

2012 N.Y. Misc. LEXIS 883, *; 2012 NY Slip Op 30466U, **

[2]** ALLSTATE INSURANCE COMPANY a/s/o ESTER SHWEKY, Plaintiff, -against- RAM CATERERS OF FLATBUSH LLC, JOHN DOE d/b/a VALET PARKING SYSTEMS, YOUNER BEKIR, PREFERRED PAYMENT SYSTEMS CORP., and MARK BARON d/b/a VALET PARKING SYSTEMS, Defendants. Index No. 102116/09

102116/09

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

2012 N.Y. Misc. LEXIS 883; 2012 NY Slip Op 30466U

February 29, 2012, Decided
March 1, 2012, Filed

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

CORE TERMS: parking, valet, summary judgment, insured, deposition, subrogation, subrogation action, plus interest, note of issue, prima facie, disbursements, entitlement, admissible, attendant, insurer, joined, custody and control, undisputed, nonparty, summons, entity

JUDGES: **[*1]** Present: Hon. Judith J. Gische, JSC.

OPINION BY: Judith J. Gische

OPINION

Decision and Order

JUDITH J. GISCHE, J.:

In this subrogation action, plaintiff Allstate Insurance Company a/s/o Ester Shweky (Allstate) moves for an order, pursuant to CPLR 3212, granting summary judgment in its favor in the amount of \$45,677.68, plus interest, costs and disbursements. Since issue has been joined and this motion was brought within 180 days of the filing of the note of issue, summary judgment relief is available (CPLR § 3212; Brill v. City of New York, 2 NY3d 648, 814 N.E.2d 431, 781 N.Y.S.2d 261 [2004]).

Facts considered

The following facts are not in dispute:

Plaintiff's insured, Ester Shweky (Shweky), was, at all relevant times, the owner of a 2008 BMW sedan automobile (automobile/car), and the owner of an Allstate automobile **[**3]** insurance policy in effect for her car (the Policy). On January 10, 2008, she lent her car to her daughter, Vivian Tawil (Tawil), who drove it to an evening event at defendant Ram Caterers of Flatbush, LLC (Ram Caterers), a catering establishment on the premises of nonparty Sharee Zion Temple, 2030 Ocean Parkway, Brooklyn New York. Tawil used the valet parking services offered by Ram Caterers to guests attending its events. The **[*2]** valet service, which refers to itself as "Parking

Systems," provided Tawil with a valet ticket/receipt in exchange for the vehicle and key.

It is undisputed that defendant Youmer R. Bekir (Bekir) was the valet attendant who took control of the vehicle for the purpose parking it in the nearby vicinity. It is also undisputed that while driving a few blocks from Ram Caterers, Bekir lost control of the vehicle at the intersection of Avenue V and East 3rd Street in Brooklyn, and struck one or more parked cars. The police were called to the scene, and Shweky's car, which sustained extensive damage, was towed to nonparty Brooklyn Collision.

Shweky made a claim against Allstate for Indemnification under the Policy. Allstate paid its insured \$45,677.68, pursuant to the terms of the Policy, and then commenced the instant subrogation action to recover, from the party or parties responsible for the damage, the amount it paid its insured, plus interest, costs and disbursements. By summons and complaint filed on February 17, 2009, Allstate sought recovery from "Ram Caterers of Flatbush LLC" and from and "Parking Systems." Issue was joined by service of a joint answer on or about April 14, 2009.

Thereafter, **[*3]** by notice of motion dated September 18, 2009, plaintiff sought an order granting it leave of court: to serve an amended summons and complaint; permitting it to change the name of defendant "Parking Systems" to "Valet Parking Systems," to add as co-defendants **[**4]** Youmer R. Bekir, "John Doe" a fictitious name or entity but intended to identify that individual or entity d/b/a Valet Parking Systems, Preferred Payment Systems Corp. and Mark Baron d/b/a Valet Parking Systems as defendants; and to change the caption to reflect this change. The motion was granted by this court's order, dated December 17, 2009. Service was made, and by amended complaint, Allstate alleges, essentially, that after Tawil delivered the car to the care, custody and control of Ram Caterers, John Doe d/b/a Valet Parking Systems, Preferred Payment Systems, Mark Baron, d/b/a Valet Parking Systems, and Youmer Bekir, for the sole purpose of parking the vehicle, the car was severely damaged due to the failure of defendants to exercise reasonable care of the automobile while it was in their custody and control. As a result, Allstate has sustained damages in the sum of \$45,677,68. Defendants served answers to the amended complaint, **[*4]** and following a preliminary conference, on or about April 29, 2010, the parties pursued discovery. Documents were exchanged, depositions were held, and the note of issue was filed by plaintiff on May 27, 2011.

Arguments

The instant motion for summary judgment is predicated on the well-recognized principle that an insurer which has paid the loss sustained by its insured is entitled, through subrogation, to recover the loss from the third party or parties legally responsible for the loss (*Winkelmann v. Excelsior Ins. Co.*, 85 N.Y.2d 577, 581, 650 N.E.2d 841, 626 N.Y.S.2d 994 [1995]). As the insurer, Allstate's "subrogation rights accrue upon payment of the loss" (*id.* at 582).

In support of its motion, Allstate submits copies of transcripts from the depositions of Shweky, Bekir and Craig Druyan (Druyan), an officer and shareholder of "Preferred Parking Payment Systems Corp.," and copies of the following documents: the police report (Allstate's **[**5]** Exhibit G); two Forms W-2 and Tax Statement for the year 2007 indicating that Bekir was employed and paid by "American Valet Services Inc.," and by "Preferred Payment Systems Corp." (Allstate's Exhibit H); an unsigned "Agreement for Valet parking Services" between "Ram Caterers of Flatbush **[*5]** LLC" and "Parking Systems" (Allstate's Exhibit J); a sworn affidavit from Patrick Morganelli, an appraiser employed by Allstate, establishing that the value of the damage to the insured's vehicle, including the insured's deductible, totaled \$45,677.68 (Allstate's Exhibit L); the Actual Cash Value Evaluation for the vehicle (Allstate's Reply Aff., Exhibit B); and what appears to be two printouts revealing the amounts paid by Allstate to its insured, to BMW Financial services, and to Brighton Collision Inc., including the numbers of the checks and the dates on which these checks were issued, printed and cashed with respect to damages sustained by Shweky's vehicle on January 10, 2008. For the following reason, Plaintiff's motion for summary judgment must be denied without prejudice to renewal.

Discussion

It is well settled law that:

the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers

(*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923 [1986] **[*6]** [internal citations omitted]).

A review of the deposition testimony reveals that, although both Bekir and Druyan concede the fact that Bekir was working as a parking valet at Ram Caterers on January 10, 2008, and that he was the attendant who had the accident with Shweky's vehicle, Allstate has failed to submit competent documentary proof sufficient to establish its entitlement to summary judgment **[**6]** (CPLR 3212 [b]).

As set forth above, Allstate's standing to pursue subrogation is dependent upon proof that it paid its insured in full pursuant to the terms of the Policy (*Winkelmann v Excelsior Ins. Co.*, 85 NY2d at 582). An examination of the papers fails to reveal a copy of either the Policy or competent, admissible proof that payment has been made, either by cancelled check, payment voucher or otherwise.¹ Although defendants do not raise this issue, Allstate's failure to tender the requisite proof in admissible form precludes this court from granting the motion for summary judgment (*Alvarez v Prospect Hosp.*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]; CPLR 3212 [b]).

FOOTNOTES

¹ It is **[*7]** noteworthy that, at her deposition, Shweky was not asked whether payment was made by Allstate.

Accordingly, it is

ORDERED that the motion by Allstate Insurance Company a/s/o Ester Shweky for summary judgment is denied with leave to renew on proper papers.

Dated: New York, New York

February 29, 2012

ENTER:

/s/ Judith J. Gische

Hon. Judith J. Gische, JSC

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