| **Phelps Mem. Hosp. Assn. v Heier** |
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| 2020 NY Slip Op 32514(U) |
| July 27, 2020 |
| Supreme Court, New York County |
| Docket Number: 652845/2019 |
| Judge: Louis L. Nock |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. LOUIS L. NOCK** **PART** **IAS MOTION 38EFM**

***Justice***

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PHELPS MEMORIAL HOSPITAL ASSOCIATION, d/b/a PHELPS HOSPITAL,

Plaintiff,

- v -

HEIER, M.D., STEVEN K.; and MLMIC INSURANCE COMPANY, f/k/a MEDICAL LIABILITY MUTUAL INSURANCE COMPANY,

Defendants.

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**INDEX NO.** 652845/2019

**MOTION DATE** 10/15/2019

**MOTION SEQ. NO.** 003

**DECISION + ORDER ON MOTION**

LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 83, 85, 86, 87, 88, 89, 92, 93, 94, 95, 96, 97, 98, 99, 100

were read on this motion to/for SUMMARY JUDGMENT.

By this motion, plaintiff Phelps Memorial Hospital Association, d/b/a Phelps Hospital ("Plaintiff"), moves for summary judgment for an order, pursuant to CPLR 3001, (1) declaring that it is entitled to funds held in escrow by defendant Medical Liability Mutual Insurance Company ("MLMIC"), derived from MLMIC's demutualization, and calculated based upon the amount of premiums paid by plaintiff for the malpractice insurance policy Plaintiff purchased on behalf of defendant Steven K. Heier, M.D. ("Heier"); and (2) ordering MLMIC to release such funds to plaintiff, plus interest thereon.

## Background

The Plaintiff is a not-for-profit acute care community hospital located in Sleepy Hollow, New York. On or about January 4, 2007, the parties executed an employment agreement (the

"Employment Agreement"), and thereafter Plaintiff hired Heier as a physician in the specialty of gastroenterology (Blum aff ¶ 10, exhibit A). Heier's employment at the Plaintiff ended on December 31, 2015 (Blum aff ¶ 10).

The Employment Agreement provided that the Plaintiff would compensate Heier for his services with a base salary, discretionary bonus, severance payment, and other benefits (Blum aff, exhibit A, ¶¶ 3, 6, 7). Heier's compensation package is detailed in Exhibit A to the Employment Agreement, and included a base salary of $200,000, as well as fees collected for professional services rendered up to a certain amount per pay period (*id.* ¶¶ 1-4). As additional compensation, plaintiff was to be paid a discretionary bonus, the amount of which was dependent on the growth of the gastroenterology practice, and to the extent that additional physicians were employed in the group, Heier's base salary would be increased as his responsibilities would increase in supervising additional physicians (*id*. ¶¶ 1, 2).

Separate and apart from the salary and benefits, the Employment Agreement also provides for the Plaintiff's payment for medical malpractice insurance coverage during Heier's employment, as well as payment of the associated premiums (Blum aff, exhibit A ¶ 13).

Specifically, paragraph 13 of the Employment provides:

> (a) Throughout the term of this Agreement, the Plaintiff will provide you with occurrence-based professional liability insurance coverage upon such terms and with such carriers as the Plaintiff may direct from time to time. You shall notify the Plaintiff of each and every claim filed against you. In addition, you shall furnish to the Plaintiff an annual certification as to the foregoing. The maintenance of such insurance coverage shall be deemed a condition precedent to the continuation of your employment hereunder. The Plaintiff agrees to pay the costs of the premiums for such professional liability insurance.
>
> (b) In the event that this Agreement is terminated, expires or is not renewed, you agree to reimburse the Plaintiff for that portion of the premium paid by the Plaintiff attributable to any periods subsequent to such termination, expiration or non-renewal which the Plaintiff has so paid unless such policy

> is terminated as of the date of termination, expiration or non-renewal. Any reimbursement may be offset against any compensation which may be payable to you pursuant to this Agreement . . . .

Plaintiff obtained the contemplated insurance policy from MLMIC, with Heier as the named insured. Plaintiff contends that it selected, paid for, and managed the policy in its entirety (Blum aff ¶ 6). Heier disputes this. The Plaintiff claims that it communicated with MLMIC concerning the policy, received the benefits of dividends issued on the policy in the form of premium credits, processed renewals, and otherwise dealt with MLMIC and the policy for all administrative purposes (*id.* ¶ 7). Plaintiff also contends that Heier did not take any steps to administer, manage, or otherwise oversee the policy; nor that he made any payments towards the premiums (*id.* ¶ 9).

In 2018, MLMIC was sold to National Indemnity Company, and in the process, converted from a mutual insurance company to a stock company (*id.* ¶ 11). As a function of MLMIC's demutualization, MLMIC is required to pay certain amounts to its policyholders or their designees ("Cash Consideration"), the amounts of which are calculated based on the premiums paid on each policy (*id.* ¶ 12). The share of MLMIC Cash Consideration apportioned to the Plaintiff's policy on behalf of Heier is $106,118.07 (Blum aff ¶ 13, exhibit E). Plaintiff contends that because the MLMIC demutualization was unanticipated, entitlement to the Cash Consideration is not governed by the Employment Agreement. Thus, Heier never bargained for its benefit, and is therefore not entitled to receive the funds (Blum aff ¶ 14).

On August 21, 2018, Plaintiff filed a formal objection with MLMIC requesting that no distribution payment be issued to Heier until its dispute with Heier was resolved (Rosenberg affirmation in support, exhibit D). By email dated October 29, 2018, after conversations between Plaintiff's CEO – Daniel Blum – and Heier, disputing who should be paid the Cash

Consideration, Plaintiff requested that Heier participate in mediation in order to resolve who was entitled to the Cash Consideration (Blum aff ¶ 16, exhibit F). Heier did not respond (Blum aff ¶ 16).

By letter dated December 21, 2018, the Plaintiff, through its counsel, requested that Heier execute an agreement by which he would direct MLMIC to pay the Cash Consideration (*id.* ¶ 17). Heier failed to respond (*id.*). The instant action ensued. The Plaintiff now moves for summary judgment seeking a declaration from the court declaring that the Cash Consideration should be paid to the Plaintiff and an order directing MLMIC to release such funds to Plaintiff.

**Discussion**

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d at 853). Upon proffer of evidence establishing a *prima facie* case by the movant, the party opposing a motion for summary judgment bears the burden of producing evidentiary proof in admissible form sufficient to require a trial of material questions of fact (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). In considering a summary judgment motion, evidence should be "viewed in the light most favorable to the opponent of the motion" (*Marine Midland Bank v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 610 [1990]).

Pursuant to CPLR 3001, "[t]he supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." "What distinguishes

declaratory judgment actions from other types of actions or proceedings is the nature of the primary relief sought – a judicial declaration rather than money damages or other coercive relief" (*Lang v Hanover Ins. Co.*, 3 NY3d 350, 355 [2004] [citation omitted]). The Plaintiff seeks a declaratory judgment stating that the Cash Consideration should be paid to the Plaintiff, and not to Heier, because the Plaintiff paid for and administered the funds as the designated Policy Administrator. The Plaintiff asserts Heier would be unjustly enriched if the Cash Consideration were paid to him.

The Appellate Division, First Department, addressed the MLMIC demutualization in *Schaffer, Shonholz & Drossman, LLP v Title* (171 AD3d 465 [1st Dept 2019]). The First Department found that, in circumstances similar to those at issue in this action, although the doctor was named as the insured on the MLMIC policy, she was not entitled to the demutualization proceeds where her employer had purchased the policy and paid all of the premiums (*id.* at 465). Noting that "she did not bargain for the benefit of the demutualization proceeds," the court held that awarding the doctor the proceeds "would result in her unjust enrichment" (*id.*)

There is no dispute that Plaintiff purchased the policy and paid the premiums to MLMIC, and "there was no bargained-for exchange with respect to the Cash Consideration" (Heier aff ¶ 18). In light of these factors, the result in this proceeding must be the same as that in *Schaffer*. It is of no consequence that MLMIC procured and kept the policy after the cessation of his employment with the Plaintiff, particularly where Plaintiff is seeking Cash Consideration for the limited period of time that Plaintiff paid the premiums.

While Heier claims that discovery is required to oppose the present motion, he has failed to demonstrate what essential facts are in the possession of plaintiff which cannot be stated

(CPLR 3212[f]). "A grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence" (*Bailey v New York City Tr. Auth.*, 270 AD2d 156, 157 [1st Dept 2000]). Moreover, as stated above, this is not a factor the court need consider in making its determination (*Schaffer*, 171 AD3d at 465). The court has considered the remainder of Heier's arguments and finds them to be without merit.

Accordingly, it is

ORDERED that the motion by plaintiff Phelps Memorial Hospital, d/b/a Phelps Hospital, for summary judgment is granted; and it is, accordingly,

ADJUDGED and DECLARED that plaintiff Phelps Memorial Hospital, d/b/a Phelps Hospital, is entitled to the funds held in escrow held by defendant Medical Liability Mutual Insurance Company, f/k/a Medical Liability Mutual Insurance Company, derived from its demutualization, and calculated based upon the premiums paid by said hospital for the malpractice insurance policy it purchased on behalf of Defendant Steven K. Heier, M.D.; and it is further

ORDERED that defendant Medical Liability Mutual Insurance Company, f/k/a Medical Liability Mutual Insurance Company, shall forthwith release the funds described above, with interest thereon, to plaintiff Phelps Memorial Hospital, d/b/a Phelps Hospital.

This shall constitute the decision and order of the court.

7/27/2020
DATE

LOUIS L. NOCK, J.S.C.

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| CHECK ONE: | X | CASE DISPOSED | | | ☐ | NON-FINAL DISPOSITION | | |
| | X | GRANTED | ☐ | DENIED | ☐ | GRANTED IN PART | ☐ | OTHER |
| APPLICATION: | ☐ | SETTLE ORDER | | | ☐ | SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | ☐ | INCLUDES TRANSFER/REASSIGN | | | ☐ | FIDUCIARY APPOINTMENT | ☐ | REFERENCE |