SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF COLUMBIA

THE COLUMBIA MEMORIAL HOSPITAL,

Plaintiff,

-against-

MARCEL E. HINDS, M.D.,

Defendant.

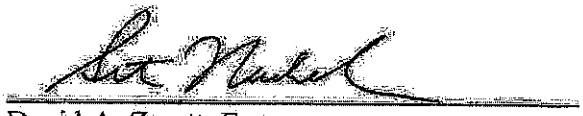
Index No.: 14064-19

**DECISION AND ORDER WITH NOTICE OF ENTRY**

PLEASE TAKE NOTICE, that attached hereto is a true copy of the Decision and Order regarding Defendant's Motion for Dismissal, duly entered in the above-captioned action in the Office of the Clerk of the above-named Court on the 12th day of September, 2019.

Dated: New Hyde Park, New York
September 20, 2019

WEISS ZARETT BROFMAN
SONNENKLAR & LEVY, P.C.
*Attorneys for Defendant*

By: 

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STATE OF NEW YORK
SUPREME COURT COUNTY OF COLUMBIA

THE COLUMBIA MEMORIAL HOSPITAL,

Plaintiff,

-against-

MARCEL E. HINDS, M.D., Defendant,

All Purpose Term
Hon. Henry F. Zwack, Acting Supreme Court Justice Presiding
RJI: 10-19-0159 Index No. 14064-19

Appearances:

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FILED
2019 SEP 12 P 12:31
COLUMBIA COUNTY
CLERK'S OFFICE

DECISION AND ORDER

Zwack, J:

Pending before the Court is a motion to dismiss the complaint in this action filed by defendant Marcel E. Hinds, M.D., and for declaratory judgment. The defendant alleges that dismissal is required pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7); and an order pursuant to CPLR 3001 declaring that he is legally entitled to cash consideration in the amount of $412,418.93 arising from the demutualization of Medical Liability Mutual Insurance Company ("MLMIC"). The plaintiff opposes.

The dispute arises out of the sale and demutualization of MLMIC, a mutual insurance company formed and existing under New York Law, which plan was approved by the Department of Financial Services ("DFS") on September 6, 2018. The DFS Decision confirmed, on pages 4, 23 (affirmation of Seth Nadel, Exhibit "A") that it is in the Insurance Law 7307 (e)(3) which explicitly defines those policyholders who are eligible to receive the purchase price consideration."

In connection with the demutualization, certain sums of money were to be paid to the policyholders (physicians) who were the mutual owners of MLMIC during the statutory eligibility period prior to the sale. An objection

procedure was put in place (and later extended) by MLMIC where certain employers of eligible physician policyholders were given the right to object to the cash distribution, to the extent the employer believed that it, and not the physician, was entitled to the funds. The plaintiff is the former employer of the defendant, and submitted an objection and commenced this action seeking a determination of its right to the cash contribution presently held in escrow.

According to the complaint, the $412,418.93 in dispute represents what the plaintiff paid to MLMIC for professional liability insurance on behalf of the defendant from July 15, 2013 to July 15, 2016. The complaint sets out four causes of action: declaratory judgment, unjust enrichment, money had and received, and breach of implied covenant of good faith and fair dealing. The plaintiff alleges that it is entitled to the MLMIC funds, currently being held in escrow, because it alone paid for the policies, administered and controlled them as the designated Policy Administrator, was always the beneficiary of any dividends, rebates or refunds under the policies, and because the defendant has no rights to receive any additional monies following his separation from the plaintiff hospital. The defendant has refused to sign the Assignment Agreement, requested by the plaintiff in order for the escrow funds to be turned over to it. The plaintiff argues

that allowing the defendant to receive and retain the MLMIC funds would result in his unjust enrichment. The complaint alleges that the defendant has already received all that he is entitled to under his employment agreement.

In lieu of an answer, the defendant has moved to dismiss the complaint on the grounds that the complaint fails to state a cause of action, and on the basis that the claims fail due to documentary evidence.

The defendant argues he is entitled to the cash proceeds under the authority which governs the demutualization, the Plan of Conversion of Medical Liability Mutual Insurance Company adopted on May 31, 201, and Insurance Law 7307. The Plan provided that policyholders, or their designees would be provided with cash consideration for their membership interest according to the premiums timely paid under their eligible policies. The Plan further provided that the cash consideration was to go directly to the policyholder unless they had affirmatively designated a policy administrator to receive the benefit–the affirmative designation is the only instance in which the policy administrator could receive the cash consideration payable to the policyholder. The defendant asserts that he is the policyholder (as demonstrated on the policy declarations page supplied by defendant); he did not sign an Assignment Agreement (although

asked to do so on at several occasions); and the plaintiff is not entitled to receive any of the cash consideration. The defendant explains that according to his Employment Agreement, at Section 3 (b) — which is attached as an Exhibit to his affidavit — he actually paid the premiums, as the plaintiff deducted the amounts it paid for his malpractice insurance from his incentive compensation. The policy administrator designation served only to appoint the plaintiff as the defendant's agent for the purposes of managing the policy, and to receive dividends to offset the cost of the policy. The defendant argues that the cash consideration is not a dividend or return premium as 1099 forms were sent to policyholders that confirm the proceeds arose from the sale of stock.

In opposition, the plaintiff argues that the defendant's dismissal motion is improper, by utilizing affidavits to establish "facts" rather than just to introduce documentary evidence. According to the plaintiff, there is a bona fide dispute which must be determined by the court. The plaintiff argues that the complaint should not be dismissed because there is a binding decision from the Appellate Division on point in this case. In *Shaeffer, Schonholtz & Drossman, LLP v Title,* 171 AD3d 465, 465 [1st Dept 2019] the Court found that despite respondent being named as the policyholder, appellant had paid all the premiums and all the costs related

to the policy and there was no record of bargaining for the benefit of the demutualization proceeds, so "awarding respondent with the cash proceeds of the MLMIC's demutualization would result in unjust enrichment." The plaintiff argues that this is the situation here — Dr. Hinds did not pay any of the premiums for the insurance, and awarding him the funds from the demutualization results in unjust enrichment. The plaintiff also argues that stare decisis applies, and this Court must follow the determination made by the First Department. Stare decisis provides that once a court has resolved a legal issue, it should not be re-examined each and every time it is presented *(Battle v State*, 257 AD2d 745 [3d Dept 1999]).

For the reasons that follow the Court grants the defendant's motion to dismiss the plaintiff's complaint.

Here, the Court is mindful, on a motion to dismiss pursuant to CPLR 3211, it must "accept the facts as alleged in the complaint as true, according the plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "[A]llegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to consideration" (*Mass v Cornell University*, 94 NY2d 87,91 [1999]).

Insurance Law 7307 governs the process by which MLMIC was converted from a mutual insurance company into a stock insurance company. Insurance Law 7307 (e) (3) provides in pertinent part that "each person who had a policy of insurance in effect at any time during the three year period immediately proceeding the date of the adoption of the resolution shall be entitled to receive in exchange for such equitable share, without additional payment, consideration payable in voting shares of the insurer or other consideration, or both." The statute repeatedly refers to those eligible for cash consideration as the "policyholder." It is important to note that "[n]o distinction is made between a policyholder who pays the premium out of his own pocket versus a policyholder whose employer pays the premium as part of an employee compensation package. Insurance Law 7307 does not confer an ownership interest...on anyone other than the policyholder" (*Maple-Gate Anesthesiologists, P.C. v Nasrin*, 63 Misc 3d 703, 709 [Sup Ct, Erie County, 2019]).

Here, the defendant is clearly the policyholder, and the plaintiff the policy administrator. The documentary evidence — the Employment Agreement — establishes that the insurance premiums were deducted before the defendant received any incentive pay. That is, the defendant was to receive incentive pay, 65% of the amount by which his revenue exceeded

the expenses paid by the hospital, and one the expenses being his medical malpractice insurance. Stated differently, the defendant would not receive incentive pay until the revenue generated by his services exceeded the amount of his medical malpractice insurance. Further, under the plain language of the Insurance Law, the cash consideration cannot be given to the plaintiff unless the defendant signs the agreement to do so. Here, the defendant has not signed such an agreement, and given the circumstances of this case — the Employment Agreement which required him to pay the cost of his malpractice premiums by way of his salary incentives — does not have to agree to do so.

The plaintiff's entire argument, as framed by the complaint, focuses on the bare and incorrect assertion that the hospital paid the policy premiums and that equity, not ownership, dictates that it should be the recipient of the cash contribution. However viewed, this assertion is belied by the terms of the Employment Agreement, whereby the defendant's incentive compensation is reduced by the policy premiums. On this record, equity does not dictate that the plaintiff should be compensated.

Nor has the plaintiff demonstrated that the defendant has been unjustly enriched. Unjust enrichment, also known as an action for money had or received, or implied contract (*Federal Ins. Co. v Groveland State Bank*,

37 NY2d 252, 258 [1975]), arises when a plaintiff demonstrates "that (1) the other party was enriched, (2) at (the plaintiff's) expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought be recovered" (*New York State Worker's Compensation Bd. v Program Risk Mgt, Inc.*, 150 AD3d 1589, 1594 [3d Dept 2017]). Given that the plaintiff received the defendant's services in exchange for compensation — which was reduced by the cost of the premium payments made on the defendant's behalf by the plaintiff — there is simply no merit to the plaintiff's claim of unjust enrichment.

"The implied covenant of good faith and fair dealing between parties to a contract embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (*Moran v Erik*, 11 NY3d 452, 456 [2008], internal citations and quotations omitted). In all likelihood neither party appreciated that a windfall could occur as a result of the MLMIC sale, because, quite simply, they did not appreciate the meaning and the value of an ownership stake prior to the demutualization plan (*Urgent Medical Care PLLC v Amedure*, 64 Misc3d 1216 [A][Sup Ct, Greene County 2019]). It cannot therefore be said that this cash contribution was negotiated or bargained for, but is simply rather an operation of law, and therefore no

one's interest in the actual contract was compromised. This cash contribution, by law, is not a return to the hospital of any insurance premiums it paid on behalf of the defendant, it represents the policyholder's share in MLMIC.

Contrary to plaintiff's arguments that *Shaeffer, Schonholtz & Drossman, LLP v Title*, 171 AD3d 465, 465 [1st Dept 2019] controls, this case is not entitled to stare decisis treatment. The doctrine of stare decisis clearly exists to provide guidance and consistent results in cases that share essentially the same facts (*Matter of Howard Johnson Co. v State Tax Commn.*, 65 N.Y.2d 726, 727[1985]). It does not apply where, as here, the facts are not the same. Here, like the defendant Nasrin in *Maple-Gate Anesthesiologists* (63 Misc3d 703) the defendant's insurance premiums were paid in lieu of compensation (Nasrin received her malpractice insurance as part of her employee compensation plan, and the Court awarded the cash contribution to her). That being said, it is equally well established that courts are free to correct prior erroneous interpretations of the law (*Matter of Charles A. Field Delivery Serv. (Roberts)*, 66 NY2d 516 [1985]).

Finally, the plaintiff's complaint itself is some what of a 'ticking time-bomb." Paragraph 10 affirmatively provides the following: "The Hospital

compensated Defendant for his services with a 'Base Salary' plus ***incentive compensation***, on call compensation, and afforded him the ***full panoply of benefits, including payment of premiums for medical malpractice insurance...***" There is no other way to read this than for it to mean that the defendant's medical malpractice insurance premiums were a part of his employee compensation plan. As to the Employee Agreement itself, at Article 9 it reads that the hospital "shall maintain an individual occurrence -based medical malpractice policy in the minimum amounts required....and provide you with evidence of same upon request." Following the determination in *Maple-Gate Anesthesiologists* (63Misc3d 703), the Court dismisses the plaintiff's complaint.

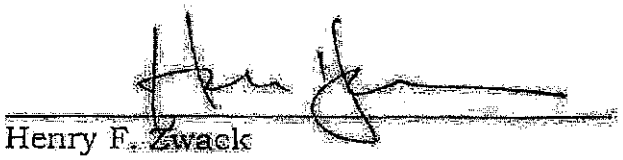
Accordingly, it is

**ORDERED**, the defendant Marcel Hinds M.D.'s motion to dismiss is granted, and the plaintiff's complaint is dismissed, and it is further

**ORDERED**, that the defendant Hinds is entitled to the $412,418.93 arising from the sale and demutualization of Medical Liability Mutual Insurance Company, and the funds are to be dispersed accordingly.

This constitutes the Decision and Order of the Court. This original Decision and Order is returned to the attorneys for the defendant. All other papers are delivered to the Supreme Court Clerk for transmission to the County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

Dated: September 3, 2019
Troy, New York



Henry F. Zwack
Acting Supreme Court Justice

Papers Considered:

1. Notice of Motion to Dismiss dated April 12, 2019; Affirmation of Seth A. Nadel, Esq., dated April 12, 2019 with Exhibits "A" through "C"; Affidavit of Marcel Hinds, M.D. dated April 1, 2019 with Exhibits "A" through "F"; Memorandum of Law;
2. Affirmation of Kevin G. Donoghue, Esq. dated May 21, 2019 with Exhibits "1" through "4"; Memorandum of Law;
3. Affirmation of Seth A. Nadel, Esq., dated June 4, 2019 with Exhibits "A" through "D"; Reply Memorandum of Law.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF COLUMBIA

THE COLUMBIA MEMORIAL HOSPITAL,

Index No.: 14064-19

Plaintiff,

**Affidavit of Service**

- against -

MARCEL E. HINDS, M.D.,

Defendant.

STATE OF NEW YORK )
COUNTY OF NASSAU )SS:

Nicole Surizon, being duly sworn, deposes and says:

I am over 18 years of age, not a party to this action, and reside in the State of New York. On September 20, 2019, I served a copy of a Defendants' Decision and Order with Notice of Entry, upon:

Garfunkel Wild, P.C.
Kevin G. Donoghue, Esq.
Anthony Prinzicalli, Esq.
*Attorneys for Plaintiff*
111 Great Neck Road
Great Neck, NY 11021

By regular mail, with the charges paid, by depositing a true copy thereof in a box designated by USPS.

Nicole Surizon

Sworn to before me this
20th day of September, 2019.

Seth Nadel

SETH A. NADEL
NOTARY PUBLIC-STATE OF NEW YORK
No. 02NA6345029
Qualified in Queens County
My Commission Expires 07-25-2020