

People v First Am. Corp.
2011 NY Slip Op 33061(U)
November 18, 2011
Sup Ct, NY County
Docket Number: 406796/07
Judge: Charles E. Ramos
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Charles Edward Ramos
Justice

PART 53

Index Number : 406796/2007
STATE OF NEW YORK
vs.
FIRST AMERICAN
SEQUENCE NUMBER : 008
STRIKE JURY DEMAND

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

NOTICE OF MOTION/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED

Cross-Motion: Yes No

NOV 22 2011

Upon the foregoing papers, It is ordered that this motion

NEW YORK
COUNTY CLERK'S OFFICE

is decided in accordance with
accompanying memorandum decision and order.

Dated: 11/18/11


HON. CHARLES E. RAMOS *S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

-----x

THE PEOPLE OF THE STATE OF NEW YORK by
ERIC SCHNEIDERMAN, Attorney General of
the State of New York,

Index No. 406796/07

Plaintiff,

-against-

FIRST AMERICAN CORPORATION and FIRST
AMERICAN EAPPRAISEIT,

Defendants.

-----x

Charles Edward Ramos, J.S.C.:

FILED
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Plaintiff People of the State of New York, by Attorney
General Eric Schneiderman, the current Attorney General of the
State of New York (AG), moves pursuant to CPLR 4102 to strike the
jury demand of defendants First American Corporation and First
American Eappraiseit (together, Defendants).

First American Corporation provides real estate appraisal
services to savings and loans institutions, banks, and other
lenders through its wholly-owned subsidiary, First American
EAppraiseit.

The AG alleges that, in the course of its relationship with
Washington Mutual, Inc. (Wamu), the country's largest savings and
loan, Defendants permitted its appraisers to be pressured into
changing appraisal values that were considered by Wamu to be too
low to permit certain loans to proceed to closing, thereby
compromising First American's independence in providing unbiased

valuations, to the detriment of consumers and amounting to deceptive business practices under New York law.

Previously, this Court denied Defendants' motion to dismiss the complaint on the basis of federal preemption (*People v First American Corp.*, 24 Misc3d 672 [Sup Ct NY County, 2009], which was affirmed by the First Department (76 AD3d 68 [1st Dept 2010])), and is currently on appeal to the Court of Appeals.

The parties have since completed discovery, and the AG filed its Note of Issue certifying trial readiness, followed by Defendants' service of a demand for a jury trial. The AG now moves to strike Defendants' jury demand on the ground that the defendants are not entitled to a trial by jury because the claims upon which the action is based and the remedies sought are equitable in nature and because the statutory claims asserted do not exist at common law.

In its complaint, the AG asserts causes of action for violations of Executive Law § 63(12), General Business Law (GBL) § 349, and for unjust enrichment. It also seeks a permanent injunction, restitution of improperly earned appraisal fees and disgorgement of unjustly earned profits.

In opposition, Defendants argue that the AG's imposition of monetary penalties in this action is not equitable in nature.

Discussion

New York's first constitution conferred the right to a jury trial in all cases "in which it hath heretofore been used," the importance of which was to include in the constitutional guarantee all cases in which a jury trial had been provided under common law (*Motor Veh. Mfrs. Assoc. of U.S. v State of New York*, 75 NY2d 175, 180-83 [1990]). Prior to 1777, a jury trial was required if the nature and substance of the relief requested was legal; if the relief demanded was equitable, there was no right to a jury trial (*Id.*).

Subsequent constitutions guaranteed those cases to which the right to a jury trial had been extended at common law before 1777 and also by statute between the 1777 and 1894 constitutions (*Id.*). Currently, all cases that afforded a jury trial under the common law prior to 1777, and all cases to which the legislature extended a right to a jury trial prior to 1894 come within the constitutional guarantee to a jury trial as set forth in Article I, section 2 of New York's present constitution (*Id.*). It has been well-settled in New York for some time that a trial by jury does not attach to actions for equitable relief.

Inclusion of a demand for monetary damages in the complaint does not, in and of itself, guarantee entitlement to a jury trial (*Phoenix Garden Restaurant v Chu*, 234 AD2d 233, 233-34 [1st Dept 1996]). Rather, courts considering whether a party has a right

to a jury trial consider whether the main thrust of the action is for legal damages or for equitable relief (*Trepuk v Frank*, 104 AD2d 780, 780-01 [1st Dept 1984]).

Here, the causes of action under Executive Law § 63(12) and GBL § 349 are primarily equitable in nature insofar as they are statutory creations that did not exist at common law. The crux of the action is for injunctive relief and the cause of action for money damages is incidental to the equitable relief sought.

Executive Law § 63(12) empowers the AG to commence a special proceeding for restitution, damages and injunctive relief against any person or entity which engages in "repeated fraudulent or illegal acts" or "persistent fraud" in the conducting of business. Similarly, GBL § 349 empowers the AG to pursue those who commit deceptive acts or practices in the conduct of business and governs consumer-oriented activity (see *Small v Lorillard Tobacco Co.*, 94 NY2d 43, 55-6 [1999]).

Under both statutes, the definition of fraud is broadly construed to include dishonest acts, and thus, the traditional elements of fraud, including fraud and justifiable reliance, are eliminated (*Small*, 94 NY2d at 55-6; *People v General Electric Co.*, 302 AD2d 314, 314 [1st Dept 2003]; *People v Apple Health & Sports Clubs*, 206 AD2d 266, 267 [1st Dept], leave dismissed, denied 84 NY2d 1004 [1994]). To this extent, these causes of action are clearly creatures of statute that did not exist at

common law (see *Channel Master Corp. v Aluminum Ltd. Sales*, 4 NY2d 403, 406-07 [1958] [elements of common law fraud are misrepresentation of material fact, falsity, scienter and injury]).

In addition, the remedies that the AG seeks for violation of these statutes, namely permanent injunction, restitution of improperly earned appraisal fees and disgorgement of unjustly earned profits, are equitable in nature (see *Roslyn Union Free School Dist. v Barkan*, 16 NY3d 643, 650-51 [2011] [injunction]; *Matter of People v Applied Card Sys., Inc.*, 11 NY3d 105, 125 [2008], cert denied 129 S Ct 999 [2009] [disgorgement]; *Motor Veh. Mfrs. Assoc. of U.S.*, 75 NY2d at 182 [restitution]). The third cause of action for unjust enrichment "is undoubtedly equitable and depends upon broad considerations of equity and justice" (*Georgia Malone & Co. v Rieder*, 86 AD3d 406, 411-12 [1st Dept 2011]).

Moreover, although there is no authority from the First Department directly on point, the majority of state courts that have considered this issue have similarly concluded that there is no right to a jury trial in actions for civil penalties and equitable relief under state consumer protection statutes, primarily because these proceedings were unknown at common law (see e.g. *Martin v Heinold Commodities, Inc.*, 163 Ill 2d 33, 71-73 [Ill 1994]; *State v Ameritech Corp.*, 185 Wis 2d 686, 698-99

[Wis App 1994], *affirmed* 193 Wis 2d 150 [Wis 1995]; *State v Alpine Air Products, Inc.*, 490 NW2d 888, 895 [Minn App 1992], *affirmed* 500 NW 2d 788 [Minn 1993]; *State v Schroeder*, 222 Neb 473, 476-77 [Neb 1986]; *State v Anderson*, 94 Wash 2d 727, 732 [Wash 1980]).

Finally, Defendants' reliance upon federal jurisprudence is misplaced. The U.S. Supreme Court has held that the Seventh Amendment guarantees the right to a jury trial to determine liability in actions by the government of the United States seeking civil penalties and injunctive relief (*Tull v U.S.*, 481 US 412, 418-27 [1987]). Nonetheless, the right to a jury trial under the Seventh Amendment is not analogous to the Defendants' purported right to a jury trial in these proceedings at least insofar as it is well-settled that the Seventh Amendment is not applicable to the states. Neither can it be reasonably argued that federal history relating to the enactment of the Seventh Amendment is analogous to New York's constitutional history relating to actions for civil penalties and equitable relief under state consumer protection statutes.

In conclusion, the Court is persuaded that the remedies sought by the AG in this proceeding are equitable in nature which simply did not exist under common law (see *Motor Veh. Mfrs. Assoc. of U.S. v State of New York*, 75 NY2d at 181-82). The magnitude of the penalties sought compared to the potential

amount of monetary relief sought in connection with the claims for restitution and disgorgement do not mandate a different conclusion.

Accordingly, it is hereby

ORDERED that plaintiff's motion to strike defendants' jury demand is granted.

The parties are directed to contact the Part Clerk for the purposes of scheduling a pre-trial conference.

Dated: November 18, 2011

ENTER:



J.S.C.
HON. CHARLES E. RAMOS

FILED

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