SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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AMERICAN STATES INSURANCE COMPANY and SAFECO INSURANCE COMPANY,

Plaintiff,

- v -

CARLOS ORTIZ-BERMUDEZ, NEW YORK CITY FIRE DEPARTMENT BUREAU OF EMERGENCY MEDICAL SERVICES, ST. BARNABAS HOSPITAL, and STAND UP MRI OF THE BRONX, PC,

Defendants.

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INDEX NO. 652590/2023

MOTION DATE 03/04/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 8, 9, 10, 11, 12, 13, and 14

were read on this motion for INJUNCTIVE RELIEF.

LOUIS L. NOCK, J.S.C.

In this no-fault declaratory judgment action, plaintiffs seek to disclaim coverage of injuries suffered by defendant Carlos Ortiz-Bermudez when he was struck by a vehicle driven by plaintiffs' policy holder, nonparty Joshua Toro. Plaintiffs argue, among other things, that Ortiz-Bermudez failed to cooperate with plaintiffs' investigation of the accident in violation of the policy and 11 NYCRR 65-1.1, specifically, because he appeared for an examination under oath ("EUO") and invoked his right against self-incrimination as protected by the United States and New York Constitutions due to a related criminal proceeding against him. Presently before the court is Ortiz-Bermudez' motion to compel plaintiffs to reschedule and conduct his EUO, as he is now free from criminal prosecution and may now testify freely as to the circumstances of the accident. There is no opposition to the motion. Upon the foregoing documents, the motion is granted, without opposition, and pursuant to the reasoning set forth hereinafter.

Background

As alleged by plaintiffs, the subject accident took place on August 18, 2021. Ortiz-Bermudez stated to police that his vehicle was sideswiped by Toro's vehicle, and when he exited his car, Toro struck him directly (complaint, NYSCEF Doc. No. 1, ¶ 11). Toro acknowledged that he had sideswiped Ortiz-Bermudez's car, but stated that Ortiz-Bermudez had, during an ensuing dispute, stolen his phone and attempted to shut down Toro's car, at which point, Toro attempted to pull away (*id.*, ¶¶ 11-12). The police arrested everyone involved at the scene, but charges against Toro were dropped while the police continued to investigate Ortiz-Bermudez (*id.*, ¶ 12).

Plaintiffs scheduled Ortiz-Bermudez for an EUO, which was adjourned several times. Finally, on June 29, 2022, Ortiz-Bermudez appeared for his EUO, but asserted his right to remain silent when asked about the accident (EUO transcript, NYSCEF Doc. No. 11 at 9-15). Plaintiffs then denied coverage for Ortiz-Bermudez's injuries based on his assertion of his Fifth Amendment right to remain silent (complaint, NYSCEF Doc. No. 1, ¶ 25).

Plaintiffs commenced this action on May 30, 2023, seeking a declaratory judgment of no coverage. Ortiz-Bermudez answered and asserted several affirmative defenses, including, that plaintiffs sought the EUO for an improper purpose; that Ortiz-Bermudez did not fail to cooperate within the meaning of the policy and the no-fault regulations; and that his invocation of his right against self-incrimination could not be interpreted as a failure to cooperate (answer, NYSCEF Doc. No. 7 at 2-3).

The charges against Ortiz-Bermudez were dropped on October 30, 2023 (certificate of disposition, NYSCEF Doc. No. 10). Ortiz-Bermudez' counsel reached out to plaintiff to reschedule the EUO now that Ortiz-Bermudez is no longer under threat of criminal prosecution

(Winkour affirmation, NYSCEF Doc. No. 9, ¶ 12; email exchange, NYSCEF Doc. No. 12). Plaintiffs declined, and have maintained their disclaimer of coverage (email exchange, NYSCEF Doc. No. 12).

Standard of Review

Ortiz-Bermudez's motion is one for, in effect, mandatory injunctive relief. "A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual" (CPLR 6301). Preliminary injunctions "should be issued cautiously and in accordance with appropriate procedural safeguards" (*Uniformed Firefighters Assn. of Greater N.Y. v City of N.Y.*, 79 NY2d 236, 241 [1992]). "The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor" (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]).

Unlike ordinary preliminary injunctions, mandatory injunctions, i.e., those in which the court directs a party to perform some act to preserve the status quo rather than refrain from doing so, are disfavored (*Second on Second Cafe, Inc. v Hing Sing Trading, Inc.*, 66 AD3d 255, 265 [1st Dept 2009] ["courts are generally reluctant to grant mandatory preliminary injunctions"] [internal quotation marks and citation omitted]). "A mandatory injunction should not be granted, absent extraordinary circumstances, where the status quo would be disturbed and the plaintiff would receive the ultimate relief sought, pendente lite" (*Spectrum Stamford, LLC v 400 Atl. Tit., LLC*, 162 AD3d 615, 617 [1st Dept 2018]). The movant must satisfy a "heavy burden of proving a clear right to mandatory injunctive relief" (*Rosa Hair Stylists, Inc. v Jaber Food Corp.*, 218

AD2d 793, 794 [2d Dept 1995]). Where the requested relief would effectively grant the movant the ultimate relief sought, or where the record establishes "sharp issues of fact, injunctive relief should not be granted" (*Lehey v Goldburt*, 90 AD3d 410, 411 [1st Dept 2011] [internal quotation marks and citations omitted]). "The decision to grant or deny provisional relief, which requires the court to weigh a variety of factors, is a matter ordinarily committed to the sound discretion of the lower courts (*Nobu Next Door, LLC*, 4 NY3d at 840).

Discussion

Before addressing whether Ortiz-Bermudez has satisfied his burden on this motion, it is worth examining the law underlying his request. The no-fault regulations and the related provisions of the Insurance Law serve the goal of speedy resolution of motor vehicle accident related insurance claims (*Presbyterian Hosp. in the City of New York v Maryland Cas. Co.*, 90 NY2d 274, 283-84 [1997]). The regulatory scheme supporting the processing of no-fault claims is meant to, among other things, "avoid[] prejudice to insureds by providing for prompt payment or disclaimers of claims" (*id.* at 284). Accordingly, the regulations require cooperation of insureds or injured parties with insurance carriers so as to swiftly resolve claims. As relevant herein, the no-fault regulations require that an eligible injured person, "may reasonably be required [to] submit to examinations under oath by any person named by the Company and subscribe the same" (11 NYCRR 65-1.1 [b], Proof of Claim). The failure to sit for an EUO is grounds for denial of coverage (*Mapfre Ins. Co. v Manoo*, 140 AD3d 468, 470 [1st Dept 2016]).

This case presents what appears to be a question of first impression. In the typical case, the insurance carrier notices an EUO of an eligible injured person, the person fails to appear—either with or without contacting the carrier first—and the carrier then disclaims coverage (*e.g., Mapfre Ins. Co., supra,* at 469-70 [carrier noticed and rescheduled EUO three times, but the

eligible injured person failed to appear at any of them]). Here, in stark contrast to the ordinary type of "no-show" scenario described above, Ortiz-Bermudez was ready and willing to undergo an EUO, but for the pending criminal charges against him which implicated his Fifth Amendment privilege. Indeed, he actually made the effort to appear at the scheduled EUO – in stark contrast to the ordinary circumstance of a "no-show" – and, as was his right to do, invoked his right against self-incrimination. Ortiz-Bermudez, represented through his counsel that he was "ready, willing and able to full testify on any and all matters once that threat of criminal prosecution is finished and done with which we expect to be in the near future and we invite Liberty Mutual to demand any further examination under oath if they deem it warranted and necessary" (EUO transcript, NYSCEF Doc. No. 11 at 16).

In other circumstances, unlike the one at hand, the courts in this state have been reluctant to protect a party from the choice between invoking the right against self-incrimination and presenting evidence in a civil case (*see, Access Capital, Inc. v DeCicco*, 302 AD2d 48, 53 [1st Dept 2002] ["the courts need not permit a defendant to avoid this difficulty by staying the civil action until a pending criminal prosecution has been terminated] [internal quotation marks and citations omitted]). Here, however, Ortiz-Bermudez assertion of his Fifth Amendment Right has been seized upon by plaintiffs as a means to summarily deny him coverage for his injuries. Plaintiffs were not required to disclaim coverage on this ground; but chose to do so. Now that the threat of prosecution is over, Ortiz-Bermudez remains ready, willing, and able to testify. Under the circumstances, the court does not perceive this as a failure to cooperate in the manner intended by the governing Insurance Law regulations or by the policy of insurance relevant to this case.

Against this backdrop then, the court finds that Ortiz-Bermudez has met his burden on the motion. Given that he was placed in an impossible position by plaintiffs, it is likely that he would succeed on his defenses related to the intent of his asserted failure to cooperate. The balance of the equities lies with Ortiz-Bermudez as well, given his constitutional right and, additionally, given plaintiffs' unaffected ability to decline the claim on any appropriate grounds which may be uncovered following his testimony at the EUO. Finally, Ortiz-Bermudez will be irreparably harmed absent plaintiffs' scheduling of his EUO, as he will be unable to fulfill his obligation to cooperate or to establish eligibility for coverage through sworn testimony.

The court also takes note of plaintiffs' non-opposition to the motion which, while not necessarily indicative of any consent to the relief sought, does, at least, indicate the lack of any complaint as to any undue burden in going forward with a re-scheduled EUO.

Accordingly, it is hereby

ORDERED that the motion by defendant Carlos Ortiz-Bermudez for affirmative injunctive relief is granted; and it is further

ORDERED that plaintiffs are directed to schedule an examination under oath for said defendant, to be held within 45 days of the date of filing hereof; and it is further

ORDERED that the court's decision is without prejudice to plaintiffs' right to disclaim coverage on any legitimate ground following said examination under oath.

This constitutes the decision and order of the court.

ENTER:

6/27/2024
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE