

People v Orbital Publ. Group, Inc.
2016 NY Slip Op 31155(U)
June 17, 2016
Supreme Court, New York County
Docket Number: 451187/2015
Judge: Carol R. Edmead
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. CAROL R. EDMEAD
J.S.C.

PRESENT: _____
Justice

PART 3

Index Number : 451187/2015
PEOPLE OF THE STATE OF NEW
vs.
ORBITAL PUBLISHING GROUP, INC.
SEQUENCE NUMBER : 002
RENEWAL

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	<input type="checkbox"/> No(s). _____
Answering Affidavits — Exhibits _____	<input type="checkbox"/> No(s). _____
Replying Affidavits _____	<input type="checkbox"/> No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Petitioner, the People of New York, by Eric Schneiderman, Attorney General of the State of New York (the "Attorney General" or the "State"), moves pursuant to CPLR 2221(3) for leave to renew its claim under Executive Law § 63(12) on the ground that there has been a change of law that would change this Court's determination, and upon renewal, finding that respondents engaged in persistent fraudulent conduct within the meaning of said statute, is granted.

Factual Background

In its petition, the State sought an order: (1) permanently enjoining respondents from soliciting business in violation of GBL § 349, GBL § 350, and GBL § 335-a, and Executive Law § 63 (12); (2) directing respondents to render an accounting to the Attorney General of the names and addresses of all consumers who paid fees to respondents for a new or renewal subscription to a magazine or other publication; (3) directing respondents to make full monetary restitution and pay damages to all aggrieved consumers, known and unknown; (4) directing respondents to disgorge all sums received from their fraudulent and illegal conduct; (5) directing respondents, pursuant to GBL Article 22-A, to pay a civil penalty in the sum of \$5,000 to the State for each violation of GBL Article 22-A; (6) directing respondents to pay a civil penalty to the State for knowing violations of GBL § 335-a; awarding the State costs plus an additional allowance of \$2,000 against each respondent.

By order dated, November 30, 2015, this Court granted respondents' motion to dismiss to the extent, *inter alia*, dismissing the substantive claim under Executive Law § 63(12). The Court, relying on *People v Charles Schwab & Co., Inc.* (109 AD3d 445, 449 [1st Dept 2013]), explained:

Dated: _____, J.S.C.

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

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

“Executive Law § 63 (12) enables the Attorney General to petition the court, on behalf of the people of New York, for redress against “any person” who has engaged in “repeated fraudulent or illegal acts.” While this statute “does not create independent claims” (*People v Charles Schwab & Co., Inc.* . . .)¹ it does provide the Attorney General standing “to seek redress and additional remedies for recognized wrongs” (*State of New York v Cortelle Corp.*, 38 NY2d 83, 85 [1975]).

Respondents are correct that while Executive Law § 63 (12) provides the standing for the Attorney General to bring this petition, *it does not provide an independent cause of action on which the state can find redress.* While the State argues at length that the holding in *Charles Schwab* was incorrect, it is worth remembering that this court does not review decisions of the Appellate Division; quite the opposite.” (Emphasis added). (Decision, p. 5).

Subsequent to the Court’s decision, the First Department in *Matter of People by Schneiderman v. Trump Entrepreneur Initiative LLC* (137 A.D.3d 409, 26 N.Y.S.3d 66 [1st Dept 2016]) held that that “*Charles Schwab* does not comport with prevailing authority, and in fact, acts to limit the power that the Attorney General has long been exercising under § 63(12). And even apart from prevailing authority, the language of the statute itself appears to authorize a cause of action; . . . § 63(12) defines the fraudulent conduct that it prohibits, authorizes the Attorney General to commence an action or proceeding to foreclose that conduct, and specifies the relief, including equitable relief, that the Attorney General may seek. . . . Hence, we hold that the Attorney General is, in fact, authorized to bring a cause of action for fraud under Executive Law § 63(12)” (emphasis added).

The State argues that the Court has broad discretion to revisit its decision, and based on the evidence, should find that respondents have engaged in repeated fraudulent conduct within the meaning of the statute. The State subsequently requests that the Court grant its motion on default due to respondents’ failure to submit a timely opposition thereto.

Respondents oppose renewal, arguing that petitioner offers no reason for its dilatory action in waiting almost three months after the issuance of the decision in *Trump*, to move for leave to renew on May 23, 2016. Respondents request, in the event renewal is granted, that they

¹ In *People v Charles Schwab & Co., Inc.*, the First Department upheld the dismissal of the first cause of action “inasmuch as Executive Law § 63(12), upon which it is based, does not create independent claims, but merely authorizes the Attorney General to seek injunctive and other relief on notice prescribed by the statute in cases involving persistent fraud or illegality” (109 AD3d 449). The complaint in that action alleged four causes of action: (1) fraud based upon violations of Executive Law § 63(12); (2) securities fraud in violation of the Martin Act; and (3) consumer fraud in violation of GBL § 349. The State sought an order directing that Schwab “(1) buy back ARS from defrauded customers at par; (2) disgorge ill-gotten gains; (3) pay restitution; (4) pay civil penalties; and (5) change its sales practices and advertising claims. The AG also seeks an order enjoining further violations of GBL § 349 and Executive Law § 63(12)” (*People ex rel. Cuomo v. Charles Schwab & Co., Inc.*, 33 Misc. 3d 1221(A) [Supreme Court, New York County 2009]).

be given an opportunity to further brief the issues raised by the purported change in law. Notwithstanding *Trump*, petitioner does not state a viable “statutory fraud” claim under Executive Law § 63(12) cause of action, and respondents seek to address the appropriate statute of limitation to apply to any Executive Law § 63(12) claim. Further, respondents contend that this Court already found that petitioner is not entitled to a summary disposition on the GBL §§ 349 and 350 claims, as there are issues of fact as to whether the solicitations at issue “amounted to deceptive acts.”

In reply, petitioners argue that CPLR 2221(e) does not specify the time within which to move to renew. The *Trump* case expressly grants the State the right to pursue a statutory fraud claim, independent of the elements needed to establish a common law fraud claim. *Trump* further held that the statute of limitations for the statutory fraud claim is six years.

Discussion

A motion for leave to renew pursuant to CPLR 2221 “shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination” and “shall contain reasonable justification for the failure to present such facts on the prior motion” (*American Audio Serv. Bur. Inc. v AT & T Corp.*, 33 AD3d 473, 476, 823 NYS2d 25 [1st Dept 2006]).

The motion to renew, when properly made, posits newly discovered facts that were not previously available *or* a sufficient explanation is made why they could not have been offered to the Court originally (*see discussion in Alpert v. Wolf*, 194 Misc.2d at 133, 751 N.Y.S.2d 707; D. Siegel New York Practice § 254 [3rd ed.1999]). A motion to renew, “is intended to draw the court’s attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court’s attention.” (*Beiny v. Wynyard*, 132 A.D.2d 190, 522 N.Y.S.2d 511, *lv. dismissed* 71 N.Y.2d 994, 529 N.Y.S.2d 277, 524 N.E.2d 879)”

A motion for leave to renew is not subject to same time constraints as govern motion for leave to reargue, but must contain reasonable justification for the failure to present such facts on the prior motion (*Luna v. Port Authority of New York and New Jersey*, 21 A.D.3d 324, 800 N.Y.S.2d 170 [1st Dept 2005]; *see also Begler v. Saltzman*, 53 A.D.2d 578, 385 N.Y.S.2d 60 [1st Dept 1976] (“a motion to renew may be brought after time to appeal from the original order has expired”); *Prude v. Erie County*, 47 A.D.2d 111, 364 N.Y.S.2d 643 [4th Dept 1975] (a motion to renew is not limited to time within which an appeal could be taken)). Inasmuch as no final entry of judgment existed at the time petitioner filed its instant motion, it cannot be said that the instant motion is untimely (*see e.g., Dinallo v. DAL Elec.*, 60 A.D.3d 620, 874 N.Y.S.2d 246 [1st Dept 2009] (“a motion for leave to renew based upon a change in the law must be made prior to the entry of a final judgment”)).

In light of the recent decision in *Trump*, renewal of the prior motion and order dismissing petitioner’s Executive Law § 63(12) cause of action is warranted. The First Department in *Trump* expressly referenced the *Charles Schwab* case incompatible “with prevailing authority.”

Upon renewal, the Court reinstates petitioners’ causes of action under Executive Law § 63(12).

However, summary judgment on petitioner’s Executive Law § 63(12) claim is denied, *without prejudice*, as the submissions fail, at this juncture, to establish a complete entitlement to

such relief.

Based on the above, and based on the reinstatement of petitioner's Executive Law § 63(12) claim, respondents' request for permission to move for dismissal of such statutory fraud claim in light of the pronouncements made in *Trump*, is warranted.

Conclusion

Therefore, it is hereby

ORDERED that the petitioner's motion pursuant to CPLR 2221(3) for leave to renew its claim under Executive Law § 63(12) on the ground that there has been a change of law that would change this Court's determination, is granted; and it is further

ORDERED that upon renewal, the branch of petitioner's motion for summary judgment finding that respondents engaged in persistent fraudulent conduct within the meaning of said Executive Law § 63(12) is denied, without prejudice, at this juncture; and it is further

ORDERED that respondents' request for permission for leave to move to dismiss said claim for failure to state a cause of action and on statute of limitations grounds, is granted; and it is further

ORDERED that petitioner shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated 6.17.2016

ENTER:  J.S.C.

HON. CAROL R. EDMEAD

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION J.S.C.

Check if appropriate: DO NOT POST REFERENCE