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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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In the Matter of the Application for an Order Vacating all Arbitration Proceedings attempted to be had between ENCOMPASS FLORIDIAN INDEMNITY COMPANY,

Petitioner,

ENCOMPASS INDENMITY COMPANY,

Proposed Add'l Petitioner,

-against-

VINCENT CRISCI and KAKO CRISCI,

Respondents.

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MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 8
Index No.: 14765/11
Motion Seq. Nos.: 01 & 02

DECISION AND ORDER

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Petitioner, Encompass Floridian Indemnity Company [hereinafter Encompass Floridian], commenced the within proceeding pursuant to CPLR Article 75, for an order permanently staying any arbitration demanded in connection to un/underinsured motorist benefits and/or directing that a hearing be held to determine the Respondents' eligibility therefor (Sequence #001). Additionally, by way of an Order to Show Cause dated, December 14, 2011, the Petitioner separately moves for various forms of relief as are recited hereinafter (Sequence #002).

By way of background, on May 14, 2009, the Respondent, Vincent Crisci, was crossing the street at the intersection of SR683 and 6th Street in Sarasota, Florida when he was struck by a vehicle which left the scene of the accident prior to the arrival of the police (*see* Petition at ¶8; *see also* Exh. C). As a result thereof, on or about September 28, 2011, the Respondents served a Demand for Arbitration in connection to a policy of insurance issued by Encompass Floridian relative to the Respondents' vehicles registered and garaged in Florida (*id.* at ¶¶5,6;Exh. A; *see also* Tesoro Affirmation in

Opposition dated December 19, 2011 at ¶23;Exh. G). In response thereto, Encompass Floridian informed the Respondents that it would not agree to the demanded arbitration and would seek court intervention permanently staying same (*id.* at Exh. D).

The within proceeding was consequently commenced on or about October 14, 2011 and seeks a permanent stay of the demanded arbitration. In support thereof, counsel for Encompass Floridian asserts the arbitration being sought is under a policy which expressly provides that all parties must agree to arbitrate and given the Petitioner's unequivocal refusal to proceed, a permanent stay is warranted (*id.* at ¶¶10-12).

In the *interim* and subsequent to the commencement of the instant proceeding, it was discovered that the Respondents herein were the holders of a second insurance policy issued by Encompass Indemnity Company [hereinafter Encompass Indemnity], the scope of which covered the Respondents' vehicles registered and garaged in New York (*see* Feeney Affirmation in Support of Order to Show Cause at ¶12). In connection to this second policy of insurance, on or about December 12, 2011, the Respondents served an Amended Demand for Arbitration for uninsured motorist benefits, the substance of which also contained a claim predicated upon loss of consortium asserted by Mrs. Crisci (*id.* at ¶¶14, 17-19; Exh.C; *see also* Tesoro Affirmation in Opposition dated, December 19th, 2012, at ¶¶3, 11, 23;Exh. A).

As a result, on December 14, 2011, the within Order to Show Cause was interposed seeking the following enumerated forms of relief:[a] a temporary stay of the arbitrations respectively demanded against Encompass Floridian and Encompass Indemnity, until further order of this Court; [b] an Order permanently staying the demanded arbitration against Encompass Floridian;[c] an order declaring that the coverage respectively issued by Encompass Floridian and Encompass Indemnity cannot be stacked; [d] an order declaring that the loss of consortium claim asserted by Respondent, Kako Crisci, in not cognizable and permanently staying same; [e] an order directing Respondent, Vincent Crisci, to appear for an examination under oath [hereinafter EUO], as well as independent medical examinations

[hereinafter IME];

[f] an order directing the Respondent, Vincent Crisci, to provide executed medical authorizations, and;[g] an order directing Respondent, Vincent Crisci, to provide tax returns for the years 2005 to present (Sequence #002).[1]

In support of the Order to Show Cause, counsel initially asserts that the loss of consortium claim asserted by Mrs. Crisci is not cognizable in accordance with controlling New York appellate authority (*id.* at ¶¶17-19). Counsel additionally contends the express language contained in each of the policies at issue herein strictly prohibits the stacking of the benefits respectively provided thereunder and as such the Respondents may not recover under the benefits afforded under both policies (*id.* at ¶¶22-26).Finally, counsel contends that under the terms of the policy issued by Encompass Indemnity, it is entitled to conduct an IME and an EUO of Mr. Cresci, as well as demand and receive medical authorizations and tax returns therefrom (*id.* at ¶¶27-33). Counsel stresses that Encompass Indemnity will be severely prejudiced if forced to proceed to arbitration under the New York policy without first being permitted to engage in the requested discovery (*id.*).

In opposing the various forms of relief herein requested, Respondents' counsel has interposed two separate opposing affirmations dated, October 31 and December 19, 2011. In the affirmation dated October 31, 2011, counsel opposes the permanent stay of arbitration, sought by Encompass Floridian in the underlying petition, and posits the policy issued to the Respondents clearly provides that "arbitration is the only option to settle disputes between the petitioner and respondents for uninsured motorist benefit claims * * * " (*see* Tesoro Affirmation in Opposition dated, October 31, 2011 at ¶5). In support of said assertion, counsel inexplicably references the New York policy issued by Encompass Indemnity

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[1] While the Petitioner's enumerated requests for relief do not formally include a request to add Encompass Indemnity as a named party, same was made in the Supporting Affirmation (*see* Feeney Affirmation in Support at ¶15). Given the status of Encompass Indemnity as the carrier which issued the New York policy in connection to which arbitration is demanded, as well as the absence of any prejudice or surprise, Encompass Indemnity is hereby added as an additional Petitioner herein (CPLR §3025[b]; *Maya's Black Creek, LLC v Angelo Balbo Realty Corp.*, 82 AD3d 1175[2d Dept 2011]).

and *not* the policy issued by Encompass Floridian, the latter of which is the policy relevant to the underlying Petition (*see* Tesoro Affirmation in Opposition dated, October 31, 2011 at ¶¶4, 5, 6, 8, 9, 16, 17; Exh. B).

As to the opposition dated December 19, 2011, Respondents' counsel specifically addresses the relief requested in the Order to Show Cause. Initially counsel argues that the Respondents have fully cooperated with the investigation of the subject claims and accordingly any additional demands for discovery should be denied (*see* Tesoro Affirmation in Opposition dated, December 19, 2011 at ¶¶7, 12). Counsel further asserts that there has been ample time in which to conduct discovery and the failure to do so until now should preclude any attempts to obtain the demanded information (*id.* at ¶¶16, 18).

Decision

Petition

The court initially addresses the relief contained in the underlying Petition, whereby Encompass Floridian seeks a permanent stay of arbitration demanded by the Respondents on September 28, 2011. A review of the relevant Demand indicates that same is sought in connection to an insurance policy which expressly provides that "[b]oth parties must agree to arbitration" as to uninsured motorist coverage.[2]

"It is settled that a party will not be compelled to arbitrate and, thereby, to surrender the right to resort to the courts, absent 'evidence which affirmatively establishes that the parties expressly agreed to arbitrate their disputes'" (*Waldron v Goddess*, 61 NY2d 181 [1984] quoting *Schubtex. Inc. v Allen Snyder, Inc.*, 49 NY2d 1[1979] at 6). "The agreement to arbitrate must be clear, explicit and unequivocal and must not depend upon implication or subtlety" (*Howell v Corastor Holding Company, Inc.*, 16 AD3d 585 [2d Dept 2005][internal citations omitted]). Here, the language contained in the

[2] *see* Petition at Exh. B as Endorsement G-23162-D at pp. 4-5.

relevant policy of insurance clearly and unequivocally states that both parties must agree to proceed to arbitration in connection to uninsured motorists claims (*id.*). Accordingly, given the absence of the Petitioner's consent, the Petition is hereby ***GRANTED*** and the arbitration in connection to the policy issued by Encompass Floridian is permanently stayed (Sequence #001).

Order to Show Cause

The Court now addresses the first branch of the Order to Show Cause denominated as paragraph [a] which seeks a temporary stay of the arbitrations demanded against Encompass Floridian and Encompass Indemnity. In accordance with the decision as set forth herein above, this relief has been rendered moot as to Encompass Floridian. With respect to Encompass Indemnity, the record establishes that while Mr. Cresci has asserted a claim for lost wages, he has only produced tax returns for the years 2008 and 2009, which the Petitioner asserts are incomplete and insufficient to determine the amount of pre-incident loss. Specifically, the Petitioner states the tax returns provided "show[ed] nothing earned" and only listed "taxable interest."[3]

As a general proposition, "a party seeking the production of tax returns must make a strong showing of necessity" (*Dore v Allstate Indemnity Company*, 264 AD2d 804 [2d Dept 1999]). Here, inasmuch as Mr. Cresci is seeking to recover for lost wages, the disclosure of his tax returns is appropriate (*id.*). Accordingly, the demanded arbitration is temporarily stayed as against Encompass Indemnity until such time that the Respondent, Vincent Cresci, produces tax returns for a five year period between 2005 through 2009.

That branch of the instant Order to Show Cause denominated as paragraph [b], which seeks an Order permanently staying the demanded arbitration against Encompass Floridian, is hereby ***GRANTED*** in accordance with the above recited decision issued in connection to the Petition.

That branch of the application denominated as paragraph [c], which seeks an order declaring that the coverage respectively issued by Encompass Floridian and Encompass Indemnity cannot be

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[3] *see* Tesoro Affirmation in Opposition dated, December 19th, 2011 at Exhs. C,G).

stacked, is hereby ***GRANTED***. Of particular relevance herein, the policy issued by Encompass Floridian provides the following in connection to uninsured motorists claims: "[w]here there is other applicable coverage, we will provide coverage as follows * * * (1) [a]ny recovery for damages sustained by you or a family member * * * (c) [w]hile not occupying any vehicle may equal, but not exceed, the highest limit for **Uninsured Mortorists Coverage** applicable to any one vehicle under any one policy affording coverage to you or any ***family member***" [emphasis in original]. Additionally, the policy issued by Encompass Indemnity specifically provides "[i]f an insured is entitled to uninsured motorist coverage * * * under more than one policy, the maximum amount such insured may recover shall not exceed the highest limit of such coverage for any one vehicle under any one policy * * *"

In the instant matter, the language contained in the two policies at issue herein clearly precludes the stacking of coverage respectively afforded thereunder (*State Farm Mutual Insurance Company v Hill,* 213 AD2d 976 [4th Dept 1995]; *Brasco v Nationwide Mutual Insurance Company*, 283 AD2d 492 [2d Dept 2001];*Met Life Auto & Home v Leonorovitz*, 24 AD3d 675 [2d Dept 2005]). Accordingly, this branch of the application is hereby ***GRANTED*** and this Court hereby declares that the insurance overage separately provided by Encompass Floridian and Encompass Indemnity cannot be stacked (*id.*; CPLR §3001).

That branch of the within Order to Show Cause designated as [d], which seeks an order declaring that the loss of consortium claim asserted by Respondent, Kako Crisci, is not sustainable and permanently staying the arbitration as to this Respondent, is hereby ***GRANTED***. Here, the specific language of the relevant insurance policy does not provide for the recovery of such damages and rather the terms thereof state "[w]e will pay all sums that the insured or the insured's legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by the insured * * *." In the instant matter, Mrs. Crisci was not involved in the subject accident and did not sustain any bodily injury resulting therefrom and as such is not entitled to uninsured motorist benefits as afforded under the plain terms of the policy (*Travelers*

Insurance Company v Lianides, 246 AD2d 490 [1st Dept 1998]).[4] Accordingly, this branch of the application is hereby ***GRANTED*** and this Court hereby declares that the loss of consortium claim asserted by Mrs. Cresci is not sustainable under the subject insurance policy and therefore the demanded arbitration relative to said claim is permanently stayed as to this Respondent (*id.*; CPLR §3001). That branch of the within Order to Show Cause denominated as paragraph [e], which seeks an order directing Respondent, Vincent Crisci, to appear for an EUO, as well as an IME, is hereby ***DENIED***. In the matter *sub judice*, the record establishes that while the Respondents reported the occurrence of the subject accident on May 21st, 2009, the Petitioners did not seek this discovery until the interposition of the instant Order to Show Cause on December 14th, 2011. Moreover, the record demonstrates that said discovery was indeed available under the policy issued by Encompass Floridian against which the claims were *originally* filed in May of 2009. Thus, as the Petitioners have had a significant amount of time in which to obtain discovery prior to the commencement of the within proceeding, as well as the submission of the Order to Show Cause, the application is ***DENIED*** (*Allstate Insurance Company v Urena*, 208 AD2d 623 [2d Dept 1994]; *Matter of Interboro Mutual Indemnity Insurance Company v Pardon*, 270 AD2d 266 [2d Dept 2000]; *Allstate Insurance Company v Miles,* 280 AD2d 472 [2d Dept 2001]).

That branch of the within application denominated as paragraph [f] is hereby ***GRANTED*** and the Respondent, Vincent Crisci, is hereby directed to execute and provide up to date executed medical authorizations.

Finally, in accordance with the above determination issued in connection with paragraph [a], that branch of the within application denominated as paragraph [g] is hereby ***GRANTED*** to the extent that Respondent, Vincent Cresci, is hereby directed to produce tax returns for the years 2005 through

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[4] The Court notes in asserting that a claim for loss of consortium is sustainable, counsel for the Respondents relies exclusively upon a list of decisions rendered by arbitrators and does not cite to any appellate authority in support of said assertion (*see* Terorso Affirmation in Opposition dated, December 19th, 2011 at Exh. D).

2009 (*Dore v Allstate Indemnity Company*, 264 AD2d 804 [2d Dept 1999], *supra*).

In sum, the instant Order to Show Cause is ***GRANTED*** as to paragraphs [a], [b],[c], [d], [f] and [g] and ***DENIED*** as to paragraph [e].

This constitutes the Decision and Order of the Court.

All applications not specifically addressed are Denied.

DATED: March 23, 2012
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD
J.S.C.
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MAR 30 2012
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