

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,  
SECOND JUDICIAL DEPARTMENT

Wimbish v. Crema-Samalya

2026 NY Slip Op 02691 (N.Y. Ct. App. 2026) · Decided April 29, 2026

SUMMARY

The Appellate Division, Second Department reversed an order denying Joan Crema-Samalya's motion to dismiss claims under General Business Law § 349 and for fraud. The court held that the complaint did not adequately allege materially misleading consumer-oriented conduct or plead fraud with the required factual detail under CPLR 3016(b).

CASE DETAILS

|                       |                                                                                                                                                                                                                                                                                                                                                                                |
|-----------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Supreme Court of the State of New York, Appellate Division, Second Judicial Department                                                                                                                                                                                                                                                                                         |
| WRITING FOR THE COURT | Angela G. Iannacci, J.P.; Lara J. Genovesi, J.; Carl J. Landicino, J.; Laurence L. Love, J.                                                                                                                                                                                                                                                                                    |
| JURISDICTION          | Supreme Court of the State of New York, Appellate Division, Second Judicial Department                                                                                                                                                                                                                                                                                         |
| DECIDED               | April 29, 2026                                                                                                                                                                                                                                                                                                                                                                 |
| DISPOSITION           | reversed                                                                                                                                                                                                                                                                                                                                                                       |
| PROCEDURAL POSTURE    | Defendant Joan Crema-Samalya appealed from an order denying her pre-answer motion under CPLR 3211(a)(7) to dismiss the complaint for failure to state a cause of action.                                                                                                                                                                                                       |
| STANDARD OF REVIEW    | On a CPLR 3211(a)(7) motion, the court accepts the facts alleged in the complaint as true, affords the plaintiff every favorable inference, and determines only whether the alleged facts fit within a cognizable legal theory. Affidavits submitted by the pleading party may be considered to remedy pleading defects, with their factual allegations likewise assumed true. |
| PRECEDENTIAL VALUE    | published                                                                                                                                                                                                                                                                                                                                                                      |
| PARTIES               | Joan Crema-Samalya v. Willie Wimbish                                                                                                                                                                                                                                                                                                                                           |

TOPICS

- motions to dismiss
- deceptive trade practices
- consumer protection
- pleadings
- appellate procedure

## PRACTICE AREAS

civil procedure

consumer protection

deceptive trade practices

fraud

insurance litigation

## QUESTIONS PRESENTED

1. Whether the complaint stated a cause of action against Crema-Samalya under General Business Law § 349.
2. Whether the complaint stated a cause of action for fraud with the particularity required by CPLR 3016(b).
3. What standard governs a motion to dismiss under CPLR 3211(a)(7), including consideration of affidavits submitted by the pleading party.

## HOLDINGS

1. On a motion to dismiss for failure to state a cause of action, the court accepts the complaint's factual allegations as true, affords the plaintiff every favorable inference, and determines whether the alleged facts fit within any cognizable legal theory; a pleading party's affidavits may be considered to remedy defects in the pleading, with their factual allegations also assumed true.
2. The complaint failed to state a General Business Law § 349 claim because it did not identify any materially misleading conduct by Crema-Samalya. The alleged text message about expenses to be submitted for payment by the insurer did not reasonably communicate that she had verified FBFR's permits or acted as a manager of FBFR's performance.
3. The complaint failed to state a fraud claim because it pleaded the elements of fraud only conclusorily and did not identify any particular statement in the text messages that constituted a misrepresentation of fact, as required by CPLR 3016(b).

## KEY QUOTATIONS

*"On a motion to dismiss pursuant to CPLR 3211(a)(7), the court should accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory"* ([\*1]-[\*2])

*"To state a cause of action under General Business Law § 349 "a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice""* ([\*2])

*"To state a cause of action alleging fraud, "a plaintiff must allege 'a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury'"* ([\*2])

## FACTUAL BACKGROUND

A fire damaged Willie Wimbish's property. Joan Crema-Samalya, an insurance adjuster employed by Mountain Valley Indemnity Company, connected Wimbish with Five Boro Fire Restoration, Inc., with which Wimbish

contracted in January 2018. FBFR performed restoration work through November 2019, and a licensed contractor later determined in March 2020 that the work was deficient. Wimbish alleged that Crema-Samalya violated General Business Law § 349 and committed fraud based on her communications and involvement with FBFR.

## PROCEDURAL HISTORY

After a fire damaged the plaintiff's property, the plaintiff sued Crema-Samalya and others, asserting claims under General Business Law § 349 and for fraud. Crema-Samalya moved before answering to dismiss the claims against her under CPLR 3211(a)(7). The Supreme Court, Kings County, denied the motion without explanation. The Appellate Division reversed and granted the motion.

## DISPOSITION

reversed

## CASES CITED

- Leon v Martinez, 84 NY2d 83, 87-88
- Katsorhis v 718 W. Beech St, LLC, 234 AD3d 744, 747
- City of New York v Smokes-Spirits.Com, Inc., 12 NY3d 616, 621
- Koch v Acker, Merrall & Condit Co., 18 NY3d 940, 941
- Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, 85 NY2d 20, 26
- North State Autobahn, Inc. v Progressive Ins. Group Co., 102 AD3d 5, 13
- Keshin v Montauk Homes, LLC, 162 AD3d 758, 760
- Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173, 178
- Lama Holding Co. v Smith Barney, 88 NY2d 413, 421
- Atlasman v Korol, 238 AD3d 826, 829
- Pare v Aalbue, 222 AD3d 769, 775
- K. M. v Ursuline Sch. of New Rochelle, 241 AD3d 673, 676
- Ikezi v 82nd St. Acads., 221 AD3d 986, 988