STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

THE PEOPLE OF THE STATE OF NEW YORK, by ELIOT SPITZER, Attorney General of the State of New York,

Petitioner,

-against-

INDEX NO. 2073-03

APPLIED CARD SYSTEMS, INC., and CROSS COUNTRY BANK, INC.,

Respondents.

B E F O R E: HON. JOSEPH R. CANNIZARO, Justice of the Supreme Court

TRANSCRIPT OF PROCEEDINGS in the above-entitled matter held in the Albany County Courthouse, Albany, New York, on Friday, May 28th, 2004 commencing at 11:50 a.m.

1 MR. KAPLINSKY: Whether or not there was
2 deception. Not just an issue of injury.
3 THE COURT: Aren't you arguing that there was
4 deception?
5 MR. KAPLINSKY: I am arguing both.
6 MR. BRYCE: Only other thing is, again, of
7 all of the complaints we reviewed from the State
8 only three related to Cap. That is all I have,
9 Your Honor.
10 THE COURT: Do you have anything you want to
11 say?
12 MR. FLEISCHER: No, Your Honor.
13 THE COURT: CPLR Section 409-b requires that
14 on the return date of the petition the Court shall
15 make a summary determination upon the pleadings,
16 papers and submissions to the extent that no
17 triable issue of fact is raised. The tests and
18 standards applied to decide whether Petitioners'
19 answer and affidavits create triable issues of
20 fact are the same as those applied on a motion for
21 summary judgment pursuant to CPLR 3212, and
22 particularly the proponent of the summary judgment
23 motion must make a prima facie showing of
24 entitlement to judgement as a matter of law
25 tendering sufficient evidence to demonstrate the

1 absence of any material issue of fact. Failure to
2 make such prima facie showing requires a denial of
3 the motion, regardless of the sufficiency of the
4 opposing papers. Once this showing has been made,
5 however, the burden shifts to the party opposing
6 the motion for summary judgment to produce
7 evidentiary proof in admissible form sufficient to
8 establish the existence of material issues of fact
9 which require a trial of the action. All
10 competent evidence must be viewed in the light
11 most favorable to the party opposing the motion.
12 Here the Attorney General has submitted
13 volumes of evidentiary proof establishing
14 Respondents' repeated and persistent fraudulent,
15 illegal and deceptive practices. For example, the
16 Attorney General submitted over 100 pages of
17 direct mail solicitations, credit card
18 applications, credit card agreements,
19 telemarketing scripts, website pages and account
20 billing statements. These documents demonstrate
21 on their face that the Respondents have repeatedly
22 and persistently engaged in deceptive marketing
23 practices, and have misrepresented the terms and
24 conditions of their credit cards and related
25 services. In addition, the Attorney General

1 submitted 22 consumer affidavits and 202 consumer
2 complaints that were filed with the Attorney
3 General, 160 of which were filed with the AG's
4 Office on complaint forms signed by the consumer
5 under penalty of perjury, 87 consumer complaints
6 that New York consumers filed with the FTC, and
7 147 written consumer complaints that New York
8 consumers filed with the FDIC, all of which
9 provide unassailable proof that the Respondents
10 have engaged in unlawful and deceptive debt
11 collection practices.
12 The Attorney General has also submitted the
13 affidavits of eight former ACS employees which
14 further corroborate the consumer testimony. These
15 affidavits contained detailed, firsthand accounts
16 of fraudulent and abusive collection practices in
17 which ACS collectors engaged, and the manner in
18 which these practices were encouraged by
19 Respondents.
20 Now the front end claims and the back end
21 claims are characterized as follows. Front end
22 claims you have deceptive marketing and
23 advertising solicitation practice involving the
24 Cap insurance, the deceptive credit limit
25 disclosures, solicitations that were deceptive and

1 misleading as to the amount of credit actually
2 available after front loading a whole bunch of
3 costs that wound up on many consumer bills,
4 forcing them into an over-the-limit circumstance,
5 and charges inured to them by virtue of that, and
6 misleading representations as to secured credit
7 card accounts. On all of the foregoing front end
8 claims the Respondents' disclosures, to the extent
9 they were given at all, were inadequate to offset
10 the deceptive impressions created by their
11 solicitations as a matter of law and fact.
12 Whether an advertisement or claim is deceptive
13 depends on the overall impression of the
14 solicitation or advertisement. The ultimate
15 impression upon the minds of the reader arises
16 from the sum total of not only what is said, but
17 also of all that is reasonably implied. Even
18 advertisements or claims that are literally or
19 technically true are considered deceptive if they
20 create a false impression, or if they are subject
21 to more than one interpretation, one of which is
22 false.
23 As I have previously stated, under 63(12) of
24 the Executive Law the test for fraud is whether
25 the targeted act has the capacity or tendency to

1 deceive or creates an atmosphere conducive to
2 fraud that the Executive Law Section is meant to
3 protect not only average consumers, but also
4 ignorant, unthinking and credulous consumers.
5 Under these tests the Court finds as a matter of
6 law and fact that the Petitioners have established
7 their front end claims entitling them to summary
8 judgement on the front end claims.
9 With respect to the back end claims,
10 collection practices relative to misrepresenting
11 identity to get card holders on the phone,
12 contacting card holders at their places of
13 employment after being instructed not to do so,
14 using rude, insulting and obscene language, making
15 false and improper threats, making repeated and
16 successive calls to abuse and harass, debiting
17 payments from card holders' bank accounts without
18 authorization, including what has been referred to
19 as assumptive pay-by-phones, misrepresenting pay
20 off plans and pay off amounts, check truncation
21 and the like, the Court finds that as a matter of
22 law and fact the Petitioners have established
23 their back end claims warranting them to be
24 entitled to summary relief on this application.
25 Viewing the Petitioners' submissions in a

1 light most favorable to the Respondent, the
2 submissions compel the conclusion that no triable
3 issue of fact exists as to the claims of deceptive
4 marketing practice and the unlawful and deceptive
5 debt collection practice asserted against the
6 Respondents. Indeed the Petitioners' submissions
7 satisfy the prima facie showing required to
8 warrant judgement as a matter of law, if not
9 rebutted by the Respondents. Such a showing
10 shifted the burden to the Respondents to lay bare
11 their proof and demonstrate the existence of a
12 triable issue of fact. The Court finds that the
13 Respondents have failed to meet their burden in
14 this regard. Specifically, the Respondents have
15 offered the affidavits of a few Cross Country Bank
16 and Applied Card Systems officers and employees
17 which consist of the repetitious, similar,
18 generally conclusory and self-serving denials of
19 the claims made by the Petitioner. None of these
20 affidavits address the specific claims that were
21 made by specific consumers in this proceeding, and
22 which are supported by the testimony of other
23 Applied Card System former employees. This is
24 particularly true as to the back end claims.
25 Rather, Respondents attempt to cast doubt on

1 reliability and accuracy of the consumer and
2 former employee testimony in this proceeding on
3 the whole by, number one, demonstrating that in a
4 parallel Minnesota action a few complainants when
5 confronted made inconsistent statements concerning
6 the number of times that Applied Card Systems debt
7 collectors actually called them, which is
8 irrelevant and fails to refute the testimony of
9 the complainants in this proceeding, and two, by
10 showing that the former employees had been
11 terminated, which does not refute their testimony,
12 but merely goes to the weight to be given such
13 testimony. Respondent clearly overlooked the fact
14 that even if the Court were to accept the number
15 of times Respondents determined that these
16 Minnesota complainants were actually called, the
17 number is still excessive and constitutes
18 harassment supporting both claims under GBL
19 Article 29-h, as well as Executive Law 63(12)
20 claims for persistent illegal activity relative to
21 the debt collection.
22 The Court also notes that with respect to
23 the front end claims, as I have already stated,
24 the affidavits from the various experts submitted
25 by the Respondents the Court finds to be taylor

1 made to attempt to create an issue of fact when,
2 in fact, they are really conclusory and
3 self-serving affidavits that fail to rise to the
4 level of creating an issue of fact warranting
5 trial on any of the front end claims asserted by
6 the Petitioner.
7 With respect to the back end claims, the
8 Respondents cannot refute the testimony of the
9 consumers and former employees as to the specific
10 abusive and unlawful debt collection practice that
11 Applied Card Systems engaged in, and which were
12 encouraged by Applied Card Systems, with mere
13 denials that such testimony is "false". In this
14 regard the Court notes that while ACS contends its
15 debt collection policies and procedures are
16 designed to prohibit abusive, harassing and
17 unlawful conduct and are incorporated into its
18 collection outbound training manual, Applied Card
19 Systems has failed to submit the manual as an
20 exhibit, even though it refers to it as having
21 been submitted.
22 Respondents also employ a "we stopped the
23 deception" defense. Respondents essentially
24 contend that because they have ceased making some
25 of the alleged false and misleading statements

1 identified in the petition, that there is no merit
2 to the petition. For example, Respondents argue
3 that they ceased promoting credit lines of up to
4 $2,500.00 and now only offer credit lines up to
5 $1,000.00, and currently only enroll consumers in
6 Applied Advantage in response to a consumer's
7 affirmative request. In fact, Respondents'
8 solicitation, whether for credit lines up to
9 $1,000.00 or $2,500.00, are equally deceptive, as
10 is their use of acceptance forms with preprinted
11 check offs for membership in Applied Advantage.
12 In this regard the Court notes that the
13 representations and the solicitations as to the
14 pre-selected unsecured credit lines of up to
15 $1,000.00 or up to $2,500.00 do not constitute
16 typical available credit and are not
17 representative of what is typical that most
18 consumers could expect to receive as a credit
19 line, and are misleading as a matter of law and
20 fact. Moreover, the discontinuance of fraudulent
21 or deceptive practices cannot relieve Respondents
22 from liability for its past actions, including
23 liability for restitution, damages and civil
24 penalties, nor does it obviate the need for
25 injunctive relief, as there is no assurance that

1 the fraudulent and deceptive practices alleged
2 will not be renewed or continued.
3 Accordingly, for the foregoing reasons the
4 Court grants the Petitioners summary judgment on
5 the issue of liability on both the front end and
6 back end claims asserted in the petition.
7 Gentlemen, that brings me to the issue of
8 the relief that need be granted and the procedures
9 that are going to be applicable to fashioning an
10 appropriate remedy in this particular case.
11 Initially the Court is going to grant Petitioners'
12 request for injunctive relief to the extent that
13 the Respondents are precluded and enjoined from
14 continuing any of the fraudulent and misleading
15 practices as to the front end claims, and as to
16 the back end claims as asserted in Petitioners'
17 papers.
18 As to the issue of restitution, damages and
19 penalties, what I want done here is within 30 days
20 I want the Petitioners' counsel to submit to me a
21 proposal as to the procedure that you would
22 proffer to be used to determine the appropriate
23 damage, penalty and restitution relief that might
24 be awarded in this case. What type of relief you
25 are going to be seeking.

1 Within 30 days after doing the filing and
2 serving I want the Respondents to file a similar
3 proposal in response as to the procedure and
4 substantive approach to the relief that you think
5 is appropriate under these circumstances, and 15
6 days thereafter you are going to file a reply to
7 that. Then I will set up a conference to assess
8 what procedure the Court is going to pursue on the
9 issue of damages, restitution and penalties in
10 this matter.
11 I want you, Mr. Fleischer, to submit an
12 order to me on notice to the Respondents' counsel
13 consistent with what I have determined here, and
14 then I want somebody to get all of these papers
15 out of my office.
16 (Discussion off the record.)
17 THE COURT: Do you guys understand where we
18 are here? Anything further, fellows? Thank you.
19 (Proceedings concluded.)
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C E R T I F I C A T I O N

I, Deborah Mehm, a Senior Court Reporter in the Unified Court System, Third Judicial District, do hereby certify that the foregoing is a true and accurate transcript of the proceedings reported stenographically by me in the above matter held before Hon. JOSEPH CANNIZZARO, Supreme Court Justice, at Albany, New York on May 28th, 2004.

Deborah Mehm

Deborah Mehm, C.S.R.