

Advantagecare Physicians, P.C. v Duker

2021 NY Slip Op 30078(U)

January 12, 2021

Supreme Court, New York County

Docket Number: 152451/2019

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 -

ADJOA DUKER,

Defendant.

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INDEX NO. 152451/2019

MOTION DATE 03/05/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 64

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

Plaintiff AdvantageCare Physicians, P.C. (AdvantageCare) moves, pursuant to CPLR 3212 (a), for summary judgment on its complaint, which alleges one cause of action for conversion, and another for unjust enrichment. Defendant Adjoa B. Duker, M.D. (Duker) cross-moves for summary judgment dismissing the complaint.

This is one of the many cases in which physicians and their corporate employers contest the right to the fruits of 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 (*see* NYSCEF Doc No. 20), provides that the stock purchase price is to be paid to MLMIC's "Eligible Policyholders." 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.” NYSCEF Doc No. 19 at 3.

Distributions of the proceeds of a demutualization of an insurance company are governed by Insurance Law § 7307 (e) (3), which states, 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 the 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 listed 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. 19 at 4), had also assigned to such persons their right to all, or a portion, of the funds that they would receive from MLMIC. Such an assignment would entitle the person so designated to receive, at least, a partial share of the cash proceeds arising from the Plan. The Plan provided for a procedure whereby such a person could file an objection, whereupon MLMIC would place the distribution in escrow pending a judicial determination of who was entitled to some, or all, of the distribution. (See NYSCEF Doc No. 19, Schedule 1 [“Objection Procedures”]).

Pursuant to Duker’s employment contract with plaintiff, plaintiff either paid the premiums for Duker’s medical malpractice insurance as part of her bargained-for compensation package, or reimbursed her for such payments. Because Duker’s name appears on the declaration page of the insurance policy that covered her during the relevant time, and because she made no

assignment of her rights under the Plan, she was an “Eligible Policyholder.” Accordingly, pursuant to the terms of the Plan, and in accord with Insurance Law § 7307 (e) (3), she was sent her proportional share of the payment that MLMIC received from NICO. The check, with no cover letter, was sent with an Internal Revenue Service Form 1099-B attached.

Plaintiff contends that because it paid Duker’s insurance premiums, it, rather than she, is entitled to that payment. However, 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 Siderski-Nutt*, Index No. EF001620-2019 (Sup Ct, Orange County Jan. 8, 2020). The Appellate Division, Third Department, has held that, in the Plan,

“‘[n]o distinction is made between a policyholder who pays the premium 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] to anyone other than the policyholder.’”

Schoch v Lake Champlain OB-GYN, P.C., 184 AD3d 338, 343 (3d Dept 2020), quoting *Maple-Gate Anesthesiologists, P.C. v Nasrin*, 63 Misc 3d 703, 709 (Sup Ct, Erie County 2019), *affd* 182 AD3d 984 (4th Dept 2020).

Turning to the causes of action alleged in the complaint,

“[a] conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person’s right of possession.”

Colavito v New York Organ Donor Network, Inc., 8 NY3d 43, 49=50 (2016); *see also William Doyle Galleries, Inc. v Stettner*, 167 AD3d 501, 504 (1st Dept 2018) (conversion is the exercise of unauthorized dominion and control of another’s property). Inasmuch as the check at issue was properly drawn to the order of defendant as the policyholder named on her policy, who was, thus,

entitled to her proportionate share of the distribution of the proceeds of the Conversion, in conformity with Insurance Law §7307 (e) (3), and the Comptroller's approval of the Plan, defendant's act of depositing into her account the check that she had been mailed was not an act of conversion.

Nor did Duker's deposit of the check that plaintiff mailed her unjustly enrich her. As the policy holder of her insurance policy, Duker's receipt of her proportional share of the proceeds of the Conversion was consistent with, rather than violative of Insurance Law § 7307 (e) (3). Accordingly, it cannot be said to have been unjust.

Plaintiff's sole argument to the contrary is that in *Matter of Schaffer, Schonholz & Drossman, LLP v Title* (171 AD3d 465 [1st Dept 2019]), which was decided on the basis of submitted facts, pursuant to CPLR 3222, the Court held that the defendant physician's employer, which had paid the premiums for the physician's malpractice insurance, was entitled to the physician's proportionate share of the proceeds of the Conversion. *Schaffer*, however, is not controlling here, because in that case, unlike here, the physician's employer, who was listed on the title page of the physician's malpractice insurance policy as the policy administrator, requested that the physician sign a consent form authorizing payment of the sum received from MLMIC to be made to the employer. Upon the physician's refusal to do so, the employer filed its objection letter with MLMIC, which placed the distribution in escrow, pursuant to MLMIC's June 22, 2018 "Policy Information Statement." See NYSCEF Doc No. 22, ¶ 20. Here, by contrast, plaintiff failed to take any action pursuant to the objection procedure provided in the Plan.

In addition, in *Schaffer*, the offer letter that the defendant received instructed her to apply forthwith to MLMIC for professional liability insurance, and informed her that her employer (SS&D) would pay her annual premiums for the duration of her employment. Shortly after she

did so, she received a letter from MLMIC informing her that SS&D “has the right to pay the premiums and receive return premiums, including dividends, when due.” NYSCEF Doc No. 11, ¶ 12. Here, by contrast, defendant, as the policyholder, either paid her own insurance premiums when due and received reimbursement for those payments from AdvantageCare, or had her premiums paid by AdvantageCare. In either case, the payment of her premiums was one of nine bargained-for benefits that her contract guaranteed (*see* NYSCEF Doc No. 26 at 7), and neither plaintiff, nor MLMIC, so much as intimated that her rights, as a policyholder, would, in any way, be limited.


Finally, the issue that the Court decided in *Schaffer* was whether Dr. Title, as the named insured, or her employer, as policy administrator, was entitled to the proceeds of the Conversion. The decision makes no reference to the rights, or lack of rights, of a policyholder.

Accordingly, it is hereby

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

ORDERED that the cross motion of defendant Adjoa B. Duker is granted and the complaint is dismissed with costs as calculated by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

01/12/2021			
DATE			W. FRANC PERRY, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		