

Cohen v Medical Malpractice Ins. Pool of N.Y. State

2007 NY Slip Op 30982(U)

April 17, 2007

Supreme Court, New York County

Docket Number: 0114857/2006

Judge: Sheila Abdus-Salaam

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

PRESENT: HON. SHEILA ABDUS-SALAAM
Justice

PART 13

Sharona Cohen

INDEX NO. 114857/06

MOTION DATE 2/2/07

- v -

MOTION SEQ. NO. 001

Medical Malpractice Insurance Pool of New York State, et al.

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 _____

FILED
PAPERS NUMBERED
APR 30 2007
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion by defendant Medical Malpractice Insurance Pool of New York State ("MMIP") for summary judgment and a declaration in its favor declaring that MMIP is neither obligated to defend nor indemnify plaintiff Sharona Cohen in the underlying action Margulies v. Gardner, et al., (Index No. 100648/06) is denied. The underlying action is a malpractice action brought by Joshua and Elizabeth Margulies against, among others, Andrew Gardner, M.D., Joel Moskowitz, M.D., their professional corporation Corinthian OB/GYN, P.C., and Sharona Cohen. Ms. Cohen allegedly performed genetic counselling for the Margulies at the office of Corinthian. The lawsuit alleges that defendants failed to test for Tay-Sachs disease and that the infant Benjamin Margulies has been diagnosed with that disease.

In this declaratory judgment action, Ms. Cohen alleges that she performed her genetic counselling services in her capacity as an employee of defendants Dr. Gardner, Dr. Moskowitz and Corinthian, and that she is therefore entitled to

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

insurance coverage in the underlying action pursuant to the policy issued by MMIP to defendants. MMIP asserts that it issued a medical malpractice policy to defendant Dr. Moskowitz for the relevant period at issue in the underlying lawsuit, but that Ms. Cohen is not an insured under the policy. As noted by MMIP, the policy states that it provides coverage to "(1) you, the physician or surgeon shown as the Named Insured on the Facts Page and (2) certain other qualified persons within the definition of Insured." The person listed on the Facts Page is Joel M. Moskowitz, M.D. so Ms. Cohen is not the named insured. Nor does she meet the definition of insured which includes the person listed on the Facts Page, the professional corporation, that person's administrator, qualified temporary substitute physician or that person's estate.

However, there is a provision in the policy that may be applicable to Ms. Cohen. Section III (A) states that the company will pay for vicarious liability claims, but that the named insured is not covered for the acts of certain people in his employment for whose conduct he is responsible unless they are insured under a separate professional liability insurance policy. Those "certain people" are defined in Section V (E) as employed physicians, "physician's assistants, specialist's assistants, nurses providing anesthesia services, nurse practitioners, or midwives." The policy further states in Section III (D) that in addition to the amounts it will pay for claims brought under this policy, it will pay to defend such claims.

Ms. Cohen has provided an affidavit in opposition to the motion in which she states that she is a genetic counselor which is not a licensed profession. A genetic counselor is not included in the policy's list of "certain people" who must be insured under a separate professional liability policy in order for the MMIP to cover vicarious liability claims. Additionally, Ms. Cohen has stated that she was essentially an employee of defendants in that she worked out of their offices, performed services requested by defendants and reported directly to Drs. Gardner and Moskowitz. Ms. Cohen avers that defendants provided all of the equipment, paid the overhead, set her hours and billed for her services. Thus, Ms. Cohen may be an employee of defendants for purposes of tort liability (see Tesillo v. Emergency Physicians Associates, 376 F.Supp. 2d 327 [W.D.N.Y. 2005]; Melbourne v. New York Life Ins. Co., 271 AD2d 196 [2000]).

MMIP's argument that plaintiff's assertions about her employment status are irrelevant because the policy issued to Dr. Moskowitz does not insure his employees, but only insures him, his professional corporation, his administrator, his temporary substitute and his estate, is rejected. This interpretation would render the vicarious liability provisions meaningless and superfluous. The vicarious liability definition "means liability arising from Claims made against you [Dr. Moskowitz] because of Professional Services, which were provided (or should have been provided) by other people for whose conduct you are legally responsible." Essentially, in the event that it is determined that Dr. Moskowitz is vicariously liable for Ms. Cohen's acts, the Margulies' claim made against Ms. Cohen is also a claim made against Dr. Moskowitz, the insured under the MMIP policy,

Accordingly, the motion for summary judgment is denied.

FILED
 APR 30 2007
 NEW YORK
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Dated: 4/17/07

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J.S.C.

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