The one class consists of those contracts which are evidenced by the acts of the parties and not by their verbal or written words-true contracts which rest upon an implied promise in fact. The second class consists of contracts implied by the law where none in fact exist-quasi or constructive contracts created by law and not by

the intentions of the parties." *Miller v Schloss*, 218 NY 400 (1916). This implied contractual duty of confidentiality is based upon NYCRR §29.1(a), (b)(8) and therefore falls into this second class of implied contract. Therefore, based upon the undisputed facts, Trio has breached the implied contract of confidentiality and summary judgment must be granted in plaintiff's favor on his fifth cause of action.

Tortious Interference and Negligence

Defendants argue that plaintiffs' common law tort claims, inducement of breach of fiduciary duty, tortious interference with contract and negligence, must be dismissed because these claims require proof of actual damages and plaintiff has opted to abandon claims actual for damages, and chose to only pursue nominal damages in order to preserve this action as a class action. Defendants are correct.⁴ Damages are an essential element for negligence (see *Chapman v Silber*, 97 NY2d 9 [2001]) and for tortious interference (see *Israel v Wood Dolson Co.*, 1 NY2d 116 [1956]). "In tort . . . there is no enforceable right until there is loss. It is the incurring of damage that engenders a legally cognizable right. To recognize nominal damages element of tort claims would be to wrest the cause of action from its traditional purposes--the compensation of losses . . . (emphasis in original)." *Kronos v AVX Corp.* 81 NY2d 90 (1993).

⁴Plaintiffs' argument that the previous decisions of this Court have allowed these claims to go forward on the basis of nominal damages is unavailing. Prior decisions addressed certification and not the merits of the action. See *Brandon*, *supra*.

Plaintiff's fourth, sixth and ninth causes of action are dismissed.

Common Law Injunctive Relief

Defendants argue that plaintiff has no standing to seek common law injunctive relief against defendants preventing the buying and selling of confidential prescription information, citing *Lee v Bd. of Governors of the Federal Reserve Sys.*, 118 F3d 905 (2d Cir 1997) and *Burns v Warwick Val. Cent. School Dist.*, 166 FSupp 2d 881 (SD NY 2001) for the proposition that past harm cannot grant standing for an injunction without a showing that future harm is likely and imminent. "Plaintiff does not dispute that, in light of the Court's limitation of the class to the Trio transaction and the fact that the transaction occurred nearly four years ago, plaintiff's claim for injunctive relief is probably now moot." *Plaintiff's Memorandum in Opposition*, p14 n9. Therefore plaintiff's eleventh cause of action is dismissed. However, this only dismisses plaintiff's claim for a common law injunction. As will be discussed below, plaintiff does have standing for injunctive relief under General Business Law §349.

General Business Law §349

Defendants make several arguments that plaintiff's cause of action under General Business Law §349 cannot be maintained. First defendant cites *Smith v Chase Manhattan Bank*, 293 AD2d 598 (2d Dept 2000) for the proposition that the sale and disclosure of confidential information to third parties who used the

information to make solicitations does not support liability under General Business Law §349. Deception itself with no other injury is not actionable under §349. *Small v Lorillard Tobacco, Co.*, 94 NY2d 43 (1999). The court in *Smith* held that "the 'harm' at the heart of this purported class action, is that class members were merely offered products and services which they were free to decline. This does not qualify as actual harm." *Id* at 599. However, the situation here is not analogous. The harm in this situation is the potential disruption of the confidential relationship between pharmacist and patient. In *Doe v Roe*, *supra*, 93 Misc 2d 201, the court held that the relationship between a psychiatrist and a patient would be compromised if the trust to keep confidential information private is violated. This court has previously held that the relationship between a pharmacist and a patient requires that same trust. The breach of that trust is an actual harm, which satisfies the injury requirement of §349, unlike the situation in *Smith*.

Defendants also argue that the abandonment of actual damages is fatal to the General Business Law §349 claims. Defendants state: "First, as to the GBL §349 claim, this Court has already held, consistent with well-settled law, that 'actual damages must be shown in order to maintain a class action pursuant to General Business Law § 349.'" Defendants also claim that this Court cited *Ridge Meadows Homeowners Assn. v Tara Dev. Co.*, 242 AD2d 947 (4th Dept 1997) for this proposition. See *CVS Memorandum of Law in Support of Motion for Summary Judgment* p. 12. This

assertion is wrong and the quotation taken out of context. The Court stated: "Lastly, CVS claims that individual inquiries will be necessary to determine what if any damages plaintiff has suffered. **Additionally**, actual damages must be shown in order to maintain a class action pursuant to General Business Law §349(emphasis added)." The use of the word additionally, links the sentence to the previous sentence. Therefore the Court was merely stating CVS's argument and not making a holding. Moreover, *Ridge Meadows* was only cited for the holding that the \$50 statutory damages available pursuant to §349, are not available in a class action.

The question still to be resolved is whether a plaintiff can maintain a class action pursuant to General Business Law §349, for recovery of nominal and punitive damages. The Court previously held that plaintiff can only maintain the class action if it limits itself to nominal damages and injunctive relief. *Anonymous v CVS*, Sup Ct, New York County, February 27, 2003, Ramos, J., Index No. 604804/99.

Pursuant to General Business Law §349(h) "any person who has been injured by reason of any violation of this section may bring an action . . . to recover actual damages. " Plaintiff, in order to maintain this action as a class action, has abandoned his claims for actual damages and chosen to pursue only nominal damages. "'Nominal damages are defined as a trifling sum[,] * * * damages in name only, having no substance, but which nevertheless vindicate the plaintiff's right' (9 Encyclopedia of

N.Y. Law, Fuchsberg, N.Y. Damages Law, § 51, p. 43)." *Jenkins v Etlinger*, 55 NY2d 35 (1982). While the Court has found that plaintiff has suffered an injury as required by §349, plaintiff cannot maintain a class claim under §349 for only nominal damages, which serves only to vindicate a plaintiff's rights and not to compensate plaintiff for actual damage. Therefore, plaintiff may not maintain this his cause of action under General Business Law §349 based upon nominal damages alone.

However, neither party has addressed the injunctive relief provision contained in §349 which states "any person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice" The injunctive relief granted by §349 is intended to be broad. " 'Consumers have the right to an honest market place where trust prevails between buyer and seller. The power to obtain injunctions against any and all deceptive and fraudulent practices will be an important new weapon in New York State's long standing efforts to protect people from consumer frauds' (Mem of Governor Rockefeller, 1970 N.Y.Legis.Ann., at 472)." *Oswego Laborers' Local 284 Pension Fund v Marine Midland Bank, N.A.*, 85 NY2d 20 (1995). To require a showing of imminent harm would deprive this "weapon" of any power.

Plaintiff has standing to bring a class action against CVS, Trio and Hinderstein under §349 for injunctive relief. This is primarily a case about protecting the privacy of patients. Plaintiffs, as a class, have not suffered readily identifiable

monitory harm. This is why the class has been limited to seeking only nominal damages. The awarding of nominal damages are to vindicate a plaintiff's rights. However, the injunctive relief in General Business Law §349 provides a much more effective tool for the vindication of those rights. This Court has already held that Trio and Hinderstein have breached their fiduciary duty to plaintiff by selling their confidential information. The selling of confidential information to a third party is an actionable deceptive practice. *See Smith v Chase Manhattan Bank, supra* 293 AD2d at 598. Therefore, based upon the undisputed facts, summary judgment is granted on plaintiff's tenth cause of action against Trio and Hinderstein for violation of General Business Law §349⁵.

Liability of CVS

All the claims against CVS, tortious interference with contract, inducement to breach fiduciary duty and violation General Business Law §349, depend on whether it induced Trio into withholding notice and not receiving consent from its patients prior to the transfer. While all the tort claims against CVS have been dismissed, the General Business Law §349 claim remains. The issue of inducement is clearly one of fact. In spite of CVS's assertion that "this Court has already found, in its plain language that the contract permitted advance notice to be given by Trio" (*CVS's Memo in Support of Motion for Summary Judgment,*

⁵Trio and Hinderson's liability in the General Business Law claim is not subsumed by the breach of fiduciary duty claim. The relief available in the two causes of action are different.

p1), CVS's liability is a disputed matter of fact. In its Decision and Order of February 27, 2003, the Court stated that "this exception to the confidentiality provision coupled with the uncontroverted evidence that in some cases independent pharmacies did give advance notice of the impending sale, supports the position that each of these transactions may raise unique **questions of fact** (emphasis added)". Mr. Hinderstein testified that one of the reasons he did not give advance notice to his customers was:

"I know I had signed a confidentiality agreement. So whether I would have [notified customers] or not became moot, because I had signed the confidentiality agreement and I knew if I started discussing it, it would ruin my agreement."

CVS argues that the provision in the confidentiality agreement which states that the seller can reveal information if it gets CVS's written consent, which shall not be unreasonably withheld, clearly allowed for prior notice. However this argument is insufficient as a matter of law to grant summary judgment, given Mr. Hinderstein's belief that even asking for permission might scuttle the deal.⁶ Whether CVS induced Trio and Hinderstein to

⁶In Trio and Hinderson's Memo of Law in Support of Summary Judgment an assertion is made that this Court held that as a matter of law the confidentiality agreement precluded the selling pharmacy from disclosing details of the transaction including the existence of the transaction. This assertion is disingenuous and simply and plainly wrong. Indeed on Page 10 of its decision and order of February 27, 2003 this Court stated "The confidentiality provision states that any details regarding **any** information regarding the impending transaction were to be confidential. This includes the existence of the transaction." However, this statement was to refute CVS's assertion that the provision only

breach their fiduciary duty is a question of fact that cannot be resolved on this motion. Plaintiff's tenth cause of action against CVS is not dismissed.

Punitive Damages

At the outset, punitive damages are parasitical. The only remaining claims upon which punitive damages may be awarded are the breach of fiduciary duty against Trio and Hinderstein, the breach of implied contract against Trio and the General Business Law §349 claims. While punitive damages may be available in a tort action for only nominal damages (*see, Vias v Rohan*, 119 AD2d 672 [2d Dept 1986]), it is clear from the statute that punitive damages are not available in an action for nominal damages under General Business Law §349. The statute provides "The court may, in its discretion, increase the amount of damages, to an amount not to exceed three times the actual damages" Therefore, any punitive damages awarded pursuant to 349 are directly linked to actual damages, and also limited to treble damages.

On the tort claims, "[p]unitive or exemplary damages have been allowed in cases where the wrong complained of is morally culpable, or is actuated by evil and reprehensible motives, not only to punish the defendant but to deter him, as well as others

prevented independent pharmacies from disclosing the details of the transaction and not the existence of the transaction. On the very next page of the decision this Court agreed that the notice clause in the provision gave rise to a **question of fact** of whether the clause indeed did forbid prior notice. Clearly this court did not hold that the contract bans notice as a matter of law.

who might so otherwise be so prompted from indulging in similar conduct in the future." *Walker v Sheldon*, 10 NY2d 401 (1961). In a breach of fiduciary duty plaintiff must show "evidence of misconduct . . . that would meet the 'very high threshold of moral culpability'"

By virtue of the injunctive relief available pursuant to General Business Law §349, the deterrent effect of punitive damages is rendered irrelevant. An injunction certainly provides the same if not more effective deterrent effect. Additionally, Trio and Hinderstein's conduct does not rise to the level of moral reprehensibility.⁷ In *Doe v Roe*, *supra* 93 Misc2d 201, the court refused to award punitive damages for the violation of the duty of confidentiality between psychiatrist and patient. The court found that "defendant's were of the opinion that they had sufficiently concealed the identity of the plaintiff * * * believed they were rendering a public service * * * there was no motive to harm" *Id* at 217. Similarly here, Mr. Hinderstein believed that by transferring the records to another pharmacy, which must abide by the statutes concerning confidentiality, that there would be no compromise of plaintiff's confidential information. Mr. Hinderstein also was following the guidelines set forth in "Discontinuance of Pharmacy Registration" form, which recommends the transfer of the records for the patients benefit. Although Mr. Hinderstein may have had a profit motive

⁷Since all the tort actions against CVS have been dismissed, CVS is not liable for punitive damages.

in this transaction, it does not render it "evil". There is no indication that there was any motive to harm the plaintiff in this transaction. Therefore as a matter of law, punitive damages are not available in this action.

Accordingly, it is

ORDERED that plaintiff's motion to reargue is granted and upon reconsideration the decision stands; and it is further

ORDERED that plaintiff's fourth, sixth, ninth and eleventh causes of action are dismissed; and it is further

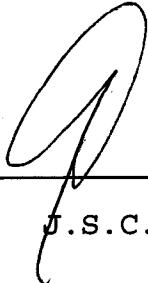
ORDERED that summary judgment is granted on plaintiff's third and tenth cause of action against Trio and Mr. Hinderstein; and it is further

ORDERED that summary judgment is granted on plaintiff's fifth cause of action against Trio; and it is further

ORDERED that the parties will schedule a hearing to determine damages and the scope of the injunction within ten days of service of this order with notice of entry; and it is further

ORDERED, the General Business Law claim against CVS shall continue.

Dated: December 9, 2003



J.S.C.
HON. CHARLES E. RAMOS