

SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK**

PRESENT: HON. R. BRUCE COZZENS, JR.  
Justice.

TRIAL/JAS PART 2  
NASSAU COUNTY

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TANYA LOVITT,

Plaintiff,

-against-

PROGRESSIVE INSURANCE COMPANY and NEW  
HYDE PARK AUTO BODY WORKS, INC.,

Defendants.

MOTION #014,015  
INDEX #019117/08  
MOTION DATE:  
December 7th, 2015

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The following papers read on this motion:

Notice of Motion.....2  
Affirmation in Opposition.....1  
Reply Affirmation.....3  
Briefs.....  
Plaintiff's Memorandum of Law in Opposition.....2

Upon the foregoing papers, it is ordered that the defendant's respective motions for summary judgment are determined as hereinafter set forth.

The plaintiff commenced this action alleging damages as the result of breach of an insurance contract; improperly steering the plaintiff to a repair facility; failing to pay a repair bill; negligent repair of a vehicle; negligent payment and negotiation of a check; and unjust enrichment and forgery.

In support of its motion, New Hyde Park Auto Body Works, Inc., asserts that it did not breach a duty of care to plaintiff and that plaintiff assumed the risk of getting her car repaired. In addition, it is maintained that plaintiff has not sustained damages, in order to maintain the causes of action sounding in against enrichment, conversion and forgery.

In support of its motion, the defendant Progressive Insurance Co., maintains that the breach of contract claim should be dismissed in that the plaintiff did not suffer damages and did not satisfy a condition precedent to the contract. In addition, it is asserted that Progressive did not owe a duty to plaintiff, that plaintiff suffered no damages and that plaintiff is not entitled to punitive damages.

The plaintiff opposes the respective motions maintaining that there are triable issues of

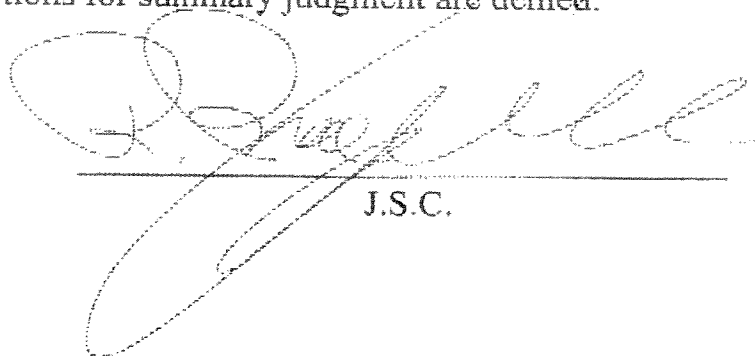
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fact relative to the work of New Hyde Park Body Works, Inc. Further, the plaintiff claims damages relative to out of pocket expenses and diminished value of the vehicle. In addition, it is asserted that questions of fact preclude summary judgment on the breach of contract claim and negligence against Progressive.

"The role of the court on a motion for summary judgment is issue finding rather than issue determination. (*Town Board of the Town of Ellicott v Lee*, 241 AD2d 958, 661 NYS2d 384 [4th Dept., 1997]). Once the moving party has met its initial burden of entitlement to summary judgment, it is then incumbent upon the opponent to come forward with sufficient evidence to create an issue of fact. (*Ryan v Xuda*, 243 AD2d 457, 663 NYS2d 220 [2nd Dept., 1997]). Here, the defendants have met their burden and shifted the burden to the plaintiff. (*Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). An opponent to a summary judgment motion may show an acceptable excuse for an inability to produce admissible proof, but, "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." (*Zuckerman*, supra).

In the instant matter, the Court finds questions of fact precluding summary judgment. As such, the respective motions for summary judgment are denied.

Dated: **JUN 08 2016**



J.S.C.