

People v Amerimod Inc.
2011 NY Slip Op 31268(U)
May 2, 2011
Supreme Court, New York County
Docket Number: 402032/09
Judge: Emily Jane Goodman
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SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN

PART 17

Index Number : 402032/2009

STATE OF NEW YORK

vs

AMERIMOD INC.

Sequence Number : 003

LEAVE TO INTERVENE

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion *to intervene is denied*
per attached

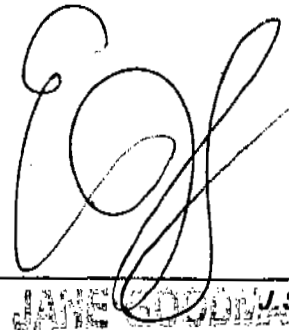
FILED

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NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 5/2/11



EMILY JANE GOODMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

-----X

THE PEOPLE OF THE STATE OF NEW YORK,
by ANDREW M. CUOMO, Attorney General
of the State of New York,

Petitioner,

Index No. 402032/09

-against-

AMERIMOD INC., THE AMERICAN MODIFICATION
AGENCY INC., and SALVATORE PANE, JR.,
INDIVIDUALLY and as principal of AMERIMOD
INC., and THE AMERICAN MODIFICATION
AGENCY, INC.,

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Respondents.

-----X

Emily Jane Goodman, J.S.C.:

NEW YORK
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This motion to intervene is brought by nonparties Blossom Joseph and Francis Joseph, Paul Eliacin, Dawn Yamada, and George Yamada, on behalf of themselves and others similarly situated; they are all plaintiffs in a Federal Court action pending in the Southern District of New York (the Federal court plaintiffs).

In this proceeding brought by the Attorney General of the State of New York (OAG) to permanently enjoin defendants Amerimod Inc., The American Modification Agency Inc. (together, Amerimod), and Salvatore Pane, Jr. (Pane), as principal of Amerimod, from engaging in a fraudulent loan modification scheme, Federal Court plaintiffs, who are currently participating as plaintiffs in the Federal Court class action law suit against Amerimod, Pane and

several other parties, seek to intervene as of right in the present proceeding, pursuant to CPLR 1012; to intervene by permission, pursuant to CPLR 1013; to vacate the April 21, 2010 decision and order of this court in order to allow the Federal Court plaintiffs to appear and/or assert defenses to the petition, citing CPLR 317¹; to permit the Federal Court plaintiffs to object to any recommendations of the Special Referee appointed by this court; or, in the alternative to vacate any order of the Special Referee.

FILED

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A decision and order, dated April 7, 2010 and filed April 21, 2010 (which was amended by Decision and Order, dated July 26, 2010 and filed August 2, 2010), granted OAG's motion for a permanent injunction against respondents, enjoined the respondents from violating Executive Law (EL) § 63 (12), General Business Law (GBL) §§ 349 and 350-d and Real Property Law (RPL) 265-b, by engaging in the fraudulent and illegal acts raised in this proceeding, and sent the matter of restitution, costs, fees and civil penalties to a Special Referee. According to the OAG, the funds frozen as a result of the restraining order is \$61,746.90.

The Federal Court action is aimed at the same wrongful acts committed by Amerimod and Pane as are raised in the present

¹This cite is, apparently, an error. CPLR 317 is inapplicable to any issue herein.

proceeding, although the Federal action includes many more causes of action, parties from numerous States, and includes as defendants parties that are not parties herein.

The Federal action has been certified as a class action, with two separate classes of plaintiffs. It brings claims under the statutory laws of some 20 states, including New York's GBL § 349 (h) and RPL § 265-b, as well as common-law and other state claims. In their proposed complaint on this motion, the Federal Court plaintiffs seek to have the present proceeding recognize the certification of the two classes. Federal Court plaintiffs do not seek to bring the other defendants into this proceeding.

The Federal Court plaintiffs are especially concerned that they, as out-of-state residents, will be excluded from sharing in the money stayed in Amerimod's account by this court's prior order, or in any further restitution the OAG might obtain.

The OAG argues that the motion to intervene is grossly untimely, coming a year after the Federal Court plaintiffs orally petitioned for intervention, which this court denied, and six months after this court's April 2010 decision.

The OAG claims that intervention as of right by private parties is impermissible because a proceeding brought under EL § 63 (12) is, by law, a claim that only the OAG can bring, and that intervention is not permissible as of right under CPLR 401.

The OAG further states, unequivocally, that its office is

fully capable of enforcing New York's laws to produce a recovery for all injured parties, no matter where they may reside, and opposes intervention based on the unnecessary delay and confusion which will result from the manifest differences between the two proceedings.

CPLR 1012 provides that intervention as of right exists if, among other things, "the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment." CPLR 1012 (a) (3). Under CPLR 1013, a party may move for intervention, by permission, "in an action when a statute of the state confers a right to intervene in the discretion of the court, or when the person's claim or defense and the main action have a common question of law or fact." The statute provides further that, in its discretion, "the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party." CPLR 1014 requires the presentation of a "proposed pleading setting forth the claim or defense for which intervention is sought."

A review of the motion brought by the Federal Court plaintiffs shows that these parties seek not only to intervene in the proceeding as parties, but to lift wholesale into this summary proceeding all of the state and statutory causes of

action that they are bringing in the Federal Court. In other words, the Federal Court plaintiffs wish to broaden this proceeding not only to add party plaintiffs, but to import wholesale the claims brought by these parties in the Federal action, under the rubric of intervention.

Federal Court plaintiffs do not have a right to intervene under CPLR 1012. CPLR 401 specifically states that "[a]fter a proceeding is commenced, no party shall be joined or interpleaded and no third-party practice or intervention shall be allowed, except by leave of court." EL § 63 (12) permits the OAG to bring a proceeding, under CPLR 401, in the name of the people of New York against any party who engages in "repeated fraudulent or illegal acts ... in the carrying on, conducting or transaction of business" It does not provide for private persons to bring such claims. GBL §§ 349 and 350-d do not, however, contain such a prohibition. Federal Court plaintiffs herein do not have a right to intervene in the special proceeding, inasmuch as it brings claims under EL § 63 (12).

Federal Court plaintiffs' application to intervene under CPLR 1013 is denied. As the OAG contends, Federal Court plaintiffs do not explain why their application came so long after this court reached the basic conclusions under New York laws, which resulted in the preliminary injunction freezing respondents' few known assets. It would be unfair, and

prejudicial, at this point to re-open the issues of liability already determined by this court, to bloat the present proceeding with a panoply of new legal theories and statutes not present from the start, no matter how similar these theories allegedly are to the ones at bar. The proceeding is poised to approach the question of damages, and should not be delayed by the imposition of the claims of the of the proposed interveners. In fact, the Federal Court plaintiffs' request almost reaches a level beyond mere intervention, into the realm of consolidation, a fact underscored in the very last line of their reply brief.² Consolidation is, of course, not an option.

The parties vigorously dispute whether Federal Court plaintiffs will enjoy any recovery in this court from the monies already restrained, or from any other source uncovered in discovery. Federal Court plaintiffs insist that they will be damaged, because, according to Federal Court plaintiffs, the OAG is authorized only to represent, and provide a recovery to, New York state residents, leaving Federal Court plaintiffs, and any other out-of-state parties, out in the cold.

Case law supports the OAG's claim that it represents all consumers injured by parties involved in frauds perpetrated in

²"The only legal mechanism available to effectively redress the out-of-state victims in this case is via the Federal Class Action and/or the proposed intervention and consolidated state court action." Reply Brief, at 14.

New York, not just New York residents. While it is true that the statutes involved say that the OAG is bringing proceedings "in the name of the people of the state of New York" (see EL § 63 [12]; RPL § 265-b [4] [d]), or "on behalf of the people of the state of New York" [see GBL 349 [b)], case-law does not limit the statutes in the manner argued by the Federal Court plaintiffs.

In *Matter of People v Telehublink Corp.* (301 AD2d 1006, 1009 [3d Dept 2003]) the Appellate Division, Third Department, held that EL § 63 and GBL § 349 (b) "by their terms, do not limit petitioners' authority to seek relief on behalf of parties injured by conduct in New York merely because those parties are nonresidents," referring to *Goshen v Mutual Life Insurance Company*, 98 NY2d 314, 325 (2002). In *Goshen*, the Court of Appeals found that "[a] General Business Law analysis does not turn on the residency of the parties ... (The statute) was (not) intended to function as a per se bar to out-of-state plaintiffs' claims of deceptive acts leading to transactions within the state." *Telehublink*, in turn, relied on *State of New York v Feldman* (210 F Supp 2d 294, 303 [SD NY 2002]) which held that EL 63 § (12) "authorizes the New York Attorney General to recover for non-residents injured by wrongdoing that occurred in New York."

Other courts have addressed the reach of the OAG in litigating frauds perpetrated in New York, and have come to the

conclusion that the OAG may represent out-of-state, as well as in-state, residents. See e.g. *People v National Home Protection, Inc.*, 2009 NY Slip Op 32880(U) *6 (Sup Ct, NY County 2009) (action by OAG brought under the GBL brought "on behalf of all aggrieved customers, including non-residents"); *People v H & R Block, Inc.*, 16 Misc 3d 1124(A), *8-9, 2007 NY Slip Op 51562(U) (Sup Ct, NY County 2007) (GBL analysis "does not turn on the residency of the parties" and "was not intended ... to function as a per se bar to out of state plaintiffs' claims of deceptive acts [internal quotation marks and citation omitted]); *People v Lipsitz*, 174 Misc 2d 571, 580 (Sup Ct, NY County 1997) ("[t]he Attorney-General has clear authority to seek to restrain illegal business practice by a local business in relation to both in-State and out-of-State residents ..."); *State of New York v Camera Warehouse, Inc.*, 130 Misc 2d 498, 499 (Sup Ct, Dutchess County 1985) ("[a] State is damaged if its citizens are permitted to engage in fraudulent practices even though those parties damaged are nonresidents of the State" and "the language of Executive Law § 63 (12) indicates that the Legislature intended that all consumers be protected from illegal practices regardless of their residency ...").

Federal Court plaintiffs rely on the rather peculiar argument that this court need not apply the holdings of higher courts, such as the Appellate Division, Third Department, in *Telehublink*, and the Court of Appeals in *Goshen*, because these

cases are, according to Federal Court plaintiffs, not based on good law. However, this court finds no fault in the many lower court cases which hold true to the tenets of *Telehublink* and *Goshen*. Furthermore, this court *must* follow higher court authority, regardless of the alleged "defective foundation". Consequently, this court finds that the OAG is authorized to protect out-of-state residents, as well as in-state residents, from the depredations of parties committing wrongdoing in this State. As such, Federal Court plaintiffs do not need to intervene in this proceeding in order to recover fairly any monies that the OAG manages to secure from respondents.

Accordingly, this court will not vacate the April 21, 2010 decision, and or allow the Federal Court plaintiffs to appear and assert defenses to the petition.

It is hereby

ORDERED that the motion to intervene in this proceeding, and to vacate the prior order of this court, brought by nonparties Blossom Joseph and Francis Joseph, Paul Eliacin, Dawn Yamada, and George Yamada, on behalf of themselves and others similarly situated in the Federal Court action, is denied in its entirety.

This constitutes the **FILED** Decision and Order of the Court.

Dated: May 2, 2011

MAY 13 2011

NEW YORK
COUNTY CLERK'S OFFICE

J.S.C.


EMILY JANE GOODMAN