

People v Orbital Publ. Group, Inc.
2016 NY Slip Op 32301(U)
November 18, 2016
Supreme Court, New York County
Docket Number: 451187/2015
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMOND
J.S.C. Justice

PART 35

Index Number : 451187/2015
PEOPLE OF THE STATE OF NEW
vs
ORBITAL PUBLISHING GROUP, INC.
Sequence Number : 003
DISMISS ACTION

INDEX NO. _____
MOTION DATE 9/8/16
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 _____ | No(s) _____
Answering Affidavits — Exhibits _____ | No(s) _____
Replying Affidavits _____ | No(s) _____

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

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

In this special proceeding alleging, *inter alia*, fraudulent and deceptive practices regarding magazine subscription solicitations, respondents move pursuant to CPLR 3211(a)(7) to dismiss the first cause of action alleging a violation of Executive Law § 63(12) for failure to state a claim, and in the alternative, pursuant to CPLR 3211(a)(5), to limit such claim to the applicable three year statute of limitations under CPLR 214(2).

In support, respondents argue that since petitioner cannot establish common law fraud, which is the only alleged basis for the Executive Law § 63(12) claim, then there can be no cause of action under Executive Law § 63(12). 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]), the First Department held that the only independent causes of action that exist under Executive Law § 63(12) are those that existed at common law. As scienter and reliance are essential elements of a fraud claim, petitioner cannot omit such allegations in its complaint and maintain a viable statutory Executive Law § 63(12) cause of action based on common-law fraud. Moreover, petitioner failed to set forth the alleged fraud with specificity as required by CPLR 3016(b).

Further, CPLR § 214(2) expressly provides that “an action to recover upon a liability, penalty or forfeiture created or imposed by statute” and therefore, Executive Law § 63(12), which is created by the legislature, is subject to a three-year statute limitation. Petitioner concedes that it is not asserting any common law claims which would be subject to a six-year statute of limitation.

Dated: _____, J.S.C.

1. CHECK ONE: CASE-DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
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In opposition, petitioner argues that respondents misinterpret *Trump*, which found that claims under Executive Law § 63(12) were not limited to common-law fraud and held that scienter and reliance need not be proven under Executive Law § 63(12). *Trump* also stated that a six-year statute of limitations applies to a claim under Executive Law § 63(12).

In reply, respondents argues that *Trump* specifically held that the Attorney General has the right to bring an independent cause of action pursuant to Executive Law § 63(12) based on one that existed at common law at the time of the enactment of the Executive Law and that petitioner does not identify what claim, if any, existed at the time of the enactment of Executive Law § 63(12) giving rise to a viable cause of action.

Discussion

In determining a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the Court's role is deciding "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 968 NYS2d 459 [1st Dept 2013]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, 960 NYS2d 404 [1st Dept 2013]). On a motion to dismiss made pursuant to CPLR § 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs "the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, *supra*; *Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]).

As pointed out in *Trump*, Executive Law § 63(12) states, in relevant part:

"Whenever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business, the attorney general may apply . . . for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts [and] directing restitution and damages ... and the court may award the relief applied for or so much thereof as it may deem proper."

Moreover, the provision defines "fraud" as "any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions" (*id.*).

As stated in this Court's previous decision dated November 20, 2015 by way of background, the petitioner alleges, *inter alia*, that respondents send misleading solicitations for magazine, newspaper and periodical subscriptions. The solicitations have an official appearance that creates a misleading impression that they are sent by the publications themselves. On the left side, they contain four boxes, containing numbers, labeled: "Control Number," "Please Return By [date]," "Installment", and "Total Amount." Near the four boxes, usually above and below, are two items written in bold: (1) a publication's name and (2) a phrase suggestive of billing, such as "Magazine Payment Services," "Publishers Billing Exchange," "Publishers Billing

Center," "United Publishers Service," "Magazine Billing Network," "Publishers Billing Association," "Subscription Billing Service," "Publishers Billing Center," or "Subscription Billing Service." The right side of the solicitations typically contain the same four boxes labeled: "Control Number," "Please Return By [date]," "Installment," and "Total Amount," this time under a heading of "Notice of Renewal," and again with the publication's name printed underneath the boxes. Notably, the petition contains copies of the actual notices allegedly sent by respondents (Page 7). According to petitioner, these solicitations create a misleading impression that they were sent by the publications themselves. Respondents, which typically do not have authorization to act as agent for the various publications, charge significantly more for the subscription than the publications themselves charge and retain the difference. Petitioner also alleges that respondents, when soliciting for renewal subscriptions, have failed to disclose the date that existing subscriptions end, as required by New York law. Respondents fail to clearly and conspicuously disclose that they are not affiliated with the publication for which they are sending the solicitation and that they are not authorized to solicit on the publication's behalf. And, it is alleged, respondents have continued to engage in repeated and persistent fraud and illegality in violation of Executive Law §63(12).

Upon a reading of the petition, the Court find that the petition sufficiently states a claim under Executive Law § 63(12).

Respondents' reliance on *Trump* in support of dismissal is misplaced, and their motion lacks merit.

And, as noted in *Trump*, "fraud under § 63(12) may be established without proof of scienter or reliance" (137 A.D.3d at 417, citing *People v. American Motor Club*, 179 A.D.2d 277, 283, 582 N.Y.S.2d 688 [1st Dept 1992], appeal dismissed 80 N.Y.2d 893, 587 N.Y.S.2d 909, 600 N.E.2d 636 [1992] [reinstating a § 63(12) claim "as a cause of action," where the AG had pleaded facts amounting to fraud under that provision, as under the statute, "scienter is not required and false promises are sufficient"] (emphasis added); see also, *State v. Coalition Against Breast Cancer, Inc.*, 40 Misc.3d 1228(A), 975 N.Y.S.2d 712 (Table) [Supreme Court, Suffolk County 2013] ("as is clear from the statute itself, it is the falsity of the promises themselves that constitute a violation, and scienter on behalf of the organization is nowhere required"); *affd*, 134 A.D.3d 1081, 22 N.Y.S.3d 562 [2d Dept 2015] (evidence that defendant "was not directly involved in any education or research, . . . was so minimally involved in any research, early detection efforts, or in helping to provide mammography for women in need" sufficient to support summary judgment finding that defendant's claims in such regard were "fraudulent and deceptive"), *leave to appeal denied*, 28 N.Y.3d 901 [Sept. 8, 2016]). Therefore, the failure of petitioner to allege scienter and reliance in support of its Executive Law §63(12) claim is not fatal to such claim, and dismissal on this ground is unwarranted.

Contrary to respondents' contention, there is no requirement that petitioner expressly plead the precise claim, if any, that existed at the time of the enactment of Executive Law § 63(12) in order to state a claim under this section. This Section defines "fraud," as including "any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions" and petitioner need only assert allegations that fit within the meaning of fraud as defined.

As to respondent's alternative request to limit petitioner's Executive Law §63(12) claim

to a three-year statute of limitations, the First Department in *Trump* pronounced that a fraud claim under § 63(12) “is not subject to the three-year statute of limitations imposed by CPLR 214(2), but rather, is subject to the residual six-year statute of limitations in CPLR 213(1)” (*Trump*, 137 A.D.3d at 418, citing *Morelli v. Weider Nutrition Group*, 275 A.D.2d 607, 608, 712 N.Y.S.2d 551 [1st Dept 2000]; see also, *People ex rel. Schneiderman v. College Network, Inc.*, 53 Misc. 3d 1210(A), 2016 WL 6330584 (Table) [Supreme Court, Albany County 2016] (citing *Trump*, and denying dismissal of an Executive Law § 63(12) claim as *not* barred due to the applicable the six-year statutory period of limitations)).

Notably, CPLR 214(2), cited in its entirety, states that the three-year statute of limitations applies to “an action to recover upon a liability, penalty or forfeiture *created or imposed* by statute *except as provided in sections 213 and 215*” (emphasis added). The Court in *Trump* noted that a common-law claim of promissory fraud existed before § 63(12) was implemented, and thus, “did not depend on a new liability ‘created or imposed by statute’” within the meaning of CPLR 214(2). Thus, the Attorney General was not subject to the three-year time limitation set forth in CPLR 214(2). It is also noted that per the exception in CPLR 214(2), CPLR 213’s six-year statute of limitations provision applies to “an action based upon fraud” (213(8)). Thus, respondents’ request to limit petitioner’s Executive Law §63(12) claim to a three-year statute of limitations is unwarranted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that respondents motion pursuant to CPLR 3211(a)(7) to dismiss the first cause of action alleging a violation of Executive Law § 63(12) for failure to state a claim, and in the alternative, pursuant to CPLR 3211(a)(5), to limit such claim to the applicable three year statute of limitations under CPLR 214(2), is denied, in its entirety; and it is further

ORDERED that respondents shall serve their answer within 20 days of service of this order with notice of entry; and it is further

ORDERED that the parties shall appear for a preliminary conference on February 21, 2017, 2:15 p.m.

ORDERED that respondents 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: 11/18/16



HON. CAROL R. EDMOAD
J.S.C.

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