SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN J.S.C. Justice PART _____

Index Number : 154275/2012
SCHLAM STONE & DOLAN LLP
VS
SHORE TOWERS CONDOMINIUM
Sequence Number : 003
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

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

Dated: 6/5/13

CYK
CYNTHIA S. KERN J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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SCHLAM STONE & DOLAN LLP,

Plaintiff,

Index No. 154275/2012

-against-

DECISION/ORDER

SHORE TOWERS CONDOMINIUM,

Defendant.

----------x

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Cross-Motion and Affidavits Annexed.....	
Answering Affidavits to Cross-Motion.....	
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff Schlam Stone & Dolan LLP commenced the instant action to recover outstanding attorney's fees allegedly owed to it by defendant. Defendant now moves for an Order pursuant to CPLR § 3212 granting it partial summary judgment dismissing plaintiff's fourth cause of action. For the reasons set forth below, defendant's motion is granted.

The relevant facts and procedural history are as follows. Defendant Shore Towers Condominium ("Shore Towers") is a condominium association. On or about July 28, 2011, a lawsuit entitled *Antone v. Shore Towers Condominium* (the "*Antone* Action") was filed against defendant, its former board member Berj Haroutunian ("Mr. Haroutunian"), and the former board

president Michael Ficco. Pursuant to defendant's by-laws, Mr. Haroutunian was entitled to indemnification from defendant as he was sued in his capacity as a board member. Thus, defendant's insurer, Travelers Casualty and Surety Company of America ("Travelers"), agreed to defend him in the action. However, due to a possible conflict of interest, Travelers' retained plaintiff to act as defense counsel on behalf of Mr. Haroutunian at an agreed-upon rate. Ultimately, the *Antoine* Action was dismissed with prejudice on a motion brought by plaintiff.

It is undisputed that Travelers has already paid plaintiff for its representation of Mr. Haroutunian in the *Antone* Action at the agreed-upon rate. Nonetheless, plaintiff claims that the agreed-upon rate paid by Travelers is far below the prevailing rates for New York commercial litigation firms and does not cover the fees that Mr. Haroutunian has actually incurred. Thus, plaintiff's fourth cause of action seeks a declaration that defendant must indemnify Mr. Haroutunian for his legal fees incurred in the *Antone* Action over and above what was already paid by Travelers. By Order dated February 21, 2013, this court denied plaintiff summary judgment on said claim on the ground that it failed to make out its *prima facie* entitlement to judgment as a matter of law. Specifically, this court found that "[t]he mere fact that defendant has agreed to indemnify board members when they are sued does not in and of itself show that it must pay more than what is paid by its insurer and the authority cited by plaintiff is inapposite." As defendant had not moved to dismiss the claim in its cross-motion, this court did not grant such relief at that time. Accordingly, defendant now moves to dismiss plaintiff's remaining fourth cause of action on the grounds that the court's prior determination is law of the case and/or that plaintiff is not entitled to fees above and beyond what was paid by Travelers as a matter of law.

"A defendant moving for summary judgment has the initial burden of coming forward with admissible evidence, such as affidavits by persons having knowledge of the facts, reciting the material facts and showing that the cause of action has no merit." *GTF Mktg. V. Colonial Aluminum Sales*, 66 N.Y.2d 965, 967 (1985). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

In the present case, defendant is entitled to summary judgment dismissing plaintiff's fourth cause of action seeking a declaratory judgment that it is entitled to indemnification above and beyond what defendant's insurer already paid as it has demonstrated that said claim has no merit as a matter of law. It is undisputed that pursuant to defendant's by-laws it had an obligation to indemnify Mr. Haroutunian in the *Antone* Action. Defendant satisfied its obligation to indemnify Mr. Haroutunian by maintaining insurance through Travelers pursuant to which Mr. Haroutunian was provided legal defense by plaintiff in the *Antone* Action. Thus, Mr. Haroutunian was afforded a defense paid by defendant via its insurance carrier Travelers and plaintiff cannot now seek to charge its client more and then seek that difference from defendant. It is simply immaterial that the agreed-upon rate may be far below the prevailing rates for New York commercial litigation firms. Plaintiff, in undertaking the representation of Mr. Haroutunian in the *Antone* Action, agreed to be compensated by Travelers at the rate of $225.00/hour. Plaintiff was in no way obligated to do so. In fact, plaintiff was free to reject the retention and/or to negotiate for higher rates but, for whatever reason, chose not to.

Additionally, the cases cited by plaintiff for the proposition that in certain situations "the

indemnification obligation applies to the amount beyond that which is covered by insurance," are inapposite. *See Dunn v. Hurt*, 4 A.D.3d 884, 885 (4th Dept 2004), *Sun Co. Inc. v. Brown & Root Braun, Inc.*, 1999 WL 681694, 12 (E.D. Pa. Sept. 2, 1999); *Kaung v. Cole Nat. Corp.*, 884 A.2d 500 (Del. 2005). In those cases, plaintiffs were seeking indemnification for liabilities or defense costs which exceeded the defendant's insurance coverage. Here, on the other hand, plaintiff is simply seeking to recover over and above what it agreed to be paid by the insurer.

Based on the foregoing, defendant's motion is granted and plaintiff's fourth cause of action is hereby dismissed. The Clerk is directed to enter judgment accordingly. This constitutes the decision and order of the court.

Dated: 6/5/13

Enter: _____

J.S.C.

CYNTHIA S. KERN
J.S.C.