SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13
Justice

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

Plaintiff,

-against-

CSA - CREDIT SOLUTIONS OF AMERICA, INC.,

Defendant.

INDEX NO. 401225/09
MOTION DATE 02 -22-2012
MOTION SEQ. NO. 002
MOTION CAL. NO.

The following papers, numbered 1 to 6 were read on this motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 3
Answering Affidavits — Exhibits ____cross motion	3 - 4
Replying Affidavits	5, 6

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is ordered that plaintiff's motion pursuant to CPLR §3212, for summary judgment as to the first, second, third, fourth, seventh, eighth and ninth causes of action, is granted. The motion by Lippes, Mathias, Wexler, Friedman LLP to withdraw as counsel to CSA - Credit Solutions of America, Inc., is granted.

Plaintiff seeks an Order for summary judgment pursuant to CPLR §3212 as to the first, second, third, fourth, seventh, eighth and ninth causes of action claiming that there are no issues of fact. Plaintiff also seeks an accounting to determine the proper amount of restitution, damages and civil penalties. Plaintiff is not seeking summary judgment on the fifth and sixth causes of action pertaining to Business Corporations Law §1301, because the defendant obtained authorization from the New York Department of State to operate its business.

Defendant's counsel fully opposes the motion, additionally counsel moves for an Order permitting the firm to withdraw as counsel on account that there has been no contact with the client, payment of attorney fees or disbursements.

In order to prevail on a motion for summary judgment pursuant to CPLR §3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v. City of New York, 89 N.Y. 2d 833, 675 N.E. 2d 548, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence in admissible form, sufficient to require a trial of material factual issues (Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 571 N.E. 2d 645; 569 N.Y.S. 2d 337 [1999]).

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

Plaintiff commenced this action asserting causes of action pursuant to General Business Law ("GBL")Article 22-A, §349, §350, Articles 28-BB, §458 [b],[e],[f],[h],[j] and Executive Law §63[12], and to enjoin defendant, CSA-Credit Solutions of America, Inc. from, "...(a) engaging in fraudulent, deceptive and illegal practices in the conduct of its debt settlement business, (b) engaging in false advertising, (c) violating the state's credit services law, and (d) engaging in business in this state without authority..." Plaintiff is no longer seeking relief pursuant to "(d)." The complaint also seeks to obtain damages and restitution for victims, statutory penalties, civil penalties and costs to the State of New York (Lasky Aff. Exh.1).

General Business Law Article 22-A, §349 and §350:

GBL Article 22-A is titled, "Consumer Protection from Deceptive Acts and Practices," it includes GBL §349 and §350. GBL §349 is titled, "Deceptive Acts and Practices Unlawful." Pursuant to GBL §349, a prima facie case is established by a showing of injury resulting from "consumer-oriented conduct," and that the defendant is engaging in an act or practice that is materially misleading or deceptive, likely to result in,"...a reasonable consumer acting reasonably under the circumstances" (Osewego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y. 2d 20, 647 N.E. 2d 741 , 623 N.Y.S. 2d 529 [1995]). The materially misleading or deceptive conduct can be either by representation or omission. It is not necessary to show the conduct was repetitious, part of a pattern of deception or defendant's intent to defraud or mislead. Pursuant to GBL §349, an omission is deceptive, if a business possesses material or information relevant to the consumer and fails to provide it to the consumer (Osewego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y. 2d 20, supra).

GBL §350 is titled, "False Advertising Unlawful." GBL §350, specifically applies to false advertising, otherwise the standard to establish a prima facie case is the same as that for a GBL §349 claim (Goshen v. Mutual Life Ins. Company of New York, 98 N.Y. 2d 314, 774 N.E. 2d 1190, 746 N.Y.S. 2d 858 [2002]). GBL §350, also requires an allegation of reliance on or knowledge of the defendant's advertisement (Small v. Lorillard Tobacco Company, Inc., 252 A.D. 2d 1, 679 N.Y.S. 2d 593 [1998]). GBL §349 and §350 were enacted to safeguard all consumers not just the average consumer but , "the vast multitude of which includes the ignorant, the unthinking and the credulous" (People v. Volkswagen of Am., 47 A.D. 2d 868, 366 N.Y.S. 2d 157 [N.Y.A.D. 1st Dept.,1975]).

Executive Law §63 [12]:

Pursuant to Executive Law § 63 [12], the attorney-general may bring an action for injunction or damages to remedy repeated fraud or illegality (Matter of Lefkowitz v. EFG Baby Products Co., 40 A.D. 2d 364, 340 N.Y.S. 2d 39 [N.Y.A.D. 3rd Dept., 1973]). Executive Law § 63 [12], defines fraud to include, "...any device, scheme, or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions." Executive Law § 63 [12] like GBL §349 and §350, is also meant to protect not just the average consumer, but the "ignorant , the unthinking and the credulous," as well (People v. Coventry First LLC, 13 N.Y. 3d 108, 915 N.E. 2d 616, 886 N.Y.S. 2d 671 [2009] and Guggenheimer v. Ginzburg, 43 N.Y. 2d 268, 372 N.E. 2d

17, 401 N.Y.S. 2d 182 [1977]). A prima facie claim of fraud pursuant to Executive Law § 63 [12], is established by showing, "..whether the act complained of has the capacity or tendency to deceive, or creates an atmosphere conducive to fraud" (People ex rel. Spitzer v. Applied Card Sys., Inc., 27 A.D. 3d 104, 805 N.Y.S. 2d 175 [N.Y.A.D. 1st Dept., 2005] and People ex rel. Spitzer v. General Electric Company, Inc., 302 A.D. 314, 756 N.Y.S. 2d 520 [N.Y.A.D. 1st Dept., 2003]). Executive Law § 63 [12], does not require scienter and although it does requires repeated acts, a large percentage of violations is not necessary (Matter of Lefkowitz v. Bull Investment Group Inc., 46 A.D. 2d 25, 360 N.Y.S. 2d 488 [N.Y.A.D. 3rd Dept., 1974] and State of New York v. Princess Prestige Co., 42 N.Y. 2d 104, 366 N.E. 2d 61, 397 N.Y.S. 2d 360 [1977]).

General Business Law Article 28-BB, §458 [b],[e],[f],[h] & [j] :

GBL Article 28-BB is titled, "Credit Services Businesses" it includes GBL §458 [a] - [k]. Pursuant to GBL §458 [b] titled "Definitions," a credit service business is,

> "...any person who sells, provides or performs, or represents that he can or will sell, provide or perform, a service for the express or implied purpose of improving a consumer's credit record, history or rating or providing advice or assistance to a consumer with regard to the consumer's credit record history or rating in return for the payment of a fee."

GBL §458 [e], declares it to be an unlawful, unfair and deceptive trade practice for a credit services business to collect fees in advance of performance of services. GBL §458 [f], requires that every contract between a credit services business and the consumer be in writing signed by the parties, include a copy of the consumer's credit report and the date modification is expected to occur. Pursuant to GBL §458 [f], a "Notice of Cancellation" in the stated form is to accompany the consumer credit contract. Pursuant to GBL §458 [g], any contract or waiver that does not comply with the provisions of GBL Article 28-BB is, "void and unenforceable as contrary to public policy." Pursuant to GBL §458 [h][1], it is unlawful for a credit services company to, "Misrepresent directly or indirectly...the nature of the services to be performed; the time within which the services be performed; the ability to improve a consumer's credit report or credit rating..." GBL §458 [j] permits the Court to direct restitution in the form of a civil penalty of not more than one thousand dollars per violation. (McKinney's Cons. Laws of NY, Book 19, General Business Law Article 28-BB, §458 [b],[e],[f],[h] & [j])

Defendant is a for profit company with its principal place of business located in Dallas, Texas; designed and founded by Douglas Van Arsdale in 2003. It charges a fee to assist heavily indebted consumers by setting up a payment plan and negotiating directly with creditors to settle credit card and unsecured debts with a substantial reduction. Mr. Van Arsdale left the company in 2006 to start another company, but re-purchased it in 2007, and has been the chief executive officer for most of its history (Lasky Aff. Exh. 29). Plaintiff claims that the defendant has advertised and solicited customers in New York over the Internet through an interactive website and sponsored links, promising a significant reduction in debt (Lasky Aff. 30, 33, 34,35 & 55).

From 2004-2005, the website advertised, "It specifically reduces your current outstanding total balances by 40-60%" and "A typical settlement can be accomplished within 36 months or less with a lower monthly payment than any other debt resolution option" (Lasky Aff. Exhs. 34 & 35) From 2005-2007, the website advertised "Most of our clients become debt free within 36 months or less, "Lower your payments by 40% or more" and "Reduce your total debt by 40-60% (Lasky Aff. Exh. 36). In 2008 the website advertised "Settle your unsecured debt up to 50%" and "Get out of debt in as little as 12-36 months" (Lasky Aff. Exh. 37). In 2009, the website advertised "Reduce your debt up to 50%" (Lasky Aff. Exh. 37). In 2010, the website was advertising "Settle your unsecured debt up to 50%" and "Get out of debt in as little as 12-36 months" (Lasky Aff. Exh. 38 & 39). In 2007, the CSA website advertised "Bad Credit Help" advising clients that, "You can remove bad credit without filing for bankruptcy" and " Poor credit scores result from having several negative lines of credit on a credit report. Our service can reduce our clients' total amount of debt to allow them to repay them. This repayment gives the consumer the opportunity to delete these negative lines on their credit report" (Lasky Aff. Exhs. 35 & 36).

Plaintiff provides the affirmation of Avinoam D. Erdfarb, a volunteer assistant attorney-general, he calculated and prepared several spreadsheets and summaries of the defendant's data (Erdfarb Aff. Exhs. 1-18). The data shows that between July 5, 2005 and June 17, 2010, of the 20,660 consumers that defendant enrolled, only 811 had completed the program and because of data problems only 768 can be verified (Erdfarb Aff. Exhs. 2, 16). Plaintiff claims that of the 20,660 enrolled consumers 11,163 cancelled their accounts and only 5.18% of their debts were settled by defendant (Erdfarb Aff. Exh.5). The enrollees that remained active, 8,053 consumers, had 29.81% of their debts settled by the defendant (Erdfarb Aff. Exh. 5). Plaintiff also claims that of the enrollees that completed the program between 2005 and 2010, only 2.99% had a 50% reduction in their debt (Erdfarb Aff. Exh. 2).

Plaintiff claims that defendant's debt settlement program was structured so that consumers were advised upon agreeing to an enrollment package, to cease making minimum payments to their creditors and make deposits directly to a dedicated savings account. Defendant was granted authority to access the dedicated savings account, the accumulated savings in the account would be used to pay off the consumer's debt at a deeply reduced settlement amount. Plaintiff claims that in actuality many creditors refused to settle the debts at the significant reduction promised by defendant and only a tiny amount of customers realized the savings that were promised. Plaintiff also claims that prior to the Federal Trade Commission (FTC) banning companies from charging fees until accounts were settled, defendant required a fee equal to approximately 15% of the total amount of debt owed by the enrolled consumers. Plaintiff states that during the first three months of enrollment, all of the consumer's deposits were directed towards payment of defendant's fee instead of the debts and a majority of payments to defendant required months of enrollment before being applied towards debt settlement. Plaintiff also states that defendant failed to intervene to prevent judgments before it collected it's fee.

Plaintiff annexes affidavits from twenty-two (22) of defendant's customers stating they were mislead into believing the program would result in savings based

on advertisements and assurances made at the time of enrollment. The customers state they were mislead or that the defendant failed to advise them of the adverse effects of the program, including accrued late fees, accrued interest, judgments, the garnishment of wages and in some instances bankruptcy (Lasky Aff. Exhs. 6- 28). The defendant's customers also state that the defendant failed to advise them of the effect of the program on their credit rating.

Plaintiff annexes the affidavit of Ray Rodriguez, a Special Agent with the United States Government Accountability Office (GAO). Mr. Rodriguez participated in a federal undercover investigation of defendant and telephoned them on December 15, 2009 posing as a potential customer (Lasky Aff. Exh. 5). Mr. Rodriguez asked the representative whether he should continue to pay the bills or put the money in the savings account. He was directed to put the money in the savings account. The consumer was also told by the representative that defendant had a legal team that would handle any lawsuits resulting from defaults (Lasky Aff. Exh. 5). Plaintiff provides excerpts from the May 25,2011 deposition transcript of Douglas Van Arsdale (Lasky Aff. Exh. 29). Mr Van Arsdale states defendant's advertising created the impression for the reasonable consumer that they would save a certain percentage amounting to 50 percent of their debt (Lasky Aff. Exh. 29, pp. 72-73).

Plaintiff has established that consumers enrolled by the defendant were mislead by communication with representatives and advertisement into believing that their debt would be reduced by 40-60% within three years, and that they would be protected from debtors. Plaintiff has also established that consumers were aware of the advertised debt reduction within three years, and all of the twenty-two individuals that submitted affidavits were repeatedly deceived, based on their reliance on the misrepresentations on the website. Defendant advertised services that bring it within the GBL §458 [b] definition of a credit services company. Plaintiff has established its prima facie case.

Defendant opposes the motion claiming that plaintiff has not properly interpreted the data and provides its own spreadheets (Opp. Exhs. A-C). Defendant calculates individual items of debt instead of grouping the debts submitted by the consumer. The individual debt percentages show increases within the 40-60% range. Defendant claims that it did not charge additional fees and the settlement amounts reflect the entire cost to enrollees to obtain settlement of the debts. Plaintiff did not provide affidavits from enrollees that remained with the program until resolution of debt and according to the defendant, failed to represent all of its customers. Defendant states that although it was precluded from providing a defense as to substantiation of savings results because of repeated failure to provide documentation pursuant to multiple discovery orders, summary judgment should be denied based on its evaluation of the data.

Defendant states that it is not a "credit service business" as defined by GBL §458 [b], it made no representations, provided no advice or assistance concerning improvement of the customer's credit history. It claims that there remain issues of fact concerning representations made to consumers and whether the rules governing consumer credit businesses applies to entities like it.

Upon review of all the papers submitted, this Court finds that there remain no issues of fact. Defendant is partially precluded and its interpretation of data does not take into account that enrollees had multiple debts submitted, settling one debt for a higher percentage while failing to settle the enrollees' remaining debts does not culminate in the result consumers were lead to expect. Plaintiff's data, the spreadsheets and affidavits submitted provide a more complete and accurate portrayal of the outcome and effect on the consumers. Defendant has not established that there remain issues of fact.

Pursuant to Executive Law § 63 [12], GBL §349 and §350, plaintiff has established a basis for the injunctive relief sought in the complaint. Injunctive relief is intended to safeguard New York consumers and is appropriate to prevent the defendant, which has obtained authorization to conduct business in New York, from attempting any future deceptive practices or false advertising. Plaintiff has also established the basis for an accounting to determine the measure of restitution, damages and civil penalties.

Defendant's counsel has stated that its client appears to have abandoned its physical address and there has not been any contact with its client. Defendant's counsel was not paid since September 23, 2011. The withdrawal as counsel was not opposed by either defendant or the plaintiff.

Accordingly, it is ORDERED that plaintiff's motion pursuant to CPLR §3212 for summary judgment as to the first, second, third, fourth, seventh, eighth and ninth causes of action, is granted; and it is further,

ORDERED, that the motion by Lippes, Mathias, Wexler, Friedman LLP to withdraw as counsel to CSA - Credit Solutions of America, Inc., is granted without opposition; and it is further,

ORDERED, that the withdrawing attorneys shall serve a copy of this Order with Notice of Entry upon the defendant at its last known address by certified mail, return receipt requested, and upon the attorneys for all other parties appearing herein by regular mail; and it is further,

ORDERED, that together with the copy of this Order with Notice of Entry served upon the defendant, withdrawing attorneys shall serve a notice directing the defendant to appoint a substitute attorney within 60 days from the date of service of the notice; and it is further,

ORDERED, that any new attorney retained by the defendant shall file a Notice of Appearance with the Clerk of the Trial Support Office (Room 158) and the Clerk of the Part; and it is further,

ORDERED, that this matter is stayed for a period of sixty (60) days from the date of service on the defendant of a copy of this Order with Notice of Entry to allow defendant to obtain new counsel; and it is further,

ORDERED, that upon completion of the sixty (60) day stay, the defendant is directed to provide plaintiff a full accounting of all New York State Consumers who have paid any monies to the defendant; and it is further,

ORDERED, that plaintiff's counsel is to serve a copy of this Order with Notice of Entry, with proof of service upon defendant and upon the Clerk of the Trial Support Office (room 158) who shall refer this matter to the Special Referee Clerk for assignment to a Special Referee; and it is further

ORDERED that the Special Referee is to hear and report pursuant to the accompanying Order of Reference determining restitution, damages and civil penalties; and it is further,

ORDERED, that defendant is permanently enjoined from engaging in business dealings with the consumer public and from doing business in New York, unless they obtain prior authorization from the Court.

This constitutes the decision and order of this court.

Dated: April 30, 2012

ENTER:

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: X FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE