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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: HON. RALPH P. FRANCO, Justice

TRIAL/IAS, PART 12

PHYSICIANS' RECIPROCAL INSURERS

Plaintiff(s),

INDEX No.: 003404/02

-against- MOTION SEQ. NO: 1

JOHN P. LANDI, M.D., et al.

Defendant(s).

The following papers read on this motion:

Notice of Motion/ Order to Show Cause..... 1 - 3

Answering Affidavits.....

Replying Affidavits.....

Motion by attorney for Plaintiff for an Order pursuant to CPLR 322, granting summary judgment in favor of Plaintiff for the declaratory relief requested in the complaint, and directing the Clerk to enter judgment declaring PRI has no obligation to further defend John P. Landi, M.D., or make any payment on his behalf, in the

action entitled **Carlos Irizarry and Edia Irizarry v. John P. Landi,** pending in Supreme Court, Bronx County, Index No. 20993/97, is **granted.**

PRI is a reciprocal insurer, organized under Article 61 of the Insurance Law, providing professional liability insurance to its subscribers. PRI insured John P. Landi, M.D., on a claims made basis, pursuant to Policy No. 26154-00-00, effective January 1, 1987, ("The policy"). PRI provided excess coverage pursuant to Policy No. 26154-00-00X. The policies were cancelled, effective April 28, 1997. Defendants', Carlos Irizarry and Edia Irizarry are Plaintiffs' in an action sounding in medical malpractice and entitled, **Carlos Irizarry and Edia Irizarry v. John P. Landi,** pending in Supreme Court, Bronx County, Index No. 20993/97, ("The underlying action"). Dr. Landi performed a hernia surgery on Carlos Irizarry at Westchester Square Medical Center.

Under the terms of the cancelled claims made PRI policy,

coverage was provided to Dr. Landi for claims which arise from professional services he rendered during the policy period and reported to PRI during the policy period. There is no insurance coverage for claims reported after termination of the policy unless the insured obtains extended reporting coverage ("tail coverage") by paying a separate premium. Dr. Landi did not purchase tail coverage. Dr. Landi has no coverage for the underlying action because PRI first received written notice of the underlying action after cancellation of the policy. Nor has Dr. Landi excess coverage since he did not maintain underlying insurance. PRI is defending Dr. Landi in the underlying action pursuant to regulation promulgated by the State of New York Insurance Department (Exhibit G). PRI's policy complies with the regulation and protects hospitals whose facilities are used by physicians who fail to buy tail coverage. The underlying action is premised on the alleged negligence that took place at Westchester Square Medical Center.

Accordingly, pursuant to regulation, as well as the cancelled policy, PRI extended a defense to Dr. Landi. However, now that there are no claims against Westchester Square Medical Center, PRI contends it is no longer obligated to continue the defense.

By letter dated August 14, 1997, PRI informed Dr. Landi he has no coverage for the period July 1, 1982 to April 28, 1997. Four months after cancellation of the policy, on August 15, 1997, Index Number 20993 was purchased and the summons and complaint to the underlying action was filed with the Clerk of the Supreme Court, Bronx County. PRI first received written notice of the underlying action on October 2, 1997, about six months after cancellation of the policy. By letter dated October 21, 1997, PRI informed Dr. Landi, the allegedly injured party, and his attorney, that there is no policy of insurance covering the underlying action, but that because a hospital was named as a Defendant, PRI would provide Dr. Landi with a defense. PRI arranged for counsel to

represent Dr. Landi. By Stipulation, dated January 3, 2000, and filed with the Clerk of the Court on June 5, 2001, the underlying Plaintiff discontinued the underlying action against Ralph M. Capalbo, Jr., M.D., with prejudice. By Stipulation dated May 7, 2001, and filed with the Clerk of the Court on July 27, 2001, the underlying Plaintiff discontinued the underlying action as against Westchester Medical Center. PRI commenced this action on February 26, 2002. An answer, dated May 8, 2002, was interposed on behalf of the Defendants', Carlos Irizarry and Edica Irizarry. Dr. Landi has not answered or otherwise appeared in the action.

Mr. Irizarry claims negligent hernia surgery by Landi. Irizarry claims he suffers from erectile dysfunction and claims he is unable to sexually perform as he was able to before the surgery. He claims he is unable to take Viagra because of a heart condition. Dr. Landi performed surgery on November 29, 1994, at Westchester Square Medical Center where Mr. Irizarry was his private patient.

The Court does not agree with the position put forward by attorney for Irizarry that an equitable estoppel should be applied to the Plaintiff insurance company on the ground that the hospital would not have been let out of the case had it been known that Dr. Landi lacked malpractice coverage.

Insurance Law Sec. 3420(d) applies to those situations where the carrier denies liability by invoking an exclusion to the policy that renders the otherwise covered claim excluded from coverage. The statute does not apply when the claim falls outside the scope of coverage purchased. **Zappone v. Home Ins. Co.,** 55 N.Y.2d 131; **Empire Group Allcity Insurance Company v. Cicciaro, 240 A.D.2d 362.** Defendant, Landi had purchased a claims made policy. He reported the action after the expiration of the policy. He did not purchase tail coverage. Tail is insurance coverage that is effective upon the cancellation or termination of the policy. **In Re Lavigne,** 114 F.3d 379 PRI neither receive a premium for Tail

insurance nor a contract to provide coverage for claims reported after the expiration of the policy.

Estoppel may not be used to impose coverage obligations where no insurance coverage exists. **Empire Group Allcity Insurance Co. V. Daniel Ciciaro,** 240 A.D.2d 362; **Employers Insurance of Wassau v. County of Nassau,** 141 A.D.2d 496, (insurer not estopped from disclaiming coverage, even though disclaimer untimely, because the claim was outside coverage); **Van Buren v. Employers Insurance of Wassau,** 98 A.D.2d 774, (coverage by estoppel not permitted where there is no policy covering the loss, even though insurer provided a legal defense); **Wassau Insurance Companies v. Feldman, M.D.,** 213 A.D.2d 179, (insurer entitled to withdraw defense, no policy covered the loss).

No expert affidavit is submitted to demonstrate to the Court that meritorious claims against the hospital and co-Defendant doctor

existed.

Dr. Landi filed a Chapter 7 Petition for bankruptcy. As such, there were no assets available for creditors. Under the bankruptcy law, counsel had no choice but to enter into a Stipulation limiting recovery to the insurance policy. Otherwise, he could not proceed with the action against Dr. Landi in state court. In fact, counsel could face **sanctions** if he attempted to pursue a state action against Landi in violation of the bankruptcy code. See: **Green v. Welsh,** 956 F.2d 30.

This is the decision and order of the Court and terminates all proceedings under Index No. 003404/02.

Dated: 9/25/02

Hon. Ralph P. Franco

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