

**Lanter v Allstate Ins. Co.**

2010 NY Slip Op 30779(U)

March 30, 2010

Supreme Court, Nassau County

Docket Number: 013522/09

Judge: Daniel R. Palmieri

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**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

**Present:**

**HON. DANIEL PALMIERI  
Acting Justice Supreme Court**

-----X  
**BERNARD LANTER, M.D.,**

**Plaintiff,**

**-against-**

**ALLSTATE INSURANCE COMPANY,**

**Defendant.**  
-----X

**TRIAL PART: 45**

**INDEX NO.:013522/09**

**MOTION DATE:2-9-10  
SUBMIT DATE:2-9-10  
SEQ. NUMBER - 003**

**MOTION DATE:2-24-10  
SUBMIT DATE:3-16-10  
SEQ. NUMBER - 004**

**MOTION DATE: 3-16-10  
SUBMIT DATE: 3-16-10  
SEQ. NUMBER - 005**

**The following papers have been read on this motion:**

- Order to Show Cause (Seq. 003), dated 1-25-10.....1**
- Affirmation in Opposition, dated 2-3-10..... 2**
- Reply Affirmation, dated 2-8-10.....3**
- Notice of Motion (Seq. 004), dated 1-29-10.....4**
- Notice of Cross Motion (Seq. 005), dated 3-5-10.....5**
- Memorandum of Law in Opposition, dated 3-5-10.....6**
- Reply Affirmation, dated 3-8-10.....7**

The motion by the plaintiff (Seq. #004) pursuant to CPLR 3212 for summary judgment declaring that defendant is obligated to complete the appraisal process under the automobile insurance policy it issued to the plaintiff is granted as indicated in this order. The cross motion by the defendant (Seq. #005) pursuant to CPLR 3211(a)(7) to dismiss the

plaintiff's claim for attorney's fees is granted. Plaintiff's motion to quash the subpoena issued to Lawrence Montenez (Seq. #003) is granted.

This action concerns a narrow issue under the automobile policy issued to the plaintiff by the defendant, Allstate Insurance Company ("Allstate"). The facts are simple and, to the extent they are material, are undisputed. Plaintiff's Mercedes-Benz automobile was involved in an accident in December of 2008, in which, according to plaintiff, the car suffered extensive damage. He took it to a particular body shop for repairs, Mid-Island Collision. It determined that the cost of repair would be \$34,177.36. However, Allstate's adjuster/agent inspected the car and offered the sum of \$8,457.55 to cover the cost of the repair. Plaintiff declined the offer, and the parties could not agree on another repair shop to do the work. The plaintiff then sought to invoke the Right to Appraisal clause in the policy. That provision is as follows:

Both **you** and **us** have a right to demand an appraisal of the loss. Each will appoint and pay a qualified appraiser. Other appraisal expenses will be shared equally. The two appraisers, or a judge of a court of record, will choose an umpire. Each appraiser will state the actual cash value and the amount of loss. If they disagree, they'll submit their differences to the umpire. A written decision by any two of these three persons will determine the amount of the loss.

The plaintiff named one Lawrence Montenez as his adjuster. In his affidavit in support of plaintiff's motion, Montenez states that he is a principal of P & L Estimating, Consulting and Investigations, which provides services to the automobile repair industry and insurance companies. He examined the car and estimated the cost of repair.

Allstate rejected Montenez as the appraiser under the policy because of his alleged

relationship with Mid-Island Collision as either an employee or consultant, asserting that he would not be impartial. Plaintiff's position is that the policy does not require that he be impartial, and demanded that the appraisal process go forward under the policy with Montenez as his designated appraiser. This action for a declaratory judgment ensued.

Initially, the Court rejects the defendant's reference to its prior decision dated November 25, 2009, vacating Allstate's default in pleading, as having any legal force here. As its counsel acknowledges, the standards for evaluating the merits of a defense in that procedural context are not as stringent as they are when opposing a summary judgment motion. *See, Bilodeau-Redeye v Preferred Mutual Ins. Co.*, 38 AD3d 1277 (4<sup>th</sup> Dept. 2006).

Turning to the merits of the present motion, the Court finds that the plaintiff has made out his *prima facie* case for judgment as a matter of law. He submits his policy with Allstate containing the provision reproduced above, his own affidavit and that of Montenez, all of which indicate that he was entitled to the completion of the appraisal process with Montenez as his designated appraiser. Montenez states he is a New York State licensed Independent Adjuster, and also presents his certifications and memberships in trade organizations. The Court finds that these render him "qualified" to perform a damage assessment under the provision set forth above.

The Court also finds that this is all that is required of Montenez and the plaintiff under the provision set forth above. The policy contemplates and provides for resolution of differences between the appraisers selected by the parties, and does not expressly or by implication require that each be impartial. This shifts the burden to Allstate to demonstrate

that issues of fact exist meriting a trial. CPLR 3212 (b); *see also* *GTF Marketing, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v City of New York*, 49 NY2d 557 (1980).

This has not been accomplished. Allstate contends that an issue of fact remains regarding Montenez's impartiality. Defendant presents in opposition the affidavit of James Jarocki, an Allstate employee who supervises, among other things, first-party collision and damage claims. However, his statement merely begs the question, because ultimately it depends on his interpretation of the policy, which he contends mandates that each appraiser not only be competent, but also "impartial and independent".

However, as noted no such requirement is to be found in the policy. Indeed, the dispute resolution mechanism indicates that there is no expectation that each party's appraiser will be neutral; that is left to the "umpire," whose title indicates his role in settling possible disagreements. The Court finds no ambiguity in this provision, and it should be accorded its plain meaning. *See generally, Teichman v Community Hosp. of W. Suffolk*, 87 NY2d 514 (1996). The policy simply does not require that the appraiser named by each party be impartial or independent, and certainly the law does not insist upon it. *See, Matter of Astoria Med. Group [Health Ins. Plan of Greater N.Y.]* 11 NY2d 128, 138 (1962); *Matter of Meehan v. Nassau Community College*, 243 AD2d 12 (2d Dept. 1998). Allstate is essentially reading in a term that does not exist. Even if there were some uncertainty about the foregoing (which the Court finds there is not), it is axiomatic that as the policy was drafted by Allstate any ambiguities are to be construed against it. *See, e.g., NAICC, LLC v Greenwich Ins. Co.*, 51

AD3d 883 (2d Dept. 2008). In sum, the Court holds that the only requirement of the policy regarding the appraisal process is that the appraiser be “qualified”, and no evidence is submitted by Allstate that Montenez is not qualified. Accordingly, summary judgment should be granted to the plaintiff.

However, the Court agrees with the defendant that attorney’s fees are not available to the plaintiff. Absent a specific allegation and proof that a prevailing party is entitled to attorney’s fees by statute, agreement or court rule, such fees generally are not recoverable. *See, RAD Ventures Corp. v Arturkmac*, 31 AD3d 412 (2d Dept. 2006). It is only where an insured is cast in the position of defending against the insurance company’s attempt to free itself of its policy obligation to defend the insured that such fees may be sought. *US Underwriters Ins. Co. v City Club Hotel, LLC*, 3 NY3d 592 (2004); *Mighty Midgets, Inc. v Centennial Ins. Co.*, 47 NY2d 12 (1979).

Here, however, no claim was made against the plaintiff as to which Allstate disclaimed coverage. Rather, the present action is by the insured, who is seeking to enforce a certain dispute resolution policy provision regarding a loss. This is outside the reach of cases such as *US Underwriters* and *Mighty Midgets*. *See, New York University v Continental Ins. Co.*, 87 NY2d 308 (1995); *Companion Life Ins. Co. v All State Abstract Corp.*, 35 AD3d 519 (2d Dept. 2006). Indeed, Allstate never attempted to disclaim coverage for the loss. Accordingly, fees are not recoverable by the plaintiff, and so much of the complaint that seeks such fees is dismissed.

In sum, the motion is granted to the extent that the Court declares that the plaintiff is entitled to proceed with the appraisal process under the policy of insurance with Allstate

concerning the repair of his 2005Mercedes-Benz automobile, and may name any qualified appraiser, including Lawrence Montenez, as his appraiser for that purpose. The cross motion is granted and the plaintiff's claim for attorney's fees is dismissed.


Finally, as indicated in its prior order dated March 2, 2010 regarding the motion to quash a subpoena served on Montenez, the Court now grants that motion for the reasons stated above. As plaintiff does not have to demonstrate Monenez's impartiality before he can serve as plaintiff's appraiser, the information sought of him – his relationship with automobile repair businesses, and records related to the subject Mercedes – have been rendered irrelevant by the instant determination to allow the process set forth in the policy to go forward.

The conference currently scheduled for April 27, 2010 is canceled, but the Court shall retain jurisdiction of this matter pending final resolution of the appraisal process.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: March 30, 2010

  
HON. DANIEL PALMIERI  
Acting Supreme Court Justice

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**ENTERED**  
APR 01 2010  
**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**