SHORT FORM ORDER

COPY

INDEX No. 01-5875

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 11-7-03
ADJ. DATE 1-15-04
Mot. Seq. # 002 - MD
003 - XMG; CASEDISP

---X

VLADIMIR AUGUSTE,

Plaintiff,

- against -

ALLSTATE INSURANCE COMPANY,

Defendant.

---X

MARCEL P. DENIS, ESQ.
Attorney for Plaintiff
572 Flatbush Avenue, Ste. 2
Brooklyn, New York 11225

BRUNO, GERBINO & SORIANO, LLP
Attorneys for Defendant
445 Broad Hollow Road, Ste. 220
Melville, New York 11747

Upon the following papers numbered 1 to 5 read on this motion and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 3 ; Notice of Cross Motion and supporting papers, 4 - 5 ; Answering Affidavits and supporting papers ______; Replying Affidavits and supporting papers ________; Other __________, (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that plaintiffs motion for summary judgment on the issue of breach of contract and unjust enrichment and for an order sanctioning defendant, pursuant to 22 NYCRR §§ 130-1.1 *et seq.* is denied; and it is further

ORDERED that defendant's cross motion for summary judgment and other relief is granted as outlined herein.

Plaintiffs complaint is premised upon the alleged theft of a 1994 Lexus he purchased and insured with the defendant carrier in 1997. Plaintiff made a claim for theft, which defendant carrier eventually decided not to settle, alleging that plaintiff was instrumental in the alleged theft of the subject vehicle. Plaintiff takes issue with this and also maintains that defendant intentionally kept the fact that the vehicle was recovered in South Carolina from him for a significant period of time. He also claims that defendant did not inform him that the vehicle identification number ("VIN") had been removed before he agreed to reclaim the vehicle, and he did not learn until much later that a vehicle with a replaced VIN has a diminished value. According to plaintiff, his vehicle has been stolen and damaged and four years later he is still waiting for defendant to settle his claim. The defendant advised him that

Allstate was denying his claim because the key was found in the ignition, not supporting a theft claim, and the damage fell below the deductible, however, according to plaintiff, this does not take into account the diminution in value for the replaced VIN, which would make damage to the vehicle in excess of the deductible. Plaintiff also wonders where the key came from, since he says he still has the ignition keys in his possession, although, according to defendant, plaintiff has failed to produce them when requested to do so.

Plaintiff argues that defendant breached the insurance contract, in spite of plaintiffs complying with the terms of the policy for making a claim, and was unjustly enriched by retaining plaintiffs premium payments with no intention of adhering to its obligations under the policy. It is also plaintiffs claim that defendant never offered proof that the key was found in the car or that there was no sign of forced entry.

Previously, defendant carrier's motion to dismiss the first, second, third and fourth causes of action in plaintiffs complaint was granted by order dated July 9,2003 (Dunn, J.). Defendant now cross-moves for an order dismissing plaintiffs complaint, for an order compelling plaintiff to respond to defendant's Notice for Discovery and Inspection, dated April 17,2003, and for an order, pursuant to 22 NYCRR 130-1.1 sanctioning plaintiffs counsel for frivolous conduct.

It is defendant's position that, after accepting the return of the vehicle, plaintiff did not notify defendant that he was pursuing his claim, or that he was making additional claims for damages. This is noted in plaintiffs deposition testimony. After the vehicle was returned to plaintiff, he continued to use it as his primary vehicle. The vehicle in question now has approximately 100,000 miles on it. Defendant notes that this court's prior decision found that plaintiff failed to establish the damage he claims he suffered on the return of the vehicle with a replaced VIN, therefore, defendant argues that the law of the case is that plaintiff has failed to establish damages in excess of the $1,000.00 deductible. Further, defendant maintains that plaintiff has failed to cite the provision of the policy in effect at the time of the theft entitling plaintiff to damages for diminished value, and that defendant satisfied its obligation under the policy by returning the vehicle to plaintiff, which plaintiff accepted without notifying defendant of any additional claims.

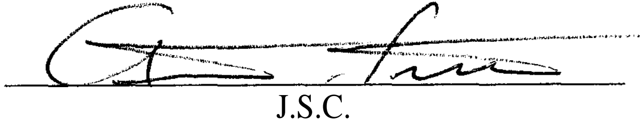
Plaintiff has submitted no additional papers in opposition to the defendant's cross motion.

Upon reviewing the papers in support of their respective positions, as well as a copy of the policy in effect at the time of the disputed theft, the court holds that plaintiff has failed to show entitlement to summaryjudgment as a matter of law, and that defendant is entitled to an order dismissing the complaint. Plaintiff reported his car stolen, it was found and returned to him, whereupon he proceeded to use the car as his primary vehicle for the next five (5) years and 50,000 miles. It would appear that restoration of the vehicle to him made the plaintiff whole. Under these circumstances, there appears to be no theory under the terms of the subject insurance contract for "diminished value" for which plaintiff

could make a claim. Thus, the loss, if any, does not appear to fall within the terms of the policy (see, ***Golebiewski v Great Eastern Ins. Co.,*** 55 Misc.2d 998,287 NYS2d 525 [1967] aff'd 64 Misc2d 813, 316 NYS2d 151; *c.f.*, ***Avdeychik v Allstate Ins. Co.***, 303 AD2d 700,758 NYS2d 80 20031). Therefore, there is no viable cause of action for breach of contract (Fifth Cause of Action) or unjust enrichment (Sixth Cause of Action). As these are the last surviving causes of action in the underlying complaint, the complaint is dismissed in its entirety.

All other requests for relief, including the applications for sanctions are denied.

Dated: March 22,2004



J.S.C.

Clerk only: Final Disposition