

**Barry's Auto Body of NY LLC v  
Allstate Fire & Cas. Ins.**

2024 NY Slip Op 35061(U)

July 30, 2024

Supreme Court, Richmond County

Docket Number: Index No. 152167/2020

Judge: Orlando Marrazzo, Jr.

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND  
BARRY'S AUTO BODY OF NY LLC**

**DECISION/ORDER**

**IAS PART 26**

HON. ORLANDO MARRAZZO, JR.

Index No.: 152167/2020  
Motion No 2,

*Plaintiff(s),*

*-against-*

**ALLSTATE FIRE AND CASUALTY INSURANCE  
and ALLSTATE INSURANCE COMPANY INC.**

*Defendant(s)*

The following numbered 1 to 3 were fully submitted on July 25, 2024

Papers  
Numbered

Defendant's Motion Seeking Partial Summary Judgment, with Supporting Papers and Exhibits, Dated, June 5, 2024,.....	1
Plaintiff's Affirmation in Opposition, with Supporting Papers and Exhibits, Dated, Dated, July 18, 2024,.....	2
Reply,.....	3

As is set forth below, Defendant's Motion for Partial Summary Judgment is denied.

Defendants have brought the instant motion seeking partial Summary judgment dismissing Plaintiff's claims pursuant to General Business Law §349.

It is well settled that Summary Judgment is a drastic remedy that should be denied if there is any doubt regarding the existence of a triable issue of fact. (See *Andre v. Pomerov* 35 NY2d361, 363 (NY 1974); *Phillips v Kantor & Co.* 31 NY2d307, 311 (NY 1972).

The party seeking summary judgment must make prima facie showing of its entitlement to judgment as a matter of law by submitting evidence in admissible form that proves the absence of material issues of fact. (See *Zuckerman v. City of New York*, 49 NY2d 557, 562 (NY 1980).

If the party seeking summary judgment fails to make prima facie showing of the absence of material issues of fact, its motion must be denied regardless of the sufficiency of the opposing papers. (*Alvarez v Prospect Hosp.*, 68 NY2d320 (1986), see also *Avotte v Gervasio*, 81 NY2d1062 (NY 1993).

The party opposing a motion for summary judgment merely needs to show facts sufficient to require a trial on any material issue of fact (I D.). Because judicial policy favors resolving matters on their merits, the standard requires the motion court to draw all reasonable inferences in favor of the non-moving party *Nicklas v. Tedlen Realty Corp.*, 305 AD2d385 (2d Dept 2003) and the evidence must be construed in a light most favorable to the party opposing the motion. *Benincasa v. Garrubbo*, 141 AD2d618 (2d Dept 1988). Since summary judgment is the procedural

equivalent of a trial, if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable", summary judgment must be denied. (Phillips v Kantor & Co., 31 N.Y.2d 307 (NY 1972); see also, Rotuba Extruders v Ceppos, 46 N.Y.2d 223). Moreover, the proof of the party opposing the motion must be accepted as true and considered in a light most favorable to it, Museums at Stony Brook v. Patchogue Fire Dep't, 146 A.D.2d 572, 573-574 citing, Dowsey v Megerian, 121 AD2d497.)

General Business Law § 349 declares unlawful all "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state" (General Business Law 6 349 (a). Courts interpreting it have recognized repeatedly that it "governs consumer-oriented conduct and, on its face, applies to virtually all economic activity" (See, North State Autobahn, Inc. v Progressive Ins. Group Co., 102 A.D.3d 5, 11 citing, Small v Lorillard Tobacco Co., 94 NY2d43, 55, 720 NE2d892, 698 NYS2d615 [1999]; see Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d314, 324, 774 NE2d 1190, 746 NYS2d858 [2002]; Karlin v IVF Am., 93 NY2d282, 2 90-291, 712 NE2d662, 690 NYS2d495 [1999]).

GBL §349 prohibits deceptive acts and practices that misrepresent the nature or quality of products or services. Himmelstein, McConnell, Donoghue & Joseph LLP v Matthew Bender & Co., 37 NY.3d 169, 176 (NY 2021).

The legislative purpose behind its enactment was to ensure that "Consumers have the right to an honest market place" IL at 13-14, citing (Mem of Governor Rockefeller, 1970 NY Legis Ann at 472; see Richard A. Givens, Practice Commentaries, McKinney's Cons Laws of NY, Book 19, General Business Law § 349 at 569 [1988 ed] ["The Legislature determined . . .that consumer deceptions of this sort inherently hurt the public-including both consumers themselves and legitimate business"]). (emphasis added). It is noteworthy in the context of this action that the Legislature specifically recognized that other businesses, such as Plaintiff herein, could be injured by this deceptive conduct, and thereby have standing to bring an action under the statute, and that the remedies were not limited to merely consumers Goshen v. Mutual Life Ins. Co of NY, 98 NY2d314.)

In order for alleged conduct to be subject to General Business Law 349 it must be shown that the conduct complained of is 1) consumer oriented; 2) materially misleading and 3) that the party bringing the action was injured by the alleged conduct. (See, Stutman v. Chemical Bank, 95 NY.2d 24 (NY 2000). For all the reasons that follow and based on the facts and evidence recited in the Affidavit of Barry A. Crupi, Defendants have failed to establish their entitlement to judgment as a matter of law because issues of fact remain that must be determined at trial regarding each of these elements.

The court finds that plaintiff has standing to assert GBL§349 claims regardless of whether they are brought as direct, or assigned claims. It is undisputed that businesses have standing to bring claims under this statute. (See, *Goshen v. Mutual Life Ins. Co of NY*, 98 NY2d 314; in fact, the appellate courts have recognized GBL349 claims brought by body shops on many occasions. Contrary to Defendant's arguments, Plaintiff's injuries claimed herein are direct and not derivative of injuries suffered by the Insureds. It is undisputed that the policies at issue obligated Defendants to pay the cash value of the cost to repair the vehicle to its pre-accident condition, though the parties clearly dispute what that means. However, in addition to the terms of the policy, "[a]pplicable provisions of the Insurance Law are 'deemed to [be] part of [an] insurance contract as .. ..... though written into it.'" *Trizzano v. Allstate Ins. Co.*, 7 A.D.3d 783, 785, 780 N.Y.S.2d 147 (2d Dep't 2004) (quotation and other citations omitted).

As such, these policies also incorporate, by operation of law, the certain statutory mandates including: "it shall be the duty of every insurer to offer claimants, or their authorized representatives, amounts which are fair and reasonable as shown by its investigation of the claim, providing the amounts so offered are within policy limits and in accordance with the policy provisions." 11 NYCRR § 216.6 (a)

Also, the amount the Defendants were obligated to pay under its contracts was "the lesser of the amounts for which the claimant can reasonably be expected to (1)

repair the property to its condition prior to the loss; or (2) replace it with an item substantially identical to the item damaged." (Nick's Garage, Inc. v. Nationwide Mut. Ins. Co., 715 F. App'x 31, 33 (2d Cir. 2017); 11 N.Y.C.R.R. § 216.6(b)(1)-(2);

On each of these claims the amounts paid by Defendants were remitted to the Plaintiff as payee on Allstate checks, as noted in the Affidavit of Barry Crupi, and as evidenced by the sample checks annexed hereto collectively as plaintiff's Exhibit 1.

Plaintiff has raised an issue of fact insofar as it has put forth evidence that the claims practices engaged in by Defendant to arrive at the sums it paid were deceptive and had the intended effect of reducing the amount paid to Plaintiff by Defendant. These practices caused Plaintiff to be injured in the form of receiving only a partial payment for the services rendered in repairing the insured vehicle. This is a direct injury to the Plaintiff that is not derivative of any injury to the Insureds. Moreover, the Insured's vehicle has been fully restored. As such, if anything it is the Insured's injury that is derivative of the shop's injury on these facts because the loss is suffered by the shop when it is not paid for its services as Defendants are obligated to do under the policy. This only injures the Insured if that cost is then passed on to them by Plaintiff. If Plaintiff is not paid for its services rendered, it is injured directly . . . and therefore, it has standing to bring these claims on its own behalf. General Business Law 349 states that an action can be commenced by anyone "who has been

injured by reason of any violation of this section may bring an action in his own name to enjoin such lawful act or practice, an action to recover his actual damages...." General Business Law §349(h).

These facts are distinguishable from the cases before the New York Court of Appeals, where the injuries claimed by certain businesses were deemed to be derivative of, and therefore too remote to be cognizable under GBL§349. For example, these facts are distinguishable from those in *Blue Cross & Blue Shield of NJ Inc. v. Phillip Morris USA Inc.*, 3 NY.3d 200, where the plaintiff sought to recover sums it paid on its health insurance policies for medical costs incurred by its insureds who were deceived about the health risks of smoking by the tobacco companies. The Court determined that the injury complained of, i.e., the payments made by the insurer, were too remote from the deceptive acts complained of because they were derivative of injuries suffered by the insureds. Here, the deceptive conduct complained of, namely Defendants claims practices which are designed to limit and suppress the amount it is otherwise obligated to pay on its standard form insurance policies, bear a direct and causal link to the injury suffered by the Plaintiff. This constitutes a sufficient injury under the law. See *Nick's Garage*, 875 F.3d at 125 ("an [i]nsurer's alleged failure to pay sufficient sums, if proved, constitutes a sufficient injury under GBL§ 349"); see also *Kronenberg v. Allstate Ins. Co.*, 2020 U.S. Dist. LEXIS 44103.)

Defendants' argument is premised on Jeffrey's Auto Body Inc v State Farm Fire & Cas Co. 2020 US Dist. LEXIS 221011, 2020 WL6939805 which is not controlling precedent, and is an outlier case from the Northern District that employed flawed logic to reach the conclusion that it was "inconceivable" that when the Insurer fails to pay the cost of repair, the shop would only be injured when the insured was also injured. The court apparently failed to appreciate as noted herein, the loss is suffered by the shop, not the insured. The shop may choose to charge its losses to the customer, or it may not but either way it is the shop's financial harm that is caused by the alleged conduct. Moreover, Jeffrey's Auto defies controlling precedent of Nicks Garage based on the premise that the decision therein did not specifically address the directness of injury. Notably, Nick's Garage, Inc. v. Progressive Cas. Ins. Co., 875 F.3d 107 expressly considered the nature of a body shop's injury under similar allegations insurance and held that "[an] Insurer's alleged failure to pay sufficient sums, if proved, constitutes a sufficient injury" Id. At 125 and denied summary judgment. Also see, related case, Nick's Garage, Inc. v. Nationwide Mut. Ins. Co., 715 F. App'x 31, 34 (2d Cir. 2017). Moreover, the Second Department has addressed the directness of injury of body shops suing Insurers pursuant to general business law 349 in its decision in North State Autobahn v. Progressive, 102 A.D.3d 5 (2d Dept 2012), on the basis that the deceptive conduct complained of therein was "specifically targeted at the Plaintiffs and other shops..." The court in Jeffery's Auto

Body adopted an artificially constrained reading of the Second Department's holding to limit it only to claims of steering, which is not supported by the language of the decision, moreover it is inconsistent with subsequent decisions of the Appellate Division which recognized that body shops are able to bring these types of claims. See e.g., *Barry's Auto v Allstate*, 190A.D.3d 807 (2d Dep't 2021), and in any event is not controlling on this Court.

Defendants' Conduct is Materially Misleading. The second element of a GBL§349 claim is that it must be "materially misleading." This is determined by the application of an objective standard, therefore Defendants' argument that it could not mislead Plaintiff due to Plaintiff's knowledge and expertise as a repair shop is incorrect on the law. A defendant's actions are materially misleading when they are likely to mislead a reasonable consumer acting reasonably under the circumstances. *Himmelstein, McConnell, Donoghue & Joseph LLP v Matthew Bender & Co.*, 37 NY.3d 169, 178 (2021). Moreover, the alleged deception is against Defendants' insureds, not Plaintiff.

Plaintiff has put forth evidence that Allstate's Estimates are materially misleading insofar as they purport to contain the elements of a proper repair, but Defendants employ selective use, and manipulation of, the trade manuals, suppressing the labor rate by deceptive conduct such as masking instances where it paid higher labor rates on their estimates as lump sum line items, or rate concessions,

rather than actually reflecting a negotiated labor rate. By these and the other practices detailed in Mr. Crupi's affidavit, these estimates do not reflect the "fair and reasonable" cost to repair the vehicle and are in fact designed to suppress Defendants' costs by avoiding its policy obligations.

Similarly, Notice of Rights Letters, which although they are statutorily mandated, contain materially misleading statements when they contain the representation that Defendants "negotiated in good faith but were unable to reach an agreed price," and or the representation that another shop in the can fix the car for the stated price which is materially misleading because no shop has inspected the vehicle or in fact agreed to accept Defendants' price, and in any event these other shops would have the right under NYS Insurance law to request supplements and increase their estimate amounts.

Defendants have already attempted the argument that a "fully disclosed practice cannot be deceptive" and failed. (See *Kronenberg v. Allstate Ins. Co.*, 2020 US Dist LEXIS 44103. There the court rejected this argument relying on language from *Nicks Garage Inc. v Progressive Cas. Ins. Co.*, 875 F.3d 107 (2d Cir. 2017), wherein the Second Circuit rejected this same argument when it was raised by Progressive, stating "whereas here the essence of a plaintiff's claim is that the 'insurer did not do what its policy said it would do and that the rates [or values] listed....do not represent the prevailing competitive rates as they purported to do' Id.

Accordingly, an insurer cannot overcome a claim of deception by disclosing estimates stating the rates to be paid when those rates are allegedly below what it is obligated to pay. The same logic should apply here, where the issue is not that Allstate did disclosure of the estimates, but rather that the estimates themselves are deceptive insofar as they are prepared using the deceptive tactics and methodologies detailed in the Affidavit of Barry Crupi.

Further the court finds that the argument that Defendants never negotiated the repairs with its insureds because they negotiated with Plaintiff as their Designated Representative on these particular claims is not determinative of whether their conduct is consumer oriented and in fact misses the point entirely. First, the argument that Defendants did not negotiate with its Insureds and only negotiated with the Shop as the designated representative is premised on a fundamental misunderstanding of the role of the Designated Representative that is undermined both by the facts averred in Mr. Crupi's Affidavit as well as in the testimony by Defendants' own witness at his deposition.

As averred in Crupi's Affidavit, the shop only negotiates the scope of repair and the cost of same with Defendants, it does not stand in the shoes of the Insured and in fact Defendants are in touch with the Insured throughout the repair process. This was confirmed by Steven Moreno, Defendants' Claims Manager at his

Deposition on March 29, 2023, when he testified to the limited scope of the Designated Representative as follows:

Q: ...what do you understand [designated representative] to mean?

A" My understanding of it is that it's a form the shop has the customer sign that allows [the shop] to negotiate the claim, as far as the aspect of collision repairs on their behalf. They're going to represent them so that the insured does not have to be present.... The shop will negotiate on their behalf to get a proper repair and an agreed price to do so."

Deposition of Steven Moreno, March 29, 2023, Page 48 Lines 5-18, copies annexed as Plaintiff's Exhibit 9.

Mr. Crupi further averred that during the time that repairs are ongoing, Defendants are communicating to the Insured, sending them among other things, copies of their Estimates which reflect their deceptive claims practices. Moreno also confirmed this when he testified that:

Q: If the shop does not receive a designated representative, then are there three parties involved in the negotiation...?

A: I would say the customer is always involved...we have to keep them informed, you know, what we discussed at the shop, what we found the car needs, find out if they have any concerns, right..."

Deposition of Steven Moreno, March 29, 2023, Page 49 Lines 17 Page 50  
Line 1, copies annexed hereto as Plaintiff's Exhibit 10.

Therefore, contrary to the Defendants' argument in their motion, Defendants are engaged in consumer-oriented conduct throughout the repair process notwithstanding the fact that the Plaintiff is acting as the designated representative.

Further the claim asserted under GBL§349 is that Allstate represented to its insureds that it would pay the cost to repair the vehicle to its pre-accident condition under its standard policies and that this was materially misleading because throughout the repair process it not only failed to fulfill this obligation, it systematically used deceptive practices to suppress the claims amounts; whilst representing to its insureds through its estimates and its communications during the repair process that it was negotiating in good faith to fulfill its obligations - to list each and every incident of deceptive practice would be too voluminous but Plaintiff through the affidavit of its managing member has cited to specific examples in the record that create an issue of fact as to whether Allstate violated GBL349 (See Crupi affidavit).

Courts have already determined that such allegations are "consumer-oriented inasmuch as it alleges conduct that has a "broad[ ] impact on consumers at large" (North State Autobahn, Inc. v Progressive Ins. Group Co., 102 A.D.3d 5, 13, citing,

(Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, 85 NY2d at 25; also see Wilner v Allstate Ins. Co., 71 AD3d 155, 164.)

Moreover, the argument by Defendants that Plaintiff "admits" that Allstate's estimates "fully disclosed the repair hours, procedures, parts and labor rates Allstate believed were sufficient to restore the vehicles." - Plaintiff never admitted this, in fact, the testimony cited by Defendants only states that Plaintiff was provided with a copy of Allstate's estimate, there is no admission as to what Allstate "believed" nor any reference to it. Indeed, the essence of Plaintiff's argument is that these Allstate Estimates do not contain the amounts "sufficient to restore the vehicles" but instead these estimates contain lowball figures that Allstate arrives at using claims practices that are designed to deceive the insureds into thinking that they represent the fair and reasonable cost to restore their vehicles as required by the policy and applicable law. The notion, as Defendants contend in their motion, that Plaintiff's dispute is based solely on Crupi's "subject feelings" is belied by the allegations, the facts in evidence and the record before this court.

The court determines that GBL §349 is applicable to these claims Defendants' claim that GBL §349 is aimed at "modest transactions" and that these claims are not the type of claims contemplated under the statute. Defendants' argument ignores multiple controlling precedents that have already determined that these types of claims, which involve standard form contracts issued throughout the state of New

York are within the ambit of GBL§349. See e.g., Barry's Auto Body of NY LLC v. Allstate, 190 A.D.3d 807 (2d Dep't 2021) (reversing the lower court's dismissal of Plaintiff's GBL 349 claims on virtually identical allegations, also see North State Autobahn v. Progressive, 102 A.D.3d 5(2d Dep't 2012); Pesce Bros, Inc. v. Cover Me Ins. Agency of NJ, Inc., 144AD3d1120. Neither does the Court of Appeals cited by Defendants, Singh v City of New York, 40 N.Y.3d 138 (2023)the case cited by Defendants, support for defendants' arguments here. As the court noted in that case, the dispute involved a single "multi-hundred-million-dollar contract" that was negotiated between sophisticated parties, whereas here the dispute involves a standard form contract that Allstate issues to all of its insureds within the state. This is part of what makes the issues presented in this case "consumer-oriented" because .....Allstate concedes this aspect of the action in its argument for the application of the 1-year limitations clause where it states that all of its policies contain substantially the same terms. As such, there are no "unique or complex" arrangements between Allstate and its customers of the type that were at issue in Singh. Furthermore, Allstate ignores the holding in Singh that the Taxi and Livery Commission was acting in its governmental capacity so that it's conduct was not "consumer oriented". I\_d at 148.

The Assignment at issues includes GBL 349 claims as well as a Breach of Contract. Defendants argue that Plaintiff's assignments are limited only to breach of

contract claims and do not encompass the GBL §349 claims that its customers might have had arising out of the repair of their vehicles at Plaintiff's shop. This argument is belied by the plain language of the Assignments, which clearly encompass all of these claims. Accordingly, even if the Court were to determine that the Plaintiff's direct claims under the statute are too remote or derivative to confer standing, it still has the ability to pursue these claims as the assignee of the Allstate Insured's claims against the Defendants.

New York law does not require specific boilerplate language to accomplish the transfer of causes of action. "[A]ny act or words are sufficient which 'show an intention of transferring the chose in action to the assignee'" (See, *Banque Arabe Et International Investment v. Maryland Nat'l Bank*, 57 F.3d 146, 151-152).

Moreover, Since the Assignments are contracts, the canons of contract interpretation apply, thus in order to determine the intent of the parties, in the Assignments, the Court must first determine whether it is ambiguous. A contract is not deemed ambiguous unless "it is reasonably susceptible of more than one interpretation, and a court makes this determination by reference to the contract alone." *Breed v. Insurance Co. of N. Am.*, 46 N.Y.2d 351 (N.Y. 1978).

Here, the Assignments are clear that the Assignors are assigning "any and all claims arising out of the repair of their vehicles, including but not limited to....." The

intent is clearly broad and includes not merely the breach of contract claim but additional claims as well, contrary to the Defendants' assertion. As such, the Assignments are clear and unambiguous.

Accordingly, they must be enforced as written and Defendants' attempt to create ambiguity through a separate, document is improper because the law is clear that "[w]hen the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and the parties' reasonable expectations. [A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Federico v Dolitsky*, 176 A.D.3d 916, 918 (2d Dept 2019) (internal citations omitted).

Applying these principles to the Assignments, it is clear that the when the parties intended to assign all claims arising out of the repair of the Assignor's vehicles, not simply the breach of contract claim. Furthermore, Defendants misinterpret the nature and purpose of what they refer to as the "preassignment...." As Crupi averred in his Affidavit annexed hereto, Plaintiff uses that document at an earlier stage of the repair process to simply to ascertain whether the customer intends to pay the difference between the short payment by Defendants or assign his or her rights to Plaintiff. It is not intended to encompass the entire agreement between the

parties. Once the repairs are completed and the vehicle is returned to the customer, the parties execute the full agreement.

The recitation of the amounts due on the breach of contract claim reflect the consideration given for the assignment, which of course there must be some consideration in order for the any contract to be enforceable.

The circumstances of this case require denial of Motion to Dismiss Contract claims While New York Courts do recognize the enforceability of contractual limitations that are shorter than the statute of limitations provided under New York Law, the application of these provisions is not automatic.

In order to be enforceable, the terms must be reasonable under the circumstances, which is . necessarily a fact-driven determination. Plaintiff is the assignee of rights to a claim for the breach of a standard form insurance policy issued en masse throughout the state. It was neither the signatory, nor a party to any negotiations on the contracts. At the time these assignments were made, it had no knowledge of the limitations clause contained therein. Moreover, there is no evidence submitted by Defendants to reflect that their Insureds knowingly agreed to these terms, no demonstration by admissible evidence that the Insureds reviewed these clauses before agreeing to purchase these policies, and as such, Defendants

have failed to make out prima facie showing that , under the circumstances, it is reasonable to enforce these provisions.

However, assuming arguendo that the Court determines that the provision is enforceable, Allstate's calculations as to when the time starts to run on the one-year period are incorrect. The relevant question when deciding whether a contractual limitations period is enforceable is "whether and when the damages were objectively ascertainable. [...] A contractual limitations period is unenforceable without a concrete determination of damages accrual." *Turner Constr. Co. v Nastasi & Assoc., Inc.*, 192 A.D.3d 103, 106-107 (internal citations omitted).

Although the Allstate policy states claims must be brought within one year of the date of loss, the question of when the loss occurs is ambiguous. (See *g Steen v. Niagara Fire Ins. Co.*, 89 NY315 ("generic language setting a contractual limitations period should be interpreted to start the clock not at the time of the accident itself but only once the right to bring an action exists"). As such, the application of the date of the accident is unreasonable because at that time, the damages for breach of contract were not objectively ascertainable. The repair process includes many opportunities for negotiation between the insurer and the insured or their designated representative. During this process, the shop might request a supplemental estimate from the insurer which has the effect of increasing the amount paid on the claim. It is only when the negotiations are complete, and the insurer deems its obligations

satisfied that the damages can be ascertainable - in this case the difference between what the shop charged the Insured and the amount that the insurer paid.

Accordingly, this court denies Defendant's motion to dismiss in its entirety.

Dated: July 30, 2024



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Orlando Marrazzo, Jr.,  
Justice, Supreme Court