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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 3

Present: HON. UTE WOLFF LALLY
Justice

M01

WALTER DREYER and PATRICIA DREYER,
Plaintiffs,

Motion Sequence #5
Submitted June 29, 2011

-against-

INDEX NO: 14248/05

NEW YORK CENTRAL MUTUAL FIRE
INSURANCE COMPANY,

Defendant.

The following papers were read on this motion:

- Order to Show Cause and Affs.....
- Affs in Opposition.....
- Memoranda of Law.....
- Affs in Reply.....

Upon the foregoing, it is ordered that this motion by plaintiffs:

- a) directing NYCM to indemnify the plaintiffs for their liability in the underlying action captioned, *Edmund Schwartz and Samantha Schwartz v. Walter F. Dreyer and Patricia A. Dreyer*, Index No. 5934/05 (hereinafter the "Underlying Action");
- b) summarily directing NYCM to reimburse the plaintiffs for defense costs they have allegedly paid for the Underlying Action, with interest; and

- c) summarily directing NYCM to pay plaintiffs' attorneys, Marshal, Conway, Wright & Bradley ("Marshall Conway") the sum of \$147,551.72, plus interest, for fees and expenses allegedly incurred,

is granted to the following extent.

This action arose out of a motor vehicle accident captioned Edmund Schwartz and Samantha Schwartz v Walter F. Dreyer and Patricia A. Dreyer, Index No. 5934/2005 which took place on February 28, 2005 (the underlying action). The Dreyers were insured under Personal Automobile Insurance Policy No. 7542399NY issued by defendant. By letter dated March 24, 2005 defendant denied coverage to the Dreyers based upon an allegation of intentional assault.

The underlying action was commenced on or about April 8, 2005. The complaint alleged intentional torts as well as negligence and ultimately defendant acknowledged its duty to defend under a reservation of rights. By prior order dated June 6, 2006, this Court (Jonas, J.) granted plaintiff's motion declaring that defendant has a duty to defend plaintiffs in the underlying action by counsel of their own choosing and that defendant must reimburse plaintiffs for the legal fees incurred due to its initial refusal to defend.

Prior to the commencement of trial of the underlying action on September 16, 2010 the intentional tort claims against Mr. Dreyer were withdrawn and the negligence part of the action was tried before a jury who returned a liability verdict of 50% against Mr. Dreyer.

Thereafter, plaintiffs moved for an order directing defendant to indemnify plaintiffs in the underlying action and to make an award of attorney fees to Marshall, Conway, Wright & Bradley, P.C., which resulted in this Court's order (Lally, J.) dated December 3, 2010 holding in part "the attorneys' fee application requires a hearing to determine the

reasonableness of the fees charged and said hearing shall be conducted after the attorney services have been completed...”.

At the damages trial of the underlying action, plaintiffs were awarded \$50,000.00 and based upon the 50% apportionment of fault defendant should have indemnified the Dreyers by paying the sum of \$25,000.00 to plaintiffs in the underlying action.

Defendant opposes this motion and claims that the verdict in the underlying action is not dispositive of its obligation as a matter of law because the intentional tort causes of action were withdrawn prior to trial and the jury never had the opportunity to determine liability as to those causes of action and, even if it found liability only for negligence, defendant still has the right to litigate its duty to indemnify.

It is well established that the duty to indemnify depends on the basis for liability and therefore, cannot be invoked until such liability as well as any damages have been established.

Here, both the question of liability on the theory of negligence as well as damages have been determined. Therefore, this adjudication is controlling and establishes the liability for indemnification. (*Prashker v United States Guarantee Company*, 1 NY2d 584; *Sport Rock International, Inc. v American Casualty Company of Reading, PA*, 65 AD3d 12).

Since the intentional tort claims in the underlying action were withdrawn and the jury determined liability on the basis of negligence, it falls within defendant’s scope of duty to indemnify.

Further, and importantly, the issue has already been determined by this Court’s prior order dated June 6, 2006 (Jonas, J.) which clearly states on page 8 “Accordingly, it is declared that New York Central has a duty to defend Walter Dreyer in the underlying action

by counsel of his own choosing and that it must reimburse for all reasonable legal fees, including those incurred due to its anticipatory breach and refusal to defend Dreyer. Such fees shall be determined by reference to a court attorney referee or in such other manner as the trial court in the underlying action shall direct. It is declared that issues concerning indemnity of Walter Dreyer shall await the outcome of the underlying action.”

Further, said order also provides on page 5 “If it is determined by a jury or other method in the underlying action that Dreyer intentionally struck and caused bodily injury to Schwartz, there is no duty to indemnify Walter Dreyer (see, *Public Service Mut. Ins. Co. v. Goldfarb*, 53 N.Y.2d 392, 400 [1981]), and there would be no vicarious liability for the vehicle owner, Patricia Dreyer.”

Conversely, if the jury determines that Dreyer was negligent, there is a duty to indemnify. That is the law of the case and it cannot be relitigated. (*RPG Consulting, Inc. v Zornati*, 82 AD3d 739).

Plaintiffs’ application for an order directing defendant to pay attorney fees requires a hearing, in accordance with the direction of this Court’s prior order (Jonas, J.) dated June 6, 2006. “The amount of damages for attorney’s fees and disbursements already incurred shall be determined at the same time as counsel fees due to Marshall, Conway and Wright, P.C., which shall be determined after the services have been completed and the entire cost for all representation may be reviewed. The determination of reasonable counsel fees is ‘within the sound discretion’ of the trial court, and the factors are ‘the time, effort and skill required; the difficulty of the questions presented; the responsibility involved; counsel’s experience, ability and reputation; the fee customarily charged in the locality; and the

contingency or certainty of compensation' (*Curtis v Nutmeg Ins. Co.*, 256 AD2d 758, 758-759 [3rd Dept 1998])”.

Based upon the foregoing, defendant shall indemnify plaintiffs in the sum of \$25,000.00 plus any interest which may be due. Further, a hearing to determine counsel fees expended and to be expended by plaintiffs in connection with this matter is hereby scheduled at an IAS Part 3 of this Court, before the undersigned justice on August 30, 2011 at 9:30 a.m.

Dated: **JUL 22 2011**



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ENTERED
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