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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN Justice PART 7

DAVID S. DINHOFER, M.D.,

Plaintiff,

- against-

MEDICAL LIABILITY MUTUAL INSURANCE COMPANY; FAGER & AMSLER, LLP; DONALD FAGER & ASSOCIATES; BROWN & TARANTINO, LLC; DONALD J. FAGER; EDWARD J. AMSLER; JEFFREY S. ALBANESE; DENNIS GRUTTADARO; PHYLIS HINES; BETH MURPHY; LOUIS NEUBURGER; PAM KNOOP; RONALD FEMIA,

Defendants.

INDEX NO. 602456/2009

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 7, were read on this motion for summary judgment, pursuant to CPLR 3212, by defendants Medical Liability Mutual Insurance Company, Fager & Amsler, LLP, Donald Fager & Associates, Donald J. Fager, Edward J. Amsler, Beth Murphy, Louis Neuburger, Pam Knoop, and Ronald Femia.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2, 3
Answering Affidavits — Exhibits (Memo)	4, 5, 6
Replying Affidavits (Reply Memo)	7

Cross-Motion: ☐ Yes ■ No

This is an action for money damages by plaintiff David S. Dinhofer, M.D. ("plaintiff"), a physician, against his former professional liability insurer, prior counsel, and individuals related to those entities, stemming from the settlement of an underlying medical malpractice action. The plaintiff in the malpractice action alleged that plaintiff deviated from accepted medical standards by failing to diagnose a cancerous lesion when he interpreted a CT scan and that his deviation was a substantial factor in a delayed diagnosis leading to the patient's death. Defendants are Medical Liability Mutual Insurance Company ("MLMIC"); Fager & Amsler, LLP

("Fager & Amsler"); Donald Fager & Associates ("Fager & Assoc."); Brown & Tarantino, LLC ("Brown & Tarantino"); Donald J. Fager ("Fager"); Edward J. Amsler ("Amsler"); Jeffrey S. Albanese ("Albanese"); Dennis Gruttadaro ("Gruttadaro"); Phyllis Hines ("Hines"); Beth Murphy ("Murphy"); Louis Neuburger ("Neuburger"); Pam Knoop ("Knoop"); and Ronald Femia ("Femia") (collectively "defendants"). The parties have not completed discovery and the Note of Issue has not been filed. Before the Court is a motion for summary judgment (motion seq. 001), pursuant to CPLR 3212, filed by MLMIC, Fager & Amsler, Fager & Assoc., Fager, Amsler, Neuburger, Murphy, Knoop, and Femia (collectively "the MLMIC defendants").[1]

Plaintiff alleges in this lawsuit that defendants coerced his consent to settle the underlying malpractice action, and that the MLMIC defendants, *inter alia*, engaged in deceitful business practices, fraud, and breach of their duty to exercise good faith in defending their insured. The MLMIC defendants seek summary judgment dismissing the complaint in its entirety as against each of them on the grounds that plaintiff's claims are barred by the doctrines of equitable estoppel and ratification.[2] A separate summary judgment motion (motion seq. 002) has been filed by Brown & Tarantino, Albanese, Gruttadaro, and Hines (collectively "the B&T defendants"), which the Court will decide in a separate decision.[3]

BACKGROUND

In support of their summary judgment motion, the MLMIC defendants submit, *inter alia*, an affidavit of Neuburger; the MLMIC insurance policy; plaintiff's deposition; plaintiff's Consent to Settle; and a Stipulation of Discontinuance and General Release. In opposition, plaintiff

[1]The MLMIC defendants consist of plaintiff's former liability insurer, MLMIC, and various of its officers, directors and employees (Fager, Amsler, Neuburger, Murphy, and Knoop); the servicing company for MLMIC (Fager & Assoc.); a law firm that serves MLMIC (Fager & Amsler); and a member of the advisory committee that MLMIC named for a dispute resolution proceeding in the underlying action (Femia).

[2]The MLMIC defendants alternatively seek partial summary judgment in their favor on plaintiff's first through fifth causes of action and first through seventh requests for damages.

[3]The B&T defendants are the lawyers that represented plaintiff in the underlying malpractice action.

submits, *inter alia*, his own affidavit. Both sides also submit copies of relevant correspondence and emails between the parties. The following facts are undisputed.

A. The Policy

MLMIC is a professional liability insurer for physicians, surgeons, and other health care professionals in the State of New York. Fager & Assoc. is the servicing organization for MLMIC. Neuburger is the Senior Vice President Upstate Regional Operations for Fager & Assoc., and supervised the claim file for plaintiff in the medical malpractice action out of which this lawsuit arises, entitled *Edwards v University of Rochester, et al.* ("the Edwards Action").

In 2002, plaintiff, a radiologist licensed to practice medicine in New York and four other states, bought a Physicians and Surgeons Professional Liability Insurance Policy ("the Policy") from MLMIC. He renewed the Policy each year thereafter until he canceled it effective May 1, 2006.

Pursuant to Section IV.2.a of the Policy, MLMIC was required to obtain plaintiff's "written, unconditional consent" in order to settle a claim under the Policy (*see* Not. of Mot., Ex. D). Section IV.2.a also set forth an arbitration-like dispute resolution procedure in the event that plaintiff refused to consent unconditionally, providing in pertinent part:

> "a. If you refuse to consent unconditionally to a settlement:
>
> A settlement will only be made by us after obtaining your written, unconditional consent at any point up to the time of a judicial or an administrative determination. Once such determination has been made, we may make a settlement without your consent.
>
> If you refuse to consent unconditionally to the settlement of a Claim when we have informed you that a settlement is advisable, either you or we may refer the dispute to an advisory committee by written notice to the other party. The advisory committee will be formed as follows:
>
> (1) you will nominate one member of the advisory committee;
> (2) we will nominate one member; and
> (3) those two members will select a third member. . . .

> The third member may act as an umpire if necessary.
>
> All members must be physicians or surgeons licensed to practice medicine in the State of New York. You will be given an opportunity to present the facts of the case to the advisory committee. The decision of the majority of the advisory committee is binding on you and us and may not be appealed" (*id.*).

B. The Settlement Of The Edwards Action

The complaint in the Edwards Action alleged that plaintiff, among other co-defendants, departed from accepted standards in the medical profession by failing to properly diagnose and treat a malignant lung tumor that Earl Edwards ("Edwards") was suffering from. On September 2, 2005, MLMIC notified plaintiff that it had received legal papers regarding the Edwards Action and that it had assigned the defense of the matter to the law firm of Brown & Tarantino.

On March 5, 2007, Edwards' attorney expressed an interest in settling the Edwards Action and forwarded a demand letter to Brown & Tarantino. MLMIC deemed it advisable for plaintiff to settle the case.[4] On September 6, 2007, Murphy, a Senior Claims Examiner for MLMIC, forwarded a Consent to Settle form to plaintiff and advised him in writing that everyone's interests would be best served by settling. Murphy also informed plaintiff that if he did not give MLMIC his unconditional, written consent to settle the Edwards Action, MLMIC would refer the matter to an advisory committee pursuant to Section IV.2.a of the Policy.

Plaintiff denies having specific recollection of Section IV.2.a of the Policy until Murphy first mentioned it in September 2007. Purportedly, when he originally purchased the Policy, it was his understanding that he would not be forced to settle if there was a disagreement between him and MLMIC.

Plaintiff did not initially give his unconditional, written consent to settle. To resolve the

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[4]The medical bases for MLMIC's views on the advisability of plaintiff's settlement of the Edwards Action are not material to this motion and therefore will not be discussed herein.

dispute, MLMIC chose Femia as its advisory committee member and plaintiff chose Dr. Carl Werne. There is a factual dispute as to whether a third person was chosen to act as umpire. The proceeding did not occur, however, because plaintiff decided that he was ready to settle.

On October 26, 2007, plaintiff signed a Consent to Settle form, which provided in pertinent part: "I herby [sic] authorize the Medical Liability Mutual Insurance Company, its designated representative or my attorney(s) to settle the claim of Edwards v Dinhofer within the applicable limits of our professional liability policy" (*id.*, Ex Z). He emailed Murphy three days later and stated that he believed he "made the right decision for settlement" (*id.*, Ex. CC).

MLMIC, purportedly in reliance on plaintiff's written consent to settle, notified the advisory committee members that the dispute resolution proceeding was no longer necessary. MLMIC claims that it would not have relieved the committee members and would have obtained a binding decision from the proceeding had plaintiff continued to refuse to give his consent.

The settlement of the Edwards Action was not finalized until five months after plaintiff gave his consent to settle. During that five month period, MLMIC participated in settlement negotiations and the action was submitted to an arbitration proceeding to determine the apportionment among the co-defendants of the amount that would be paid to Edwards. A former judge was selected as the arbitrator. MLMIC paid its attorneys for the time they expended in the proceeding and plaintiff did not express any intention to rescind his consent to settle. On March 10, 2007, Judge Raymond Cornelius issued an Award of Arbitration which apportioned plaintiff's liability in the Edwards Action at 30%. This resulted in liability of $135,000 for plaintiff's portion of the settlement, which MLMIC paid to Edwards on plaintiff's behalf.

The parties thereafter executed a General Release on March 18, 2008, and a Stipulation of Discontinuance that discontinued the Edwards Action with prejudice on March 19, 2008 (*id.*, Ex. BB). Plaintiff paid nothing out of his own pocket to settle the Edwards Action, and

he has not reimbursed MLMIC for the $135,000 that it paid to settle the case on his behalf.

C. Revocation Of Consent To Settle And The Present Lawsuit

On March 27, 2008, MLMIC wrote to plaintiff to confirm that the Edwards Action had been settled on his behalf for $135,000, and to notify him that it was closing the file. Plaintiff sent an email to MLMIC on April 8, 2008, stating that he was not happy with the outcome of the arbitration, but he did not indicate that he wished to revoke his prior consent to settle.

On May 6, 2009, plaintiff's counsel wrote to defendants and, for the first time, expressed plaintiff's intent to revoke his consent to settle (*id.*, Ex. GG). Plaintiff indicated that he was bringing a lawsuit against defendants because he allegedly discovered documentation demonstrating that his consent was procured by false representations and fraudulent concealment of material facts.

Plaintiff thereafter commenced the present action for money damages on August 10, 2009, alleging that he was coerced into giving his consent to settle because defendants, *inter alia*, misled him about the terms of the Policy and concealed the fact that the same counsel represented multiple co-defendants in the Edwards Action. The complaint asserts five causes of action: (1) deceitful business practices in violation of GBL § 349; (2) fraud by concealment; fraud by misrepresentation; (3) attorney misconduct violating Judiciary Law § 487; (4) breach of insurer's duty to exercise good faith in defending an insured; and (5) attorney malpractice. Relevant to the MLMIC defendants are the first, second, and fourth causes of action.

DISCUSSION

The MLMIC defendants argue that they are entitled to summary judgment dismissing all causes of action against them because plaintiff's claims are barred by the doctrines of equitable estoppel and ratification as a matter of law. Specifically, the MLMIC defendants assert that plaintiff should be equitably estopped from suing them over the defense and resolution of the Edwards Action because they justifiably relied on plaintiff's unconditional, written consent to

settle to the action to their detriment. They allege several detriments resulting from their reliance on plaintiff's consent to settle, which include their payment of $135,000 to Edwards on plaintiff's behalf, expenditures for settlement negotiations and the arbitration proceeding before Judge Cornelius, and their ending of the first dispute resolution proceeding prior to obtaining a binding decision. They further argue that plaintiff has ratified his consent to settle since he accepted the benefits of the general release, did not seek to revoke his consent until 18 months after he signed the written consent, and failed to return the money paid to Edwards to settle the case.

Plaintiff argues that summary judgment should be denied because the Policy contains ambiguities regarding how the language "unconditional consent" could be interpreted, and ambiguities as to what powers the "advisory committee" was granted under the Policy. He claims that there could be differing outcomes under the Policy depending on whether the individual insured was the only defendant named in an action or was named as one of multiple co-defendants, especially where the co-defendants are represented by the same counsel. He also asserts that the MLMIC defendants' reliance on the doctrines of estoppel and ratification is improper since the complaint contains allegations of fraud.

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material

issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New* York, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied *(see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

Equitable estoppel precludes a party at law and in equity from denying or asserting the contrary of any material fact which he or she has induced another to believe and to act on in a particular manner (*see Shondel J. v Mark D.*, 7 NY3d 320, 326 [2006]). "The law imposes the doctrine as a matter of fairness. Its purpose is to prevent someone from enforcing rights that would work injustice on the person against whom enforcement is sought and who, while justifiably relying on the opposing party's actions, has been misled into a detrimental change of position" (*id.).* The necessary elements are: (1) conduct amounting to false representation or concealment of material facts; (2) intention or expectation that the other party will act upon such conduct; and (3) actual or constructive knowledge of the true facts (*see BWA Corp. v Alltrans Express U.S.A., Inc.*, 112 AD2d 850, 853 [1st Dept 1985]). In order to prevail, the party seeking estoppel must show: (1) lack of knowledge of the true facts; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change in his or her position (*see Id.; River Seafoods, Inc. v JP Morgan Chase Bank*, 19 AD3d 120, 122 [1st Dept 2005]).

Ratification may result where a party accepts the benefits of an agreement, or remains silent or acquiesces in the agreement for a considerable length of time after having opportunity to avoid it, or by acting upon it, performing under it, or affirmatively acknowledging it (*see VKK*

Corp. v Natl. Football League, 244 F3d 114, 123 [2d Cir. 2001]; *Reddy v Carpal Holdings Ltd.*, 2010 WL 1379844, *3 [SDNY 2010]; *Er-Loom Realty, LLC v Prelosh Realty, LLC*, 77 AD3d 546, 547 [1st Dept 2010]; *Wujin Nanxiashu Secant Factory v Ti-Well Intl. Corp.*, 14 AD3d 352, 353 [1st Dept 2005]).

Here, the Court finds that the MLMIC defendants have made a prima facie showing that they are entitled to judgment as a matter of law under the theories of estoppel and ratification (*see Korngold v Korngold*, 26 AD3d 358, 358 [2d Dept 2006]). Under the estoppel criteria, the MLMIC defendants have prima facie established that plaintiff's execution of the Consent to Settle form on October 26, 2007, was intended to convey the impression that plaintiff was giving his unconditional, written consent to the settlement of the Edwards Action, with the expectation that plaintiff would be released from liability. The MLMIC defendants have also demonstrated that they lacked knowledge of the true facts and justifiably relied in good faith upon plaintiff's representations when they thereupon settled the Edwards Action, obtaining a general release of Edwards' claims upon paying $135,000 on plaintiff's behalf, among other expenditures (*see Twumasi v TJMT Transp. Serv., Inc.*, 267 AD2d 153, 154 [1st Dept 1999] ["where, as here, defendants relied on the settlement to their detriment, plaintiff is equitably estopped from avoiding it"]; *Marshall v Stark*, 276 AD2d 601, 603 [2d Dept 2000] [plaintiff was estopped from asserting that he was fraudulently induced to sign a 1991 settlement agreement where he commenced an action to enforce the settlement in 1993 which was settled and the entire settlement sum was paid to plaintiff]).

The MLMIC defendants have also prima facie established that plaintiff ratified his consent to settle by accepting the benefits of the settlement and general release, and further, by failing to challenge his consent to settle until 18 months after the written consent was signed (*see Philips South Beach, LLC v ZC Specialty Ins. Co.*, 55 AD3d 493, 493 [1st Dept 2008] [action seeking to set aside settlement agreement as procured by duress was properly

dismissed because plaintiff ratified the settlement by accepting its benefits and failing to repudiate it in a prompt fashion]; *Napolitano v City of New York*, 12 AD3d 194, 195 [1st Dept 2004] [claim that plaintiff was coerced into entering guilty plea settling disciplinary charges was barred because "[h]aving accepted the benefits of the settlement, plaintiff ratified the release, and [was] therefore barred from alleging duress in its execution," and almost two years passed between the alleged duress and the filing of the complaint which further undermined the claim of duress]).

In opposition, plaintiff has failed to raise a triable issue of fact (*see Korngold*, 26 AD3d at 358). Plaintiff has clearly benefitted from the settlement. He does not dispute that for a considerable period of time he received, and indeed continues to receive, the benefits of the general release under the settlement of the Edwards Action. He paid nothing out of pocket to settle the case, and he has not reimbursed MLMIC for the $135,000 that it paid to Edwards on his behalf (*see Er-Loom*, 77 AD3d at 547; *Napolitano*, 12 AD3d at 195; *Markovitz v Markovitz*, 29 AD3d 460, 461 [1st Dept 2006]; *Belmont Homes, Inc. v Kreutzer*, 6 AD2d 697, 697 [2d Dept 1958], *aff'd* 6 NY2d 800 [1959]).

Plaintiff's purported failure to understand the plain language of the Policy does not require a contrary result (*see Beekman Regent Condominium Assn. v Greater New York Mut. Ins. Co.*, 45 AD3d 311, 311 [1st Dept 2007] [plaintiffs' contention that they were unaware of contractual limitations clause was insufficient to raise a factual issue as to the applicability of the clause since "an insured has an obligation to read his or her policy and is presumed to have consented to its terms"] [quotations omitted]). Moreover, plaintiff's conclusory allegations of fraud are insufficient to state a cause of action under the present circumstances (*see Wilson v Neppell III*, 253 AD2d 493, 494 [2d Dept 1998] [plaintiff's conclusory allegations of fraud and duress failed to state a cause of action because, where plaintiff "accepted the benefits of the parties' agreement for over three years without objecting, she [was] deemed to have ratified the

contract"]).

The Court, therefore, concludes that plaintiff's claims against the MLMIC defendants are barred by the doctrines of equitable estoppel and ratification. Accordingly, the MLMIC defendants' motion for summary judgment is granted.

For these reasons and upon the foregoing papers, it is,

ORDERED that the MLMIC defendants' motion for summary judgment is granted, and the complaint is dismissed as against MLMIC, Fager & Amsler, Fager & Assoc., Fager, Amsler, Neuburger, Murphy, Knoop, and Femia; and it is further,

ORDERED that the remainder of this action shall continue; and it is further,

ORDERED that the MLMIC defendants shall serve a copy of this order, with notice of entry, upon all parties.

This constitutes the Decision and Order of the Court.

Dated: December 27, 2010

Paul Wooten J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**