

At an IAS Term, Part Comm-1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 5th day of November, 2009

P R E S E N T:

HON. CAROLYN E. DEMAREST,

Justice.

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WILLIAM AND EVELYN CORSELLO, on behalf of themselves and all others similarly situated,

Plaintiffs,

- against -

**DECISION
AND ORDER**

Index No. 39610/07

VERIZON NEW YORK INC. (F/K/A NEW YORK TELEPHONE COMPANY), VERIZON COMMUNICATIONS INC., AND JOHN DOES,

Defendants.

-----X

Motion Sequence Number 8: Motion for Class Certification

Papers Numbered

Notice of Motion

Affidavits (Affirmations) Annexed _____

Appendix to Affirmation of David M. Wise in Support Volumes 1-2

Opposing Affidavits/Affirmations

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Plaintiffs' Memorandum of Law

Defendants' Memorandum of Law

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Motion Sequence Number 9: Motion to Amend the Pleadings

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Defendants' Memorandum of Law

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Plaintiffs William and Evelyn Corsello move, pursuant to CPLR § 902, for class certification. Plaintiffs also move, pursuant to CPLR 3025(b) to amend the First Amended Complaint. For the reasons set forth below both motions are denied.

Background

Defendants Verizon New York Inc. and Verizon Communications Inc. (collectively, “Verizon”) provide telephone service in New York City as the corporate successor to the New York Telephone Company which was incorporated in 1896. Briefly, the relevant facts are that, in order to service high density neighborhoods in New York City, where buildings are attached and access to the street is limited, Verizon extends its telephone lines from the public way or street to individual homes and businesses by implementing an “inside block architecture,” which requires Verizon to place terminal boxes on the rear-walls of privately owned buildings (“rear-wall terminal” or “terminal box”) from which telephone cable is strung from one host building’s terminal box to the next terminal box circumnavigating the interior of the block through rear yards until the “inside plant” network circuit for that particular block is complete.¹ Plaintiffs, as owners of property encumbered by one of the described rear wall terminals, have commenced this prospective class action on behalf of themselves and the owners of other properties throughout New York City so encumbered by defendants’ equipment, allegedly without permission or compensation, seeking declaratory and injunctive relief

¹For a more detailed account of Verizon’s “inside block architecture” and the background of this case see *Corsello v Verizon*, 21 Misc 3d 1116[A], [Kings Co. Sup. Ct. 2008].

and monetary damages for trespass upon their property, compensation pursuant to Transportation Corporations Law § 27 which entitles them to such compensation, and pursuant to General Business Law § 349, for deceptive practices by which defendants avoid the payment of compensation.

In their First Amended Complaint (Complaint) plaintiffs assert as the basis of their class action that:

[T]he Defendant Telephone Corporation has, as a matter of corporate policy, systematically affixed Rear Wall Terminals and related Outside Plant fixtures dedicated to the use of the general public to numerous buildings throughout various neighborhoods in the five boroughs of the City of New York without negotiating for, or making, the payment of full compensation to the owners of such buildings, as required under Section 27 of the New York Transportation Corporation [*sic*] Law. (First Amended Complaint ¶ 1).

The Complaint alleges that the Rear Wall Terminal (Terminal) was affixed to plaintiffs' building by defendant "in the 1970's or 1980's or earlier" and has been maintained and upgraded for the benefit of Verizon customers in "numerous" buildings without "any written right-of-way agreements or easements from the Corsellos or prior owners" of the building (Complaint ¶ 30-32).

The Complaint further alleges:

33) Defendant never paid full compensation to the Corsellos or any prior owners of 185 Vanderbilt before installing these facilities, and never disclosed to the Corsellos or the prior owners of this property their right to receive full compensation for use of their properties.

34) Defendant created the false impression that Defendant had a right to attach the Rear Wall Terminal and associated Outside Plant to 185 Vanderbilt as a condition for providing service to the building.

35) The Corsellos made complaints about the Rear Wall Terminal and related Outside Plant attachments at 185 Vanderbilt, and requested compensation from Defendant (a) for damages already incurred as a result of the encumbrances; and (b) for compensation for future encumbrances in connection with the Outside Plant, or the complete removal of that plant and repair of the damage caused by that plant.

36) Consistent with what is Defendant's longstanding general policy of not setting a precedent of compensating these uses as required pursuant to Trans. Corp. Law § 27, Defendant refused these requests. (Complaint ¶¶ 33-36).

In fact, pre-certification discovery has revealed that on February 9th, 1911, a prior owner of plaintiffs' property, one William Beard, signed a written permission form for New York Telephone Company to install its telephone cable "in the following manner [*pre-printed*] 'Cable with terminal box to be attached to wall of rear buildings, 185-187-189 Vanderbilt Ave' [*handwritten*]." The printed portion of the form includes the following limitation: "This permission is revocable by ninety days previous notice in writing, and is given on the condition that the work shall be done with care, and that all damage to the premises caused thereby shall be made good."¹¹ Although plaintiff William Corsello's testimony indicates that the original box must have been moved or replaced several times, as evidenced by several sets of holes created by anchoring devices, no compensation of any kind was paid or offered until plaintiffs' attorney

¹¹Precedent clearly establishes that such license would lapse, as a matter of law, upon transfer of title. (*See Bunke v New York Telephone Co.*, 110 AD 241, 247 [1st Dept 1905], *aff'd* 188 NY 600 [1907]; *Cassata v New York New England Exchange*, 250 AD2d 491 [1st Dept 1998]).

contacted Verizon on their behalf, nor have any repairs been made to remedy the damage to the building. (William Corsello Deposition at 36, 86-89, 98, 151, 154-159).

Although the Corsellos acquired the property in 1955, they contend that they first became aware of the presence of the terminal box in 1977. (Exhibit 2 to the Wise Affirmation in Reply, William Corsello Deposition at 86:11-15). Verizon submits a document showing that in 1978, Mr. Corsello gave the New York Telephone Company (Verizon's predecessor) verbal permission to splice a cable on the rear-wall of the subject property (Exhibit 40 to Serino Affirmation).

It was not until 1986 that Mr. Corsello first formally lodged a complaint about the terminal box when a burglar apparently used some of the cables emanating from the box to climb into a tenant's window on the second floor of the subject premises. (William Corsello Deposition at 40-41). It was at that time that Mr. Corsello first contacted AT&T, a Verizon predecessor then in control of the box. A representative of AT&T visited the property and was requested by Mr. Corsello to remove the terminal box and any telephone wires on the building (William Corsello Deposition at 34-37). Mr. Corsello testified that he told the representative "to take it off" (*Id.* at 103:16-19) and "get everything out of here" (*Id.* at 102:12-13). Mr. Corsello states that the representative responded that he could not remove the box and claimed that AT&T had a right to maintain it. Mr. Corsello also testified that he requested "rent" for the use of his building, to which the agent replied "We don't do that" (*Id.* at 49:10-11). However, it is not

disputed that in lieu of removing the box, the representative offered to relocate it, which was done.

Relying on the contention that they never gave permission to Verizon to install the terminal box and never were compensated for the use of their property or the damage sustained, plaintiffs describe Verizon's method of installing rear-wall terminals as an "attach and run" policy whereby terminal boxes are attached to the rear-walls of buildings without the consent of the building owners and without informing owners of their right to compensation. Apparently unaware of the 1911 permission form in Verizon's files, plaintiffs allege in their complaint that, without permission, Verizon field technicians frequently scale walls or fences to initially install and subsequently gain access to rear-wall terminals, causing damage to the building and leaving behind a mess of wires, cable fragments and wire clippings. Plaintiffs proffer support for these allegations in the form of affidavits and deposition testimony of former Verizon employees Jeremy Walsh,³ a technician, and John C. Donovan, who was "responsible for the methods and procedures utilized by [Verizon's] outside plant engineers and right-of-way agents and managers" during his twenty-four year tenure at NYTEL and NYNEX (both entities that are now part of Verizon). (Donovan Affidavit in Support of Motion for Class Certification ¶ 9). In his affidavit, Mr. Donovan claims that, during his time there, Verizon had a general practice of not obtaining "a formal right-of-way" for rear-wall terminals (*Id.* ¶ 11).

³Mr. Walsh's affidavit was previously submitted in opposition to Verizon's motion to dismiss.

Instead, he states that, prior to commencing work, technicians would inform owners that “he or she would be going to the back of the building and would be attaching a small box to the back of the building in order to provide service.” (*Id.* ¶ 13) Mr. Donovan claims that “the operative rule was that rear-wall terminals, and other outside plant equipment, were to be installed without the payment of compensation to property owners.” (*Id.* ¶ 19). He also states that outside plant engineers were not authorized to pay compensation for the terminals and right-of-way personnel “were instructed to avoid the payment of monetary compensation using excellent salesmanship, plus all legal and moral methods of coercion.” (*Id.* ¶ 20). However, in his deposition testimony, Mr. Donovan qualified these statements by acknowledging that Verizon’s policy was to “Negotiate on a true and reasonable basis. Be fair, don’t cheat, don’t lie, don’t steal, to negotiate in good faith with the land owner.” (Exhibit 24 to Serino Affirmation, Donovan Deposition at 199:19-22).

Mr. Walsh, a former Verizon employee, characterizing Verizon’s methods as “attach and run,” claims that Verizon infrequently obtained permission to install and maintain rear-wall terminals. However, at his deposition, he testified that, while he was an engineer for Verizon, there were actually instances where he would ask Verizon’s right-of-way department to secure permission from an owner to install a rear-wall terminal on the property. (Exhibit 26 to Serino Affirmation, Walsh Deposition at 47:12-16). Mr. Walsh also testified that when he was a Verizon technician implementing work orders he would “never deceive or misrepresent to the customer.” (*Id.* at 75:24-25).

In opposition to plaintiffs' instant motion, Verizon's policies are described in affidavits submitted on behalf of Verizon by Rocca Ida, Christopher Levendos,⁴ and Denis Neil, all current employees of Verizon. Mr. Ida is currently the individual at Verizon responsible for promulgating Verizon's right-of-way policy. He claims that he has personally worked on Verizon's right-of-way policies dating back to 1990 and is familiar with the policies dating back to the 1970s. He states that, as a general policy, Verizon "obtains permission to place rear wall terminals on private property and obtains this permission in the best form it can." (Exhibit 2 to Serino Affirmation, Affidavit of Rocco Ida ¶ 3). This assertion is buttressed by Verizon's current right-of-way policy, submitted in opposition to the motion, which states: "[I]t is [Verizon's] policy to gain facility deployment rights on private property in writing, more specifically in the form of an easement or right of way, wherever feasible. An easement or right of way is absolutely required in every case when facilities serve multiple properties" (Exhibit 32 to Serino Affirmation, Verizon Document No. 2002-00218-OSP at 2.0). Mr. Ida claims that this policy is long-standing and dates back to 1979. As an example, Mr. Ida points to a right-of-way policy document from 1986 which identifies a set of forms that are "intended for securing permission to place cable, terminal, etc. on or within a building."

⁴Mr. Levendos, Verizon's Executive Director of Operations for New York City, points out that plaintiffs' expert, Jeremy Walsh, testified at his deposition that his primary job at Verizon was to "feed blocks and not to rehab blocks." (Exhibit 26 to Serino Affirmation, Walsh Deposition at 129:8-11). Thus, Mr. Levendos claims that Mr. Walsh was probably a feeder engineer and that "feeder jobs do not involve the placement of Verizon facilities on private property; instead, feeder facilities are generally placed in the street or otherwise in the public right-of-way." (Levendos Affidavit at 7).

(Serino Affirmation, Exhibit 37 at 2). Ida and Levendos agree that, although it is not the most ideal form of permission, verbal permission is sometimes the only form of permission a right-of-way agent is able to obtain. (*see* Exhibit 1 to Serino Affirmation, Levendos Affidavit ¶¶ 4-7).

With respect to compensation, Ida claims that Verizon’s policy governing the payment of compensation is straightforward: Verizon pays what is fair and reasonable. However, he explains that “first and foremost, the amount of compensation that is fair and reasonable is a matter of negotiation between Verizon and the property owner” (Ida Affidavit ¶ 5) and varies depending on the circumstances of each case. It is common for owners to grant permission without demanding compensation according to Levendos who adds that sometimes compensation is nominal.⁵ According to Ida, Verizon’s official company policies dating back to 1979 warn against the use of fraud or deceit (*see* Exhibit 30 to Serino Affirmation at 3.05).

Joseph P. Messina, a right-of-way agent for Verizon in 1986, attests, in opposition to the motion for certification that, in the summer of 1986, he received a request “to design a job to relocate a cable so that it would no longer be underneath a second-story window on the rear wall of Plaintiffs’ property.” (Exhibit 4 to Serino Affirmation, Affidavit of Joseph P. Messina at 2). In order to relocate the cable, the box had to be moved. Messina explains that at least three written documents evidence Mr. Corsello’s

⁵Mr. Levendos stated at his deposition that although the amount of compensation varies on a case-by-case basis, on some occasions, cash has actually changed hands (Exhibit 5 to the Wise Reply Affirmation, Levendos Deposition at 185).

consent to the relocation of the terminal box: a work order prepared by Mr. Messina which diagrams the box's relocation, a "Right of Way Request" form prepared by Messina on July 31, 1986, requesting the right-of-way department to secure permission to move the box in accordance with the details specified in the work order, and a P-3078A permission form. The Right of Way Request form contains a handwritten note which states "R/W secured 9/86." Mr. Messina claims that this notation indicates that a representative met with the property owner and secured permission to move the box. The note states that workers were to access the building on Wednesday only and were to contact a "knife grinder" on the first floor or Mr. Corsello by phone prior to commencing work. Mr. Corsello admits that the telephone number listed on the right-of-way request form is his own and that Wednesday is one of the days that his tenant, the knife grinder (who admittedly receives telephone service at the building), is present at the building (William Corsello Deposition at 120-122). At the bottom of the right-of-way request form, the "R/W COMPLETED" field is circled, indicating, according to Messina, that the right-of-way supervisor certified receipt of the right-of-way by signing the form.

The third document cited by Mr. Messina, a "P-3078A" form, is partially handwritten and grants the telephone company "permission . . . to relocate cable and terminal on the rearwall of the building at 185 Vanderbilt Ave. Brooklyn, NY." This form, attached as Exhibit 11 to Serino Affirmation, is not signed by Mr. Corsello. In place of his signature is the word "Verbal," Mr. Corsello's name, a telephone number and

a partially illegible stamp marked “approved.” A handwritten note indicates that Mr. Corsello gave verbal permission to relocate the box but “refused to signed.” Mr. Messina attests that, while the text of the document is illegible, the stamp reads:

I hereby certify that on this day I read to [Mr. Corsello] whose interest is [owner] the within agreement, and applied for the privileges therein set forth, and that [he] readily consented to the same, declining however to sign said agreement, stating that [refused to sign].

Mr. Messina claims that property owners frequently give this kind of oral permission to relocate equipment but refuse to sign the form, noting that some owners “do not want to grant Verizon a perpetual right to locate equipment on their property or worry that signing a permission form might adversely affect their title” (Messina Affidavit ¶ 12).⁶

Mr. Corsello admitted at his deposition that 1986 was the “first and only time” he asked the telephone company to remove the terminal (William Corsello Deposition at 22, 39). However, the Corsellos allege in the complaint that in 2004 or 2005, they repeatedly complained about the loose high capacity wires routed through the terminal boxes anchored to the Corsellos’ building. They argue that Verizon’s failure to respond to these complaints forced them to retain counsel.

By letter dated August 4, 2006, Mr. Corsello’s attorney David Wise asserted that Verizon had “no legal right to be using the building for the attachment of its distribution cables and the terminal box,” and demanded prompt removal of “all wiring other than that directly servicing customers” at the subject premises and compensation for “interference”

⁶Verizon argues that Mr. Corsello’s deposition testimony reveals that he never signs any written documents, including leases with his tenants. (See Corsello deposition at 70).

with the building in the sum of \$10,000 (Exhibit 39 to Serino Affirmation). In response, Dennis Neil, a Verizon right-of-way specialist, visited the subject property. Corroborating Mr. Neil's representations in his affidavit submitted in opposition, Mr. Corsello acknowledged at his deposition that he did not discuss the terminal with Mr. Neil. Instead, he claimed that "[t]he problem was . . . roof debris, a roll of wire, and there was debris all over the place that his people left." (William Corsello Deposition at 26:4-10; 195-197). A foreman accompanying Mr. Neil removed the loose wires and debris and Mr. Neil swears in his affidavit that he also offered to repair any damage to the property provided Mr. Corsello gave him a reasonable estimate of the cost of any damages. Mr. Corsello's response at deposition was that "Mr. Neal [*sic*] made no offers or said he wouldn't pay, never," nor did they discuss removal of the terminal (William Corsello Deposition at 200); compensation was not discussed (William Corsello Deposition at 199). Thereafter, plaintiffs commenced the instant action. As a result of this Court's ruling upon Verizon's earlier motion to dismiss, only three causes of action remain: inverse condemnation, trespass and deceptive trade practices under General Business Law § 349(h), alleging that Verizon has misled building owners regarding their rights to compensation or removal when installing the terminal boxes.

Plaintiffs' Motion to Amend the Complaint

Although CPLR 3025(b) provides that, "leave shall be freely given" to amend and supplement pleadings, the ultimate decision to grant an amendment is left to the sound

discretion of the court (*Guiliano v Carlisle*, 296 AD2d 438 [2d Dept 2002]). Leave to amend will not be granted under circumstances that would cause prejudice or surprise to the opposing party or if the amendment is otherwise palpably insufficient (See *Lucido v Mancuso*, 49 AD3d 220 [2d Dept 2008]; *Dialcom, LLC v AT&T Corp.*, 50 AD3d 727 [2d Dept 2008]). Denial of a motion to amend the pleadings is appropriate where a party seeks to “re-assert a cause of action that was previously dismissed” (*Dialcom*, 50 AD3d at 728). Indeed, motions to amend have consistently been denied when the movant attempts to insert or reargue a cause of action previously dismissed on a motion for summary judgment (see *Blum v New York Stock Exchange, Inc.*, 298 AD2d 343 [2d Dept 2002]; *Napoli v Canada Dry Bottling Co. of N.Y.*, 166 AD2d 696 [2d Dept 1990]; *Reznick v Tanen*, 162 AD2d 594 [2d Dept 1990]). “[N]ew life may not be breathed into it through permissive repleading” (*Buckley & Co., Inc. v City of New York*, 121 AD2d 933, 935 [1st Dept 1986]).

Plaintiffs move to amend the first amended complaint pursuant to CPLR 3025(b) to replace their trespass cause of action with an action for unjust enrichment.⁷ This Court has already dismissed plaintiffs’ unjust enrichment claim from their First Amended Complaint in deference to the trespass cause of action, which, in this case, more appropriately articulates plaintiffs’ legal cause (see *Corsello v Verizon*, 21 Misc 3d 1116[A], [Kings Co. Sup. Ct. 2008]). In my prior decision, I found the unjust enrichment

⁷The proposed second amended complaint also eliminates a cause of action for punitive damages and incorporates an injunctive relief cause into the inverse condemnation claim from the first amended complaint.

claim “duplicative of plaintiffs’ trespass claim since both seek to recover damages incident to the alleged trespass.”⁸ Arguing that the pleading principles enunciated in the CPLR allow for pleading alternative causes of action (CPLR 3014), and alternative or different forms of relief (CPLR 3017), plaintiffs claim that the court should grant their motion because they have a right to “elect” between different remedies and such amendment would resolve the duplicity issue which served as the basis for dismissal of their unjust enrichment claim.

However, plaintiffs disregard the fact that they have already tried to reinstate their unjust enrichment cause of action through a prior motion to reargue Verizon’s motion to dismiss. Plaintiffs’ motion to reargue was denied after oral argument on November 19, 2008. Thus, in opposition to the motion to amend, defendants rightfully argue that plaintiffs’ motion to amend, is “merely a Second Motion for Leave to Reargue.” Although plaintiffs’ frame their motion as merely electing one valid cause of action over another, plaintiffs fail to explain how the instant motion is substantively different from their earlier motion to reargue which also specifically questioned this Court’s decision that the unjust enrichment claim was duplicative of plaintiffs’ trespass claim. It is noted that, in affirming dismissal of a cause of action for unjust enrichment which was apparently predicated upon reasoning similar to that of plaintiffs here, the Appellate Division, First Department, recently observed: “It is not sufficient that a defendant is

⁸The court also noted that the “the necessary elements of a claim for unjust enrichment” were “adequately allege[d]” in the complaint.

enriched; rather, the enrichment must be unjust.” (*Dobroski v Bank of America*, 65 AD3d 882 [1st Dept 2009]).

Moreover, plaintiffs once again fail to adequately distinguish the instant matter from the facts in *Granchelli v Walter S. Johnson Building Co. Inc.*, 85 AD2d 891 [4th Dept 1981], upon which this Court relied in dismissing the action for unjust enrichment. Essentially, by seeking to amend the complaint to “elect” one cause of action over another, plaintiffs are trying to circumvent this Court’s decision on their motion to reargue and mask what is actually a second motion to reargue as a motion to amend the pleadings. Plaintiffs have appealed the Court’s October 2008 decision which dismissed the unjust enrichment claim. After an initial motion to dismiss, and a subsequent motion to reargue, an appeal is the only appropriate procedural recourse to address this issue. Therefore, this Court declines to modify its previous decisions. The motion to amend is denied.

The Motion for Class Certification

CPLR 901(a) sets forth the following prerequisites to certification of a class action: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class which predominate over any questions affecting only individual members; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; (4) the representative parties will fairly and adequately protect the interests of the class; (5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy. These

requirements are to be liberally construed and the decision to certify a class rests in the sound discretion of the trial court (*Beller v William Penn Life Insurance Company of New York*, 37 AD3d 747, 748 [2d Dept 2007]). Plaintiffs have the burden of proving the requirements for class certification. (*Globe Surgical Supply v Geico Insurance Co.*, 59 AD3d 129, 137 [2d Dept 2008]). General or conclusory allegations in the pleadings or affidavits are insufficient to meet this burden (*Rallis v City of New York*, 3 AD3d 525, 526 [2d Dept 2004]).

In determining whether a case should be certified as a class action, the Court must also apply the criteria outlined in CPLR 902 and consider the interests of the class members in controlling the prosecution of the action (CPLR 902[1]), the impracticality or inefficiency in prosecuting separate actions (CPLR 902[2]), whether other class members have already commenced any litigation concerning the same controversy (CPLR 902[3]), the propriety of the forum (902[4]) and the difficulties in managing the class action (CPLR 902[5]).

Plaintiffs move to certify the following class:

All owners of buildings located in New York City that were at any time between October 24, 2001 and the date of this notice affixed with a 25-pair or 50-pair Rear-Wall Terminal or Side-Wall Terminal owned by Verizon New York, Inc. or other Verizon Communications, Inc. Affiliate (henceforth collectively 'Verizon') and servicing multiple properties, and as to which attachment Verizon has no documentary evidence of a signed and currently enforceable agreement.

As a threshold matter, plaintiffs' definition of the proposed class disregards this Court's decision dated October 17, 2008, in which the Court ruled that evidence of a property owner's grant of a valid oral license to place the terminal box on his or her property would defeat claims for inverse condemnation and trespass. (*Corsello v Verizon*, 21 Misc 3d 1116[A]). Including within the class all owners of encumbered properties "as to which attachment Verizon has no documentary evidence of a signed and currently enforceable agreement," renders the class overbroad since it captures within the class those who do not qualify for the relief requested by virtue of the grant of oral permission. While it would be possible to edit the definition of the class to avoid this problem by eliminating from the class those who gave any form of verifiable permission, it is questionable whether a class, so defined as to conform to this Court's prior ruling, could be represented by plaintiffs herein since there is considerable evidence that defendants are in possession of evidence of prior permission to mount the terminal box on plaintiffs' property. Moreover, although plaintiffs' primary concern seems to be the failure of Verizon to compensate them for the use of their property, the proposed class definition contains no reference to compensation or the denial of compensation. For this and the reasons that follow, plaintiffs' motion must be denied.

Numerosity

"There is no 'mechanical test' to determine whether the numerosity requirement has been met" (*Friar v Vanguard Holding Corp.*, 78 AD2d 83, 96 [2d Dept 1980]). However, it has been held that "the threshold for impracticability of joinder seems to be

around forty” (*Dornberger v Metropolitan Life Ins. Co.*, 182 FRD 72, 77 [SDNY 1998]).

In determining whether a sufficient number of individuals would meet the definition of the class, the court is to consider the particular circumstances of each case and the reasonable inferences to be drawn therefrom. (*See Friar*, 78 AD2d at 96).

It is not disputed that thousands of buildings in New York City are encumbered with rear terminal boxes. It is clearly possible to identify each such building as Verizon must maintain readily accessible records as to the location of its own equipment. It is not plausible that Verizon is unable to determine from its records whether a particular property owner has given permission, whether written or oral, for the placement of its equipment. Indeed, it would be Verizon’s legal burden to maintain records of such permission. *See Bunke v New York Telephone*, 110 AD at 246 (“[I]t would be incumbent on the defendant to plead and prove a license” in response to a claim of trespass). Based upon the proposed class definition, it is irrelevant whether any compensation was either offered or paid to the property owner; however, defendant would also presumably have a record of the payment of any compensation.

The test area used to extrapolate the potential number of class members in this action consists of sixteen properties with terminal boxes affixed on the rear wall. Based on the evidence submitted by plaintiff (Exhibit 5 and Appendix A to the Wise Affirmation in Support), it appears that there exists some form of documented permission for only twelve of those properties, seven of which are 90-day-revocables, similar to that

signed by Mr. Beard in 1911 for the subject property, all dating back at least 50 years, and signed by prior owners. By rejecting 90-day revocable permissions as “per se” invalid, and arguing that Verizon “only has documentation of facially valid easements or grants (ROW-3's or equivalents) as to about 20-25% of these properties,” plaintiffs conclude that “there are more than 16,000, and probably more than 30,000, Verizon 25-pair and 50-pair Rear-Wall Terminals servicing multiple properties in New York City” eligible for inclusion in the class (Plaintiffs Memorandum in Support at 9). At the very least, according to Mr. Wise’s affirmation, even assuming the accuracy of defendants’ master list (which he disputes), the proposed class is comprised of 12,000 members (Wise Affirmation ¶ 22). However, as pointed out by defendants, this argument is flawed because plaintiffs’ definition of “facially valid easements” refers only to ROW-3 easements and disregards the seven other forms of written permission Verizon may obtain, as well as verbal permission. It is also true that the test areas represent a very small, statistically unreliable, sample. Nonetheless, given the size of the prospective class overall (Verizon produced a list of 16,401 addresses), the criteria of numerosity has been met even accepting the eligibility of only 20 to 25% of the encumbered buildings.

Commonality

Commonality requires that, ancillary to the presence of common questions of law or fact, individualized issues not predominate over issues common to the class (*see Alix v Wal-Mart Stores, Inc.*, 57 AD3d 1044, 1047 [3d Dept 2008]; *Lieberman v 293 Mediterranean Market Corp.*, 303 AD2d 560 [2d Dept 2003]). The determination as to

commonality requires an assessment as to whether a class action will “achieve economies of time, effort, and expense, and promote uniformity of decision as to the persons similarly situated.” (*See Friar v Vanguard Holding Corp.*, 78 AD2d 83, 96 [2d Dept 1980] quoting *LaMar v H&B Novelty & Loan Co., D.C.*, 55 FRD 22, 25 [US Dist. Ct. D. Or. 1972]). Upon this criteria, plaintiffs’ motion fails.

The defect in the proposed class definition frames a central issue with respect to the commonality requirement of CPLR 901. Arguing that commonality is satisfied simply because Verizon lacks “documentation of a valid and lawful easement or grant with respect to a specific *current* Rear-Wall Terminal or proof that it paid ‘full compensation’ to the owner” (Plaintiffs’ Memorandum of Law in Support of the Motion for Certification at 11, *emphasis in original*), plaintiffs ignore the evidence that many of the proposed class members have given Verizon verbal or temporary permission to place terminal boxes on their properties and may have received or intentionally declined compensation for such license. Thus, the assessment as to class eligibility is unique to each property.

In reliance upon the representations of prior Verizon employees, plaintiffs premise their complaint upon Verizon’s alleged “corporate policy” of encouraging Verizon employees to engage in “attach and run” tactics, systematically affixing terminals to buildings without permission. While a lack of evidence of any type of permission would support plaintiffs’ contentions and establish a cause of action in trespass as to such

property owners, plaintiffs are not within such a class. Although the 1911 license conveyed by a predecessor in title to plaintiffs' property does not relieve Verizon of its duty to obtain permission from the Corsellos and compensate them pursuant to Transportation Corporations Law § 27 upon their refusal to agree to a consensual license, the initial placement of the terminal box was pursuant to written license. Moreover, discovery has revealed evidence of Verizon's stated policy to seek permission to affix the subject equipment, even to the extent of establishing by documentary evidence that plaintiffs themselves gave oral permission to move the terminal box on their property. As plaintiffs admit, the purported "common question" regarding the need to obtain permission is not a question at all as defendants concede, and their written policies reflect, that they are required by law to obtain permission to affix the terminal and related cables or will be trespassing.

Although it is plaintiffs' burden to prove each of the elements for class certification, they offer little evidence of a common question of law or fact as to a Verizon policy inconsistent with legal requirements. In fact, some of Walsh's and Donovan's deposition testimony is consistent with Verizon's own representations about its policy. Although Donovan claims in his affidavit that Verizon had a general practice of not obtaining "a formal right-of-way" for rear-wall terminals (Attachment to the Wise Affirmation in Support, Donovan Affidavit ¶ 11), he acknowledged at his deposition that Verizon has obtained easements for its facilities (Donovan Deposition at 123-125). Noting that Walsh's "attach and run" characterization of Verizon procedures was not a

phrase he had seen before (Donovan Deposition at 105), Donovan confirmed that Verizon asks for some type of permission before affixing a terminal to property: “It was [Verizon’s] policy to ask for permission, whether that constitutes a right of way I believe requires a legal conclusion” and “Yes, it was Verizon’s policy to ask for permission in a general way to attach the terminal.” (Donovan Deposition at 47, 48). These statements corroborate Mr. Ida’s representation that it is Verizon’s policy to acquire the best possible form of permission in every instance although it may not always obtain an easement or written permission from the property owner.

Given the pre-certification evidence adduced, as the class has been framed by plaintiffs, the proposed definition would require a case by case evaluation of the history of each eligible property to determine whether prior permission remains valid. Plaintiffs contend, for example, “[v]irtually all the 90-day-revocables would also seem to be nullities as a matter of law . . . because of property transfers and/or terminal upgrades and replacements” (Plaintiffs’ Memorandum in Support at 12), thus requiring an investigation to determine whether the property has been conveyed since Verizon obtained the license and whether Verizon obtained some other type of permission, such as verbal permission, subsequent to the transfer of title. Such an inquiry would be highly individualized and is not appropriate for resolution by class action. (*Alix*, 57 AD3d at 1047). Thus, the requirement of commonality is not satisfied for the proposed class as there exist issues of both fact and law unique to each member of the proposed class (*see generally Evans v*

City of Johnstown, 97 AD2d 1, 3 [3d Dept 1983]). The need for individualized inquiries defeats the purpose of the class-action of saving time and resources.⁹

However, it is not the existence of permission, *per se*, that lies at the heart of plaintiffs' complaint but, rather, the deception allegedly employed by defendant Verizon and its predecessors that is the gravamen of their complaint. Mr. Corsello testified at deposition, when telephone company representatives responded to his complaints in 1986 and he demanded removal of the terminal, the telephone company employee told him that the company had a right to maintain the box on the property, and that no compensation would be paid to him. (William Corsello Deposition at 48-49). Although there is documentation of a work order, a right of way request form and a P-3078A form,¹⁰ all suggesting that Verizon representatives consulted Mr. Corsello before performing work on the property and had obtained permission, it is plaintiffs' contention that he was misled into granting permission without receiving compensation. In 2006, prior to commencement of this action, Verizon sent Mr. Neil to the Corsello's property to address Mr. Wise's demand to "remove all wiring other than that directly servicing customers."

⁹Verizon also argues that it secures access to private property through its tariff filed with the New York State Public Service Commission. However, plaintiff rejects this argument as a tariff only sets the "terms and conditions under which a utility renders service *to its customers*" (*Matter of AT&T Communications v Public Serv. Commn.*, 231 AD2d 155,157 no. 1 [3d Dept 1997][emphasis added]; see also *Krasner v New York State Electric & Gas Corp.*, 90 AD2d 921, 921-922 [3d Dept 1982][“tariffs of a public utility are considered as part of a contract between the customer and the utility”]; see also NY Pub Serv. Law § 92 [requiring and explaining the filing of tariffs]). As this Court held in its previous decision, whether plaintiffs in this case are “customers” of Verizon under tariffs is uncertain because they do not live in or receive telephone service through the subject building. As the tariff issues have not been adequately developed at this time, the Court will not address the arguments raised regarding various tariff provisions.

¹⁰This form was cited by Mr. Ida as being one of the eight types of permission Verizon secures before placing equipment on the property.

While Verizon employees did remove some of the offending debris, the terminal box and related wiring remained. The Corsellos want to be compensated for the use of their property and damage that has been caused by defendants' equipment. Defendant Verizon does not dispute that they are entitled to such compensation.

However, plaintiffs seek injunctive relief directing defendants to affirmatively notify the class members of their right to be compensated for the encumbrance of, and damage to, their property as a legal obligation under the Transportation Corporations Law, arguing that common issues of law or fact warranting litigation as a class predominate under their GBL § 349 claim, which they define as whether,

Verizon and its legal predecessors pursue[d] a sustained course of action to conceal from the owners of encumbered buildings their entitlement to 'full compensation' under TCL 27, and instead lead these owners to believe that their buildings had to host Rear-Wall Terminals servicing multiple properties without compensation merely as a precondition for telephone service (Plaintiffs Memo of Law at 13).¹¹

GBL § 349 prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." "Section 349 governs consumer-oriented conduct and, on its face, applies to virtually all economic activity." (*Small v Lorillard Tobacco Co.*, 94 NY2d 43, 55 [1999]). To state a cause of action for deceptive trade practices under GBL § 349, a plaintiff must show: "first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a

¹¹In their fifth cause of action brought under GBL § 349(h), plaintiffs claim that Transportation Corporations Law § 27 places "an affirmative obligation" upon defendants to notify building owners of the right to compensation.

material way; and third, that the plaintiff suffered injury as a result of the deceptive act” (*Stuntman v Chemical Bank*, 95 NY2d 24, 29 [2000]). Deceptive or misleading representations are defined as those “likely to mislead a reasonable consumer under the circumstances.” *Oswego Laborers’ Local 214 Pension Fund v Marine Midland Bank, NA*, 85 NY2d 20, 27 [1995]). Deceptive trade practices are not “the mere invention of a scheme or marketing strategy, but the actual misrepresentation or omission to a consumer.” (*Goshen v Mutual Ins. Co. Of New York*, 98 NY2d 314, 325 [2002]).

Unlike many GBL § 349 actions, this case does not concern an advertisement which was marketed to a wide demographic (*see Solomon v Bell Atlantic Corp.*, 9 AD3d 49 [1st Dept 2004]). The allegation here is that, in practice, and notwithstanding the written policies, Verizon employees convince property owners to permit attachment of terminal boxes through misrepresentations that it had a right to do so without compensating the property owner or that such attachment was a necessary condition of service. A further concern of plaintiffs is that Verizon employees were able to access their rear yard to service or add to the terminal box without their knowledge and without obtaining permission for such trespass. Hence, the characterization of “attach and run.” As the provider of telephone service to the public, Verizon would be vulnerable to suit under GBL § 349 for the deception alleged by plaintiffs in that plaintiffs are members of the consuming public and have alleged to have been damaged by such deception by virtue of having been deprived of compensation to which they were legally entitled. But unless

all members of the proposed class were exposed to the same misrepresentations, class certification of an action under GBL § 349 is inappropriate. (*Solomon*, 9 AD3d at 53).

Moreover, plaintiffs' own witness, Jeremy Walsh, testified that when he was a Verizon technician implementing work orders he would "never deceive or misrepresent to the customer." (Walsh Deposition at 75:24-25). John C. Donovan (also plaintiffs' witness) attests that Verizon's policy was to "Negotiate on a true and reasonable basis. Be fair, don't cheat, don't lie, don't steal, to negotiate in good faith with the land owner." (Donovan deposition at 199:19-22). Absent evidence of a sustained policy of deception, the Court is presented with the question of whether individual Verizon field agents engaged in oral communications which deceived individual property owners. Such inquiry into whether oral communications induced particular property owners to grant gratis permission requires individualized proof for each class member and would overwhelm any questions common to the class (*see Carnegie v H&R Block, Inc.*, 269 AD2d 145, 147 [1st Dept 2000]; *see also Compact Electra Corp. v Paul*, 93 Misc2d 807, 809 [Sup Ct. App. Term 1977]; *Brissenden v Time Warner Cable of New York City*, 2009 WL 3018730 [Sup. Ct. NY Co., Decided September 16, 2009]).

Nowhere is the highly individualized nature of issues of both fact and law relevant to this proposed class action better exemplified than in the circumstances surrounding the placement of the terminal box on the Corsellos' property. Verizon has proffered documents indicating that some form of permission had been granted to it or its

predecessors to place equipment on the Corsellos' premises since at least 1911. As noted, the prior owner of 185 Vanderbilt gave written permission to the New York Telephone Company to attach a terminal box to the rear wall of the building. The Corsellos acquired the property in 1955, and admit that they only became aware of the box in 1977. Verizon has provided a form showing that, in 1978, Mr. Corsello allegedly gave the New York Telephone Company verbal permission to splice a cable on the rear-wall of the subject property (*see* Exhibit 40 to Serino Affirmation).

In 1986, Mr. Corsello permitted the telephone company to move the box to another location on his property. Plaintiffs dispute the validity of the P-3078A form prepared in 1986 because Mr. Corsello did not sign the form and it indicates that Mr. Corsello gave only verbal "permission . . . to relocate cable and terminal on the rearwall of the building at 185 Vanderbilt Ave. Brooklyn, NY." (Exhibit 11 to the Serino Affirmation). The validity of the purported permission is highly relevant to the Corsellos' inverse condemnation and trespass claims. Whether that permission was given due to coercive tactics by the telephone company's representative as alleged in the Corsellos' GBL § 349 claim, and whether permission, if valid, continued after the conversation between Mr. Neil and Mr. Corsello in 2006, are all questions of fact unique to plaintiffs that would necessarily affect their standing to represent other prospective class members (*see Tegnazian v Consolidated Edison, Inc.*, 189 Misc2d 152, 156 [Sup Ct NY Co. 2000][denying motion for class certification where individual fact questions would require the Court to investigate the standing of each class member]). The Corsellos' own

experience exemplifies the dominance of individual fact questions in this case.

Therefore, plaintiffs fail to meet their burden to show that common questions predominate over individual questions, warranting denial of the motion for class certification.

Typicality

The typicality requirement of CPLR 901[a][3] has not been contested on this motion. However, it is noted that typicality is whether “plaintiff’s claim derives from the same practice or course of conduct that gave rise to the remaining claims of other class members and is based on the same legal theory.” (*Friar*, 78 AD2d at 99). To meet the typicality requirement, the claims of the plaintiffs need not be identical to the claims of all other prospective class members (*Pruitt v Rockefeller Center Properties, Inc.*, 167 AD2d 14, 22 [1st Dept 1991]). The typicality requirement “is satisfied even if the class representative cannot personally assert all the claims made on behalf of the class” (*Id.*). However, “[t]he procedural device of a class-action may not be used to bootstrap a plaintiff into standing which is otherwise lacking.” (*Murray v Empire Ins. Co.*, 175 AD2d 693, 694 [1st Dept 1991]). A class representative must be eligible to sue in his own right (*Akerman v Oryx Communications*, 609 F Supp 363, 376 [SDNY 1984]). Thus, on a motion for class certification, the Court “may also consider the merits of the action to the extent necessary for the elimination, as early as possible, of spurious actions” (*Hoerger v Board of Education of Great Neck Union Free School Dist.*, 98 AD2d 274, 278 [2d Dept

1983]). The evidence presented by Verizon in opposition to the motion to certify the class presents serious questions as to plaintiffs' standing to maintain this action as an aggrieved member of the proposed class. Plaintiffs thus fail the test of typicality. (*See Alix*, 57 AD3d at 1046).

Adequacy of Representation

It is incumbent on the class representatives to protect the interests of the class (CPLR 901[a][4]), especially in light of the binding effect a judgment in a class action has on the class as a whole. (*Tanzer v. Turbodyne Corp.*, 64 AD2d 614, 620 [1st Dept 1979]). Therefore, there are a number of factors a court must evaluate when determining whether class representatives are adequate. Specifically, the court must look at the representatives' "background and personal character, as well as [their] familiarity with the lawsuit, to determine [their] ability to assist counsel in its prosecution and, if necessary 'to act as a check on the attorneys'" (*Pruitt*, 167 AD2d at 24, quoting *Tanzer v Turbodyne*, 68 AD2d at 620). The court must further ensure that class representatives are independent from their attorneys and do not simply act as their alter egos (*Tanzer*, 68 AD2d at 620).

Plaintiffs' attorney David Wise argues that plaintiffs will adequately represent the class because "the Corsellos are fully aware of their rights and obligations as class-action Plaintiffs" and his litigation team, consisting of experts in the telecommunications field, Donovan and Walsh, and he and his co-counsel Irving Like, "elder statesmen of class action litigation in New York State," have the experience and skill to competently litigate

on behalf of the class. In reply to the defendants' argument that plaintiffs will not vigorously pursue this action after it is certified, Mr. Wise argues that the Court's inquiry should be limited to whether a) class representatives are "professional plaintiffs" and b) whether there is evidence of undue collusion between class counsel and the class representative. (Plaintiffs Memorandum in Support at 19).

Verizon challenges plaintiffs' ability to fairly and adequately protect the interests of the class as a whole largely because of their relationship to counsel Wise, who is Mr. Corsello's nephew, the son of his sister. Although this Court does not find evidence that Mr. Wise instigated this action upon his own initiative in the interest of generating legal fees, as there is considerable evidence of Mr. Corsello's efforts to remedy the unsatisfactory condition created by Verizon through his own direct communications beginning decades before this case was brought, it is clear from Mr. Corsello's responses at deposition that he would defer to Mr. Wise in the management of the litigation and sees no reason to "check up on the case" (William Corsello Deposition at 17:6-16). Thus, although in some respects the class would benefit from the expertise of Mr. Wise and his personal commitment to the interests of his aunt and uncle, clearly there would not be the measure of independence between counsel and plaintiffs that is required for adequate representation. Accordingly, plaintiffs fail to meet this requirement for certification.

Superiority

As noted in my earlier decision in this case, citing to the analogous case of *Loretto v Teleprompter Manhattan CATV Corp.*, 458 US 419, 425 (1982), the New York State Commission on Cable Television determined reasonable compensation to the property owner for the use of its building walls to be only one dollar. From this decision, it is reasonably inferred that compensation to the prospective class members here would be negligible. The expense of litigation obviously overwhelms the value of the recovery to the individual litigant. The number of individual properties suffering from the burden of which plaintiffs complain is considerable. Thus, had the other requirements of class certification been met, the superiority of the class action to redress the wrongs complained of would be established. (*See Super Glue Corp. v Avis Rent A Car System, Inc.*, 132 AD2d 604, 607-08 [2d Dept 1987]; *Weinberg v Hertz Corporation*, 116 AD2d 1, 5 [1st Dept 1986]).

CPLR 902 Factors

The Court must also consider the factors outlined in CPLR 902, specifically, the interest of individual class members in prosecuting separate actions and the feasibility thereof, the impracticability or inefficiency of maintaining separate actions, whether class members have already commenced litigation which concerns the same controversy, the desirability of the proposed class forum and the difficulties in managing the class action (*see* CPLR 902[1-5]; *see also Ackerman v Price Waterhouse*, 252 AD2d 179, 191 [1st Dept 1998]).

The Court has not been apprised of another pending litigation involving the same controversy. (CPLR 902[3]). Moreover, this forum is appropriate as the proposed class concerns the placement of terminal boxes on properties in the New York City area. (CPLR 902[4]).

However, as discussed, there are various forms of permission that Verizon may obtain from individual property owners. There is evidence that some owners do not wish to sign a form granting permanent permission, such as a right of way, because they do not wish to permanently encumber their property. Their claims and desired relief may vary significantly from the plaintiffs' demands. For example, some owners might elect only to bring a trespass and/or ejectment claim so as to obtain damages but not plead inverse condemnation so that Verizon does not acquire a perpetual right to occupy the property. Others may prefer inverse condemnation in exchange for compensation, or willingly give a revocable license. Therefore, an interest in prosecuting separate individual actions exists here which weighs against certification (*see* CPLR 902[1]).

Moreover, as is relevant to CPLR 902(2), if absolutely no form of permission exists and property owners desire compensation, Eminent Domain Procedure Law §§ 601-604 allows them to file a claim for damages, request a hearing and present evidence in support of their claim with or without the presence of an attorney (*see* CPLR 601 and 602), thus providing them with a practicable way to obtain the desired compensation outside the class action.

Finally, and most notably, as detailed throughout this decision, determining the composition of the class and addressing the claims on the merits would require property-by-property inquires for, according to plaintiffs' definition of the class, tens of thousands of properties. This renders the class utterly unmanageable. (CPLR 902[5]).

Thus, in addition to those inadequacies cited under CPLR 901, the CPLR 902 factors weigh against certification. Because plaintiffs have failed to meet their burden on their motion for class certification, the motion for class certification is denied.

Conclusion

Plaintiffs' motions to amend the pleadings and for class certification are denied. Counsel shall appear for a conference in Supreme Courtroom 756 on January 14, 2010, at which time the requests for sealing portions of the record will be addressed.

This constitutes the Decision and Order of the Court.

E N T E R

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