

<b>Houck v Allstate Ins. Co.</b>
2013 NY Slip Op 30810(U)
April 10, 2013
Sup Ct, Queens County
Docket Number: 30232/10
Judge: Howard G. Lane
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE**  
**Justice**

**IAS PART 6**

-----  
WILLIAM HOUCK,  
  
Plaintiff,  
  
-against-  
  
ALLSTATE INSURANCE COMPANY and  
CARMINE DESTEFANO,  
  
Defendants.  
-----

Index No. 30232/10  
  
Motion  
Date March 5, 2013  
  
Motion  
Cal. No. 59 and 60  
  
Motion  
Sequence No. 4 and 5

	<u>Papers Numbered</u>
Notice of Motion #59-Affidavits-Exhibits...	1-5
Opposition.....	6-8
Reply.....	9-10
Notice of Motion #60-Affidavits-Exhibits...	1-6
Opposition.....	7-9
Reply.....	10-12

Upon the foregoing papers it is ordered that the motion by defendant Allstate Insurance Company ("Allstate") for dismissal of plaintiff's Verified Complaint pursuant to CPLR 3212 along with any and all claims, cross claims, counter claims and any other claims that were or could not have been brought against defendant Allstate and the motion by defendant Carmine DeStefano ("DeStefano") for an Order pursuant to CPLR 2221(e) granting defendant Carmine DeStefano leave to renew its prior motion for summary judgment, based upon new facts adduced during discovery, and upon renewal, dismissing plaintiff's Verified Complaint pursuant to CPLR 3212 are hereby joined solely for purposes of disposition of the instant motions and are decided as follows:

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (Andre v. Pomeroy, 32 NY2d 361 [1974]; Kwong On Bank, Ltd. v. Montrose Knitwear Corp., 74 AD2d 768 [2d Dept 1980]; Crowley Milk

Co. v. Klein, 24 AD2d 920 [3d Dept 1965]. Even the color of a triable issue forecloses the remedy (Newin Corp. v. Hartford Acc & Indem. Co., 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (Bennicasa v. Garrubo, 141 AD2d 636 [2d Dept 1988]; Weiss v. Gaifield, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]; Pizzi by Pizzi v. Bradley's Div. of Stop & Shop, Inc., 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (Gervasio v. DiNapoli, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (Knepka v. Tallman, 278 AD2d 811 [4<sup>th</sup> Dept 2000]).

Plaintiff, William Houck initially brought causes of action against both defendants sounding in breach of contract and negligence. Pursuant to the Verified Complaint: Carmine DeStefano was a licensed agent and broker for defendant Allstate Insurance Company, on or about December 14, 2007, plaintiff and defendants entered into a contract for motor vehicle insurance coverage for a particular automobile registered to plaintiff's mother [i.e., a 1998 Toyota Camry], defendants failed to perform their obligations in that they failed to file and/or erroneously filed the insurance coverage period on the policy on the vehicle with the Department of Motor Vehicles, that as a result of the defendants' negligence, on December 14, 2007, plaintiff was driving the motor vehicle with his mother's consent and was stopped and arrested by the Nassau County Police Department, strip searched and detained in the Nassau County Correctional facility, and as such, suffered severe and permanent personal injuries.

In a decision/order dated September 20, 2011, this Court held in relevant part:

Those branches of the motion by defendant, Carmine DeStefano and defendant, Allstate Insurance Company motion for an order dismissing the Verified Complaint

pursuant to CPLR 3212 along with any and all claims, cross claims, counter claims and any other claims that were or could not have been brought against defendant Carmine DeStefano and defendant, Allstate Insurance Company are granted with regard to the negligence cause of action.

\* \* \*

Those branches of the motion by defendant, Carmine DeStefano and the motion by defendant, Allstate Insurance Company for an order dismissing the Verified Complaint pursuant to CPLR 3212 along with any and all claims, cross claims, counter claims and any other claims that were or could not have been brought against defendant Carmine DeStefano and defendant, Allstate Insurance Company are denied with respect to the breach of contract claim, without prejudice with leave to renew. As it is undisputed that the parties have not completed discovery, and that the depositions of defendants are outstanding, defendants' motions for summary judgment pursuant to CPLR 3212 are denied without prejudice as they are premature (see, CPLR 3212[f]; Groves v. Lands End Housing Co., Inc., 80 NY2d 978 [NY 1992]; Ramos v. DEGU Deutsche Gesellschaft Fuer Immobilienfonds MBH, 2007 NY Slip Op 1714 [2d Dept 2007]; Yadgarov v. Dekel, 2 AD3d 631 [2d Dept 2003]; George v. New York City Transit Authority, 306 AD2d 160 [1st Dept 2003]). Accordingly, defendants' motions for summary judgment regarding the breach of contract cause of action pursuant to CPLR 3212 are hereby denied "with leave to renew when discovery . . . is complete" (see, Ramos, supra).

In support of its motion, defendant Allstate establishes that there are no triable issues of fact regarding the breach of contract cause of action. "The elements of a cause of action for breach of contract are the formation of a contract between plaintiff and defendant, performance by plaintiff, defendant's failure to perform, and resulting damages" (Beheer B.V. (Amsterdam) v. South Caribbean Trading Ltd., 801 NYS2d 243 [Sup Ct, NY County 2004][internal citations omitted]). Plaintiff must plead "the terms of the agreement, the consideration, the

performance by plaintiffs and the basis of the alleged breach of the agreement by defendant" (Furia v. Furia, 116 AD2d 694 [2d Dept 1986]). In support of the motion, defendant Allstate submits, inter alia: the examination before trial transcript testimony of plaintiff himself, the examination before trial transcript testimony of Patti Selock a Senior Field Representative with Allstate, the examination before trial transcript testimony of non-party witness, plaintiff's mother, Angela Houck, a copy of the motor vehicle insurance policy issued to plaintiff's mother, and a copy of the Automobile Policy Cancellation Notice. Said evidence reveals that: On May 3, 2007, plaintiff and his mother were notified by Allstate that if a minimum insurance payment in the amount of \$614.20 was not received by May 23, 2007, the policy insuring the 1988 Toyota Camry would be cancelled for non-payment of premium; the Allstate notice advised plaintiff that if continuous insurance was not kept in force, the registration on any of the insured vehicles (including the 1988 Toyota Camry) would also be subject to suspension, after Allstate did not receive a response or payment from plaintiff or his mother to the cancellation notice, the Allstate policy was cancelled effective as of May 23, 2007; Plaintiff's coverage for the 1988 Toyota Camry was subsequently reinstated on a secondary Allstate policy with a different policy number via endorsement effective June 9, 2007, resulting in a 17-day lapse of insurance coverage for this vehicle; thereafter, on June 12, 2007, Angela Houck received a Suspension Order from the New York Department of Motor Vehicles advising that due to her failure to maintain continuous liability insurance coverage on the vehicle, the registration and license plates on the 1988 Toyota Camry would be suspended for a period of 17 days, effective July 11, 2007. Accordingly, at the time plaintiff was stopped and ticketed on July 24, 2007, the registration on the vehicle was suspended due to the prior cancellation of the Allstate policy for non-payment of premiums. Accordingly, defendant Allstate establishes a prima facie case that there was no failure to perform on its part.

As it is undisputed that discovery has now been completed, that branch of defendant Carmine DeStefano's motion for leave to renew its prior motion for summary judgment, based upon new facts adduced during discovery is granted.

In support of his motion, defendant Carmine DeStefano establishes that there are no triable issues of fact regarding the breach of contract cause of action. In support of his motion, defendant Carmine DeStefano submits, inter alia: plaintiff's own examination before trial transcript testimony, the affidavits of defendant Carmine DeStefano himself and the

affidavit of Pasqualy Destefano, owner of the DeStefano Agency, which evidence establishes, inter alia: plaintiff was not a client of defendant Carmine DeStefano, plaintiff did not have any contractual relationship with defendant Carmine DeStefano, the insurance policy for the subject 1988 Toyota Camry was caused to lapse due to non-payment of premiums, resulting in the cancellation of the Allstate policy, which subsequently led to the subject vehicle being suspended at the time plaintiff was pulled over and ticketed on July 24, 2007, plaintiff never communicated with defendant DeStefano concerning the issuance of the tickets, plaintiff did not have a driver's license on him at the time he was pulled over, and plaintiff's arrest was due to his failure to appear at his court appearance on September 6, 2007 to answer the tickets because he had to work. Accordingly, defendant DeStefano established that there was no breach of contract.

In opposition to both motions, plaintiff fails to present a triable issue of fact. In opposition to defendants' motions plaintiff submits, inter alia, the affidavit of plaintiff himself, which affidavit indicates that: prior to the date he was supposed to appear in court, he contacted Carmine DeStefano to inquire about the suspended registration and was advised by him that he and Allstate had resolved the error regarding the registration suspension and that an appearance in court would not be necessary and that defendant DeStefano told him not to worry about it and that he would take care of it. Plaintiff fails to present any evidence which rebuts the defendants' arguments that there was no contractual relationship between himself and defendants. As such, there are no triable issues of fact.

Accordingly, as there are no triable issues of fact, summary judgment is warranted, and both defendants' motions are granted and the Complaint is dismissed in its entirety.

This constitutes the decision and order of the Court.

Dated: April 10, 2013

.....  
**Howard G. Lane, J.S.C.**