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

PRESENT: HON. CAROL EDMEAD PART 35

Index Number : 107933/2005

ESSURANCE

vs

LOUIS PROVENZANO INC.,

Sequence Number : 001

SUMMARY JUDGMENT

EX NO.

ION DATE 4/13/07

ION SEQ. NO.

ION 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

Based on the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by Louis Provenzano, Inc. for summary judgment is denied; and it is further

ORDERED that Esurance a/s/o Chris Zimman serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the Decision and Order of the Court.

Dated: 6/21/07

J.S.C.

HON. CAROL EDMEAD

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

☐ DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------X

ESURANCE a/s/o CHRIS ZIMMAN,

Plaintiff,

-against-

LOUIS PROVENZANO, INC.,

Defendant.

----------X

Index No. 107933/05

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Plaintiff, Esurance a/s/o Chris Zimman ("plaintiff"), seeks reimbursement from Louis Provenzano, Inc. ("defendant") for damages sustained to a 2001 Mercedes Benz ("vehicle") owned by plaintiff's insured, Chris Zimman ("Mr. Zimman"), after the vehicle was placed at the defendant's parking garage located at 180 West Broadway, New York, New York. The plaintiff alleges that the occurrence was caused wholly and solely by reason of the negligence and breach of bailment of the defendant.

Factual Background

On November 23, 2003, during the early morning, Mr. Zimman dropped off the vehicle at the defendant's garage for long-term parking. According to the affidavit of the parking attendant, Sulayman Gaye ("Mr. Gaye"), he took the keys from Mr. Zimman and parked the vehicle in the garage. Mr. Gaye also states that he left the garage at around 2:00 am or 2:30 am for about twenty minutes to get some food. When Mr. Gaye returned, he noticed the theft and reported the missing vehicle to the police. Hours thereafter, the vehicle was recovered by the police, after having sustained damages as a result of a collision with another vehicle.

According to the complaint, the plaintiff paid its insured pursuant to the insurance policy in effect at the time of the accident the sum of $46,058.26 for damages sustained to the vehicle. In accordance with the subrogation provisions in the insurance policy, the insured assigned his

rights thereunder to the plaintiff and the plaintiff became subrogated to all the rights of the insured to recover against any firm, person or corporation, any and all sums paid under the policy. The plaintiff is now seeking damages in the amount of $46,058.26.

Instant Motion

The defendant now moves for summary judgment dismissing the plaintiff's complaint. The defendant initially contends that the plaintiff is not the insurer of Mr. Zimman, and thus lacks standing to commence this action. After plaintiff filed the Note of Issue, the plaintiff provided documentation indicating that Argonaut Insurance Company was the actual insurer of the vehicle. The defendant contends it had no way of knowing what relationship, if any, exists between plaintiff Esurance and Argonaut Insurance Company; defendant submits that contrary to the allegations in the complaint, Argonaut Insurance Company and not Esurance insured the vehicle, and that as such, the wrong insurance company is bringing suit.

In addition, the defendant contends that it is entitled to summary judgment on liability. In a bailment situation, after the bailee comes forward with an explanation supported by evidentiary proof in admissible form as to how the loss occurred, the burden shifts to the plaintiff to prove that the loss was due to the defendant's negligence. It is undisputed that a criminal broke into defendant's locked garage in the middle of the night and stole the vehicle, and that the police were promptly notified, quickly responded to the scene, and recovered the vehicle within a relatively short period. There is no evidence of any negligence on the part of the defendant.

Furthermore, the defendant contends that the theft was an intervening cause which was not foreseeable. To establish foreseeability, the criminal conduct at issue must be reasonably predictable based on the prior occurrence of the similar criminal activity at a location sufficiently proximate to the subject location. Mr. Gaye indicates that this is the first time someone has ever broken into the garage and stolen a vehicle. Thus, as the theft was an intervening act that was not foreseeable, the defendant should not be held liable.

In opposition, the plaintiff argues that the defendant is not entitled to summary judgment

given that there are issues of fact and of law that must be decided at trial. The plaintiff contends that the defendant's argument that Esurance is not the correct plaintiff is unavailing. According to plaintiff's Claims Representative, Donna Williams ("Ms. Williams"), the plaintiff applied for a license to write policies in New York and approval was pending. The plaintiff contracted with Argonaut Insurance Company to write policies for the plaintiff's customers while the plaintiff awaited approval. However, the plaintiff at all times was responsible for any loss, including any claims, defense or payment due. Esurance sold the policy and paid the claim in this case, making it the insurer. Therefore, the plaintiff is the proper party to this action.

A copy of a check tendered to Mr. Zimman for the loss sustained to the vehicle, refers to the plaintiff as "EISI," (Esurance Insurance Services, Inc.), and the check states "EISI for the benefit of Argonaut Insurance Co." The check amount was $45,558.26 and the "Memo" indicated that the amount was for the "total loss of 2003 mercedes less a 500 ded." The plaintiff argues that such check gives evidentiary proof of the partnership between the plaintiff and Argonaut Insurance Company, thus establishing that the plaintiff is the insurer.

Plaintiff also maintains that, the defendant has a duty of care and is liable for any damages due to the bailee's property that is caused by the defendant's negligence. Mr. Gaye's affidavit contains conflicting descriptions of the care undertaken to protect the vehicle. The defendant left the vehicle unattended for at least 20 minutes in the middle of the night when Mr. Zimman was promised 24- hour security. The fact that the garage was locked is insufficient given that the duty of care arose from its obligation to provide 24 hour security.

Furthermore, there are conflicting descriptions as to how the garage was secured when Mr. Gaye left to get food. There are issues of fact as to whether the garage was automatically locked or whether it was locked by a latch, and whether Mr. Gaye actually locked the facility when he left for dinner. Such issues cannot be determined as Mr. Gaye has not been deposed.

The plaintiff also argues that not only did the defendant leave the vehicle unattended, but left the vehicle in the elevator instead of placing it safely in the garage. It is unclear whether the

keys to the vehicle were in an unlocked office or in the car itself. Mr. Gaye indicates that the inner office door was damaged, but not whether the keys to the vehicle were left in the office or in the vehicle.

In reply, the defendant argues that the plaintiff is not an insurance company, but the agent to Argonaut Insurance Company. According to the California Department of Insurance, the plaintiff is a licensed fire and casualty agent-broker, that works with several insurance companies to obtain insurance coverage for its clients and one of those companies is Argonaut Insurance Company. Therefore, the plaintiff is not the insurer of the vehicle.

The defendant also contends that Ms. Williams' knowledge of the relationship between Argonaut Insurance Company and the plaintiff is misleading. Although Ms. Williams claims that the plaintiff and Argonaut have a partnership agreement, whereby Argonaut issues the plaintiff's policies in New York, Ms. Williams has no personal knowledge of the corporate structure of the plaintiff's entities and the purported contract was not submitted to the court.

Furthermore, the defendant contends that Mr. Zimman did not rely on the garage to provide 24-hour security for his vehicle, and there is no evidence in the record to substantiate his claim that he parked the vehicle in the defendant's garage because it had 24-hour security. Mr. Zimman testified at his deposition that he had no idea what the defendant's security procedures were at night and that he parked his vehicle at the garage because it was around the corner from where he lived, it did not look questionable, and it was an indoor garage not exposed to the elements. And, the cases to which the plaintiff cites for the proposition that the failure to have someone present in a locked garage 24 hours a day is negligence *per se*, are distinguishable.

Analysis

Summary Judgment

Where a defendant is the proponent of a motion for summary judgment, the defendant must establish that there is no defense to the cause of action or that the defense offered has no merit (CPLR § 3212 (b)), thereby rendering defendant's motion sufficient to warrant the court as

a matter of law to direct judgment its favor (*Bush v. St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v. National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390 (U) [Sup Ct. New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v. Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]). A party can prove entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra; Prudential Securities Inc., v. Rovello*, 262 AD2d 172 [1st Dept. 1999]). However, the movant's failure to make a *prima facie* showing will result in the denial of the motion, regardless of the sufficiency of the opposing papers (*Pappalardo v. New York Health & Racquet Club*, 279 AD2d 134 [1st Dept. 2000] *citing Lesocovich v. 180 Madison Ave. Corp.*, 81 NY2d 982, 985, 599 NYS2d 526 [1993]; *Winegrad v. New York Univ. Med. Ctr., supra*).

Where the proponent of the motion makes the initial *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v. Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v. City of New York, supra*, 49 NY2d at 560, 562; *Forrest v. Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept. 2003]).

With respect to defendant's claim that the plaintiff is the incorrect party to enforce subrogation rights, generally, upon payment for a loss, an insurer is entitled to be subrogated *pro tanto* to any right of action which the insured may have against a third person whose negligence

or wrongful act caused the loss (71 NY Jur. 2d, Insurance § 2173; *Winkelmann v. Excelsior Ins. Co.*, 85 N.Y.2d 577, 579 [1995]). The purpose of subrogation is to prevent double recovery by the insured and to force the party that is liable to bear the cost (*id; Winkelmann, supra*). However, recovery by the subrogee is limited to rights as the insured would have against the third party (*id.*). Furthermore, the subrogee limits its action to only the third party, because a subrogee cannot recover damages against its own insured or against a party named as an additional insured (*see New York Board of Fire Underwriters v. Trans Urban Constr. Co., Inc.*, 91 A.D.2d 115, 120 [1st Dept. 1983]).

In order for a party to file suit against another to enforce its subrogation rights, the party must be a natural beneficiary (*see Winkelmann v. Excelsior Ins. Co.*, 85 N.Y.2d 577, 581 [1995]) of a conventional subrogation where the express terms of a contractual agreement gives the party the right to subrogate on behalf of the insured or an equitable subrogation where the rights of the subrogation have been accrued independent of a contractual agreement upon payment of the loss under its policy (*see Federal Ins. Co. v. Arthur Andersen & Co.*, 75 N.Y.2d 366, 370 [1990]). In addition the subrogee has to pay the insured the total loss of the property, before seeking recovery from the third party (*see Federal Ins. Co., supra* at 369).

Defendant failed to established that Argonaut Insurance Company, and not the plaintiff, is the primary insurer of the vehicle. Furthermore, the defendant's argument about his ignorance of the relationship between Argonaut Insurance Company and the plaintiff is insufficient to establish that the plaintiff is not the proper party to this action. Defendant's submission includes an amendment to the insurance policy, which expressly bears plaintiff's name in addition Argonaut Insurance Company. There is no indication in the amendment that Argonaut Insurance Company is the primary insurance company. Futhermore, the plaintiff submitted a check, *inter alia*, which arguably indicates that the plaintiff tendered the payment under the policy . The check states that the plaintiff was "for the benefit of Argonaut Insurance Co." thus inferring that the check tendered was from the plaintiff on behalf Argonaut Insurance Company. The record

indicates that the total amount of the loss was $46,058.26 and that the plaintiff paid Mr. Zimman $46,058.26. Arguably, the plaintiff paid Mr. Zimman's loss, plaintiff's subrogation rights under equitable subrogation have accrued.

Furthermore, there is a dispute as to whether the defendant was negligent. In *Herbert*, it was undisputed that the insured's loss was caused by one of its employee who caused a fire that severely damaged the insured's building (*see Winkelman*, 85 NY2d at 577). In this case, the record indicates that when the theft was discovered, Mr. Gaye notified the police promptly and the vehicle was recovered.

Ordinarily, the relationship between a customer and a garage owner is that of bailor and bailee, respectively. According to *Motors Insurance Corp. v. American Garages, Inc.* (98 Misc.2d 887, 888 [1979]):

> "the burden is always on the customer to prove lack of due care in safeguarding his vehicle in order to recover for its loss. However, upon a mere showing that he delivered the vehicle to the bailee and the failure or refusal of the bailee to return it, the burden of going forward with evidence shifts to the bailee. If he then shows a reasonable explanation for the failure to return (e.g., as by the intervention of a criminal agency), the customer, to recover, must now show that the negligence of the bailee brought about that occurrence."

It is undisputed that the vehicle was delivered to the defendant, the bailee, and that the defendant failed to return it to the insured. Furthermore, it is also undisputed that the vehicle was stolen from the defendant's garage. However, there is an issue of fact as to whether the negligence of the defendant herein brought about the theft of the vehicle. Arguably, Mr. Gaye failed to provide due care for the vehicle when he left an otherwise attended parking garage unattended for twenty minutes. Further, there are factual disputes as to whether the garage was locked and the manner in which it was locked and secured after the attendant left (*see Motors Insurance Corp., supra*).

Conclusion

In light of the factual disputes as to whether the plaintiff is the proper party and whether the defendant was negligent, summary judgment cannot be granted.

It is hereby

ORDERED that the motion by Louis Provenzano, Inc. for summary judgment is denied; and it is further

ORDERED that Esurance a/s/o Chris Zimman serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the Decision and Order of the Court.

Dated: June 21, 2007

Hon. Carol Robinson Edmead, J.S.C.