

**Myers v National Union Fire Ins. Co. of  
Pittsburgh, Pa.**

2007 NY Slip Op 33324(U)

October 5, 2007

Supreme Court, New York County

Docket Number: 0603767/2006

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: YORK  
*Justice*

PART 2

Dwight Myers p/k/a Heavy D

INDEX NO.

603767/06

MOTION DATE

Natl Union Fire Ins.

MOTION SEQ. NO.

02

MOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM DECISION.**

**FILED**

OCT 16 2007

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 10/05/07

Ley  
**LOUIS B. YORK**

J.S.C.

Check one:  FINAL DISPOSITION  NON FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**Supreme Court of the State of New York  
County of New York**

**Index No. 603767/06**

**Part 2**

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DWIGHT MYERS, p/k/a HEAVY D,

Plaintiff,

- against -

NATIONAL UNION FIRE INSURANCE  
COMPANY OF PITTSBURGH, PA.,

Defendant.

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**Decision/Order**

Present:  
Hon. Louis B. York  
Justice, Supreme Court

Louis B. York, J:

Motion sequence numbers 01 and 02 are consolidated for decision disposition and resolved as follows.

The underlying cases arose as a result of a stampede at a celebrity basketball game at City College of New York on December 28, 1991. Plaintiff, Dwight Myers ("Myers"), was involved in planning the event. In addition, Myers was going to participate in this basketball game along with Sean Combs and other celebrities. Prior to the start of the game, patrons crowded the stairwell in an attempt to enter the gymnasium. A stampede erupted as the crowd rushed into the gymnasium, injuring and killing several people.

Myers had a \$1,000,000 general liability entertainment insurance policy with Defendant, National Union Insurance Company of Pittsburgh, PA. ("National Union"), to cover costs arising from his job as an "Entertainer." When Myers was sued, along with others, in the personal injury cases arising from the stampede, National Union would not defend or indemnify him for any of the costs.

Through his counsel, Myers participated in the litigation of the personal injury and wrongful death actions, and took part in the settlement negotiations. Ultimately, he entered into settlement agreements along with the other defendants in these cases. Allegedly, Myers' share of the settlements totaled \$791,899, divided as follows: (1) \$30,000 to Anthony Slaughter, paid December 1999; (2) \$27,004.00 and \$3621.19, to Al Naji and Katie Heard, respectively, paid November 1998; (3) \$20,000 to Benjamin Andrews, paid May 2000; (4) \$5,000 to Jeanice Roberts, paid May 1999; (5) \$5,000 to Tiombe Curtis, paid May 1999; (6) \$133,044.54 to the Christina Brown, paid May 1999; (7) \$50,000 to the Estate of Charise Noel, paid May 1999; (8) \$70,000 to Dorothy McCain, paid May 1999; (9) \$70,000 to Barbara Swain, paid November 1998; (10) \$70,000 to Yvonne Dargan, paid November 1998; (11) \$164,479.38, still unpaid when the parties made the current motions, but owed to Sheila Williams; (12) \$43,750.00 paid May 1999 to Jennifer Rainey; and (13) \$100,000 to Nicole Levy, paid May 2000.

After it denied coverage to Myers in 1996, National Union brought an action seeking declaratory judgment that it did not have to indemnify and defend Myers. Nat'l Union Fire Ins. Co. v. Ferrell & Myers, Inc., Index No. 117606/1996 (Sup. Ct. N.Y. County) ("Nat'l Union"). The Nat'l Union trial took place in 2004 before this Court, which issued a declaratory judgment that National Union was obligated to defend and indemnify Myers in all the personal injury and

wrongful death cases. Nat'l Union Fire Ins. Co. v. Ferrell & Myers, Inc., 4 Misc.3d 1013A, 791 N.Y.S.2d 872 (Sup. Ct. N.Y. County 2004)(“Nat'l Union”). National Union appealed to the First Department, which affirmed this Court's decision. Nat'l Union Fire Ins. Co. v. Ferrell & Myers, Inc., 26 A.D.3d 191, 809 N.Y.S.2d 29 (1st Dept. 2006). On July 5, 2006, the Court of Appeals denied National Union's application to appeal. Nat'l Union Fire Ins. Co. v. Ferrell & Myers, Inc., 7 N.Y.3d 705, 819 N.Y.S.2d 873 (2006).

In 2006, Myers submitted his current order to show cause apparently<sup>1</sup> using the caption and index number for the original case, attempting to obtain reimbursement of settlement and counsel fees and to obtain punitive damages. His counsel apparently – and incorrectly – thought that because I was an Acting Supreme Court Justice during the pendency of Nat'l Union and am now an elected Supreme Court Justice, the order to show cause was in a different court than the original declaratory judgment action had been. Counsel therefore tried to file the order to show cause separately, neither under the earlier caption, Nat'l Union Fire Ins. Co. v. Ferrell & Myers, Inc., Index No. 117606/1996 (Sup. Ct. N.Y. County), nor under another active case or proceeding. The Motion Support office rejected the order to show cause because it was not filed in connection with any existing case or a proceeding.

As a result of the above, Myers filed the new complaint currently before the Court and brought his order to show cause under the index number for this new action. In the current case, Myers seeks a finding that based on the decision in Nat'l Union he is entitled to indemnification and reimbursement of costs associated with the earlier actions and with this new case. He also seeks punitive damages. In his first cause of action, Myers requests \$791,899, the reimbursement

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<sup>1</sup> The explanation of what transpired is somewhat confusing.

for settlements of the personal injury cases, plus interest of 9% per annum from the various dates at which he paid the settlements. In addition, Myers seeks reimbursement of \$324,919 for legal fees he paid litigating the personal injury cases and the two actions with National Union itself, with 9% interest per annum from August 9, 2004, the date of this Court's decision in the declaratory judgment action.

Myers' second cause of action asks for the same amount of damages based on the theory of fraud and fraudulent inducement. Myers states that National Union made false statements with the intent of deceiving and defrauding Myers, and that these misrepresentations induced him to purchase the policy. Further, according to Myers, National Union issued the policy but never intended to cover Myers professionally as an entertainer.

The order to show cause seeks a ruling that the damages are as set forth above – essentially, then, it seeks summary judgment for the relief set forth in the complaint. National Union opposes the order to show cause and also moves, separately rather than as a cross-motion, to dismiss the complaint. For the reasons below, both the order to show cause and motion are denied in part and granted in part.

The statute of limitations for bringing an action against an insurance company for denying coverage on a policy is six years. National Union makes the surprising argument that this case is time-barred because the present action was not brought within six years of the date of denial of coverage. Myers raises a number of arguments, attacks National Union's tactics, appeals to principles of equity and notice, and ultimately counters that he commenced this action within the statute of limitations period – stating that the statute should run from the date of this Court's declaratory judgment.

National Union's argument is faulty and Myers' response to it is convoluted. Therefore, without addressing the parties' arguments on this issue in detail, the Court finds that the action is timely to the extent that this case is based on the declaratory judgment action. Quite simply, as Myers suggests – albeit unclearly – in his opposition to National Union's motion at page 18, the case at hand seeks to enforce the declaratory judgment, not the insurance policy, and the statute of limitations should be computed accordingly. However, the remainder of the action – which asserts fraudulent inducement to enter into the insurance contract and seeks punitive damages based on National Union's failure to indemnify Myers – is untimely and shall be severed and dismissed. Myers provides no legitimate justification for adding new allegations of fraud, relating to the denial of coverage, at this late juncture.

The court notes that, even if the fraud and punitive damages claims were timely, they would fail on their merits. “Punitive damages are not recoverable for an ordinary breach of contract as their purpose is not to remedy private wrongs but to vindicate public rights.” Fulton v. Allstate Ins. Co., 14 A.D.3d 380, 381, 788 N.Y.S.2d 349, 350 (1<sup>st</sup> Dept. 2005). To state a claim for punitive damages, therefore, Myers would have to “not only demonstrate egregious tortious conduct by which he . . . was aggrieved, but also that such conduct was part of a pattern of similar conduct directed at the public generally.” Id. Philips v. Republic Ins. Co., 108 A.D.2d 845, 485 N.Y.S.2d 566 (2<sup>nd</sup> Dept.), aff'd, 65 N.Y.2d 1000, 494 N.Y.S.2d 301 (1985), upon which Myers partially relies, underscores the high threshold which exists in punitive damages claims arising under breach of insurance contracts. See also Flores-King v. Encompass Ins. Co., 29 A.D.3d 627, 818 N.Y.S.2d 221 (2<sup>nd</sup> Dept. 2006)(reiterating the standard).

The case at hand, like the dispute in Flores-King, involves “a private breach of contract dispute between the insurers and their insureds.” 29 A.D.3d at 627, 818 N.Y.S.2d at 222 (citations and internal quotation marks omitted). The denial of coverage by National does not rise to the level of egregious tortious conduct. Myers contends that this case serves a greater public purpose “because it would set the standard for future insurers to be conscious of their grounds in disclaiming coverage and require a check and balance and appropriate sanction to those insurers who reap the financial benefits from their insureds {sic} and later create theory upon baseless theory in attempt to forgo their obligations to cover the insured under the insurance agreement.” Order to Show Cause at ¶ 31. The same can be said about every case in which there is a bad faith or unsubstantiated denial of coverage, but the law does not provide for the award of punitive damages in all such situations.

In the fraud and fraudulent inducement claims contained in the second cause of action, Myers alleges that National Union made false statements that induced him into buying the policy and that National Union never intended to cover Myers under the policy. However, National Union says that Myers has given no reasoning or support to show that these allegations are in any way true.

The essential elements of a cause of action for fraud are “representation of a material existing fact, falsity, *scienter*, deception and injury” (citing Channell Master Corp. v Aluminium Ltd. Sales Corp., 4 N.Y.2d 403, 407, 176 N.Y.S.2d 259, 262 (1958)). At the very threshold, then, plaintiff must allege a misrepresentation or material omission by defendant, on which it relied, that induced plaintiff to purchase the policy of insurance. General allegations that

defendant entered into a contract while lacking the intent to perform it are insufficient to support the claim.

New York University v. Continental Ins. Co., 87 N.Y.2d 308, 318, 639 N.Y.S.2d 283, 289 (1995). The complaint here contains only bare allegations concerning the alleged fraud. Thus, Myers did not set forth a prima facie claim.

Now, the Court discusses the merits of the claim based on this Court's declaratory judgment determination. Despite the differences between this case and Nat'l Union, the current case nevertheless raises many of the same issues as the earlier one; and, accordingly, both parties here have had the opportunity to litigate these issues. Indeed, the parties already have argued, and the Court already has heard arguments on and resolved, most of the issues presented here. Moreover, National Union has not presented any persuasive reason for deviation from this Court's earlier determination – which was, as stated, affirmed on appeal – or for considering any issues that could or should have been raised in the earlier lawsuit.<sup>2</sup> Therefore, the Court finds that the findings and determinations in Nat'l Union, 4 Misc.3d 1013A, 791 N.Y.S.2d 872 (Sup. Ct. N.Y. County 2004) are binding here. Applying the binding precedent of Nat'l Union, the Court concludes that, as this Court and the First Department have already held, National Union is obligated to compensate Myers based on his policy with the company.

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<sup>2</sup>National Union's reference to the length of the declaratory judgment hearing – and the concomitant suggestion that not all issues were addressed – is unpersuasive. This statement ignores the lengthy nature of that litigation and fails to mention the three motions and numerous court appearances. National Union also overlooks the fact that the two-hour hearing, and the decision the Court issued following the hearing, was affirmed on appeal. In arguing its appeal before the First Department, National Union also attempted to raise new issues, and the First Department also rejected the arguments as waived.

National Union further attempts to avoid the precedent of Nat'l Union by stating that, though the Court decided National Union had to cover Myers with respect to the joint venture at issue, the Court did not decide whether the individual wrongful death and personal injury cases arising out of the event were covered. This argument is illogical. This Court has no jurisdiction to issue advisory opinions. The underlying personal injury and wrongful death actions, rather than the theoretical scope of the policy, compelled National Union to initiate the declaratory judgment action. Therefore, when this Court decided whether the incident was covered, it implicitly and explicitly held that lawsuits arising under it were covered.

The only remaining issue is the amount that Plaintiff owes to Defendant, and the court turns to the pertinent arguments now. In its motion, National Union argues that Myers settled the personal injury actions for excessive amounts and that it is entitled to a trial or hearing regarding the reasonableness of the settlements. Myers counters that National Union was aware of the settlements at the time they were being negotiated and should have participated in the negotiations in order to control the amounts that were agreed upon.

If an insurance company obliged to indemnify its client is uninvolved in the underlying litigation, it is entitled to challenge the reasonableness of a settlement. See Atlantic Cement Co. v. Fidelity & Casualty Co. of N.Y., 63 N.Y.2d 798, 801-802, 481 N.Y.S.2d 329, 330 (1984); Tishman Constr. Corp. v. Am. Mfrs. Mut. Ins. Co., 303 A.D.2d 323, 324-325, 757 N.Y.S.2d 535, 537 (1st Dept. 2003). However, “[w]here an insurer is involved in the underlying proceeding yet fails to challenge the reasonableness

of the settlement there, it may not do so in a separate declaratory judgment action.” City of New York v. Zurich-American Ins. Group, 27 A.D.3d 609, 611, 811 N.Y.S.2d 773, 774 (2<sup>nd</sup> Dept. 2006) (“Zurich-American Ins. Group”). Here, both parties concede that Lester Schwab Katz and Dwyer (“Lester Schwab”), on behalf of National Union, was not primary counsel for Myers during the settlement negotiations. However, in parts of its papers – in particular, where it challenges Myers’ attorney’s fees as unreasonably high – National Union acknowledges that, through Lester Schwab, it represented Myers at various points of the litigation. In addition, counsel from Lester Schwab appeared on National Union’s behalf during the settlement negotiations and continued “monitoring the claims” during the negotiation period, delivering reports of the settlements to National Union. See National Union Mem. of Law, pp. 19- 20. Indeed, as to some settlements – including those relating to Andrews, Curtis, Williams and Dargan -- National Union’s counsel actually wrote to Myers’ private counsel, reminding him of the settlements, and directed him to pay the plaintiffs pursuant to the negotiated agreement. Based on this level of involvement, and also on National Union’s apparent failure to challenge the reasonableness of the settlements in the context of the declaratory judgment action or the underlying actions, cf. Serio v. Public Serv. Mutual Ins. Co., 7 A.D.3d 277, 776 N.Y.S.2d 245 (1<sup>st</sup> Dept. 2004), the Court finds that National Union has no right to assert the challenge now. Zurich-American Ins. Group, 27 A.D.3d at 611, 811 N.Y.S.2d at 774. The fact that Lester Schwab may have opined, privately, to National Union that the

settlements were too high is irrelevant.<sup>3</sup>

However, as National Union points out, Myers still must show that the numbers he sets forth are accurate. Myers has not provided sufficient evidentiary support for all of the settlements. Therefore, as to those which are not substantiated fully, a hearing is necessary.

Eight of the settlements are adequately supported, as Myers has submitted copies of checks and other evidentiary support as to the settlements involving Ali Naji, Katie Herd, Charisse Noel, Dorothy McCain, Barbara Swain, Yvonne Dargan, Jennifer Rainey, and Nicole Levy. However, Myers apparently owed Tiombe Curtis and Jeanice Roberts \$4,000 each, rather than the \$5,000 each he alleges, and apparently paid each one \$4,000. In addition, Myers' letter and checks to the Estate of Brown assert that he owes \$122,500 rather than \$133,044.54; some of the discrepancy may be attributable to subsequent accrued interest and the fact that ultimately a marshal was hired on the Estate's behalf, but this is unclear. Next, Myers asserts that he owed Sheila Williams \$164,479.38, based on a letter from her counsel dated March 27, 2006. However, the judgment entered August 30, 2001 was for \$70,000, approximately \$20,000 in back interest, and \$3,500 in attorney's fees -- a total of approximately \$93,500. Although there surely is additional

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<sup>3</sup>The Court further notes that National Union's challenge to the settlements' reasonableness is not facially persuasive, given the horrific nature of the incident and the substantial injuries at issue, including wrongful death; and of the large number of sophisticated defendants' attorneys involved in the settlement negotiations. National Union's allegations that Sean Combs settled for excessive amounts because of the negative publicity and its suggestion that Combs may have paid some of Myers' settlements are completely unsubstantiated and speculative. Its references to Combs' brushes with the law are irrelevant.

interest due, this amount still must be established. Moreover, it is not clear why Sheila Williams' counsel asserted that he was subsequently entitled to \$25,000 rather than the \$3,500 awarded in the judgment. Finally, Myers states he paid \$20,000 to Benjamin Andrews. The letter from National Union's counsel to Myers' personal counsel states the matter was settled for \$15,000 but that Myers would have to pay \$20,000 if payment was untimely made. However, there is no indication whether or when Myers paid the claim or whether it was for \$15,000 or \$20,000. Thus, as to five settlements, a hearing is required.

Next, National Union argues that Myers' claim for legal fees should be reduced or determined by hearing because Myers did not properly document the fees. Myers' papers bills from each attorney or firm that represented him, but these are final statements of account only, which do not detail the firms' actual work and costs. Myers notes that National Union declined coverage at its own risk. Although this is correct, it does not entitle Myers to make this relatively conclusory demand for attorney's fees. Tishman Constr. Corp. allows National Union the right to contest the fees at a hearing, and in light of the sparse material submitted here – in support of Myers' claim for a hefty \$324,919 in fees -- a hearing on attorney's fees is appropriate. 303 A.D.2d at 324-325, 757 N.Y.S.2d at 537. At the hearing, Myers must provide evidentiary support which adequately documents his legal fees. National Union can challenge the reasonableness of the fees. National Union may want to have pre-hearing discovery related to this issue; if so, it can seek discovery from Myers in advance of the hearing, and it should raise any discovery disputes with the Referee.

Finally, National Union argues that because Myers has not fully paid all

settlement amounts, his demand for interest must be denied as premature. However, the Clerk can determine the interest due as to those claims Myers has paid, with interest continuing to accrue at the statutory rate following the entry of judgment. The one settlement that Myers states he has not paid is Sheila Williams. At the hearing this Court has ordered, the Referee will determine the amount that National Union owes to Myers on this claim, including any back interest due to Sheila Williams. Here, too, the interest will continue to accrue up to the time of payment. Because the amount has not been paid to the Williams Estate, National Union should pay the sum, including interest, directly to Sheila Williams and/or the Williams Estate.

Based on the above, it is

ORDERED that the motion to dismiss the second cause of action is granted and the second cause of action is dismissed; and it is further

ORDERED that the motion to dismiss the first cause of action is granted to the extent that the cause of action seeks punitive damages, and is denied to the extent the cause of action seeks personal injury damages and legal fees; and it is further

ORDERED that the order to show cause is denied as to the claims for punitive damages and fraudulent inducement, and granted to the extent that it seeks to enforce the holding of the declaratory judgment, and it is further

ORDERED that the portion of the first cause of action seeking punitive damages is severed and dismissed; and it is further

ORDERED that Myers is awarded judgment as follows:

(1) \$27,004.00 and \$3621.19, constituting the amounts paid to Al Naji and Katie

Heard, respectively, with interest at the statutory rate from November 30, 1998 to the date of entry, and thereafter at the statutory rate;(2) \$50,000, constituting the amount paid to the Estate of Charise Noel, with interest at the statutory rate from May 30, 1999 to the date of entry, and thereafter at the statutory rate; (3) \$50,000, constituting the amount paid to the Estate of Charise Noel, with interest at the statutory rate from May 30, 1999 to the date of entry and thereafter at the statutory rate; (4) \$70,000, constituting the amount paid to Dorothy McCain, with interest at the statutory rate from May 30, 1999 to the date of entry, and thereafter at the statutory rate; (5) \$70,000, constituting the amount paid to Barbara Swain, with interest at the statutory rate from November 30, 1998 to the date of entry and thereafter at the statutory rate; (6) \$70,000, constituting the amount paid to Yvonne Dargan, with interest from November 30, 1998 to the date of entry and thereafter at the statutory rate; (7) \$43,750.00 constituting the sum paid to Jennifer Rainey, with interest at the statutory rate from May 30, 1999 to the date of entry and thereafter at the statutory rate; and (8) \$100,000, constituting the sum paid to Nicole Levy, with interest at the statutory rate from May 30, 2000 to the date of entry and thereafter at the statutory rate; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly, with costs and disbursements; and it is further

ORDERED that the portions of the Complaint relating to attorneys fees and to the amounts due based on the settlements of the claims relating to the Curtis, Roberts, Brown, Williams, and Andrews cases are severed and these severed portions of the Complaint are referred to a Referee; and it is further

ORDERED that a hearing is directed on the issue of attorney's fees and the amounts due based on settlement and interest on the claims relating to the Curtis, Roberts, Brown, Williams, and Andrews cases; and it is further

ORDERED that this matter is referred to the Referee's Clerk on the issues set forth in the above paragraph, and the Referee's Clerk is directed upon filing of a copy of this Order to place the severed portions of this action on the appropriate Referee's calendar to hear and decide the amount due on the settlements listed above, including the amount due in attorney's fees, in accordance with the guidelines set forth in this order, and to enter a Judgment thereon.

Dated: 10/5/07

ENTER:

*Levy*  
**LOUIS B. YORK**  
Louis B. York, J.S.C.  
**J.S.C.**

**FILED**  
OCT 16 2007  
NEW YORK  
COUNTY CLERK'S OFFICE