Lenox Hill Med. Anesthesiology, PLLC v Perera
2021 NY Slip Op 30484(U)
February 23, 2021
Supreme Court, New York County
Docket Number: 151405/2019
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. BARBARA JAFFE** ***Justice***

PART **IAS MOTION 12**

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LENOX HILL MEDICAL ANESTHESIOLOGY, PLLC,

Plaintiff,

- v -

SAUNI PERERA,

Defendant.

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INDEX NO. 151405/2019

MOTION DATE ________

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20-74 were read on this motion for summary judgment.

Plaintiff Lenox Hill Medical Anesthesiology, PLLC moves pursuant to CPLR 3212 for an order granting it summary judgment on its second cause of action for unjust enrichment in the amount of $112,705.79, plus interest. Defendant Sauni P. Perera, D.O. cross moves for summary judgment dismissing the complaint.

I. BACKGROUND

Plaintiff was the exclusive provider of anesthesiology services to Lenox Hill Hospital from approximately December 1, 1997 through February 4, 2018 (NYSCEF 22). Defendant was employed by plaintiff from September 2012 until either late January or early February 2018. (NYSCEF 1; NYSCEF 1). The terms of the parties' relationship were governed by an employment agreement dated August 12, 2012 (agreement). (NYSCEF 26).

Paragraph seven of the agreement requires defendant to secure and maintain, at plaintiff's expense, a medical malpractice insurance policy from a New York State licensed insurance company acceptable to plaintiff. Plaintiff approved Medical Liability Mutual Insurance Company

(MLMIC) as the insurer, and defendant thereafter obtained coverage from it and became a policyholder. Although defendant was additionally identified as the policy administrator on the declaration page of the policy (NYSCEF 46), due to what plaintiff characterizes as a "clerical error" by the insurer (NYSCEF 22), defendant does not dispute that plaintiff acted as the policy administrator during the relevant period (NYSCEF 45).

Plaintiff paid defendant's insurance premiums for which it was invoiced by MLMIC for coverage of plaintiff's physicians and nurse anesthesiologists (NYSCEF 22, 24, 25. Plaintiff also received dividends from MLMIC and credited them toward the premiums due, handled policy cancellations, and received the premium refunds due on canceled policies (NYSCEF 22). Between 2013 and 2016, plaintiff paid approximately $60,000 in premiums for defendant and did not list it as compensation on the W-2 issued to defendant (*id.*).

On July 15, 2018, MLMIC adopted a plan of conversion (NYSCEF 29) to convert MLMIC from a mutual insurance company into a stock insurance company, subject to approval by its policyholders and the Superintendent of the New York Department of Financial Services (DFS) (NYSCEF 24, 25). Under the plan, MLMIC policyholders from July 15, 2013 through July 14, 2016 (eligible policyholders) are eligible to receive cash distributions based on malpractice insurance premiums paid by, or for them during that period, in amounts equal to the premiums paid from July 15, 2013 through July 14, 2016 by or for the eligible policyholders, multiplied by 1.9 (consideration) (NYSCEF 22).

By letter dated August 13, 2018, plaintiff asked that defendant to sign an agreement whereby she would assign the consideration to it. (NYSCEF 39). On August 30, 2018, plaintiff's counsel followed up on the request. (NYSCEF 24, 25).

On September 6, 2018, DFS approved the plan (NYSCEF 31), and on that day plaintiff's

counsel sent defendant another request for an assignment (NYSCEF 24, 25).

By letter to MLMIC dated September 12, 2018 and copied to defendant's counsel, plaintiff's counsel objected to any distribution to defendant, and asked that the funds be sent to plaintiff instead (NYSCEF 24, 25). Defendant's counsel responded the next day, asking that the funds be either sent to defendant or held in escrow pending mediation (NYSCEF 24, 25).

On or about October 4, 2018, MLMIC issued a check to defendant for $112,705.79 (NYSCEF 40). On October 18, 2018, plaintiff's counsel sent a final letter to defendant's counsel seeking payment of those funds. (NYSCEF 41). Defendant declined to do so. (NYSCEF 24, 25).

Plaintiff commenced this action on February 8, 2019, asserting two causes of action, one for conversion and the other for unjust enrichment. Issue was joined on March 18, 2019 and plaintiff filed a note of issue and certificate of readiness on March 6, 2020. The instant motions followed.

II. DISCUSSION

In *Schaffer, Schonholz & Drossman, LLP v Title*, the Court addressed the issue raised here concerning the distribution of the consideration payable upon the demutualization of MLMIC, and found that

> [a]lthough [the physician] was named as the insured on the relevant MLMIC professional liability insurance policy, [the employer] purchased the policy and paid all the premiums on it . . . [the physician] does not deny that she did not pay any of the annual premiums or any of the other costs related to the policy . . . [n]or did she bargain for the benefit of the demutualization proceeds.

(171 AD3d 465, 465 [1st Dept 2019]). In view of these facts, the court held that "[a]warding [the physician] the cash proceeds of MLMIC's demutualization would result in her unjust enrichment" (*Id.*).

Defendant essentially argues that *Schaffer* was wrongly decided and she faults the Court

for failing to consider the New York State Insurance Law, the plan, the DFS decision, or New York law on unjust enrichment, for relying on inapplicable case law, and for providing no reasoning for its conclusion. She also asserts that Schaffer is distinguishable both procedurally and factually, because it was a CPLR 3222 "Action on Submitted Facts" wherein the parties submitted incomplete record and deficient legal arguments, and because here, by contrast, there is no allegation that plaintiff's payment of premiums was a bargained-for part of defendant's compensation package.

The Third and Fourth Departments have criticized and refused to follow *Schaffer* for the reasons articulated by plaintiff (*see Schoch v Lake Champlain Ob-Gyn, P.C.*, 184 AD3d 338 [3d Dept], *leave to appeal granted*, 35 NY3d 918 [2020]; *Maple-gate Anesthesiologists, P.C. v Nasrin*, 182 AD3d 984 [4th Dept 2020]) and, after this motion was submitted, the Second Department followed suit (*Maple Medical, LLP v Scott*, 191 AD3d 81 [2d Dept 2020]). *Schaffer* is presently under review on appeal from *Mid-Manhattan Physician Services, P.C. v Dworkin*, 2019 WL 4261348 (Sup Ct, NY Co 2019), and, according to one commentator, will likely result in its reversal. (*See* Joel M. Greenberg, "Yet Another Appellate Department Unanimously Rules That the MLMIC Buyout Proceeds Belong to the Physician-Policyholder," New York Law Journal, January 24, 2021 [https://tinyurl.com/1wkwqmkp]. Moreover, the Court of Appeals may resolve the issue in the pending appeal in *Schoch*.

Not only is this court bound to apply the law "as promulgated by the Appellate Division within its particular Judicial Department" (*D'Alessandro v Carro*, 123 AD3d 1, 6 [1st Dept 2014]; *Tzolis v Wolff*, 39 AD3d 138, 142 [1st Dept 2007], *affd* 10 NY3d 100 [2008]; *Mountain View Coach Lines, Inc. v Storms*, 102 AD2d 663, 664 [2d Dept 1984]), but state trial courts must follow a higher court's existing precedent "even though they may disagree" (*People v Rivera*, 5

NY3d 61, 72 n 2 [2005] [Kaye, Ch. J., dissenting] [internal citations omitted], *cert den* 546 US 984 [2005]). "And even where a decision of the Appellate Division has been appealed, the weight of authority stands for the proposition that the lower court remains bound by the apposite decision of the Appellate Division." (*Matter of Estate of Weinbaum*, 51 Misc 2d 538, 539 [Surr Ct, Nassau County 1966], *citing Vanilla v Moran*, 188 Misc 325, 334 [Sup Ct, Albany County 1947], *affd on other grounds*, 272 AD 859 [3d Dept 1947], *affd* 298 NY 796 [1949]; *see Cunningham v Bayer AG*, 2003 NY Slip Op 30175[U] [Sup Ct, NY County 2003] [plaintiff's argument that Appellate Division decision erroneous no basis for supreme court to refuse to follow it]; *see also Vasquez v National Sec. Corp.*, 2015 WL 1963675, 2015 NY Slip Op 25143 [Sup Ct, NY County] ["While defendants and respected commentators persuasively argue why the (Appellate Division) holdings . . . are outdated and do not reflect the current state of (the law) . . . , it is up to the appellate courts or legislature to undo clear New York precedent and change policy."]). Ultimately, "a higher court commands superiority over a lower not because it is wiser or better but because it is institutionally higher. This is what is meant, in part, as the rule of law and not of men." (*People v Hobson*, 39 NY2d 479, 491 [1976] [Breitel, CJ.]; *In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus, The Nonhuman Rights Project, Inc., on behalf of Hercules and Leo v Stanley*, 49 Misc 3d 746,770 [Sup Ct, New York County 2015] [Jaffe, J]).

Consequently, the majority of the trial courts within the First Department have considered and rejected all of the objections to *Schaffer* raised here (*see AdvantageCare Physicians, P.C. v Granas*, 2020 WL 7316004 [Sup Ct, NY Co 2020]; *AdvantageCare Physicians, P.C. v Alvarez*, 2020 WL 7316014 [Sup Ct, NY Co 2020]; *Phelps Memorial Hosp. Ass'n v Heier, M.D.*, 2020 WL 4365397 [Sup Ct, NY Co 2020]; *AdvantageCare Physicians, P.C. v Botros*, 2020 WL

254658 [Sup Ct, NY Co 2020]; *Sullivan v Medical Liability Mut. Ins. Co.*, 2019 WL 6496820 [Sup Ct, NY Co 2020]). Although some courts awarded the consideration to the physician (see *AdvantageCare Physicians, P.C. v Duker,* 2021 WL 126337 [Sup Ct, NY Co 2020]; *AdvantageCare Physicians, P.C. v Bitter*, 2020 WL 7137814 [Sup Ct, NY Co 2020]), those rulings are either distinguishable on their facts or in disregard of *Schaffer.* Defendant's claim that plaintiff's payment of her premiums was a bargained-for part of her compensation package is irrelevant, as under *Schaffer* the question is whether she specifically bargained for receipt of the consideration.

Plaintiff also seeks prejudgment interest. In an equitable action, the grant of such an award falls within the discretion of the court (CPLR 5001; *Genger v TPR Inv. Assocs., Inc.*, 182 AD3d 417 [1st Dept 2020]; *Universe Antiques Inc. v Gralla*, 168 AD3d 548 [1st Dept 2019]). Although prejudgment interest is "virtually mandated" in cases involving serious fiduciary misconduct (*see Sexter v Kimmelman, Sexter, Warmflash & Leitner*, 43 AD3d 790, 795 [1st Dept 2007]; *Aurnou v Greenspan*, 161 AD2d 438, 439–40 [1st Dept 1990]), fraud (*CDR Creances S.A. v. Cohen*, 104 AD3d 17, 30 [1st Dept 2012]) or under other circumstances where money is wrongfully withheld (*see Eighteen Holding Corp. v Drizin*, 268 AD2d 371, 372 [1st Dept 2000]), defendant did not engage in such conduct. Rather, she was justified in believing that she was entitled to the funds when she refused to agree to pay them to plaintiff. Insofar as plaintiff is not the designated policy administrator, MLMIC properly disbursed the money to defendant and left it to the courts to determine its ultimate disposition. Moreover, *Schaffer* had not yet been decided, and was not rendered until after this action was commenced, and as noted, its continued viability is in question given the contrary determinations in the other three judicial departments.

Accordingly, it is

ORDERED, that the motion of plaintiff Lenox Hill Medical Anesthesiology, PLLC for summary judgment is granted; it is further

ORDERED, that as cause of action for conversion is essentially duplicative of the cause of action for unjust enrichment, it is severed and dismissed; it is further

ORDERED, and the Clerk is hereby directed to enter judgment in favor of plaintiff and against defendant, Sauni P. Perera, D.O., declaring that plaintiff is entitled to the cash consideration payable upon the demutualization of non-party Medical Liability Mutual Insurance Company that defendant received in the amount of $112,705.79; it is further

ORDERED and ADJUDGED, that judgment be entered in favor of plaintiff Lenox Hill Medical Anesthesiology, PLLC, with an address at 210 East 64th Street, New York, New York 10065, and against defendant Sauni P. Perera, D.O., with an address at 60 West 61st Street, Apt. 22C, New York, New York 10023, in the amount of $112,705.79. plus post-judgment interest at the statutory rate together with costs and disbursements as taxed by the Clerk, upon presentment of a bill of costs; and it is further

ORDERED, that defendant's motion for summary judgment is denied.

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2/23/2021
DATE

BARBARA JAFFE, J.S.C.

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