

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS A. ADAMS,

Acting Supreme Court Justice

TRIAL/IAS, PART 33
NASSAU COUNTY

QARIA OSMANZAI, ALFRED SANTANA, ROSALIND
SANTANA, JULIO MORALES, ARNOLD DRAKES,
YVONNE ELLIS, GLENDA STEWART, ANDERSON
ANDREWS, FERNE MAYCOCK, BERNARD KILKENNY,
CORA WILLIAMS, GERONIMO DELEON, JR.,
SHARLENE CUMMINGS, FELICIA JOHNSON, KATIA
LAPAIX-DORCELET, CHERYL FORDE, FINBAR FRANCIS,
ROBERT YONKES, SUSAN YONKES and JUDITH CUDJOE,

Plaintiff(s),

MOTION DATE: 9/23/11

INDEX NO.: 9471/11

SEQ. NO. 3

-against-

SAVE MY HOME CORP., SAVE MY HOME NOW, INC.,
SAVE MY HOME TODAY, INC., HUMA HALIMI (a/k/a
HELEN HALIMI) NAVIN MENON, EXPRESS HOME
SOLUTIONS, INC. (a/k/a EXPRESS DEBT SETTLEMENT
a/k/a HOME MITIGATION HELP), EXPRESS MODIFICATIONS
INC., EMPIRE HOME SAVER INCORPORATED (a/k/a
EMPIRE HOME SAVINGS a/k/a EMPIRE HOME SAVINGS
CORP.), STEPHEN CROWLEY, DAVID J. GOTTERUP,
LUIGI DELLAMONICA, YELENA TELESHOVA, MILADYS
BOHORQUEZ, LLOYD DOE, KENNETH SAROSI, JASON
GREEN, ALBERT KALASTEIN and GREG GARVIN,

Defendant(s)

The defendants Yelena Teleshova and Albert Kalastein's motion, pursuant to CPLR 3211(a)(7), to dismiss the plaintiffs' complaint as against them is determined as hereinafter provided.

The basic facts of this case, as alleged within the plaintiffs' 138 page complaint, are delineated in the Court's August 23, 2011 order and need not be repeated here. Presently, prior to disclosure, the movants seek to dismiss the plaintiffs' pleading as against them asserting, in sum, that it fails to specifically allege claims as to them due, in large part, to their purported status as mere employees and independent contractors (see defendant Yelena Teleshova's 7/27/11

affidavit, para.2; defendant Albert Kalastein's 7/27/11 affidavit, para.3).

"On a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the Court must afford the pleading a liberal construction, accept all the facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (Rietschel v Maimonides Med. Ctr., 83 AD3d 810; Leon v Martinez, 84 NY2d 83,87). Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff stated one and, unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate" [internal quotation marks and citations omitted]. Evidence submitted by a defendant in support of a motion, pursuant to CPLR 3211(a)(7) does not warrant dismissal unless it conclusively establishes that the plaintiff has no cause of action" (Young v Campbell, ___ AD3d ___ [2nd Dept; 8/23/11] quoting Reitschel supra; Guggenheimer v Ginzburg, 43 NY2d 268,274-275; Lawrence v Graubard Miller, 11 NY3d 588,595; Sokol v Leader, 74 AD3d 1180).

Here, apart from the causes of action voluntarily discontinued by the plaintiffs (see plaintiffs' 9/2/11 memorandum of law, p.41), the movants have failed to establish that, liberally construed and accepting all the facts alleged therein to be true, the complaint fails to state its various causes of action as against them. For example, contrary to their largely conclusory affidavits, Ms. Teleshova and Mr. Kalastein are alleged to have actively participated in the purported fraudulent scheme, inter alia, by agreeing to personally handle the plaintiff Cora Williams' file (see 6/26/11 complaint, para.257), endorsing a payment check "SrVP" (para.343), advising the plaintiffs Robert Yonkes and Susan Yonkes that, if their modification application was unsuccessful, a refund would be forthcoming (para.397) and assuring the plaintiff Bernard Kilkenny not to worry about a potential foreclosure (para.239) (see Real Property Law §265-b; Banking Law §590 and General Business Law §349).

Accordingly, the defendants Yelena Teleshova and Albert

Kalastein's motion, pursuant to CPLR 3211(a)(7), to dismiss the plaintiffs' complaint as against them is denied.

Dated: OCT 18 2011


A.J.S.C.

ENTERED
OCT 21 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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NASSAU INDEX # _____
FILED

OCT 21 2011

COUNTY CLERK OF
NASSAU COUNTY