COUNTY COURT
COUNTY OF ONONDAGA : STATE OF NEW YORK

NICK'S GARAGE, INC. D/B/A NICK ORSO'S
BODY SHOP AND SERVICE CENTER,
Plaintiff-Appellant,

-vs-

DECISION/ORDER
Index # 2008-9681

ADIRONDACK INSURANCE EXCHANGE,
Defendant -Appellee.

APPEARANCES: JOSEPH R. TALARICO, II, ESQ.
Talarico & Associates
Attorneys and Counselors at Law
For the Appellant.

KENNETH M. ALWEIS, ESQ.
Goldberg Segalla, LLP
Attorneys at Law
For the Appellee

ERICA L. EVERSMAN, J.D.
Amicus Curiae
For The Automotive Education & Policy Institute
& Vehicle Information Services, Inc..

WALSH, J.

In an action to recover full payment for automobile repair services rendered, Nick's Garage, Inc., d/b/a Nick Orso's Body Shop & Services Center (hereinafter "the appellant") has appealed from a Decision/Order of the City Court for the City of Syracuse (Cecile, J.) dated December 2, 2008 granting a motion for summary judgement by Adirondack Insurance Exchange (hereinafter "the appellee") and dismissing the appellant's complaint. The appellant claims that the lower court erred as a matter of law in granting the appellee's summary judgement motion to dismiss the claim on the grounds that the appellant lacked standing to bring the action .

The action arose from two separate automobile property damage accidents involving two different individuals, Michael Albino and David Hess (hereinafter the "assignors"), insured by the appellee. Both of the assignors reported their respective accidents to the appellee, which in due course determined the damage to both vehicles to be coverable losses and elected to have both repaired.

Both assignors engaged the appellant to repair their vehicles. Pursuant to Insurance Regulation 64, both assignors appointed the appellant as their Designated Representative to negotiate and settle theirs claims with the appellee. Additionally, both executed written authorizations assigning their claims and the proceeds thereof to the appellant, ostensibly giving the appellant the authority to collect the proceeds of their respective losses.

With respect to Mr. Albino's vehicle, the appellant submitted to the appellee an estimate of $5,105.69 for the necessary repairs. The appellee in turn provided the appellant an estimate of $1,449.31 for the repairs, minus the $500.00 deductible called for in the policy. In response to a notice of deficiency, the appellee subsequently amended the amount is was willing to pay for the repairs to $2,844.28, minus the $500.00 deductible. The appellant protested that this sum was insufficient to repair the vehicle, but rather than negotiate the appellee simply paid the appellant the sum of $2,344.28 and Mr. Albino paid the $500.00 deductible, for a total of $2,844.28 to conduct the repairs. In response , the appellant notified the appellee that the final repair total would be $4,963.23, claiming an additional $2,118.85 would be required to complete the necessary repairs. The appellee refused to pay the difference.

Pursuant to the same process, the appellant submitted an initial estimate of $7,903.20 for the necessary repairs to Mr. Hess's vehicle. The appellee responded with an estimate of

$4,310.61, less a $200.00 deductible, which it subsequently amended to $5,700.74 minus a $500.00 deductible. After the appellant protested this estimate, the appellee paid it $5,500.74 and Mr. Hess paid a $200.00 deductible. The appellant then claimed a final bill of $8,275.88 would be necessary to conduct the repairs, for a difference of $2,575.14 which the appellee refused to pay.

The appellant ultimately repaired both vehicles and commenced this action against the appellee to recover the claimed outstanding balances, relying upon the written assignments of the claims and proceeds executed by the assignors. After joining issue, the appellee subsequently moved for summary judgement claiming the appellant lacked standing to bring the action because a standard clause in both assignors' policies precluded them form assigning the claimed losses without the prior written consent of the appellee, which was not obtained. The clause in question reads as follows, in relevant part:

> **Transfer Of Your Interests In This Policy**
>
> > Your rights and duties under this policy may not be assigned without our written consent. However, if a named insured shown in the Declarations dies, coverage will be provided for... .

By Decision/Order dated December 2, 2008, the court below found in favor of the appellee and granted the motion. In making its determination, the lower court noted that the appellant had submitted no New York case law invalidating such an anti-assignment provision in an automobile insurance policy and relied instead upon two Third Department decisions submitted by the appellee, *Spindex Laboratories Inc. vs. Empire Blue Cross & Blue Shield*, 212 A.D.2d 906 and *New Medico Assoc. vs. Empire Blue Cross & Blue Shield*, 267 A.D.2d

757, which both upheld similar anti-assignment provisions in health insurance policies.

Upon appeal, the appellant contends that the New York Court of Appeals held as long ago as 1858 that *post loss* anti-assignment clauses in insurance policies are not binding, even absent the consent of the insurer (*Mellen vs. Hamilton Fire Ins. Co.* ,17 N.Y. 609 [1858].) It is, indeed, well settled New York law that enforceability of anti-assignment clauses in contained in insurance contracts are limited, in that as a general matter such provisions are valid with respect to *pre-loss* assignments, but not with respect to *post-loss* assignments (*Globecon Group, LLC vs. Hartford Fire Insurance Company*, 434 F3d 165, 170-171 [2d Cir. 2006].) New York is among the majority of jurisdictions in the United States which allow *post-loss* assignments, despite express anti-assignment clauses contained in insurance contracts, under the theory that although the insurer's exposure to risk is altered if the insured assigns the policy prior to a covered loss, the risk the insurer has contracted to cover is not altered *post-loss*, when the claimant is not the party who was the original insured (*Id, at 171.*)

What is at issue in the instant case is not the assignment of the insurance policy as a whole, which may be prohibited, but the assignment of claims for property damage covered by the policy, which are not precluded (*see, Mellen vs. Hamilton Fire Ins. Co.* , supra ; *Globecon Group, LLC vs. Hartford Fire Insurance Company*, supra.)

The Legislative intent with respect to assignments is embodied in *General Obligations Law* §13-101, pursuant to which any claim or demand can be transferred except in one of the following cases:

"1. Where it is to recover damages for personal injury;

"2. Where it is founded upon a grant which is void by a statute of the state; or upon a claim to or interest in real property, a grant o0f which, by the transferrer, would be void by such a statute;

"3. Where a transfer thereof is expressly forbidden by a statute of the state, or of the United States, or would contravene public policy."

Thus, the assignment of automobile property damage claims are not made void by statute. Nor do they in any way contravene public policy. In fact, the settlement and payment of claims to an insured's repair shop are authorized by application of 11 *NYCRR* § 216.7, not prohibited, and the New York State insurance law does not even require an insured to repair an automobile as a condition of payment by the insurer for a covered loss (*Insurance Law* § 3411[i].) Therefore, the court finds that a departure from the general New York rule in favor of assignment of claims is not warranted in this case, inasmuch as application of the purported anti-assignment provision in the policy would not serve to protect the insurer's exposure, but only to limit the free assignability of claims favored by the law (*see, Citibank, N.A. vs. Tele/Resources, Inc. & Newmarket Co., Ltd.,* 724 F.2d 266 [2d Cir. 1983.)

Furthermore, the enforceability of insurance contract provisions prohibiting assignments must be clear, definite and unambiguous *(see, Cole vs. Metropolitan Life Insurance Co., 273 A.D.2d 832, 833 (4th Dept. 2000); New Medico Associates, Inc. Ex rel. Van Arsdal vs. Empire Blue Cross & Blue Shield,* 267 A.D.2d 757 (3d Dept. 1999.) The contract clause contained in the policy at issue herein is entitled "Transfer Of Your Interests In This Policy" and merely states that "Your rights and duties under this policy may not be

assigned without our written consent." Initially, it must be noted that the very title of the clause provides for the possibility of the assignment of the insured's rights and duties under the policy, albeit with certain limitations. Secondly, the word *"may,"* by its very definition, intimates permissiveness. Finally, the language of the provision neither differentiates between *pre-loss* versus *post-loss* assignments, nor does it state that assignments made without the insured's written consent are void. Thus, the court finds that the transfer provision in the appellee's insurance contract is too vague and ambiguous to be construed as a definite prohibition against the assignment of the rights and duties of the insured, in that it merely provides for the possibility that the written consent of the insured *may* be necessary for such an assignment(*see, Belge vs. Aetna Casualty & Insurance Co.*, 39 A.D.2d 295, 297-298 [4th Dept. 1972].)

Accordingly, the judgement of the City Court for the City of Syracuse is REVERSED, the complaint reinstated and the case remitted back to that court for further proceedings consistent with this decision.

This shall constitute the decision and order of this court.

Dated: June 2, 2010

William D. Walsh
County Court Judge

Enter:

To: Joseph R. Talarico, II, Esq.
Kenneth M. Alweis, Esq.
Erica L. Eversman, J.D.
Clerk of the Syracuse City Court