

Osmanzai v Save My Home Corp.

2011 NY Slip Op 32339(U)

August 23, 2011

Supreme Court, Nassau County

Docket Number: 9471/11

Judge: Thomas A. Adams

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SCAW

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS A. ADAMS,

Acting Supreme Court Justice

TRIAL/IAS, PART 33

NASSAU COUNTY

QARIA OSMANZAI, ALFRED SANTANA, ROSALIND SANTANA, JULIO MORALES, ARNOLD DRAKES, YVONNE ELLIS, GLENDA STEWART, ANDERSON ANDREWS, FERNE MAYCOCK, BERNARD KILKENNY, CORA WILLIAMS, GERONIMO DELEON, JR., SHARLENE CUMMINGS, FELICIA JOHNSON, KATIA LAPAIX-DORCELET, CHERYL FORDE, FINBAR FRANCIS, ROBERT YONKES, SUSAN YONKES and JUDITH CUDJOE,

Plaintiff(s),

MOTION DATE: 8/8/11

INDEX NO.: 9471/11

-against-

SEQ. NO. 1

SAVE MY HOME CORP., SAVE MY HOME NOW, INC., SAVE MY HOME TODAY, INC., HUMA HALIMI (a/k/a HELEN HALIMI) NAVIN MENON, EXPRESS HOME SOLUTIONS, INC. (a/k/a EXPRESS DEBT SETTLEMENT a/k/a HOME MITIGATION HELP), EXPRESS MODIFICATIONS INC., EMPIRE HOME SAVER INCORPORATED (a/k/a EMPIRE HOME SAVINGS a/k/a EMPIRE HOME SAVINGS CORP.), STEPHEN CROWLEY, DAVID J. GOTTERUP, LUIGI DELLAMONICA, YELENA TELESHOVA, MILADYS BOHORQUEZ, LLOYD DOE, KENNETH SAROSI, JASON GREEN, ALBERT KALASTEIN and GREG GARVIN,

Defendant(s)

The plaintiffs' motion, pursuant to CPLR §6021(3) and General Business Law §§349 and 350, for a preliminary injunction and an order of attachment is determined as hereinafter provided.

The plaintiffs are a group of low-to-middle income homeowners who were allegedly fraudulently induced by the defendants into retaining the corporate defendants in the desperate hope of modifying their failing home mortgage loans in order to avert foreclosure. More specifically, as delineated within the plaintiffs' individual affidavits, which are supported by the accompanying documentary evidence, after responding to the defendants' solicitations and

paying a substantial fee, the plaintiffs were allegedly instructed, inter alia, to cease all communication with their lenders. Indeed, in some cases, the plaintiffs were also reportedly directed to discontinue their monthly mortgage payments. However, rather than securing the promised loan modifications, the alleged scheme purportedly further victimized the plaintiffs by, inter alia, forcing them to incur additional debt, jeopardizing their already fragile credit ratings and contributing to the potential loss of their home to foreclosure. Moreover, although the defendants boasted that, in the event they were unsuccessful, a prompt refund would be tendered, none of the plaintiffs reportedly received either a loan modification or a refund.

The plaintiffs therefore filed the within action on June 27, 2011 (see Exhibit D to the June 26, 2011 affirmation of Daniel F. Kolb, Esq.) asserting a variety of causes of action sounding in breach of contract, violation of General Business Law §§349 and 350 and, inter alia, common law fraud. In addition, this Court issued a temporary restraining order (see CPLR §6313) which, upon the posting of a \$15,000.00 undertaking (see CPLR §6313[c]), enjoined the defendants from participating in mortgage assistance relief services pending the hearing, i.e., the submission, of this motion for determination. After two consensual adjournments, it was ultimately submitted on August 8, 2011 at which time the only defendants to appear, i.e., the defendants Navin Menon, Albert Kalastein, Yelena Teleshova and Luigi Dellamonica, stipulated a) to "refrain from employment or business association of any kind with any of the [remaining] defendants" and b) "not to negotiate or accept upfront payments for loan modification services in the event they work for a [non-party] modification company". It is, however, unclear whether these or any other defendant has interposed a responsive pleading. They have not cross moved to dismiss (see CPLR 3211[a]). Two defendants, i.e., Anu Singh and Jose Escobar, were admittedly not served with a copy of the plaintiffs' pleadings and the action is therefore, sua sponte, dismissed as against them.

"In order to establish a prima facie violation of General Business Law §349, a plaintiff must demonstrate that a defendant is engaging in consumer-oriented conduct which is deceptive or misleading in a material way, and that the plaintiff has been injured because of it" (Corsetto v Verizon, NY, 77 AD3d 344,365 quoting Ladino v Bank of Amer., 52 AD3d 571,574). For the conduct to be consumer orientated, the plaintiff must demonstrate that the act or

practice has a broader impact on consumers at large, in the sense that it is directed to consumers or will potentially affect similar consumers (see Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, 85 NY2d 20,25; Corsello supra at 365). The plaintiff must, however, sustain an actual injury independent of the initial deceptive act (see Small v Lorillard Tobacco Co., 94 NY2d 43,55-56; Sokoloff v Town Sports International Inc., 6 AD3d 185,186). Here, the record amply supports the plaintiffs' assertion of substantial injury apart from the initial upfront payment including, but not limited to, additional debt incurred after their cessation of mortgage payments, the impairment of their credit ratings and, potentially foreclosure.

Moreover, the plaintiffs' claims as delineated in their detailed affidavits and accompanying documentary evidence are essentially unrefuted. The defendant Luigi Dellamonica belatedly appeared by counsel but he has neither cross moved or served opposition papers. The July 27, 2011 affidavit of the defendant Yelena Teleshova avers, in conclusory fashion, that she was merely an independent telemarketer for the defendant Express Home Solutions who "simply performed what [she] believed to be appropriate tasks upon instructions to do so from [her] supervisor, Mr. Dellamonica" (para.8). Similarly, the defendant Albert Kalastein avers, in pertinent part, that his title of Senior Vice President of the Express Home Solutions was only "nominal" (para.3) since most of his time was allegedly spent performing compliance work and he "very rarely went out on sales calls" (para.5). With respect to those instances when he did, e.g., with the plaintiffs Katia Lapaix-Dorcelet and Robert and Susan Yonkes, their detailed claims of fraudulent inducement are simply dismissed as "untrue" (para.17). None of the remaining defendants have opposed the plaintiffs' application.

The plaintiffs have therefore established a prima facie entitlement to a preliminary injunction enjoining the defendants' allegedly deceptive practices and false advertising (see GBL §§349[h] and 350). Even assuming, arguendo, that the defendants suffer a limited financial hardship as a result, "the interest of the public in not being defrauded outweighs other considerations" (People v New York Federation of Police, Inc., 188 AD2d 689,691; see Marcus v Jewish Natl. Fund, 158 AD2d 101,104-106). Moreover, the temporary restraining order was consensually modified as to the four appearing defendants on August 8, 2011 and, as to them, the modified order

shall remain in effect.

"In order to obtain an order of attachment under CPLR 6201(3), the plaintiff must demonstrate that the defendant has or is about to conceal his or her property in one or more of several enumerated ways, and has acted or will act with the intent to defraud his or her creditors, or to frustrate the enforcement of a judgment in favor of the plaintiff" (Mineola Ford Sales Ltd. v Rapp, 242 AD2d 371; see Societe Generale Alsacienne DeBanque, Zurich v Flemingdon Dev. Corp., 118 AD2d 769,772). The plaintiffs' uncontradicted evidence that the defendants have closed bank accounts, failed to pay existing judgments (see 6/23/11 affidavit of Harry Santana, paras. 39 & 40, Exhibits J & K) and relocated is sufficient, when coupled with the aforementioned proof of fraudulent intent and a likelihood of success on the merits, to warrant an order of attachment (see Mineola Ford supra at 371-372).

Accordingly, the plaintiffs' motion, pursuant to CPLR §6021(3) and General Business Law §§349 and 350, for an order preliminarily enjoining the non-appearing defendants from engaging in mortgage assistance relief services and an order of attachment is granted. The four appearing defendants, i.e., Navin Menon, Luigi Dellamonica, Yelena Teleshova and Albert Kalastein shall remain enjoined and restrained in accordance with the August 8, 2011 so-ordered stipulation.

Finally, the Court hereby schedules a September 14, 2011 (9:30 a.m.) preliminary conference in this matter to be held in the Preliminary Conference Part (lower level).

The plaintiffs are directed to serve a copy of this order upon all parties.

Dated: AUG 23 2011

Thomas A. Adams
A.J.S.C.

ENTERED
AUG 25 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE