At an IAS Term, Part 10 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 11 day of May 2022.

PRESENT: **Larry D. Martin, J.S.C.**

WYCKOFF HEIGHTS MEDICAL CENTER,

Plaintiff,

-against-

WENDY-ANN MICHELLE OLIVIER and MLMIC INSURANCE COMPANY,

Defendants.

No. 526152/18

DECISION & ORDER
Motion Sequence Nos. 5, 6

In 2018, a New York medical malpractice insurer converted from a mutual insurance company to a stock insurance company—the first in the State to do so. This Court is asked to decide whether money paid as part of the conversion providently belongs to a physician holder of a policy issued by the insurer or to the medical practice that employed the physician and paid the policy's annual premium. While the four Departments of the Appellate Division are split on this question, this Department is not. As set forth below, the money belongs to the policyholder.

FACTS

Medical Liability Mutual Insurance Company, now called MLMIC Insurance Company ("MLMIC"), was a mutual insurance company that issued malpractice insurance to health care providers in New York. Plaintiff Wyckoff Heights Medical Center ("Wyckoff") is a hospital that serves predominantly Brooklyn and Queens. Defendant Wendy-Ann Michelle Olivier ("Dr. Olivier") was employed as a surgeon for Wyckoff from May 20, 2014 until May 26, 2017.

A. Employment Agreement

Upon hire, pursuant to an employment contract (the "Employment Agreement"), Wyckoff procured medical malpractice insurance for Dr. Olivier from MLMIC (the "Policy"). Specifically, Section VI of the Employment Agreement, entitled "Professional Liability Coverage," states, in relevant part, that Wyckoff "will maintain policies of professional liability insurance, and/or self-insurance, to insure" Dr. Olivier. In other words, Wyckoff, rather than Dr. Olivier, was obligated to pay the Policy's annual premium. The parties do not dispute that Wyckoff duly did so.

Separately, Section IV of Schedule A of the Employment Agreement, entitled "Compensation and Benefits" (the "Compensation Section"), lists all compensation and benefits to which Dr. Olivier is entitled under the Employment Agreement. Specifically, the Compensation Section states that the "compensation and benefits as expressly provided in this Schedule A shall be the sole and exclusive compensation and benefits to be provided to the physician in consideration for all of the services rendered or to be rendered by the physician and all of the physician's obligations under this Agreement."

B. Administrator Agreement

In the ordinary course, Dr. Olivier executed MLMIC's "Policy Administrator — Designation &/or Change" form (the "Administrator Agreement"), wherein she designated Wyckoff as "Policy Administrator." According to the Administrator Agreement's terms, "Designation as a Policy Administrator confers no coverage." Rather, a "Policy Administrator is the agent of all Insureds herein for the paying of Premium, requesting changes in the policy, including cancellation thereof and for receiving dividends and any return Premiums when due."

C. MLMIC's Demutualization

MLMIC, like "[e]very domestic mutual insurance corporation," was "organized, maintained and operated for the benefit of its members" (Ins. Law § 1211 [a]). Accordingly, when

MLMIC issued coverage to Dr. Olivier, she acquired certain rights and benefits, including membership in MLMIC. As a member, Dr. Olivier had "the right to elect directors and the right to receive a proportionate share of the company if it liquidates" as well as certain "contract rights (*i.e.*, the obligations of the insurance company under the policy)" (*Maple Med., LLP v. Scott*, 191 AD3d 81 [2d Dept 2020]).

As part of its acquisition by National Indemnity Company ("NICO"), a subsidiary of Berkshire Hathaway Inc., in 2016, MLMIC resolved to convert ("demutualize") from a mutual insurance company to a stock insurance company. New York Insurance Law § 7307 governs demutualizations in the State. As required under the statute, pursuant to resolution by its board of directors, MLMIC applied to New York State Department of Financial Services (DFS) for permission to demutualize (*See* Ins. Law § 7307[b]). Under Insurance Law § 7307(d) and (e), once DFS grants such permission, the parties to the proposed transaction must prepare a conversion plan—the operative document in demutualizations, which must also be approved by DFS. Crucial in this case, Insurance Law § 7307(e)(3) supplies, in relevant part, 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 shall be entitled to receive . . . consideration payable in voting common shares of the insurer or other consideration, or both.

MLMIC's plan of conversion (the "Plan") supplied that, as part of the proposed transaction, "eligible policyholders" or "their designees" would "collectively receive," in total, $2.502 billion (the "Cash Consideration"). From the total pie of Cash Consideration, each individual eligible policyholder or their designee would be entitled to a share (the "Payout") in exchange for extinguishment of their membership interest in MLMIC. As defined in the Plan, an "eligible policyholder' is the person named as insured on their policy, while a "designee" is an entity or person "designated by [the] Policyholder[] to receive the [Payout]." The Payout in controversy in

this case is $179,402.64. Dr. Olivier declined to designate Wyckoff to receive the Payout in her stead.

Following an August 2018 hearing, DFS issued a decision approving the Plan (*Matter of Med. Liab. Mut. Ins. Co. [Nat'l Indemn. Co.]*, NY St Dept of Fin Servs [Sept. 6, 2018] [("*DFS Decision*"]). In it, DFS observed that, as it relates to mutual insurance companies, "[m]embership interests … exist only in connection with a policyholder's ownership of a policy" (*DFS Decision*, at 3) and that "Insurance Law § 7307(e)(3) expressly defines those persons who are entitled to receive the proceeds of the Demutualization as each person who had a policy 'in effect during the three-year period' preceding the MLMIC Board's adoption of the resolution" (*Id.* at 4, quoting Ins. Law § 7307[e][3]). But DFS also recognized that policyholders may have assigned their rights to others, so the Plan included an objection and escrow procedure to resolve disputes "either by agreement of the parties or by an arbitrator or court" with appropriate jurisdiction (*Id.* at 25).

After duly lodging its objection, Wyckoff brought the instant action seeking a declaratory judgment that Dr. Olivier would be unjustly enriched if she were awarded the Payout because Wyckoff had paid his annual premiums. In addition, Wyckoff claimed, in the alternative, breach of contract arguing that the Compensation Section supplies Dr. Olivier's "sole and exclusive compensation and benefits" and omits therefrom malpractice insurance.

PROCEDURAL HISTORY

On or about December 28, 2018 Wyckoff filed this action by summons and complaint. Dr. Olivier filed her answer on March 11, 2019 asserting a counterclaim for certain additional funds that she claims Wyckoff owes her. In response, Wyckoff amended its complaint to assert a third claim against Dr. Olivier for breach of a promissory note that she appears to have signed. In October 2019, Dr. Olivier moved to compel MLMIC to release the Payout to her (Mot. Seq. 1) and Wyckoff moved for summary judgment on its unjust enrichment claim (Mot. Seq. 2). In February

2020, the Court denied both motions without prejudice implicitly directing the parties to proceed to discovery (*Decision 1*, ECF 64, 65).

On February 25, 2021, Dr. Olivier moved for summary judgment as to her first and second claims against Wyckoff and, again, for an order to compel MLMIC to release the Payout to her (Mot. Seq. 3). On October 8, 2021, the Court issued a Decision dismissing Wyckoff's unjust enrichment claim reasoning that Dr. Olivier had not been enriched since she had not yet received the money (*Decision 2*, ECF 94, at 3) but let stand Wyckoff's contractual claim reasoning that "[i]ssues of fact exist as to whether or not parol[] evidence should be admitted to shed interpretive light on the underlying contracts, … and/or who should be the beneficiary of any windfall" (*Id.* at 6–7). The Court also declined to direct MLMIC to release the funds to Dr. Olivier (*Id.* at 7).

On October 14, 2021, Dr. Olivier moved for leave to reargue *Decision 1* asking, again, that the Court dismiss Wyckoff's breach of contract claim by summary judgment (Mot. Seq. 4). Wyckoff opposed that motion charging, among other things, that Dr. Olivier had raised new arguments for the first time. On March 10, 2022, the Court granted Dr. Olivier leave to reargue and, upon reconsideration, dismissed Wyckoff's breach of contract claim reasoning that the Payout was a "windfall" and "as a matter of fundamental contract law … [it] could not have been bargained for and thus cannot fall under the ambit of a contract" (*Decision 3*, ECF 106, at 2). However, the Court once again denied Dr. Olivier's request to direct MLMIC to release the funds held in escrow finding that "while Dr. Olivier has demonstrated that no cause of action should lie against her for breach of contract and unjust enrichment, neither party has demonstrated, thus far, that it should be deemed the owner of the Proceeds" (*Ibid.*).

Wyckoff now moves for leave to reargue requesting the court to reconsider its order dismissing its breach of contract claim (Mot. Seq. 6) and Dr. Olivier moves, again, to reargue asking the Court for the fourth time to order MLMIC to release the funds held in escrow (Mot.

Seq. 5). In so moving, Dr. Olivier's charges that this Court erroneously concluded that she has not demonstrated her ownership of the Payout. Dr. Olivier is correct.

STANDARD OF REVIEW

Motions for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion but shall not include any matters of fact not offered on the prior motion" (CPLR 2221[d][2]). "While the determination to grant leave to reargue a motion lies within the sound discretion of the court," it is "not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented" (*Ahmed v. Pannone*, 116 AD3d 802, 805 [2d Dept 2014]).

DISCUSSION

In the wake of MLMIC's demutualization, health care employers and employee-providers around the State have litigated the issue of who should receive the Payout, and the Appellate Division is split on the question. In 2019, the First Department held for an employer (*Schaffer, Schonholz & Drossman, LLP v. Title*, 171 AD3d 465, 2019 NY Slip Op 02617 [1st Dept 2019]). The following year, the Fourth (*Maple-Gate Anesthesiologists, P.C. v. Nasrin*, 182 AD3d 984, 2020 NY Slip Op 02389 [4th Dept 2020]), Third (*Schoch v. Lake Champlain Ob-Gyn, P.C.*, 184 AD3d 338 [3d Dept 2020], *lv granted*, 35 NY3d 918 [2020]), and Second Departments (*Maple Med.*, 191 AD3d 81) found for employees. As a result, the Court of Appeals has agreed to hear a dozen of these cases, including *Maple Med.*, *supra*. Nonetheless, this Court is bound to apply the law as it stands today (*Cf. ibid.* ["the Supreme Court is bound to apply the law as promulgated by the Appellate Division in its own department … until its home department or the Court of Appeals pronounces a contrary rule").

In the First Department, a medical employer sought a declaration that it is entitled to the Payout (*Schaffer*, 171 AD3d 465). There, the employee physician argued that the Plan made clear that she is entitled because she was the sole policyholder and did not designate her employer to receive the Payout instead of her (*Id.* at 465). In affirming the trial court's ruling for the employer, the Appellate Division, in a brief opinion, held that awarding the Payout to the employee "would result in her unjust enrichment" since she did not "bargain for the[ir] benefit" (*Ibid.*). But the employee there did not raise arguments under Insurance Law § 7307.

In the Fourth Department, an anesthesiology medical practice sued its former employees for conversion and unjust enrichment, alleging it is entitled to the Payout (*Maple–Gate*, 182 AD3d 984). In affirming the trial court, a unanimous panel found that, under Insurance Law § 7307(e)(3), "each person who had a policy of insurance in effect" is "entitled to receive" the Payout (*Id.* at 984). And observed the Plan plainly states that the Payout "would be made to the policyholder unless he or she *affirmatively* designated a Policy Administrator … to receive such amount on [their] behalf" (*Ibid.* [emphasis added]). The Appellate Division noted that, although the employees had assigned *some* rights to their employer, crucially, they had not designated the employer to receive the Payout and concluded that the "mere fact" that the employer had "paid the annual premiums on the policies … does not entitle it" to the Payout (*Ibid.*)

Likewise, in the Third Department, an employee nurse practitioner, sued her employer seeking a declaratory judgment as to her entitlement to the Payout, and her employer counter-claimed unjust enrichment (*Schoch*, 184 AD3d 343). The trial court found for her employer, and the Appellate Division reversed, holding that the employee is entitled, even though her employer had paid her annual premium. Citing the same Insurance Law provision, the Third Department did not mince words:

> No distinction is made between a policyholder who pays the premium out of his [] 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 stock or Consideration to anyone other than the policyholder (*Ibid.*, citing § Ins. Law 7307[e][3]).

Thereafter, this Department "addressed the same single legal issue at the heart of all of the actions"—whether the Payout belongs to a physician policyholder or to the medical practice that employed the physician and paid the premiums on his policy (*Maple Med.*, 191 AD3d 81). There, an employer sued its former employee seeking a declaration that it is entitled to the Payout and the trial court granted the same. In reversing, the Court held that the "plain language of Insurance Law § 7307, the plan of conversion, and the DFS decision make clear that the policyholder is entitled to the [Payout]" (*Id.* at 81). In doing so, the Second Department made clear where it stands: "We agree with our colleagues in the Third and Fourth Departments that the consideration belongs to the physician-policyholder and respectfully do not agree with our colleagues in the First Department that the [Payout] should be paid over to the medical practice-employer" (*Ibid.*).

Here, the parties do not dispute that Dr. Olivier is the named policyholder. Under the Plan, for an entity to be entitled to the Payout, the policyholder needed to specifically designate that entity to receive it. The dispositive question is, thus, whether Dr. Olivier specifically designated Wyckoff to receive the Payout in her stead. It is uncontroverted that she refused Wyckoff's requests to do so. Moreover, neither the Employment Agreement's nor the Administrator Agreement's terms indicate she did. Indeed, her merely designating Wyckoff as her agent or Wyckoff's contractual craftsmanship does not make Wyckoff a policyholder, does not make Wyckoff a member of MLMIC, and does not entitle Wyckoff to the Payout. Because Dr. Olivier did not specifically designate Wyckoff to receive the Payout, she remains entitled to the same.

Wyckoff resists this conclusion arguing that the facts here are distinguishable from those in *Maple Med.* since there—unlike here—payment of the premiums was part of the employees' compensation. The argument goes that, because the Compensation Section supplies Dr. Olivier's

"sole" and "exclusive" compensation and does not include payment of the premiums, Dr. Olivier is not entitled to anything that stems from the Policy, including the Payout. But "[m]embership interests in a mutual insurance company are not paid for by the premiums; rather, such rights are acquired, at no cost, as an incident of the structure of [a] mutual insurance policy, through the operation of law and the company's charter and bylaws" (*Id.* at 81). That is, Wyckoff "has not provided the benefits in question" (*Ibid.*).

Thus, it cannot be said that Wyckoff paying Dr. Olivier's premiums pursuant to a different section than that of compensation, somehow, entitles it to the Payout because the Payout is simply *not* compensation. Instead, it is a function of Dr. Olivier's membership in MLMIC, which, in turn, "exist[s] only in connection with [her] ownership of a policy" (*DFS Decision*, at 3). Indeed, by the express terms of Insurance Law § 7307(e)(3), the Payout belongs to Dr. Olivier.

CONCLUSION

Accordingly, it is hereby

ORDERED, Wyckoff's and Dr. Olivier's respective motions for reargument are **granted** and, upon reargument, Dr. Olivier's motion for summary judgment as to her claim for a declaratory judgment is **granted** (Mot. Seq. 5) and Wyckoff's motion to reconsider dismissal of Wyckoff's breach of contract claim is **denied** (Mot. Seq. 6). MLMIC is directed to release the Payout to Dr. Olivier in the principal amount of $179,402.64 within 30 days of service of this Decision and Order with Notice of Entry.

Dated: June 23, 2022

Hon. Larry D. Martin
Supreme Court of the State of New York

HON. LARRY MARTIN
JUSTICE OF THE SUPREME COURT