[* 1]

SCAN

*REVISED SHORT FORM ORDER*

*SUPREME COURT - STATE OF NEW YORK*

*Present:*

*HON. THOMAS P. PHELAN,*
*Justice.*

TRIAL/IAS PART 2
NASSAU COUNTY

UTICA MUTUAL INSURANCE COMPANY AND BRIAN FINNERAN,

Plaintiff,

-against-

GOVERNMENT EMPLOYEES INSURANCE COMPANY,

Defendant.

ORIGINAL RETURN DATE: 06/01/11
SUBMISSION DATE: 06/15/11

Index No. 23395/09

MOTION SEQUENCE #2

The following papers read on this motion:

Notice of Motion.....1
Answering Papers.....2
Reply.....3

THIS ORDER REVISES THE SHORT FORM ORDER DATED JULY 12, 2011 (PHELAN, J.), BY DIRECTING GEICO TO REIMBURSE UTICA MUTUAL FOR GEICO'S $3,000,000 SHARE OF THE SETTLEMENT AMOUNT, PLUS STATUTORY INTEREST FROM THE DATE OF THE SETTLEMENT, MAY 26, 2011.

Plaintiffs move for an order of this Court: (1) pursuant to CPLR 3212, granting them summary judgment against defendant ("GEICO") as to the reasonableness of the settlement in the action entitled Carline Hippolite as the Guardian for the Personal Needs and property Management of Wilner Hippolite and Carline Hippolite, individually v. State Bancorp., Inc. d/b/a State Bank of L.I. and Brian Finneran, previously pending in the Supreme Court of the State of New York, County of Queens, Index No. 5174/08 (referred to herein as the "Underlying Action"); and, (2) pursuant to CPLR 3001, declaring that GEICO must pay the full $3,000,000 policy limit of the GEICO Personal Umbrella Policy, No. P 5030630, toward the settlement of the Underlying Action. The motion is granted in its entirety.

The Underlying Action involved a pedestrian knockdown accident. The evidence herein establishes that, as a result of the underlying accident, Wilner Hippolite is awake and can feel pain but is trapped in his own body and unable to communicate.

Plaintiffs brought this action seeking a declaration of priority of insurance coverage obligations with respect to the underlying automobile accident. By short form order dated January 18, 2011 (Phelan, J.), this court ruled in plaintiffs' favor and held that GEICO is obligated to indemnify Brian Finneran for any damages awarded in the Underlying Action and that the Utica Mutual Umbrella Policy is excess to the GEICO Personal Umbrella Policy. This Court held that the GEICO Personal Umbrella Policy must be exhausted before the Utica Mutual Umbrella Policy applies.

The Underlying Action was settled for $6,750,000.00. Prior to reaching this settlement, counsel for plaintiffs sent GEICO's counsel a letter inviting GEICO to participate in the mediation in the Underlying Action. The letter stated in pertinent part as follows:

> The mediation will afford GEICO the opportunity to contribute towards a settlement, if any, and to express its position as to the reasonableness of the settlement amount. Should GEICO elect not to participate, it will have waived any objections to the reasonableness of a settlement. Utica Mutual and Brian Finneran reserve all rights to proceed against GEICO up to the full limits of the GEICO Personal Umbrella Policy.

The day before the scheduled mediation, GEICO's counsel sent plaintiffs' counsel an email in which he stated in part that "GEICO will not be participating in the mediation of the Hippolite Action, which we understand remains scheduled to take place tomorrow."

On September 24, 2010, the parties in the Underlying Action agreed to a $6,750,000 settlement before the Honorable Robert Roberto, Jr., a mediator. The settlement was memorialized in a Mediation and Settlement Agreement (Movant's Ex. 35). On September 27, 2010, counsel for plaintiffs advised GEICO's counsel of the settlement and "demand[ed] that GEICO pay the full $3,000,000 policy limit of the Personal Umbrella Policy

it issued to Brian Finneran towards the Hippolite settlement."

Thereafter, in the short form order dated January 18, 2011, this Court declared, *inter alia*, the following:

> Accordingly, I DECLARE that
>
> Pursuant to CPLR 3001, that under the GEICO Personal Umbrella Policy No. P5030630, GEICO is required to indemnify Brian Finneran for damages, if any, awarded in the action entitled "Carline Hippolite as the Guardian for the Personal Needs and Property Management of Wilner Hippolite and Carline Hippolite, individually v. State Bancorp., Inc. d/b/a State Bank of L.I. and Brian Finneran," pending in the Supreme Court of the State of New York, County of Queens, Index No. 5174/08 (the "Underlying Action"), which exceed the $1,000,000 limit of the primary Utica National Assurance Company auto policy, up to the full $3,000,000 policy limit of the GEICO Personal Umbrella Policy; and that coverage for Brian Finneran under the Utica Mutual Commercial Umbrella Policy, No. CULP 4078511, is excess to the GEICO Personal Umbrella Policy.

Following plaintiffs' filing of the instant motion, the Queens County Supreme Court, Hon. Martin J. Schulman, J.S.C., issued a Compromise Order, which approved the $6,750,000.00 settlement and prescribed the manner in which the settlement proceeds were to be distributed. Thereafter, plaintiffs in the Underlying Action provided a stipulation of settlement, a release and a stipulation discontinuing the Underlying Action with prejudice. In accordance with the Court's Compromise Order, Utica National and Utica Mutual then issued 15 settlement checks totaling $6,750,000.00.

Upon the instant motion, plaintiffs seek summary judgment as to the reasonableness of the settlement and a declaration that GEICO should pay its full $3,000,000 policy limit toward the Hippolite settlement. Plaintiffs, as movants herein, have submitted ample evidence establishing that the economic damages in the Underlying Action would exceed $4,000,000, sustainable conscious pain and suffering values would exceed $4,000,000,

a sustainable loss of parental guidance claim would exceed $1,000,000 and a sustainable loss of services/consortium claim would approximate $300,000, which together with additional orthopedic injuries would render the sustainable value of the claims in the Underlying Action in the neighborhood of $10 million (Movant's Ex. 32).

"[W]here an insurer unjustifiably refuses to defend a suit, the insured may make a reasonable settlement or compromise of the injured party's claim, and is then entitled to reimbursement from the insurer" (*Isadore Rosen & Sons v Security Mut. Ins. Co. of N.Y.*, 31 NY2d 342, 347 [1972] (internal quotation marks omitted); *American Ref-Fuel Co. of Hempstead v Resource Recycling*, 281 AD2d 573 [2d Dept. 2001]). Here, this Court has already determined that the GEICO Personal Umbrella Policy covered Brian Finneran for the Underlying Action. Therefore, there is no question that GEICO is obligated to pay for any reasonable settlement of that action (*Isadore Rosen & Sons, Inc. v. Security Mut. Ins. Co. of New York*, supra; *Cardinal v. State*, 304 NY 400 [1952]). Further, in that regard, having refused to participate in the settlement negotiations in the Underlying Action, GEICO is also foreclosed from contesting the reasonableness of the settlement (*Serio v. Public Service Mut. Ins. Co.*, 7 AD3d 277, 278 [1st Dept. 2004]; *City of New York v. Zurich-American Ins. Group*, 27 AD3d 609 [2d Dept. 2006]). Indeed, in this case, not only did GEICO refuse to participate in the settlement negotiations, but it also failed to offer its own view of what a "reasonable settlement" would be. Accordingly, GEICO does not have any basis to contest the reasonableness of the settlement.

In any event, in opposition, GEICO fails to present any admissible evidence raising an issue of fact as to the reasonableness of the settlement and whether it should pay its full $3,000,000 policy limit toward the Hippolite Settlement. As stated above, this Court previously held that the GEICO Personal Umbrella Policy covers Brian Finneran for the Hippolite loss and that the GEICO Personal Umbrella Policy must be exhausted before the Utica Mutual Umbrella Policy applies. GEICO fails, in opposition, to raise any issue of fact with respect to liability or damages.
GEICO's argument that "[i]f the Hippolite action had proceeded to trial a jury would likely have considered [the] fact [that Mr. Hippolite contributed substantially to the occurrence which resulted in his injuries] and was also free to conclude that Mr. Hippolite's injuries were so severe that he would

not have lived to the life expectancy of a person of his age" is simply unavailing (Aff. in Opp'n., ¶11).

One opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord v. Swift & Muller Constr. Co.*, 46 NY2d 276 [1978]).

"In order to recover the amount of the settlement from the insurer, the insured need not establish actual liability to the party with whom it has settled 'so long as * * * a potential liability on the facts known to the [insured is] shown to exist, culminating in a settlement in an amount reasonable in view of the size of possible recovery and degree of probability of claimant's success against the [insured]'" (*Luria Bros. & Co., Inc. v. Alliance Assur. Co., Ltd.*, 780 F.2d 1082, 1091 [2d Cir. 1986] (citation omitted)). GEICO does not dispute that there was a potential for liability finding. Thus, on this motion to recover $3,000,000 from GEICO, plaintiffs are not required to demonstrate with certainty that a jury would have found Brian Finneran liable or that Wilner Hippolite's damages were worth precisely $6.75 million (or $4 million). Rather, viewing the settlement in light of the potential liability and damages under the circumstances, GEICO has failed to raise any issue of fact as to the reasonableness of the settlement in which it did not participate.

Further, GEICO's argument that "the reasonableness of the settlement presents an issue of fact under the circumstances presented" (Aff. in Opp'n., ¶12), also flies in face of the fact that GEICO was given the opportunity to attend the mediation and to express its view as to the question of reasonableness but it declined to do so. Because of the absence of any admissible evidence creating an issue of fact, plaintiffs' motion for summary judgment is granted in its entirety. Pursuant to CPLR 3001, I declare that GEICO must pay the full $3,000,000 limit of the GEICO Personal Umbrella Policy, No. P 5030630, toward the settlement of the underlying Hippolite Action.

The parties' remaining contentions have been considered by this Court and do not warrant discussion.

It appearing that Utica Mutual tendered payments on May 26, 2011, in accordance with the order dated May 18, 2011 (Schulman, J.), GEICO is hereby directed to reimburse Utica Mutual for GEICO's $3,000,000 share of the settlement amount, plus statutory interest from May 26, 2011.

In the event that GEICO fails to reimburse Utica Mutual within ten (10) days days from the date hereof, upon submission of proof of service of a copy of this order and an affidavit of default, the Clerk is directed to enter judgment in favor of Utica Mutual and against GEICO in the sum of $3,000,000 with interest thereon from May 26, 2011.

This decision constitutes the order of the court.

Dated: 9-13-11

HON THOMAS P. PHELAN

J.S.C.

ENTERED
SEP 15 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Attorneys for the Parties

Lester Schwab Katz & Dwyer, LLP
Attention: Eric A. Portuguese, Esq.
Attorneys for Plaintiffs
120 Broadway
New York, NY 10271-0071

Bleakley, Platt & Schmidt, LLP
Attention: Robert D. Meade, Esq.
Attorneys for Defendant
One North Lexington Avenue, 7th Floor
P. O. Box 5056
White Plains, NY 10601-5056