

**Option One Mtge. Corp. v Massanet**

2009 NY Slip Op 31840(U)

August 14, 2009

Supreme Court, Richmond County

Docket Number: 102944/07

Judge: Joseph J. Maltese

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND DCM PART 3

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Index No. 102944/07  
Motion No.:003

**OPTION ONE MORTGAGE CORPORATION,**

*Plaintiff*

*against*

**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

**GUILLERMO M. MASSANET  
A/K/A GUILLERMO MASSANET,  
LUCHIANO SANTOS, JR.,  
A/K/A LUCIANO SANTOS,  
MARIA MASSANET  
A/K/A MARIA MASSANET,  
MORTGAGE ELECTRONIC REGISTRATION SYSTEM, INC.,  
As nominee for FIRST CONTINENTAL MORTGAGE &  
INVESTMENT CORPORATION,  
NEW YORK CITY ENVIRONMENTAL CONTROL BOARD,  
NEW YORK CITY TRANSIT ADJUDICATION BOARD,  
JOHN DOE (Said name being fictitious it being the intention  
of Plaintiff to designate any and all occupants of premises  
being foreclosed herein, and any parties, corporations or entities,  
if any, having or claiming an interest or lien upon the mortgaged  
premises.)**

*Defendants*

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**GUILLERMO MASSANET,  
MARIA MASSANET, and  
LUCHIANO SANTOS,**

**Third-party  
Index No. A102944/07**

*Third party plaintiffs,*

*Against*

**OLD MERCHANTS MORTGAGE INCORPORATED,  
OPTION ONE MORTGAGE CORPORATION,  
KENSINGTON TITLE SERVICES  
d/b/a WOLVERINE ABSTRACT LLC,**

*Third party defendants*

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The following items were considered in the review of the following motion to dismiss.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	3
Exhibits	Attached to Papers
Memorandum of Law	2

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Option One Mortgage Corporation (“Option One”) moves to dismiss the defendants, Guillermo Massanet, Maria Massanet and Luchiano Santos’ counter claims alleging violations of the federal Truth in Lending Act, Home Ownership and Equity Protection Act and Credit Repair Organizations Act, as well as a violation of General Business Obligations Law § 349, pursuant to CPLR § 3211(a)(7). Option One’s motion is granted in part.

### **Facts**

This is an action for foreclosure. By a decision and order dated February 5, 2009 this court vacated the ex parte judgment of foreclosure taken against the movants and permitted them to interpose an answer. On or about April 6, 2009 the movants amended their answer with counterclaims and third-party complaint.

The defendants, third-party plaintiffs Guillermo Massanet and Maria Massanet (“the Massanets”) purchased their home, the subject of this foreclosure action, in March 2001 for \$179,900. In 2003 the Massanets began facing mounting financial problems stemming from pregnancy of their daughter and the loss of their son-in-law and co-defendant, third party plaintiff, Luciano Santos’s job. In an attempt to make ends meet the Massanets amassed approximately \$30,000 in credit card debt. In or about August 2005 the Massanets contacted Old Merchants Mortgage Company (“Old Merchants”) in response to an advertisement promising debt consolidation through refinancing hoping to alleviate the financial stress they were facing.

At the time the Massanets contacted Old Merchants their monthly mortgage payment was \$2600. In or about the end of September 2005 the Massanets submitted an application for refinancing to Old Merchants. As a result, Old Merchants had the Massanets property appraised on two occasions. The first appraisal stated that the Massanets' property was worth \$435,000. The second appraisal stated that their home was worth \$470,000.

The Massanets borrowed \$423,000 at a monthly cost of \$3800 per month with a 10% adjustable rate. When the Massanets expressed their concerns about the increased loan payments Old Merchants representatives assured them that after a few months the Massanets would be able to refinance out of the mortgage. After the proceeds of the refinance had been spent, the Massanets were left with a monthly payment they could not afford, and a loan with a prepayment penalty preventing any type of refinance. Subsequent to the loan closing Option One purchased the Massanets's loan from Old Merchants. In addition to holding the note, Option One acted as the loan's servicer as well.

On July 21, 2008 this court issued a Judgement of Foreclosure and Sale on default. Subsequently, this court by decision and order dated February 5, 2009 vacated the default judgment and permitted the defendant Massanets to interpose an answer. On April 6, 2009 the defendants filed their verified amended answer, counterclaims and third-party complaint. The defendants allege several causes of action against the plaintiff, Option One and third-party defendant, Old Merchants Mortgage Incorporated ("Old Merchants"). Option One moves to dismiss the Massanets' causes of action alleging violations of the Truth in Lending Act ("TILA"); Home Ownership Equity Protection Act ("HOEPA"); New York General Business Law § 349; and Credit Repair Organizations Act ("CROA") pursuant to CPLR § 3211(a)(7)..

### **Discussion**

The scope of a court's inquiry on a motion to dismiss under CPLR § 3211 is narrowly circumscribed. The court must accept the facts alleged as true and determine simply whether the

facts alleged fit within any cognizable legal theory. The court must accept as true not only the pleading's material allegations but also whatever can be reasonably inferred there from in favor of the pleader. In ruling on a motion to dismiss, the court is not authorized to assess the merits of the complaint or any of its factual allegations but only to determine if, assuming the truth of the facts alleged, the complaint states elements of a legally cognizable cause of action.<sup>1</sup>

### **Defendants' Counterclaims alleging violations of Truth In Lending Act (TILA) and Home Ownership Equity Protection Act (HOEPA)**

Option One argues that the defendants' counterclaims asserted pursuant to TILA and HOEPA should be dismissed as the one year statute of limitations has expired. The statute of limitations articulated by Congress when enacting TILA and HOEPA states in pertinent part:

Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation. *This subsection does not bar a person from asserting a violation of this subchapter in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law . . .*<sup>2</sup>

The laws of New York do not bar the defendants from asserting their counterclaim. The Civil Practice Law and Rules § 203(d) provide in pertinent part that:

. . . A defense or counterclaim is not barred if it was not barred at the time the claims asserted in the complaint were interposed, except that if the defense or counterclaim arose from the transactions, occurrences, or series of transactions or occurrences, upon which a claim asserted in the complaint depends, it is not

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<sup>1</sup> *P.T. Bank Central Asia v. ABN Amro Bank N.V.*, 301 AD2d 373, [1<sup>st</sup> Dep't, 2003]; *See also, Kevin Spence & Sons, Inc. v. Boar's Head Provisions, Co.*, 5 AD2d 352 [2d Dep't 2004].

<sup>2</sup> 15 USCA § 1640(e)[emphasis added].

barred to the extent of the demand in the complaint notwithstanding that it was barred at the time the claims asserted in the complaint were interposed.<sup>3</sup>

The Court of Appeals held in *SCM Corp. v. Fisher Park Lane Co.*, that the equitable doctrine of recoupment may be interposed in a counterclaim even if it was barred by the statute of limitations at the time the plaintiff commenced its action.<sup>4</sup> Subsequent to the its decision in *SCM Corp.*, the Court of Appeals applied this holding to counterclaims raising violations of the TILA by defendants in their answers in *Public Loan Co.,Inc. v. Hyde*.<sup>5</sup>

Option One's reliance on the one year statute of limitations is misplaced. The two cases relied on by Option One support the dismissal of TILA claims by virtue of the expiration of the statute of limitations when the claim is raised in a complaint rather than in a counterclaim.<sup>6</sup> As Massanets counterclaims alleging the violation of both TILA and HOEPA are recoupment defenses, they not subject to the one year statute of limitations—therefore the dismissal these counterclaims is denied.

### **Defendants' Counterclaim alleging violation of *General Business Law* § 349**

The defendants allege that Option One as the assignee of the mortgage originated by Old Merchants is liable under General Business Law § 349 for deceptive acts and practices. Option One argues that the defendants do not have an independent claim under the statute against it. This position is incorrect. As the assignee of Old Merchants, Option One is “. . . subject to all claims and defenses with respect to that mortgage that the consumer could assert against the

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<sup>3</sup> CPLR § 203(d).

<sup>4</sup> 40 NY2d 788, [1976].

<sup>5</sup> 47 NY2d 182, [1979].

<sup>6</sup> See, *Cardiello v. The Money Store, Inc.*, 2001 US Dist LEXIS 7107, [SD NY 2001]; See also, *McAnaney v. Astoria Financial Corp.*, 2007 US Dist LEXIS 67552, [ED NY 2007].

creditor of the mortgage . . .”<sup>7</sup>

In order to successfully plead a claim under General Business Law § 349 the following elements must be shown: 1) that the challenged act or practice was consumer oriented; 2) that it was misleading in a material way; and 3) that the plaintiff suffered injury as a result of the deceptive act. The act giving rise to a claim under the statute need not rise to the level of common law fraud, however an “actual” injury must be proved although it need not be pecuniary in nature.<sup>8</sup>

As Option One is liable for the actions of its predecessor in interest, Old Merchants, the first two prongs of this inquiry are not disputed, the court is left only to evaluate whether the defendants’ counterclaim properly pleaded an acceptable injury to satisfy the language of the statute. A court’s role in a motion to dismiss for failure to state a cause of action is limited to determining whether a cause of action is stated within the four corners of the pleading, and not whether there is any evidentiary support for the pleading.<sup>9</sup>

The defendants’ answer and counterclaim allege facts that indicate as a result of the actions taken by Old Merchants and their representatives, they were charged fees not reasonably related to the services performed by Old Merchants.<sup>10</sup> As such, the plaintiff’s motion to dismiss the counterclaim alleging violation of General Business Law § 349 is denied.

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<sup>7</sup> 15 USCA § 1641(d)(1); *See also*, 15 USCA § 1602(aa)(1); *See also*, *In re Barber*, 266 BR 309, 320 [Bkrtcy ED Pa., 2001].

<sup>8</sup> *Stutman v. Chemical Bank*, 95 NY2d 24, [2000].

<sup>9</sup> *Frank v. Daimlerchrysler Corp.*, 292 AD2d 118, [1<sup>st</sup> Dep’t, 2002].

<sup>10</sup> Defendants, Answer at 9.

## **Defendants' Counterclaim alleging violation of the Credit Repair Organization Act (CROA)**

Setting aside the issue of whether the plaintiff acted as a credit repair organization this court finds that the defendants' allegations contained in their answer and counterclaim are insufficient to support a claim for a violation of CROA. As such, the plaintiff's motion to dismiss the defendants' counterclaim alleging a breach of CROA is dismissed without prejudice to replead.<sup>11</sup>

### **Conclusion**

A court's role in a motion to dismiss for failure to state a cause of action is limited to determining whether a cause of action is stated within the four corners of the pleading, and not whether there is any evidentiary support for the counterclaim.<sup>12</sup> In this case the defendants have alleged facts sufficient to support their counterclaims under, TILA, HOEPA, and General Business Law § 349. However, the defendants' allegations with respect to the counterclaim alleging a violation of CROA is inadequate based on the four corners of the pleading. As such, it is dismissed with leave to replead.

Accordingly, it is hereby:

ORDERED, that Option One Mortgage Corporation's motion to dismiss is granted to the extent it sought the dismissal of the defendants' seventh defense, and fifth counterclaim and third party claim; and it is further

ORDERED, that Option One Mortgage Corporation's motion to dismiss is denied as to all other defenses, counterclaims and third party claims; and it is further

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<sup>11</sup> *Overmyer v. Todd*, 77 AD2d 919, [2d Dep't 1980].

<sup>12</sup> *Frank v. Daimlerchrysler*, *supra*.

ORDERED, that Guillermo Massanet, Maria Massanet and Luchiano Santos, is granted leave to serve an amended answer with counterclaims so as to replead the violation of Credit Repair Organization Act counterclaim within twenty (20) days after the service on defendants' attorney of a copy of this order with notice of entry. In the event that plaintiff fails to serve an amended answer with counterclaims within such time, leave to replead shall be deemed denied and the counterclaim deemed dismissed with prejudice; and it is further

ORDERED, that the parties shall return to DCM Part 3 for a compliance conference on **Thursday, September 17, 2009 at 9:30 A.M.**

ENTER,

DATED: August 14, 2009

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Joseph J. Maltese  
Justice of the Supreme Court