Scan

INDEX
No. 13265-08

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 11 NASSAU COUNTY

PRESENT:
HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: 10-7-08
Submission Date: 10-28-08
Motion Sequence No.: 001,002/MOT D

THE SAGEMARK COMPANIES, LTD., PREMIER P.E.T. OF LONG ISLAND, LLC AND PET MANAGEMENT OF QUEENS, LLC,

Plaintiffs,

- against -

ARCH INSURANCE GROUP INC. a/k/a ARCH SPECIALTY INSURANCE AGENCY INC.,

Defendants.

COUNSEL FOR PLAINTIFFS
Westerman, Ball, Ederer, Miller & Sharfstein, LLP
170 Mineola Blvd., Suite 400
Mineola, New York 11501

COUNSEL FOR DEFENDANT
Mound, Cotton, Wollan & Greengrass, Esqs.
One Battery Park Plaza
New York, New York 10004

ORDER

The following papers were read on Defendant's motion to dismiss the complaint and Plaintiffs' cross-motion to amend the caption:

Notice of Motion dated September 16, 2008;
Affirmation of Antoinette L. Banks, Esq. dated September 16, 2008;
Affidavit of Rebecca Apel sworn to on September 16, 2008;
Affidavit of Ray Pernsteiner sworn to on September 16, 2008;
Affidavit of Kevin O'Brien sworn to on September 16, 2008;
Defendant's Memorandum of Law;

Notice of Cross-motion dated October 13, 2008;
Affirmation of Judah Wernick dated October 13, 2008;
Affidavit of George W. Mahoney sworn to on October 9, 2008;
Affidavit of Lucille Taverna dated October 13, 2008;
Plaintiffs' Memorandum of Law;
Defendant's Reply Memorandum of Law.

Defendant, Arch Specialty Insurance Company, s/h/a Arch Insurance Group, Inc. a/k/a Arch Specialty Insurance Agency, Inc. moves pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint which seeks a judgment declaring that certain medical malpractice polices are void. Plaintiff cross-moves to amend the caption to reflect the correct name of the Defendant.

BACKGROUND

Plaintiffs, the Sagemark Companies Ltd., and its subsidiaries Premier P.E.T. of Long Island, LLC ("Long Island LLC") and PET Management of Queens, LLC ("Queens LLC")(collectively "Sagemark"), allege that they are not physicians, and that the LLCs are prohibited from practicing medicine under New York law. Thus, they allege that they do not require medical malpractice insurance and that Defendant, Arch Specialty Insurance Agency Inc. ("Arch"), issued medical malpractice insurance to them knowing that they did not practice medicine. Plaintiffs demand a return of premiums paid for policies and renewals thereof over a multi-year period.

Addressing the specific allegations of the complaint, paragraph 5 alleges that "this is an action for a declaratory judgment . . . that certain medical malpractice insurance policies . . . are null and void and that, accordingly, all premiums paid in connection with such void policies should be returned to Plaintiffs..." Plaintiffs seek a

return of $337,851.96 in premiums paid over a period of several years for the subject policies and renewals thereof.

The basis for the claim that the policies are void is that "the New York LLCs do not engage in the practice of medicine" and that pursuant to New York law "limited liability companies are prohibited from engaging in the practice of medicine" (Complaint (Complaint ¶¶ 7, 8). The complaint alleges that although Sagemark submitted applications which state that the Long Island and Queens LLCs provide "management and administrative" services, Arch purported to issue "a medical malpractice insurance policy".

Complaint ¶¶ 20 and 21 state that the Plaintiffs are "in the business of managing radiology medical practices" and do not perform any "radiology or other medical services themselves." The complaint alleges that "since the New York LLCs do not provide any *medical services* and *are prohibited* by New York Law from doing so" there was no basis for Arch to issue the policies (emphasis supplied). Plaintiffs repeatedly refer to the alleged medical malpractice policies as "the Void Policies" (Complaint ¶ 23).

Plaintiffs allege that "in addition, because there was no insurable risk since the New York LLCs were not engaged in the practice of medicine and because New York Law expressly prohibits New York LLCs from practicing medicine, any such medical malpractice insurance policies purportedly issued to them by Arch . . . are null and void and without force and effect" (Complaint ¶ 24).

Plaintiffs allege that Arch was aware that "the New York LLCs did not provide medical services, yet still issued the policies to the New York LLCs and collected

premiums. . . " (Complaint ¶ 30). Plaintiffs also use the term "health care professional" services interchangeably with "medical" services, repeating that they are "prohibited from providing such services under New York law" (Complaint ¶ 32).

The complaint concludes: "As the New York LLCs do not, and legally cannot, perform any health care professional services, there is no insurable risk under the Void Policies, and the Void Policies are void, and the premiums paid for these policies by Sagemark and/or the New York LLCs must be returned to them" (Complaint ¶ 34).

Arch avers that the policies issued to Plaintiffs did not provide coverage for medical malpractice, but rather for "healthcare professional services." It claims that the Long Island and Queens LLCs are not legally prohibited from, and do provide, healthcare services covered by the subject policies, that risk attached, and that Plaintiffs are not entitled to a return of premiums. In support, they provide a copy of Sagemark Companies Ltd. Form 10-KSB filed with the Securities and Exchange Commission for the fiscal year ended December 31, 2007. Arch also submits copies of the subject insurance policies.

Sagemark's annual report under the Securities Exchange Act of 1934, Form 10-KSB, for the fiscal year ending December 31, 2007, reports that Sagemark had operated PET/CT, short for Positron Emission Tomography and Computer Tomography, imaging centers at multiple locations throughout the United States, including Kansas, New York, New Jersey and Florida. Page 6 of the report (Moving Papers Ex. B, p. 12 of 103) notes that some of the states in which Sagemark operated "prohibit the practice of medicine by non-physicians . . . prohibit the employment of

physicians by non-professional entities, and prohibit the rebate or division of fees between physicians and non-physicians."

In contrast, the report also indicates that Sagemark provided "imaging procedures" for Medicare patients (*Id.* at p. 33 of 103). The range of services provided is clear from the recitation of Sagemark's sources of revenue, *viz.*, "net patient service revenue from the PET imaging centers which we own, management fees from the PET imaging centers which we manage pursuant to services agreements, and lease revenue from PET imaging centers where we lease time on the PET/CT equipment to physician groups." (*Id.* at p. 30 of 103).

The report indicates that imaging services provided at Sagemark's PET imaging centers "involve the controlled storage, use and disposal of material containing radioactive isotopes" which "presents a risk of accidental environmental contamination and physical injury" (*Id.* at p. 16 of 103). The report indicates that all but one of the imaging centers has been sold.

Turning to the subject Arch policies, Section 1(a) provides coverage for "amounts that the insured becomes legally required to pay as damages because of 'medical professional injury' that results from acts or omissions in the providing of or failure to provide 'health care professional services' *by or for* an insured" (emphasis supplied).

Section VIII (definitions) at ¶ 13 defines "medical professional injury" as "injury, including death, to others that results from acts or omissions in the providing of or failure to provide 'health care professional services' by or for an insured."

Paragraph 10.a defines "health care professional services", in part, as, "Medical; surgical, dental, x-ray, nursing, mental or other similar health care professional services or treatments". Paragraph 10.b includes "[p]roviding or dispensing food, beverages, medications or medical supplies or appliances in connection with services described in Paragraph 11.a (*sic*) above."

Having defined what is covered, the policy describes who an "insured" is. With regard to a limited liability company coverage it provides:

> with respect to the provision of "health care professional services" by you or for you. Your members are also insureds . . . with respect to the conduct of your business. Your managers are insureds . . . with respect to their duties as your managers.

However, "*no* intern, extern, resident, or dental, osteopathic or *medical doctor is an insured* for any 'medical professional injury' that results from acts or omissions in the providing of or failure to provide 'health care professional services'."

DISCUSSION

The foregoing language precludes any claim that the policy, which covers health care professional services, includes as an insured any medical or osteopathic doctor. Thus, the documentary evidence defeats, as a matter of law, any claim that the subject policies are medical malpractice policies.

Where the documentary evidence "utterly refutes Plaintiff's factual allegations, conclusively establishing a defense as a matter of law" dismissal is warranted. Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314, 326 (2002). Plaintiffs fail to state a

claim that no risk ever attached on the basis that an LLC is prohibited from practicing medicine, as doctors are precluded from coverage under the subject policies. As the complaint seeks a declaratory judgment, dismissal is not an appropriate remedy and judgment must be declared on behalf of Defendant. See, Lanza v Wagner, 11 N.Y.2d 317, 334, *app. dism.*, 371 U.S. 74, *cert den.*, 371 U.S. 901 (1962).

Plaintiffs have not sought leave to amend the complaint to allege that they are prohibited under New York law from providing "medical professional services" as defined. This is not an example of a matter in which the affidavits submitted by a Plaintiff remedy defects in the complaint. See, Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 635 (1976). ("affidavits may be used freely to preserve inartfully pleaded, but potentially meritorious, claims"). See also, Nonnan v. City of New York, 9 N.Y.3d 825 (2007).

The essence of the complaint is that Plaintiffs are legally prohibited from performing the very acts for which they claim they are insured. The affidavits do not provide any alternative prohibitions limiting their services as a matter of law. For example, licensed technicians routinely administer x-rays, and a technician need not be a radiologist/physician (See e.g., Public Health Law Art. 35). Plaintiff has not alleged that an LLC is precluded from employing technicians or administering x-rays on behalf of a radiologist. Plaintiffs' affidavits have not shown that, although they have failed to state a cause of action, they nevertheless are possessed of one.

The only colorable claim supported by the present record is that Plaintiffs' private management services contracts with third parties do not provide for the

services which are covered under the subject policies. However, Plaintiffs, in attempting to save the complaint, have not provided affidavits or provided any authority that such private contracts with third parties would constitute sufficient grounds to void the subject policies after they have expired. Nor have they alleged that Arch was aware of the terms of the management contracts.

Indeed, the insurance application has the box marked "X-ray Imaging Center Management" checked under the legend "Health Care Services Provided" (Maloney Aff. Ex. C p. 2). It also indicates that Plainfiffs engage in hiring health care professionals and engage in the screening procedures outlined in the application (*Id.* at p. 6).

It would be inappropriate under the circumstances presented to require a refund of premiums of expired policies which are not void. See, O'Connor Transportation Co. v. Glens Falls Ins. Co., 204 App. Div. 56, 58 (4th Dept 1922), where the Court stated:

> I gravely doubt that we should adopt the doctrine in *Waller v. Northern Assurance Co.* (64 Iowa 101 [1884]). The principle in that case has not been followed in any jurisdiction so far as I can discover. Where the policy has expired and there has been no loss and no question of the validity of the policy has arisen, it seems to me that it would be against public policy and good morals to permit a recovery of the premium on the ground that the policy had at all times been invalid *because the insured had made or taken advantage of a warranty therein which was not true.* (emphasis supplied)

Thus, the action must be dismissed.

Since the caption misstates the identity of Defendant the caption should be amended notwithstanding the dismissal of this action.

Accordingly, it is,

ORDERED, that Defendant's motion to dismiss this action is **granted**; and it is further,

ORDERED, that Plaintiff's cross-motion to amend the caption herein is **granted**.

The caption is hereby amended as follows:

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

THE SAGEMARK COMPANIES, LTD.,
PREMIER P.E.T. OF LONG ISLAND, LLC AND
PET MANAGEMENT OF QUEENS, LLC

v.

ARCH SPECIALTY INSURANCE GROUP

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
February 4, 2009

Hon. LEONARD B. AUSTIN, J.S.C.