NEW YORK SUPREME COURT - COUNTY OF BRONX
**PART 32**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
---------------------------------------------------------X
**ST. BARNABAS HOSPITAL and ABDURHAM AHMED, M.D.,**

Index No. **814414/2021E**

Plaintiffs,

Hon. **FIDEL E. GOMEZ**
Justice

- against -

**PHYSICIANS' RECIPROCAL INSURERS; MEDICAL LIABILITY MUTUAL INSURANCE COMPANY; N.Y. MEDICAL MALPRACTICE INSURANCE POOL; DARRYL L. ADLER, M.D.; THE ESTATE OF RONALD L. CIUBOTARU BY THE PUBLIC ADMINISTRATOR OF WESTCHESTER COUNTY; and RICHARD STUMACHER, M.D.,**

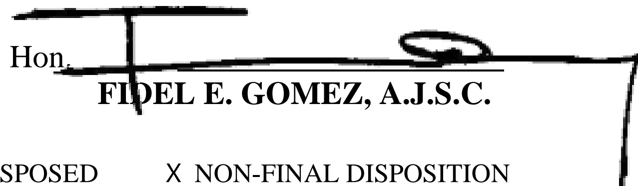
Defendants.
---------------------------------------------------------X

The following papers numbered 1 to 9, read on these motions, noticed on 1/19/2022 and 2/23/2022, and duly submitted as no. 1, 2, and 3 on the Motion Calendar of 5/11/2022.

| | PAPERS NUMBERED | |
|---|---|---|
| Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed | 1, 4, 7 | |
| Answering Affidavit and Exhibits | 2, 5, 8 | |
| Replying Affidavit and Exhibits | 3, 6, 9 | |

Defendants Physicians' Reciprocal Insurers, MLMIC Insurance Company, f/k/a Medical Liability Mutual Insurance Company, and N.Y. Medical Malpractice Insurance Pool's motions are decided in accordance with the Decision and Order annexed hereto.

Dated: 7/8/22



Hon. FIDEL E. GOMEZ, A.J.S.C.

1. CHECK ONE.................................................. ☐ CASE DISPOSED X NON-FINAL DISPOSITION
2. MOTION IS.................................................... X GRANTED (#1, 2) ☐ DENIED X GRANTED IN PART (#3) ☐ OTHER
3. CHECK IF APPROPRIATE.......................... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT X NEXT APPEARANCE DATE: September 12, 2022 at 3:30 p.m.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
-------------------------------------------------------X

**ST. BARNABAS HOSPITAL and ABDURHAM AHMED, M.D.,**

Plaintiffs,

**DECISION AND ORDER**

- against -

Index No. **814414/2021E**

**PHYSICIANS' RECIPROCAL INSURERS; MEDICAL LIABILITY MUTUAL INSURANCE COMPANY; N.Y. MEDICAL MALPRACTICE INSURANCE POOL; DARRYL L. ADLER, M.D.; THE ESTATE OF RONALD L. CIUBOTARU BY THE PUBLIC ADMINISTRATOR OF WESTCHESTER COUNTY; and RICHARD STUMACHER, M.D.,**

Defendants.
-------------------------------------------------------X

Defendant MLMIC Insurance Company, f/k/a Medical Liability Mutual Insurance Company ("MLMIC") moves for an order dismissing the complaint pursuant to CPLR 3211(a)(3) and/or 3211(a)(7) ("Motion Seq. No. 1"). Plaintiff St. Barnabas Hospital ("St. Barnabas") opposes. Plaintiff Abdurham Ahmed, M.D. ("Dr. Ahmed") does not oppose.

Defendant N.Y. Medical Malpractice Insurance Pool ("MMIP") moves for an order dismissing the complaint pursuant to CPLR 3211(a)(3) and/or 3211(a)(7) ("Motion Seq. No. 2"). St. Barnabas opposes. Dr. Ahmed does not oppose.

Defendant Physicians' Reciprocal Insurers ("PRI") moves for an order dismissing the complaint pursuant to CPLR 3211(a)(3) and/or 3211(a)(7) ("Motion Seq. No. 3"). St. Barnabas opposes. Dr. Ahmed also opposes.

For the reasons which follow, MLMIC's motion is granted, MMIP's motion is granted, and PRI's motion is granted, in part.

BACKGROUND:

On October 22, 2021, Plaintiffs St. Barnabas and Dr. Ahmed ("Plaintiffs") commenced the instant action by filing a summons and complaint, alleging causes of action for breach of duty of

good faith, tort of bad faith, breach of contract, and prima facie tort against MLMIC, MMIP and PRI (the "Insurance Defendants").

The complaint alleges that Keimoneia Redish ("Redish") was hospitalized at St. Barnabas Hospital from December 4, 2010, through January 25, 2011, for treatment of asthma (Compl., ¶ 70). During the course of her hospitalization, she received medical care from Dr. Ahmed, Dr. Darryl L. Adler, M.D. ("Dr. Adler"), Dr. Ronald L. Ciubotaru, M.D. ("Dr. Ciubotaru"), and Dr. Richard Stumacher, M.D. ("Dr. Stumacher") (collectively, the "Doctors") (Compl., ¶ 71-74). In 2011, Redish commenced a medical malpractice action in the Bronx County Supreme Court, under Index No. 310294/2011. She named the Doctors and St. Barnabas as defendants in that action (Compl., ¶ 75).

The complaint alleges that PRI insured Dr. Ahmed at both the primary and excess levels for a total coverage in the amount of $2,300,000.00 (Compl., ¶ 21, 23, 26). MLMIC insured Dr. Adler, Dr. Ciubotaru, and Dr. Stumacher at the primary level to the extent of $1,300,000.00 per doctor (Compl., ¶ 27, 33 38). MMIP insured Dr. Adler, Dr. Ciubotaru, and Dr. Stumacher at the excess level in the amount of $1,000,000.00 per doctor (Compl., ¶ 30, 35, 40).

Plaintiffs allege that PRI accepted the claim against Dr. Ahmed and took charge of his defense in the Redish action. MLMIC accepted the claims against Dr. Adler, Dr. Ciubotaru, and Dr. Stumacher, and took charge of their defense (Compl., ¶ 76, 77, 79, 84). Plaintiffs allege that MMIP never appointed attorneys to represent Dr. Adler, Dr. Ciubotaru or Dr. Stumacher (Compl., ¶ 86).

The complaint alleges that on September 29, 2016, the Court (Green, J.) issued a decision holding that St. Barnabas had no direct liability to Redish, but had vicarious liability to her for the Doctors, who were attending physicians at St. Barnabas Hospital (Compl. ¶ 87-88).

After trial, the jury returned a verdict in favor of Redish and against the Doctors. The jury apportioned different percentages of liability to each of the Doctors. The jury awarded Redish $60,000,000.00 for her past pain and suffering, $30,000,000.00 for future pain and suffering, and $15,100,000.00 for economic damages (Compl., ¶ 97, 98, 100).

The complaint alleges that by order dated November 21, 2019, the Court granted judgment to St. Barnabas on its claim for common-law indemnification against Dr. Adler, Dr. Ciubotaru and Dr. Stumacher (Compl., ¶ 104). Plaintiffs allege that Redish stipulated to a reduction of her award for pain and suffering from $90,000,000.00 to $30,000,000.00 (Compl., ¶ 105). On January 17,

2020, based on the above, the Court entered a judgment against the Doctors and St. Barnabas in the amount of $45,089,492.68 (Compl., ¶ 106).

The Doctors and St. Barnabas filed notices of appeal from the judgment. On June 3, 2021, the Appellate Division issued a decision modifying the judgment. In conformity with the decision, Redish stipulated to the reduction of her total awards for pain and suffering to $10,000,000.00. As such, Plaintiffs allege that the Doctors are liable to Redish in an amount of $10,000,000.00, plus interests and costs, for her pain and suffering. The Doctors are also liable for Redish's economic damages in an amount to be determined after a collateral source hearing. Plaintiffs allege that St. Barnabas is vicariously liable for the Doctors' liability. The Doctors are liable to St. Barnabas under the doctrine of common-law indemnification for any amounts it pays to Redish or is owing to her (Compl., ¶ 107-115).

The complaint alleges that there was a total of $9,200,000.00 available to the Doctors to settle Redish's claims (Compl., ¶ 116). Plaintiffs allege that the Insurance Defendants could have settled the action within the limits of their policies, but did not do so (Compl., ¶ 117-139). The complaint alleges that the Insurance Defendants have paid the limits of their policies in partial satisfaction of the judgment (Compl., ¶ 140, 141-146). Plaintiffs allege that the Insurance Defendants have not paid the balance of Redish's judgment and interest, or any portion, despite their demands (Compl., ¶ 147-153).

On December 8, 2021, MLMIC and MMIP filed their motions to dismiss. The motions were marked fully submitted on May 11, 2022.

On January 21, 2022, PRI filed its motion to dismiss. The motion was marked fully submitted on May 11, 2022.

**DISCUSSION:**

MLMIC'S MOTION TO DISMISS (MOTION SEQ. NO. 1):

As against MLMIC, the complaint alleges three causes of action: the tort of bad faith (fifth cause of action), breach of contract (eighth cause of action), and prima facie tort (eleventh cause of action).[1]

[1] Although these causes of action begin by stating that: "St. Barnabas Hospital and Dr. Ahmed repeat the allegations of paragraphs . . . above" (Compl., ¶ 205, 261, 306), the causes of action are alleged solely on St. Barnabas' behalf.

Fifth Cause of Action – Tort of Bad Faith:

MLMIC moves to dismiss the complaint, arguing that St. Barnabas does not have standing to maintain this action. MLMIC argues that a cause of action for bad faith sounds in breach of contract. It argues that it issued insurance policies to Dr. Adler, Dr. Ciubotaru and Dr. Stumacher, and that St. Barnabas is not an insured or a party to those policies. MLMIC also argues that St. Barnabas is not an excess carrier to whom it owes a duty. MLMIC further argues that there is no tort of bad faith.

CPLR 3211(a) provides that: "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 3. the party asserting the cause of action has not legal capacity to sue".

On a motion to dismiss the complaint pursuant to CPLR 3211(a)(3), "the burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing" as a matter of law (*Phoenix Grantor Trust v Exclusive Hospitality, LLC*, 172 AD3d 923, 925 [2d Dept 2019]; *Mariners Atlantic Portfolio, LLC v Hector*, 159 AD3d 686, 687 [2d Dept 2018]; *Berger v Friedman*, 151 AD3d 678, 679 [2d Dept 2017]). "To defeat a defendant's motion, the plaintiff has no burden of establishing its standing as a matter of law; rather, the motion will be defeated if the plaintiff's submissions raise a question of fact as to its standing" (*Phoenix Grantor Trust* at 926).

"An insurer's duty of 'good faith' in regard to settlements is an implied obligation that is derived from the contract of insurance. It is implied by operation of law in all contracts of insurance" (*Schwartz v Twin City Fire Ins. Co.*, 492 F Supp2d 308, 329 [SDNY 2007]; *Gordon v Nationwide Mut. Ins. Co.*, 30 NY2d 427, 437 [1972] ["In every contract 'there exists an implied covenant of good faith and fair dealing"]; *Cinderella Holding Corp. v Calvert Ins. Co.*, 265 AD2d 444, 444 [2d Dept 1999]).

"[A]n insurer may be held liable for the breach of its duty of 'good faith' in defending and settling claims over which it exercises exclusive control on behalf of its insured" (*Pavia v State Farm Mut. Auto. Ins. Co.*, 82 NY2d 445, 452 [1993]; *Federal Ins. Co. v North American Specialty Ins. Co.*, 83 AD3d 401, 402 [1st Dept 2011]). "This duty also applies where an excess insurer is exposed to liability, and requires a primary insurer to give as much consideration to the excess carrier's interests as it does to its own" (*Federal Ins. Co.* at 402; *Metropolitan Property and Casualty Insurance Company v GEICO General Insurance Company*, 186 AD3d 1513, 1515 [2d Dept 2020]).

Here, MLMIC has demonstrated that St. Barnabas is not an insured under the insurance policies at issue (Defendant's Exhibits C, D and E). MLMIC has also demonstrated that the complaint alleges that St. Barnabas is not an excess carrier. As such, MLMIC has demonstrated that it did not owe a duty to St. Barnabas to act in good faith in defending and settling the claims against the Doctors.

MLMIC has also demonstrated that there is no "separate cause of action in tort for an insurer's bad faith failure to perform its obligations under an insurance policy" (*Continental Cas. Co. v Nationwide Indem. Co.*, 16 AD3d 353, 355 [1st Dept 2005]; *Acquista v New York Life Ins. Co.*, 285 AD2d 73, 82 [1st Dept 2001]; *Johnson v Allstate Ins. Co.*, 33 AD3d 665, 666 [2d Dept 2006]; *Zawahir v Berkshire Life Ins. Co.*, 22 AD3d 841, 842 [2d Dept 2005]).

In opposition, St. Barnabas has failed to raise an issue of fact. St. Barnabas does not dispute that it is neither an insured nor an excess carrier. St. Barnabas merely argues that it is akin to an excess carrier, and that the Court has the authority to fashion an equitable remedy. However, it has not cited any law holding that an entity such as St. Barnabas, which is vicariously liable for the torts of another, is similarly situated to an excess carrier so as to be able to take advantage of the case law protecting excess carriers. *Russo v Rochford*, 123 Misc2d 55 [Sup Ct, Queens County 1984], cited by St. Barnabas, does not support its position, as it only concerns excess carriers, not an entity such as St. Barnabas.

Moreover, St. Barnabas has not demonstrated that New York recognizes a separate cause of action in tort for bad faith under these circumstances. In *Orient Overseas Assoc. v XL Ins. Am., Inc.*, 132 AD3d 574 [1st Dept 2015], the only case cited by St. Barnabas, the court dismissed the cause of action for "unfair [or bad faith] claim selling practices" as duplicative of a breach of contract cause of action. It also found that there is no authority indicating that a separate, non-contractual claim exists for "bad faith claims handling" (*id.* at 577).

Accordingly, MLMIC's motion to dismiss the fifth cause of action for the tort of bad faith is granted.

<u>Eighth Cause of Action – Breach of Contract</u>:

MLMIC moves to dismiss the eighth cause of action for breach of contract, arguing that St. Barnabas is not an intended, third-party beneficiary of the insurance policies at issue. MLMIC argues that St. Barnabas is not an insured under the policies, and the policies do not indicate that

the parties intended to insure or benefit St. Barnabas. St. Barnabas does not oppose this portion of the motion.

"The four corners of an insurance agreement govern who is covered and the extent of coverage" (*Sixty Sutton Corp. v Illinois Union Ins. Co.*, 34 AD3d 386, 388 [1st Dept 2006]). Moreover, it is well-settled that the certificate of insurance is not sufficient to confer coverage if the insurance policy itself does not provide coverage (*Id.* at 389).

"In order for a third party to enforce a policy of insurance, it must be demonstrated that the parties intended to insure the interest of him who seeks to recover on the policy. As with other contracts, unless it is established that there is an intention to benefit the third party, the third party will be held to be a mere incidental beneficiary, with no enforceable rights under the contract. The intention to benefit the third party must appear from the four corners of the instrument. The terms contained in the contract must clearly evince an intention to benefit the third person who seeks the protection of the contractual provisions" (*Stainless, Inc. v Employers Fire Ins. Co.*, 69 AD2d 27, 33 [1st Dept 1979]; *Sixty Sutton Corp.* at 388). "The intention to cover the third party must be that of both parties to the insurance contract" (*Stainless, Inc.* at 34).

Here, MLMIC has demonstrated that St. Barnabas is not an intended, third-party beneficiary of the insurance policies at issue. The insurance policies at issue demonstrate that there was no intention to benefit St. Barnabas. The policies do not name St. Barnabas as an insured, and do not indicate that the parties intended to insure or benefit St. Barnabas.

Accordingly, MLMIC's motion to dismiss the eighth cause of action for breach of contract is granted.

Eleventh Cause of Action – Prima Facie Tort:

MLMIC moves to dismiss the eleventh cause of action for prima facie tort, arguing that St. Barnabas has not pled a cause of action for prima facie tort. MLMIC argues that St. Barnabas must allege that disinterested malevolence was the sole motivation for the conduct of which it complains. It argues that Plaintiffs' allegation that MLMIC acted in its economic self-interest negates a finding of disinterested malevolence.

CPLR 3211(a)(7) provides that: "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: the pleading fails to state a cause of action."

> On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in

> the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory . . . In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and 'the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one'.

(*Leon v Martinez,* 84 NY2d 83, 87-88 [1994]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976] [". . . affidavits may be used freely to preserve inartfully pleaded, but potentially meritorious claims. Modern pleading rules are 'designed to focus attention on whether the pleader has a cause of action rather than on whether he has properly stated one'"]; *Dollard v WB/Stellar IP Owner, LLC*, 96 AD3d 533 [1st Dept 2012]). The facts alleged in such affidavits must also be assumed to be true (*Gawrych v Astoria Fed. Sav. & Loan*, 148 AD3d 681, 683 [2d Dept 2017]). However, "bare legal conclusions and factual claims which are flatly contradicted by the record are not presumed to be true" (*Id.; Cruciata v O'Donnell*, 149 AD3d 1034 [2d Dept 2017]).

A complaint must contain all essential facts to provide notice of the claim asserted (*DiMauro v Metropolitan Suburban Bus Authority*, 105 AD2d 236, 239 [2d Dept 1984]). Accordingly, vague and conclusory allegations will not suffice (*id.* at 239; *Fowler v American*, 306 AD2d 113, 113 [1st Dept 2003]) and a complaint suffering such affliction ought to be dismissed for failure to state a cause of action (*Schuckman Realty, Inc. v Marine Midland Bank, N.A.*, 244 AD2d 400, 401 [2d Dept 1994]; *O'Riordan v Suffolk Chapter*, 95 AD2d 800, 800 [2d Dept 1983]).

The elements of a cause of action for prima facie tort are: "(1) intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, and (4) by an act or series of acts that would otherwise be lawful" (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 332 [1983]). Significantly, "there is no recovery in prima facie tort unless malevolence is the sole motive for defendant's otherwise lawful act or, . . . unless defendant acts from 'disinterested malevolence', by which is meant 'that the genesis which will make a lawful act unlawful must be a malicious one unmixed with any other and exclusively directed to injury and damage of another'" (*Id.* at 333; *Curiano v Suozzi*, 63 NY2d 113, 117 [1984]). "The plaintiff [must] allege that disinterested malevolence was the sole motivation for the conduct of which [he or she] complain[s]" (*AREP Fifty-Seventh, LLC v PMGP Associates, L.P.*, 115 AD3d 402, 403 [1st Dept 2014] [internal quotation marks omitted]).

Here, MLMIC has demonstrated that St. Barnabas has not sufficiently pled a cause of action for prima facie tort. St. Barnabas has not alleged that MLMIC's sole motivation was disinterested malevolence. Rather, Plaintiffs allege throughout the complaint that MLMIC acted in its own financial interest (*See* Compl., ¶ 6 ["PRI, MLMIC, and The Pool [MMIP] undertook these bad faith actions to enjoy the minimal chance that they might prevail in the action by Redish, cap their exposure, and transfer any risk to the four insured physicians and St. Barnabas Hospital. . . ."]; Compl., ¶ 218, 273 ["MLMIC placed its financial interests above the interests of its insureds . . ."]).

In opposition, St. Barnabas has not raised an issue of fact. St. Barnabas merely argues in a conclusory fashion that it properly pled the cause of action. Although St. Barnabas argues in its memorandum of law that MLMIC's failure to settle within its policy limits constitutes "malevolence", it does not argue that it was the sole motivation for MLMIC's actions, nor does it point to any allegations in the complaint alleging that any such disinterested malevolence was the sole motivation for MLMIC's actions.

Accordingly, MLMIC's motion to dismiss the eleventh cause of action for prima facie tort is granted.

St. Barnabas' Request for Leave to Amend the Complaint:

St. Barnabas seeks leave to amend its complaint to replead any causes of action that this Court may dismiss on these motions. The request is made in opposition, not as a cross-motion. MLMIC opposes, arguing that St. Barnabas did not cross-move or attach a proposed pleading. As such, MLMIC argues that St. Barnabas has not demonstrated that any amendment would not be palpably insufficient or patently devoid of merit.

CPLR § 3025(b) provides that:

> A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.

Applications to amend pleadings are within the sound discretion of the court. Courts are given considerable latitude in exercising their discretion, and absent abuse of discretion as a matter

of law, such determination will not be disturbed on appeal (*Kimso Apartments, LLC v Gandhi*, 24 NY3d 403, 411 [2014]).

Leave to amend should be granted in the absence of evidence of substantial prejudice or surprise or that the proposed amendments are palpably insufficient or patently devoid of merit (*JP Morgan Chase Bank, N.A. v Low Cost Bearings N.Y. Inc.*, 107 AD3d 643, 644 [1st Dept 2013]). The party seeking the amendment has the burden of showing that the proposed amendment is not palpably insufficient or patently devoid of merit (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 [1st Dept 2010]).

"Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side" (*Edenwald Contracting Co. Inc. v City of New York*, 60 NY2d 957, 959 [1983]). Absent prejudice, courts are free to permit amendment, even after trial. "Prejudice is more than the mere exposure of the [party] to greater liability. Rather, there must be some indication that the [party] has been hindered in the preparation of [the party's] case or has been prevented from taking some measure in support of [its] position. The burden of establishing prejudice is on the party opposing the amendment" (*Kimso* at 411 [internal quotations omitted]).

Here, St. Barnabas' request for leave to amend its complaint is denied. As a preliminary matter, St. Barnabas did not cross-move for the requested relief. Affirmative relief may not be granted in an opposition. Moreover, St. Barnabas did not submit a proposed complaint or otherwise demonstrate that the proposed amendments would not be palpably insufficient or patently devoid of merit (*See Cracolici v Barkagan*, 127 AD3d 414, 415 [1st Dept 2015] ["The court providently exercised its discretion in denying plaintiff leave to amend the complaint absent any indication as to the nature of, evidentiary basis for, or viability of, the proposed amendment, a copy of which was not annexed to the cross motion"]). In fact, St. Barnabas did not even set forth what amendments it seeks to make.

Accordingly, St. Barnabas' request for leave to amend its complaint is denied.

MMIP'S MOTION TO DISMISS (MOTION SEQ. NO. 2):

MMIP moves to dismiss the complaint as against it, referring to and joining in the arguments made in MLMIC's motion. The Court has considered MLMIC's arguments in determining MMIP's motion to the extent that the arguments made by MLMIC are applicable to MMIP. The Court notes that St. Barnabas submitted an identical opposition to all of the Insurance Defendants' motions.

As against MMIP, the complaint alleges three causes of action: the tort of bad faith (sixth cause of action), breach of contract (ninth cause of action), and prima facie tort (twelfth cause of action).

Sixth Cause of Action - Tort of Bad Faith:

MMIP moves to dismiss the sixth cause of action for tort of bad faith, arguing that St. Barnabas has no standing to sue MMIP. MMIP argues that the duty of good faith arises out of the insurance contract, but it has no contract with St. Barnabas.

Here, MMIP has demonstrated that St. Barnabas is not an insured or a party to the insurance policies at issue (MMIP's Exhibits C, D, and E). As such, MMIP has demonstrated that it did not owe a duty to St. Barnabas to act in good faith in defending and settling the claims against the Doctors. Moreover, since MMIP refers to and joins in the arguments made in MLMIC's motion, MMIP has demonstrated that St. Barnabas is not an excess carrier so as to owe it a duty to act in good faith.

As explained above, in opposition, St. Barnabas has failed to raise an issue of fact. St. Barnabas does not dispute that it is neither an insured nor an excess carrier. St. Barnabas merely argues that it is akin to an excess carrier, and that the Court has the authority to fashion an equitable remedy. However, as noted above, it has not cited any law holding that an entity such as St. Barnabas, which is vicariously liable for the torts of another, is similarly situated to an excess carrier so as to be able to take advantage of the case law protecting excess carriers. Moreover, as explained above, St. Barnabas has not demonstrated that New York recognizes a separate cause of action in tort for bad faith under these circumstances.

Accordingly, MMIP's motion to dismiss the sixth cause of action for the tort of bad faith is granted.

Ninth Cause of Action – Breach of Contract:

MMIP moves to dismiss the ninth cause of action for breach of contract, arguing that it has no privity with St. Barnabas. MMIP also argues that St. Barnabas is not a third-party beneficiary of the policies, as it is not a named insured and was not granted any rights under the policies. St. Barnabas does not oppose this portion of the motion.

Here, MMIP has demonstrated that St. Barnabas is not a party or an intended, third-party beneficiary of the insurance policies at issue. The insurance policies at issue demonstrate that there

was no intention to benefit St. Barnabas. The policies do not name St. Barnabas as an insured, and do not indicate that the parties intended to insure or benefit St. Barnabas.

Accordingly, MMIP's motion to dismiss the ninth cause of action for breach of contract is granted.

Twelfth Cause of Action – Prima Facie Tort:

MMIP moves to dismiss the twelfth cause of action, arguing that the complaint does not plead a prima facie tort. MMIP argues that the complaint does not allege any special damages or a "bad motive".

Here, MMIP has demonstrated that St. Barnabas has not sufficiently pled a cause of action for prima facie tort. St. Barnabas has not alleged that MMIP's sole motivation was disinterested malevolence. Rather, Plaintiffs allege throughout the complaint that MMIP acted in its own financial interest (*See* Compl., ¶ 6 ["PRI, MLMIC, and The Pool [MMIP] undertook these bad faith actions to enjoy the minimal chance that they might prevail in the action by Redish, cap their exposure, and transfer any risk to the four insured physicians and St. Barnabas Hospital. . . ."]; Compl., ¶ 240 ["The Pool [MMIP] placed its financial interests above the interests of its insureds . . ."]).

As explained above, in opposition, St. Barnabas has not raised an issue of fact. St. Barnabas merely argues in a conclusory fashion that it properly pled the cause of action. Although St. Barnabas argues in its memorandum of law that MMIP's failure to settle within its policy limits constitutes "malevolence", it does not argue that it was the sole motivation for MMIP's actions, nor does it point to any allegations in the complaint alleging that any such "bad motive" or disinterested malevolence was the sole motivation for MMIP's actions.

Accordingly, MMIP's motion to dismiss the twelfth cause of action for prima facie tort is granted.

PRI'S MOTION TO DISMISS (MOTION SEQ. NO. 3):

CAUSES OF ACTION BY DR. AHMED:

As against PRI, the complaint alleges three causes of action on behalf of Dr. Ahmed: breach of the duty of good faith (first cause of action), tort of bad faith (second cause of action), and prima facie tort (third cause of action). However, in his opposition, Dr. Ahmed states that he "agrees to stipulate to the voluntary dismissal of his two tort-based causes of action and intends to proceed

solely with his contract based claim" (Dr. Ahmed's Memorandum of Law, p. 1, 11). As such, the Court will consider only the portion of PRI's motion to dismiss the first cause of action for breach of the duty of good faith.

First Cause of Action – Breach of the Duty of Good Faith:

"[I]n order to establish a prima facie case of bad faith, the plaintiff must establish that the insurer's conduct constituted a 'gross disregard' of the insured's interests – that is, a deliberate or reckless failure to place on equal footing the interests of its insured with its own interests when considering a settlement offer. In other words, a bad-faith plaintiff must establish that the defendant insurer engaged in a pattern of behavior evincing a conscious or knowing indifference to the probability that an insured would be held personally accountable for a large judgment if a settlement offer within the policy limits were not accepted" (*Pavia* at 453-454; *Federal Ins. Co.* at 402).

"Naturally, proof that a demand for settlement was made is a prerequisite to a bad-faith action for failure to settle. However, evidence that a settlement offer was made [by a plaintiff] and not accepted [by a defendant] is not dispositive of the insurer's bad faith. It is settled that an insurer 'cannot be compelled to concede liability and settle a questionable claim' simply 'because an opportunity to do so is presented'. Rather, the plaintiff in a bad-faith action must show that 'the insured lost an actual opportunity to settle the … claim' at a time when all serious doubts about the insured's liability were removed (*Pavia* at 454).

"Bad faith is established only 'where the liability is clear and the potential recovery far exceeds the insurance coverage'. . . . The bad-faith equation must include consideration of all of the facts and circumstances relating to whether the insurer's investigatory efforts prevented it from making an informed evaluation of the risks of refusing settlement. In making this determination, courts must assess the plaintiff's likelihood of success on the liability issue in the underlying action, the potential magnitude of damages and the financial burden each party may be exposed to as a result of a refusal to settle. Additional considerations include the insurer's failure to properly investigate the claim and any potential defenses thereto, the information available to the insurer at the time the demand for settlement is made, and any other evidence which tends to establish or negate the insurer's bad faith in refusing to settle. The insured's fault in delaying or ceasing settlement negotiations by misrepresenting the facts also factors into the analysis" (*Pavia* at 454-455).

PRI moves to dismiss the first cause of action for breach of the duty of good faith, arguing that it is duplicative of a breach of contract claim. This argument is without merit. Although a cause of action for breach of the duty of good faith may be dismissed as duplicative of a cause of action for breach of contract, here, Dr. Ahmed does not allege a breach of contract cause of action against PRI. As such, the cause of action for breach of the duty of good faith is not duplicative, and cannot be dismissed on that ground. The cases cited by PRI are inapposite, as in those cases, the plaintiffs had alleged causes of action in both breach of contract and breach of the duty of good faith.

PRI also argues that a bad faith claim requires proof that the insurance company acted with gross disregard of the insured's interest, and that its bad faith prejudiced an actual opportunity to settle the claim within the coverage limits of the policy at a time when all serious doubts about the insured's liability were removed. PRI argues that Plaintiffs have not alleged that there was a demand for PRI to settle the claims against Dr. Ahmed within its policy limits, and that Plaintiffs cannot demonstrate that it refused to settle the claims or that such refusal was with gross disregard of Dr. Ahmed's interests.

This argument is without merit. Plaintiffs allege in their complaint that the Doctors had testified at trial between March 8 and March 13, 2019 (Compl., ¶ 125), that it was apparent that the jury would find the Doctors liable for medical malpractice and award damages that would exceed the total insurance coverage of the Doctors, that based on the evidence presented to the jury, all serious doubts about the Doctors' liability were removed (Compl., ¶ 127; ¶ 166, ¶ 172), and that there was a strong probability that Dr. Ahmed would be held personally accountable for a large judgment (Compl., ¶ 172). Plaintiffs also allege, *inter alia*, that:

> On April 3, 2019, counsel for Redish sent letters via overnight delivery to the attorneys for Dr. Ahmed, Dr. Adler, Dr. Ciubotaru, and Dr. Stumacher informing that Redish would accept the full amount of insurance coverage from each physician (i.e., $2,300,000 from each doctor) in full settlement of Redish's claims. The letters further stated that these offers of settlement would expire at the end of business on April 5, 2021 (Compl., ¶ 134).

Plaintiffs further allege, *inter alia*, that:

> Despite this notice to the defense attorneys appointed by PRI, MLMIC, and The Pool to inform that Redish would accept the amounts of the insurance policies of the four physicians, PRI, MLMIC, and The Pool undertook no efforts to settle the action within Redish's demand and the limits of the insurance policies (Compl., ¶ 135).

Plaintiffs also allege that PRI had complete control over the defense and "could settle any claim at its own expense" (Compl., ¶ 56), that the coverage permitted PRI "to settle claims against him without his consent" (Compl., ¶ 57) and that Dr. Ahmed asked PRI to settle the claims on his behalf before the jury rendered its verdict (Compl., ¶ 167). Plaintiffs further allege that "a good faith consideration of the interests of Dr. Ahmed required that PRI settle the claim within the limits of the PRI policies when it had the opportunity to do so" (Compl., ¶ 168) and that "[b]y repeatedly refusing to settle the action within the limits of the professional liability policies it had issued to BIMA and Dr. Ahmed, PRI engaged in a pattern of behavior which was knowingly indifferent to and in gross disregard of Dr. Ahmed's interests "(Compl. ¶ 172). Since the instant motion is one for dismissal, not for summary judgment, Plaintiffs need not prove their causes of action (*Roldan v Allstate Ins. Co.*, 149 AD2d 20, 37 [2d Dept 1989] ["Allstate's motion is addressed solely to the adequacy of the pleadings; the motion was made pursuant to CPLR 3211, not CPLR 3212, and so the plaintiff was not put to her proof"]).

Accordingly, PRI's motion to dismiss the first cause of action for breach of the duty of good faith and fair dealing is denied.

CAUSES OF ACTION BY ST. BARNABAS:

As against PRI, the complaint alleges three causes of action on behalf of St. Barnabas: tort of bad faith (fourth cause of action), breach of contract (seventh cause of action) and prima facie tort (tenth cause of action).

Fourth Cause of Action – Tort of Bad Faith:

PRI moves to dismiss the fourth cause of action for the tort of bad faith, arguing that St. Barnabas lacks standing to bring claims against PRI because it is not a party to the policies at issue. PRI argues that a duty of good faith arises out of a contractual relationship, and duties are owed only to the insured. PRI argues that St. Barnabas was not an insured under its policies.

Here, PRI has demonstrated that St. Barnabas is not an insured or a party to the insurance policies at issue (PRI's Exhibits C, D). As such, PRI has demonstrated that it did not owe a duty to St. Barnabas to act in good faith in defending and settling the claims against Dr. Ahmed.

As explained above, in opposition, St. Barnabas has failed to raise an issue of fact. St. Barnabas does not dispute that it is not an insured under the policies. It merely argues that it is akin to an excess carrier, and that the Court has the authority to fashion an equitable remedy. However,

as noted above, it has not cited any law holding that an entity such as St. Barnabas, which is vicariously liable for the torts of another, is similarly situated to an excess carrier so as to be able to take advantage of the case law protecting excess carriers. Moreover, as explained above, St. Barnabas has not demonstrated that New York recognizes a separate cause of action in tort for bad faith under these circumstances.

Accordingly, PRI's motion to dismiss the fourth cause of action for the tort of bad faith is granted.

Seventh Cause of Action – Breach of Contract:

PRI moves to dismiss the seventh cause of action for breach of contract, arguing that St. Barnabas is not a third-party beneficiary. PRI argues that St. Barnabas is not named as an insured, or referred in the policies, and has not been granted any rights to coverage under the policies. St. Barnabas did not oppose this portion of the motion.

Here, PRI has demonstrated that St. Barnabas is not a party or an intended, third-party beneficiary of the insurance policies at issue. The insurance policies at issue demonstrate that there was no intention to benefit St. Barnabas. The policies do not name St. Barnabas as an insured, and do not indicate that the parties intended to insure or benefit St. Barnabas.

Accordingly, PRI's motion to dismiss the seventh cause of action for breach of contract is granted.

Tenth Cause of Action – Prima Facie Tort:

PRI moves to dismiss the tenth cause of action for prima facie tort, arguing that Plaintiffs have not alleged special damages or that disinterested malevolence was PRI's sole motivation for not settling the Redish action against Dr. Ahmed.

Here, PRI has demonstrated that St. Barnabas has not sufficiently pled a cause of action for prima facie tort. St. Barnabas has not alleged that PRI's sole motivation was disinterested malevolence. Rather, Plaintiffs allege in the complaint that PRI acted in its own interest (*See* Compl., ¶ 6 ["PRI, MLMIC, and The Pool undertook these bad faith actions to enjoy the minimal chance that they might prevail in the action by Redish, cap their exposure, and transfer any risk to the four insured physicians and St. Barnabas Hospital. . . ."]; Compl., ¶ 202 ["These acts and omissions by PRI were in bad faith, put PRI's own interests over those of its insureds . . ."]).

As explained above, in opposition, St. Barnabas has not raised an issue of fact. St. Barnabas merely argues in a conclusory fashion that it properly pled the cause of action. Although St. Barnabas argues in its memorandum of law that PRI's failure to settle within its policy limits constitutes "malevolence", it does not argue that it was the sole motivation for PRI's actions, nor does it point to any allegations in the complaint alleging that disinterested malevolence was the sole motivation for PRI's actions.

Accordingly, PRI's motion to dismiss the tenth cause of action for prima facie tort is granted.

It is hereby

**ORDERED** that the Clerk dismiss the complaint against Defendant MLMIC Insurance Company, f/k/a Medical Liability Mutual Insurance Company. It is further

**ORDERED** that the Clerk dismiss the complaint against Defendant N.Y. Medical Malpractice Insurance Pool. It is further

**ORDERED** that the Clerk dismiss the second, third, fourth, seventh and tenth causes of action against Defendant Physicians' Reciprocal Insurers. It is further

**ORDERED** that this matter is scheduled for a **Preliminary Conference** on **September 12, 2022, at 3:30 p.m.** It is further

**ORDERED** that Defendant MLMIC Insurance Company, f/k/a Medical Liability Mutual Insurance Company serve a copy of this Decision and Order upon all parties, with Notice of Entry, within thirty (30) days of the date hereof.

This constitutes the Decision and Order of this Court.

Dated: 7/8/22

Hon.

**FIDEL E. GOMEZ, A.J.S.C.**