

Brown v American Tax Relief, LLC
2007 NY Slip Op 30402(U)
March 19, 2007
Supreme Court, Kings County
Docket Number: 0016771
Judge: Gloria M. Dabiri
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At an IAS Term, Part 39 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 19th day of March 2007.

P R E S E N T:

HON. GLORIA M. DABIRI,

Justice.

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WILLIE MAE BROWN, ON BEHALF OF
HERSELF AND OTHERS SIMILARLY SITUATED,

Plaintiff,

- against -

Index No. 16771/06

AMERICAN TAX RELIEF, LLC,

Defendant.

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The following papers numbered 1 to 5 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross-Motion and Affidavits (Affirmations) Annexed _____	1-3, 4-5
Opposing Affidavits (Affirmations) _____	_____
Reply Affidavits (Affirmations) _____	_____
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers, defendant American Tax Relief LLC (ATR) moves, pursuant to CPLR 3211 (a) (5) and (a) (7), for an order dismissing plaintiff Willie Mae Brown's (plaintiff) verified class action complaint.¹ Plaintiff moves, pursuant to CPLR 901

¹After ATR moved to dismiss plaintiff's complaint, plaintiff filed an amended verified class action complaint and ATR submitted papers which addressed the amended complaint. Consequently, the court will deem ATR's motion as one seeking the dismissal of the amended complaint.

et seq., for an order certifying this matter as a class action.

ATR is a California limited liability company that markets and sells tax settlement services in New York and throughout the United States. In or about the early part of 2000, ATR began an extensive advertising campaign by mass mailing postcards to plaintiff and numerous other persons whose names appeared on tax lien lists. These postcards stated:

Important Update

The Congress has recently passed NEW laws, making it easier to settle tax debts. We are now finding that many people who did not previously qualify for tax relief can now take advantage of these New Changes and settle for much less. Our staff of tax professionals have helped thousands settle their taxes for only Pennies-on- the-Dollar. We can also Immediately Stop Wage Garnishments, Bank Levies, suffocating IRS Payment Plans, and Remove Penalties and interest.

The postcards also advised potential customers to contact ATR for “your free, confidential consultation.”

It is alleged in the amended complaint, that in order to attract clients and induce them to pay for ATR’s tax settlement services, these postcards misled reasonable consumers into believing that ATR could settle their delinquent tax obligations for far less than the amount that they owed. In this regard, and contrary to what the postcard indicated, the Internal Revenue Service (IRS) does not settle debts for less than the amount owed for people who have enough assets or future earning potential to pay their delinquent tax obligations and, as a result, the vast majority of taxpayers with delinquent

tax obligations do not qualify for the “pennies-on-the dollar” relief touted in the postcard.

When potential clients (including plaintiff) responded to the postcard and contacted ATR, they were sent a form letter which states, in pertinent part:

“Congratulations! By contacting American Tax Relief, you have shown that you are finally ready to take care of your tax problem. If the IRS has not started involuntary collection action yet, they may soon. We can help you avoid these serious financial problems. Our nationwide firm helps individuals like you, as well as businesses, resolve their tax situations everyday . . . Based on the information you have provided us, you qualify for a Tax Relief Program per IRS guidelines.”

The form letter goes on to state, “Many of our clients qualify for an ‘Offer in Compromise.’ This program allows you to settle your tax debt with the IRS for only a fraction of the debt!”

According to the amended complaint, the form letter misled numerous consumers (including plaintiff) into paying ATR up-front fees ranging from \$1,000 to \$5,000 based upon the false promise that such clients would qualify for the IRS’s Offer in Compromise program and be able to settle their debts with the IRS for less than the amount owed. The amended complaint further alleges that, in plaintiff’s case, ATR did not provide any service or obtain any tax relief for plaintiff despite the fact that she paid an up-front fee of \$5,000.

By complaint dated June 1, 2006, and amended complaint dated October 5, 2006, plaintiff brought the instant class action alleging that ATR’s conduct violated General Business Law §§ 349, 350, and that ATR breached its contracts with plaintiff and hundreds

of other consumers in New York State by failing to obtain Offer in Compromises or other forms of tax relief from the IRS as promised. The amended complaint asserts these causes of action on behalf of a class defined as “[a]ll residents of the State of New York who purchased tax settlement services from [ATR] between June 1, 2000 and the present and received [the aforementioned] form letter.” In addition, the amended complaint seeks certification of a sub-class which consists of “[a]ll residents of the State of New York who received [the aforementioned] form postcard . . . and purchased tax settlement services from [ATR] between June 1, 2000 and the present.” Finally, the amended complaint seeks relief in the form of an order permanently enjoining ATR from engaging in the fraudulent, deceptive and illegal practices alleged in the complaint, as well as full restitution and consequential damages to all victimized class members.

ATR now moves, pursuant to CPLR 3211 (a) (5) and (a) (7), for an order dismissing the amended complaint, while plaintiff moves, pursuant to CPLR 901 et seq., for an order certifying this matter as a class action.

Turning first to the matter of class certification, plaintiff maintains that the instant case satisfies all five prerequisites for a class certification set forth in CPLR 901 (a), *to wit*: numerosity; predominance of common issues; typicality; adequacy of representation; and superiority of a class action for the fair and efficient adjudication of the controversy. In particular, with respect to the numerosity requirement, plaintiff maintains that, given ATR’s mass marketing methods and the number of people who have actually purchased ATR’s

services, the proposed class contains at least “a few hundred” persons. Plaintiff also argues that the class claims in this case raise many common questions of law and fact that are at the heart of this case including, whether ATR’s statements in their mass-mailed postcard solicitation and form letter contained misstatements of material fact and violated General Business Law §§ 349 and 350, whether ATR’s form letter created a binding contract between ATR and consumers, and whether ATR breached this contract. Similarly, plaintiff avers that her claims against ATR are typical of the proposed class since the legal theories pled by plaintiff apply “across the board” to all class members and plaintiff does not seek anything more or different than what is sought by the class as a whole. In addition, plaintiff notes that she is represented by experienced and competent legal counsel who will adequately protect the interests of the class. Finally, plaintiff argues that a class action is superior to other available methods for the fair and efficient adjudication of the instant matter given the number of consumers affected by ATR’s conduct as well as the relatively small amount of damages sustained by the individual purchasers of ATR’s services.

In opposition to plaintiff’s motion for class certification, and in support of its own motion to dismiss the class claims against it, ATR initially argues that plaintiff’s motion for class certification is premature under CPLR 902 inasmuch as plaintiff moved for class certification before ATR answered either the complaint or the amended complaint. In addition, ATR maintains that the proposed class and subclass are over-inclusive since, on their face, they include consumers who were not harmed by the form letter and postcard, who

did not rely upon the alleged false representations contained in these advertisements, and who were satisfied with the services provided by ATR. ATR also claims that the proposed classes are over-inclusive since they contain some individuals whose General Business Law §§ 349 and 350 claims are barred by the applicable three-year statute of limitations. Furthermore, ATR avers that the classes are over-inclusive since they contain individuals whose claims are being pursued in a pending lawsuit filed against ATR by the New York City Department of Consumer Affairs.

In addition, ATR argues that class certification should be denied in this case because individual issues predominate over class issues. In this regard, ATR notes that the complaint alleges various misrepresentations and thus different consumers could have been subjected to various types and amounts of alleged misrepresentations before contracting with ATR for services. ATR notes that the form letter specifically identifies several available tax relief services in addition to Offers in Compromise. Thus, a case by case determination would have to be made as to which class members qualified for and/or relied upon which tax services when they retained ATR. Moreover, ATR points out that the mass-mailed post card merely invited potential clients to contact ATR for a free consultation. Consequently, a fact specific case by case analysis would be required so as to determine what information each client supplied to ATR and what representations ATR made to each individual customer at his or her respective consultation.

“[I]n New York, a class action may be maintained only if: (1) the proposed class is

so numerous that joinder of all members is impracticable; (2) common questions of law or fact predominate over any questions affecting only individual members; (3) the claims of the representative parties are typical of the class as a whole; (4) the representative parties will fairly and adequately protect the interests of the class; and (5) the class action is superior to other methods for the fair and efficient adjudication of the controversy” (*Klein v Robert’s American Gourmet Food, Inc.*, 28 AD3d 63, 69-70 [2006], citing CPLR 901 [a] [1]-[5]; 902). “The determination to certify a class action rests in the sound discretion of the trial court” (*Jacobs v Macy’s East, Inc.*, 17 AD3d 318, 319 [2005]). Furthermore, “CPLR article 9, which authorizes class action suits in New York, and sets forth the criteria to be considered in granting class action certification, is to be liberally construed” (*Kidd v Delta Funding Corp.*, 289 AD2d 203 [2001]). When, however, the plaintiff fails to demonstrate that questions of fact common to the class predominate over questions affecting only individual members, a motion for class certification must be denied (*Klein*, 28 AD3d at 72; *Smilen v William Penn Life Ins. Co. of New York*, 19 AD3d 476, 477 [2005]; *Solomon v Bell Atlantic Corp.*, 9 AD3d 49, 54 [2004]; *Catalano v Heraeus Kulzer, Inc.*, 305 AD2d 356, 357 [2003]). Class certification also is improper when the proposed class is defined so broadly that it encompasses individuals who have little connection with the underlying claim or who have not been harmed by the defendants’ allegedly wrongful conduct (*Klein*, 28 AD3d at 71).

Here, the proposed class set forth in the amended complaint includes “all residents of the State of New York who purchased tax settlement services from [ATR] between June 1,

2000 and the present and who received [the form letter or a document similar to the form letter].” In the court’s view, the proposed class is overly inclusive. The gravamen of plaintiff’s complaint is that ATR victimized consumers through fraudulent/misleading advertisements which falsely represented that ATR could settle their delinquent tax obligations through the IRS’s Offer in Compromise program, for “pennies-on-the dollar” when, in fact, the vast majority of the recipients of these advertisements would not qualify for the program. Although the letter which forms the nexus between the members of the proposed class states that “[m]any of our clients qualify for an Offer in Compromise,” the letter also does state that this program may “not [be] the right solution for you” and goes on to describe other tax services offered by ATR, including removing penalties and interest from tax debt, arranging reasonable and affordable payment plans for tax debts and removing liens from delinquent taxpayers’ assets. Thus, the proposed class will, of necessity, include individuals whose retention of ATR’s services were unrelated to the alleged fraudulent/misleading claims associated with ATR’s ability to settle delinquent tax obligations for pennies-on-the dollar (*see Klein*, 28 AD3d at 71; *Solomon*, 9 AD3d at 54).

Turning to the proposed sub-class, this group includes all New York State residents who purchased tax services from ATR between June 1, 2000 and the present and received the postcard (or a document similar to the postcard). Although the postcard contained the alleged fraudulent/misleading claims regarding ATR’s ability to settle tax obligations for “pennies-on-the dollar,” the same document advertised other tax services including the

removal of penalties, interest, wage garnishments and bank levies, and the institution of payment plans. Furthermore, the postcard merely invited potential customers to contact ATR for a free consultation. Accordingly, the sub-class also is over inclusive, inasmuch as it will contain individuals who purchased ATR's tax services for reasons unrelated to the alleged fraudulent/misleading claims - namely the "other" tax services advertised in the postcard and/or whatever legitimate representations were made to customers during the free consultations.

Moreover, both the proposed class and sub-class are over inclusive inasmuch as they will include members whose General Business Law §§ 349 and 350 claims are barred by the applicable three-year statute of limitations.

In addition to the over-inclusive nature of the proposed class and sub-class, the amended verified complaint also suffers from a related defect - that is, that questions of fact affecting individual class members will predominate over fact questions common to the class. In a class action alleging deceptive acts and practices and false advertising under General Business Law §§ 349 and 350, "the proof must show that each plaintiff was reasonably deceived by the defendant's misrepresentations or omissions and was injured by reason thereof" (*Solomon*, 9 AD3d at 52). In other words, the proof must demonstrate that the deceptive conduct caused injuries to each member of the class (*Gale v. International Business Machines Corp.*, 9 AD3d 446, 447 [2004]). Furthermore, claims under General Business Law § 350 require proof of reliance upon the deceptive claims and/or false

advertising (*Gale v International Bus. Mach. Corp.*, 9 AD3d at 447). Similarly, any breach of contract claim must be supported by evidence that the individual class members relied upon ATR's promise to settle their tax obligations for less than the amount owed and that these members were damaged by ATR's failure to fulfil this promise.

Here, once again, the alleged deceptive/fraudulent claims regarding ATR's ability to settle delinquent tax obligations for pennies-on-the dollar constituted only one of several tax services advertised in the form letter and postcard. Furthermore, the postcard merely invited potential customers to contact ATR for an individual consultation. Thus, "[t]he purportedly common issues advanced by the plaintiff in [her] amended complaint and in support of [her] motion are dependant upon resolution of . . . issues of causation and reliance as to each member of the putative class" (*Catalano*, 305 AD2d at 357). That is to say, the question of whether each individual class member was damaged by the alleged deceptive advertising and whether said members relied upon the alleged deceptive claims when they retained ATR will differ on a case by case basis depending upon which tax service the individual class member purchased from ATR and what representations ATR made at the individual consultation. Under the circumstances, questions of fact affecting individual class members will predominate over fact questions common to the class.

With respect to plaintiff's individual claims, ATR argues that plaintiff's amended complaint fails to state a claim under General Business Law §§ 349 and 350. ATR maintains that the form letter and postcard which serve as the foundation for these claims, contain no

misrepresentations, and otherwise omit material facts, required to state a claim under these statutes. ATR contends that the General Business Law §§ 349 and 350 causes of action also must be dismissed because the amended complaint fails to allege that plaintiff was damaged as a result of the alleged false claims contained in the postcard and form letter. Moreover, argues ATR, dismissal of the General Business Law § 350 claim is required because plaintiff neglects to allege reliance upon the alleged misrepresentations in these advertisements.

As to plaintiff's breach of contract claim, ATR maintains that the allegations in the verified complaint regarding the nature of the contractual agreement are vague and conclusory and, therefore, insufficient to support a breach of contract cause of action. In this regard, ATR points out that the amended complaint does not specify what services ATR promised to perform for plaintiff or whether the contract was written or oral.

In opposition to ATR's motion to dismiss her individual claims in the amended complaint, plaintiff argues that the amended complaint adequately states a claim for violations of General Business Law §§ 349 and 350. In support of this argument, plaintiff notes that the amended complaint alleges that ATR engaged in deceptive, fraudulent and illegal practices in advertising its tax services. Plaintiff points out that the amended complaint specifically identifies ATR's deceptive claims and omissions in its advertisements and alleges that plaintiff was harmed by this wrongful conduct inasmuch as she paid ATR an up-front fee of \$5,000. In further opposition to ATR's motion, plaintiff submits an affidavit in which she avers that "[t]he only reason I paid [ATR] a \$5,000 fee, or 10% of the

amount due, was because I was repeatedly promised the amount I would pay the IRS would be substantially reduced.” Finally, plaintiff maintains that the amended complaint adequately states a claim for breach of contract inasmuch as the complaint alleges that plaintiff paid ATR a \$5,000 fee for tax services and ATR failed to provide her with any such services.

In determining whether to grant a motion to dismiss the complaint for failure to state a cause of action, pursuant to CPLR 3211(a) (7), “the pleading is to be afforded a liberal construction (CPLR 3026) and the court should accept as true the facts alleged in the complaint, accord the plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any discernable legal theory” (*Shiela C. v Povich*, 11 AD3d 120, 122 [2004]). Moreover, “the court may freely consider additional facts contained in affidavits submitted by the plaintiff to remedy any defects in the complaint” (*International Oil Field Supply Servs. Corp. v Fadeyi*, 35 AD3d 372 [2006], citing *Rovello v. Orofino Realty Co.*, 40 NY2d 633, 635 [1976]).

A *prima facie* claim under General Business Law § 349 “requires . . . a showing that the defendant is engaging in an act or practice that is deceptive or misleading in a material way and that plaintiff has been injured by reason thereof” (*Oswego Laborers’ Local 214 Pension Fund v Marine Mindland Bank, N.A.*, 85 NY2d 20, 25 [1995]). Deceptive or misleading representations or omissions are defined as those “likely to mislead a reasonable consumer acting reasonably under the circumstances” (*id.* at 26). A claim under General Business Law § 350 requires the same showing, plus an additional showing that the plaintiff

relied upon the underlying deceptive misrepresentations and/or omissions (*Gale*, 9 AD3d at 447).

Here, accepting the allegations in the pleadings as true, and affording the plaintiff the benefit of every possible inference, the amended complaint adequately states a claim against ATR under General Business Law §§ 349 and 350. In this regard, the amended complaint alleges that ATR engaged in misleading/false advertising in representing that it routinely settled customers' outstanding tax debts for less than the amount owed when in fact such relief was rarely if ever available. Furthermore, while the amended complaint fails to adequately allege that plaintiff was damaged by and relied upon these misleading advertisements, these omissions are addressed by plaintiff's affidavit. Specifically, the affidavit alleges that plaintiff paid an up-front fee of \$5,000 based upon ATR's misrepresentations and omissions and received no service.

The amended complaint and affidavit state a breach of contract claim. Plaintiff alleges that ATR promised to settle her tax debts for less than the amount owed, that she paid ATR \$5,000 to perform this service, and that ATR failed to fulfil its obligation or to perform any tax services on her behalf. Plaintiff's affidavit similarly addresses any vagueness with regards to the terms of the contract.² Accordingly, it is

ORDERED, that plaintiff's motion for class action certification is denied; and it is

²It is noted that to the extent that plaintiff relies upon her affidavit she undercuts the contention that questions of fact common to the purported class predominate over questions affecting its individual members.

further

ORDERED, that ATR's motion to dismiss plaintiff's individual claims against it is denied.

ENTER

J. S. C.