Sneider v Great S. Bay Surgical Assoc. & Vascular Lab, LLP

2020 NY Slip Op 35745(U)

June 23, 2020

Supreme Court, Nassau County

Docket Number: Index No. 600728/2019

Judge: Vito M. DeStefano

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. VITO M. DESTEFANO
JUSTICE

TRIAL/IAS PART 7

ERICA SNEIDER, M.D. and
JENNIFER CASTRO, M.D.,

Plaintiffs,

INDEX NO.: 600728/2019

-against-

MOT. SEQ. 01

GREAT SOUTH BAY SURGICAL ASSOCIATES
AND VASCULAR LAB, LLP.,

Defendant.

The following papers were read on this motion: Documents Numbered

Notice of Motion, Affirmation, Exhibits Annexed	1
Affidavit of John Francfort	2
Affirmation of Ross Kartez	3
Memorandum of Law in Support	4
Affidavit in Opposition	5
Affirmation in Opposition	6
Memorandum of Law in Opposition	7
Reply Affidavit	8
Memorandum in Reply	9
Statement of Material Facts	10
Response to Statement of Facts	11

Defendant Great South Bay Surgical Associates and Vascular Lab, LLP ("the Practice") moves for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint and awarding it summary judgment on its counterclaim for a declaratory judgment.

Background

On April 8, 2014, Plaintiff Dr. Erica Sneider and the Practice entered into an employment agreement which provided that the Practice would pay for Sneider's liability insurance. That provision of the Employment Agreement specifically provided as follows:

> Malpractice: An occurrence malpractice policy will be purchased for you and this policy is transportable in New York State and can be maintained by you should you leave employment and work elsewhere in the state. However, if you leave our employment and begin work out of state, a tail rider policy will be paid by Great South Bay Surgical Associates and Vascular Lab at the time you leave us. We will pay for (MLMIC) a $1.3 million policy limit. If you desire an administrative agency defense rider, you may pay for it on your own.

On June 24, 2014, Plaintiff Dr. Jennifer Castro and the Practice executed an employment agreement which similarly provided that:

> Malpractice: The malpractice policy will continue to be paid for you by Great South Bay Surgical Associates and Vascular Lab, LLP [the Practice]. This policy is obtained through MLMIC and has a 1.3 million policy limit. It is transportable in New York State and can.be maintained by you should you leave employment and work elsewhere in the state. However if you leave our employment and begin work outside of the state, a tail rider policy will be purchased by [the Practice] if required. If you wish an administrative agency defense rider, you may pay for it on your own.[1]

The Doctors[2] were, at all relevant times, salaried employees of the Practice. It is undisputed that while employed, the Practice paid 100% of the malpractice premiums for liability insurance issued by Medical Liability Mutual Insurance Company ("MLMIC") covering medical services rendered by the Doctors and on behalf of the Practice.

The Doctors were the policyholders of their respective MLMIC policies. The Practice was the policy administrator of their policies.

MLMIC is a mutual insurance company, an insurance company owned entirely by its policyholders. As such, any profits earned by it are rebated to the policyholders in the form of dividend distributions or reduced future premiums. In this vein, the dividends were, in turn, automatically applied to discount future premium payments.

---

[1] Dr. Castro's employment with the Practice dates back to 2008.

[2] Drs. Sneider and Castro are collectively referred to as "Doctors."

On July 15, 2016, MLMIC announced its proposal to seek approval from the New York State Department of Financial Services ("DFS") for the conversion, demutualization and proposed sale of MLMIC, a mutual insurance company, to National Indemnity Company, a stock insurance company.

On May 31, 2018, MLMIC adopted and revised a Plan of Conversion providing for its "demutualization" (the "Plan"). The Plan provided for the issuance of distributions in the name of each eligible policyholder, concurrent with the termination of his or her policyholder membership.[3] Specifically, section 8.2(a) of the Plan states "each Eligible Policyholder (or its Designee) shall receive a cash payment in an amount equal to the applicable Conversion Payment" (the "cash distribution").

The Plan was revised on June 15, 2018 and a public hearing on the Plan was held on August 23, 2018. The DFS approved the Plan on September 6, 2018 which was followed by a vote of the shareholders to move forward with the Plan (the "DFS Decision"). The transaction closed on October 1, 2018.

MLMIC thereafter adopted and implemented procedures to effectuate the Plan, pursuant to which each individual policyholder was afforded the opportunity to confirm his or her consent to receipt of the cash distribution by the policy administrator identified on his or her MLMIC policy. In this regard, the Plan did not authorize payment of any distributions to non–policyholders without the express consent from the policyholder. The DFS Decision approving the Plan contained the following relevant provisions:

> Insurance Law 7307(e)(3) defines the policyholders eligible to be paid their proportional shares of the purchase price, but also recognizes that such policyholders may have assigned such legal right to other persons. Therefore, the Plan appropriately includes an objection and escrow procedure for the resolution of disputes for those persons who dispute whether the policyholder is entitled to the payment in a given case.
>
> The Objection Procedure provides a reasonable framework for the resolution of disputes between certain policyholders and entities that claim to be Policy Administrators. . . .
>
> * * *
>
> Nor does the definition of Policy Administrator represent the Department's view that anyone that falls within the definition is (or is not) entitled, under the particular facts or applicable law, to receipt of the cash consideration. The determination of who is entitled to the cash consideration depends on the facts and circumstances of

[3] A policyholder's ownership interest in a mutual insurance company is known as a "membership interest," and these interests provide policyholders with certain benefits, including the right to receive a distribution of profits earned by the mutual insurance company in the form of a dividend.

the parties' relationship and applicable law, to be decided either by agreement of the parties or by and arbitrator or court (Ex. "B" to Affirmation in Opposition)

In June 2018, the Practice received Policyholder Information Statements from MLMIC in its capacity as the policy administrator on the Doctors' policies. The Doctors allege that the Practice "withheld the Policyholder Information and the material information contained therein" (Affidavit in Opposition at 19, 23). According to the Doctors, "[n]ot only did it withhold the documents; it failed to provide us with any of the important information that MLMIC intended Policyholders to learn from the documents—including our right to decline to designate [the Practice] to receive the Cash Consideration and instead receive the money ourselves" (Affidavit in Opposition at 19).

The Doctors also claim that the Practice "withheld another notice that MLMIC sent" to them as policyholders but in the care of their policy administrators. That June Notice read, in relevant part:

> In connection with the Conversion, it has been determined that the current policy administrator designations on file with MLMIC do not extend to the distribution of the cash amounts allocated to eligible policyholders. Eligible policyholders are owners of policies issued by MLMIC that were in effect at any time from July 15, 2013 until July 14, 2016 . . . .
>
> **If there is a preference to have such distributions paid to a policy administrator as a matter of convenience or as a result of contractual obligations between you and your policy administrator, please execute the enclosed consent form . . . . (Ex. "C" to Affidavit in Opposition [emphasis in original]).**

In July 2018, the Doctors executed consent forms whereby they authorized the Practice to receive the MLMIC cash distribution proceeds. Both consent forms contained the following identical language:

CONSENT FORM
MEDICAL LIABILITY MUTUAL INSURANCE COMPANY
Two Park Avenue, Room 2500
New York, New York 10016
Authorization of Distribution to Policy Administrator in Connection with
Conversion of Medical Liability Mutual Insurance Company
From a Mutual to a Stock Company

By signing below, the undersigned hereby irrevocably supplements the policy administrator appointment previously executed by the undersigned to provide that,

in addition to the previously designated responsibilities of the policy administrator, the undersigned hereby designates the undersigned's policy administrator as agent to receive any distribution that may be allocated to the undersigned upon the consummation of the announced proposed conversion of Medical Liability Mutual Insurance Company from a mutual insurance company to a stock insurance company pursuant to New York Insurance Law Section 7307 and the acquisition of Medical Liability Mutual Insurance Company by National Indemnity Company. This designation will expire on December 31, 2018 if the conversion and acquisition have not been completed by that date.

In July 2018, the Practice received the cash distribution proceeds.

On January 16, 2019, the Doctors commenced the instant action asserting causes of action for conversion, fraudulent misrepresentation, breach of fiduciary duty, constructive fraud, negligent misrepresentation, fraudulent omission and/or concealment, and unjust enrichment.

According to the complaint, the Doctors executed the consent forms because the Practice: (a) withheld material information concerning the MLMIC conversion and their rights with respect to the cash distribution; (b) falsely claimed that the Practice was being refunded an overpayment of insurance premiums, and that the signing of a consent form was a routine, time sensitive administrative requirement; and (c) failed to disclose the Practice's conflict of interest with the Doctors' rights to receive the cash distribution (Complaint at 5).

The Practice answered the complaint and asserted a counterclaim seeking a declaration that the Practice is the proper recipient of the cash distribution proceeds already paid to it. According to the Practice, it: paid the MLMIC policy premiums necessary to secure medical malpractice liability insurance covering the Doctors' service as salaried employees working on behalf of the Practice; was exclusively responsible for managing and maintaining the subject policies; received all related dividends and return premiums from MLMIC; and received signed consents from the Doctors instructing MLMIC that the cash considerations belong to the Practice.

The Doctors replied to the counterclaim on April 4, 2019.

The Practice moves for summary judgment dismissing the Plaintiffs' claims and on its counterclaim for declaratory relief.

For the reasons that follow, the motion is granted.

The Court's Determination

In support of its motion, the Practice argues that "[r]ecovery of the demutualization proceeds at issue in this case by [the Practice] – the sole 100% payor of all underling premiums –

is entirely consistent with the Appellate Division's binding decision in *Schaffer*" and other trial court decisions throughout the state; that *Schaffer* is "dispositive" of the claims in issue; and the Doctors did not bargain for the benefit of receiving demutualization proceeds (Affidavit in Support at 5, 6, and 17; Memorandum of Law in Support at pp 8, 12, 13).

Notwithstanding the undisputed fact that the Doctors are the policyholders on their MLMIC policies at issue, the recent decision in *Schaffer, Schonholz & Drossman, LLP v Title* (171 AD3d 465 [1st Dept 2019] [internal citations omitted]) ("*Schaffer*") mandates that the Practice is entitled to the cash distribution proceeds.

In *Schaffer*, the doctor, as the insured, executed a liability insurance policy with MLMIC naming his employer, the plaintiff medical practice, as the policy administrator. The employer paid in full all of the costs and premiums associated with the policy. Four years after the doctor's employment terminated, MLMIC began its plan of conversion from a mutual insurance company owned by its members to a stock insurance company. Thereafter, a dispute arose as to who was entitled to receipt of the cash distribution as a result of the demutualization.

The Appellate Division in *Schaffer* (*supra*) held as follows:

> Upon facts submitted to this Court pursuant to CPLR 3222(b)(3), it is declared that [employer] is entitled to the cash proceeds resulting from the demutualization of nonparty Medical Liability Mutual Insurance Company (MLMIC) . . . .
>
> Although [doctor] was named as the insured on the relevant MLMIC professional liability insurance policy, [employer] purchased the policy and paid all the premiums on it. [Doctor] does not deny that she did not pay any of the annual premiums or any of the other costs related to the policy. Nor did she bargain for the benefit of the demutualization proceeds. Awarding [doctor] the cash proceeds of MLMIC's demutualization would result in her unjust enrichment.

The doctrine of stare decisis provides that once a court has resolved a legal issue, it should not be re-examined each and every time it is presented. In *Schaffer* (*supra*), the First Department found as a matter of law that an award of the MLMIC proceeds to the named insured doctor would result in that doctor's unjust enrichment.

As demonstrated, the significant facts relied upon by the First Department in *Schaffer* are not distinguishable from the significant facts in this case and, thus, the court is bound to follow the Appellate Division, First Department until such time as the Appellate Division, Second Department or the Court of Appeals issues a contrary decision.

As noted (*supra*), the employee doctor in *Shaeffer* obtained a liability insurance policy with MLMIC and was named as the insured on the policy. Nevertheless, because the employer paid in full all of the costs and premiums associated with the policy, awarding the doctor the cash proceeds of MLMIC's demutualization would result in her unjust enrichment.

Other courts have rejected claims similar to those raised by the Doctors herein, to wit, that as policyholders, they were entitled to the demutualization proceeds, notwithstanding the fact that the Practice paid the insurance premiums.

For example, in the Supreme Court of Westchester County, Maple Medical LLP commenced six actions against various employee doctors with respect very similar issues to that at bar. In the six actions: *Maple Medical LLP v Lisa H Youkeles, MD., and MLMIC* (Index No. 51109/2019); *Maple Medical LLP v Joseph Scott, D.O. and MLMIC* (Index No. 51103/2019); *Maple Medical LLP v Diana Goldenberg, M.D. and MLMIC* (Index No. 51105/2019); *Maple Medical LLP v Diana Arevalo, MD. and MLMIC* (Index No. 51106/2019); *Maple Medical LLP v Nina Sundaram, MD. and MLMIC* (Index No. 51107/2019); and *Maple Medical LLP v Mario Mutic, MD. and MLMIC* (Index No. 51108/2019), Justice Lawrence Ecker ruled on the single issue of whether the physician employee or the employer, a medical partnership, was entitled to the distribution payment made by MLMIC, ruling in favor of the employer.

Similarly, the court held in each of the following actions that the medical employer, who paid the employee physicians' policy premiums, was entitled to the distribution proceeds resulting from MLMIC's demutualization (*see also Mid-Manhattan Physician Services, PC v Dworkin*, 2019 WL 4261348 [Sup Ct New York County 2019]; *Schoch v Lake Champlain Ob-Gyn, P.C.*, 64 Misc.3d 1215(A) [Sup Ct Saratoga County 2019]; *Advantagecare Physicians, P.C. v Botros*, 2020 WL 254658 [Sup Ct New York County 2020]; *Wyckoff Heights Medical Center v Leonora Monroe & MLMIC Ins. Co.*, 2020 WL 905761 [Sup Ct New York County 2020]; *Long Island Radiology Associates, P.C. v Koshy, et al.*, Index No. 600195/19 [Sup Ct Nassau County 2019] [Libert, J.]; *NRAD Medical Associates, P.C. v Kim, et al.*, Index No. 617351/18 [Sup Ct Nassau County 2019] [Driscoll, J.]; *Vladimer Benoit, M.D. v Jamaica Anesthesiologist, P.C.*, Index No. 615476/18 [Sup Ct Nassau County 2019] [Driscoll, J.]; *John T. Mather Memorial Hospital of Port Jefferson v Fadel*, Index No. 624734/18 [Sup Ct Suffolk County 2019]; *Zilkha Radiology, PC v Schulze*, Index No. 622517/18 [Sup Ct Suffolk County 2019]).

In consideration of the foregoing, the court concludes that the Practice has established prima facie entitlement to judgment as a matter of law that it paid to MLMIC insurance premiums on behalf of the Doctor employees and that to permit the Doctors to retain the proceeds of MLMIC's demutualization, an amount which is calculated on the premiums paid, would result in the Doctors' unjust enrichment.

The Fourth Department's recent decision in *Maple-Gate Anesthesiologists, P.C. v Nasrin* (182 AD3d 984 [4th Dept 2020]) does not warrant a different conclusion:

> The documentary evidence established as a matter of law that plaintiff [employer] had no legal or equitable right of ownership to the demutualization payments. Insurance Law § 7307(e)(3) provides that, when a mutual insurance company converts to a stock insurance company, the plan of conversion: "shall . . . provide that each person who had a policy of insurance in effect . . . shall be entitled to receive in exchange for such equitable share, without additional payment, consideration payable in voting common shares of the insurer or other consideration, or both." [T]he MLMIC plan of conversion (plan), which, in

> accordance with that provision of the Insurance Law, provided that cash distributions were required to be made to those policyholders who had coverage during the relevant period prior to demutualization in exchange for the "extinguishment of their Policyholder Membership Interests." The plan stated that the cash distribution would be made to the policyholder unless he or she "affirmatively designated a Policy Administrator . . . to receive such amount on [his or her] behalf." Additional documentary evidence demonstrated that defendants were the policyholders of the relevant MLMIC policies and that . . . they had not designated plaintiff to receive demutualization payments. Even assuming, arguendo, that plaintiff could be entitled to the demutualization payments without the express designation contemplated by the plan, we conclude that plaintiff has not alleged any facts or circumstances from which it could be established that it was entitled to any such payments. The mere fact that plaintiff paid the annual premiums on the policies on defendants' behalf does not entitle it to the demutualization payments (*cf. Matter of Schaffer, Schonholz & Drossman, LLP v Title*, 171 AD3d 465, 465 [1st Dept 2019]).

Maple-Gate Anesthesiologists, P.C. v Nasrin differs from the instant action inasmuch as the doctors' employment agreements at issue therein provided that the employer would pay the doctors' professional liability insurance premiums as an "employment benefit for and on behalf of" the doctors (*Maple-Gate Anesthesiologists, P.C. v Nasrin*, 63 Misc3d 703 [Sup Ct Erie County 2019]). In the instant case, however, the Practice's payment of premiums to MLMIC on behalf of the Doctors was not listed as part of the Doctors' "compensation" or a "benefit" in the employment agreements but, rather, was provided for in a separately denominated section of both of the employment agreements (section 2) designated "Malpractice" (compare *Columbia Memorial Hosp. v Hinds*, 65 Misc3d 1205[A] [Sup Ct Columbia County 2019] [employee doctor was entitled to the cash proceeds upon demutualization where the doctor "actually paid the premiums" because the policy administrator deducted the amount it paid for malpractice insurance from the doctor's incentive compensation. Specifically, the doctor's insurance premiums were paid in lieu of compensation]).

In opposition, the Doctors argue that Insurance Law 7307(e)(3)[4], the Plan of Conversion[5] and the DFS Decision[6] provide that "as Eligible Policyholders, Plaintiffs are entitled to receive their shares of the Cash Consideration" (Memorandum of Law in Opposition at p 3).

To the contrary, the DFS specifically stated in its Decision: that: the Plan "includes an objection and escrow procedure for the resolution of disputes for those persons who dispute whether the policyholder is entitled to the payment in a given case"; the "Objection Procedure provides a reasonable framework for the resolution of disputes between certain policyholders and entities that claim to be Policy Administrators"; the sole purpose of the Objection Procedure is to create a category of disputed claims for which the cash consideration will be released by MLMIC if MLMIC either receives "joint written instructions from the Eligible Policyholder and the Policy Administrator . . . as to how the allocation is to be distributed," or an order of an arbitration panel or "court with proper jurisdiction ordering payment of the allocation to the Policy Administrator . . . or the Eligible Policyholder"; "[n]or does the definition of Policy Administrator represent the Department's view that anyone that falls within the definition is (or is not) entitled, under the particular facts or applicable law, to receipt of the cash consideration"; and that the "determination of who is entitled to the cash consideration depends on the facts and circumstances of the parties' relationship and applicable law, to be decided either by agreement of the parties or by and arbitrator or court" (Ex. "B" to Affirmation in Opposition at pp 23-25).[7]

Although the MLMIC conversion documents provide that only eligible policyholders or their designees will receive MLMIC conversion payments for the extinguishment of their membership interests and, notwithstanding that the Practice is not the policyholder on either of the Doctors' MLMIC policies, the recent decision in *Schaffer, Schonholz & Drossman, LLP v Title* (171 AD3d at 465, *supra*) coupled with the undisputed fact that the Practice paid the

---

[4] Insurance Law § 7307(e)(3) provides that when a mutual insurance company converts to a stock insurance company, its plan of conversion shall include: "The manner and basis of exchanging the equitable share of each eligible mutual policyholder for . . . consideration . . . . The plan shall also 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 the resolution [of the insurer to seek conversion] 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."

[5] The Plan of Conversion provides: "Eligible Policyholders, or their Designees, will receive Cash Consideration in consideration of the extinguishment of their Policyholder Membership Interest" and that the Cash Consideration shall be paid to eligible policyholders "in respect of the extinguishment of all Policyholder Membership Interests."

[6] According to the DFS's September 6, 2018 Decision approving the Plan, a "mutual insurance company is owned by and operated for the benefit of its policyholders. A policyholder's ownership interest in a mutual insurance company is known as a 'membership interest'" and membership interests "exist only in connection with a policyholder's ownership of a policy." "[I]nstead of receiving stock in the converted stock company, MLMIC's Eligible Policyholders will receive cash consideration."

[7] Contrary to the Doctors' contention, to wit, that the DFS rejected the notion that a policy administrator which paid the physicians' MLMIC premiums is entitled to the cash distribution, the court concludes that payment of premiums is, at a minimum, a factor to be considered as to which party is entitled to receive the cash distribution.

premiums mandates that the Practice is entitled to receive the cash distribution resulting from the demutualization.[8]

Inasmuch as the damages sought in the complaint are predicated upon the Practice's alleged wrongful receipt of the MLMIC cash distribution proceeds, the complaint is dismissed given this court's finding that the Practice is the rightful recipient entitled to the cash distributions resulting from the demutualization of MLMIC.

Conclusion

Based on the foregoing, it is hereby

Ordered that: the Defendant's motion for summary judgment is granted; the complaint is dismissed and Defendant is awarded judgment on the counterclaim; and it is further

Ordered, Adjudged and Declared that the Defendant is the proper recipient of the distribution proceeds with respect to the conversion of Plaintiffs' medical malpractice insurance policies.

This constitutes the decision and order of the court.

DATE: June 23, 2020

Hon. Vito M. DeStefano, J.S.C.

[8] The court further notes that three years after the termination of their employment relationship with the Practice, the Doctors executed consents to allow the Practice to receive the cash distribution of the demutualization funds. The consent expressly "designates" the Practice to receive any distribution that may be allocated by virtue of MLMIC's conversion to a stock insurance company.