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SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK
Present: HON. RALPH P. FRANCO, Justice

**STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY**

TRIAL/IAS, PART 13

NASSAU COUNTY

Plaintiff(s),

INDEX No.: 000192/00

-against-

MOTION SEQ. NO: 1

**ANTHONY BARBA, SHEAR-RITE
STEEL CORP, CEFLIA DEVA and
BUKURIJE DEVA**

Defendant(s).

The following papers read on this motion:

- Notice of Motion/ Order to Show Cause..... 1 - 4
- Answering Affidavits.....
- Replying Affidavits.....

Motion by attorney for Plaintiff for an Order pursuant to CPLR 3212, declaring that the Plaintiff is not obligated to provide a defense or indemnification to Defendants', Anthony Barba and Shear-Rite Steel Corp., with regard to an accident that occurred **March 22, 1999**, and authorizing the firm of Scalzi & Nofi to withdraw as counsel for

Defendant, Anthony Barba, is **granted**.

On **March 22, 1999**, at approximately **8:30 A.M.**, Defendant, Cefli Deva was driving his passenger automobile westbound on the Long Island Expressway at or near Exit 46 and was blocked, obstructed and prevented from proceeding by a commercial flatbed truck owned by Defendant, Shear-Rite, and driven by Defendant, Barba who, "forced his vehicle off to the shoulder of the road", (Barba deposition, page 40, lines 21-24). Defendant, Barba who was employed by Defendant, Shear-Rite at the time, exited the flatbed truck and struck and cut Defendant, Deva with a knife in his left forearm, causing Defendant, Deva to sustain severe and serious personal injuries.

Defendant, Barba pled guilty to assault in the Second Degree as a "D" violent felony and was sentenced to incarceration and placed in probation.

There is absolutely no evidence in this case that Deva sustained

any injuries other than by reason of the assault by Anthony Barba. In Plaintiff's moving papers, reference was made to Page 30 of the deposition of Mr. Deva, a copy of which is annexed to the Plaintiff's moving papers. Mr. Deva testified at that page as follows:

“Q. You don't claim to have been injured during any of swerves or when you hit the guard rail, correct?

A. No.”

The opposing papers submitted by counsel for Mr. Deva do not refer to any pages of Mr. Deva's testimony in which he claimed to have been injured through any means other than the assault by Anthony Barba. No affidavit was submitted by Mr. Deva to establish otherwise.

It is clear that Mr. Deva was only injured through the assault of Anthony Barba.

State Farm was not under any obligation to issue a disclaimer of coverage in this situation and, in any event, its disclaimer was timely.

In **Zappone v. Home Insurance Company**, 55 N.Y.2d131, 447

N.Y.S.2d 911 (1982), the Court of Appeals held that the requirement to timely disclaim coverage:

... was not, however, to provide an added source of indemnification which had never been contracted for and for which no premium had ever been paid, 55 N.Y.2d at 137, 447, N.Y.S.2d at 915.

See also: Worcester Insurance Company v. Bettenhauser, 95 N.Y.2d 185, 712 N.Y.S.2d 443 (2000).

State Farm's insurance policy in question provides, at page 7, that:

We will:

1. Pay damages which an insured becomes legally liable to pay because of:
 - a. bodily injury to others, and
 - b. damage to or destruction of property including loss of its use caused by accident resulting from the ownership, maintenance or use, including loading and unloading of your car;

There is no exclusion in the policy for assault or intentional injury. There is no coverage under the policy unless injuries are

caused by an “accident”. There is no coverage by virtue of a lack of inclusion rather than an exclusion. Injuries caused by an assault are not covered by the policy since an assault is not an accident. Anthony Barba pled guilty to assault in the Second Degree because he caused injury to Mr. Deva with a deadly weapon.

The complaint of Cefli Deva, a copy of which is annexed to the Plaintiff’s moving papers, does not make any allegations of negligence and simply refers to the assault. As set forth in Plaintiff’s moving papers, the complaint of Cefli Deva alleges:

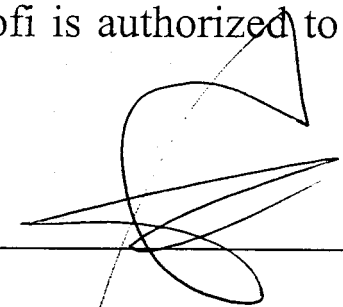
That after obstructing the Plaintiff’s vehicle as aforesaid, Defendant, Barba, without just cause or provocation, exited said flat bed truck and confronted Plaintiff, raising a weapon, believing it to be a knife, causing Plaintiff to sustain the serious personal injuries herein alleged to be of a permanent and protracted nature. Defendant, Barba, without just cause or provocation, exited said flat bed truck and confronted Plaintiff, raising a weapon, believing it to be a knife, causing Plaintiff to sustain the serious personal injuries herein alleged.

There is no allegation in the complaint that the Plaintiff sustained any injuries other than through the assault and there is no allegation of

negligence on the part of Anthony Barba. When the allegations of the underlying action cannot in any way be construed as falling without a policy's coverage, an insurer, as a matter of law, has no duty to defend, **Allstate v. Mende**, 176 A.D.2d 907, 575 N.Y.S.2d 520, (2nd Dept. 1991).

The Plaintiff is not obligated to provide a defense or indemnification to Defendants', Anthony Barba or Shear-Rite Steel Corporation, with regard to the accident that occurred **March 22, 1999**, and the firm of Scalzi and Nofi is authorized to withdraw as counsel for Defendant, Barba.

Dated: December 4, 2001



Hon. Ralph P. Franco, J.S.C.

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ENTERED

DEC 07 2001

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**