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| <b>Liberty Mut. Ins. Co. v Colot</b>                                                                                                                                                                                                                             |
| 2012 NY Slip Op 33500(U)                                                                                                                                                                                                                                         |
| June 26, 2012                                                                                                                                                                                                                                                    |
| Sup Ct, New York County                                                                                                                                                                                                                                          |
| Docket Number: 650143/2012                                                                                                                                                                                                                                       |
| Judge: Ellen M. Coin                                                                                                                                                                                                                                             |
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| This opinion is uncorrected and not selected for official publication.                                                                                                                                                                                           |

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

PRESENT: HON. ELLEN M. COIN  
JusticePART 63Liberty Mutual Insurance  
vs.  
Shoni ColotINDEX NO. 650143/12

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

## PAPERS NUMBERED

Cross-Motion: ☒ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

*is*  
~~MOTION AND CROSS MOTION(S) ARE~~  
DECIDED IN ACCORDANCE WITH ANNEXED  
DECISION AND ORDER.

*This constitutes the decision and order of the Court.*

Dated: 6/26/12Euc  
HON. ELLEN M. COIN J.S.C.Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITIONCheck if appropriate: ☐ DO NOT POST ☐ REFERENCE☐ SUBMIT ORDER/ JUDG.☐ SETTLE ORDER/ JUDG.MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 63

-----X  
LIBERTY MUTUAL INSURANCE COMPANY and  
LIBERTY MUTUAL FIRE INSURANCE COMPANY,

Plaintiffs,

-against-

LHOSNI COLOT

("Individual Defendant"),

and

BROOKDALE E/R PHYSICIAN'S DEPARTMENT,  
BROOKDALE HOSPITAL, COMPAS MEDICAL, P.C.  
DELTA DIAGNOSTIC RADIOLOGY P.C., NATURAL  
THERAPY ACUPUNCTURE, P.C., PROFESSIONAL  
HEALTH IMAGING, P.C., SHORE MEDICAL  
DIAGNOSTIC, P.C., T & J CHIROPRACTIC, P.C.,  
UNLIMITED PRODUCTS LTD,

("Medical Provider Defendants"),

collectively, the Defendants.

-----X  
**For Plaintiffs :**

Law Offices of Burke, Gordon & Conway  
Employees of Liberty Mutual Group, Inc.  
By Stephane D. Martin, Esq.  
10 Bank Street-Suite 790  
White Plains, New York 10606  
914-997-8100

**For Defendants Compas, Delta, Natural and  
T&J:**

The Rybak Firm PLLC  
By Oleg Rybak, Esq.  
1506 Kings Highway, 2<sup>nd</sup> Floor  
Brooklyn, New York 11229  
718-975-2035

Papers considered in review of this motion for a preliminary injunction:

| <b>Papers</b>                                   | <b>Numbered</b> |
|-------------------------------------------------|-----------------|
| Order to Show Cause and Affidavits Annexed..... | <u>1</u>        |
| Affirm. in Opposition.....                      | <u>2</u>        |
| Reply Affirm.....                               | <u>3</u>        |

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**ELLEN M. COIN, J.**

Plaintiffs Liberty Mutual Insurance Company and Liberty Mutual Fire Insurance Company (“Liberty Mutual”), move for an order: 1) staying any and all court hearings or arbitration proceedings for No-Fault benefits stemming from individual defendant Lhosni Colot’s (“Colot”) automobile accident on July 18, 2009 (“the accident”); 2) granting a preliminary injunction barring any arbitration or court hearings for No-Fault benefits arising from the accident until there has been a final determination of the relief sought herein; and 3) declaring that Liberty Mutual’s denial of all claims arising from the alleged accident is valid or, in the alternative, ordering a framed issue hearing on the validity of such denial.

### **BACKGROUND**

Briefly stated, this is an action by Colot’s automobile insurer, Liberty Mutual, to nullify any No-Fault benefits allegedly due to any of Colot’s medical provider assignees for services they rendered to him as a result of the automobile accident.

Liberty Mutual states that its investigation of Colot’s automobile accident claim revealed information which led it to believe that at the time Colot purchased the automobile policy, he falsely stated that he lived at an address in Elmont, New York, rather than at his allegedly true address in Brooklyn in order to secure a lower premium rate. At his examination under oath (EUO) on December 11, 2009, Colot testified that he had resided at his Brooklyn address since coming to the United States from Haiti in March 2006. (Reply Aff., Ex. A at 5); that his cousin lived at the Elmont address; and that he had lived at the Elmont address for 5 or 6 months. (Reply Aff., Ex. A at 6).

Liberty Mutual argues that it would not have written the policy at the same price point had it known that Colot lived in Brooklyn (Martin Aff., Ex. B [hereinafter Cmplnt], ¶ 45), and

that because Colot knowingly and fraudulently misrepresented information at the time of policy inception, it is not obligated to provide No-Fault coverage for the accident. (Cmplnt, ¶ 46).

### **CONTENTIONS**

Liberty Mutual contends that it is entitled to (1) a stay of any arbitrations and/or court hearings or, in the alternative, that it is entitled to a preliminary injunction barring any arbitrations or court hearings for No-Fault benefits arising from the accident, and (2) a declaration that its denial of coverage is valid. Liberty Mutual's position is that where, as here, the insured, or his assignees, bring an action to recover benefits under the policy, the insurer may assert an affirmative defense that the insured's misrepresentation and/or fraud in obtaining the policy precludes any recovery by the insured or his assignees. In addition, Liberty Mutual argues that to avoid irreparable harm, the judgment rendered by the Kings County Civil Court on January 27, 2012 should be stayed until the consolidation and resolution of all of the No-Fault Claims in any and all of the Colot matters.

Compas Medical, P.C., Delta Diagnostic Radiology, P.C., Natural Therapy Accupuncture, P.C. and T & J Chiropractic, P. C. oppose the motion. They argue that motions to stay an action must be made in the action to be stayed, and that a preliminary injunction is not warranted because Liberty Mutual has not demonstrated a likelihood of success on the merits or that it will suffer an irreparable injury<sup>1</sup>.

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<sup>1</sup> The individual defendant and the remaining provider defendants did not respond to the instant motion.

## DISCUSSION

### A. Stay

The Court denies so much of the instant motion as seeks a stay of arbitration or court hearings for no-fault benefits stemming from the accident and a stay of enforcement of the January 27, 2012 judgment. Plaintiff has brought a plenary action for a declaratory judgment and thus cannot avail itself, either explicitly or implicitly, of the mechanism for staying arbitration under Article 75 of the CPLR. The only other CPLR provision for stays of court proceedings, CPLR 2201, is also unavailable. That section provides: “Except where otherwise prescribed by law, *the court in which an action is pending* may grant a stay of proceeding in a proper case, upon such terms as may be just” (emphasis added). The general rule is that a court’s power to grant a stay is limited to proceedings in an action pending in that court. (4 Weinstein-Korn-Miller, New York Civil Practice, ¶ 2201.04, at 22-14). In *Matter of Modernismo Publications, Ltd. v Tenney* (104 AD2d 721, 721 [4th Dept 1984]), the court stated, “[t]he practice of applying in one action to stay the proceedings in another action, pending in a different jurisdiction, is unauthorized.” (See also *Matter of Church Mut. Ins. Co. v People*, 251 AD2d 1014 [4<sup>th</sup> Dept 1998]). “[T]he proper procedure for seeking a stay or dismissal of another action would be to apply to the judge presiding over that matter.” (*Fourth Fed. Sav. & Loan Assn. of N.Y. v Garber*, 172 AD2d 399, 399 [1<sup>st</sup> Dept 1991]).

### B. Injunction

This motion is properly viewed as one for a preliminary injunction. On a motion for a preliminary injunction, the movant has the burden of showing (1) a likelihood of success on the merits, (2) irreparable injury absent the grant of the preliminary injunction, and (3) a balance of

the equities in the movant's favor. (*Doe v Axelrod*, 73 NY2d 748, 750 [1988]). Plaintiff must establish that the irreparable injury plaintiff will sustain in the absence of an injunction outweighs the harm that defendants will suffer as a result of the imposition of the injunction. (*Lombard v Station Sq. Inn Apts. Corp.*, 94 AD3d 717, 721-722 [2d Dept 2012]).

Liberty has established a likelihood of recovery on the merits by submitting a transcript of defendant Colot's EOU, at which Colot acknowledged that the address he communicated to Liberty did not match his actual residence in Brooklyn, New York. Misrepresentation of the address where the vehicle is garaged and used is likely to constitute a material breach of the insurance policy and may be deemed fraudulent inducement, fueled by an insured's attempt to obtain reduced premiums. (*AA Acupuncture Serv., P.C. v Safeco Ins. Co. of America*, 25 Misc 3d 30, 31 [App Term 1<sup>st</sup> Dept 2009]). "Although Vehicle and Traffic Law § 313 does not permit an insurer to cancel an automobile insurance policy retroactively on the grounds of fraud or misrepresentation [citation omitted], an insurer may assert misrepresentation or fraud as an affirmative defense . . ." in an action by the insured or his assignees. (*AA Acupuncture Service, P.C.*, 25 Misc 3d at 31, citing *Matter of Liberty Mut. Ins. Co. v McClellan*, 127 AD2d 767, 769 [2<sup>nd</sup> Dept 1987]). Although this affirmative defense is not available as against innocent third parties injured in the accident, a health care provider that obtains an assignment of the insured's no-fault benefits is not deemed "an innocent third party" and is subject to the same defenses as the assignor-insured. (*A.B. Medical Servs. PLLC v Commercial Mut. Ins. Co.*, 12 Misc 3d 8, 11-12 [App Term 2<sup>nd</sup> Dept 2006])

Rather than require insurers to wait to be sued so as to assert the affirmative defense of fraud, New York courts routinely permit insurers to proactively seek injunctive relief against any

current and future actions and arbitration proceedings brought by, or on behalf of, the insured while the Court considers the merits of the alleged fraud. (See *Matter of Ins. Co. of North America v Kaplun*, 274 AD2d 293, 300 [2<sup>nd</sup> Dept 2000]; see also *21<sup>st</sup> Century Advantage Ins. v Cabral*, 2012 NY Slip Op 31490(U), \*10 [Sup Ct, Nassau County 2012]; *Autoone Ins. Co. v Manhattan Heights Medical, P.C.*, 24 Misc 3d 1229A [Sup Ct, Queens County 2009]). The element of irreparable harm is established by the numerous assignments of no-fault benefits that Colot made to medical providers. The multiplicity of lawsuits and arbitration proceedings, necessitating constant revisiting of the identical issue of fraud, may lead to an ever snowballing amount in attorneys' fees and may subject the insurance company to conflicting legal directives. (*21<sup>st</sup> Century Advantage Ins.*, 2012 NY Slip Op 31490U at 10]). Therefore, the Court must enjoin all currently pending arbitration and court proceedings.

However, Liberty Mutual is not entitled to enjoin execution of the Civil Court judgment (Lib Mut. Affirm., Ex. F) issued as a result of its failure to appear in that proceeding. The judgment in the amount of \$7,166.71 was issued in the Civil Court, the County of Kings, Index No. CV-077590-10/KI, and the County Clerk entered it on January 27, 2012. Liberty Mutual has not moved in the appropriate forum to vacate its default under CPLR 5015 (a)(1) or 317, whichever is applicable. In relevant part, CPLR 5015 (a) states that "[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just . . ." Accordingly, the request for an injunction to stay execution of this monetary judgment must be made in the Civil Court, because it rendered the judgment that Liberty Mutual now wishes to challenge. ( See *Schachter v Sofasa LLC*, 66 AD3d 526, 526 [1<sup>st</sup> Dept 2009]; see also *Lipp v Port Auth. of New*



*York and New Jersey*, 17 Misc 3d 667, 670 [Sup Ct, Queens County 2007], citing *Levine v Berlin*, 46 AD2d 902, 903 [2<sup>nd</sup> Dept 1974]).

In accordance with the foregoing, it is hereby

ORDERED that plaintiffs' motion brought by order to show cause is granted to the extent of enjoining those above-named defendants on whom plaintiff effected service of process from prosecuting any and all actions and arbitration proceedings currently pending or that may be commenced in the future for No-Fault benefits arising out of the alleged accident that occurred on July 18, 2009 under the insurance policy issued by Liberty Mutual Insurance Company to Lhosni Colot (Policy No. AO2-221-182503-70), and the motion is otherwise denied; and it is

ORDERED that as a condition of issuance of this preliminary injunction, plaintiffs shall post within ten (10) days from the date of this Order an undertaking pursuant to CPLR 6312 (b) in the sum of \$10,000.00, conditioned that plaintiffs, if it is finally determined that they were not entitled to an injunction, will pay to the appearing defendants all damages and costs which may be sustained by reason of this injunction.

This constitutes the decision and order of the Court.

Dated: 6/26/12

ENTER:

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Ellen M. Coin, A.J.S.C.