

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

-----X

THE PEOPLE OF THE STATE OF NEW YORK,
by ANDREW M. CUOMO, Attorney General of
the State of New York,

Petitioner,

Index No. 402032/09

-against-

AMERIMOD INC., THE AMERICAN MODIFICATION
AGENCY INC., and SALVATORE PANE, JR.,
INDIVIDUALLY and as principal of
AMERIMOD INC., and THE AMERICAN
MODIFICATION AGENCY INC.,

Respondents.

FILED
APR 21 2010
NEW YORK
COUNTY CLERK'S OFFICE

-----X

Emily Jane Goodman, J.S.C.:

Petitioner the People of the State of New York, by Andrew M. Cuomo, Attorney General of the State of New York (petitioner) brings this special proceeding, pursuant to Executive Law (EL) § 63 (12), Real Property Law (RPL) § 265-b, and General Business Law (GBL) §§ 349 (a) and 350-d, to enjoin respondents Amerimod Inc., The American Modification Agency Inc. (together, Amerimod) and Salvatore Pane, Jr., individually, and as a principal of Amerimod and American Modification Agency Inc. from engaging in numerous fraudulent acts in connection with respondents' loan modification business, whereby, according to petitioner, some thousand or more homeowners were victimized. Petitioner also seeks restitution, damages, penalties and costs. Respondents

cross-move for an order vacating the existing temporary restraining order (TRO).

I. Background

Amerimod claims to be in the business of obtaining loan modifications for homeowners whose mortgages are threatened with, or already in, foreclosure. Amerimod's mission is, allegedly, to find the means to allow its clients to remain in their homes, by obtaining forgiveness, or restructuring of, debt, by, among other things, obtaining more favorable loan terms, such as reducing the amounts homeowners are required to pay to their mortgage lenders, and reducing interest rates. Petitioner maintains that, instead of helping clients in their time of distress, Amerimod has preyed on homeowners in a number of ways which violate both RPL § 265-b and GBL Article 22-A, often leaving its clients in worse positions than they were before Amerimod's intervention.

Among Amerimod's alleged wrongdoing is its illegal collection of up-front fees in exchange for services which are often not provided; the making of numerous false claims in advertising its services, including that it is "licensed" by the State; the failure to make required disclosures in its contracts, including the client's right to walk away from the contract within five days of its execution; the failure to provide its

clients, especially Spanish-speaking clients,¹ with contracts in their own language; the holding out of itself to be a law firm, or to retain lawyers on behalf of clients; grossly misleading clients as to its success rates; falsely informing clients that they could not obtain any form of loan restructuring from their banks without Amerimod's intervention; misleading clients as to how long the loan modification process will take; and making itself unavailable to its clients once it has obtained fees up-front. Petitioner claims that the individual respondent, Salvatore Pane, Jr. (Pane) has, as Amerimod's principal, participated in Amerimod's acts of wrongdoing and fraud, in such a manner as to make himself personally liable for Amerimod's misdeeds.

On August 13, 2009, another judge of this court issued a TRO enjoining respondents from engaging in the above-described fraudulent acts. Respondents seek to vacate the TRO on the grounds that petitioner does not have proof of the misrepresentations and wrongful acts of which Amerimod has been accused, and that the instigation of the TRO has forced it to cease all business, placing its clients in jeopardy, and making it unable to pay its employees.

¹Apparently, Amerimod focused a large part of its advertizing on Spanish-speaking customers.

II. Discussion

EL § 63 (12) permits the Attorney General to commence a proceeding to enjoin acts of "fraud or illegality in the carrying on, conducting or transaction of business" The Attorney General may also seek restitution and damages under this section. The terms "fraud" or "fraudulent" include "any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions." *Id.*; see also *People v Apple Health and Sports Club, Ltd., Inc.*, 80 NY2d 803 (1992). Fraud under EL § 63 (12) is established if "the targeted act has the capacity or tendency to deceive, or creates an atmosphere conducive to fraud." *People v General Electric Co., Inc.*, 302 AD2d 314, 314 (1st Dept 2003). The statute is broadly construed so as to protect "not only the average consumer, but also 'the ignorant, the unthinking and the credulous.'" *Id.*, quoting *Guggenheimer v Ginzberg*, 43 NY2d 268, 273 (1977). And, while injunctive relief is ordinarily not appropriate to "operate on acts already performed" (*Allen v Pollack*, 289 AD2d 426, 427 [2d Dept 2001]), injunctive relief calling for the cessation of further deceptive practices in consumer-related matters is appropriate in the context of a proceeding pursuant to EL § 63 (12). See *People v General Electric Company, Inc.*, 302 AD2d 314, *supra*.

Matters brought pursuant to EL § 63 (12) are brought as special proceedings under CPLR 409 (b), and "are subject to the same standards that apply to a motion for summary judgment." *Matter of People v Applied Card Systems, Inc.*, 27 AD3d 104, 106 (3d Dept 2005); see also *Matter of Port of New York Authority v 62 Cortlandt Street Realty Co.*, 18 NY2d 250 (1966). "[W]here the petition and supporting papers contain sufficient allegations of fact to merit the relief requested and the respondents have raised no triable issues of fact by an evidentiary showing, but only assert conclusory statements in a general denial, judgment without trial is proper [internal citation omitted]." *Matter of People v Telehublik Corp.*, 301 AD2d 1006, 1007 (3d Dept 2003); see also *Matter of State of New York v Daro Chartours, Inc.*, 72 AD2d 872 (3d Dept 1979).

GBL § 349 (a) prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state" See also *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A.*, 85 NY2d 20, 24 (1995). GBL § 349 (b) allows the Attorney General to bring an action or proceeding to enjoin such acts on behalf of the people of the State, and to obtain restitution.

To state a claim under GBL § 349 (a), "a plaintiff must allege that the defendant engaged 'in an act or practice that is deceptive or misleading in a material way and that plaintiff, has

been injured by reason thereof.'" *Small v Lorillard Tobacco Co., Inc.*, 94 NY2d 43, 55 (1999), quoting *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d at 25. "Intent to defraud and justifiable reliance by the plaintiff are not elements of the statutory claim." *Small v Lorillard Tobacco Co. Inc.*, 94 NY2d at 55.

GBL § 350 finds unlawful "[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state" GBL § 350-a invokes

not only representations made by statement, word, design, device, sound or any combination thereof, but also the extent to which the advertising fails to reveal facts material in the light of such representations with respect to the commodity or employment to which the advertising relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual.

GBL § 350-d permits the Attorney General to seek civil penalties for violation of any part of Article 22-A of the GBL, including GBL § 350.

RPL § 265-b (2) (b) prohibits "distressed property consultants" from charging fees prior to completion of their services. This section became law on September 1, 2008. RPL § 256-b (3) (a) (iii) requires that the contract be "written in the same language that is used by the homeowner and was used in discussions between the consultant and the homeowner" RPL § 265-b (3) (a) (viii) requires that distressed property consultants provide their clients with contracts which, among

other things, contain a right to cancel the contract without penalty within five days of execution of the contract, in a form set forth in the section.

Petitioner has provided ample evidence that Amerimod has conducted itself fraudulently under EL § 63 (12), and violated both the RPL and GBL in its business practices. Amerimod has only claimed, in conclusory fashion, that there are substantial factual issues in dispute, and has alleged bad faith on petitioner's part, which is also conclusory.

Respondents claim that the advertisements which form the part of the case against Amerimod were placed by unnamed "independent contractors" acting without Amerimod's approval. These claims are wholly unsupported by any evidence whatsoever, and belie credibility. There is no basis to believe that the advertisements were placed by anyone other than Amerimod, or without Amerimod's blessing.

Further, the petitioner has established that Amerimod's numerous advertisements falsely claim that Amerimod has successfully addressed 7,000 claims, and has a success rate of 90% to 100%. See Aff. in Support, Ex C, exs. 1-24. Although Amerimod, in defense of this petition, attests to having successfully modified 1,300 loans, out of 3,000 applications (Aff. of Pane, ¶ 5), this claim merely illuminates that its advertisements are materially misleading.

Amerimod has also not attempted to refute the charge that it claimed to be "licensed" by some governmental agency, a claim made in many of its advertisements. Nor has it addressed the claim made in its advertisements that it was affiliated with "legal experts."

Not all of the petitioner's claims are conclusive, however. Amerimod now claims that it informed its representatives in an e-mail never to tell a borrower not to make a mortgage payment (Amerimod Opp. Ex C). Although it does not deny sending "thank you" letters informing customers that they should not deal with calls for collection, and should refer all such communications to Amerimod (Petition, Ex AA), advising clients not to deal with collection calls is not the same as advising them to ignore the requirement to keep abreast of their mortgage payments. Regardless, Amerimod does not seriously challenge the numerous accusations that it failed to attend to its clients after it received payment of its initial fee.

In response to respondents' claim that this proceeding was brought in bad faith, the petitioner has provided a great deal of evidence as to a meticulous investigation of Amerimod's business, bringing in a mass of testimony and other evidence that shows that Amerimod misled its customers concerning its ability to help them modify their mortgages, and did, in fact, fail to make good on its promises. In total, Amerimod has failed to avert the

charges that it breached GBL §§ 349 and 350.

Amerimod have also violated RPL § 265-b. There is no question that, after the inception date of the statute, Amerimod took up-front fees, failed to provide contracts in the language of the customer, especially Spanish, and failed to allow for the five-day notice of rescission. While Amerimod maintains that it only found out about the statute two months after it went into effect, and changed its policies accordingly, the evidence presented by the petitioner shows that Amerimod was still taking in up-front fees into 2009; was not offering contracts in any language other than English; and was not providing a five-day rescission period in the form required by the statute (although some contracts alluded to a five-day rescission period). Therefore, the petitioner has established a violation of statute under RPL § 265-b, as well as under the GBL, and pursuant to EL § 63 (12).

Additionally, respondent Pane (the President, CEO and sole principal and the sole shareholder of Amerimod) is personally liable for engaging in fraudulent and illegal acts. EL § 63 (12) is directed against "any person" who "engage[s] in repeated fraudulent or illegal acts." Corporate officers and directors are liable for illegal or fraudulent acts if they personally participate in those acts or have knowledge of them. See *People v Apple Health and Sports Club, Ltd.*, 80 NY2d 803 (1992); see

also *Peguero v 601 Realty Corp.*, 58 AD3d 556 (1st Dept 2009) (corporate officer who participated in tort may be held individually liable). Notably, respondents fail to separately address the issue of Pane's personal liability. Pane, who appeared on numerous commercials touting Amerimod's services (Ex E), does not deny statements that he "was clearly the person in charge at Amerimod" and was the only decision maker (Ex H-13; Ex P at 22), who approved all of the expenditures on marketing and advertising and approved the content (Ex P at 68, 70); nor does he deny that he made the statements attributed to him in the press to the effect that Amerimod helped more than 7,000 homeowners and did not violate law by taking upfront fees because the money was "placed in escrow" (Ex Q). Accordingly, as petitioner has submitted evidence of Pane's fraudulent and illegal acts, and, as respondents have failed to differentiate the acts of Amerimod from the acts of Pane, who is undisputedly in charge of Amerimod, it is proper to hold Pane personally liable for the violations found herein.²

As a result of the foregoing, respondents' cross motion to lift the TRO is denied. Respondents further request to release

²Banking records indicate that since May 1, 2008, nearly \$1.25 million dollars has been transferred from respondents' checking accounts to accounts in the name of three other entities connected with respondents, including one entity operated by Pane's brother, although respondents contend that this was done in the ordinary course of business.

\$4,800 from its accounts to notify customers whose files remain open is denied, but the parties are free to agree to such release for that purpose, and in fact, may have already agreed to the release.³

Accordingly, it is

ORDERED that the petition is granted in accordance with the terms herein; and it is further

ORDERED that the respondents Amerimod Inc., The Amerimod Modification Agency Inc., and Salvatore Pane, Jr., individually and as principal of Amerimod Inc. and Amerimod Modification Agency Inc. are hereby permanently enjoined from violating EL § 63 (12) and GBL §§ 349-d and 350 by engaging in the fraudulent, deceitful and illegal acts as set forth in the petition; and it is further

ORDERED that the matter of the amount of restitution, costs and fees, and civil penalties under GBL § 349-d, and any discovery issues related thereto, is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or other person designated by the parties to serve as referee shall determine the aforesaid issue; and it is further

³Due to the issues raised herein, the Court will forward the Decision and Order, and the Judgment, to the office of the District Attorney.

ORDERED that resolution of the matter of the amount of restitution, costs and fees, and civil penalties is held in abeyance pending receipt of the report and recommendation of the Special Referee, and a motion pursuant to CPLR 4403; and it is further

ORDERED after decision on a motion to confirm and or reject the report of the Special Referee, the Court will issue Judgment in this matter; and it is further

ORDERED that the cross motion is denied.

This Constitutes the Decision and Order of the Court.

Dated: April 7, 2010

ENTER:



J.S.C.
EMILY JANE GOODMAN

FILED
APR 21 2010
NEW YORK
COUNTY CLERK'S OFFICE