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

PRESENT: JOAN B LOBIS Justice PART 6

Sharona Cohen

-v-

Medical Malpractice DNS.

INDEX NO. 114857/06

MOTION DATE 11/24/09

MOTION SEQ. NO. 6

MOTION CAL. NO.

The following papers, numbered 1 to 29 were read on this motion to/for Summ judgmnt

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1-22 |
| Answering Affidavits — Exhibits | 23-28 |
| Replying Affidavits | 29 |

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

UNFILED JUDGMENT
This Judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgement Clerk's Desk (Room 141B)

MOTION DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION AND ORDER

Dated: 4/5/10

J.S.C.

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

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

[* 2]

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

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SHARONA COHEN,

Plaintiff,

Index No.: 114857/06

- against -

**Decision and Order**

MEDICAL MALPRACTICE INSURANCE POOL OF NEW YORK STATE, ANDREW GARDNER, M.D., JOEL MOSKOWITZ, M.D., CORINTHIAN OB/GYN, P.C., CCC INSURANCE CORPORATION and CCC INSURANCE COMPANY, LTD.,

Defendants.

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**JOAN B. LOBIS, J.S.C.**

Motion Sequence Numbers 003, 004, 005, 006, and 007 are hereby consolidated for disposition. In Sequence 003, plaintiff Sharona Cohen moves for an order granting her summary judgment against defendants CCC Insurance Corporation and CCC Insurance Company, LTD. (collectively "CCC") and declaring that CCC is obligated to defend and indemnify plaintiff in the action entitled Margulies v. Gardner, New York Supreme Court, New York County, Index Number 100648/06 (the "Margulies Action"); striking defendant Joel Moskowitz, M.D.'s answer for failing to appear for an examination before trial ("EBT") or compelling him to appear for an EBT; striking defendant Andrew Gardner, M.D.'s answer for failing to respond to discovery demands or compelling him to respond; awarding plaintiff attorneys fees; and for other related relief. In Sequence 004, CCC moves for an order granting it summary judgment and declaring that it has no duty to defend or indemnify plaintiff in the Margulies Action. In Sequence 005, Dr. Gardner moves for summary judgment dismissal of plaintiff's complaint on the grounds that there are no material issues of fact that Ms. Cohen is an independent contractor and not Dr. Gardner's employee, and that, pursuant to BCL § 1505, Dr. Gardner, as a shareholder and employee of Corinthian OB/GYN, P.C.

("Corinthian"), cannot be held vicariously liable for any tortious acts or omissions of other employees of the corporation. In Sequence 006, Dr. Moskowitz moves for summary judgment on similar grounds as Dr. Gardner's motion in Sequence 005. In Sequence 007, Corinthian moves for summary judgment dismissal of the complaint as against it, adopting and incorporating the facts and arguments set forth in Dr. Moskowitz's motion in Sequence 006.

This declaratory judgment action was commenced by Ms. Cohen after she was named as a defendant in the Margulies Action, which is an action for medical malpractice and negligence against Ms. Cohen, Dr. Gardner, Dr. Moskowitz, Corinthian, and several other defendants. The plaintiffs in the Margulies Action allege that the defendants to that action failed to perform genetic counseling and screening during the prenatal care that the defendants provided to the plaintiffs and their child. Ms. Cohen is a genetic counselor who provided certain counseling to plaintiffs in conjunction with the obstetrical and prenatal care provided to plaintiffs by the other defendants to the Margulies Action. She did not maintain professional liability coverage. Ms. Cohen asserts that she was an employee of Corinthian, Dr. Gardner, and Dr. Moskowitz. She seeks a declaratory judgment against CCC that she was a covered employee under an insurance policy issued by CCC which provides voluntary attending physicians professional liability insurance to Dr. Gardner, a shareholder and employee of Corinthian. Ms. Cohen asserts that she is entitled to defense and indemnification from CCC.

In her capacity as a genetic counselor, plaintiff counseled patients regarding the benefits, risks, and limitations of amniocentesis. According to plaintiff's EBT testimony, she

considered her services akin to those provided by a receptionist or billing clerk. She did not give advice regarding the tests that patients should undergo; rather, she counseled patients regarding the tests that would be performed, the genetic markers for which both partners would be tested, and the illnesses for which their fetuses would be tested. The physicians were not present during the counseling sessions. Plaintiff would report to the physicians for their review of the genetic counseling services she provided.

Plaintiff performed her services for defendant Corinthian's patients at Corinthian's offices. She worked out of Dr. Moskowitz's personal office. Her schedule was set by mutual agreement between plaintiff and the physicians. Plaintiff used Corinthian's telephone line, and her appointments were scheduled by Corinthian's office staff. She had discretion to conduct the counseling sessions as she saw fit. She used standard genetic questionnaires and prepared her own information sheets regarding various genetic conditions. These documents were not specific as to defendant Corinthian. Plaintiff's hand-written notes were generally prepared on blank paper. She did not utilize any medical equipment during the counseling sessions. For her services, plaintiff was paid on a "per patient" basis by defendant Corinthian; she did not bill patients. She received no medical or other benefits from Corinthian, including no paid vacation, paid leave or life insurance. The checks she received from Corinthian demonstrate that no payroll taxes were withheld from payments. Compensation from defendant Corinthian was included on plaintiff's own IRS forms under the section entitled "Non-Employee Compensation." During this period, plaintiff also worked for another physician at a different facility and was paid in a similar manner.

Defendant CCC issued a policy to Dr. Gardner from July 1, 2003 through July 1, 2006. CCC agreed to "pay on behalf of the Insured all sums that the Insured shall become legally obligated to pay as Damages because of injury or death to which this insurance applies arising out of a Medical Incident occurring during the Policy Period." "Insured" is defined as "the licensed physician . . . to whom this [coverage] is issued and any Covered Employee of the Insured." The term "Covered Employees" is defined as "any nurse, technician or medical assistant employed by the Insured while acting within the scope of employment for the Insured and includes a Leased Worker or a Temporary Worker." The coverage specifically does not extend to "any physician, dentist, nurse-midwife, nurse-anesthetist, nurse-practitioner, podiatrist, chiropractor, radiation therapist, physician's assistant, specialist's assistant or acupuncturist employed by (or working as an independent contractor for) the Insured." The policy covers medical incidents, defined as "any act or omission in the rendering of, or failure to render, Professional Services by the Insured, or by any person for whose acts or omissions the Insured is legally responsible performed in the practice of the Insured's profession." "Professional Services" includes, in pertinent part, "medical and surgical examination and/or treatment of patients" and "medical lecturing, diagnosis, opinion or advice."

After Ms. Cohen was sued in the Margulies Action, she requested coverage—including defense and indemnification—under Dr. Gardner's malpractice policy with CCC. CCC disclaimed coverage. CCC asserts that Ms. Cohen is not a "covered employee" of Dr. Gardner's because she was an independent contractor, not an employee, nor is she a "nurse, technician or medical assistant," and therefore she is not an "insured" under the policy. CCC further

maintains that even if Ms. Cohen is considered an "insured", the policy only provides coverage for claims arising out of "medical incidents" and by Ms. Cohen's testimony, the services she provided that are the subject of the Margulies Action do not qualify as "medical incidents".

CCC argues that, by Ms. Cohen's sworn testimony, the services she provided to patients at Corinthian do not fall under the category of "professional services" as defined in the policy. Ms. Cohen argues that she advised patients about genetic testing and reported the contents of her interviews to the physicians, so therefore, she provided medical assistance to the physicians for their patients.

Ms. Cohen testified that her duty as a genetic counselor at Corinthian was to consult patients regarding the benefits, risks and limitations of amniocentesis. She stated that she could not see patients unless there was a physician on site. She did not give advice about what tests the patient should or should not have; rather, she relayed the results of her interview and her recommendations to the physician and the physician made the final decision. She gave her patients the facts about genetic testing, and the patients made their own decisions. She procured the consent for amniocentesis testing from the patient. She used no medical equipment. She did not perform medical examinations, engage in medical treatment, give medical advice, or offer medical opinions. She did not provide any medical treatment and had no physical contact with the patients aside from shaking patients' hands. She did not consider herself a nurse. She testified that there was always a nurse on staff, and that it was her understanding there were no medical or physician's assistants employed at Corinthian.

The definition of professional services is unambiguous in the policy and the term must be given its plain and ordinary meaning. Based on her own testimony, Ms. Cohen's services do not fall into the category of medical or surgical examination or treatment. Neither, by her own testimony, did she provide medical advice, medical opinions, or medical diagnoses. She is equipped, by her background and education, to essentially gather information. She acted as a means of communicating the information she gathered by presenting it to the physicians. In the same way a physician would take a patient's medical history, the genetic counselor is trained in genetics to perform this function. However, there is a major distinction between the physician and the genetic counselor. By her own statements, Ms. Cohen may not do anything beyond gathering information and conveying that information to the physician. She is "non-directive," i.e., she provides no direct advice to the patient about what tests the patient should or should not have; she simply reports her findings to the physician. While she did "advise" patients on the genetic tests available, she did not provide what is considered "medical advice" as defined under the policy; that function was reserved for the physician. The services Ms. Cohen provided at Corinthian were not professional services as covered in the CCC insurance policy issued to Dr. Gardner.

Even assuming, *arguendo*, that the services Ms. Cohen provided fell under the category of "professional services," thus making an act or omission in the rendering of those services a "medical incident" covered under Dr. Gardner's policy with CCC, she would not be considered an "insured" under the policy. The term "insured" includes the physician to whom the policy is issued and any "covered employee." Genetic counselors are neither specifically excluded from coverage, nor are they specifically included in the definition of "covered employee," which is defined

in the policy as any "nurse, technician or medical assistant *employed* by the Insured . . . ." (Emphasis added.) Plaintiff maintains that she was an employee of Dr. Gardner, Dr. Moskowitz, and Corinthian. These three defendants and CCC argue that plaintiff was an independent contractor and not an employee.

In general, "the employer of an independent contractor is not liable for injury caused to a third party by an act or omission of an independent contractor[.]" Lazo v. Mak's Trading Co., Inc., 199 A.D.2d 165, 167 (1st Dep't 1993), aff'd 84 N.Y.2d 896 (1994). The question of whether someone is an independent contractor or employee is a question of fact concerning which party controls the methods and means by which the work is to be done. Lazo, 199 A.D.2d at 166. When the evidence on the issue of control over the work has no conflict, the court may determine the issue as a matter of law. Id.; see Greene v. Osterhoudt, 251 A.D.2d 786, 787 (3rd Dep't 1998).

Determining whether a person acts as an employee or an independent contractor is fact specific (O'Brien v. Spitzer, 7 N.Y.3d 239, 242 [2006]), and cannot be stated with "mathematical precision". Liberman v. Gallman, 41 N.Y.2d 774, 778 (1977) (internal quotes and citations omitted). "Broadly speaking, an employee is someone who works for another subject to substantial control, not only over the results produced but also over the means used to produce the results. A person who works for another subject to less extensive control is an independent contractor." O'Brien, 7 N.Y.3d at 242.

> [T]he critical inquiry in determining whether an employment relationship exists pertains to the degree of control exercised by the purported employer over the results produced or the means used to

> achieve the results. Factors relevant to assessing control include whether the worker (1) worked at his own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer's payroll and (5) was on a fixed schedule.

Bynog v. Cipriani Group, Inc., 1 N.Y.3d 193, 198 (2003) (internal citations omitted). Other facts taken into consideration are whether said individual furnishes his own tools, how payment is made, and whether taxes are withheld from such payments. Gfeller v. Russo, 45 A.D.3d 1301, 1302 (4th Dep't 2007); Stevens v. Spec, Inc., 224 A.D.2d 811, 812 (3d Dep't 1996). These factors are not singularly dispositive, but rather relevant to assessing the extent of control over the worker. Gagen v. Kipany Prod., Inc., 27 A.D.3d 1042, 1043 (3d Dep't 2006).

"An employer-employee relationship exists when the evidence demonstrates that the employer exercises control over the results produced by claimant or the means used to achieve the results[.]" In re Hertz Corp., 2 N.Y.3d 733, 735 (2004) (citation omitted).

> 'The distinction between an employee and an independent contractor has been said to be the difference between one who undertakes to achieve an agreed result and to accept the directions of his employer as to the manner in which the result shall be accomplished, and one who agrees to achieve a certain result but is not subject to the orders of the employer as to the means in which they are used.'

Liberman, 41 N.Y.2d at 778 (citation omitted). "[T]he mere retention of general supervisory powers over independent contractors cannot form a basis for the imposition of liability against the principal." Melbourne v. N.Y. Life. Ins. Co., 271 A.D.2d 296, 297 (1st Dep't 2000) (citations omitted). "'The requirement that the work be done properly is a condition just as readily required of an independent contractor as of an employee and not conclusive as to either.'" Hertz Corp., 2 N.Y.3d at 735 (2004), citing In re Werner, 210 A.D.2d 526, 528 (3d Dep't 1994). Rather, when an employer "assumes

control over the details of the work or some part of it," the worker is considered an employee and not an independent contractor. Wright v. Esplanade Gardens, 150 A.D.2d 197, 198 (1st Dep't 1989). The focus of this determination is control over the direction of the mode and manner of the work.

There exists no conflict regarding control over the results of plaintiff's work at Corinthian. She worked without supervision and the results of her work—the pedigree and the follow-up discussions—were controlled by plaintiff. She was not subject to the orders of Dr. Moskowitz, Dr. Gardner, or Corinthian. Her hours were set by mutual agreement between herself and Dr. Moskowitz. She received no fringe benefits. She was free to engage in other employment, and did. She was compensated by Corinthian per patient seen. She used her own standard genetic questionnaires and prepared her own information sheets regarding various genetic conditions. Corinthian did not provide her with any material for her interviews nor were any doctors present. Plaintiff prepared her own hand-written notes. The fact that she may have used Corinthian's letterhead to draw the pedigree neither establishes an employment relationship nor raises a material issue of fact.

Other factors to be considered are her tax forms, manner of payment and other work the plaintiff performed. Plaintiff had outside work at different facilities and only worked at Corinthian's office once a week. Plaintiff's name did not appear on the door or letterhead of the facility. She did not have her own workplace or telephone line but used the office of the physician. She was paid on a per patient basis, and if there were no patients scheduled for the day, plaintiff would not come to work. Also, Corinthian did not withhold any taxes from her payments,

suggesting that she was not an employee. She was a "1099 worker". Compensation from Corinthian was even included on plaintiff's own IRS form under the section entitled "Non-Employee Compensation," which supports this contention of her status as an independent contractor. According to her tax documents, Ms. Cohen paid taxes as a "self-employee." She also deducted incidental expenses from her income, such as travel, parking, Internet service, meals, and telephone charges. While the manner in which the parties treat their business relationship for the purposes of income taxes is not singularly dispositive on the issue of employment relationships, it is a significant consideration. Gagen v. Kipany Prod., Inc., 27 A.D.3d at1043.

Dr. Moskowitz, Dr. Garnder, and Corinthian merely retained supervisory control over plaintiff's work. They scheduled plaintiff's appointments and handled billing the patients. Although she worked out of Dr. Moskowitz's personal office when he was not using it, there was no authority figure present in the office besides the plaintiff. The fact that plaintiff was permitted to occupy desk space in Dr. Moskowitz's office when he himself was not using that space, and her use of the phones and office equipment, does not demonstrate the existence of an employment relationship. See In re Interglobal Travel Service, Inc., 156 A.D.2d 849 (3d Dep't 1989).

Ms. Cohen also asserts that even if she was an independent contractor, nothing in the CCC policy precludes coverage for independent contractors, relying on the language of the policy that a covered employee includes "a Leased Worker or a Temporary Worker." But, the definitions of these terms in the policy are unambiguous. A Leased Worker means a person "leased to the Insured by a labor-leasing firm" and a Temporary Worker is a person "who is furnished to the

Insured to substitute for a permanent employee on leave or to meet seasonal or short-term workload conditions." Nothing in any of the papers or testimony indicates that Ms. Cohen was a Leased or Temporary Worker.

Accordingly, it is hereby

ADJUDGED and DECLARED that Sharona Cohen's work at Corinthian was in the nature of an independent contractor and not an employee; and it is further

ORDERED that defendants are entitled to summary judgment, dismissing the complaint as against them. The complaint is dismissed. The clerk is directed to enter judgment accordingly.

Due to the disposition of the case, plaintiff's requests for relief regarding issues of discovery have not been considered.

This constitutes the decision, order, and judgment of the court.

Dated: April 5, 2010

JOAN B. LOBIS, J.S.C.