

**Medical Liab. Mut. Ins. Co. v  
Roach**

2007 NY Slip Op 30244(U)

March 9, 2007

Supreme Court, New York County

Docket Number: 0101030

Judge: Karen S. Smith

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SUPREME COURT OF THE STATE OF NEW YORK. — NEW YORK COUNTY

PRESENT: HON. KAREN SMITH

PART 44

Index Number : 101030/2004

MEDICAL LIABILITY MUTUAL

vs

ROACH, LAWRENCE C.

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE 1/3/07

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 5 were read on this motion to/for \_\_\_\_\_

	PAPERS NUMBERED
Notice of Motion/ <del>Order to Show Cause</del> -- Affidavits -- Exhibits ...	<u>1</u>
Answering Affidavits -- Exhibits _____	<u>2</u>
Replying Affidavits _____	<u>3</u>
<u>Supplemental Memoranda</u>	<u>4, 5</u>
Cross-Motion: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	

FOR THE FOLLOWING REASON(S):

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached memorandum decision and order.

[ FILED ]

MAR 19 2007

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 3/9/07

*KS*

**HON. KAREN SMITH** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 44

-----X  
MEDICAL LIABILITY MUTUAL INSURANCE  
COMPANY,

Plaintiff,

-against-

Index No.: 101030/04  
Motion Seq.: 003  
Motion Date: 1/3/07

**DECISION AND ORDER**

LAWRENCE C. ROACH,

Defendant.

-----X  
LAWRENCE C. ROACH,

Third-Party Plaintiff,

-against-

PELTZ AND WALKER,

Third-Party Defendant.

-----X  
**PRESENT: KAREN S. SMITH, J.S.C.:**

Plaintiff Medical Liability Mutual Insurance Company's (hereinafter "MLM") motion for an order granting summary judgment in its favor and dismissing defendant Lawrence C. Roach's (hereinafter "Roach") counterclaim against it is granted for the reasons set forth more fully below.

Plaintiff MLM, a professional malpractice liability insurer, brought the instant action to recover money it paid on Roach's behalf to settle a medical malpractice claim brought against Roach, a doctor and its insured, and to cover legal expenses incurred by a law firm hired by

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MAR 19 2007  
COUNTY CLERK'S OFFICE  
NEW YORK

MLM to defend the claim against Roach, totaling \$71,952.46, plus statutory interest.<sup>1</sup> Roach answered and counterclaimed, asserting that MLM hired incompetent counsel to defend him and advised counsel to settle the claim over Roach's objection. Roach also served a third-party complaint against the law firm MLM hired to represent him, Peltz and Walker, claiming the firm committed legal malpractice when it settled the case against him rather than go to trial. MLM now moves for summary judgment in its favor against defendant Roach, dismissing the complaint and all counterclaims against it.

In support of its motion, MLM submits, 1) a Medical Liability Mutual Insurance Company Physicians & Surgeons Professional Liability Insurance Policy (Claims-made Form); 2) invoices from Peltz and Walker submitted to MLM for legal services dated between November 1, 1994 and May 1, 2002; 3) copies of checks showing payment by MLM to Peltz and Walker; 4) MLM's complaint; 5) Roach's answer with counterclaims; 6) MLM's reply to Roach's answer; and 7) an EBT of Roach dated September 14, 2005. Roach opposes the instant motion and submits 1) one page of an EBT of Timothy Howell, a claims adjuster for MLM employed by Donald J. Fager and Associates, the exclusive broker for plaintiff; and 2) a letter from Roach to MLM's policyholders' department dated January 13, 2004.

The facts are contained in the parties' moving papers and are not in material dispute except as noted below. Roach is a physician specializing in radiology. In 1994, Roach was sued for medical malpractice by Noemi Rosario, who claimed to have been a former patient. The suit

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<sup>1</sup> Although MLM originally sought to recover \$85,752, Roach affirmatively asserted in his answer that part of that amount is barred by the six year statute of limitations governing contracts. In its reply papers to this motion, MLM acknowledged that \$13,799.54 of the original amount was for services rendered prior to January 4, 1998 and would be barred by the statute of limitations, thus reducing the amount of judgment sought to \$71,952.46.

was based on Roach's alleged review of Rosario's x-rays and failure to detect breast cancer on or about December 7, 1991. Roach reported the claim to MLM for coverage on August 9, 1994. According to MLM, Roach initially sought insurance coverage by MLM in 1988 and was provided with a "claims-made" policy, which was in effect from July 1, 1991 through February 8, 1993. (Exhibit A to MLM's motion papers). Roach disputes that the policy submitted by MLM was the policy he purchased, an issue discussed in more detail below.

After Roach reported Rosario's claim against him to MLM, the company hired third-party defendants Peltz and Walker to represent Roach in the action. The litigation went on for several years until, in October 2002, the other defendants reached a settlement agreement in the amount of \$340,000. Peltz and Walker, on behalf of Roach, agreed to contribute \$25,000 to the settlement rather than be the only remaining defendant to go to trial. According to Roach, he objected to the settlement because he believed there was sufficient evidence to demonstrate his absolute innocence and lack of involvement with Rosario's care. In addition to claiming that the "claims-made" policy MLM relies on is not his and he is, therefore, not liable for the expenses incurred by it, Roach counter-claims, asserting the MLM is liable to him for alleged legal malpractice committed by Peltz and Walker in settling the case over his objection and for advising Peltz and Walker to do so.

On this motion for summary judgment, MLM must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence in an admissible form to demonstrate the absence of any material issues of fact. (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1987]). Once MLM has made such a showing, the burden then shifts to Roach to produce evidence in admissible form sufficient to establish the existence of any material issues of fact

requiring a trial of the action. (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

### **Roach's Liability Under The Policy**

In support of its motion, MLM submits a Physicians & Surgeons Professional Liability Insurance Policy (Claims Made Form), which it claims was the policy Roach last purchased, covering the period July 1, 1991 to February 8, 1993. MLM's motion is supported by an affidavit of Timothy Howell, a claims supervisor for MLM's servicing agent Donald J. Fager and Associates, in which he states that he was the claims examiner on the Roach matter between 1996 and 2002 and that at the time of the alleged medical malpractice, Roach was covered by a "claims-made" policy under the policy number CMP-022495-7, which was cancelled on February 8, 1993. According to Howell, the annexed "claims-made" policy was the only such policy MLM issued during that time period. Howell states that its coverage of the Roach claim was pursuant to Section 10 of that policy, which states, in pertinent part:

Section 10: IF YOU DO NOT PURCHASE OPTIONAL EXTENDED REPORTING ENDORSEMENT COVERAGE AND IF YOU ARE NOT ENTITLED TO AUTOMATIC EXTENDED REPORTING ENDORSEMENT COVERAGE AND A CLAIM IS MADE AGAINST YOU AND YOUR HOSPITAL OR ANOTHER SURGEON

. . . [t]here are two situations where Claims against you will be handled under this policy as though you had purchased or were entitled to this coverage even though the Claims were first reported to the Company after the 60<sup>th</sup> day following the end of the Policy Period or any Termination of Coverage. IN BOTH CASES, THE COMPANY HAS THE RIGHT TO INSTITUTE A CLAIM AGAINST YOU PERSONALLY FOR ANY CLAIMS OR JUDGMENTS THE COMPANY ACTUALLY PAYS AND FOR ALL DEFENSE COSTS THE COMPANY INCURS UNDER THIS PROVISION. . . .

In either situation described above, the Company retains all rights to negotiate or to agree to a settlement of any Claim; you have no rights to consent to or withhold consent to a settlement.

(Emphasis in original). One of the two circumstances under which Section 10 applies is where the insured is sued with another physician, as was the case in Rosario's claim against Roach.

Roach asserts in his opposition that the policy submitted by MLM on this motion is not the policy he purchased. According to Roach, he was covered by a non-"claims-made" policy purchased in 1976 and has had continuous coverage with MLM between that time and 1993. Roach attacks MLM's position that the policy it submitted is his, on the basis that it is not signed and has no policy number on it to identify the holder of the policy. As a result, Roach argues, there is a material issue of fact as to what Roach's policy was, prohibiting summary judgment. It is important to note that Roach submits no evidence in support of this contention. In response, MLM submits the following documents, which plainly contradict Roach's assertion and demonstrate that Roach was under the "claims-made" policy at the time the alleged medical malpractice occurred: 1) three "Facts (Declaration) Pages" addressed to Roach which identify Roach's policy as a "claims-made" policy and provide the policy number, covering the periods of July 1, 1990 to July 1, 1991, July 1, 1991 to July 1, 1992, and July 1, 1992 to July 1, 1993; 2) three invoices addressed to Roach bearing the same policy number dated July 5, 1990, July 9, 1991, and July 9, 1992; 3) an application for Physician & Surgeon Part-Time Insurance dated April 20, 1991 and signed by Roach; 4) two policy endorsements bearing Roach's signature and the same policy number, dated December 10, 1990 and April 20, 1991; 5) an application for insurance dated May 2, 1988 bearing Roach's signature; and 5) an opinion by the Office of General Counsel of the New York State Insurance Department dated July 28, 2003, which states clearly that the signature of the insured need not be placed on the policy itself under New York law.

The submission of these documents are sufficient to make a *prima facie* showing of entitlement to judgment as a matter of law. It is well-settled that “one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate an acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient.” (*Zuckerman v. New York*, 49 NY2d 557, 598 [1980], internal citations omitted). Roach’s submission of his own self-serving affidavit, one page of irrelevant deposition testimony by Howell, and a letter from Roach to MLM requesting a copy of his allegedly lost 1976 policy, incidently bearing the same policy number as the documents submitted by MLM, fails to raise an issue of fact as to whether the “claims-made” policy submitted by MLM is the policy Roach was covered by at the time of the alleged medical malpractice. Roach testified in his 2005 deposition that he is unable to provide his original 1976 policy or other supporting documentation because his former wife confiscated his important documents during the couple’s divorce proceedings. However, Roach submits no evidence that he sought a subpoena from the Court for those records or made any other formal attempt to obtain evidence to defeat this motion for summary judgment since his 2005 deposition. Therefore, Roach has failed to “demonstrate an acceptable excuse for his failure to meet the requirement of tender in admissible form.” (*Zuckerman v. New York, id.*). As Roach has failed to raise a triable issue of fact regarding whether the MLM “claims-made” policy it submitted was the same policy in effect at the time of the alleged medical malpractice, there is no issue of fact requiring a trial.

Finally, as the alleged medical malpractice occurred on or around December 14, 1991,

during the policy period, and the claim was not reported until more than 6 months after the policy terminated, MLM's duty to defend Roach arose under Section 10 of the "claims-made" policy. Under the plain terms of Section 10, Roach is liable to MLM for "any claims or judgments the Company actually pays and for any and all defense costs the Company incurs..." Accordingly, MLM is entitled to recover the full \$25,000 settlement amount and defense costs it paid to Peltz and Walker on Roach's behalf.

### **Roach's Counter-Claim**

Roach's counter-claim against MLM seeks money damages for settling the underlying claim against his wishes. The New York Department of Insurance mandates that liability insurers "offer all applicants for medical malpractice insurance . . . the option of purchasing a no-consent policy." (11 NYCRR § 70.2(a)(1)). A "no-consent" policy is defined as "a policy which provides that the insurer has the sole authority to settle any claim, up to the policy limits, without the consent of the insured." (11 NYCRR § 70.1). Roach's policy from MLM was a no-consent policy, stating clearly in Section 10 that "...the Company retains all rights to negotiate or to agree to a settlement of any Claim; you have no rights to consent to or withhold consent to a settlement." It is therefore clear that under the law of New York, MLM's no-consent policy which Roach purchased, is a valid policy enforceable upon the insured.

In arguing that MLM is liable to him for settling against his wishes, then, Roach may be arguing that MLM violated its duty to exercise good faith in defending Roach. (*See Ansonia Associates Limited Partnership v. Public Service Mutual Ins. Co.*, 257 AD2d 84, 86 [1<sup>st</sup> Dept 1999]; *see Pavia v. State Farm Mutual Automobile Ins. Co.*, 82 NY2d 445, 452 [1993] ["The duty of 'good faith' settlement is an implied obligation derived from the insurance contract."]).

“There is a well-established proscription against permitting an insurer to place its own financial interests above those of its insured.” (*Ansonia Associates Limited Partnership v. Public Service Mutual Ins. Co., id.*). In order to establish a *prima facie* case of bad faith, Roach must establish that the insurer’s conduct constitutes a “gross disregard” of the insured’s interest. (*Pavia v. State Farm Mutual Automobile Ins. Co.*, 82 NY2d 445, 452 [1993]). While an insurer is obliged to respond accurately to requests from its insured regarding the progress or status of any settlement negotiations (*Knobloch et al., v. Royal Globe Ins. Co.*, 28 NY2d 471, 438 [1976]; *Gerling America Ins. Co., v. G.A. Braun, Inc.*, 273 AD2d 139 [1<sup>st</sup> Dept. 2000]), as a matter of law, the assertion of bad faith based solely upon the insurer’s settlement without [the insured’s] knowledge or consent, particularly where the policy is a no-consent policy, is insufficient to make out a *prima facie* case of bad faith. (*Feliberty v. Damon*, 72 NY2d 112, 116; *Knobloch et al. v. Royal Globe Ins. Co., supra*). As Roach’s claims of bad faith are based solely on MLM’s failure to obtain Roach’s consent before authorizing Peltz and Walker to settle the claim against Roach, he has failed to make out a *prima facie* case and this claim must fail.

As part of his counter-claim against MLM, Roach also contends that MLM is liable to him because it appointed incompetent counsel and

...advised said counsel of Peltz and Walker to settle the action over the objection of Defendant and in bad faith despite the fact that there was ample evidence to support Defendant’s defense that he had never treated the injured individual or otherwise rendered any medical diagnosis, treatment or care to the injured individual and therefore there was no basis for the medical malpractice action or settlement of same.

The Court need not address the claims of legal malpractice against Peltz and Walker on this motion, but need only address the issue of whether a liability insurance company may be held vicariously liable for the malpractice of counsel which it appoints to represent its insured.

There is no dispute that Peltz and Walker acted as an independent contractor to represent Roach. Roach's counsel was not employed by MLM, but was in a pool of law firms with which MLM regularly contracted legal defense work on behalf of its insureds. As such, in order to hold MLM liable for any alleged malpractice of Peltz and Walker, Roach would have to demonstrate that the duty to represent him was a non-delegable duty for which MLM is solely liable.

However, such a contention has been explicitly rejected by the New York Court of Appeals. In *Feliberty v. Medical Malpractice Ins. Assoc.*, (72 NY2d 112 [1988]), the Court wrote an extensive analysis of the delegability of a liability insurer's duty to defend. The *Feliberty* Court listed several factors which justify declining to define such a duty as non-delegable: 1) an insurance company is explicitly prohibited from practicing law (Judiciary Law § 495); 2) independent counsel's primary interest must be that of the insured, not the insurer; it is, therefore, untenable to prohibit insurers from conducting or controlling the representation of its own insureds, while charging the insurer with responsibility for counsel's independent professional judgments in such representation; and 3) an insured is never left without a remedy for alleged legal malpractice; he may always assert such a claim against the independent counsel directly, as Roach has done here. (72 NY2d 112, 120 [1988]). Roach has failed to submit any evidence that MLM interfered with the relationship between himself and counsel or otherwise conducted itself unlawfully.

Accordingly, it is;

ORDERED that plaintiff Medical Liability Mutual Insurance Company's motion for summary judgment in its favor and dismissing all claims against it is granted; and it is further

ORDERED that the defendant Lawrence Roach's counter-claim against plaintiff is

dismissed; and it is further

ORDERED that the plaintiff serve a copy of this order, together with notice of entry hereof, and a judgment roll and bill of costs, together with such other forms and fees as may reasonably be required by the Clerk, upon the Clerk of the Court (60 Centre St., Basement); and it if further

ORDERED that upon receipt of the necessary forms and fees, the Clerk is directed to enter judgment in favor of plaintiff in the amount of \$71,952.46 plus statutory interest from October 17, 2002; and it is further

ORDERED that plaintiff serve a copy of this decision and order, together with notice of entry hereof, upon the Trial Support Office (60 Centre St., Room 158), and all other parties.

The foregoing constitutes the decision and order of this court.

Dated: March 9, 2007

ENTER:

**[ FILED ]**  
MAR 19 2007  
COUNTY CLERK'S OFFICE  
NEW YORK  
*K.S.S.*  
\_\_\_\_\_  
Hon. Karen S. Smith, J.S.C.