To be argued by:
James R. Peluso, Esq.
(Time requested: 10 minutes)

Appellate Division Docket No. 529615
Saratoga County Supreme Court Index No. 20184228

New York State Supreme Court
Appellate Division – Third Department

KIM E. SCHOCH, CNM, OB/GYN NP,

Plaintiff-Appellant,

- against -

LAKE CHAMPLAIN OB-GYN, P.C.,

Defendant-Respondent.

RESPONDENT'S BRIEF

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PRELIMINARY STATEMENT

Defendant-Respondent Lake Champlain OB-GYN, P.C. ("Defendant" or "Lake Champlain") opposes Plaintiff's appeal from the Decision and Order of the Supreme Court (Crowell, J.) that denied Plaintiff's motion for summary judgment and granted Defendant's cross-motion for summary judgment. (R. 5-8).

QUESTIONS PRESENTED

1. Was the Appellate Division's decision in *Matter of Schaffer, Schonholz & Drossman, LLP v. Title*, 171 A.D.3d 465 (1st Dep't 2019) binding precedent on the court below?

   ANSWER: The court below answered in the affirmative, holding that *Schaffer* was binding precedent under the doctrine of stare decisis.

2. Is Defendant-Respondent entitled to the proceeds from the demutualization of Medical Liability Mutual Insurance Company ("MLMIC") as a matter of law and equity with respect to a MLMIC policy of insurance purchased and administered by Defendant-Respondent that covered Plaintiff-Appellant.

   ANSWER: The court below answered in the affirmative, holding pursuant to the doctrine of stare decisis that the significant facts relied upon by the Appellate Division in *Schaffer* are not distinguishable from the significant facts in this case.

NATURE OF THE CASE

As cited in *Matter of Schaffer, Schonholz & Drossman, LLP v. Title*, 171 A.D.3d 465 (1st Dep't 2019), courts have decided the issue of entitlement to insurance demutualization proceeds among employers and employees pursuant to principles of equity and fairness. The proper standard of review to determine a party's equitable share of the demutualization proceeds is to calculate the amount of premiums that the employer/employee paid. This rule is consistent with the MLMIC Plan of Conversion, the New York State Department of Financial Service's September 6, 2018 Decision, and New York Insurance Law § 7307(e)(3), which provides that "[t]he equitable share of the policyholder in the mutual insurer shall be determined by the ratio which the net premiums (gross premiums less return premiums and dividend paid) such policyholder has properly and timely paid to the insurer on insurance policies . . . ." (emphasis added). Contrary to Plaintiff's arguments, the mere designation of a party as a "policyholder" or "named insured" or "member" is not determinative of whether they paid premiums and are entitled share in the demutualization proceeds. Rather, "[t]he determination of who is entitled to the cash consideration depends on the facts and circumstances of the parties' relationship and applicable law, to be decided by agreement of the parties or by an arbitrator or court." (R.151, DFS Decision). Here, Defendant paid all of the policy premiums. Accordingly, the Court should affirm the judgment below.

STATEMENT OF FACTS

Defendant-Respondent Lake Champlain OB-GYN, P.C. is an organized professional medical practice group providing obstetrical and gynecological patient services with principal offices located in Plattsburgh, New York. (R.222 ¶6). Plaintiff-Appellant Kim E. Schoch, CNM was employed by Lake Champlain as a certified nurse midwife ("CNM") from June 18, 2007 to February 27, 2015 pursuant to a written employment agreement. (R.17, R.222 ¶12). The employment agreement provided that Defendant would "obtain and pay all premiums" for a professional medical liability insurance policy that insured Plaintiff. *Id*.

As set forth in the affidavit of Jeffrey A. Dodge, D.O., Defendant Lake Champlain purchased professional liability insurance for all of its physicians, certified nurse midwives and nurse practitioners, including Plaintiff, from Medical Liability Mutual Insurance Company ("MLMIC"). (R.222 ¶¶6,12-13). Since medical malpractice insurance cannot be written as a group policy, the named insured on each policy is the individual practitioner. New York State does not permit Plaintiff to practice as a CNM unless she is in a collaborative relationship with a licensed physician or hospital that practices obstetrics such as Defendant Lake Champlain OB-GYN, P.C. Thus, Plaintiff was ineligible to purchase a policy in her own right. (R.6, R.225 ¶21).

Defendant Lake Champlain selected, bargained for, contracted and purchased the MLMIC policies for each of its professionals, including the policy that insured Plaintiff. (R.223-24, ¶17). Defendant paid all of the premiums for the policy that insured Plaintiff. *Id*. (R.226 ¶28). For example, the annual premium for the policy period 7/1/2014 - 7/1/2015 was approximately $25,710. (R.225 ¶22, R. 233). All of the policy endorsements were issued to "Lake Champlain OB-GYN, P.C." (R.230, 237-38, 240-41, 247). The policy named Defendant as the "Policy Administrator." (R.233, 245). Defendant selected the coverage limits and policy term; was responsible for all communications and dealings with MLMIC; maintained all policy records; received all dividends and premium reductions; paid all policy premium increases; and was responsible for all financial aspects of the policy. (R.223-24 ¶17).

Plaintiff never objected when Defendant received policy dividends or premium reductions, including the policy cancellation premium refund of $8,664.00 when Plaintiff left her employment. (R.223 ¶16, R.224 ¶19). Plaintiff never made any contribution from her salary for the policy premiums. The premiums paid by Defendant were never requested by Plaintiff, or treated by Defendant, as W-2 or other income to Plaintiff. (R.225, ¶24).

In 2018, MLMIC announced that it was converting from a mutual insurance company into a stock insurance company. This was the first demutualization of a medical malpractice insurance company in New York history. As part of the

conversion, MLMIC was required to allocate and distribute a portion of the "Cash Consideration" to each eligible policyholder (R.75) based on the amount of premiums paid during the three year-period preceding the plan of conversion. (R.77 §2.1 "Eligibility Period", R.86 §8.2). Here, the equitable share of the Cash Consideration, based on the premiums paid by Defendant for the policy, is $74,747.03 (R.42 ¶31).

The MLMIC Plan of Conversion ("Plan") provides for payment of the cash proceeds, by default, to each "policyholder." The Plan, however, recognizes that the "named insured" may not be entitled to the Cash Consideration, and that a "Policy Administrator" may have a legal right to the proceeds. As stated by the New York State Financial Department's ("DFS") September 6, 2019 Decision approving the Plan, "[t]he determination of who is entitled to the cash consideration depends on the facts and circumstances of the parties' relationship and applicable law, to be decided by agreement of the parties or by an arbitrator or court." (R.151).

The stated intent of the Plan and distribution of the demutualization proceeds is to comply with New York Insurance Law § 7307, which provides that "[t]he equitable share of the policyholder in the mutual insurer shall be determined by the ratio which the net premiums (gross premiums less return premiums and dividend paid) such policyholder has properly and timely paid to the insurer on insurance

policies . . . ." *Id*. at 7307(e)(3) (emphasis added). Plaintiff did not pay any of the policy premiums, which were paid by Defendant. (R.226, ¶28).

When MLMIC announced its agreement to be acquired by Berkshire Hathaway and converted to a stock company, it was contemplated that the demutualization cash proceeds would be paid to the person or entity that paid the policy premiums. (R.226, ¶29). As stated in the *MLMIC Dateline* Fall 2016 newsletter sent to Defendant:

> 5. Will policyholders receive a payout?
>
> Once the transaction is completed, each owner of an eligible policy will be entitled to receive a proportionate share of all of the cash consideration paid by National Indemnity Company. In most cases, the person or entity that paid the premium will be considered as the owner of the eligible policy.

(R.255 ¶5). In anticipation of receiving the Cash Consideration, one hospital system "booked approximately $24 million in proceeds as part of their cash flow projection."[1] Here, Defendant requested that Plaintiff consent to the payment of the MLMIC cash proceeds to Defendant as the Plan Administrator, which Plaintiff refused. (R. 50 ¶31); (R.61 ¶5).

[1] *Urgent Medical Care, PLLC v. Amedure*, 2019 N.Y. Slip. Op. 51188(U), 64 Misc.3d 1216(A), 2019 WL 3331795 (Table) (Sup. Ct. Greene County July 12, 2019) (citing NYS Department of Financial Services Hearing Transcript).

The MLMIC Plan provides an objection process for a Policy Administrator who claims that it, rather than the named insured, "has a legal right to receive [the] Cash Consideration." (R.171 ¶A.14); (R.87 §8.3, R.91). Here, Lake Champlain filed an objection with MLMIC on October 12, 2018. (R.227 ¶34, R. 266). MLMIC is holding the Cash Consideration in escrow pending "joint written instructions" from the named insured and Policy Administrator as to how the cash proceeds are to be distributed or "a non-appealable order of an arbitration panel or court with proper jurisdiction ordering payment of the allocation to the Policy Administrator or … the Eligible Policyholder." (R. 171 ¶A15, R.150). On May 3, 2019, the parties provided MLMIC with a joint "Active Dispute Resolution Notice" requesting that the cash proceeds remain in escrow pending resolution of this dispute. (R.227 ¶38, R.279).

Plaintiff did not bargain for insurance coverage through MLMIC or for the benefit of the demutualization proceeds. Plaintiff's memorandum of law to the court below acknowledged that the "present dispute is over the Cash Consideration from the October 1, 2018 demutualization of MLMIC; it does not arise out of or relate to the Employment Agreement, which does not address or assign ownership of the MLMIC Cash Consideration or Membership Interest." Plaintiff relied on these facts to avoid arbitration of the dispute (R.34 ¶12) under the Employment Agreement's mandatory arbitration clause (R.25 ¶25), which Defendant's answer raised as an affirmative defense. (R.49 ¶16).

PROCEDURAL BACKGROUND

Plaintiff Schoch commenced this action on December 28, 2018. (R.37). Defendant Lake Champlain served an Answer with Counterclaims on February 28, 2019. (R.47). Defendant asserted as an affirmative defense that Plaintiff's claims were barred by binding contractual arbitration (R.49 ¶16), pled its counterclaims as subject to arbitration, and reserved the right to seek a stay to compel arbitration. (R.49 ¶25). Plaintiff served a Reply to the counterclaims on March 18, 2019 (R.60). Prior to any discovery among the parties, Plaintiff moved for summary judgment on April 22, 2019. (R.9).

Based on Plaintiff's factual and legal arguments against arbitration made to the court below (i.e., that MLMIC Cash Consideration did not relate to or arise out of Plaintiff's employment agreement) and the First Department's April 1, 2019 decision in *Schaffer*, 171 A.D.3d 465, Defendant Lake Champlain cross-moved for summary judgment. (R.219). Prior to cross-moving, Defendant's right to compel arbitration was preserved. *See Les Constructions Beauce-Atlas, Inc. v Tocci Bldg. Corp. of New York, Inc.,* 294 A.D.2d 409, 410 (2d Dep't 2002) ("The fact that the defendants, in response to the complaint, requested an extension of time to serve an answer, and subsequently served an answer containing, among other things, counterclaims and affirmative defenses, was insufficient to warrant the conclusion that they waived their right to arbitrate, particularly where the defendants asserted

the right to arbitration as an affirmative defense."). Accordingly, Plaintiff should be estopped from arguing that this dispute arises out of her Employment Agreement.

ARGUMENT

The Court should affirm the decision below which granted Defendant summary judgment on its counterclaim seeking declaratory relief that Lake Champlain is entitled the Cash Consideration from the demutualization of MLMIC (R.52-53 ¶¶56-62) because "Plaintiff would be unjustly enriched, it would be against equity and good conscience, and a breach of the implied covenant of good faith and fair dealing, to allow Plaintiff to receive and retain the MLMIC Funds." (R.53, ¶59). The instant controversy is justiciable because it concerns "present, rather than hypothetical, contingent or remote, prejudice" to the parties since the Cash Consideration is currently being held in escrow by MLMIC pending resolution of the dispute. *See American Insurance Association v. Chu,* 64 N.Y.2d 379, 382 (1985).

I. THE COURT BELOW PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF DEFENDANT-RESPONDENT LAKE CHAMPLAIN OB-GYN, P.C.

A. The Appellate Division's Decision in *Schaffer* Was Binding Precedent on the Court Below

In *Matter of Schaffer, Schonholz & Drossman LLP v. Title*, 171 A.D.3d 465 (1st Dep't 2019), the First Department ruled that a medical practice group, who was the Policy Administrator and paid all policy premiums, was entitled to the cash proceeds from the demutualization of MLMIC. The *Schaffer* court held that to award

the cash proceeds to the named insured physician who never paid any policy premiums would constitute unjust enrichment:

> Although respondent was named as the insured on the relevant MLMIC professional liability insurance policy, petitioner purchased the policy and paid all the premiums on it. Respondent does not deny that she did not pay any of the annual premiums or any of the other costs related to the policy. Nor did she bargain for the benefit of the demutualization proceeds. Awarding respondent the cash proceeds of MLMIC's demutualization would result in her unjust enrichment

171 A.D.3d 465. As discussed below, the parties' summary judgment motions raise the same facts and legal issues presented in *Schaffer*. The CPLR § 3222 stipulated facts filed in *Schaffer* are part of the record on this appeal. (R.291-99).

The court below properly ruled that *Schaffer* was binding under the doctrine of stare decisis. "Absent a contrary ruling from the Third Judicial Department or Court of Appeals, case law from another Department of the Appellate Division is binding on this Court." *Arroyo v. Annucci*, 61 Misc.3d 930, 935 n.3 (Sup. Ct. Albany County 2018). *See also People v. Turner*, 5 N.Y.3d 476, 482 (2005) (holding that a 1914 Third Department decision, "though old, was still a valid precedent, binding on all trial-level courts in the state.").[2]

[2] Notably, "[t]he Appellate Division is a single State-wide court divided into departments for administrative convenience and, therefore, the doctrine of stare decisis requires trial courts in [one] department to follow precedents set by the Appellate Division of another department until the Court of Appeals or [the trial court's appellate department] pronounces a contrary rule." *Mountain View Coach Lines, Inc. v. Storms*, 102 A.D.2d 663, 664 (2d Dep't 1984) (internal citations omitted). *See also*, *In re Bonesteel's Will*, 38 Misc.2d 219, 222 (Sur. Ct. Rensselaer County 1963);

B. The Facts in *Schaffer* are Identical to the Facts Here

The court below held that "[t]he significant facts relied upon by the Appellate Division in *Schaffer* are not distinguishable from the significant facts in this case." (R.7). Plaintiff's sole factual argument on appeal is that the MLMIC policy in *Schaffer* was a "group policy" that was "issued to the employer." (Pl. Brief p.25). The facts in *Schaffer*, however, are identical to this case.

First, contrary to plaintiff's contention, the *Schaffer* record states that "[t]he subject Policy was an individual physician's insurance policy, not a group policy." (R. 332). In *Schaffer*, separate premiums were paid for the policies insuring the medical practice group and the individual physician. *Id*. This is because "under New York law with the limited exception of a risk retention group authorized under Federal law, group property/casualty insurance for physician groups may not be written in New York." *Urgent Medical Care, PLLC v. Amedure*, 64 Misc.3d 1216(A), 2019 WL 3331795 (Sup. Ct. Greene County 2019) (citations omitted). Here, as in *Schaffer*, the MLMIC policy insured Plaintiff individually and a separate policy insured Defendant Lake Champlain (R.223 ¶¶7,12). Notwithstanding said facts, it does not matter if the subject policy was a group policy or individual policy. Such distinction does not change the legal analysis in *Schaffer* that Plaintiff, as a

Badrow v Common Council and City Clerk of City of Tonawanda, 43 Misc.2d 64, 64 (Sup. Ct. Erie County 1964); *Hamlin v Bender*, 92 Misc.16, 20 (Sup. Ct. Oneida County 1915), *aff'd*, 173 A.D. 958 (4th Dep't 1916)).

nominal named insured, is not entitled to the demutualization proceeds.

Second, also contrary to Plaintiff's claim (and again factually the same as in *Schaffer*) the policy here was "issued to" the employer Defendant Lake Champlain OB-GYN, P.C. The policy expressly states:

> The insurance policy referenced above has been issued to the Policy Administrator named herein.

(R. 223). Accordingly, Defendant was the "policyholder." As discussed in Dr. Dodge's affidavit, Lake Champlain selected, bargained-for, purchased, managed and assumed all financial responsibility for the policy. (R. 223-34 ¶17).

All policy endorsements were also issued to Defendant "Lake Champlain OB-GYN, P.C." (R.230, 237-38, 240-41, 247). For example, the endorsement refunding the premium upon policy cancellation was issued to Defendant:

> This **Endorsement** effective 02/28/2015
>
> issued to Lake Champlain OB-GYN, P.C.
> 206 Cornelia Street
> Suite 306
> Plattsburgh

(R. 230) (emphasis in original). Likewise, the other policy endorsements were issued to Defendant:

> This Endorsement effective 07/01/2014
> issued to Lake Champlain OB-GYN, P.C.
> forms a part of policy no. NY-PZ-PO-3158640-ND

(R.230, 237-38, 240-41, 247).

Third, in *Schaffer* the MLMIC policy named "Dr. Title as the insured and SS&D as the Policy Administrator." (R.293 ¶11). The same facts are present here, i.e., the policy named Plaintiff "Kim E. Schoch, CNM" as the insured and Defendant "Lake Champlain OBG-YN, P.C." as the Policy Administrator. (R.223 ¶15, R.233).

Fourth, in *Schaffer* the employer "paid in full all annual premiums for the MLMIC Insurance Policy for the duration of Dr. Title's employment with SS&D. Dr. Title did not pay an of the annual premiums or any of the other costs related to the Insurance Policy." (R.294 ¶ 13). Again, the identical facts are present here—Defendant paid all premiums and costs associated with the policy. (R. 223-34 ¶17).

Accordingly, to award Plaintiff the cash proceeds from the demutualization of MLMIC "would result in her unjust enrichment." *Schaffer*, 171 A.D.3d 465.

C. *Schaffer* Does Not Conflict with Court of Appeals or Third Department Precedent on Unjust Enrichment Because Plaintiff Did Not Bargain For the MLMIC Demutualization Proceeds

Plaintiff incorrectly argues that *Schaffer* conflicts with the law of unjust enrichment as espoused by the Court of Appeals and Third Department. To reach this conclusion, Plaintiff argues that she bargained for the benefit of the demutualization proceeds in her employment contract. (Pl. Br. p.31). This is a reversal of Plaintiff's argument to the court below that the parties' dispute is not covered by her Employment Agreement. As stated in Plaintiff's memorandum of law in support of summary judgment against Defendant to the court below:

> The present dispute is over the Cash Consideration from the October 1, 2018 demutualization of MLMIC; it does not arise out of or relate to the Employment Agreement, which does not address or assign ownership of the MLMIC Cash Consideration or Membership Interest.

Plaintiff's Verified Complaint likewise admits that "Ms. Schoch's employment agreement makes no reference to her Policyholder Membership Interest." (R.40 ¶17). Moreover, in order to avoid mandatory arbitration under the Employment Agreement, Plaintiff made factual and legal arguments to the court below that the distribution of the MLMIC demutualization proceeds does "'not arise out of the employment agreement and therefore is not subject to arbitration'" quoting *Fromer v. Schor*, 2019 Slip. Op. 30265(U); 2019 N.Y.Misc LEXIS 4408 (Sup. Ct. New York County January 31, 2019) (denying contractual arbitration of dispute over MLMIC demutualization proceeds between medical practice that paid premiums and insured physician). Plaintiff submitted a copy of the decision in *Fromer* to the court below, which is part of the record. (R. 212).

Plaintiff never bargained for a policy or membership in MLMIC or any demutualization proceeds. (R.224 ¶20). Plaintiff has already received what she bargained for—medical liability insurance coverage. The demutualization of MLMIC and benefit of the cash distribution was never contemplated, let alone bargained for, by the parties. In fact, the Employment Agreement makes no reference to MLMIC. To the contrary, during all periods of Plaintiff's employment,

Defendant selected the insurance company, coverage and terms of the policy that insured Plaintiff. (R.224 ¶17). The mere fact that Defendant purchased a MLMIC policy that insured Plaintiff does not divest Defendant of its equitable rights to the demutualization proceeds. *See* cases cited *supra*; see *also, Castellotti v. Free*, 138 A.D.3d 198, 207-08 (1st Dep't 2016) ("Here, the complaint's allegations show that [defendant] was enriched at [plaintiff's] expense because [plaintiff] paid the estate taxes and insurance premiums, despite [defendant] being the sole beneficiary of the will, and that it would be against equity and good conscience to allow [defendant] to retain that windfall.").

Even assuming *arguendo* that the Employment Agreement contemplated the selection of MLMIC as the insurer and receipt of future demutualization proceeds (which it did not), Defendant asserts alternative counterclaims for (i) money had and received and (ii) breach of the implied covenant of good faith and fair dealing. (R.55-56 ¶¶73-84). Accordingly, irrespective of the cause of action, principles of equity and fairness equally apply whether Defendant recovers in contract, quasi-contract or otherwise. *See Joseph Sternberg, Inc. v. Walber 36th Street Associates*, 187 A.D.2d 225, 228 (1st Dep't 1993) ("Thus, it appears that where there is a bona fide dispute as to the existence of a contract or where the contract does not cover the dispute in issue, plaintiff may proceed upon a theory of quantum meruit and will not be required to elect his or her remedies.").

D. The Record in *Schaffer* Included the MLMIC Plan of Conversion

Plaintiff's argument that the *Schaffer* court did not consider the MLMIC Plan of Conversion (Pl. Br. p. 33) is refuted by the record before the First Department, which included, among other things, the MLMIC Plan of Conversion. (R. 295, ¶16-17 citing as Exhibit 5 the MLMIC Plan of Conversion). The Plan is cited throughout the briefing. (R.311 *passim*, R.327 *passim*). Moreover, the briefs in *Schaffer* show that the same arguments made by Plaintiff were raised before the First Department. (R.324-337). For example, the respondents in *Schaffer* erroneously argued: that the MLMIC Plan of Conversion defines the "policyholder" as the named insured (R.329); that the insured had an "ownership interest" in MLMIC (R.331); that the Policy Administrator is the "agent" of the insured (id.); that the insured "bargained for the payment of insurance premiums" under her employment agreement (R.332); that "New York State law considers [the insured] to be the member of MLMIC as the Policyholder; and MLMIC's plan documents define [the insured] as the Policyholder entitled to receive the Cash Consideration under the Plan of Conversion." *Id*. Accordingly, not only are the facts in *Schaffer* identical but the same legal arguments were raised before the First Department and rejected.

E. Other Lower Courts Have Concurred with the Analysis in *Schaffer*

Other lower courts have concurred with the analysis in *Schaffer* on grounds independent of stare decisis. For example, in *Zilkha Radiology, PC v. Schulze*, Index

No. 622517/2018 NYSCEF Doc. 59 (Sup. Ct. Suffolk County November 1, 2019) [Addendum A-9] the plaintiff medical practice paid all of the defendant physician's MLMIC policy premiums. Without any discussion of stare decisis, the court held:

> This court agrees with the First Department's conclusion in *Matter of Schaffer*. The essential inquiry is any action for unjust enrichment…is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. Under the facts of this case, awarding the proceeds to defendant Schule would result in his unjust enrichment.

Id. (internal citations omitted).

Likewise, in *Maple Medical LLP v. Scott,* 64 Misc.3d 909, 912-13, 105 N.Y.S.3d 823, 826 (Sup. Ct. Westchester County 2019), the court ruled on stare decisis grounds but further held that "[i]n any event, the court finds that the conclusions drawn in the First Department's decision are persuasive, and that a similar holding in this action based on the principles of unjust enrichment is warranted. Simply put, awarding [defendant physician] the cash proceeds of MLMIC's demutualization would result in his unjust enrichment." *Id*.

In *Long Island Radiology Associates, P.C. v. Koshy et al,* Index No, 600195/2019 NYSCEF Doc. 127 (Sup. Ct. Nassau County October 7, 2019) [Addendum A-1], the plaintiff medical practice paid all of the defendant physician's MLMIC policy premiums. The court held that the defendant "received the benefit of his bargain having been relieved of the obligation to pay those premiums. Like

the respondent in *Schaffer* (supra) [defendant] would be unjustly enriched if he received the dividend based on the premiums that plaintiff paid." *Id*.

In *New Rochelle Radiology Associates, P.C. v. Sabrina Pieroni, M.D.,* Index No. 70879/2018 NYSCEF Doc. 48 (Sup. Ct. Westchester County September 10, 2019) [Addendum A-5], the court followed *Schaffer* under stare decisis and held "[m]oreover the employment agreement between the [medical practice] and [named insured physician] is silent to demutualization proceeds and therefore [the physician] did not bargain for the benefit of the demutualization proceeds."

Also, in *Urgent Medical Care, PLLC v. Amedure*, 2019 N.Y. Slip. Op. 51188(U), 64 Misc.3d 1216(A), 2019 WL 3331795 (Table) (Sup. Ct. Greene County July 12, 2019), the court denied a motion to dismiss the plaintiff medical practice's unjust enrichment claim to recover the premiums it paid for the defendant physician's MLMIC policy.

II. DEFENDANT IS ENTILED TO THE MLMIC DEMUTALIZATION PROCEEDS AS A MATTER OF LAW AND EQUITY

A. Principle of Equity and Fairness Control the Distribution of Demutualization Proceeds Based on the Amount of Premiums that the Employer/Employee Paid

As cited in *Schaffer*, other courts have decided the issue of entitlement to insurance demutualization proceeds among employers and employees pursuant to principles of equity and fairness. The proper standard of review to determine whether a party has an equitable claim to share in the proceeds is to calculate the

amount of premiums that the employer/employee paid. *See, Ruocco v. Bateman, Eichler, Hill, Richards, Inc.*, 903 F.2d 1232, 1238 (9th Cir.1990) (holding that the "balance of equities" weighed in favor of distributing the demutualization proceeds to the employees who paid the insurance policy premiums), *cert denied*, 498 U.S. 899 (1990); *Chicago Truck Drivers, Helpers & Warehouse Workers Union [Ind.] Health & Welfare Fund v. Local 710, Intl. Bhd. of Teamsters, Chicago Truck Drivers, Helper and Warehouse Workers Union [Ind.] Pension Fund*, 2005 WL 525427, *4, 8 (N.D. Ill., Mar. 4, 2005) (holding employees who fully funded 401(k) plan were entitled to demutualization proceeds rather than the employer who would receive an "undeserved windfall"); *see also, Mell v. Anthem, Inc.*, 688 F.3d 280 (6th Cir. 2002) (affirming district court's finding that employees were not the owners of health insurance policy subject to demutualization "because as employees and retirees [the employees] 'had nothing to do with the choice of insurance carrier, nor with its governance, and they received what they bargained with the [the employer] to get: insurance coverage'") (quoting *Mell v. Anthem, Inc.*, 2010 WL 796751, at *10 (S.D. Ohio Mar. 3, 2010)); *Greathouse v. E. Liverpool*, 159 Ohio.App.3d 251, 257, 823 N.E.2d 539, 544 (Ohio Ct. App. 2004) (holding that "[a]s a benefit of his employment, the city provided appellant with health insurance—nothing more. Appellant cannot contend that he somehow owned the policy and was entitled to the [demutualization] stock proceeds."); *Town of N. Haven v. N. Haven Educ.*

Association, 2004 WL 113524, at *2 (Conn. Super. Ct. Jan. 5, 2004) (commenting in application to stay arbitration of dispute concerning insurer's demutualization and distribution of stock that "[f]airness dictates that the teachers should share in the proceeds received by the Town to the extent that the amount of the premiums paid by them bears to the total amount of the premiums paid by the Town upon which the total stock distribution was based").

As illustrated by the above cases, entitlement to the MLMIC Cash Consideration is determined by the parties' respective share of the premiums that they paid. This is consistent with New York Insurance Law § 7307(e)(3), which provides that "[t]he equitable share of the policyholder in the mutual insurer shall be determined by the ratio which the net premiums (gross premiums less return premiums and dividend paid) such policyholder has properly and timely paid to the insurer on insurance policies . . . ." (emphasis added). Accordingly, contrary to Plaintiff's arguments, the mere designation of a party as a "policyholder" or "named insured" or "member" is not determinative of whether they paid premiums and are entitled share in the proceeds. The proper analysis is what proportion of premiums were paid by each party. Here, Defendant paid all of the premiums.

Moreover, Insurance Law § 7307(e)(3) did not contemplate the demutualization of a medical malpractice insurance company. As discussed, MLMIC is the first mutual medical malpractice insurer to demutualize in New York,

where medical malpractice insurance generally cannot be written as a group policy. It was acknowledged during the hearing before the NYS Department of Financial Services that under a group policy, the employer would be the policyholder notwithstanding the individual named insureds covered by the policy.[3] But for this anomaly, Plaintiff would lack standing to challenge the distribution of the Cash Consideration, and Defendant would receive a return on its investment of selecting the MLMIC policy, paying all premiums, and assuming all financial risk associated with the same. Again, the Plan as approved by DFS provides that the Cash Consideration may be distributed to a Policy Administrator who paid the premiums and claims "a legal right to receive [the] Cash Consideration." (R.171 ¶A.14).

To accept Plaintiff's simplified argument that the named insured is automatically entitled to the Cash Consideration, as adopted by the court in *Maple-Gate Anesthesiologists, P.C. v. Nasrin*, 63 Misc.3d 703, 2019 NY Slip Op 29075 (Sup. Ct. Erie County, March 22, 2019), would obliviate the need for the dispute resolution process in the MLMIC Plan of Conversion (which the medical group in *Maple-Gate* failed to utilize) that is designed to resolve disputes such as this one. Specifically, the Plan's dispute resolution process provides that:

[3] *See* Public Hearing in the Matter of Medical Liability Mutual Insurance Company ("MLMIC"), Transcript at p. 170, available at: www.dfs.ny.gov/system/files/documents/2019/01/mlmic_transcript_20180823.pdf

> If a Policy Administrator … has not been specifically designated to receive the Cash Consideration allocated to an Eligible Policyholder, but nevertheless believes that it has a legal right to receive such Cash Consideration, such Policy Administrator … may send MLMIC [an objection and] … The allocated Cash Consideration will be held in escrow … until MLMIC receives joint written instructions from the Eligible Policyholder and the Policy Administrator … as to how the allocation is to be distributed, or a non-appealable order of an arbitration panel or court with proper jurisdiction ordering payment of the allocation to the Policy Administrator or … or the Eligible Policyholder.

(R.91). The *Schaffer* decision and caselaw cited *supra*, which apply principles of fairness and equity, are entirely consistent with the Insurance Law and the DFS Decision that, "[t]he determination of who is entitled to the cash consideration depends on the facts and circumstances of the parties' relationship …." (R.151).

B. Neither the MLMIC Plan of Conversion or the New York Insurance Law Defines Who is a "Policyholder" Entitled to the Distribution of the MLMIC Demutualization Proceeds

Contrary to Plaintiff's argument, the New York Insurance Law does not address, let alone resolve, the instant dispute over the allocation of the MLMIC demutualization proceeds. Otherwise there would be no need for a 28-page Decision from the NYS Department of Financial Services and the dispute resolution process under the Plan of Conversion. Plaintiff incorrectly argues, in conclusory fashion, that she is a "policyholder" entitled to the Cash Consideration by virtue of her status as a "member" of MLMIC pursuant to Insurance Law § 1211 and because she

designated Defendant as her "agent" on the MLMIC insurance application.

First, Insurance Law § 1211 does not mention demutualization and does not address, let alone create, any right of a "policyholder" or "named insured" or "member" to demutualization proceeds. As discussed above, such nominal designations are not determinative in balancing the legal and equitable rights of the parties. Defendant Lake Champlain, of course, likewise argues that it is a "policyholder" as relevant here because Defendant purchased the policy, was the Policy Administrator, paid all the premiums, and the policy and its endorsements were "issued to" Lake Champlain. (R.224 ¶17).

Second, the DFS September 6, 2018 Decision rejected the argument of insureds like Plaintiff "who contend that all of the cash consideration should be paid to [policyholders]." (R.149). Instead, the DFS recognized the competing claim of "medical groups and hospitals that contend that the cash consideration should be paid to them in the circumstances where they paid the premiums on behalf of policyholders and/or acted as policy administrators." *Id*. The DFS Decision further noted that the definition of "policyholder" under Insurance Law 7307(e) "*might or might not be the person who paid the premiums*" (*id.*) (emphasis added) and that, "[t]he determination of who is entitled to the cash consideration depends on the facts and circumstances of the parties' relationship and applicable law, to be decided by agreement of the parties or by an arbitrator or court." (R.151). Thus, it is not

surprising that the First Department's decision in *Schaffer* did not cite the Insurance Law. As stated by the DFS Decision, the MLMIC Plan of Conversion and its dispute resolution process endorsed by the DFS, "do[es] not violate the Insurance Law" and "is fair and equitable." (R.152).

C. The Cases Relied Upon by Plaintiff Are Distinguishable

The cases relied upon by Plaintiff are distinguishable. For example, in *Maple-Gate Anesthesiologists, P.C. v. Nasrin*, which was decided prior to *Schaffer*, the court emphasized that the employer "did not make a claim, or otherwise avail itself of the objection and escrow procedure." 63 Misc.3d 703, 96 N.Y.S.3d 838 (Sup. Ct. Erie County, March 22, 2009) (awarding MLMIC demutualization proceeds to employee). The court further found that the employer made an "implicit acknowledgment" of the employee's right to the Cash Consideration, which was consistent with the employer's failure to object and participate in the escrow process. *Id*. Here, in contrast, Defendant filed an objection and has, at all times, asserted its legal and equitable rights to the proceeds without any waiver. (R.227 ¶34, R.266).

The decision in *Columbia Memorial Hospital v. Hinds,* 2019, NY Slip Op 51508(U), 65 Misc.3d 1205(A), 2019 WL4620674(Table) (Sup. Ct. Columbia County September 3, 2019) is also inapposite because the insured physician "actually paid the premiums, as the [policy administrator] deducted the amounts it paid for ... malpractice insurance from his incentive compensation." *Id*. Here in

contrast, Plaintiff did not pay any of the policy premiums.

Defendant submits that the court's decision in *Shoback v. Broome Obstetrics and Gynecology, P.C.*, Index No, EFCA2018003334 (Sup. Ct. Broome County 2019) misapprehends the MLMIC Plan of Conversion, the DFS Decision and the proper legal standard applicable to the distribution of demutualization proceeds. Foremost, *Shoback* relies principally on *Dorrance v. United States*, 809 F.3d 479 (9th Cir. 2015) which is a tax case. In *Dorrance*, however, the demutualization proceeds were shares of stock that were not valued based on the payment of policy premiums. *Id*. at 497 ("Thus, the value at demutualization was not derived from something paid for by the [policyholder]."). Here, in contrast, the value of the MLMIC Cash Consideration is directly based on the amount of premiums paid during the three year-period preceding the plan of conversion. (R.77 §2.1 "Eligibility Period", R.86 §8.2). Moreover, the Ninth Circuit, which decided *Dorrance*, has also held that where the distribution of demutualization proceeds is based on premium payments, that "the balancing of equities weighed in favor of the plan participants because the premiums for the plan were paid by the participants and because…'[the other party] paid nothing." *Ruocco v. Bateman, Eichler, Hill, Richards, Inc.*, 903 F.2d 1232, 1238 (9th Cir.1990); *see also* cases cited *supra* Point II.A (holding that the proper standard of review in determining the right to demutualization proceeds is to calculate the amount of premiums paid by the employer/employee).

Shoback and Plaintiff's reliance on *Bank of New York v. Janowich*, 470 F.3d 264, 274 (6th Cir. 2006) is also misplaced. First, *Bank of New York* involved annuity contracts that were purchased after the termination of an employer funded employee benefit plan. The annuities were purchased from benefits that were already due the employees. The employer had no interest in the annuity contracts, and thus no right to the demutualization proceeds. *See* 470 F.3d at 271. Here, in contrast, the MLMIC policy is the subject of the demutualization. Second, the demutualization plan in *Bank of New York* was silent as to any rights of the employer. Here, in contrast, the MLMIC Plan of Conversion and DFS Decision approving the Plan expressly acknowledge that the employer policy administrator who paid the premiums, rather than the named insured, may be entitled to the demutualization proceeds (R.87 ¶8.3, R.91, R.171 ¶A.14, R.149-51), depending "on the facts and circumstances of the parties' relationship and applicable law…" (R.151).

III. ALTERNATIVELY, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE QUESTIONS OF FACT EXIST WARRANTING DISCOVERY

Should the Court decline to affirm the decision below, Defendant submits that its counterclaims and affirmative defenses state a prima facie case, and Plaintiff's motion for summary judgment seeking dismissal is premature prior to discovery. *See e.g.*, *Radiation Oncology Services of Cent. New York, P.C. v. Our Lady of Lourdes Mem. Hosp., Inc.*, 148 A.D.3d 1418, 1420 (3d Dep't 2017) (denying motion to

dismiss affirmative defenses as a matter of law where "the parties have not yet engaged in discovery to determine whether any of these defenses are applicable"). Plaintiff's claim that Defendant abandoned its counterclaims and affirmative defenses is specious. Defendant's motion below raised said claims and defenses and sough discovery in the alternative. (R.287 ¶31).

Defendant pleads three actionable counterclaims: (1) unjust enrichment, (2) monies had and received and (3) breach of the implied covenant of good faith and fair dealing. (R.54-56 ¶¶63-84). These counterclaims underlie Defendant's request for declaratory relief and were alleged in the event that MLMIC released the Cash Consideration from escrow and distributed it to Plaintiff over Defendant's objection. (R.50 ¶ 27). The Court should reject, at the pleading stage prior to discovery, any claim by Plaintiff that one or more of the counterclaims are duplicitous or barred by the existence, or lack, of an express contract between the parties. *See e.g., Kosowsky v. Willard Mountain, Inc.*, 90 A.D.3d 1127, 1131 (3d Dep't 2011) ("Where a disagreement exists as to 'whether the scope of an existing contract covers the disagreement between the parties, a party will not be required to elect his or her remedies and may proceed on both quasi contract and breach of contract theories.'"). Defendant submits that each counterclaim is actionable, and any disputed issues about what the parties bargained for will be answered by deposition testimony and documentary evidence concerning the parties' relationship, including their

expectations and performance under the terms of the Employment Agreement and MLMIC policy of insurance.

First, "[t]he essential inquiry in any action for unjust enrichment . . . is whether it is against equity and good conscience to permit [one party] to retain what is sought to be recovered." *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 (2011) (internal quotation marks and citation omitted). Defendant is not required to show that Plaintiff committed a "wrongful act" to establish unjust enrichment. "Innocent parties may frequently be unjustly enriched." *Simonds v. Simonds*, 45 N.Y.2d 233, 242 (1978) (holding former wife had equitable right to benefits under former husband's life insurance policies).

Second, "[s]imilarly, the claim of money had and received, like a claim for unjust enrichment, rests upon the broad considerations of right, justice and morality" and "allows [a] plaintiff to recover money which has come into the hands of the defendant impressed with a species of trust because under the circumstances it is against good conscience for the defendant to keep the money." *Williamson v Stallone*, 28 Misc.3d 738, 747 (Sup. Ct. New York County, 2010) (internal quotations and citations omitted) (citing *Board of Education of Cold Spring Harbor Central School District v. Rettaliata*, 78 N.Y.2d 128, 138 (1991)).

Lastly, implicit in every contract is the implied covenant of good faith and fair dealing. "This 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." *Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 389 (1995) (quoting *Kirke La Shelle Co. v. Paul Armstrong Co.*, 263 N.Y. 79, 87 (1933)).

Here, as discussed, Defendant procured the insurance policy that insured Plaintiff; paid all of the premiums; received all dividends and premium reductions; paid all premium increases; administered the policy; and was financially responsible for all risk associated with the policy. Defendant accordingly has an equitable claim to the demutualization proceeds. Plaintiff also has an implied duty to deal fairly with Defendant with respect to said proceeds. Plaintiff, however, has denied Defendant's right to receive the fruits of the policy that it bargained for and paid all the premiums.

CONCLUSION

Defendant-Respondent Lake Champlain OB-GYN, P.C., respectfully requests that the Court affirm the decision below granting declaratory judgment in its favor.

Dated: November 19, 2019

Respectfully submitted,

James R. Peluso, Esq.
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ADDENDUM

SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. JACK L. LIBERT,
Justice.

TRIAL PART 23
NASSAU COUNTY

LONG ISLAND RADIOLOGY ASSOCIATES, P.C.

Plaintiff,

-against-

MOTION # 02, 04, 05
INDEX # 600195/19
MOTION SUBMITTED:
AUGUST 2, 2019
md, md, mg

X X X

ABEY KOSHY, ALICIA A. CAMBRIA, AMARYLLIS MENDEZ, ANGELA T. LAINO, ANGELA RAMOS, ARON NAFISI, BASIL J. OSABU, BENJAMIN A. GOBIOFF, BIND KEERIKATTE, BRIGITTE M. GEFFKEN-KELLY, CARLOS A. MONTILLA, CARMEN H. SANTOS, CHRISTINA L. WEEDON, CHRISTINA PALMIERO-WILLIAMS, CYNTHIA BRITO, DANIEL E. BEYDA, DEBORAH A. ASDAHL, DENNIS R. ROSSI, ELVIRA E. ERDAIDE, GEORGE H. CONNELL, GERALD SCHULZE, GEORGINA PEACHEY, HADASSAH HOFFMAN-BROWNSTEIN, HAMIDE CENAJ, IGOR CHER, IRINA MURATOVA, JAMIE L. ESPOSITO, JAMES M. LODOLCE, JASON W. SISK, JASON WILSON, JEFFREY JONES, JENNIFER E. D'AMBROSIO, JESSICA A. BOXER, JONATHAN OLIVERI, JOSE F. VALERIANO, KATIE L. O'SULLIVAN, KHALID U. KHAN, KRISTEN PERDICHIZZI, LANCE S. LEFKOWITZ, LISA G. LEE, MARGARET J. USURIELLO, MARILYN MADRID, MARINA TAMARKINA, MARTHA S. MORALES, MELISSA SPENCER, MICHAEL KLUKO, MILAGROS A. TLATOA, MIRA SHPIGELMAN, NILKA E. SANTANA, NORMA Y. ARCE, OLIVER PRATT, PASHA TORKAMANI, RON PANDOLFINI, SAMUEL M. ISSAC-REJIAH, SCOTT A. MCNALLY, STACY HONOVICH, SUZANNE CARLTON, THIERRY DUVIVIER, TINAMARIE P. THADAL, AND VICTORIA L. BEYDA,

Defendants.

The following papers having been read on this motion:

Notice of Motion/Order to Show Cause.....1, 2
Cross Motion/Answering Affidavits.....3, 4, 5, 6
Reply Affidavits.....7, 8, 9

Pursuant to CPLR 3211 defendant Gerald Schulze moves for summary judgment dismissing the complaint against him and granting the declaratory relief sought in his counterclaims (Motion Seq. # 2); defendants Daniel E. Beyda and Victoria L. Beyda also move for dismissal of the complaint and summary judgment on their counterclaims (Motion Seq. # 4); plaintiff moves for summary judgment granting the relief sought in the complaint and dismissing the counterclaims of Schulze and the Beyda defendants (Motion Seq. # 5]).

Plaintiff owns and operates a radiological medical practice. Schulze is a former physician employee. The Beyda defendants were originally shareholders of plaintiff, but subsequently relinquished their shareholdings and became employees. Plaintiff provided malpractice insurance for each of the moving defendants through Medical Liability Mutual Insurance Company, which was a mutual company. As part of an approved demutualization plan, MLMIC agreed to a dividend payment[1] to policyholders of record, subject to a court determination as to whether that is the party equitably entitled to the proceeds. Plaintiff asserted in the instant action that it is entitled to the dividend distribution, having paid all the premiums and maintained the policies.

Defendant Schulze

At all relevant times Schulze was employed by plaintiff under the terms of an employment contract dated July 1, 2011. The compensation of Schulze was fixed on an annual basis (¶ Third, Schulze Affidavit). In addition to the annual compensation plaintiff agreed to pay certain expenses that Schulze would incur in connection his employment including the cost of malpractice insurance (Exhibit B, ¶ Fourth, Schulze Affidavit). These premium payments were not deducted from the compensation that Schulze received from plaintiff. Essentially they were in lieu of reimbursement

[1]The dividends are calculated based upon the premiums paid (Insurance Law §7307).

to him for expenses he would have otherwise incurred. It is undisputed that plaintiff duly paid the insurance premiums throughout the course of Schulze's employment.

In the *Matter of Schaffer, Schonholz & Drossman, LLP v Title* (171 A.D.3d 465, 96 N.Y.S.3d 526 [1st Dept. 2019]) the court held:

> Although respondent was named as the insured on the relevant MLMIC professional liability insurance policy, petitioner purchased the policy and paid all the premiums on it. Respondent does not deny that she did not pay any of the annual premiums or any of the other costs related to the policy. Nor did she bargain for the benefit of the demutualization proceeds.

In the case at bar plaintiff paid the premiums at its own expense. Schulze received the benefit of his bargain having been relieved of the obligation to pay those premiums. Like the respondent in *Schaffer* (*supra*) Schulze would be unjustly enriched if he received the dividend based upon premiums that plaintiff paid.

The Beyda Defendants

With respect to their tenure as employees of plaintiff the Beyda defendants would be unjustly enriched in the same fashion as Schulze if allowed to collect the policy dividends. With respect to the period of time that they were shareholders, the Beyda defendants argue that the premiums paid were paid out of corporate funds which would otherwise have been distributed to them (presumably in *pari passu* to the respective ownership interests of all shareholders). Since "their equity interest contributed to the payment of MLMIC premiums" they claim to be entitled to the dividends.

Under general principles of corporate law, a shareholder and the corporation are separate entities. Even if they were not separate entities the position of the Beydas is contrary to reason. If the corporation distributed to shareholders the funds used to pay for the malpractice insurance, the

Beyda defendants would not have had the insurance; unless they paid for it themselves in which event they would not have the distributed funds.

Conclusion

Plaintiff is entitled to the cash proceeds resulting from the demutualization of nonparty MLMIC. The motions of moving defendants (Motion Seq. # 2 and #4) are denied. Plaintiff's motion for summary judgment (Motion Seq. #5) is granted and the counterclaims are dismissed.

ORDERED and decreed, it is hereby declared that plaintiff is entitled to the proceeds of the MLMIC distribution; and it is further

ORDERED that MLMIC shall pay the cash proceeds in escrow together with interest accrued to plaintiff.

ORDERED, that any relief not specifically granted is denied.

Submit judgment.

ENTER

DATED: October 7, 2019

Jack L. Libert

HON. JACK L. LIBERT
J. S. C.

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 WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

---x

NEW ROCHELLE RADIOLOGY ASSOCIATES, P.C.,
Plaintiff,

Index No. 70879/2018

– against –

Sequence No. 1 & 2

SABRINA PIERONI, M.D.,
Defendant.

DECISION & ORDER

---x

In an action for a judgment declaring that the plaintiff is entitled to distribution payments made by the non-party Medical Liability Mutual Insurance Company to defendant (1) the defendant moves for summary judgment dismissing the complaint, pursuant to CPLR 3212; and (2) the plaintiff cross-moves for summary judgment pursuant to CPLR 3212:

Papers Considered

1. Notice of Motion/Affirmation of Justin A. Heller, Esq./Exhibits A-H/Affidavit of Sabrina Pieroni, M.D./Exhibits A-E (NYSCEF doc. no. 6-21);
2. Notice of Cross Motion/Affirmation of Joseph M. Buderwitz, Esq./Exhibits A-C/Affidavit of Marlo Murphy/Exhibits A-B (NYSCEF doc. no. 28-36);
3. Affirmation of Justin A. Heller in Opposition and Reply/Exhibits I-L (NYSCEF doc. no. 38-43).

Factual and Procedural Background

The defendant, Dr. Sabrina Pieroni, was employed by plaintiff New Rochelle Radiology Associates, P.C., between July 27, 2010, and April 8, 2016. Pursuant to the terms of Dr. Pieroni's employment agreement, she was to maintain medical malpractice insurance which was paid for by the plaintiff.

Notably, in filing out her application for malpractice insurance, Dr. Pieroni did not fill out the Policy Administrator – Designation form. This form states, in pertinent part:

> You are your own Policy Administrator, unless you designate another party. As a service to you, the insured, your policy allows you to designate a Policy Administrator other than

> yourself. Please take the time to read and understand the authority granted by such a designation.
>
> Policy Administrator means the person or organization designated in the Declarations Page. Designation as a Policy Administrator confers no coverage.
>
> The Policy Administrator is the agent of all Insureds herein for the paying of Premium, requesting changes in the policy, including cancellation thereof and for receiving dividends and any return Premiums when due. By designating a Policy Administrator each Insured gives us permission to release information about each such Insured, your practice or any other information that we may have to such Policy Administrator.

Medical Liability Mutual Insurance Company ("MLMIC") issued a medical malpractice insurance policy identifying Dr. Pieroni as the policyholder and policy administrator. It is undisputed that plaintiff paid the policy premiums during Dr. Pieroni's employment tenure.

In July 2016, MLMIC applied to the New York State Department of Financial Services for permission to file a plan to convert from a mutual insurance company to a stock insurance company. As a result of the plan of conversion, MLMIC's policyholders were to receive cash consideration for the extinguishment of their policyholder membership interests. Dr. Pieroni attest that MLMIC issued payment to her in the amount of $178,635.53 in cash consideration, net of federal gains tax withheld by MLMIC of 24%.

Plaintiff commenced this action against Dr. Pieroni. The complaint asserts causes of action for breach of the employment agreement and unjust enrichment and seeks a judgment declaring that distribution of the cash consideration to defendant constitutes a breach of her obligations under the employment agreement with plaintiff and unjust enrichment and that plaintiff is entitled to receive the cash consideration associated with the policy.

The complaint alleges that plaintiff performed all the functions and obligations of a policy administrator including payment of premiums; handling all administrative and financial matters related to policy issuance and renewal; requesting changes in the policy, including cancellation; reviewing and negotiating rates; receiving dividends, dividend credits, and any return of premiums; discussing and processing renewals and rate quotations; taking responsibility for interacting with MLMIC regarding claims issues; and acting as intermediary and facilitator in communications between defendant and MLMIC. The complaint alleges that in light of plaintiff's performance of such functions during Dr. Pieroni's employment, plaintiff was the policy administrator regardless of its formal designation.

Defendant moves for summary judgment dismissing the complaint. Defendant argues that she is entitled to the cash consideration from her MMLIC membership interest. Defendant asserts that she is the policy administrator, and, in any event, the role of policy administrator does not confer a right to the cash consideration. Defendant points to the MLMIC information statement stating that the amount distributable to each eligible policyholder shall be paid directly to such eligible policyholder unless such eligible policyholder has affirmatively designated a policy administrator to receive such amounts on its behalf.

Plaintiff cross-moves for summary judgment. Plaintiff argues that this Court is bound, by stare decisis, to follow the only Appellate Court decision on this issue from the First Department in *Schaffer, Schonholz & Drossman, LLP v. Title*, 171 AD3d 465 [1st Dept 2019]).

In addition, plaintiff submits an affidavit of its office manager attesting to the records kept by plaintiff pertaining to its dealings with MLMIC to demonstrate that plaintiff took care of the details, premium payments, and invoices for Dr. Pieroni's medical malpractice insurance.

Discussion

In *Matter of Schaffer, Schonholz & Drossman, LLP v Title*, 171 AD3d 465, the First Department declared that the petitioner former employer was entitled to the cash proceeds resulting from the demutualization of MLMIC. The Court held that although the respondent, Dr. Title, was named as the insured on the MLMIC professional liability insurance policy, the employer purchased the policy and paid all the premiums. Dr. Title did not deny that she did not pay any of the annual premiums or any of the other costs related to the policy or bargain for the benefit of the demutualization proceeds. The Court held that awarding Dr. Title the cash proceeds of MLMIC's demutualization would result in her unjust enrichment.

As in *Schaffer*, here, Dr. Pieroni was the named insured on the MLMIC policy which was purchased by New Rochelle Radiology and New Rochelle Radiology paid all the premiums. Moreover, the employment agreement between plaintiff and Dr. Pieroni is silent as to demutualization and therefore, Dr. Pieroni did not bargain for the benefit of the demutualization proceeds.

Stare decisis requires this Court to follow precedent set by the Appellate Division of another department until the Court of Appeals or the Second Department pronounces a contrary rule (*see Mtn. View Coach Lines, Inc. v Storms*, 102 AD2d 663, 664 [2d Dept 1984]). In fact, in six actions involving an employer and individual physicians with the same set of facts as *Schaffer*, the Supreme Court, Westchester County (Ecker, J.), relying upon *Schaffer*, declared that the employer was entitled to receipt of the cash considerations (*see Maple Med. LLP v Scott*, 2019 NY Slop Op 29210, et al.).

However, the facts in *Schaffer* are not identical to the facts of this case. In *Schaffer*, the parties filed an agreed upon statement of facts with the First Department, pursuant to CPLR 3222. A copy of the statement of facts establishes that in *Schaffer*, Dr. Title completed and executed the MLMIC professional liability insurance policy application naming the petitioner employer as the policy administrator and that the insurance policy identified Dr. Title as the insured and the *employer* as the policy administrator.

The circumstances of this case differ inasmuch as Dr. Pieroni did not complete the policy administrator designation form with her MLMIC policy application and the policy in question identifies Dr. Pieroni as the insured *and* the policy administrator. Notwithstanding these differences, the Court finds *Schaffer* to be controlling.

Furthermore, the plaintiff demonstrated entitlement to summary judgment by establishing, as a matter of law, that it acted as the policy administrator by choosing the insurer, paying the annual premiums, communicating with the insurer, and notifying the insurer of cancellation upon the termination of Dr. Pieroni's employment. In opposition, defendant failed to raise a triable issue of fact.

The parties remaining contentions have been considered by the Court and are found to be without merit. Any relief requested by either party not specifically addressed herein is denied.

Accordingly, it is

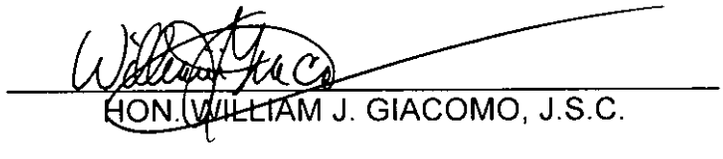
ORDERED that the defendant's motion for summary judgment dismissing the complaint, pursuant to CPLR 3212 is DENIED (motion sequence #1); and it is further

ORDERED that the plaintiff's cross motion for summary judgment pursuant to CPLR 3212 is GRANTED (motion sequence #2); and it is further

ORDERED ADJUDGED AND DECLARED that the plaintiff New Rochelle Radiology Associates, P.C is entitled to the cash consideration payment made by the non-party Medical Liability Mutual Insurance Company associated with the professional liability policy of insurance to the defendant Sabrina Pieroni, M.D., in the amount of $178,635.53, which amount shall be paid to plaintiff New Rochelle Radiology Associates, P.C. within **twenty days** of service of this order with notice of entry; and it is further

ORDERED that upon payment of the amount due to the plaintiff New Rochelle Radiology Associates, P.C. in connection herewith, the action is dismissed.

Dated: White Plains, New York
September 10, 2019



HON. WILLIAM J. GIACOMO, J.S.C.

H: ALPHABETICAL MASTER LIST-WESTCHESTER/New Rochelle Radiology v. Pieroni

Short Form Order Index No. 622517/2018

SUPREME COURT – STATE OF NEW YORK
PART 55 - SUFFOLK COUNTY

P R E S E N T:
Hon. George Nolan
Justice Supreme Court

ZILKHA RADIOLOGY, PC

Plaintiff,

-against-

GERALD SCHULZE

Defendant.

Mot. Seq. No. #001 - MD
Mot. Seq. No. #002 - MG Case Disp
Orig. Return Date: 05/17/2019
Mot. Submit Date: 10/10/2019

PLAINTIFF'S ATTORNEY
RUSKIN MOSCOU FALTISCHEK PC
1425 RXR Plaza, East Tower, 15th fl
Uniondale, NY 11556

DEFENDANT'S ATTORNEY
NOLAN HELLER KAUFFMAN LLP
80 State Street, 11th fl
Albany, NY 12207

Upon the e-filed documents numbered 07 through 54, and upon due deliberation and consideration by the Court of the foregoing papers, the motion and cross-motion (motion sequence nos. 001 and 002) are decided as follows.

Defendant, Gerald Schulze ('Schulze"), moves and plaintiff, Zilkha Radiology, P.C. ("Zilkha"), cross- moves, pursuant to CPLR 3212, each seeking an order granting summary judgment and a declaration of their right to certain cash proceeds resulting from the demutualization of the Medical Liability Mutual Insurance Company ("MLMIC").

This action is one of many arising from the aforementioned demutualization. MLMIC was a mutual insurance company owned by its policyholders. Between 2016 and October 1, 2018, MLMIC negotiated and completed the sale of its business to the National Indemnity Company ("NICO"), a subsidiary of Berkshire Hathaway, which formed a stock company and paid $2.5 billion for MLMIC's assets. The New York State Department of Financial Services approved a conversion or "demutualization" plan which provided a methodology for the pro-rata distribution of the sale proceeds to eligible policyholders. While the conversion plan approved by the New York State Department of Financial Services defined "eligible policyholder" as the named insured and not the entity which paid the premiums, the plan also included an objection and escrow procedure for the resolution of disputes for those persons and entities disputing whether a policyholder was entitled to the payment.

The defendant Schulze is a physician who was employed by Zilkha from October 12, 2015 through February 12, 2016. In an affidavit attached to his moving papers the defendant states, *inter alia*,"[u]nder the terms of my employment agreement...one of the benefits to be provided to me in exchange for my services was the Plaintiff's payment of my medical malpractice insurance premiums...Consistent with the terms of my Employment Agreement, Plaintiff paid the insurance premiums to MLMIC with respect to my medical malpractice insurance coverage, and performed administrative duties with respect to my Policy, and received periodic refunds of premiums from MLMIC." Schulze does not assert that he bargained with Zilkha for the demutualization proceeds that are in dispute in this action.

The amount of demutualization consideration allocable to the defendant's insurance coverage is $40,124.29. Zilkha objected to the payment of this sum to the defendant. Schulze states in his affidavit that MLMIC is holding these monies pending the resolution of this dispute.

The essential facts in this case are indistinguishable from those presented in the recent Appellate Division decision, ***Matter of Schaffer, Schonholz & Drossman v. Title***, 171 AD3d 465, 96 NYS3d 526 [1st Dept 2019]. As in the instant action, ***Matter of Schaffer*** involved a physician named as an insured on a MLMIC policy. The doctor's employer purchased the policy and paid all of the premiums and costs related to the policy. As in this case, the doctor in ***Matter of Schaffer*** did not bargain for the demutualization proceeds. Based on these facts, the Appellate Division, First Department, concluded that awarding the doctor the cash proceeds resulting from the demutualization of MLMIC would result in her unjust enrichment.

This court agrees with the First Department's conclusion in ***Matter of Schaffer***. "The essential inquiry in any action for unjust enrichment...is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (***Mandarin Trading Ltd v. W. Ivenstein***, 16 NY3d 173, 919 NYS2d 465 [2011], *quoting* ***Paramount Film Distrib. Corp. v. State of New York***, 30 NY2d 415, 334 NYS2d 388 [1972]). Under the facts of this case, awarding the proceeds to defendant Schulze would result in his unjust enrichment. Accordingly, it is

ORDERED that the motion (motion sequence no. 001) of defendant Gerald Schulze, made pursuant to CPLR 3212, for an order granting summary judgment in favor of the defendant and for declaratory judgment against the plaintiff Zilkha Radiology, P.C., is denied and the defendants counterclaim is dismissed; and it is further

ORDERED that the cross-motion (motion sequence no. 002) of plaintiff Zilkha Radiology, P.C. made pursuant to CPLR 3212, for an order granting summary judgment in its favor and for declaratory judgment against defendant Gerald Schulze, is granted; and it is further

ORDERED, ADJUDGED and DECREED that plaintiff Zilkha Radiology, P.C. is entitled to the receipt of funds in the amount of $40,124.79, plus accrued interest, if any, from October 1, 2018 to the date of judgment, said amount representing the pro-rata amount assigned to the MLMIC

Medical Malpractice Policy, Policy Number NY-PZ-PO-3503042 (Named Insured - Gerald John Schulze) as a result MLMIC's demutualization.

The foregoing constitutes the decision and Order of the Court.

ENTER

Date: November 1, 2019
Riverhead, New York

HON. GEORGE NOLAN, J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION