

<b>Del Manzano v Vanguard Dermatology P.C.</b>
2021 NY Slip Op 32176(U)
November 1, 2021
Supreme Court, Kings County
Docket Number: Index No. 507770/2019
Judge: Peter P. Sweeney
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS, PART 73

Index No.: 507770/2019  
Motion Date: 8-2-21  
Mot. Seq. No.: 1

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GILBERTO ALVAREZ DEL MANZANO, M.D.,  
RAHAT AZFAR, M.D.,  
SUSAN BARD, M.D.,  
KAREN L. HAMMERMAN, M.D.,  
WYNN H. KAO, M.D., Ph.D.,  
LINA S. PLANTILLA, M.D,

**DECISION/ORDER**

Plaintiffs,

-against-

VANGUARD DERMATOLOGY P.C.,

Defendant.

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Upon the following e-filed documents, listed by NYSCEF as item numbers 6-50, the motion is decided as follows:

Plaintiffs Gilberto ALVAREZ DEL MANZANO, M.D., RAHAT AZFAR, M.D., SUSAN BARD, M.D., KAREN L. HAMMERMAN, M.D., WYNN H. KAO, M.D., PH.D., and LINA S. PLANTILLA, M.D. ("Plaintiffs"), move for an order pursuant to CPLR 3212: (1) Granting summary judgment in their favor against defendant VANGUARD DERMATOLOGY P.C. ("Vanguard"), on their claims for breach of fiduciary duty, constructive fraud, conversion, unjust enrichment and money had and received against and dismissing Vanguard's Answer and affirmative defenses, as a matter of law; (2) awarding Plaintiffs the costs and disbursements of this motion; and (3) awarding plaintiffs such other and further relief as to the Court may seem just and proper.

In their moving papers, the plaintiffs submitted admissible proof establishing the following: Each of the plaintiffs was employed as a physician with Vanguard during the following time periods: (a) Dr. Alvarez: From July 2012 to December 2013; (b) Dr. Azfar: From July 2013 to July 2014; (c) Dr. Bard: From August 2013 to April 2016; (d) Dr. Hammerman: From September 2014 to November 2015; (e) Dr. Kao: From May 2014 to April 2017; and (f) Dr. Plantilla: From July 2013 to October 2013. Pursuant to the terms of plaintiffs' respective employment contracts, Vanguard was required to pay the premiums for plaintiffs' malpractice insurance policies. The plaintiffs were insured by Medical Liability Mutual Insurance Company

("MLMIC") and as required by the employment contracts, Vanguard paid plaintiffs' premiums with MLMIC. Plaintiffs were the sole named policyholders and insureds under the MLMIC policies. All plaintiffs executed Policy Administrator Designation Forms designating Vanguard as their Policy Administrator, except for Dr. Azfar who designated herself as her own Policy Administrator. The Policy Administrator Designation Forms state that the Policy Administrator is the Policyholder's agent for paying premiums, requesting any changes to the policy, and receiving any refunds of premiums.

On July 16, 2016, MLMIC applied to the New York State Department of Financial Services ("DFS") for permission to file a plan to convert from a mutual insurance company to a stock insurance company in connection with a sale of MLMIC to a subsidiary of Berkshire Hathaway. MLMIC's Plan of Conversion provided that "Eligible Policyholders" would receive \$2.502 billion in Cash Consideration for the extinguishment of their Policyholder Membership Interests. MLMIC's Plan of Conversion defined "Eligible Policyholders" as policyholders during the period July 15, 2013 through July 14, 2016.

On or about June 29, 2018, MLMIC mailed notices to Policyholders which stated 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 . . . .**

(Emphasis in original.)

On September 6, 2018, DFS approved the Plan of Conversion. None of the plaintiffs signed the consent form. Instead, Vanguard's President, Michael Shapiro, M.D., signed plaintiffs' signatures on the consent forms and submitted them to MLMIC, thereby causing MLMIC to release the Cash Consideration that each of the plaintiffs was entitled to directly to Vanguard. On about October 4, 2018, MLMIC issued checks to Vanguard representing their

shares of the Cash Consideration. The checks were accompanied by Cash Distribution statements calculating the allocations of Cash Consideration for each Policyholder, as follows: (a) Dr. Alvarez: \$9,367.50; (b) Dr. Azfar: \$18,078.92; (c) Dr. Bard: \$129,018.39; (d) Dr. Hammerman: \$22,082.90; (e) Dr. Kao: \$48,337.86; and (f) Dr. Plantilla: \$3,747.75. Vanguard does not dispute any of the above and does not dispute that these funds have not been disbursed to the plaintiffs.

The pivotal issue presented this is whether the plaintiffs are entitled to their respective shares of the Cash Consideration stemming from the demutualization and sale of MLMIC. Vanguard maintains it is entitled to keep all of the Cash Consideration because it paid plaintiffs' medical malpractice premiums with MLMIC and the plaintiffs would be unjustly enriched if the Court held that plaintiffs were entitled to their respective shares of the Cash Consideration. In *Maple Medical, LLP v. Scott*, 191 A.D.3d 820, decided December 9, 2020, the Appellate Division addressed this issue in a case which presented essentially the same facts and held that the physician-policy holders were entitled to the Cash Consideration and the employer had no cognizable unjust enrichment cause of action against the employees. The Third and Fourth Departments are in accord (*see Schoch v. Lake Champlain OB-GYN, P.C.*, 184 A.D.3d 338; *Shoback v. Broome Obstetrics & Gynecology, P.C.*, 184 A.D.3d 1000; *Columbia Memorial Hospital v. Hinds*, 188 A.D.3d 1337; and *Maple-Gate Anesthesiologists, P.C. v. Nasrin*, 182 A.D.3d 984).

On the authority of the above holdings, the Court finds that the plaintiffs are entitled to the Cash Consideration paid out by MLMIC. The Court further finds that the plaintiffs' have demonstrated their prima facie entitlement to summary judgment against Vanguard on their conversion claims. "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" (*C & B Enters. USA, LLC v. Koegel*, 136 A.D.3d 957, 958 [internal quotation marks omitted]; *see Colavito v. New York Organ Donor Network, Inc.*, 8 N.Y.3d 43, 49–50, 827 N.Y.S.2d 96, 860 N.E.2d 713). "Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's right" (*Colavito v. New York Organ Donor Network, Inc.*, 8 N.Y.3d at 50, 827 N.Y.S.2d 96, 860 N.E.2d 713 [citations omitted] ). "Money, if specifically identifiable, may be the subject of

a conversion action” (*Simpson & Simpson, PLLC v. Lippes Mathias Wexler Friedman LLP*, 130 A.D.3d 1543, 1544–1545 [internal quotation marks omitted]; see *East Schodack Fire Co., Inc. v. Milkewicz*, 140 A.D.3d 1255, 1256; *Peters Griffin Woodward, Inc. v. WCSC, Inc.*, 88 A.D.2d 883, 884; *Independence Discount Corp. v. Bressner*, 47 A.D.2d 756, 757). “[C]onversion occurs when funds designated for a particular purpose are used for an unauthorized purpose” (*East Schodack Fire Co., Inc. v. Milkewicz*, 140 A.D.3d at 1256, quoting *Lemle v. Lemle*, 92 A.D.3d 494, 497; *Petrone v. Davidoff Hutcher & Citron, LLP*, 150 A.D.3d 776, 777).

Here, the plaintiffs established, prima facie, that they had the immediate right of possession to their respective shares of the Cash Consideration resulting from the demutualization and sale of MLMIC and that Vanguard assumed and exercised control over those funds, thus interfering with their right of possession of such funds. Since the Cash Consideration to which each plaintiff was entitled to is specifically identifiable, such funds are the proper subject of a conversion action. Vanguard failed to raise a triable issue of fact.

The plaintiffs also demonstrated that each of Vanguard’s alleged affirmative defenses was either conclusory, lacking in merit as a matter of law and insufficient to defeat plaintiffs’ claims of conversion.

The general rule of damages in a conversion action is the value of the property at the time and place of the conversion, plus interest (see *Hoffman v. Dorner*, 86 A.D.2d 651; *Fantis Foods v. Standard Importing Co.*, 49 N.Y.2d 317, 326, 402 N.E.2d 122; *Jones v. Morgan*, 90 N.Y. 4, 10). Thus, the plaintiffs are entitled to recover their respective shares with interest from October 4, 2018.

Vanguard’s request for legal fees is improper since Vanguard alleges no basis on which to recover the same (see *Traiman v. U.S. Life Ins. Co. in City of N.Y.*, 139 A.D.3d 713, 715). The Court also rejects Vanguard’s contention that in the interest of judicial economy, the Court should refrain from issuing a decision in this action pending a determination of the appeals to the Court of Appeals in *Schoch v Lake Champlain OB-GYN, P.C.*, 184 A.D.3d 338, *lv granted* 35 N.Y.3d 918; *Columbia Mem. Hosp. v Hinds*, 188 A.D.3d 1337, *lv granted* 36 N.Y.3d 904; *Maple Med., LLP v Scott*, 191 A.D.3d 81, *lv granted* 2021 NY Slip Op 62415[U]) which Vanguard admits concern the identical issues presented to this Court. Generally, a trial court should follow

the last decision of the controlling Appellate Division and should not hold an adjudication in abeyance pending a determination by the Court of Appeals unless such determination is imminent (see *Miller v. Miller*, 109 Misc. 2d 982, 983; see also *In re Weinbaum's Estate*, 51 Misc.2d 538). Vanguard has not demonstrated that the Court of Appeals will be issuing decisions in the above matters any time soon and the court sees no reason to delay the adjudication of this case. If Vanguard chooses to appeal this decision, they can do so after posting an appropriate undertaking.

In light of this determination, the remaining branches of plaintiff's motion are moot.

Accordingly, it is hereby

**ORDERED** that plaintiff's motion for summary judgment on their conversion claims is **GRANTED**, and the plaintiffs may enter a judgment against Vanguard in accordance with this decision. **PLAINTIFFS ARE DIRECTED TO SETTLE A JUDGMENT ON NOTICE WITHIN 60 DAYS OF ENTRY OF THIS ORDER.**

This constitutes the decision and order of the Court.

Dated: November 1, 2021



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**PETER P. SWEENEY, J.S.C.**

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020