

Guaman v American Hope Group

2016 NY Slip Op 30905(U)

April 6, 2016

Supreme Court, Queens County

Docket Number: 700873/15

Judge: Carmen R. Velasquez

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CARMEN R. VELASQUEZ IAS PART 38
Justice

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ANGELITA CHIMBAY DE GUAMAN,
individually and as personal
representative of the ESTATE OF LUIS
GUAMAN; SEGUNDO J. CHICAIZA; and
RAFAEL E. VALDEZ,
Plaintiffs,

Index No. 700873/15
Motion
Date: October 16, 2015

M# 2

-against-

AMERICAN HOPE GROUP and THE DONADO
LAW FIRM A PROFESSIONAL CORPORATION,
Defendants.

FILED
APR 12 2016
COUNTY CLERK
QUEENS COUNTY

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The following papers numbered EF 8 and EF 10-17 read on this motion by defendant The Donado Law Firm to dismiss the complaint.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	EF 8
Affirmation in Opposition - Exhibits.....	EF 10-17

Upon the foregoing papers it is ordered that this motion by defendant The Donado Law Firm to dismiss the complaint is decided as follows:

Plaintiff Angelita Chimbay de Guaman and her now deceased husband entered into a mortgage for property located at 34-67 111th Street, Corona, New York in 2006. Thereafter, she entered into two additional mortgages in connection with the purchase of property located at 35-19 90th Street, Jackson Heights, New York. In 2005 and 2006, plaintiffs Segundo J. Chicaiza and Rafael E. Valdez entered into mortgages in connection with the purchase of property located at 40-61 Junction Boulevard, Corona, New York. The plaintiffs subsequently became delinquent in payment of the mortgages. As a result, plaintiffs retained defendants American Home Group and The Donado Firm to provide consulting services regarding the mortgages. Plaintiffs allege that defendants were actually engaged in a fraudulent foreclosure rescue scam in which

the plaintiffs were falsely promised a modification on their mortgages in return for upfront as well as monthly fees.

The instant action alleges causes of action for violation of Real Property Law § 265-b, violation of General Business Law § 349, breach of contract, fraud and fraudulent inducement. Defendant The Donado Law Firm now moves to dismiss the complaint. In support of its motion, defendant argues that Real Property Law § 265-b does not apply to it since it is a law firm that practices in the State of New York. Defendant next argues that General Business Law § 349 does not apply to this case since the statute does not cover private contract disputes. Defendant further contends that the cause of action for breach of contract must be dismissed since defendant did not commit any breach which entitles the plaintiffs to relief. Finally, defendant asserts that the claims sounding in fraud and fraudulent inducement must be dismissed since the claims were not pled with particularity as required by the CPLR.

"A motion to dismiss made pursuant to CPLR 3211(a)(7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law." (*Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 37 [2d Dept 2006]; see *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Behar v Glickenhau Westchester Dev. Inc.*, 122 AD3d 784, 785 [2d Dept 2014].) The standard on such a motion is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action. (*Sokol v Leader*, 74 AD3d 1180, 1181 [2d Dept 2010].)

Real Property Law § 265-b prohibits a "distressed property consultant" from charging for or accepting payments for consulting services before the completion of the work. "Distressed property consultant" is defined as "an individual or a corporation, partnership, limited liability company or other business entity that, directly or indirectly, solicits or undertakes employment to provide consulting services to a homeowner for compensation or promise of compensation with respect to a distressed home loan or a potential loss of the home for nonpayment of taxes. A consultant does not include ... an attorney admitted to practice in the state of New York when the attorney is directly providing consulting services to a homeowner in the course of his or her regular legal practice."

In the case at bar, the complaint sufficiently pleads a cause of action under RPL § 265-b. The complaint alleges that

Angelita Chimbay De Guaman and Luis De Guaman paid an upfront fee of \$5,500.00 to the defendant and agreed to be debited \$595 per month until a loan modification occurred. The complaint also alleges that the defendant never obtained a loan modification for the plaintiffs even though Angelita Chimbay De Guaman and Luis De Guaman paid more than \$50,000.00. Similarly, the complaint alleges that plaintiffs Rafael E. Valdez and Segundo J. Chicaiza paid an upfront fee, \$2,850.00, and agreed to be debited \$675 per month until the modification occurred. The complaint further alleges that although these plaintiffs signed a retainer agreement with defendant, the work for the loan modification was outsourced to defendant American Hope Group Inc. Plaintiffs Valdez and Chicaiza never received the modification. Contrary to the defendant's assertions, the court cannot conclude that defendant is exempt from liability under RPL § 265-b. It is unclear to the court as to whether the defendant was "directly providing consulting services ... in the course of his or her regular legal practice." Plaintiff Guaman avers in her affidavit that she never met with anyone from the defendant that represented themselves as an attorney. In addition, as noted above, the complaint alleges that the work relating to the modification for plaintiffs Valdez and Chicaiza was outsourced to American Hope Group Inc., which is not a law practice.

The second cause of action alleges that plaintiff engaged in deceptive business practices in violation of General Business Law § 349. To assert a claim under General Business Law § 349(a), a party must plead that (i) the challenged conduct was consumer oriented, (ii) the conduct was materially misleading and (iii) he sustained damages. (*Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000]; *Emigrant Mtge. Co., Inc. v Fitzpatrick*, 95 AD3d 1169, 1172 [2d Dept 2012]; *Lum v New Century Mtge. Corp.*, 19 AD3d 558, 559 [2d Dept 2005].) Here, the complaint validly pleads a cause of action for violation of General Business Law § 349. The complaint alleges that the defendant engaged in deceptive acts that were targeting the Hispanic communities in New York. Indeed, the complaint further alleges that defendant sent advertisements in Spanish to Spanish speaking homeowners in danger of foreclosing on their homes. These advertisements allegedly offered aid in obtaining loan modifications and reducing a homeowner's mortgage.

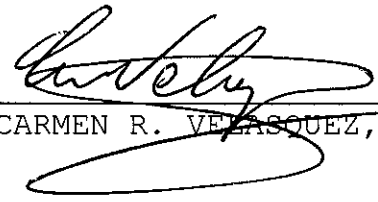
The complaint also sufficiently pleads a cause of action for breach of contract. The essential elements to recover damages for breach of contract are the existence of a contract, plaintiff's performance pursuant to the terms of the contract, defendant's breach of its contractual obligations and damages resulting from the breach. (*Legum v Russo*, 133 AD3d 638, 639 [2d

Dept 2015]; *Canzona v Atanasio*, 118 AD3d 837, 838 [2d Dept 2014].) The complaint alleges all the required elements for a cause of action for breach of contract. The complaint asserts that plaintiffs and defendant entered into a contract for a loan modification, and plaintiffs performed their obligations by paying thousands of dollars in upfront fees. The complaint also asserts that defendants failed to provide the services promised.

The elements of a cause of action for fraud are a misrepresentation or a material omission of fact which was false and known to be false by the defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission and injury. (*Nafash v Allstate Ins. Co.*, ___ AD3d ___, ___ NYS 2d ___, 2016 NY Slip Op 02061 [2d Dept 2016]; *Chung v Wang*, 79 AD3d 693, 694-695 [2d Dept 2010].) In addition, the circumstances underlying a cause of action for fraud must be stated in detail. (CPLR 3016[b]; *Mariano v Fiorvante*, 118 AD3d 961 [2d Dept 2014]; *Genovese v State Farm Mut. Auto. Ins. Co.*, 106 AD3d 866, 867 [2d Dept 2013]; *Quinones v Schaap*, 91 AD3d 739, 741 [2d Dept 2012].) In the case at bar, the complaint sets forth the requisite elements for fraud and fraudulent inducement. Further, contrary to the argument by the defendant, the complaint sets forth the fraud in sufficient detail.

Accordingly, this motion by defendant The Donado Law Firm to dismiss the complaint is denied.

Dated: April 6, 2016


CARMEN R. VELASQUEZ, J.S.C.

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