SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAKOTA D. RAMSEUR **PART** 34M

Justice

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ADVANTAGECARE PHYSICIANS, P.C.,

Plaintiff,

- v -

TRESARA C. DEFENDANT,

Defendant.

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INDEX NO. 161307/2021

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to/for DISMISSAL.

In December 2021, plaintiff AdvantageCare Physicians, P.C. commenced the instant action against its former employee, defendant Tresara Defendant, to recovery money she received as the primary insured on a medical malpractice insurance policy underwritten by non-party Medical Liability Mutual Insurance Company ("MLMIC"). Plaintiff asserts conversion and unjust enrichment causes of action, contending that as the party that paid the premiums on the policy, MLMIC should have dispersed approximately $260,800.00 to it, rather than defendant, as part of MLMIC's financial plan to demutualize into a stock insurance company. In this motion sequence, Defendant moves to dismiss pursuant to CPLR 3211 (a) (1), (a) (5), and (a) (7), which plaintiff opposes in its entirety. For the following reasons, Defendant's motion is granted, and the complaint is dismissed.

BACKGROUND

In October 2012, defendant, a licensed physician and general surgery specialist, entered into an employment agreement with plaintiff for a two-year term. (NYSCEF doc. no. 9, agreement.) In addition to providing her a base salary plus a recruitment incentive, plaintiff agreed to provide defendant with professional liability/medical malpractice insurance coverage at no cost to defendant. (*Id.* at ¶ 16.C.) There is no dispute that plaintiff purchased the requisite coverage with MLMIC in accordance with the terms of Defendant's employment and that plaintiff was named as the sole insured policyholder. While plaintiff paid the policy's premiums, the policy designated plaintiff a "policy administrator" and not, relevantly, a policyholder. (NYSCEF doc. no. 10, certificate of insurance.)

In July 2016, MLMIC's Board of Directors approved a sale of the company's assets to National Indemnity Corp, a member of the Berkshire Hathaway Group, which required the

company to convert itself from a mutual insurance company into a stock insurance company.[1] The company's demutualization plan was then submitted to the New York State Department of Financial Services (the "Department") for its approval. MLMIC later issued a revised plan and submitted it for review in May 2018 ("the May 2018 Plan" or "the Plan") (*see* NYSCEF doc. no. 11, MLMIC's proposed conversion plan.). That September, the Department approved MLMIC's May 2018 Plan after holding a public hearing on the issue. (NYSCEF doc. no. 12, the Department's Decision)

Under this final plan, in return for surrendering their ownership interests in MLMIC (known as policyholder membership rights), each "eligible policyholder" with an in-force policy (as of when the Board approved the 2016 plan) would receive a portion of the total cash consideration (the $2.5 billion that National Indemnity Corp purchased the company for) to be paid out by MLMIC. A "policyholder" as defined by the Plan's "Glossary of Key Terms," is "the Person (s) identified on the declaration page of such Policy as the insured." (NYSCEF doc. no. 11 at 13.) As described *supra*, plaintiff does not dispute that the policy identified Defendant as the policy's insured.

The May 2018 Plan did not directly entitle policy administrators to a distribution even where the administrator had been paying the insurance premiums. (The Department of Financial Services specifically rejected an interpretation of the relevant provisions of the Plan that suggested the entity paying the premium was automatically entitled to the proceeds from the demutualization process.) Instead, the Plan allowed for policyholders, if they so chose, to designate a policy administrator to receive their distribution (*Id.* at § 6.3 [f].) And where a policy administrator disputed whether the policyholder was a proper distributee, the Plan provided the administrator with the opportunity to file an objection with MLMIC prior the Department of Financial Service's public hearing on August 23, 2018. In such cases, MLMIC would be required to put the funds into escrow until the policyholder and administrator had resolved their underlying dispute. (*Id.*) Here, defendant refused plaintiff's request to designate it as the proper distributee of her portion of the distribution owed on her policy, yet plaintiff did not object with MLMIC to Defendant receiving the distribution prior to the public hearing. As such, Defendant received a letter from MLMIC entitling her to $260,880.60 and a check for $198,269.26 (withholding approximately $62,600.00 in taxes) in October 2018 as one of MLMIC's policyholders.

Plaintiff commenced this action seeking to recover the money paid to defendant, and defendant has moved herein, pre-answer, to dismiss the complaint pursuant to CPLR 3211. She contends that plaintiff's action is time barred, that the documentary evidence refutes any claim that she was unjustly enriched at plaintiff's expense or converted property belonging to plaintiff, and accordingly, it has failed to state a cause of action. Plaintiff's opposition to the motion is primarily based upon the First Department's decision in *Schaffer, Schonholz & Drossman, LLP v Title* (171 AD3d 465 [1st Dept 2019]), in which the court found that a named policyholder who did not pay the policy premiums was not entitled to an MLMIC distribution—rather, the policy administrator, the employer, was entitled to the demutualization proceeds. As will be discussed further *infra*, *Schaffer* cannot be considered controlling precedent in light of the Court of

[1] As mutual insurance company, MLMIC was "organized, maintained, and operated for the benefit of its members"—and, therefore "every policyholder was a member of" MLMIC (*See* Insurance Law § 1211 [a].)

Appeals' more recent and contrary holding in *Columbia Memorial Hospital v Hinds* (38 NY3d 253 [2022]), which parties stipulated the Court can consider for purposes of this motion. (NYSCEF doc. no. 30 and 32, def. and pla. letters to the Court, respectively.) As *Columbia Memorial Hospital* requires, the Court grants defendant's motion to dismiss.

DISCUSSION

On a motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7), courts afford the pleadings a liberal construction, accept the facts as alleged in the complaint as true, and give the plaintiff the benefit of every possible favorable inference. (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015].) A courts' inquiry is limited to assessing the legal sufficiency of the plaintiff's pleadings; accordingly, its only function is to determine whether the facts as alleged fit within a cognizable legal theory. (*JF Capital Advisors*, 25 NY3d at 764.)

In *Columbia Mem. Hosp. v Hinds*, the Court of Appeals consolidated for resolution appeals in eight separate cases. The common thread uniting each case (and this one as well) was that a medical practice/employer had included as a term of employment with its doctor that it would provide paid-for insurance coverage, had designated itself as an administrator of the policy, including by receiving dividends and paying premiums, and, after demutualization, had asserted that it, and not its doctor/employee, was entitled to the cash consideration that MLMIC allocated to each policy (despite the absence of an assignment of the cash consideration to the employers). (*Columbia Mem. Hosp.*, 38 NY3d at 268.) In determining that the employees, as policyholders, were entitled to MLMIC's cash distribution, the Court of Appeals relied on the statutory language of Insurance Law §7307 (e) (3), which governs an insurance company's demutualization plan and requires every plan to "include the manner and basis of *exchanging the equitable share of each eligible mutual policy holder for securities or other consideration*, or both, of the stock corporation into which the mutual insurer is to be converted [emphasis original]." (*Id.* at 271.) That Insurance Law § 7303 provides the "policyholder" is entitled to cash consideration was, in the Court's view, "dispositive" of the question on appeal, especially where, again as here, "no contract of employment, insurance policy language, or separate agreement…purported to assign the employee/policyholder's rights in the demutualization consideration to anyone." (*Id.* at 273.)

The Court of Appeals also rejected the line of argument that plaintiff now urges this Court to adopt—namely, that the equitable share of the policyholder receives in proportion to the total consideration "shall be determined by the ratio which the net premiums (gross premiums less return premiums and dividend paid) such policy holder has properly and timely paid to the insurer...bears to the total net premiums received by the mutual insurer from such eligible policyholders" (Insurance Law § [e] [3]; NYSCEF doc. no. 21 at 10, plaintiff's memo of law in opposition.) The argument is essentially that the policyholder under this "ratio" formula would receive nothing because they paid nothing. Yet, for the Court of Appeals, this portion of Insurance Law § 7303 (e) (3) addresses only the method by which the amount of consideration is to be allocated among all the members who own the mutual insurance company—the policy holders—not to whom consideration is payable, and that the premiums paid by the employer are

ultimately attributable to the employee as the policyholder. (*Columbia Mem. Hosp.*, 38 NY3d at 274.)

The above conclusion—that employers who paid premiums on a MLMIC policy are not entitled to demutualization proceeds where they are not policyholders—demonstrates that plaintiff cannot plead a cause of action for conversion. Since it has no ownership interest in the proceeds, plaintiff cannot not demonstrate that defendant interfered with a legal ownership or possessory right to property. (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]; *NY Medscan, LLC v JC-Duggan Inc.*, 40 AD3d 536, 537 [1st Dept 2007].) Defendant's motion to dismiss this cause of action pursuant to CPLR 3211 (a) (7) is granted.[2]

The Court in *Columbia Memorial Hospital* rejected the medical practices/employers unjust enrichment arguments as well. The Court of Appeals proceeded to describe how the practices/employers failed under each factor, noting that to recover under a theory of unjust enrichment, a plaintiff must allege facts that demonstrate (1) the opposing party was enriched, (2) at plaintiff's expense, and (3) it is against equity and good conscience to permit the other party to retain what is sought to be recovered. As to (1), the employees were not unjustly "enriched" because the employees should and did receive cash consideration for having lost their ownership interest in the mutual insurance company; as to (2), the premiums that the employers paid were in return for professional liability coverage, so the employees did not receive anything at their employer's expense; and as to (3), "there is nothing inequitable about complying with the clear statutory language establishing that policyholders are the members of mutual insurance companies and whose benefit those companies are to operate. (*Columbia Mem. Hosp.*, 38 NY3d at 275-276.) As such, Defendant's motion to dismiss this cause of action must be granted as well.

Since that plaintiff's opposition relies entirely on *Schaffer* from First Department, which has now been overruled by *Columbia Mem. Hosp. v Hinds*, the Court need not address whether *Schaffer* was procedurally or substantively precedential in the first place.

Accordingly, for the foregoing reason, it is hereby

ORDERED that defendant Tresara Defendant's motion to dismiss plaintiff AdvantageCare Physicians, P.C.'s causes of action for unjust enrichment and conversion pursuant to CPLR 3211 (a) (7) is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for defendant shall serve a copy of this order, along with notice of entry, on all parties within twenty (20) days of entry.

This constitutes the Decision and Order of the Court.

[2] Having found as a matter of law that plaintiff does not have a property interest in the MLMIC distributions, the Court need not delve further into whether plaintiff's causes of action are time barred under a three-year statute of limitations.

5/9/2023
DATE

DAKOTA D. RAMSEUR, J.S.C.

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