

SHORT FORM ORDER

SUPREME COURT-NEW YORK STATE-NASSAU COUNTY

PRESENT: HON. ANTHONY L. PARGA
JUSTICE

-----X PART 4
THE PIANO EXCHANGE and RICHARD SMITH,

Plaintiffs,

-against-

DONNA WEBER, GLEN WEBER and REYES PANTRO,

Defendants.
-----X

INDEX NO.604824/15

MOTION DATE: 12/6/16
SEQUENCE NOS.: 001, 002

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Upon the foregoing papers, the motion of the defendants, Donna and Glen Weber (hereinafter "Weber"), which seeks an order pursuant to CPLR Rule 3212, granting summary judgment in favor of the defendant on the issue of liability against plaintiffs, The Piano Exchange and Richard Smith is granted. Plaintiff's cross-motion for summary judgment is denied as set forth below.

The within action is brought by plaintiff, seeking, *inter alia*, to recover damages for property damages sustained to plaintiff's vehicle by a vehicle owned by defendant Weber and operated by co-defendant Reyes Pantro. The plaintiff's main cause of action is for negligence based on the fact that the defendant "left her keys to her vehicle in another vehicle".

It is undisputed that the Weber vehicle was stolen on April 10, 2015 by Reyes Pantro and another individual. The vehicle was stolen from the Weber's private driveway at their home. The Pantro defendant drove the Weber vehicle and crashed into plaintiff's vehicle which was parked in a parking lot behind plaintiff's business, located on the corner of School Street and Dosis Way in Glen Cove. Both the plaintiff and the Weber defendant were notified of the

theft and the incident by the Glen Cove Police. Pantro was subsequently arrested. The Pantro defendant has not appeared in the action.

The Weber defendants now move for summary judgment on the issue of liability. The plaintiff bases their case on the fact that Weber left the keys to their vehicle in another vehicle owned by Weber and parked in tandem in their driveway. Weber contends that as a matter of law Weber cannot be held liable for the negligence of a thief and that New York State Vehicle and Traffic Law (hereinafter as "VTL") §1210(a) applies only to public highways and public roadways, etc. In support of their motion, defendant Weber, submit, *inter alia*, the pleadings in the action, the deposition transcripts of the parties and the police incident report.

VTL §1210(a) provides as follows: "No person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition, removing the key from the vehicle, and effectively setting the brake thereon and, when standing upon any grade, turning the front wheels to the curb or side of the highway, provided, however, the provision for removing the key from the vehicle shall not require the removal of keys hidden from sight about the vehicle for convenience or emergency."

VTL §1210(a) is commonly referred to as the "key in the ignition" exception to the common-law rule of nonliability on the part of the owner whose vehicle was stolen. However, it is well-settled that prior to determining whether VTL §1210(a) applies is whether defendant's vehicle was parked on a public highway or a public road open to a motor vehicle. (See VTL §1100(a)). "Subdivision (a) of section 1210 is found in article 33 of title 7 of the Vehicle and Traffic Law. Subdivision (a) has been held inapplicable to a privately owned parking lot... and to a private driveway" (*Albouyeh v. County of Suffolk 96 A.D. 2d 543 465 N.Y.S. 2d 50 [2d Dept. 1983]*) (*internal citations omitted*). The Weber vehicle was parked at the Weber's private residence in their private driveway when it was stolen.

Movant Weber has made a *prima facie* showing of entitlement to summary judgment on the issue of liability. "To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so be tender of evidentiary proof in admissible form (*Zuckerman v. New York 49 N.Y.2d 557[1980]*). "It is well established that before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff.

In the absence of duty, there is no breach and without a breach there is no liability. (*Pulka v. Edelman 40 N.Y.2d 781[1976]*)(*internal citations omitted*). Weber has submitted proof in admissible form that their vehicle was stolen and has also established that pursuant to the New York State Vehicle and Traffic Law §1100(a) and §1210(a) Weber owed no duty to plaintiff.

Turning now to plaintiff's cross-motion for summary judgment and opposition to Weber's motion, plaintiff contends that there are questions of fact regarding the permissive use of the Weber vehicle. The Weber plaintiffs routinely left the keys to their vehicles in their cars while parked in their driveway. Plaintiff submits the affidavit of Scott Perry an auto security expert to support this contention that by leaving the keys in their vehicle, the Webers action constituted permissive use of their vehicle.

Plaintiff further contends that the Webers have violated VTL §388.

VTL §388 provides as follows in relevant part: "Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the *permission, express or implied, of such owner*"

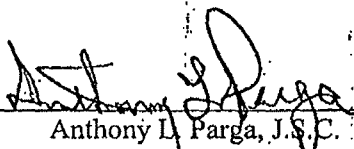
Plaintiff submits that by routinely leaving the keys in their vehicles the Webers had consented to the permissive use of their vehicles. The case law submitted by the plaintiff all involve vehicles that were either parked on a public street or public parking lot. Further, the Fourth Department case *Matter of Merchants Ins. Group v. Haskins*, 11 A.D.3d 694, 2004, relied upon by plaintiff concerns a car that was stolen from an **actual permitted user**.

"Evidence that a vehicle was stolen at the time of the accident will rebut the presumption of permissive use" (*Fuentes v. Virgil 119 A.D. 3d 522, 989 N.Y.S.2d 498 [2nd Dept. 2014]*).

Accordingly, defendant's motion for summary judgment on the issue of liability against plaintiffs, is granted. Plaintiff's cross-motion is denied in its entirety.

This constitutes the decision and Order of this Court. Any request for relief not expressly granted herein is denied.

Dated: January 27, 2017


Anthony L. Parga, J.S.C.

ENTERED

FEB 01 2017

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