SCAN

SHORT FORM ORDER

SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T :
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 8

MVB. COLLISION, INC., d/b/a MID-ISLAND COLLISION, INC.,

Plaintiff ,

- against -

PROGRESSIVE INSURANCE COMPANY, ANN RILEY, RICHARD DOWD and DANIEL McNALLY,

Defendants.

INDEX NO.: 018018/2009
MOTION DATE: 06/18/2010
MOTION SEQUENCE: 007

The following papers read on this motion:

Notice of Motion, Affirmation & Exhibits Annexed 1
Decision in M.V.B. Collision, Inc. v. Allstate Insurance Company, E.D.N.Y. 2
Progressive Northeastern Insurance Company's Opposition to Plaintiff's Motion to Reargue & Exhibit Annexed 3
Ann Riley's, Richard Dowd's and Dan McNally's Opposition to Plaintiff's Motion to Reargue & Exhibit Annexed 4
Reply Affirmation of Gina M. Arnedos 5

PRELIMINARY STATEMENT

Plaintiff moves for an order to renew and/or reargue a prior decision of this Court which granted defendants' motions to dismiss causes of action pursuant to Gen. Business Law ("GBL") § 349, and all causes of action against the individual defendants.

BACKGROUND

In this action plaintiff seeks recovery against the defendants for tortious interference with prospective business relations; violations of § 349 of the GBL; and seeks injunctive and

declaratory relief against all defendants for claimed persistent illegal and retaliatory conduct directed at Mid Island. The matter was the subject of oral argument on February 22, 2010 and of a written decision and order dated March 23, 2010. With respect to defendant Progressive, plaintiffs request is limited to the courts dismissal of that portion of the complaint which dealt with GBL § 349. The application seeks a reconsideration of the dismissal of all causes of action against the individual defendants.

The Order of March 23, 2010.[1]

Beginning at page 4, the Court's prior decision dealt at length with the application of this statute. The court noted that the statute is aimed at preventing "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state". This requires a showing that a defendant has engaged in "an act or practice that is deceptive or misleading in a material way and that the plaintiff has been injured by reason thereof. While the statute is generally aimed at protecting consumers, it also encompasses virtually all economic activity". Citations omitted.

The complaint [2], insofar as it addresses a violation of § 349, after alleging claims of misconduct by defendants, states that the conduct by defendants, including its flagrant violation of the New York Insurance Law, was consumer – oriented , directed at the public and misleading in a material way. It goes on to state that defendants have been continued to violate § 349 by failing to adhere to the auto insurance industry's good faith labor rate negotiation, estimating method of repair, and steering customers away from Mid Island. It also alleges that the defendants practices have been directed at Progressive policyholders and third – parties who have made claims against their policy holder and that those persons are consumers pursuant to the Gen. Business Law § 349. These actions, it is claimed were meant to mislead customers in a material way and have harmed the general public at large, including plaintiff's customers.

This Court's decision pointed to the fact that § 349 is consumer-oriented, does not encompass a private contract dispute, but applies, rather, to something with an "extensive

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[1] Exh. "A" to Motion.

[2] P/O Exh. "B" to Motion.

marketing scheme". A recent Second Department case [3] involved an action by a homeowner against its carrier based upon language contained in each Allstate Deluxe Plus Homeowners' Policy, requiring the insureds to protect the subrogation rights of the insurer. They contended that the language regarding preservation of the right of subrogation, compelled them to bring an action against the Village where the delay in rendering a decision as to coverage extended beyond the statute of limitations. The Court agreed, and determined that plaintiffs stated a valid claim under GBL § 349.

Noting that Courts have been loathe to expand § 349 claims to "derivative actions", those in which the loss arises solely as a result of injuries to another party [4], this Court concluded that the losses sustained by plaintiff were, in fact, derivative in nature. The parties directly injured by the alleged conduct of Progressive were the insureds, who may have had their cars inappropriately totaled, or their business steered to a less-costly, and perhaps less-skilled body repair garage.

In addition, the Court determined that the claims which plaintiff sought to interpose in this action were essentially the same as claims which could be brought by consumers under Insurance Regulations, but which are not available to plaintiff, a non-consumer. For these reasons, the motion to dismiss the claims of Progressive under § 349 was granted.

M.V.B. Collision, Inc. v. Allstate Insurance Company, Memorandum and Order, U.S.D.C., E.D.N.Y.

Plaintiff, brings to the court's attention a decision dated July 27, 2010 in which Hon. Joseph F. Bianco, United States District Judge, arrived at a different opinion as to the application of § 349 under essentially similar facts. While this is not a "change in the law", since the decision of the District Court is not binding, it is certainly informative in that it offers a different perspective as to whether or not the action by plaintiff is "derivative" and so far removed, as to fail to state a claim under the Insurance Law. That case involved claims, among others, that

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[3] *Wilner v. Allstate Insurance Co.*, 71 A.D.3d 155 (2d Dept. 2010).

[4] *City of New York v. Smokes-Spirits.com, Inc.*, 12 N.Y.3d 616 (2009); *Blue Cros & Blue Shield of N.J., Inc., v. Philip Morris USA, Inc.* 3 N.Y.3d 200 (2004).

Allstate violated § 349 by means of conduct analogous to that alleged against Progressive in this action.

The court there noted that in order for plaintiff to establish Allstate's liability under this section, they must establish that Allstate "has engaged in (1) consumer – oriented conduct that is (2) materially misleading and that (3) [it] suffered injury as a result of the allegedly deceptive act or practice".[5] The decision also acknowledges *Blue Cross & Blue Shield of N.Y., Inc. v. Philip Morris* and *City of New York v. Smokes-Spirits.com, Inc.*

The former is an action in which a health insurer sought to recover against cigarette manufacturers, alleging a number of federal and state claims including a § 349 claim. The theory under that claim was that cigarette manufacturers engaged in deceptive practices by not revealing the harmful effects of smoking, and that is a result of the deceptive practices people smoked, became ill and therefore insurance companies costs increase. The verdict on behalf of the plaintiff was reversed after the Second Circuit certified to the New York State Court of Appeals question as to whether the claims of the health insurance companies were too remote to permit suit under §349. The response of the Court of Appeals was that they were, in fact, too remote. In its explanation, the Court of Appeals noted that although the statute permitted recovery to all those who were injured by reason of the deceptive business practice, there was no evidence that the statute allowed for recovery of those suffering derivative, indirect injuries.

Smokes-Spirits, Inc. also involved a question certified to the New York State Court of Appeals from the Second Circuit. The question was whether or not the City had standing to assert § 349 claims against out-of-state businesses selling cigarettes over the internet without collecting the tax imposed by the City. The response to the certified question was that the City's claim was only derivative, with the persons misled that the cigarettes were "tax-free" were the consumers, and damages sustained by the City were indirect only, in that they would not incur them were it not for the misrepresentation to the consumers.

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[5] Citing *City of New York v. Smokes-Spirits.com, Inc.*, 12 N.Y.3d 616 (2009) and *Cohen v. JP Morgan & Chase Co.*, 498 F.3d 111, 126 (2d Cir. 2007).

Judge Bianco distinguished the damage sustained by Mid-Island from those alleged by Blue Cross and Blue Shield and the City of New York. He concluded that when, for example, Allstate allegedly engaged in a retaliatory totaling of a car, precluding recovery by plaintiff, or steered a car away from Mid Island, the latter suffered a direct loss of business or other injury. He concluded that the damages which Mid Island alleged occurred as a direct result of the claimed deceptive practices directed at consumers and that it's injuries were not quote solely as a result of injuries sustained by another party", as described in *Blue Cross & Blue Shield.* He noted that the New York Court of Appeals, in *Smokes-Spirits.com* declined to hold that only consumers could bring an action under this statute. He cited the language in that case to the effect that this statute permitted "any person who has been injured by reason of any violation of this section" to bring suit. He, therefore, concluded that Mid Island had standing to bring the § 349 claim.

DISCUSSION

Plaintiff's argument is that the Court misperceived the applicability of § 349. Obviously adopting the position of Judge Bianco, their position on the motion to reargue is that the damages of plaintiff are direct, and not derivative, in that each time Progressive allegedly performs one of the challenged actions, totaling out a vehicle even when the cost of repair is less than 75% of its value, or refusing to negotiate a repair cost with plaintiff, requiring the automobile owner to go elsewhere for repair services, plaintiff directly suffers a loss of business. Plaintiff asks this Court to reconsider its opinion as to the derivative nature of their losses, and upon reconsideration, to withdraw its prior determination to dismiss the § 349 claim.

While the Court understands the distinguishing factors in *Blue Cross & Blue Shield,* it finds the determination of the Court of Appeals in *Smokes-Spirits.com* less readily distinguishable. Similar to the facts in the instant case, each time a sale of cigarettes without a tax stamp is sold to a person in New York City, the City sustains a direct and immediate loss of revenue. Nevertheless, claiming that the purchaser, a consumer deceived by a claim that the cigarettes are "tax free", is the party directly damaged, and the City is only secondarily damaged.

While this Court finds the concept that persons purchasing cigarettes without paying legitimate taxes are victims to be convoluted, even if accurate, it does not change the fact that the City incurs a loss on each and every occasion that such a sale occurs. As tempting as it might be

to follow Judge Bianco, this Court considers itself bound by the Court of Appeals, and declines to modify its previous determination.

The motion to reargue is denied. The motion to renew is denied, in that plaintiff has not provided any new fact, in existence at the time of the original motion, which would change the determination of the Court. Nothing in the plaintiff's motion causes the Court to modify its decision with respect to individual defendants.

Dated: August 31, 2010

J.S.C