218 A.D.3d 1156
Supreme Court, Appellate Division,
Fourth Department, New York.

Gretchen GRECO, Individually and on Behalf of All Others Similarly Situated, Plaintiff-Respondent,
v.
SYRACUSE ASC, LLC, Doing Business as Specialty Surgery Center of Central New York, Defendant-Appellant. (Appeal No. 1.)

228
|
CA 22-01218
|
Entered: July 28, 2023

Synopsis

Background: Patient brought putative class action against healthcare provider, asserting, among other claims, negligence arising from provider's alleged failure to protect her personal data, stored on electronic files in provider's computer system, from data breach by an unknown hacker. The Supreme Court, Onondaga County, Greenwood, J., 2022 WL 20439028, denied provider's motion to dismiss for lack of standing. Provider appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] potential for future misuse of patient's data and possible economic harm were too conjectural, tenuous, and hypothesized to constitute an injury that was sufficiently concrete to confer standing, and

[2] alleged costs of identity protection and mitigation efforts did not establish a sufficiently concrete injury-in-fact to confer standing.

Reversed.

Procedural Posture(s): On Appeal; Motion to Dismiss for Lack of Standing.

West Headnotes (5)

[1] Action Persons entitled to sue

In order to possess standing, plaintiff was required, inter alia, to have suffered an injury-in-fact.

[2] Action Persons entitled to sue

The injury-in-fact requirement for standing necessitates a showing that the party has an actual legal stake in the matter being adjudicated and that the party has suffered a cognizable harm that is not tenuous, ephemeral, or conjectural, but is, instead, sufficiently concrete and particularized to warrant judicial intervention.

[3] Health Right of action; standing

Potential for future misuse of patient's data and possible economic harm from a hacker's data breach of electronic files stored on healthcare provider's computer system were too conjectural, tenuous, and hypothesized to constitute an injury that was sufficiently concrete to confer standing in putative class action alleging provider negligently failed to safeguard patient's personal data, where patient did not allege that any of the information purportedly accessed by the hacker had actually been misused in over year after the data breach occurred, and further, complaint alleged that the hacker accessed health information only and did not allege that data more readily used for financial crimes such as dates of birth, credit card numbers, or social security numbers had been accessed.

1 Case that cites this headnote

[4] Health Right of action; standing

Patient's alleged costs of identity protection and mitigation efforts of data breach of electronic files stored on healthcare provider's computer system did not establish a sufficiently concrete injury-in-fact to confer standing to pursue claims

alleging provider negligently failed to safeguard patient's personal data, where plaintiff alleged only fear of hypothetical future harm that was not certainly impending, which did not legitimatize or warrant such efforts.

[5] **Action** Persons entitled to sue

A plaintiff cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.

***512** Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered June 28, 2022. The order, insofar as appealed from, denied the motion of defendant to dismiss the complaint.

Attorneys and Law Firms

WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP, WHITE PLAINS (MELISSA A. MURPHY-PETROS OF COUNSEL), FOR DEFENDANT-APPELLANT.

FINKELSTEIN, BLANKENSHIP, FREI-PEARSON & GARBER, LLP, WHITE PLAINS (DOUGLAS G. BLANKENSHIP OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

PRESENT: SMITH, J.P., LINDLEY, CURRAN, AND OGDEN, JJ.

MEMORANDUM AND ORDER

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion to dismiss the complaint is granted and the complaint is dismissed.

Memorandum: Plaintiff commenced this putative class action seeking to recover damages allegedly arising when an unknown third party gained unauthorized access to certain personal information belonging to plaintiff and others, which was stored on defendant's computer system. Defendant moved to dismiss the complaint on the ground that, inter alia, plaintiff lacked standing to bring the action because she had not alleged an injury-in-fact. In appeal No. 1, defendant appeals, as limited by its brief, from that part of an order denying its motion to dismiss the complaint. In appeal No. 2, defendant appeals from a subsequent order denying its motion to stay all proceedings pending this Court's resolution of appeal No. 1.

[1] **[2]** In appeal No. 1, we agree with defendant that Supreme Court erred in denying its motion to dismiss the complaint. In order to possess standing, plaintiff was required, inter alia, to have suffered "an injury-in-fact" (*Matter of Association for a Better Long Is., Inc. v. New York State Dept. of Envtl. Conservation*, 23 N.Y.3d 1, 6, 988 N.Y.S.2d 115, 11 N.E.3d 188 [2014]; *see* ***513** *Matter of Sheive v. Holley Volunteer Fire Co., Inc.*, 170 A.D.3d 1589, 1590, 95 N.Y.S.3d 700 [4th Dept. 2019]). The injury-in-fact requirement necessitates a showing that the party has "an actual legal stake in the matter being adjudicated" (*Society of Plastics Indus., Inc. v. County of Suffolk*, 77 N.Y.2d 761, 772, 570 N.Y.S.2d 778, 573 N.E.2d 1034 [1991]; *see Matter of Mental Hygiene Legal Serv. v. Daniels*, 33 N.Y.3d 44, 50, 98 N.Y.S.3d 504, 122 N.E.3d 21 [2019]) and that the party has suffered a cognizable harm that is not " 'tenuous,' 'ephemeral,' or 'conjectural,' " but is, instead, "sufficiently concrete and particularized to warrant judicial intervention" (*Daniels*, 33 N.Y.3d at 50, 98 N.Y.S.3d 504, 122 N.E.3d 21; *see New York State Assn. of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 211, 214, 778 N.Y.S.2d 123, 810 N.E.2d 405 [2004]; *Matter of Festa v. Town of Oyster Bay*, 210 A.D.3d 678, 679-680, 177 N.Y.S.3d 665 [2d Dept. 2022]). An alleged injury will not confer standing if it is based on speculation about what might occur in the future or what future harm might be incurred (*see Frankel v. J.P. Morgan Chase & Co.*, 193 A.D.3d 689, 690, 141 N.Y.S.3d 919 [2d Dept. 2021]; *Matter of Niagara County v. Power Auth. of State of N.Y.*, 82 A.D.3d 1597, 1599, 919 N.Y.S.2d 618 [4th Dept. 2011], *lv dismissed in part & denied in part* 17 N.Y.3d 838, 930 N.Y.S.2d 533, 954 N.E.2d 1158 [2011]; *Matter of Brewster v. Wright*, 45 A.D.3d 1369, 1370, 844 N.Y.S.2d 801 [4th Dept. 2007]).

The parties correctly note that this is the first time the Appellate Division has been asked to address the issue of standing in this context, i.e., in a case brought by an individual whose information was involved in a larger electronic data breach or whose personal data was otherwise involved in the unauthorized access of electronic files stored on a computer system. Although the rise of unauthorized access to secure electronic systems, resulting in third parties obtaining the

information stored thereon, is a relatively modern issue, the injury-in-fact requirement recognized in other contexts applies equally here. Thus, the novel issue presented is simply what circumstances, specific to this context, create an injury that is "sufficiently concrete" and non-speculative to constitute an injury-in-fact (*Daniels*, 33 N.Y.3d at 50, 98 N.Y.S.3d 504, 122 N.E.3d 21).

Analyzing similar issues, New York trial courts have looked to certain considerations, such as the type of personal information that was compromised; whether hackers or cybercriminals were involved and whether the attack was targeted; whether personal information was exfiltrated, published, or otherwise disseminated; whether the data has actually been misused; and the length of time that has elapsed since the data breach without misuse of the personal information at issue (*see Keach v. BST & Co. CPAs, LLP*, 71 Misc.3d 1204[A], 2021 N.Y. Slip Op. 50273[U], *4, 2021 WL 1203026 [Sup. Ct., Albany County 2021]; *see also Smahaj v. Retrieval-Masters Creditors Bur., Inc.*, 69 Misc.3d 597, 602-604, 131 N.Y.S.3d 817 [Sup. Ct., Westchester County 2020]; *Lynch v. Johnson*, 2018 N.Y. Slip Op. 32962[U], *3-4, 2018 WL 6181300 [Sup. Ct., N.Y. County 2018]; *Manning v. Pioneer Sav. Bank*, 56 Misc.3d 790, 796-797, 55 N.Y.S.3d 587 [Sup. Ct., Rensselaer County 2016]). Addressing the issue under the distinct Federal standing analysis (*see Society of Plastics, Inc.*, 77 N.Y.2d at 772, 570 N.Y.S.2d 778, 573 N.E.2d 1034), the Second Circuit has looked to conceptually similar considerations, such as whether the data was accessed via a targeted attack or an inadvertent disclosure, whether some of the data accessed has actually been misused even if plaintiff's data has not yet ***514** been specifically misused, and whether the type of data at issue has exposed plaintiff to a greater risk (*see McMorris v. Carlos Lopez & Assocs., LLC*, 995 F.3d 295, 301-302 [2d Cir. 2021]). Given the numerous circumstances under which such data breaches may occur, many of those considerations may not apply in all cases and additional considerations may become relevant. Nevertheless, the core of the analysis remains the same: whether plaintiff has suffered a "sufficiently concrete" and non-speculative injury to satisfy the injury-in-fact requirement (*Daniels*, 33 N.Y.3d at 50, 98 N.Y.S.3d 504, 122 N.E.3d 21).

[3] **[4]** **[5]** Here, having considered all relevant circumstances as alleged in the complaint, we conclude that plaintiff has not alleged an injury-in-fact and thus lacks standing. Perhaps most importantly, plaintiff has not alleged that any of the information purportedly accessed by the unknown third party has actually been misused. Plaintiff has not alleged that her own information has been misused or that the data of any similarly situated person has been misused in the over one-year period between the alleged data breach and the issuance of the trial court's decision. Further, the complaint itself alleges that a third party accessed health information only. It does not allege that a third party accessed data more readily used for financial crimes such as dates of birth, credit card numbers, or social security numbers. Indeed, other than a general concern that certain of plaintiff's health information may have been illegally accessed by a third party, plaintiff does not allege any direct harm flowing from the breach of defendant's electronic system. We conclude that plaintiff failed to allege an injury-in-fact inasmuch as the potential for future misuse of her data and possible economic harm is too "conjectural, tenuous [and] hypothesized" to constitute an interest that is sufficiently concrete to confer standing (*Niagara County*, 82 A.D.3d at 1599, 919 N.Y.S.2d 618; *see Daniels*, 33 N.Y.3d at 50, 98 N.Y.S.3d 504, 122 N.E.3d 21). To the extent that plaintiff also contends that she established an injury-in-fact by virtue of the cost of identity protection and other mitigation efforts, we conclude that such mitigation efforts cannot confer standing absent a sufficiently concrete injury-in-fact legitimizing or warranting such efforts. A plaintiff "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending" (*Matter of Practicefirst Data Breach Litig.*, 2022 WL 354544 at *4 [W.D.N.Y. 2022]). Reviewing the complaint, we conclude that plaintiff has not otherwise alleged an injury-in-fact that would confer standing to bring this action.

In light of our determination, we do not address defendant's remaining contentions in appeal No. 1.

The appeal from the order in appeal No. 2 is dismissed because it has been rendered moot by our determination in appeal No. 1 (*see Fasano v. J.C. Penney Corp.*, 59 A.D.3d 1103, 1103, 872 N.Y.S.2d 353 [4th Dept. 2009]; *Mercer v. Pal Energy Corp.*, 280 A.D.2d 896, 897, 720 N.Y.S.2d 689 [4th Dept. 2001]).

All Citations

218 A.D.3d 1156, 193 N.Y.S.3d 511, 2023 N.Y. Slip Op. 03987

End of Document