SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 29
NASSAU COUNTY

NEW HYDE PARK AUTO BODY INC., as assignee of Virginia Reale,

Plaintiff,

- against -

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant.

Index No.: 601568/2023
Motion Seq. No.: 01
Motion Date: 04/18/2023

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibit, Memorandum of Law	1
Memorandum of Law in Opposition	2
Reply Memorandum of Law	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant moves, pursuant to CPLR § 3211(a)(1) and (7), for an order dismissing plaintiff's claim pursuant to General Business Law § 349, as alleged in the Second Cause of Action, along with plaintiff's demand for punitive damages and equitable relief. Plaintiff opposes the motion.

In support of the motion, counsel for defendant submits, in pertinent part, that, "[i]n this action, plaintiff New Hyde Park Auto Body, Inc., ('Plaintiff') seeks to recover certain costs to repair a vehicle insured under an insurance policy (the 'Policy') issued by

defendant State Farm Mutual Automobile Insurance Company ('State Farm') to Plaintiff's assignor and State Farm's insured, Virginia Reale ('Reale'). Following an accident resulting in physical damage to Reale's 2020 GMC Terrain (the 'GMC'), Reale retained Plaintiff to perform repairs to the GMC and purportedly assigned certain rights under the Policy. Plaintiff's complaint alleges Reale authorized Plaintiff to charge certain hourly labor rates and Plaintiff prepared an estimate and repaired the GMC based on those rates. The complaint further alleges an estimate prepared on behalf of State Farm was based on an hourly labor rate lower than the rate in Plaintiff's estimate and State Farm allegedly refused to negotiate the labor rates with Plaintiff. According to Plaintiff, the differences in labor rates resulted in an offer of reimbursement under the Policy for an amount less than Plaintiff's estimate, constituting a breach of the Policy. Attempting to transform an ordinary breach of contract action for compensatory damages beyond its intended parameters, Plaintiff purports to assert a claim pursuant to New York's General Business Law §349 ('GBL §349') for which it seeks punitive damages in addition to compensatory damages. In the complaint's prayer for relief, the Plaintiff also seeks certain undefined equitable relief. … [T]he second cause of action purporting to assert a claim pursuant to GBL §349 should be dismissed for failure to state a cause of action pursuant to CPLR 3211(a)(7). New York State and Federal courts interpreting GBL §349 have consistently held that ordinary breach of contract disputes involving insurance policies like this action do not support a claim pursuant to GBL §349. For this reason, Plaintiff cannot satisfy the consumer oriented element for a GBL §349 claim. Plaintiff's complaint also fails to allege with sufficient detail any alleged deceptive acts as required for pleading a GBL §349 claim. And because Plaintiff is a non-consumer and its only injury is purely derivative, based solely on the insured/assignor's alleged damages, it fails to allege the

type of direct injury cognizable under section 349. ...Plaintiff's demand for punitive damages should be dismissed because the complaint fails to comply with New York's strict pleading requirements for such damages, which requirements apply with greater force here because they are sought in connection with an insurance claim. Specifically, the complaint fails to allege (1) any conduct on the part of State Farm that is actionable as an independent tort, (2) that State Farm engaged in conduct evincing a high degree of moral turpitude and demonstrating such wanton dishonesty as to imply a criminal indifference to civil obligations, and (3) that such conduct is directed at the public generally. ... [B]ecause Plaintiff has an adequate remedy at law in the form of its breach contract claim pursuant to which it seeks compensatory damages, equitable relief is unavailable." *See* Defendant's Affirmation in Support Exhibit A.

Counsel for defendant further contends, in pertinent part, that, "Plaintiff's second cause of action purports to allege a violation by State Farm of GBL §349 based upon certain vague and conclusory allegations concerning State Farm's representations that it will pay for 'automobile repair services' in an amount equal to the 'prevailing competitive market price in the relevant geographic area.' (Complaint at ¶ 43) As shown below, this cause of action, as pleaded, is insufficient to state a claim for deceptive business practices pursuant to GBL §349 and should be dismissed pursuant to CPLR 3211(a)(7). GBL §349 provides, in pertinent part: (a) Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this State are hereby declared unlawful. ... (h) In addition to the right of action granted to the attorney general pursuant to this section, any person who has been injured by reason of any violation of this section may bring an action in his own name . . . to recover his actual damages . . . . [citation omitted]. In order to plead a legally sufficient cause

of action under GBL §349, a plaintiff must allege: (1) Acts or practices that are 'consumer-oriented,' (2) that such acts or practices are deceptive or misleading in a material way, and (3) that plaintiff has been injured by reason of those acts. [citations omitted]. It is well settled that: The consumer-oriented prong of the Section 349 claim requires a plaintiff to show that the practices complained of have a 'broad impact on consumers at large;' 'private contract disputes unique to the parties . . . would not fall within the ambit of the statute.' [citation omitted]. The allegations contained in the Plaintiff's complaint in support of its second cause of action under GBL § 349 allege nothing more than a private contractual dispute between the Plaintiff, as the assignee of a single State Farm insured, and State Farm based upon Plaintiff's dispute with State Farm concerning the applicable hourly labor rate.... Plaintiff's allegations that State Farm 'holds itself out to consumers as providers of insurance policy products,' (Complaint at ¶ 42) and that it 'claims to consumers that it will provide coverage that includes payments for automobile repair services at least equal to the prevailing competitive market price,' (Complaint at ¶ 43) are conclusory and insufficient to satisfy the consumer-oriented prong of GBL§ 349. The remaining allegations at paragraphs 46 and 47 of the complaint which allege only that Plaintiff's assignor has sustained damages, but not Plaintiff, describes nothing more than the standard private contract dispute between a policy holder and an insurer that is not the proper vehicle for a GBL §349 claim." *See id.*

Counsel for defendant also argues, in pertinent part, that, "[e]ven if the Plaintiff had asserted a consumer-oriented dispute rather than a private contractual dispute which, as discussed above, it does not, Plaintiff's GBL § 349 should still be dismissed because it does not allege sufficiently specific facts to support the elements of such a claim. A party seeking to impose liability must plead facts sufficient to identify the material deceptive acts and

establish injury to the public generally as distinguished from injury to itself. [citation omitted]. Conclusory allegations are insufficient to state a cause of action under GBL § 349. [citations omitted].... A party seeking to assert a claim based upon GBL §349 must also allege specific acts or omissions that he is claiming are deceptive together with allegations concerning why those acts were deceptive and how the allegedly deceptive conduct resulted in the specific injury the party is claiming. [citation omitted]. Here, Plaintiff has failed to assert any facts which, if proven, would establish State Farm engaged in any deceptive act or practice. First, the complaint fails to allege State Farm made any materially misleading representation to Plaintiff's assignor Reale. Second, Plaintiff fails to allege any consumer other than Plaintiff's assignee actually sustained damages. Therefore, the complaint fails to satisfy the second element for a GBL 349 claim. The New York Court of Appeals has held that a non-consumer like Plaintiff, may assert a claim under GBL §349, but only where the plaintiff alleges it has sustained a direct, rather than a derivative, injury. [citations omitted].... For purposes of GBL§349, '[a]n injury is indirect or derivative when the loss arises solely as a result of injuries sustained by another party.' [citation omitted].... Plaintiff's claim pursuant to GBL §349 should be dismissed because it fails to allege any direct injury. Indeed, the second cause of action does not allege any injury to Plaintiff directly, but only alleges that 'Ms. Reale suffered damages ...'" *See id.*

Counsel for defendant adds, in pertinent part, that, "[i]n order to be entitled to recover punitive damages, a plaintiff must comply with New York's strict pleading requirements, especially where, as here, punitive damages are sought in connection with an insurance claim. [citations omitted].... The New York Court of Appeals has limited the type of conduct that is actionable as an independent tort for purposes of recovering punitive damages.... In the

present action, Plaintiff's complaint fails to allege any actionable tort claim separate and apart from a purported breach of contract claim. Apart from its claim under GBL §349, Plaintiff's complaint only alleges a breach of contract claim and there is no mention of any tortious conduct. Where, as here, a plaintiff is 'merely seeking to enforce its bargain, a tort claim will not lie.' [citation omitted]. To satisfy the second element, the complaint must allege that defendant's conduct constituted 'a fraud evincing a high degree of moral turpitude and demonstrating such wanton dishonesty as to imply a criminal indifference to civil obligations....' [citation omitted].... Here, Plaintiff's complaint fails to allege any conduct on the part of State Farm that constitutes 'a fraud evincing a high degree of moral turpitude and demonstrating such wanton dishonesty as to imply a criminal indifference to civil obligations....' [citation omitted]. At best for Plaintiff, the complaint merely alleges 'State Farm refused to negotiate the labor rates with [Plaintiff] in good faith.' (Complaint at ¶ 19) That allegation is clearly insufficient to sustain a claim for punitive damages.... Further, Plaintiff's complaint fails to set forth a single fact of malicious, wanton or reckless conduct allegedly committed by State Farm by which to support its conclusory allegations. [citation omitted]. Not only does Plaintiff's complaint fail to allege any facts showing State Farm engaged in any egregious conduct, it fails to allege State Farm's conduct was aimed at the public generally. As explained above in connection with Plaintiff's GBL §349 claim, Plaintiff's action is nothing more than an ordinary breach of contract action involving a purely private dispute. Plaintiff's conclusory allegations and references to consumers other than Reale are insufficient to allege a scheme aimed at the public in general. [citation omitted]. In sum, Plaintiff's complaint fails to allege any of the necessary elements for punitive damages requiring dismissal of its demand for such damages. It is well-settled under New York law that if a plaintiff can obtain

'adequate relief by a money judgment, there is no need for equitable relief.' [citation omitted]. Although the complaint does not assert a cause of action seeking equitable relief, in the complaint's wherefore clause, it states that Plaintiff seeks a 'judgment against the Defendant for ... equitable ... damages.' Although that single reference to 'equitable' in the context of the type of damages sought is ambiguous, if Plaintiff seeks equitable relief, it is not entitled to do so because in the event Plaintiff prevails in this action on its breach of contract claim, it will be entitled to a money judgment, rendering any equitable relief unnecessary and unwarranted." *See id.*

In opposition to the motion, counsel for plaintiff asserts, in pertinent part, that, "[t]his action emerges from State Farm's widespread practice of underpaying its car insurance customers in cases where their vehicles need repairs from auto body shops. The essence of State Farm's underhanded practice is, they inform their thousands of customers that they will match the 'prevailing competitive price' for body shop services when in reality they pay substantially less. Instead of responding to prices that emerge from a free market, State Farm uses its market power to dictate prices to body shops on a take-it or leave-it basis. Because many body shops rely upon customers who get their insurance from State Farm, they are forced to relent to State Farm's price-demands at tremendous discounts to their ordinary prices. State Farm then uses the cadre of victimized body shops to reflect the 'competitive' price that is 'prevailing'—at a far distance from the price for body shop labor that prevails in the absence of their intervention and in an actually 'competitive' market. As with many State Farm customers, this behavior affected assignor Virginia Reale— because instead of taking her car to a body shop run so cheaply that it could still turn a profit at State Farm's lowball prices, she kept her car at New Hyde Park Auto Body, where State Farm elected to stiff her on the added and more

reasonable price of its work. She, through her assignee, has clearly stated a claim not just for breach of contract, which State Farm's motion does not seek to dismiss, but also for deceptive business practices under General Business Law §349. This claim, for both compensatory and punitive damages, should proceed into discovery."

Counsel for plaintiff further contends, in pertinent part, that, "'[t]o state a claim for a §349 violation, a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice.' [citation omitted]. These elements are clearly satisfied in this action, where the standard car insurance policy that State Farm sells to the general public, and sold to Virginia Reale, makes the material misrepresentation that it will meet and respond to competitive market prices charged by auto body shops rather than offering non-competitive prices that will often saddle their insureds with debt. Nevertheless, State Farm asks for this claim to be dismissed on the pleadings—before being exposed to discovery—because, in its view, its behavior is not 'consumer-oriented,' because the allegations are not sufficiently particular, and because Plaintiff allegedly lacks a sufficient stake in the outcome of the litigation. These arguments are not colorable, and the motion to dismiss this deceptive practices claim should be denied. As squarely applicable here, a GBL §349 claim is cognizable where an '[i]nsurer's policy provides that it is obligated to pay labor rates up to 'the prevailing competitive … rates'' and yet the plaintiff alleges that 'the rates Insurer agreed to pay reflected not the prevailing competitive rates in the market but rates that a potentially large volume customer could prevail on repair shops to accept.' [citation omitted]. …[T]he broader pleading requirements for the 'consumer-oriented' prong of a GBL §349 claim … simply require[s] that the conduct at issue 'potentially affect[]' the similarly situated, a standard that is

'construed liberally.' [citation omitted]. Plaintiff has clearly satisfied these standards, as this case involves an insurer who promised to pay the 'prevailing competitive price' (Complaint at ¶33); who then paid what was 'not the prevailing competitive price' (id. at ¶34); and who based its deceptive claim, …, not on 'competitive' pricing but on rates that a powerful industry player could 'prevail on repair shops to accept.' [citation omitted].... State Farm's motion simply ignores this doctrine, and instead it focuses on irrelevant cases that involve 'nothing more than a private contractual dispute'—a description that plainly does not pertain to standard form insurance policies like the one in issue here, which affect thousands upon thousands of customers. [citation omitted]. As a matter of law, conduct is consumer-oriented '[w]here, as here, a defendant enters into contractual relationships with customers nationwide via a standard form contract and has allegedly committed the challenged actions in its dealings with multiple insureds.' [citation omitted]. …[T]he deceptive conduct appears on the face of standard-form insurance policies and thus may 'potentially affect' similarly situated policyholders. [citation omitted]. The conduct is thus consumer-oriented under the General Business Law.... 'Standard policy' cases like this one present fertile ground for GBL §349, because insurance companies like State Farm are so prevalent and thus their standard form policies 'potentially affect' [citation omitted] the consumer public. State Farm's motion ignores this fundamental point, which warrants denial of the motion."

Counsel for plaintiff also argues, in pertinent part, that, "State Farm alternatively seeks dismissal on the basis that GBL §349 pleadings must 'identify the material deceptive acts' in issue and must 'establish injury to the public generally as distinguished from injury to itself.'… Two points are noteworthy about State Farm's argument in this regard. First, it relies exclusively on federal law—which imposes a different and higher pleading standard than

state law.... [citation omitted]. And second, it overlooks a plain reading of New Hyde Park's complaint. Plaintiff specifically pleads the material deceptive acts in issue and their effect on the general public. State Farm 'claims to consumers that it will provide coverage that includes payments ... at least equal to the prevailing competitive market price,' the pleadings describe, when in 'actuality, the defendant does not offer [such] payments,' and instead relies 'upon prices that [insurers] impose upon auto body shops—prices that such shops will accept in order to avoid losing business from institutional payors like large insurance companies....' ... Ms. Reale was thus the precise type of victim that State Farm's scheme would most naturally contemplate: she bought and maintained an insurance policy in the expectation that her body shop bills would be paid in the event she ever had a car crash; and, instead, she came to learn that State Farm would offer only a portion of those bills, because it is deceptive about what 'competitive' means to its definition of a 'prevailing competitive price.' Third, beyond the complaint, the court may consider this 'submission[] in opposition to the motion' in determining whether the claim fits 'within any cognizable legal theory.' [citation omitted]. If there were any doubt about the adequacy of the pleadings themselves, they should be satisfied by the additional details offered here in these papers. Ultimately, this claim under General Business Law §349 should proceed into discovery, and State Farm's motion for dismissal should be denied. Finally, State Farm argues that this action should be dismissed because the Plaintiff's damages are only 'derivative' to Virginia Reale's.... This argument simply ignores the relationship between Plaintiff and Virginia Reale: Plaintiff is Ms. Reale's assignee. It is thus 'standing in the shoes' of Ms. Reale, and can 'exercise only the rights it inherited from [her].' [citations omitted]."

Counsel for plaintiff adds, in pertinent part, that, "State Farm argues that punitive damages should be held unavailable in this case because, as a matter of law, such exemplary damages are not available in a standalone breach of contract case and instead require a separate actionable tort.... They add that there is also no allegation of sufficiently culpable moral turpitude, and that the case is not directed as required at the general public.... The basic shortcoming of State Farm's argument is that it relies upon the absence of the General Business Law §349 claim—which, as set forth above, is well supported in the case law and should survive beyond the pleadings. Not only is it the 'standalone tort' that State Farm deems necessary, but the case law has specifically held that GBL §349 may anchor a pursuit of punitive damages. [citation omitted]. The particular circumstances of this §349 case are acutely fitted to a pecuniary damages claim. Assuming the truth of the allegations, as required here on the pleadings, State Farm is a major national insurance company that holds out in a standard car insurance policy a materially deceptive claim about the nature and strength of the coverage it is providing. This claim, if true, affects a broad swath of the general public—not only in affecting how they arrive at the decision of which insurance company to hire, but also in the damages their insureds sustain by owing substantially more money for car repairs than they should, like Virginia Reale."

"In reviewing a motion to dismiss pursuant to CPLR 3211(a)(7), '"the court will accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory."' *Mills v. Gardner, Tompkins, Terrace, Inc.*, 106 A.D.3d 885, 965 N.Y.S.2d 580 (2d Dept. 2013) *quoting Matter of Walton v. New York State Dept. of Correctional Servs.*, 13 N.Y.3d 475, 893 N.Y.S.2d 453 (2009) *quoting Nonnon v. City of New York*, 9 N.Y.3d 825, 842 N.Y.S.2d 756 (2007); *ABN AMRO Bank, N.V. v. MBIA Inc.*, 17 N.Y.3d 208, 928 N.Y.S.2d

647 (2011); *Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994); *Fay Estates v. Toys "R" Us, Inc.*, 22 A.D.3d 712, 803 N.Y.S.2d 135 (2d Dept. 2005); *Collins v. Telcoa, International Corp.*, 283 A.D.2d 128, 726 N.Y.S.2d 679 (2d Dept. 2001). The task of the Court on such a motion is to determine whether, accepting the factual averment of the complaint as true, plaintiff can succeed on any reasonable view of facts stated. *See Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 631 N.Y.S.2d 565 (1995). In analyzing them, the Court must determine whether the facts as alleged fit within any cognizable legal theory (*see Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 729 N.Y.S.2d 425 (2001)), not whether plaintiff can ultimately establish the truth of the allegations. *See 219 Broadway Corp. v. Alexander's Inc.*, 46 N.Y.2d 506, 414 N.Y.S.2d 889 (1979). The test to be applied is whether the complaint gives sufficient notice of the transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from the factual averments. *See Treeline 990 Stewart Partners, LLC v. RAIT Atria, LLC*, 107 A.D.3d 788, 967 N.Y.S.2d 119 (2d Dept. 2013). However, bare legal conclusions are not presumed to be true. *See Goel v. Ramachandran*, 111 A.D.3d 783, 975 N.Y.S.2d 428 (2d Dept. 2013); *Felix v. Thomas R. Stachecki Gen. Contr., LLC*, 107 A.D.3d 664, 966 N.Y.S.2d 494 (2d Dept. 2013). "In assessing a motion to dismiss under 3211(a)(7) . . . a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint." *Leon v. Martinez, supra* at 88.

On a motion to dismiss a complaint for failure to state a cause of action, the complaint must be afforded a liberal construction. The facts alleged must be presumed to be true and must be accorded every favorable inference. If they fit within any cognizable legal theory, the motion to dismiss must be denied. *See Stein v. Chiera*, 130 A.D.3d 912, 14 N.Y.S.3d 133 (2d Dept. 2015) *citing East Hampton Union Free School Dist. v. Sandpebble Bldrs., Inc.*, 66 A.D.3d 122, 884 N.Y.S.2d 94 (2d Dept. 2009) *affd* 16 N.Y.3d 775, 919 N.Y.S.2d 496 (2011). "If ... the allegations do not fit within any cognizable legal theory even after they are accorded every

favorable inference, the motion to dismiss should be granted." *Stein v. Chiera*, *supra* at 914 *citing Fisher v. DiPietro*, 54 A.D.3d 892, 864 N.Y.S.2d 532 (2d Dept. 2008). "A court can consider evidence submitted in opposition to a motion to dismiss 'to remedy defects in the complaint.' This is because '[m]odern pleading rules are designed to focus attention on whether the pleader has a cause of action rather than on whether he has properly stated one.'" *Warberg Opportunistic Trading Fund, L.P. v. GeoResources, Inc.*, 112 A.D.3d 78, 973 N.Y.S.2d 187 (1st Dept. 2013) *quoting Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 389 N.Y.S.2d 314 (1976).

"To state a cause of action to recover damages for a violation of General Business Law § 349, the complaint must allege that "a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice.'" *Barry's Auto Body of NY, LLC v. Allstate Fire & Casualty Insurance Company*, 190 A.D.3d 807, 140 N.Y.S.3d 246 (2d Dept. 2021) *quoting Koch v. Acker, Merrall & Condit Co.*, 18 N.Y.3d 940, 944 N.Y.S.2d 452 (2012) *quoting City of New York v. Smokes–Spirits.Com, Inc.*, 12 N.Y.3d 616, 883 N.Y.S.2d 772 (2009).

In the instant matter, the Court finds that plaintiff sufficiently alleged that defendant engaged in consumer-oriented conduct that was materially misleading and that plaintiff suffered injury as a result of the allegedly deceptive act or practice. *See Barry's Auto Body of NY, LLC v. Allstate Fire & Casualty Insurance Company*, *supra*; *Pesce Bros., Inc. v. Cover Me Ins. Agency of NJ, Inc.*, 144 A.D.3d 1120, 43 N.Y.S.3d 85 (2d Dept. 2016).

Therefore, based upon all of the above, defendant's motion, pursuant to CPLR § 3211(a)(1) and (7), for an order dismissing plaintiff's claim pursuant to General Business Law § 349, as alleged in the Second Cause of Action, along with plaintiff's demand for punitive damages and equitable relief, is hereby **DENIED**. And it is further

ORDERED that a Preliminary Conference is scheduled to be held on **December 4, 2023**, by the filing of a Proposed Preliminary Conference Order. The parties are hereby directed to the court website (http://ww2.nycourts.gov/COURTS/10JD/nassau/cicgeneralforms.shtml) where they will find a fillable PC form with instructions on how to fill it out and when and how to return it. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
October 17, 2023

ENTERED
Oct 19 2023
NASSAU COUNTY
COUNTY CLERK'S OFFICE