

Infinity Auto Ins. Co. v Luna
2026 NY Slip Op 30533(U)
February 3, 2026
Supreme Court, New York County
Docket Number: Index No. 161092/2023
Judge: Nicholas W. Moyne
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NICHOLAS W. MOYNE PART 41M

Justice

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INFINITY AUTO INSURANCE COMPANY,

Plaintiff,

INDEX NO. 161092/2023

MOTION DATE 05/19/2025

MOTION SEQ. NO. 002

- v -

DAROLIN LUNA, KATHERINE LOPEZ, OMAR RODRIGUEZ, 79 EXPRESSRX, INC, ATLANTIC MEDICAL & DIAGNOSTIC, PC, BEACON PHARMACY, INC, BETTER SOON RX, INC, CITIMED COMPLETE MEDICAL CARE, PC, CLOUDLYTE TECH SERVICE, INC, COMMUNITY MEDICAL CARE OF NY, PC, DIANA BEYNIN, D.C., DRAK MEDICAL EQUIPMENT, INC, FIRST STOP PT, PC, FIVE TOWNS PHYSICIANS, PC, HARVEY LEVITAN MEDICAL, PC, INTEGRATED MEDICAL REHABILITATION AND DIAGNOSTICS P.C., JR MEDICAL, PC, NEW HORIZON SURGICAL CENTER, LLC, OPAQUE NY, INC, PALMIRA AP, INC, PARS MEDICAL, PC, PRECISION ANESTHESIA ASSOCIATE OF NEW JERSEY, PRECISE PAIN MEDICINE LLC, QUALITY ORTHOPEDICS & COMPLETE JOINT CARE, P.C., RAPID SCRIPTS PHARMACY CORP, ROTTECH IMAGING SERVICE, INC, SOLOMON HALIOUA MD, STAY WELL CHIROPRACTIC, PC, TATSU LEASING CORP, THIRD AVENUE IMAGING, LLC, TITAN DIAGNOSTIC IMAGING SERVICES, INC, TOV MEDICAL SUPPLY INC, UNITY CARE PHYSICAL THERAPY, PC, WELLNESS INTEGRATIVE MEDICAL, PC

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111 were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is

Plaintiff Infinity Auto Insurance Company (“Infinity”) moves for summary judgment against defendants 79 EXPRESSRX, INC; BETTER SOON RX, INC; CITIMED COMPLETE MEDICAL CARE, PC; COMMUNITY MEDICAL CARE OF NY, PC; FIRST STOP PT, PC; HARVEY LEVITAN MEDICAL, PC; INTEGRATED MEDICAL REHABILITATION AND DIAGNOSTICS P.C.; JR MEDICAL, PC; NEW HORIZON SURGICAL CENTER, LLC; PARS MEDICAL, PC; RAPID SCRIPTS PHARMACY CORP; and TOV MEDICAL SUPPLY INC. Defendants 79 EXPRESSRX, INC; JR MEDICAL, PC; RAPID SCRIPTS PHARMACY CORP; and TOV MEDICAL SUPPLY

INC. have not opposed the motion. The remaining defendants named above oppose the motion.

Plaintiff commenced this action seeking a declaratory judgment that Infinity owes no duty to pay the Mandatory Personal Injury Protection (“No-Fault”), Uninsured/Underinsured Motorist Coverage, and Supplemental Uninsured/Underinsured Motorist Coverage claims of the defendants for any claims submitted by the defendants under an Infinity insurance policy with respect to a January 27, 2023, collision involving defendants Darolin Luna (“Luna”), Katherine Lopez (“Lopez”) and Omar Rodriguez (“Rodriguez”) (collectively the “individual defendants”). Infinity contends that it has a founded belief that the injuries of the individual defendants were not causally related to the January 27, 2023, collision. Infinity also contends that defendants Luna and Rodriguez breached a condition precedent to coverage by twice failing to attend duly scheduled Examinations Under Oath (“EUO”).

Summary Judgment

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of any material issues of fact or where the issue is arguable (*Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]). “If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion” (CPLR § 3212[b]). “In considering a summary judgment motion, evidence should be analyzed in the light most favorable to the party opposing the motion” (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]).

The plaintiff is entitled to summary judgment due to EUO no-show

The plaintiff has sufficiently demonstrated that defendants Darolin Luna and Omar Rodriguez breached a condition precedent to coverage in that they each twice failed to appear for duly scheduled EUOs. Plaintiff has submitted the EUO scheduling letters sent to Luna and Rodriguez, together with affidavits of service for the same (NYSCEF Doc. No. 91). Furthermore, plaintiff has submitted the affirmation of Harlan Schreiber, Esq. (NYSCEF Doc. No. 93), the attorney assigned to conduct the EUOs of Luna and Rodriguez, who indicates that he was present in the office where the EUOs were noticed to be conducted at the times and dates the EUOs were to be conducted and that neither Luna nor Rodriguez appeared for their scheduled EUOs. This constitutes prima facie evidence that Luna and Rodriguez breached a condition precedent to coverage.

As set forth in the affidavit of Denise Winant (NYSCEF Doc. No. 87), the no-fault claims representative assigned to the claim number relating to the subject accident, Infinity had a reasonable basis for requesting EUOs. Reasons for requesting the EUOs

included the sheer magnitude of the claims submitted; the insured was not driving the vehicle at the time of loss; the vehicle was an older model vehicle (often used as a crash car in staged losses) which was last registered to a non-party in Florida in 2018; the insured had represented that the vehicle would be garaged in Lancaster, Pennsylvania while the accident occurred in New York and all treatment was in New York; the named insured did not respond or otherwise cooperate in the investigation; there was no police report; only Lopez's and Luna's injuries were listed on the MV-104 report of motor vehicle accident, but Infinity received an NF-2 application for motor vehicle no-fault insurance benefits from Rodriguez; and all three claimants reported similar injuries and have been receiving mirroring treatment from the same clinics. Accordingly, the plaintiff has met their prima facie burden of demonstrating that Luna and Rodriguez breached a condition precedent to coverage – the requirement to appear at an examination under oath. The defendants have only submitted the affirmations of their attorneys and not an affidavit of anyone with knowledge of the facts to rebut the plaintiff's prima facie showing of entitlement to summary judgment based upon failure to appear at an EUO. "Such an affirmation by counsel is without evidentiary value and thus unavailing" (*Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]). There is no support in the record for the defendants' contention that the EUOs were not timely requested pursuant to 11 NYCRR § 65-3.5(b) within 15 days of receipt of verification forms. The only verification forms appended to the motion or opposition thereto are dated after the EUO scheduling letters were sent (see NYSCEF Doc. No. 92). Accordingly, the plaintiff's motion for summary judgment is granted as to the claims for treatment provided to Darolin Luna and Omar Rodriguez based on their failure to appear at duly scheduled EUOs.

Plaintiff has not established a founded belief that the subject loss was not a covered event

Plaintiff contends that it is not obligated to pay no fault benefits for treatment provided to the individual defendants because it has a founded belief that the January 27, 2023, collision was not a covered event and that any alleged injuries or treatment did not arise from that alleged occurrence.

"[A]n insurer, despite its failure to reject a claim within the 30-day period prescribed by Insurance Law § 5106 (a) and 11 NYCRR 65.15 (g) (3), may assert a lack of coverage defense premised on the fact or founded belief that the alleged injury does not arise out of an insured incident" (*Cent. Gen. Hosp. v Chubb Group of Ins. Companies*, 90 NY2d 195, 199 [1997]). The insurer must establish the fact or founded belief that the alleged injuries do not arise out of an insured incident (*Webster Diagnostic Medicine, P.C. v State Farm Ins. Co.*, 15 Misc 3d 97, 98 [App Term 2007]). Mere unsubstantiated assertions or speculations are insufficient (see *Webster Diagnostic Medicine, P.C., supra*). An insurer may premise its defense upon a lack of coverage and can establish this defense by a preponderance of the evidence; an insurer is not required to establish that the subject collision was the product of fraud, which would require proof of all of the elements of fraud, including scienter (see *V.S. Med. Services, P.C. v Allstate Ins. Co.*, 25 Misc 3d 39, 41 [App Term 2d Dept 2009]). The "insurer bears the burden of coming forward with admissible evidence of 'the fact'

of lack of coverage or of the ‘foundation for its belief’ that there is no coverage” (*A.B. Med. Services, PLLC v State Farm Mut. Auto. Ins. Co.*, 7 Misc 3d 822, 825 [Kings County Civ Ct 2005]).

As set forth in the affidavit of Denise Winant, the plaintiff’s claims representative, plaintiff contends that, based on its investigation into the collision and the Lopez’s EUO testimony, INFINITY maintains a founded belief that the Claimants’ alleged injuries and any subsequent No-Fault treatment submitted by the Medical Provider Defendants was not causally related to the January 27, 2023, collision and/or did not arise from a covered event (Winant Aff. ¶ 32, NYSCEF Doc. No. 87). Aside from the Lopez EUO, the investigation is summed up hereinabove in the discussion of the plaintiff’s reasons for requesting EUOs. As summed up by Winant, the portions of Lopez’ testimony that raised issues as to the legitimacy and medical necessity of the treatment, and raised concerns that the treatment was not causally related to the collision or were exaggerated are: she was dating Rodriguez, who did not have a car; Rodriguez had borrowed the vehicle from a friend that she did not know; Lopez couldn’t identify the insured vehicle as more than “a car” and was unsure if it was a sedan or SUV; that Rodriguez had picked her up “Around 4 – something”¹, and had traveled around 20 minutes before they picked up Luna; that she stated the loss occurred around 6:00 P.M., and she testified that the accident occurred 10 -15 minutes after they picked up Luna; she described the accident impact as medium, and acknowledged that the airbags did not deploy; she didn’t know the color of the other vehicle and could only describe it as “like a van;” she claimed Rodriguez called the police and told them they were okay and didn’t require an ambulance; she didn’t seek emergency care following the accident and began treatment at a clinic three-days after the accident. Lopez state that she doesn’t know a lot about cars (Lopez May 25, 2023 Tr at p. 27 In 22, NYSCEF Doc. No. 90). Lopez further testified that she told a friend of hers about the accident and he recommended the clinic where she began treatment as a place that did really good therapy (*Id.* at p. 34 – 35). Lopez told Rodriguez and Luna about the clinic (*Id.* at p. 35 – 36).

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of any material issues of fact or where the issue is arguable (*Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]). In the instant matter, the plaintiff has not established, by a preponderance of the evidence, a founded belief that Lopez’ injuries were not the result of a covered event. Taken in the light most favorable to the parties opposing the motion (*Martin, supra*), the limited facts alleged regarding the investigation do not provide sufficient evidence to eliminate any material issues of fact from the case. The Lopez testimony provides some explanations for some of the allegedly suspicious circumstances, such as all three individual defendants receiving treatment from the same providers. Furthermore, the Lopez testimony corroborated certain aspects of the Report of Motor Vehicle Accident, such as the location of the accident, that the adverse vehicle failed to stop at the stop sign, struck the insured vehicle on the driver’s side, and that medical attention was not sought or received at the scene. Additionally, although the affidavit of the claims representative

¹ Lopez May 25, 2023 Tr at p. 23 In 8, NYSCEF Doc. No. 90

sets forth factors supporting its requests for EUOs, they do not explain how those factors support a founded belief that the accident was not a covered event (*see Liberty Mut. Fire Ins. Co. v Wilson*, 86 Misc 3d 1231(A) [Sup Ct Kings County 2025] [“Without an evidentiary basis, Petitioner Liberty Mutual's assertions of a fraudulent scheme are nothing more than unsubstantiated hypotheses and suppositions”]). Furthermore, the proof submitted falls far short of the proof proffered in cases where summary judgment was granted on the insurer's founded belief that the accident was not a covered event (*see e.g. Unitrin Safeguard Ins. Co. v Manuel*, 236 AD3d 558, 559 [1st Dept 2025] [“Plaintiff proffered an affidavit from a claims investigator detailing the circumstances of the accident that led to the investigation, including the magnitude of the claims submitted, the absence of any claims for damage to the vehicle, and the lack of a police report. Plaintiff submitted affidavits from the occupants of the adverse vehicle, who characterized the accident as a bumper ‘tap’ resulting in no visible damage to the covered vehicle or injury to the driver. The occupants of the adverse vehicle also stated they were able to see into the covered vehicle and there were no passengers within”]). This is not to say that the petitioner could not, at trial, prove a founded belief that the injuries were not the result of a covered accident. However, on the basis of the affidavits and testimony submitted on the instant summary judgment motion, plaintiff has not demonstrated by admissible evidence that they hold a founded belief that the injuries did not arise from a covered event. Accordingly, as to the claims submitted for treatment provided to Ms. Lopez, the motion for summary judgment must be denied.

Conclusion

For the reasons stated herein above, it is hereby

ORDERED that the plaintiff's motion for summary judgment is GRANTED IN PART as to claims for treatment provided to defendants Darolin Luna and Omar Rodriguez; and it is further

ORDERED that the plaintiff's motion for summary judgment is DENIED as to claims for treatment of defendant Katherine Lopez; and it is further

ORDERED, ADJUDGED and DECLARED that defendants Darolin Luna and Omar Rodriguez breached a condition precedent to coverage as established by the No-Fault Regulation and the subject policy of insurance by failing to appear at duly and properly scheduled EUOs on two or more occasions; and it is further

ORDERED, ADJUDGED and DECLARED that plaintiff Infinity Auto Insurance Company has no obligation to pay the No-Fault claims of Darolin Luna and Omar Rodriguez, should any be submitted, with respect to the January 27, 2023, collision under Infinity claim number 23123511607; and it is further

ORDERED, ADJUDGED and DECLARED that plaintiff Infinity Auto Insurance Company has no obligation to pay any No-Fault claims submitted by Medical Providers for treatment allegedly provided to Darolin Luna or Omar Rodriguez, should any be

submitted, with respect to the January 27, 2023, collision under Infinity claim number 23123511607; and it is further

ORDERED, ADJUDGED and DECLARED that plaintiff Infinity Auto Insurance Company has no obligation to pay the No-Fault claims submitted by ATLANTIC MEDICAL & DIAGNOSTIC, PC, BEACON PHARMACY INC, DRAK MEDICAL EQUIPMENT, INC, PARS MEDICAL, PC, PRECISION ANESTHESIA ASSOCIATE OF NEW JERSEY, ROTECH IMAGING SERVICE, INC, TATSU LEASING CORP, THIRD AVENUE IMAGING LLC, TITAN DIAGNOSTIC IMAGING SERVICES, INC, TOV MEDICAL SUPPLY, INC, UNITY CARE PHYSICAL THERAPY, PC, or WELLNESS INTEGRATIVE MEDICAL, PC for treatment allegedly provided to Darolin Luna or Omar Rodriguez with respect to the January 27, 2023, collision under claim number 23123511607; and it is further

ORDERED that the parties appear for a preliminary conference in Part 41, room 327 of the courthouse located at 80 Centre Street, New York, NY on June 18, 2026 at 2:15 PM, failure to appear may result in the striking of pleadings pursuant to 22 NYCRR § 202.27.

This constitutes the decision and order of the court.


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<u>2/3/2026</u> DATE	<hr/> NICHOLAS W. MOYNE, J.S.C.			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE