

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

PRESENT: MANUEL J. MENDEZ Justice

PART 13

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

INDEX NO. 452308/14 MOTION DATE 04-29-2015 MOTION SEQ. NO. 001 MOTION CAL. NO.

-against-

LITVIN LAW FIRM, PC, LITVIN, TORRENS & ASSOCIATES, PLLC, and GENNADY LITVIN, individually, and as principal of LITVIN LAW FIRM, P.C. and LITVIN, TORRENS & ASSOCIATES, PLLC,

Respondents.

The following papers, numbered 1 to 4 were read on this Petition:

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... Answering Affidavits — Exhibits cross motion Replying Affidavits

Table with 2 columns: PAPERS NUMBERED, 1 - 4

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is ordered and adjudged that the Petition pursuant to Executive Law §63 (12) seeking a permanent injunction enjoining Respondents from violating Executive Law § 63 (12), GBL §§349 and 350 and New York Judiciary Law §§479 and 480, directing Respondent to render an accounting to the Attorney General, directing monetary restitution and damages, disgorgement, penalties and pursuant to CPLR §8303 (a)(6), for an additional allowance, is granted.

This special proceeding was commenced by the Attorney General of the State of New York on behalf of the People of the State of New York (hereinafter referred to as "Petitioner") and seeks to permanently enjoin Litvin Law Firm, P.C., Litvin, Torrens & Associates, PLLC, and Gennady Litvin, individually, and as a principal of Litvin Law Firm, P.C. and Litvin, Torrens & Associates, PLLC, (hereinafter referred to collectively as "Respondents") from alleged deceptive, fraudulent and illegal business practices targeting distressed homeowners seeking to lower their mortgages and prevent the foreclosures of their homes. The Petition also seeks restitution, damages, disgorgement, civil penalties and costs as against Respondents asserting causes of action pursuant to Executive Law § 63(12) for: (1) violations of the New York General Business Law §350 for false advertising and §349 for deceptive business practices; (2) Fraud; (3) violations of the New York Judiciary Law § 479 for soliciting business on behalf of an attorney and § 482 for employment by an attorney of a person to aid, assist or abet in solicitation of business.

On February 9, 2015, this Court denied Motion Sequence 002, Respondents' pre-answer motion to dismiss and set a date for argument on this Petition. Respondents were given until March 25, 2015 to serve and file an answer and opposition to the Petition. On March 18, 2015, Respondent Litvin Law Firm, P.C. filed a Chapter 7 Bankruptcy Petition in the United States Bankruptcy Court for the Eastern District. By letter dated April 7, 2015, Respondents notified this Court of the Bankruptcy Court filing and advised of a potential filing by Gennady Litvin within a

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

week. The scheduled hearing on the Petition was adjourned to April 29, 2015. Respondents correspondence seeks to have this proceeding statutorily stayed pending the outcome of the bankruptcy proceedings. Respondents subsequent letter dated April 16, 2015, states that they have, "already concluded operations and cannot realistically resume the challenged conduct..." and that the Petitioner's interest is solely pecuniary requiring a stay of this proceeding.

11 U.S.C. § 362(b)(4) provides an exception to the bankruptcy stay, it specifically permits:

"...the commencement or continuation of an action or proceeding by a governmental unit...to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power."

The purpose of 11 U.S.C. § 362(b)(4) is to prevent an entity or individual that filed for bankruptcy from, "frustrating necessary governmental functions by seeking refuge in bankruptcy court." (City of New York v. Exxon Corporation, 932 F. 2d 1020 [C.A. 2 (N.Y.), 1991]). Under circumstances where a governmental unit is suing a debtor that filed for bankruptcy to, "prevent or stop violation of fraud,...consumer protection, safety or other similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay." (Securities and Exchange Commission v. Brennan, 230 F. 3d 65 [C.A. 2 (N.Y.), 2000]). A governmental unit is permitted to fix damages for violations of laws that affect public safety and welfare, not where the government is seeking an interest in the debtor's estate and not to protect private parties. The bankruptcy stay continues to apply to proceedings brought by the governmental unit seeking to collect or enforce any judgment (Securities and Exchange Commission v. Brennan, 230 F. 3d 65 [C.A. 2 (N.Y.), 2000]). A state consumer protection action seeking injunctive relief and penalties, "is fundamentally a law enforcement action designed to protect the public." (In re General Motors LLC Ignition Switch Litigation, 2014 WL 6655796 [S.D.N.Y., 2014]).

Respondents have not stated a basis for staying the proceeding due to the bankruptcy filing by Litvin Law Firm, P.C., the purpose of this proceeding is fundamentally to protect the public and not to collect or enforce a judgment. Petitioner advised this Court that Gennady Litvin and Litvin, Torrens & Associates, PLLC did not file for bankruptcy prior to the scheduled hearing date.

Petitioner claims that from 2010 through late 2012, Respondents relied on third-party marketers to solicit homeowners to participate in a comprehensive legal services plan (hereinafter referred to as "Legal Plan"). Solicitation of consumers is alleged to be done through cold calls, brochures, television and website ads, which falsely represented that prior clients had achieved positive results. The Petition alleges that third-party marketers referred the homeowners to law firms which included the Respondents and the consumers' fees were shared by the law firms with the third-party marketers. The Petition further alleges that third-party marketers falsely represented to homeowners that a new mortgage would be negotiated, a forbearance plan would be obtained, and the homeowners would be represented by attorneys in court appearances, including providing a defense in foreclosure proceedings. According to the Petition, although the consumers were required to continue to pay the fees associated with the Legal Plan, many homeowners did not receive the services promised, and the Respondents by advising homeowners against making mortgage payments while failing to contact the mortgage providers, only accelerated foreclosure.

The Federal Trade Commission ("FTC") commenced an action in Federal Court against the third-party marketers and obtained an injunction enjoining statements that they would obtain mortgage modifications and avoid foreclosures on behalf of enrollees of the Legal Plan. Respondents were not named as parties in the FTC action. Petitioner claims that after the federal injunction, Respondents continued to make the same misleading representations through their website and promotional communications with homeowners, offering the Legal Plan at discounted rates. Petitioner also claims customers were encouraged to sign new retainer agreements while Respondents demanded fees prior to obtaining any mortgage relief.

New York Judiciary Law §479 and §482 :

New York Judiciary Law §§479 and 482, apply to the employment of individuals for the purpose of soliciting legal business directly or indirectly (In re Ravitch, 82 A.D. 3d 126, 919 N.Y.S. 2d 141 [1st Dept., 2011]). Judiciary Law §§479 and 482 typically apply to disciplinary proceedings and criminal actions involving illegal solicitation or referral of clients. Petitioner refers to these statutory provisions to establish inappropriate and fraudulent actions by the Respondents.

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]). A prima facie claim of fraud pursuant to Executive Law § 63 (12), is established by showing that, "...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 require 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 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]). 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, specifically applies to false advertising, otherwise the standard to establish a prima facie case is the same as that for a claim, pursuant to GBL §349 (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 (Non-Linear Trading Co. v. Braddis Associates, Inc., 243 A.D. 2d 107, 675 N.Y.S. 2d 5 [N.Y.A.D. 1st Dept., 1998]).

Respondents were provided with time to submit an answer and failed to do so. Respondents have also failed to oppose the Petition, and are in default. Petitioner

annexed multiple consumer affidavits and declarations to substantiate the claims made in the Petition including those of Stephen M. Garzon of Staten Island, New York and Erin Wolfe of Brooklyn, New York (Pet. Exhs. M & N). Copies of internet advertisements are printed and incorporated into the the Petition to further substantiate the Petitioner's claims of false advertising. Pursuant to Executive Law § 63 (12), GBL Article 22-A , GBL §349 and §350, Petitioner has established entitlement to an accounting and an inquest to determine the measure of restitution, damages, civil penalties and costs. Petitioner cannot obtain actual disgorgement of funds which are subject to the bankruptcy filing from this Court. The amount that would be subject to disgorgement can be identified to enable the Petitioner to seek those funds from the Bankruptcy Court.

Pursuant to CPLR §8303 (a)(6), the Court in its discretion can award costs in a sum not exceeding \$2,000 against each named respondent, in addition to statutory costs. Petitioner has stated a basis pursuant to CPLR §8303 (a)(6) to obtain costs. Petitioner has also established that it is entitled to the injunctive relief sought in the complaint. Injunctive relief is intended to safeguard consumers and is appropriate to prevent the Respondents from attempting any future deceptive practices or false advertising. The correspondence provided by the Respondents has not established that they have fully concluded operations and cannot resume the conduct alleged by the Petitioners.

Accordingly, it is ORDERED and ADJUDGED that the Petition pursuant to Executive Law §63 (12) seeking a permanent injunction enjoining Respondents from violating Executive Law § 63 (12), GBL §§349 and 350 and New York Judiciary Law §§479 and 480, directing Respondent to render an accounting to the Attorney General, directing monetary restitution and damages, disgorgement, penalties and pursuant to CPLR §8303 (a)(6) for an additional allowance, is granted on default; and it is further,

ORDERED and ADJUDGED, that Respondents are directed to provide Petitioner with a full accounting of all consumers who have paid any monies to the Respondents within thirty (30) days from the date of service of a copy of this Order with Notice of Entry; and it is further,

ORDERED and ADJUDGED, that Respondents are permanently enjoined from violating Executive Law § 63 (12), GBL §§349 and 350 and New York Judiciary Law §§ 479 and 482 and from engaging in the fraudulent, deceptive and illegal practices alleged in this Petition, and it is further,

ORDERED, that Petitioner's counsel is to serve a copy of this Order with Notice of Entry, upon Respondents and upon the Trial Support Clerk located in the General Clerk's Office (Room 119), who is directed, upon the filing of a Note of Issue and a Statement of Readiness and the payment of the proper fees, if any, to place this matter on the inquest calendar for a determination of the measure of restitution, identity of the amount subject to disgorgement by the Bankruptcy Court, damages, civil penalties, and costs.

Dated: May 12, 2015

ENTER:

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST SETTLE ORDER REFERENCE