

Advantagecare Physicians, P.C. v Bitter

2020 NY Slip Op 34013(U)

December 3, 2020

Supreme Court, New York County

Docket Number: 152327/2019

Judge: W. Franc Perry

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

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ADVANTAGECARE PHYSICIANS, P.C.

Plaintiff,

- v -

J. JASON BITTER,

Defendant.

-----X

INDEX NO. 152327/2019
MOTION DATE 01/16/2020
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 80, 81, 82, 83, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

Plaintiff Advantagecare Physicians, P.C. moves, pursuant to CPLR 3212 (a), for summary judgment on its second amended complaint (Complaint). The Complaint alleges causes of action for conversion and unjust enrichment. Defendant J. Jason Bitter, M.D. (Bitter) cross-moves, primarily for summary judgment declaring that he has the right to retain the payment that is discussed below. This is one of the many actions following from the conversion (Conversion) of nonparty Medical Liability Mutual Insurance Company (MLMIC), one of the largest medical malpractice insurers in New York State, from a mutual insurance company to a publicly traded stock insurance company. The Conversion was effected through the purchase of all MLMIC's stock by National Indemnity Company (NICO), a member of Berkshire Hathaway, Inc., for the sum of \$ 2.502 billion. The agreement between MLMIC and NICO, which was approved by the New York State Department of Financial Services on September 6, 2018, provides that the stock purchase price is to be paid to MLMIC's "Eligible Policyholders."

(NYSCEF Doc No. 53 at 4). The Plan of Conversion (Plan), as revised on June 15, 2018, defines “Eligible Policy” as “[a]ny Policy that is or was In Effect at any time [from July 15, 2013 through the Record Date], and “Eligible Policyholder” as “the Policyholder of an Eligible Policy. It provides that “[f]or Eligible Policies that identify multiple insureds, each person so identified on the declaration page of the applicable Policy shall be an Eligible Policyholder” (NYSCEF Doc No. 52 at 3).

Distributions of the proceeds of a demutualization of an insurance company are governed by Insurance Law § 7307 (e) (3), which provides, in relevant part that a demutualization plan shall:

provide that each person who had a policy of insurance in effect at any time during the three-year period immediately preceding the date of adoption of [a resolution to convert to stock ownership] shall be entitled to receive in exchange for such equitable share . . . consideration payable in voting common shares of the insurer or other consideration or both. The equitable share of the policyholder in the mutual insurer shall be determined by the ratio which the net premiums . . . such policyholder has properly and timely paid to the insurer on insurance policies in effect during the three years immediately preceding the adoption of the resolution by the board of directors . . . bears to the total net premiums received by the mutual insurer from such eligible policyholders.

The Plan recognized that some policyholders, who are not self-employed, had assigned their right to receive their proportional share of the purchase price paid to MLMIC to a “Policy Administrator,” defined in the Plan as “a Person designated on the declarations page of the applicable Policy or otherwise as the administrator of the Policy on behalf of the applicable Policyholder.” (NYSCEF Doc No, 52 at 4). Such an assignment would entitle the person so designated to receive, at least, a partial share of the cash proceeds arising from the Plan.

It is undisputed that, pursuant to his employment contract with plaintiff, Bitter paid the premiums for his medical malpractice insurance, and plaintiff reimbursed him for those payments. (NYSCEF Doc No. 56, ¶ L). Bitter’s insurance contract was part of his bargained-for

compensation package. Because Bitter's name appears on the declaration page of the insurance policy that covered him from July 1, 2014 to July 1, 2015 (NYSCEF Doc No. 60), and because he alone paid the premiums on that policy, and made no assignment of his rights under the Conversion, he was an "Eligible Policyholder," and accordingly, pursuant to the terms of the Conversion, and in accord with Insurance Law § 7307 (e) (3), he received his proportional share of the payment that MLMIC received from NICO.

Nonetheless, plaintiff contends that, because it reimbursed Bitter for his payment of insurance premiums, it, rather than he, is entitled to the payment. To be sure, the distribution to Bitter was a happenstance that followed from the fact that only an individual physician can be the holder of a medical malpractice policy, and that, accordingly, he was the "Eligible Policyholder" of his policy. But, as the court pointed out in *Schoch v Lake Champlain OB-Gyn, P.C.* 184 AD3d 338, 345 (3d Dept 2020), it would be no less adventitious for a physician's employer to receive the distribution. At the times that physicians, and their employers entered into their contractual relations, neither group anticipated that MLMIC would demutualize and give rise to a bonanza. Moreover, to the extent that employers funded the premiums paid for insurance, they had "already received the benefit of the bargain from the dividends which reduced the premiums that [they] paid before MLMIC converted." *GHVHS Med. Group, P.C. v Sidorski-Nutt*, Index No. EF001620-2019 (Sup Ct, Orange Cty 2020). Finally, in this regard, "the lion's share of the surplus that [feeds] valuation of the newly issued stock" in a demutualization is attributable not to current premium payers, but to those who paid premiums in the past. *Dorrance v United States of Am.* 809 F3d 479, 480 (9th Cir 2015).

The Appellate Division, Third Department, has written that, in the Plan,

'[n]o distinction is made between a policyholder who pays the premiums out of his (or her) own pocket versus a policyholder whose employer pays the premium

as part of an employee compensation package. Insurance Law § 7307 does not confer an ownership interest [in the proceeds of demutualization] in anyone other than the policyholder.’

Schoch v Lake Champlain OB-GYN, P.C. 184 AD3d at 343, quoting *Maple-Gate*

Anesthesiologists, P.C. v Brundin, 63 Misc3d 703, 709 (Sup Ct, Erie Co. 2017), *affd* 182

AD3d989 (4th Dept 2020); *see also Columbia Regional Hosp. v Hinds*, 2020 WL 6493498,

__AD3d __ (3d Dept 2020).

Plaintiff contends that the holding of *Schaffer, Schonholz & Drossman, LLP v Title*, 171 AD3d 465 (1st Dept 2019) is contrary to the holdings of the Third and Fourth Departments, and that this court is bound by *Schaffer*. *Schaffer* was decided solely based on facts jointly submitted by the parties in that case, pursuant to CPLR 3222 (NYSCEF Doc No. 64 at 1), and there are decisive differences between those facts and the facts here. In *Schaffer*, the plaintiff, unlike the plaintiff here, engaged in MLMIC’s objection procedure, contending that it was entitled to receive the cash distribution resulting from the conversion, and, as a result, the relevant cash distribution was placed in escrow. (NYSCEF Doc No. 64, §§ 25-26). In *Schaffer*, Dr. Title’s employment contract required her to list her employer as the Policy Administrator on the declarations page of her insurance policy. (NYSCEF Doc No. 54, ¶ 6 and NYSECF Doc No.64, ¶¶ 11-12). Bitter was not contractually obligated to do so, and the only admissible evidence presented to this court is that he listed himself as Policy Administrator on the declaration page of his policy, effective from July 2014 to 2015. (NYSCEF Doc No. 60). While he may, later, have changed that designation, there is no evidence that Bitter assigned his rights under the Plan, in any manner, to plaintiff. Dr. Title’s contract provided that her employer would purchase malpractice insurance for her, and her employer paid MLMIC all the premiums due pursuant to that policy. (NYSCEF Doc No. 54, ¶ 8). By contrast, Bitter’s employment contract expressly

states that plaintiff will not purchase malpractice insurance (NYSCEF Doc No. 56, ¶ 2 (c)). In a separate provision, governing Bitter's compensation, the contract provides that plaintiff will reimburse Bitter for the cost of that insurance. (NYSCEF Doc No. 56, Attachment A). Even more significantly, Dr. Title's contract broadly states that she "agrees to execute any and all forms and documents requested by [her employer] so that [employer] may bill and collect from patients and third party payers, including Medicare, for services you render on behalf of [Employer]." (NYSCEF Doc No. 54, ¶ 23). Bitter's contract, by contrast, carves out from the income and fees to which plaintiff is entitled, income received from, among other activities, "activities that are not directly related to patient care or the provision of professional services to patients." (NYSCEF Doc No. 56, ¶ J). To be sure, the contract provides that such activities must be approved in advance, but the point, here, is that the "income and fees," that plaintiff reserved to itself, in part, includes only the income and fees that Bitter would earn "from the practice of medicine." and not from other medically related gainful activities. (*Id.* ¶ J). The distribution arising from the Conversion is not income earned "from the practice of medicine," but income accruing by being a policyholder in MLMIC. Accordingly, plaintiff has no cognizable claim to any share of the cash distribution, either by the Conversion, or by Bitter's employment contract, and plaintiff's claims are foreclosed by Insurance Law § 7307 (e) (3).

Turning to the causes of action alleged in the Complaint, there can be no conversion of property, to the ownership of which one does not have a right. Plaintiff had no right to any of the payment that MLMIC received. Nor is a claim of conversion viable as to property over which the plaintiff "never exercised ownership, possession, or control." *Lynn v Maida*, 170 AD3d 573, (1st Dept 2019), citing *Peters Griffin Woodard, Inc. v UCSC, Inc.*, 88 AD2d 883, 884 (1st Dept 1982). Nor can a claim of conversion be based solely on an allegation that a defendant received

money and failed to pay it to the plaintiff. *Interstate Adjusters v First Fid. Bank, N.J.*, 251 AD2d 233, 234 (1st Dept 1998).

The basic element of an unjust enrichment claim is that the defendant was enriched at the plaintiff's expense and that it is against equity and good conscience to allow the defendant to keep that which the plaintiff seeks to recover. *Georgia Malone & Co. v Ridder*, 19 NY3d 511, 526 (2012), citing *Mandarin Trading Co. v Wildenstein*, 16 NY2d 173, 182 (2011). Here, inasmuch as plaintiff had no ownership rights to a share of the money that MLMIC received from NICO, Bitter's enrichment was not effected at plaintiff's expense, and, of course, a distribution that is consistent with Insurance Law § 7307 (e) (3), rather than in violation thereof, cannot be considered unjust.

Accordingly, it is hereby


ORDERED that the motion of plaintiff Advantagecare Physicians, P.C. for summary judgment is denied; and it is further

ORDERED that the cross motion of defendant J. Jason Bitter, M.D. is granted and the complaint against him is dismissed; and it is

ORDERED, ADJUDGED and DECLARED that defendant J. Jason Bitter, M.D.'s counterclaim for a declaratory judgment in his favor is granted and the court declares that he is the rightful owner of the sum of approximately \$244,454.31 in funds that he received in his capacity as a policyholder of an insurance policy issued to him by Medical Liability Mutual Insurance Company; and it is further

ORDERED, ADJUDGED AND DECLARED that plaintiff Advantagecare Physicians, P.C. has no right to receive said funds.

Any requested relief not expressly addressed by the court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the court.

<u>12/3/2020</u> DATE		 W. FRANC PERRY, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE