Panos v Medical Liab. Mut. Ins. Co.
2018 NY Slip Op 33858(U)
February 21, 2018
Supreme Court, Putnam County
Docket Number: 500103/2017
Judge: Paul I. Marx
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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF PUTNAM
HON. PAUL I. MARX, J.S.C.

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SPYROS N. PANOS, M.D.

Plaintiff,

-against-

Index No.: 500103/2017
DECISION AND ORDER

MEDICAL LIABILITY MUTUAL INSURANCE COMPANY and STEPHANIE E. SIEGRIST, M.D.

Defendants.

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The following papers numbered 1 through 21 were considered in connection with (a) defendant Medical Liability Mutual Insurance Company's ("MLMIC") motion seeking an order (1) "pursuant to CPLR 3211(a)(5), dismissing the complaint as it [sic] is the subject of an arbitration and award; (2) pursuant to CPLR 3211(a)(7), dismissing the complaint for failure to state a cause of action"[1] (motion sequence #1), (b) defendant Stephanie E. Siegrist, M.D.'s ("Siegrist") motion seeking an order dismissing the plaintiff's complaint on the same grounds (motion sequence #2) and (c) plaintiff's motion seeking an order "pursuant to CPLR 3025(b) granting Plaintiff leave to amend the Complaint" (motion sequence #4).

Motion Sequence #1

Notice of Motion/Affirmation of Frank Misiti, Esq./Exhibits A-F 1-3
Memorandum of Law in Support of Medical Liability Mutual Insurance Company's Motion to Dismiss the Complaint 4
Affidavit of Spyros N. Panos, M.D. in Opposition to Defendants' Motions[2]/Exhibits 1-5 5
Affidavit of John Leahy/Affirmation of Frank Misiti, Esq. dated

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[1] All motions seek "such other and further relief as the Court deems just and proper", in one form or another.

[2] Plaintiff submitted only one set of papers in opposition to both defendants' motions.

Motion Sequence #2

Motion Sequence #4

As an initial matter, on the Court's own motion, the parties' applications are joined for decision.

For the reasons set forth below, defendant Siegrist's motion to dismiss plaintiff's complaint against her is granted in all respects and all claims against her are dismissed. Defendant MLMIC's motion to dismiss the complaint against it is granted in all respects and all claims against it are dismissed. Plaintiff's motion to amend the complaint is denied.

Procedural History

The action was initiated by filing of a Summons and Complaint on February 24, 2017. Siegrist answered the complaint on May 9, 2017. MLMIC moved to dismiss, in lieu of answering,

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[3] Plaintiff did not annex an Amended Complaint to his motion, he annexed those portions of the proposed amended complaint which he desired to add. This error, in and of itself is sufficient to deny his motion to amend the Complaint. CPLR §3025(b). Nevertheless, the Court has considered plaintiff's application.

on July 24, 2017. Siegrist filed her own motion to dismiss on August 11, 2017. Subsequently, plaintiff's counsel moved to be relieved as a result of her then pending, now final, disbarment. That motion (sequence #3) was granted. On October 18, 2017, plaintiff and defense counsel appeared before the Court. Plaintiff advised the Court of his intention to move to amend the Complaint.

Factual Background

This action had its genesis in approximately 260 medical malpractice actions ("the malpractice actions") brought against plaintiff,[4] a former orthopedic surgeon[5] and now convicted felon,[6] between 2010 and 2014. Complaint ¶14. Following the filing of the malpractice actions, plaintiff tendered the claims to his professional liability insurer, MLMIC, for defense and indemnity. *Id.* ¶17. Because the professional liability policies issued by MLMIC include provisions requiring the insured's consent to settle, MLMIC sought plaintiff's consent. *Id.* ¶19.

Plaintiff initially agreed to MLMIC negotiating settlements of the malpractice actions, but later withdrew his consent, claiming that he did not understand (and/or that MLMIC failed to adequately explain) that he had the right to withhold consent or that MLMIC could proceed to negotiate settlements without any further input from him once consent was given. Complaint ¶¶23-37. Plaintiff claims that he inquired whether a "global resolution" of all claims could be made under one docket number in order to reduce the number of claims/settlements that would be reported to the National Practitioner Data Bank.[7] *Id.* ¶28.

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[4] Claims were also asserted against various co-defendants. Those claims are not relevant to the instant motions.

[5] The parties spend considerable time in their papers arguing over whether plaintiff is still licensed as a physician. The initial complaint states "Plaintiff was thereafter no longer a licensed medical professional ..." Complaint ¶12. Whether he remains licensed is not relevant to the determinations herein.

[6] Plaintiff was convicted, by his own plea in the United States District Court Southern District of New York of one count of healthcare fraud on October 13, 2013. Exhibit D, p7. He was sentenced to 54 months in federal prison and paid substantial fines.

[7] The Court notes that even if MLMIC had agreed to plaintiff's proposal, the Court could not agree to allow 260 cases to be resolved under one index number. Each of the malpractice actions was filed under a separate index number. As such, each case requires a separate resolution, by settlement or judgment. While the actions were joined for discovery and other universally applicable procedures, they could not be consolidated under one index number because the allegations were sufficiently disparate as to require separate adjudication.

Plaintiff claims that in or around January 2016, MLMIC advised him of its intent to resolve the malpractice actions by way of a global and unconditional settlement. *Id.* ¶ 38.Plaintiff asserts that he informed MLMIC that he would not consent to settlement of the malpractice actions because he believed the malpractice actions to be "defendable" [sic]. *Id.* ¶ 40. Plaintiff claims that MLMIC decided to proceed to settle the cases "despite the likelihood of a successful defense". He claims that MLMIC failed to properly vet the claims and that he requested MLMIC to evaluate the cases on their merits. *Id.* ¶¶41-42.

Plaintiff asserts that MLMIC informed him by letter that each of the insurance policies contained a provision whereby an insured's refusal to consent could be overridden if MLMIC challenged the refusal and requested that the matter be adjudicated by an "adviser" appointed by the Medical Society of the State of New York ("MSSNY"). Complaint ¶43. Plaintiff states that he was advised that he would have the "opportunity to present the facts of the cases to [the] adviser who would then render a decision on whether Plaintiff unreasonably refused his consent to a settlement." *Id.* ¶44.

Plaintiff states that he was subsequently advised that MSSNY had selected Siegrist as the advisor. Complaint ¶47. He states that he and MLMIC submitted documents in support of their respective positions. *Id.* ¶¶48,49.

By letter dated February 25, 2016, Siegrist granted MLMIC's request that it be permitted to negotiate and settle the malpractice actions. Complaint ¶ 51.("the Siegrist Decision"). A copy of the Siegrist Decision is annexed to MLMIC's moving papers as Exhibit F.

In this action, plaintiff challenges the Siegrist Decision. He claims that Siegrist did not review the litigation or medical files that underlay the malpractice actions. Complaint ¶50. He complains that the decision "fails to account for any reasoning or documents relied upon" and asserts that "prior to any considerable review of the alleged damages the claimant's [sic] allege.". *Id.* ¶52, 53. He continues, "MLMIC and Siegrist reached the conclusion to settle and avoid defending Plaintiff against the claims without having fully vetted the basis of the claims." *Id.* ¶56.

The Complaint, filed on February 24, 2017, sets out four causes of action. The first cause of action seeks a declaratory judgment that "any settlement of Plaintiff's [sic][8] claims are null and void" based on MLMIC and Siegrist's "utter lack of regard for the interests of Plaintiff when electing to settle these claims prior to even reviewing the merits of the claims and/or damages alleged." Complaint ¶¶65-67. In addition, he seeks a judicial declaration setting aside the Siegrist decision, declaring it to be null and void "as MLMIC has failed to provide [him] with a copy of his policy demonstrating [MLMIC's] ability and authority to make such a binding decision." *Id.* ¶69.

The second cause of action seeks "an order enjoining MLMIC from proceeding to act on behalf of Plaintiff ... so as to preserve the status quo." Complaint ¶74. Plaintiff seeks "a preliminary injunction to preserve the parties [sic] interests in this matter as well as the pending two hundred plus cases."[9] *Id.* ¶75.

The third cause of action alleges that MLMIC violated NY General Business Law §349, by engaging in deceptive business practices. Plaintiff alleges that "MLMIC engaged in a number of consumer oriented practices that were materially misleading, resulting in significant damages to Plaintiff" Complaint ¶79. He states that on its website, MLMIC asserts that its "mission is to provide the strongest possible defense of their insureds for claims without merit, and prompt equitable compensation to those with legitimate claims against their insureds." *Id.* ¶81. Plaintiff continues that "by reserving the right to control the defense, MLMIC undertakes a duty to provide an uncompromised and unconflicted defense to its insureds against whom claims or lawsuits are brought against [sic]." *Id.* ¶83. He alleges that "MLMIC's policies and practices, however, deny its insureds an uncompromised and unconflicted defense, thus resulting in a material breach of

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[8] Presumably, the reference to "Plaintiff's claims" is to the claims asserted by the plaintiffs in the malpractice actions. As written, the allegation is that any settlement of Dr. Panos' claims in this action are null and void. This makes no sense.

[9] The Court notes that although plaintiff's complaint purports to seek a preliminary injunction, no application, by order to show cause or otherwise, seeking a stay of the malpractice actions was sought. The Court is aware that MLMIC and the plaintiffs' counsel in the malpractice actions have reached an agreement whereby those matters will be resolved through a hybrid of alternate dispute resolution. Hence, any request for a preliminary injunction is moot. Even if an application had been timely and properly made, the application would have been denied since plaintiff could not demonstrate, as he is required to do, a likelihood of success on the merits. *See generally, Lombard v Station Square Inn Apartments Corp.*, 94 AD3d 717, 717 [2nd Dept 2012].

MLMIC's duty to its insureds." *Id.* ¶84. He alleges that "[b]ecause it is MLMIC's policy, practice, procedure and/or preference to settle claims within policy limits, without fully analyzing the claims MLMIC puts its insureds, like Plaintiff, at a significant risk of unjustified reputational harm." *Id.* ¶88. He concludes that "MLMIC's representation to the general public that it provides a strong and unconflicted defense is deceptive in light of its policies, practices, procedures and/or preferences, which compromise MLMIC's ability to effectively and appropriately defend its insureds [sic] interests." *Id.* ¶90. Consequently, plaintiff claims damages in an amount to be determined at trial.

The fourth cause of action alleges that MLMIC breached the contracts of insurance issued by it to plaintiff for the years in question by not defending the malpractice actions more vigorously. Plaintiff asserts that "under the contracts, MLMIC by and through its employees, servants, and/or agents were [sic] obligated to defend Plaintiff's interests in the cases of professional liability claims against him in exchange for premiums paid by Plaintiff to Defendant, MLMIC." Complaint ¶94. He claims that MLMIC "deprived Plaintiff of the benefit of his bargain, namely, the uncompromised protection and defense of his interests with respect to the claims against him." *Id.* ¶95. He seeks, therefore, damages in an amount to be determined at trial.

MLMIC's Motion

MLMIC moves to dismiss the complaint, asserting that the insurance policy provisions by which an insured's refusal to consent to settlement is resolved comprise an agreement to arbitrate and that the Siegrist Decision constitutes a binding arbitration determination. MLMIC argues that Panos did not timely move to vacate the Siegrist Decision and is, therefore, prohibited from seeking any relief related to it. Consequently, MLMIC argues, this action is barred under CPLR §3211(a)(5). MLMIC also contends that plaintiff's complaint fails to state a cause of action under CPLR §3211(a)(7).

MLMIC asserts that it complied with all provisions of the insurance policies, including the "Refusal to Consent to Settle Clause", which provides for an advisor, selected independently by MSSNY to determine whether MLMIC could settle the malpractice actions without plaintiff's consent. MLMIC states that Siegrist was appointed by MSSNY and "after submission of materials by Dr. Panos and MLMIC", issued the Siegrist Decision. Memorandum of Law in Support of Medical Liability Mutual Insurance Company's Motion to Dismiss the Complaint, p5. MLMIC

continues that at no time after Siegrist rendered her decision did Panos move to vacate it and that the 90 days allotted for that purpose by CPLR §7511 has long since run. MLMIC states that Panos' first challenge to the Siegrist Decision came by this lawsuit, filed almost a year after the Siegrist Decision was rendered. Thus, MLMIC asserts, the challenge is untimely and barred.

In addition, MLMIC argues plaintiff's GBL §349 cause of action fails to state a cause of action because it fails to allege any consumer oriented conduct or deceptive acts or that plaintiff was injured by any such acts. *Id.* p6. Rather, it contends, the "GBL §349 claim is nothing more than a private contractual dispute between the parties — a claim that cannot be brought under GBL § 349." *Id.*

As to its arbitration and award defense, MLMIC has provided a copy of the relevant insurance policy[10] which reads, in relevant part:

> If you or a **Member** of the **Professional Entity** refuse to consent unconditionally to the settlement of a **Claim** when informed that settlement is advisable, then either you, the **Professional Entity** or we may, with written notice to the other party, refer the dispute to an advisor within your medical specialty who is licensed to practice medicine in the State of New York and who is selected by the Medical Society of the State of New York.
>
> Within 30 days following the selection of the advisor, you or the Professional Entity and we will be given an opportunity to present the facts of the case to the advisor by written submission. The decision of the advisor will be binding and may not be appealed. (Bold lettering in original).

MLMIC notes that the provision does not require the advisor to evaluate the claims to determine whether the insured actually committed malpractice, but, rather whether settlement was advisable. MLMIC states that it submitted the requisite materials to Siegrist by letter dated January

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[10] Notwithstanding that the malpractice actions arose from Panos' actions over a four year span, MLMIC provided only a copy of the insurance policy issued to plaintiff for the period July 2010 to July 2011 on its motion. Exhibit B. This, despite the fact that Panos asserted that he was never provided with a copy of the relevant insurance policies. In fact, Panos attached a different form policy to his papers as Exhibit 1. Absent from that policy is the Refusal to Consent provision at issue here. Nevertheless, the Court is satisfied that the policy form attached to MLMIC's moving papers as Exhibit B is the operative form insurance policy based on the affidavit of John Leahy, Senior Vice President of MLMIC submitted on MLMIC's reply. Mr. Leahy attests that the form submitted by Panos has not been used since 2001 and that the form policy submitted as Exhibit B is a true and accurate copy of the policy type issued to Panos for the relevant policy periods. Affidavit of John Leahy dated October 16, 2017.

27, 2016 and that Panos submitted his materials sometime thereafter. MLMIC notes that it was only after the Siegrist Decision that he objected to the arbitration of the issue.

MLMIC notes that Panos has not challenged the arbitration provision in the contract, except to the extent that he claims that the "specimen policy" that he attached to his papers did not include a provision for arbitration. (*See* footnote 10).

MLMIC asserts that the GBL claims cannot stand because: (a) generally, they arise from plaintiff's disagreement with the Refusal to Consent to Settle arbitration and (b) the dispute is nothing more than a contractual dispute between parties and not a consumer oriented transaction.

MLMIC states that the elements of a GBL §349 claim are the commission of (acts or practices that are (1) "consumer oriented", (2) deceptive or misleading in a material way, and (3) cause damage to the plaintiff. *Gaidon v Guardian Life Insurance Co. of Am.*, 94 NY2d 330, 343-344 [1999]. It argues that the law is clear that private disputes between parties do not fall within the ambit of GBL §349. *Oswego Laborers Local 214 Pension Fund v Marine Midland Bank,* N.A., 85 NY2d 20, 25 [1995].

MLMIC argues that in order for plaintiff to sustain a GBL §349 claim, he must have plead (and prove later) that its practices have a broad impact on consumers at large and not just him. In addition, MLMIC states that conclusory allegations of consumer oriented practices are insufficient to support a complaint, they must be specific.

MLMIC notes that numerous courts have held that disputes between insurers and policy holders do not comprise a GBL claim. *See DePasquale v Allstate Ins. Co.*, 179 F Supp 2d 51, [EDNY], *aff'd* 50 Fed Appx. 475 [2nd Cir. 2002], *P.B. Americas Inc. v Continental Cas. Co.*, 690 F. Supp. 2d 242 , 252-253 [SDNY 2010] and *Continental Cas. Co. v Nationwide Indem Co.*, 16 AD3d 353, 354 [1st Dept 2005]. Thus, relying on those cases, MLMIC argues that plaintiff cannot demonstrate that this matter is anything other than a dispute between insured and insurer. Hence, it urges dismissal.

MLMIC adds that plaintiff did not plead any "materially deceptive or misleading acts or practices" such that the GBL claim is defective. *Gaidon, supra.* MLMIC asserts that to be deceptive, an act must be a "representation or an omission likely to mislead a reasonable consumer acting reasonably under the circumstances". *Gaidon, supra.* at 344. Rather, MLMIC argues that Panos'

reliance on its representations that it has "successfully defended more New York medical and dental professionals than any other insurer" and that it "provides the strongest possible defense of its insureds for claims without merit" as being false is inadequate to establish a GBL claim. Rather, MLMIC states that the pleading is simply a re-assertion of a breach of contract claim, designed to challenge the arbitration and claims handling decisions. Thus, it concludes, plaintiff's GBL claim must be dismissed.

Finally, MLMIC states that Panos has not suffered any damages which might be compensated by a GBL claim. It states that damages must specifically flow from the alleged GBL violation, not merely from a claimed breach of contract. "Although a monetary loss is a sufficient injury to satisfy the requirement under NYGBL §349, that loss must be independent of the loss caused by the alleged breach of contract." *Spagnola v Chubb Corp.* 574 F3d 64, 74 [2nd Cir 2009].

MLMIC concludes that the complaint must be dismissed under CPLR 3211(a)(5) because it is time barred due to plaintiff's failure to timely challenge the arbitration decision, and that to the extent the claims are not barred by arbitration, they fail to state a cause of action under CPLR §3211(a)(7).

Siegrist Motion

Siegrist also moves to dismiss plaintiff's complaint predicated on CPLR §3211(a)(5) and CPLR §3211(a)(7). Siegrist urges dismissal of the complaint because she contends the issues have already been adjudicated by arbitration and award (CPLR §3211(a)(5)) and because the allegations of the complaint as against her are "merely conclusory [,] and do not state entitlement to relief". Siegrist asserts that the allegations against her in the complaint are insufficient to support a cause of action against her under CPLR §3013. Finally, Siegrist alleges that she is immune from suit because of her participation as an arbitrator. Affirmation of Richard S. Tubiolo dated August 10, 2017, ¶10.

Siegrist asserts that the claims alleged by Panos have been the subject of an arbitration which was not timely challenged and, therefore, are barred under CPLR §3211(a)(5). Rather than expand on this assertion, she adopts MLMIC's arguments on this point.

Siegrist asserts as well that the allegations against her in the complaint cannot support a cause of action because they do not allege, other than in a conclusory fashion, "misconduct, indefiniteness

of award, partiality, or lack of jurisdiction" on her part. Siegrist Memorandum of Law dated August 10, 2017, p2. She contends that the mere conclusory statements against her are insufficient as a matter of law to state a cause of action. She urges that the Court must enforce an arbitral award under CPLR §7511(b) unless plaintiff can provide evidence that the arbitrator "acted with fraud, corruption, or misconduct; partiality of the arbitrator; the arbitrator's award was indefinite; or the arbitrator failed to follow proper procedures." *Id.* She cites to *Island Surgical Supply Co. v Allstate Ins. Co.*, 32 AD3d 824 [2nd Dept 2006] for the proposition that even though the Court must construe the allegations of a complaint in the light most favorable to the plaintiff on a motion to dismiss, this does not excuse plaintiff from failing to allege facts rather than opinion to support a suit against an arbitrator. She continues that "mere suspicion of fraud, as is alleged here in paragraphs 62, 65, 69 and 70 of Plaintiff's Complaint, is insufficient to enable a plaintiff to successfully set aside an arbitration and award." *Id.* p3. She concludes, therefore, that the complaint fails to state a cause of action against her.

Next, Siegrist contends that plaintiff has not set forth any causes of action in the complaint against her since each cause of action alleged commences "AS AND FOR A [ORDINAL NUMBER] CAUSE OF ACTION AGAINST MLMIC". She asserts, therefore, that plaintiff did not intend to, nor did he, set out any claims against her as required by CPLR §3013. In addition, Siegrist points out that plaintiff's cause of action for injunctive relief does not involve her, but lies, if at all, against MLMIC alone.

Finally, Siegrist attests that she was engaged as a neutral party to review materials submitted by MLMIC and Panos and that after doing so, she rendered an award. Affidavit of Stephanie E. Siegrist, M.D. dated August 11, 2017, ¶3. She attests, further, that she "thoroughly reviewed everything [I] was sent, so as to make a full and fair determination based on the evidence was [sic] presented to me. I completed my job as an arbitrator. ... I served in the capacity of an Arbitrator, and completed my duties within the scope of what was required of me." *Id.* ¶¶ 4-5.

Because of her role as arbitrator, Siegrist urges that she is immune from suit. "An arbitrator is entitled to judicial immunity from suit for actions taken within the scope of their duties because an arbitrator stands as a judge." *Pinkesz Mut. Holdings v Pinkesz*, 139 AD3d 1032, 1033 [2nd Dept 2016].

Plaintiff's Response to MLMIC and Siegrist's Motions/Plaintiff's Motion To Amend

As noted above, plaintiff submitted one set of opposition papers to both defendants' motions. Essentially, plaintiff contends that the complaint sets out a cause, or causes, of action and should not be dismissed. He asserts that there are "inherent inconsistencies ... warranting not only an explanation by Defendants, but which clearly preclude the entry of summary judgment[11] at this juncture". Opposition to Defendant's Motions for Summary Judgment and In Support of Plaintiff's Motion to Amend Complaint dated October 6, 2017 ¶3. Plaintiff alleges that defendants attempt to portray him in a negative light but mis-state the fact that he lost his medical license. (But see paragraph 12 of the complaint). He assails some of the attorneys who represent the plaintiffs in the actions brought against him as the reason for the multiple malpractice cases filed against him.

Notably, plaintiff states that he "has never been in opposition of consent [sic] to settle the pending malpractice actions", complaining that he was never asked for a conditional consent. *Id.* ¶11. Rather, he states that he refused to grant an unconditional consent. *Id.*

Plaintiff claims that the terms of the insurance contract are disputed because, he asserts, he was never provided with a copy of the insurance policy.[12] *Id.* ¶13. He complains that Siegrist deliberated for less than 24 hours before she determined that MLMIC should be permitted to negotiate settlements of the malpractice actions. He assails the completeness of Siegrist's review of the malpractice actions and contends that she did not review any medical records to determine the merits of the actions. *Id.* ¶15-17. He refers to Siegrist as a "hired gun" and complains that she did not render a written decision explaining her reasoning for authorizing the settlements. *Id.* ¶17-19.

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[11] Plaintiff has submitted opposition to defendants' motions for "summary judgment". Summary judgment is sought under CPLR §3212. Defendants have not moved for summary judgment, they have moved for dismissal under CPLR §3211. In addition, plaintiff's opposition papers purport to seek leave to amend his complaint. However, plaintiff did not include a notice of cross motion as required under CPLR 2214(b). Thus, to the extent he seeks affirmative relief in connection with defendants' motions, that relief is denied. This turns to be of no consequence because plaintiff has filed a separate motion seeking to amend the complaint (sequence #4) decided herein.

[12] The Court notes that plaintiff was defended by counsel assigned by MLMIC throughout the underlying litigation. Had he wanted a copy of the insurance policy, clearly, counsel could have provided it to him.

He continues that Siegrist's review of over 200 cases without reviewing medical records "smells foul and is consistent with negligence in its highest form." *Id.* ¶20.

Apparently believing that the defendants' motions seek summary judgment, plaintiff asserts that there are triable issues of fact which warrant denial of summary judgment. Although not relevant to the instant motion, the Court notes that plaintiff identifies the issues as follows:

1. Plaintiff asserts that while he was incarcerated he requested from Louis Neuberger, formerly a senior executive at MLMIC, that he be provided with a copy of the operative policy. He claims that he was told by Neuberger that the terms were the same as when the policies incepted in 1999. Plaintiff challenges, therefore, whether the policy which is annexed as Exhibit B is the correct policy. Plaintiff annexes to his papers a copy of a "specimen" insurance policy, which includes different procedures to be employed when an insured refuses to consent to settle. He asserts, therefore, that there is a question of fact as to whether the correct policy terms were applied to him. Panos Affirmation[13] in Opposition to Defendants' Motions for Summary Judgment and in Support of Plaintiff's Motion to Amend Complaint, ¶¶28-35.

2. Plaintiff asserts that MLMIC has misapplied the terms of the insurance policies, contending that it was improper for it to submit all of the claims simultaneously to one arbitrator. He cites to the fact that the policy language refers to a "Claim" being referred for arbitration claiming that submitting over 200 claims at once was improper. He asserts that the "spirit of the language in this disputed contract was meant to decide the individual merits of each pending malpractice action on an individual case by case basis, not globally and collectively."[14] *Id.* ¶36-41.

3. Plaintiff states that MLMIC's motion is defective because it did not include an affidavit from anyone with knowledge attesting to the "true and correct" nature of the insurance policy submitted by MLMIC as Exhibit B. Given that MLMIC's representative is alleged to have told him that it did not have the actual insurance policy in its possession, he asserts there are questions of fact to be decided. *Id.* ¶42-44.

4. Plaintiff asserts that there is a question of fact as to why MLMIC did not proceed to settle the cases after he had given consent but before he withdrew it. He contends that MLMIC engaged in unfair practices by pursuing the arbitration when he was

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[13] Plaintiff is a party to the litigation. As such, submission of an affirmation is improper. CPLR §2106(a).

[14] It is interesting that plaintiff objects to the arbitration of the consent issue being adjudicated globally, but states that if all cases were resolved as one, *i.e.* globally, he would consent to settlement.

incarcerated and thus "a wounded duck who would be unable to oppose such action at that time". *Id.* ¶ 45-50, 46.

5. Plaintiff asserts that there are issues of fact as to Siegrist's impartiality, contending that she violated standards of professionalism for orthopedic surgeons. He laments that by issuing the Siegrist Decision, she has "opened the door for the filing of over 200 potential negative entries against Plaintiff with the National Practitioner's Data Bank (NPDB). Such entries would irreversibly harm Plaintiff in efforts to seek future re-licensure and employment." *Id.* ¶55. He claims that Siegrist did not review medical records of any type and that she never concluded that he committed malpractice. *Id.* ¶ 57. He concludes, therefore, that Siegrist "violated the Rules and Standards of Professional she took an oath to uphold". *Id.* ¶58.

6. Plaintiff contends that an issue of fact exists as to the "Rules of Engagement" under which Siegrist performed her review. He states that he was not consulted as to procedural issues and criticizes the decision form as having been "drafted by a second grade student." He challenges, therefore, the impartiality of her decision. *Id.* ¶¶62-70.

7. Plaintiff opposes Siegrist's assertion of arbitral immunity contending that the letter of engagement does not identify her as an arbitrator. He asserts that the decision is not impartial and, therefore, she does not enjoy immunity, arguing further that she acted negligently because her decision was rendered only one day after he and MLMIC finalized their submissions. Thus, he argues, the arbitration was tainted. *Id.* ¶¶ 71-79.

8. Plaintiff asserts that the GBL §349 claim should survive because, he contends, there are questions concerning the communications between MLMIC and Siegrist prior to her review. He suggests that MLMIC over-reached in its direct communications with her and argues that the information MLMIC sent her was incorrect and misleading. In this regard, he submits that MLMIC informed Siegrist that plaintiff saw as many as 70 patients per day, a statement he contests. Additionally, he challenges the failure of Siegrist to render a reasoned decision, one in which the reasons for her decision are stated. *Id.* ¶¶ 80-89.

9. Plaintiff challenges the arbitration process itself, stating that he requested information from MLMIC about the process on several occasions while he was incarcerated, but received no response. He asserts that Siegrist is not a "licensed and coded arbitrator" and that because of his incarceration, he was not able to be present at any hearing or to cross examine. He submits, therefore, that "this was a one sided process favoring MLMIC and Dr. Siegrist did not act as a neutral third party." Consequently, he asserts "both defendants have significant questions to answer and need to be held accountable for their actions." *Id.* ¶¶ 95-102.

10. Finally, plaintiff submits that discovery is required to allow him to ascertain the scope and level of his damages arising from his GBL §349 claims. Thus, he argues, under CPLR § 3212(f) the motions should be denied. *Id.* ¶¶103-107.

As noted above, plaintiff's opposition included a request for affirmative relief, leave to amend his complaint. Since that request came without a notice of motion as required, the court has not considered it in connection with MLMIC and Siegrist's motions.

Plaintiff's Motion to Amend the Complaint
(Motion sequence #4)

Apparently recognizing that he failed to include a notice of motion on his putative cross motion to amend his pleadings, plaintiff filed a separate motion seeking to amend the complaint. In the motion, plaintiff seeks to add several causes of action against defendants. In support of that application, he submits only a document entitled "Amended Verified Complaint",[15] the Complaint filed in this action and a copy of the affidavit of John Leahy submitted by MLMIC with its reply papers.

In the proposed Amended Verified Complaint, plaintiff adds causes of action as follows: (1) against Siegrist for claimed (a) "Negligence and Provable Bias" (the Fifth Cause of Action), and (b) Fraud (the Sixth Cause of Action), and (2) against MLMIC for (a) negligence (the Seventh Cause of Action), (b) Fraud (the Eighth Cause of Action), c) Fraud (a second "count") (the Ninth Cause of Action),[16] (d) for a "Second Declaratory Judgment" (the Tenth Cause of Action).

In the Fifth Cause of Action, plaintiff alleges that Siegrist owed a duty as an orthopedic surgeon serving as an arbitrator to evaluate the claims against him on their merits, but did so negligently by failing to review medical records of the plaintiffs in the malpractice actions. In

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[15] The purported Amended Verified Complaint is proffered without any affidavit attesting to the merits of the claims or the reason the amendment is sought. The only justification for amending the complaint is a "Preliminary Statement" in the proposed Amended Complaint which states, in essence, that the defendants' moving papers contain "inherent inconsistencies ... warranting not only an explanation by Defendants, but that clearly bring rise to additional causes of action." Proposed Amended Complaint, ¶3. The Proposed Amended Complaint is, in fact, a proposed Supplemental Complaint since it seeks to add causes of action. CPLR §3025(b).

[16] This "count" is also "in further support for Plaintiff's Third Cause of Action".

addition, he alleges that she failed to review the insurance policies to determine if she had "standing to rule in this action." Plaintiff asserts that Siegrist had a "clear bias" and was "gross[ly] negligent" for which she "must be held accountable." He claims an unspecified amount of damages. Proposed Amended Complaint ¶¶4-16.

In the Sixth Cause of Action, plaintiff alleges that Siegrist committed fraud by misrepresenting that she had the qualifications to review the malpractice claims against him. He contends that she was not a peer of his because her website does not list certain medical procedures which were under review. He claims that "in continuing to represent that she was qualified and neutral third party reviewer, Dr. Siegrist acted fraudulently and violated the rules of ethical conduct and standards of professionalism as outlined in AAOS, which Dr. Siegrist took an oath to uphold". *Id.* ¶¶17-28.

In the seventh cause of action, plaintiff alleges that MLMIC was negligent in advancing $50,000 to a law firm without his consent. He contends that the insurance policies issued by MLMIC provided $100,000 in coverage for "administrative actions", that MLMIC advanced $50,000 to a firm without his approval, that it admitted as much and that it has yet to secure a return of the monies. He contends that as a result he has not been able to "appropriately defend against administrative actions." *Id.* ¶¶29-38.

In the eighth cause of action, plaintiff alleges that MLMIC committed fraud on the court by representing that it had authority to negotiate settlements of the malpractice actions, unconditionally. He contends that the Siegrist Decision did not grant unconditional authority to settle, only that they should be settled. He challenges Siegrist's appointment as a neutral arbitrator, claiming that he never received any notice from MSSNY of her appointment or her qualifications. He asserts, therefore, that Siegrist lacked authority to rule and that MLMIC's representations to the Court that it could negotiate the cases unconditionally were false. *Id.* ¶¶ 39-52.

In the ninth cause of action, plaintiff alleges that MLMIC's change in insurance policy form was improper and constituted fraud. He asserts that he never agreed to a change in form of the insurance policy he first purchased and that MLMIC's change in 2001 constituted a fraud "to all persons seeking insurance coverage through MLMIC and to all residents of New York State." He

contends, further, that the change in policy form is "in violation of General Business Law Section 349". *Id.* ¶¶53-62.

In the tenth cause of action, plaintiff seeks a judgment declaring that the Administrative Riders to the insurance policies which provide insurance coverage of up to $100,000 of benefits to answer administrative proceedings brought against an insured are cumulative and not limited to a one time benefit. He seeks, therefore, an order, declaring that "plaintiff is entitled to $100,000 of separate and distinct administrative coverage for each policy period covered by this Plaintiff's effective insurance coverage." *Id.* ¶¶63-72.

MLMIC's Opposition to Plaintiff's Motion to Amend The Complaint

MLMIC opposes plaintiff's application to amend the complaint raising both procedural and substantive grounds. MLMIC notes that plaintiff attempted to seek an amendment to his complaint in his opposition papers, but without attaching a copy of the proposed amended complaint. MLMIC contends that this application is similarly defective because it does not include any justification for amending the complaint or a complete version of the entire proposed amended complaint. MLMIC asserts that any new causes of action that arise from the arbitration and/or Siegrist Decision are barred for the same reasons that dismissal of the amended complaint is warranted and that the GBL claims also do not lie. MLMIC does not address plaintiff's application to amend the complaint to include causes of action relating to administrative action coverage.

Siegrist Opposition to Plaintiff's Motion to Amend The Complaint

Siegrist opposes plaintiff's motion to amend the complaint because (1) he failed to attach a copy of the proposed amended complaint to the application, (2) the action against her is barred by virtue of her status as arbitrator in the previously held arbitration, and (3) any challenge to the arbitration award is time barred.

Plaintiff's Supplemental Affirmations In Support of Motion to Amend Complaint

Plaintiff submitted affirmations purportedly in further support of his motion to amend. These have not been considered by the Court. There is no provision in the CPLR for Sur-Reply papers to be served in connection with cross motions and this Court does not accept Sur-Reply papers. CPLR 2214(b) and (c).

Discussion

The filed complaint against MLMIC must be dismissed because (a) to the extent that it seeks relief related to, or challenges the impartiality or thoroughness of, the proceeding before Siegrist or the Siegrist Decision, any such challenge is untimely, and (b) the Complaint fails to state a cause of action under GBL §349.

The statute of limitations for challenging an arbitration award is 90 days. CPLR §7511. The Siegrist Decision was rendered on February 25, 2016. The instant action was commenced on February 24, 2017, nearly a year after the decision was rendered and well after the allotted period. Consequently, to the extent that the complaint challenges the arbitration award, it must be dismissed.

In this regard, the Court notes that Panos asserts that the proceeding before Siegrist was not an arbitration. This attack fails for several reasons. First, to the extent that Panos challenges the arbitration process as not being an arbitration at all, the Court finds that he waived any such objection by participating in it. Had Panos wanted to challenge the arbitrability of the dispute, he could have and should have objected to or sought a stay of the proceedings. He did not. Simply put, one cannot take a "wait and see" approach to arbitration by participating in it and then, when the decision is different than the one sought, challenge the arbitrability of the dispute. *Frumkin v P&S Construction, N.Y., Inc.*, 116 AD3d 602, 603 [1st Dept 2014]; *Rothman v Re/Max of New York, Inc.*, 274 AD2d 520, 521 [2nd Dept 2000].

Moreover, even though a contractual provision may not specifically state that it is an "arbitration provision", the law is clear that when parties to a contract agree to submit all disputes arising from that contract to a third party for resolution, the Court will enforce such a determination as an arbitration award. *See Maross Const. Inc. v Central New York Transp. Authority*, 66 NY2d 341 [1985].

Indeed, CPLR §7601 provides that parties may commence a special proceeding to "enforce an agreement that is a question of valuation, appraisal or other issue or controversy ... determined by a person named or to be selected." The statute continues, "the Court may enforce such an agreement as if it were an arbitration agreement."

A review of the complaint reveals that causes of action numbered 1, 3 and 4 challenge directly or indirectly the arbitration award. As such, they must be dismissed.

The GBL Claims Fail to State a Cause of Action

Although the law is clear that pleadings should be liberally construed, a Court is not required to read a complaint in such a manner to create causes of action that do not exist. Here, even given a liberal reading, the complaint fails to state a cause of action that MLMIC violated GBL §349. As MLMIC correctly notes, case law is definitive that a breach of contract claim between an insured and his/her insurer does not state a claim under GBL §349.

Here, plaintiff's complaint states nothing more than a dispute with MLMIC over whether it should proceed in its attempts to resolve the 260 claims against him. Plaintiff agrees to the concept of settlement of the actions, but not unconditionally. Rather, he wants the cases to be addressed as he wants, with conditional consent. Unfortunately for him, the insurance policy does not provide for conditional consent.[17]

Thus, the dispute with MLMIC is solely a dispute over the insurance contract and GBL §349 is not implicated. As such, the cause of action which seeks relief against MLMIC based on an alleged GBL violation must be dismissed.

The Claims Against Siegrist Must Be Dismissed

Although Siegrist's suggestion that the claims against her are barred under CPLR §3211(a)(5) because they were the subject of an arbitration is misplaced, she is correct that the complaint against her must be dismissed. CPLR §3211(a)(5) addresses arbitration between parties, in this case, MLMIC and Panos. As such, the claims against Siegrist are not subject to dismissal simply because the dispute between the other parties was arbitrated, but rather because she enjoys immunity as an arbitrator. *See Pinkesz, supra.*

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[17] The Court notes that Panos' objection to the resolution of the malpractice actions seems to be guided by his intention to seek to reinstate his medical license. Panos seems not to have considered that settlement of these cases on the terms negotiated by MLMIC spared him from exposure to judgments in excess of his policy limits or due to the large number of claims, exhaustion of the policy limits. The policies issued to Panos provide him with only $1,300,000 in indemnity for any individual person and $3,900,000 in the aggregate for each policy year. Given the number of claims asserted against him, it was likely that in at least some of the years, he would have had either personal exposure or exposure through his excess insurance policies.

Panos' only challenge to Siegrist's assertion of immunity is to state that the arbitration was tainted and unfair. The time for such a challenge has long since run as any challenge to the impartiality of the arbitrator under CPLR §7511 is time barred.

As such, all claims against Siegrist must be dismissed.

Panos' Motion to Amend

Panos' motion to amend the complaint must be denied. Although Panos' application to serve an amended complaint is flawed by his failure to include a complete copy of the proposed amended pleading, given his self represented status, the Court will ignore this technical defect and evaluate the proposed pleading on its merits.

Claims Against Siegrist

First, as decided above, all claims against Siegrist which are predicated on her having served as an arbitrator are barred by virtue of the expiration of the statute of limitations and because she is entitled to immunity for acting as an arbitrator.

A review of the proposed amended complaint reveals that plaintiff now seeks to assert claims against Siegrist for alleged "Negligence and Provable Bias" and Fraud. He complains that Siegrist did not evaluate the malpractice claims on their merits[18] and, therefore, breached her duty to him under AAOS standards. He complains that Siegrist failed to review any medical records to evaluate the malpractice claims and questions her intent to serve as a neutral third party. As alleged by plaintiff, both of these claims arise from her involvement in the parties' dispute over Panos's refusal to grant unconditional consent to MLMIC to pursue settlement of the malpractice claims. Since these claims arise from Siegrist's appointment by the MSSNY as arbitrator, the negligence and bias claims are barred.

In addition, plaintiff alleges that Siegrist misrepresented herself as a qualified third party arbitrator. He claims that she lacked proper qualifications or credentials to serve as an arbitrator since

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[18] The Court notes that the insurance agreement does not require the arbitrator to evaluate claims on their merits. The arbitrator is asked to determine if settlement is "advisable". Settlements may be advisable for reasons other than the merits of the underlying claims. For example, settlement may be advisable where, as here, the insured is exposed to potential verdicts well in excess of available policy limits by the sheer number of claims asserted against him/her or where the costs of defense render the continuation of a defense fiscally irresponsible.

she does not, according to her website, perform surgeries similar to those previously performed by plaintiff. He claims that Siegrist had *ex parte* communications with MLMIC which prevented her from serving as an arbitrator. All such claims fall within the ambit of Siegrist's immunity and cannot proceed. To the extent that they are not barred by Siegrist's immunity, they are barred by the CPLR as untimely.

Thus, leave to serve an amended complaint against Siegrist is denied in all respects.

Additional Claims Against MLMIC

In the Amended Complaint, plaintiff seeks to add causes of action against MLMIC sounding in negligence, two separate claims of fraud, and for a declaratory judgment pertaining to a rider to the insurance policies applicable to administrative proceedings.

The claim for negligence asserts that MLMIC was negligent in advancing $50,000 to an unidentified law firm for fees pertaining to "administrative actions" without his approval. He complains that MLMIC has failed to obtain a return of these monies. He complains that without this coverage, he has been "[u]nable to appropriately defend against administrative actions." As noted above, MLMIC has not responded to this aspect of plaintiff's motion. Nevertheless, plaintiff has failed to state that he was the subject of any administrative action, that MLMIC has disclaimed coverage for any administrative action or that MLMIC has asserted that coverage under this provision has been exhausted. As such, plaintiff's complaint is defective and fails to state a cause of action.

In addition, plaintiff seeks to add two causes of action against MLMIC sounding in fraud. The first fraud claim alleges that MLMIC misrepresented Siegrist's qualifications as a qualified arbitrator and misrepresented to the Court that Siegrist had determined that the malpractice claims should be settled, unconditionally, when, in fact, she merely held that they should be settled (*i.e.*, the word "unconditionally" does not appear in the Siegrist Decision). He complains that despite requests, MLMIC has not provided any documents from MSSNY by which the qualifications of Siegrist were set out. He complains that MLMIC has misrepresented to the Court that Siegrist determined that the malpractice claims should be settled, unconditionally.

Panos' complaint that he was not provided with information pertaining to Siegrist's qualifications is not an issue before the Court as all issues relating to the arbitration are time barred.

Additionally, plaintiff lacks standing to sue based on the claimed misrepresentation to the Court.[19] Further, none of the parties was damaged as a result of MLMIC having proceeded to negotiate settlements of the malpractice actions. Consequently, this claim cannot proceed.

Plaintiff's second claim of fraud (the Ninth Cause of Action) also fails to state a cause of action. In the proposed pleading, plaintiff complains that he was unaware that during the many years he was insured by MLMIC, the form or terms of the insurance policy changed. He asserts that the modification of the policy form constitutes a fraud and a further basis for the GBL claims which have now been dismissed. A change in terms of an insurance policy over a period of years is simply not fraudulent. The insurance policies in question were issued on an annual basis. Plaintiff had ample opportunity to review the terms of the policies each year and to ascertain that the policy terms had changed. That he failed to do so does not comprise fraud by MLMIC but, rather, lack of diligence on his part. Consequently, the second claim for fraud cannot stand.

Finally, plaintiff seeks to add causes of action for declaratory judgment. Plaintiff avers that the insurance policies issued to him provided $100,000 in "Administrative Action" coverage. He seeks a declaration that the additional "administrative actions" coverage is cumulative, *i.e.* that $100,000 is available to him for each year in which an Administrative Action is levied against him. Plaintiff has not specified or alleged that Administrative actions have been undertaken against him. Thus, the proposed pleading is defective and cannot be permitted.

Moreover, there does not appear to be any justiciable controversy. The policy which has been submitted as an exhibit specifically states "[a]ll coverage provided by this policy is on a **Claims** made basis." Exhibit B, p1 of 1 entitled "Declarations Addendum" (bold in original). The policy language continues, in the "Endorsement", which plaintiff alleges is unclear, "[w]hen you, [the insured], are being investigated in a single administrative action or a single Governmental Proceeding that took place over multiple Policy Periods only one limit of Defense Costs Coverage will respond and it will be the Limit of the Defense Costs Coverage in effect on the date the

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[19] Perhaps equally important, MLMIC made no such representation to the Court. Rather, in this Court's opinion, MLMIC fulfilled its obligations to plaintiff and the Court by acting in what can only be viewed as a responsible manner by resolving all claims against Panos within his policy limits.

administrative action or Governmental Proceeding is first reported to us." Endorsement entitled "Physicians & Surgeons Legal Defense Cost Coverage" p3 of 4.

Thus, since there is no ambiguity in the contract, there is no issue to be adjudicated in a declaratory judgment action. Hence, leave to amend to include this claim is denied.

Summary

Defendant Siegrist's motion to dismiss the complaint against her is granted in all respects and all claims against her are hereby dismissed.

Defendant MLMIC's motion to dismiss is granted in all respects.

Plaintiff's motion to amend the complaint to add additional causes of action is denied.

The foregoing constitutes the Decision and Order of the Court. All arguments not specifically referred to have been considered and rejected.

ENTER:

Dated: February 21, 2018
New City, NY

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