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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

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UTICA MUTUAL INSURANCE COMPANY,

Plaintiff,

-against-

INDIVIDUAL DEFENDANTS
ALEC CULLUM, KENYA PEAVY, STERLING HENDERSON, ANTHONY FENNER, JAME HAMILTON, WEI DUN WARREN, U-HAUL MOVING AND STORAGE OF HEMPSTEAD,
HEALTHCARE PROVIDER DEFENDANTS
PREMIER SURGICAL SERVICES, P.C., LONGEVITY MEDICAL SUPPLY, INC., M & M MEDICAL, P.C., ATLANTIC CHIROPRACTIC, P.C., ACTUAL CHIROPRACTIC, P.C., HMP ORTHOPEDICS, P.C., ANESTHESIA ASSOCIATES OF BORO PARK, EASY CARE ACUPUNCTURE, P.C., ULTIMATE HEALTH PRODUCTS, INC., PERFECT DRUGS, INC., NATIONAL MEDICAL & SURGICAL SUPPLY, INC., EMPIRE CITY LABORATORIES, INC. PRIME MOVERS PHYSICAL THERAPY, PLLC, NEW CAPITAL SUPPLY, INC., HILLSIDE OPEN MRI, P.C., HEEL TO TOE FOOT CENTER, LLC, VICTORY MEDICAL DIAGNOSTICS, P.C., K.O. MEDICAL, P.C., NEW MILLENIUM PSYCHOLOGICAL SERVICES, P.C., UPPER EASTSIDE SURGICAL, PLLC, V & T MEDICAL, P.C., ADVANCED CHIROPRACTIC SERVICES, P.C., RICHARD PEARL, M.D. TITAN PHARMACY,

Defendants

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TRIAL/IAS PART 17

INDEX # 16426/11

Motion Seq. 1
Motion Date 1.5.12
Submit Date 3.1.12

The following papers were read on this motion: Papers Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed..... 1
Answering Affidavit 2,3,4
Reply Affidavit..... 5,6,7

Plaintiff, Utica Mutual Insurance Company ("Utica"), moves, by Order to Show Cause, for an order, pursuant to CPLR 2201, staying any and all actions against it, pending the outcome and determination of this action. The pending actions include:

> Atlantic Chiropractic P.C. a/a/o Anthony Fenner v. Utica Mutual Insurance Company (Civil Court, Kings County, Index No. 51293/11)
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> Advanced Chiropractic Services, P.C. a/a/o Sterling Henderson v. Utica Mutual Insurance Company (Civil Court, Kings County, Index No. 52263/11)
>
> Premier Surgical Services, P.C. a/a/o Anthony Fenner v. Utica Mutual Insurance Company (AAA Case No.: 412011048363)
>
> Premier Surgical Services, P.C. a/a/o Kenya Peavy v. Utica Mutual Insurance Company (AAA Case No.: 412011048371)
>
> Victory Medical Diagnostics, P.C. a/a/o Anthony Fenner v. Utica Mutual Insurance Company (Civil Court, Bronx County, Index No. 47008/11)
>
> Longevity Medical Supply, Inc. a/a/o Kenya Peavy v. Utica Mutual Insurance Company (Civil Court, Kings County, Index No. 57891/11)
>
> Richard Pearl, MD a/a/o Anthony Fenner v. Utica Mutual Insurance Company (AAA Case No.: 412011067949)

Victory Medical Diagnostics, P.C. a/a/o Kenya Peavy v. Utica Mutual Insurance Company (AAA Case No.: 412011068277)

Victory Medical Diagnostics, P.C. a/a/o Kenya Peavy v. Utica Mutual Insurance Company (AAA Case No.: 412011068277)

Atlantic Chiropractic P.C. a/a/o Kenya Peavy v. Utica Mutual Insurance Company (Civil Court, Kings County, Index No. 57326/11)

Longevity Medical Supply, Inc. a/a/o Sterling Henderson v. Utica Mutual Insurance Company (Civil Court, Queens County, Index No. 079045/11)

Plaintiff also seeks an order granting it a preliminary injunction enjoining the defendants from commencing, prosecuting or proceeding on any arbitrations pending the outcome and determination of this action. The motion is denied.

At the heart of this action is a motor vehicle accident that took place on February 13, 2011. Specifically, the vehicle owned by Alec Cullum (Cullum) was being operated by Kenya Peavy (Peavy) and contained passengers Sterling Henderson (Henderson) and Anthony Fenner (Fenner). The Cullum vehicle was rear-ended by a rental vehicle, to wit, a 2010 Ford U-Haul van, owned by the defendant U-Haul Moving and Storage of Hempstead, and being operated by defendant Jame Hamilton. Defendant Wei Dun Warren was a passenger in the U-Haul van at the time of the accident.

Plaintiff, Utica, provided a policy of insurance to its insured, the defendant Alec Cullum. The policy included a no-fault endorsement which provided coverage to an insured or an eligible injured person for first party benefits for basic economic loss resulting from a motor vehicle accident. The policy was in effect on February 13, 2011.

As a result of this collision, the "Individual Defendants" noted above made claims, as purported eligible injured persons under the policy issued by Utica. The Individual Defendants, sought no-fault benefits from the various "Healthcare Provider" defendants. Subsequently, the Healthcare Provider defendants submitted billing to Utica for the treatment that was allegedly rendered to Kenya Peavy, Sterling Henderson and Anthony Fenner. Prior to the submission of the bills, the Healthcare Provider Defendants obtained from Peavy, Henderson and Fenner Assignment of Benefits forms which allowed the defendants to submit the bills directly to Utica. The Assignment of Benefits forms granted the defendants the rights to pursue collection of unpaid no-fault bills directly from Utica, and also compelled the defendants to meet conditions precedent to coverage before Utica sustained any liability under the regulation or the policy of insurance.

However, as a result of, *inter alia*, the failure of the defendants in the underlying actions to meet certain conditions precedent to coverage, Utica denied the defendants' application for no-fault benefits. As a result, the Healthcare Defendants commenced various actions and proceedings against Utica.

Plaintiff, Utica, in turn, commenced this declaratory judgment action asserting five causes of action: first, the incident of February 13, 2011 is not the product of a covered event; second, it

has no obligation to provide coverage for any claims made for the alleged incident of February 13, 2011; and, the third, fourth and fifth causes of action are each premised upon plaintiff's claim that it is not obligated to pay for any harm, injury, or treatment for the alleged incident of February 13, 2011. It is plaintiff's contention that the events which give rise to the defendants' claims and the subject lawsuit were the product of an intentional incident, which was perpetrated solely for the purpose of inflicting intentional bodily harm and injury upon the Individual Defendants. Utica contends that the applicable policy of insurance and accompanying endorsements that it issued to its insured do not afford coverage to any defendants named herein, for any of the events leading up to the alleged incident of February 13, 2011, the events of February 13, 2011, and the events subsequent to February 13, 2011 (Aff. In Support of Order to Show Cause, ¶¶5-6).

Upon the instant motion, the plaintiff seeks an immediate stay and an injunction of any and all current, pending and/or future no-fault actions, no-fault arbitrations, no-fault lawsuits, or no-fault proceedings, involving any and all of the defendants named herein, their agents, employees, assignees and/or heirs, pending the hearing and the resolution of the instant declaratory judgment action.

Initially, it is noted that the only defendants to oppose the plaintiff's instant motion are: defendants Perfect, National, New Capital and Heel to Toe; defendants Premier, Richard Pearl, M.D., and Upper East Side; and defendants Longevity, Ultimate and New Millennium.

The procedural device of a preliminary injunction is designed to maintain the status quo pending determination of an action (*City of Long Beach v. Sterling Am. Capital, LLC*, 40 AD3d 902, 903 [2nd Dept. 2007]). The party seeking the preliminary injunction has the burden of

establishing a prima facie entitlement to such relief (*Gagnon Bus Co., Inc. v. Vallo Transportation, Ltd.*, 13 AD3d 334 [2nd Dept. 2004]); *William M. Blake Agency, Inc. v. Leon*, 283 AD2d 423 [2nd Dept. 2001]). The decision whether to grant or deny such relief rests in the sound discretion of the court (*Ruiz v. Meloney,* 26 AD3d 485, 486 [2nd Dept. 2006]). In determining whether a movant has met this standard, the court is mindful that a preliminary injunction is a drastic remedy which should be used sparingly, with caution, and only when required in urgent situations or grave necessity and then upon the clearest evidence (*Wm. Rosen Monuments, Inc. v. Phil Madonick Monuments, Inc.*, 62 AD2d 1053 [2nd Dept. 1978]).

In order to obtain a preliminary injunction the movant must demonstrate: (1) a likelihood of success on the merits; (2) irreparable injury absent the granting of the requested relief; and (3) a balancing of the equities in the movant's favor (*Aetna Ins. Co. v. Capasso*, 75 NY2d 860, 862 [1990]; *W.T.Grant v. Srogi*, 52 NY2d 496 [1981]; *Wiener v. Life Style Futon Inc.*, 48 AD3d 458 [2nd Dept. 2008]). That is, the injury to be sustained by plaintiff must be more burdensome to plaintiff than the harm which would be caused to defendants through the imposition of the injunction (*McLaughlin, Piven, Vogel, Inc. v. W.J. Nolan & Co., Inc.*, 114 AD2d 165, 174 [2nd Dept. 1986], *app. den.* 67 NY2d 606 [1986]). Further, to establish a likelihood of success on the merits, the movant must show that its right to a preliminary injunction is plain on the facts of the case (*Peterson v. Corbin*, 275 AD2d 35, 37 [2nd Dept. 2000], *lv. app. dism.*, 95 NY2d 919 [2000]). Proof establishing the necessary elements must be supported by affidavit and other competent proof buttressed by evidentiary detail (CPLR 6312[c]). Bare, conclusory allegations are insufficient to support the application (*Neos v. Lacey*, 291 AD2d 434, 435 [2nd Dept. 2002]).

If a movant establishes the elements necessary to satisfy the tripartite test, factual issues raised by the opponent will not necessarily mandate denial of the motion (CPLR 6312). The existence of issues of fact cannot serve as the sole basis for denial of the motion.

Here, while the plaintiff has met its burden of demonstrating a likelihood of success on the merits, in the absence of any demonstration of an irreparable injury, its motion must be denied.

Plaintiff's primary claim for declaratory relief is that the incident of February 13, 2011 is not the product of a covered event; that the loss was staged and/or intentional. It is true that "[a] deliberate collision caused in furtherance of an insurance fraud scheme is not a covered accident" (*State Farm Mut. Auto. Ins. Co. v. Laguerre*, 305 AD2d 490, 491 [2nd Dept. 2003]). In *Fair Price Med. Supply Corp. v. Travelers Indem. Co.*, 42 AD3d 277, 284 [2nd Dept. 2007], *aff'd.* 10 NY3d 556 [2008], the Second Department explained that "[w]hat excuses the insurer's compliance with the 30–day rule in a staged-accident case is not the egregiousness of the fraud; rather, it is the absence of coverage for something that is not an accident.' " As noted by the Appellate Division, "[t]he rationale for such [a] holding[ ] is that a deliberate collision that is caused in furtherance of an insurance fraud scheme is simply not an accident covered by the subject insurance policy" (Id. at 283). Thus, in the case at bar, plaintiff can premise its claim upon a lack of coverage and establish this claim by a preponderance of the evidence. Specifically, if the insurer, Utica, establishes that it had a "founded belief" that the alleged accident was not a true accident, it will be permitted to deny the claim based on 11 NYCRR 65–3.8(e)(2). The

insurer has the burden to come forward with proof in admissible form to establish the fact or the evidentiary foundation for its belief that there is no coverage (*Mount Sinai v. Triboro Coach Inc.*, 263 AD2d 11 [2nd Dept. 1999]). If this threshold is reached, the burden shifts to the individual and/or its assignee to rebut the insurer's case. Here, the insurer, Utica, meets the threshold.

In establishing its claim that there is no coverage for the subject loss, Utica submits the affidavit of its investigator who, in turn, relies upon the expert affidavit of a biomedical engineer. That is, plaintiff's claim that the loss was staged and/or intentional is based upon the affidavit of Frank Emmerich, "an investigator in the Special Investigative Unit of Utica National Insurance Group of which [plaintiff] is a part," who states in his affidavit that there were numerous inconsistencies in the stories of the parties involved (Order to Show Cause, Ex. FF, ¶1).

Emmerich states in his affidavit that "[a]s was learned during the course of my investigation, the most telling discovery is that the insured/owner of the subject vehicle, the driver, and the two alleged passengers were 'hanging out' at the home of the individual who at 3:15 p.m. that same day rented the very U-Haul van that was the offending car in this very incident at 7:03 p.m. that evening." (Id. at ¶5). Emmerich states that while Cullum and Henderson did not appear for their respective Examinations Under Oath, the EUOs of Kenya Peavy and Anthony Fenner revealed material discrepancies as to the happening of the accident (Id. at ¶¶16-17). Emmerich further states that he retained the services of a Biomedical Engineer to conduct a study of the subject accident and of the injuries allegedly sustained by Peavy, Fenner and Henderson. Based upon that study, Emmerich concluded, *inter alia*, that "the accelerations

experienced by Peavy, Henderson and Fenner, were within the limits of human tolerance and their individual personal tolerances . . . and were comparable to that experienced during various daily activities" and that "there is no injury mechanism in the subject incident for the claimed [injuries of Peavy, Henderson or Fenner such that] a causal relationship between the subject incident and the [injuries can] be made" (*Id.* at ¶20[a]-[g]).

This court finds that giving Emmerich's trained opinion some weight (*Travelers Indemnity Co. v. Morales*, 188 AD2d 350, 351 [1st Dept. 1992]), there is sufficient evidence to carry Utica's burden of coming forward with a "founded belief" that the collisions were "staged." In opposition, the defendants fail to furnish any admissible evidence defeating the plaintiff's prima facie showing of declaratory judgment relief (CPLR 3001). Nonetheless, despite its demonstration of a likelihood of a success on the merits of its underlying declaratory judgment action, in the absence of any demonstration as to the existence of an irreparable injury, the plaintiff's motion must be denied.

In the context of a preliminary injunction, irreparable injury is one that cannot be redressed through a monetary award (*McLaughlin, Piven, Vogel, Inc. v. W.J. Nolan & Co., Inc.*, *supra* at 174; *Walsh v. Design Concepts, Ltd.*, 221 AD2d 454, 455 [2nd Dept. 1995]). Monetary loss will not amount to irreparable harm unless the movant provides evidence, not here present, of damage that cannot be rectified by financial compensation. Further, the alleged harm must be shown by the moving party to be imminent, not remote or speculative (*Golden v. Steam Heat, Inc.*, 216 AD2d 440, 442 [2nd Dept. 1995]).

Under the circumstances presented here, Utica has not demonstrated a sufficient prospect of irreparable harm to warrant the issuance of a preliminary injunction.

Plaintiff claims that it is seeking a preliminary injunction to avoid having to defend the listed matters, including any and all future related proceedings, and having it bear the cost of litigation (Aff. In Support, ¶103). As stated above, economic loss which is compensable by money damages does not constitute irreparable harm warranting the granting of a preliminary injunction (*EdCia Corp. v. McCormack*, 44 AD3d 991 [2nd Dept. 2007]; *1659 Ralph Ave. Laundromat Corp. v. David Enteprises LLC*, 307 AD2d 288 [2nd Dept. 2003]).

Further, plaintiff has not shown that the behavior to be stopped is imminent. That is, counsel for the plaintiff consistently maintains that if the injunction is not granted by this court, the plaintiff "*may be* obligated to provide coverage for an incident it determined to be the product of a staged or intentional act," "the underlying lawsuits and any other action or arbitration *may* produce inconsistent decisions based upon the determinations made by the individual arbitrators and/or judges," and "there *could* [be] a multiplicity of inconsistent decisions" (Aff. In Opposition, ¶¶111-113 [Emphasis Added]). Plaintiff's alleged harm in this case is remote and speculative, at best. It cannot form the predicate for injunctive relief (*Golden v. Steam Heat, Inc.*, *supra*).

Based on the foregoing, the plaintiff's motion for a preliminary injunction is herewith **DENIED**.

The parties' remaining contentions have been considered by this court and do not warrant discussion.

The foregoing constitutes the decision and order of this court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
April 25, 2012

ENTER:

HON. JEFFREY S. BROWN
J. S. C.

ENTERED
APR 27 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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