

Brardo v American Hope Group Inc.

2014 NY Slip Op 33556(U)

September 10, 2014

Supreme Court, Queens County

Docket Number: 21154/13

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

OS

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

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ELVA BRARDO,

Index No.: 21154/13

Plaintiff,

Motion Date: 05/21/14

- against -

Motion No.: 23

Motion Seq.: 1

AMERICAN HOPE GROUP INC.; THE DONADO
LAW FIRM, A PROFESSIONAL CORPORATION;
MAURICIO VILLAMARIN; VALMIRO L.
DONADO; ROBERTO L. PAGAN-LOPEZ;
EDUARDO RANGEL; MIRIAM DURAN; FAIRUZ
MANUN; AND LENORE GONZALEZ,

Defendants.



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The following papers numbered 1 to 23 were read on this motion by the defendants for an order pursuant to CPLR 3211(a)(1) and 3211(a)(7) dismissing the plaintiff's complaint on the ground that the plaintiff released the defendants from all claims she may have against them; defendants did not breach the contract and the Donado Law Firm is not subject to the requirements of RPL § 265-b; and the cross-motion of the plaintiff for leave to file an amended complaint to add additional plaintiffs.

Papers
Numbered

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Plaintiff, Elva Brardo, commenced this action against the defendants by filing a summons and complaint on November 18, 2013, alleging a violation of RPL §265-b (Distressed Property Consulting) against all defendants; a violation of New York General Business Law § 349 (Deceptive Practices Act) against the corporate defendants and defendants Rangel, Duran, Manun and Gonzales and asserting a cause of action for breach of contract against the corporate defendants and defendant Valmiro L. Donado, Esq. Plaintiff alleges that she is a victim of a fraudulent foreclosure rescue operation perpetuated by the defendants in which plaintiff paid a total of \$11,000 and the defendants made false promises to work on her behalf to obtain a mortgage loan modification.

The complaint alleges that plaintiff, Elva Brardo, lost \$11,000.00 as part of a foreclosure rescue scam perpetrated by American Hope Group, Inc. (American Hope), The Donado Law Firm (Donado Law), Mauricio Villamarin, Valmiro L. Donado, Esq., Roberto L. Pagan-Lopez, Esq., Eduardo Rangel, Miriam Duran, Fairuz Manun, and Leonor Gonzalez (defendants). It is alleged that the defendants promised to provide Ms. Brardo with a team of experienced auditors and attorneys who would work on her behalf to obtain a mortgage loan modification and would provide legal representation to defend her foreclosure action. It is alleged that even though Ms. Brardo signed a "Retainer Agreement" with Donado Law Firm at American Hope's Office and paid a "large, illegal upfront fee," defendants never obtained a more affordable mortgage payment for Ms. Brardo and never provided her with legal representation. Plaintiff seeks damages for the defendants' alleged violation of RPL § 265-b (Distressed Property Consulting), GBL § 349 (Deceptive Practices Act) and common law breach of contract. The plaintiff also seeks to enjoin defendants from engaging in deceptive acts and practices and to recover actual and consequential damages arising from the violations, including the trebling of the actual and consequential damages and reasonable attorney's fees and costs.

The complaint asserts that Ms. Brardo obtained a mortgage loan from Continental Loans to purchase her property located at 89-27 91st Street, Woodhaven, New York, 11421. The loan was subsequently assigned to Chase. Due to her financial circumstances, the plaintiff stopped making mortgage payments in the fall of 2011. The repayment plan offered to her by Chase in April 2012 was unaffordable and she turned it down. In June 2012, Ms. Brardo sought assistance from American Hope in order to secure a more affordable loan modification with Chase. At that time she met with defendant Rangel, a salesperson, and Duran, a processing manager, who informed her that due to errors

in her mortgage documents they could assist her with getting a loan modification with lower monthly payments. They explained that their fee would be approximately \$10,000 and that they required \$2,850.00 as a downpayment and monthly payments of \$695.00 by electronic funds transfer. On June 12, 2012, she signed a six page "Retainer Agreement" written on the letterhead of the Donado Law Firm. The agreement stated that she was retaining the Donado Law Firm and that back office work would be outsourced to American Hope. Plaintiff alleges that the retainer agreement violates RPL § 265-b in not providing details regarding the securitization mortgage audit, did not include the total cost for services, was not printed in Spanish, and did not include statutory notices regarding her right to cancel the contract.

In July 2012, she met with defendant Manun and plaintiff provided him with requested financial documents. In October 2012, Chase offered the plaintiff a three month trial loan modification. She did not accept the modification offer finding the terms to be unaffordable for her. In June 2013 she received a letter from Chase informing her that her request for further mortgage assistance was declined.

In June 2013, the plaintiff filed a complaint against Donado and American Hope with the New York City Commission of Human Rights. In July 2013, Ms. Brardo wrote a letter terminating the services of the Donado Law Firm. In August 14, 2013, she went to American Hope's Offices seeking the return of her personal and financial documents. She was told by defendant Gonzalez that she could only obtain the documents if she signed a release. The release was written in English on Donado's letterhead and stated that she released American Hope and the Donado Law Firm from any claims regarding any matter against the companies based upon their business relationship. On August 14, 2013, she signed the release. The complaint states that between June 2012 and July 2013 she paid American Hope a total of \$11,885 and she he is currently facing foreclosure.

The complaint also alleges that defendants engaged in conduct which violated RPL § 265-b by requiring that she pay an upfront fee prior to completion of their consulting services, required her to sign documents written in English, that they violated the GBL § 349, Deceptive Practices Act, by engaging in acts and practices that were misleading in a material way, were unfair, deceptive and contrary to public policy and standard business practices. The complaint alleges in this regard that the Corporate defendants appear to target Hispanic communities in New York as demonstrated by the American Hope website and

multiple advertisements in Spanish-language newspapers widely circulated in the New York metropolitan region.

Lastly, the plaintiff asserts a cause of action for breach of contract alleging that the defendants failed to provide the services of an attorney, did not obtain any relief from foreclosure, and never gave her copies of the securitization mortgage audit. Plaintiff also seeks a declaratory judgment declaring the acts of the defendants to constitute a violation of RPL § 265-b and GBL § 349, enjoining the defendants from engaging in deceptive practices that affect consumers in New York State under GBL 349(h); and awarding monetary damages and reasonable attorney's fees.

Defendants now move to dismiss the complaint pursuant to CPLR 3211(a)(1) based upon documentary evidence, to wit, a release signed by the plaintiff in which she states that she fully releases the defendants from any and all claims that she might have against them; on the ground that she entered into a contract with Donado Law Firm (not American Hope Group), and pursuant to CPLR 3111(a)(7) on the ground that the complaint fails to state a cause of action for deceptive Business Practices and breach of contract because the Donado Law Firm is not subject to the requirements of RPL 265-b and neither American Hope nor the Donado Law Firm nor Valmiro Donado breached the contract with which she entered with Donado Law Firm.

First, the defendants claim that the plain language of the release signed by the plaintiff is clear and unambiguous and constitutes a complete bar and defense to an action subject to the release (citing Goldberg v Manufacturers Life Ins. Co., 242 AD2d 175 [1st Dept. 1998]). Further, defendants assert that the plaintiff cannot willingly sign a legally binding release and then claim that she signed it reluctantly and did not understand the language or the legal effect of the release.

Secondly, defendants claim that the RPL § 265-b claim is not applicable herein because said section specifically exempts attorneys from the definition of a distressed property consultant [see RPL § 265-b (1)(e)(I)], and plaintiff had no contractual relationship with American Hope, only with the Donado Law Firm which is purportedly exempt.

Thirdly, the defendants assert that the complaint fails to set forth a claim for a violation of GBL § 349 because the courts have held that violations of GBL § 349 that do not allege an effect on a population broader than the individual plaintiff

at issue must be dismissed (citing Allstate Ins. Co. v Bogoraz, 818 F. Supp. 2d 544 (EDNY 2011)). Defendants assert that a complaint under GBL § 349 must charge conduct that is consumer oriented, and therefore, unique private contract disputes do not fall within this category (citing Midland Funding, LLC v. Giraldo, 39 Misc. 3d 936 [Dist Ct. Nassau Co. 2013]). Further, the defendants allege that the complaint fails to establish that the defendants acted in a misleading or deceptive manner. It is claimed that the defendants told the plaintiff that they would attempt to negotiate a more favorable mortgage terms and they did so albeit the plaintiff turned down the bank's offer.

The plaintiff cross-moves to amend the verified complaint to add three additional plaintiffs. Plaintiff's counsel, Nicole L. Arrindell, Esq., asserts that since the time the complaint was served she has spoken to additional consumers who entered into agreements with the defendants for loan modification services and foreclosure representation and whose homes subsequently went into foreclosure. She states that proposed plaintiffs, Ms. Lopez, Ms. Leon and Mr. Gomez expressed a desire to join in the lawsuit. Counsel asserts that the proposed amended complaint contains facts essentially identical to those set forth in the original complaint and the newly proposed plaintiffs assert the same causes of action against defendants. As such, it is claimed that defendants will not be prejudiced by the amendment.

Defendants oppose the cross-motion to amend the complaint on the ground that the proposed additional plaintiffs signed different types of agreements with the American Hope defendants.

Upon review and consideration of the defendants' motion to dismiss the complaint, plaintiff's cross-motion to amend the complaint, the affirmation in opposition and the respective reply affirmations, this Court finds as follows:

The cross-motion by the plaintiff for an order granting leave to amend the complaint pursuant to CPLR 1002(a) is granted. CPLR 1002 provides, in pertinent part, that persons "who assert any right to relief jointly ... arising out of the same transaction, occurrence, or series of transactions or occurrences, may join in one action as plaintiffs if any common question of law or fact would arise." Here, this court finds that the proposed plaintiffs, Ana Lopez, Rosa Leon and Jorge Gomez, are all native Spanish speaking homeowners that reside in Queens County and were each at risk of losing their homes to foreclosure at the time they entered into mortgage rescue agreements with the defendants. This court finds that there are

common question of law and fact with regard to the agreement each plaintiff made with the defendants. The plaintiffs are similarly situated in that each entered into similar agreements with the defendants to obtain the same services. Each plaintiff allegedly had the same result as Ms. Brardo as a result of their respective contract with defendant during the same time frame. Therefore, as the agreements are similar, the same questions of law arise with respect to the interpretation, breach of the contract and violations of GBL § 349 and RPL § 265-b (see Palmer Fish Co., Inc. v APA Agency, Inc., 34 Misc. 3d 1233(A) [Sup Ct Monroe Co. 2011]). Further, this Court finds that the defendants will not be prejudiced as the proposed plaintiffs are asserting the same causes of action which have been asserted by the original plaintiff.

A cause of action may be dismissed under CPLR 3211(a)(1) "only where the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]). In other words, the documents relied upon must "definitely dispose of the plaintiff's claim" (Blonder & Co. v Citibank, N.A., 28 AD3d 180 [1st Dept 2006]). Here, defendants submit a release admittedly signed by the plaintiff on August 14, 2013, in which she released and discharged the defendants, American Hope Group and Donado Law Firm, from any claim regarding any matter against said entities from the beginning of their business relationship to the date of execution of the release. Defendants claim that the release constitutes a complete bar and defense to this action. Thus, defendants claim that in light of the release, the Court must dismiss the complaint in its entirety.

However, a release may be invalidated for any of the traditional bases for setting aside written agreements, such as duress, fraud, or mutual mistake, with the burden on the party seeking to invalidate the release (see Matter of Boatwright, 114 AD3d 856 [2d Dept. 2014]; Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V., 17 NY3d at 276). Ms. Brardo submits an affidavit in opposition to the motion in which she states that she was told that she would not be able to obtain the return of her personal and financial documents unless she signed the release. Therefore, this court finds there is a question of fact as to whether the release is invalid as it was allegedly signed under duress (see Warmhold v Zagarino, 106 AD3d 994 [2d Dept. 2013][a motion to dismiss should be denied where fraud or duress in the procurement of the release is alleged]; Great Eagle Intl. Trade, Ltd. v Corporate Funding Partners, LLC, 104 AD3d 731 [2d Dept. 2013]; Gordon v Boyd, 96 AD3d 719 [2d

Dept. 2012)). Accordingly, the defendants' motion to dismiss the complaint based upon the execution of the release is denied.

It is well settled that in considering a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7)), the pleadings must be liberally construed. The sole criterion is whether, from the complaint's four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law (Leon v Martinez, 84 NY2d 83 [1994]; Guggenheimer v Ginzburg, 43 NY2d 268 [1977]; Rochdale Vil. v Zimmerman, 2 AD3d 827 [2d Dept. 2003]). The facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration (see Morone v Morone, 50 NY2d 481 [1980]; Gertler v Goodgold, 107 AD2d 481 [1st Dept. 1985], affirmed 66 NY2d 946, [1985]). The Court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (see EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11[2005]; Guggenheimer v Ginzburg, 43 NY2d 268 [1977]; Sokol v Leader, 74 AD3d 1180 [2d Dept. 2010]). When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one (Guggenheimer v Ginzburg, supra at 275).

Defendants assert that the complaint fails to state a cause of action for a violation of RPL 265-b because the plaintiff had no business or contractual relationship with a distressed property consultant. Defendants assert that the plaintiff signed a retainer agreement with attorneys from the Donado Law firm and based upon RPL 265-B(1)(e)(I) attorneys are excluded from the definition of distressed property consultants. Further, counsel asserts that the plaintiff had no contractual relationship with the employees of American Hope. However, this court finds that the plaintiff sufficiently pled a cause of action under RPL 265-b in that it is alleged that both the Donado Firm and the corporate defendants solicited plaintiff to provide consulting with respect to her distressed home loan and that plaintiff had a contract with the defendants and paid them over \$11,000 including upfront money. The pleading also sufficiently alleges violations of the provisions of RPL § 265-b in that there were collections of upfront fees, failure to render a contract and failure to render a contract that was in Spanish. Further, although the Donado defendants claim that attorneys are exempt from the regulatory provisions of RPL § 265-b, that exemption only applies when the attorney is directly providing consulting

services and not merely if the attorney is on staff (see RPL 265-b(1)(e)(I)).

Therefore, the motion to dismiss the cause of action pursuant to RPL § 265-b is denied as there is a question of fact as to whether the attorneys were providing direct or indirect services to the plaintiff and whether counsel was acting in the course of his regular legal practice. The plaintiff states that she never spoke to an attorney at the firm and that all of the documents were executed at the offices of American Hope.

Defendant asserts that the complaint fails to properly plead a violation of GBL §349 as there is no allegation of an effect on a population greater than the individual plaintiff. Second, defendants assert that there is no allegation defendant engaged in an act or practice that was deceptive or misleading in a material way.

The elements of a claim under GBL § 349 include consumer-oriented conduct that is materially deceptive and causes injury to the plaintiff (see Shou Fong Tarn v. Metropolitan Life Ins. Co., 79 AD3d 484 [1st Dept. 2010]), and affords a right of action to "any person who has been injured by reason of any violation of this section" (GBL 349(h)). Here, this Court finds that plaintiff has sufficiently pled that the actions of the defendants (1) had an impact on consumers at large, (2) was deceptive or misleading in a material way, and (3) resulted in injury (see Andre Strishak & Assocs., P.C. v Hewlett Packard Co., 300 AD2d 608 (2d Dept. 2002)). Further, the defendants placed advertisements to the Spanish speaking community of Queens and the amended complaint seeks damages on behalf of four plaintiffs.

The essential elements for pleading a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of his or her contractual obligations, and damages resulting from the breach (see Dee v Rakower, 112 AD3d 204 [2d Dept. 2013]; Elisa Dreier Reporting Corp. v Global NAPS Networks, Inc., 84 AD3d 122 [2d Dept. 2011]). Here, the plaintiff sufficiently pled a cause of action for breach of contract in that she alleged the formation of oral and written contracts with the defendants for loan modification services, her performance by the payment of \$11,000 to the defendants, the failure of the defendants to provide loan modification services including the performance of a securitization mortgage audit, and damages that exceed the amount of money Ms. Brardo paid to the defendants.

Accordingly, for all of the above stated reasons it is hereby,

ORDERED, that plaintiff's cross-motion for leave to amend the complaint is granted, and the proposed amended complaint in the proposed form annexed to the cross-moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED, that the defendants shall serve an answer to the amended complaint within 20 days from the date of said service, and it is further,

ORDERED, that the defendants' motion for an order dismissing the plaintiff's complaint based upon documentary evidence and for failure to state a cause of action is denied in its entirety.

Dated: September 10, 2014
Long Island City, N.Y.



ROBERT J. MCDONALD
J.S.C.