Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D28045
W/kmg

_____AD3d_____ Argued - June 11, 2010

MARK C. DILLON, J.P.
JOSEPH COVELLO
DANIEL D. ANGIOLILLO
SANDRA L. SGROI, JJ.

2009-11653 DECISION & ORDER

William Corsello, et al., appellants, v Verizon New York, Inc., formerly known as New York Telephone Company, et al., respondents.

(Index No. 39610/07)

David M. Wise, Babylon, N.Y., for appellants.

Kirkland & Ellis LLP, New York, N.Y. (Joseph Serino, Jr., and Patrick F. Philbin pro hac vice of counsel) for respondents.

In an action, inter alia, to recover damages for inverse condemnation, the plaintiffs appeal from an order of the Supreme Court, Kings County (Demarest, J.), dated November 5, 2009, which denied their motion, among other things, for class action certification pursuant to CPLR article 9, and denied their separate motion for leave to amend the first amended complaint.

ORDERED that the appeal from so much of the order as denied the plaintiffs' motion for leave to amend the first amended complaint is dismissed, as academic; and it is further,

ORDERED that the order is affirmed insofar as reviewed; and it is further,

ORDERED that one bill of costs is awarded to the defendants.

Contrary to the plaintiffs' contentions, the Supreme Court properly denied their motion, inter alia, for class action certification. The Supreme Court properly found that the proposed class definition was overbroad (*see Klein v Robert's Am. Gourmet Food, Inc.*, 28 AD3d

63, 71). Furthermore, the plaintiffs failed to establish that questions of law or fact common to the class predominate over any questions affecting only individual members (*see* CPLR 901[a][2]; *Morrissey v Nextel Partners, Inc.*, 72 AD3d 209; *Solomon v Bell Atl. Corp.*, 9 AD3d 49, 53; *Hazelhurst v Brita Prods. Co.*, 295 AD2d 240, 241-242; *Small v Lorillard Tobacco Co.*, 252 AD2d 1, 9, *affd* 94 NY2d 43; *Mitchell v Barrios-Paoli*, 253 AD2d 281, 291), and that their claims or defenses were typical of those of the class (*see* CPLR 901[a][3]; *Dimich v Med-Pro, Inc.*, 34 AD3d 329, 330; *Ross v Amrep Corp.*, 57 AD2d 99, 102-103).

The appeal from so much of the order as denied the plaintiffs' motion for leave to amend the first amended complaint has been rendered academic in light of our determination on a companion appeal (*see Corsello v Verizon New York, Inc.*, _____AD3d_____ [Appellate Division Docket No. 2008-10448; decided herewith]).

DILLON, J.P., COVELLO, ANGIOLILLO and SGROI, JJ., concur.

ENTER:

Matthew G. Kiernan
Clerk of the Court