STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

PINO ALTO PARTNERS,
INDIVIDUALLY AND ON BEHALF OF ALL
OTHERS SIMILARLY SITUATED

Plaintiff,

MEMORANDUM DECISION

vs.

Index No. 11957/06

ERIE COUNTY WATER AUTHORITY

Defendant

BEFORE: **HON. JOHN M. CURRAN, J.S.C.**

APPEARANCES: **HARTER SECREST & EMERY, LLP**
Kenneth W. Africano, Esq., of Counsel
John G. Horn, Esq., of Counsel
David T. Archer, Esq., of Counsel
Attorneys for Plaintiff

RALPH C. LORIGO, ESQ.
Attorney for Plaintiff

HODGSON RUSS, LLP
Hugh M. Russ, III, Esq., of Counsel
Michael B. Risman, Esq., of Counsel
Joseph S. Brown, Esq., of Counsel
Attorneys for Defendant

CURRAN, J.

Plaintiff has moved herein for an Order of class certification pursuant to CPLR §§ 901 and 902.

PROCEDURAL BACKGROUND

This action was commenced in December of 2006. Issue was joined in March of 2007. Since that time, the parties have conducted pre-certification discovery to determine the size of the potential plaintiff class, if any, and the amounts of each individual claim, to the extent ascertainable. The parties have agreed to extend the time by which the plaintiff was required to make a motion for class certification and therefore the instant motion complies with CPLR § 902.

The motion for class certification was initially returnable on September 27, 2007. At that time, the Court only had available to it the pleadings and the affidavits of counsel. The Court and the parties agreed that the next step would be to conduct a "mini hearing" (*see Chimenti v American Express Co.*, 97 AD2d 351 [1st Dept 1983], appeal dismissed 61 NY2d 669 [1983]; *Becker v Empire of Am. Fed. Sav. Bank*, 155 AD2d 923 [4th Dept 1989], appeal dismissed 75 NY2d 865 [1990]). The parties agreed that the "mini hearing" would involve a stipulated record comprised of affidavits and accompanying evidence. Further oral argument was conducted on August 21, 2008, at which time the motion was deemed submitted.

FACTUAL BACKGROUND

In December of 2002, plaintiff entered into a "private fire protection service contract" ("Contract") with the defendant. The Contract provided that the defendant would furnish an eight-inch (8") connection from an existing ten-inch (10") water main located in the Town of Amherst. The parties agreed that plaintiff would pay defendant, in advance, an amount equal to defendant's estimated cost of installing the connection. The parties also agreed

that if the "actual cost" of the project exceeded the "estimated cost," plaintiff would pay defendant the difference between the two. If the "actual cost" of the connection turned out to be less than the "estimated cost," defendant was required to refund plaintiff the difference. Plaintiff thereupon advanced to defendant the sum of $22,105.00.

Defendant hired Kandey Company ("Kandey") to install the connection. Kandey submitted invoices to the defendant totaling $17,756.70, which were paid by the defendant.

In October of 2003, defendant issued an invoice to plaintiff for the installation work. The invoice included an entry entitled "Payment to Contractor" in the amount of $23,119.23. Defendant subsequently provided a detailed invoice which showed that the Kandey invoices had been marked-up by approximately thirty percent (30%).

Plaintiff commenced this action asserting a cause of action for breach of contract alleging that the defendant charged plaintiff, and the proposed class of plaintiffs, an amount in excess of the actual cost of installing certain water service connections without disclosing the mark-up. The crux of the action is that the charges imposed by defendant for the plaintiff and for others similarly situated included various types of mark-ups which were not agreed to in the contracts governing the work performed by the defendant and were never disclosed by the defendant to the plaintiff and the proposed class members.

As a result of the pre-motion discovery conducted by the parties, and in preparation for the "mini hearing," plaintiff has been able to more specifically identify the members of the proposed class. Plaintiff has described the proposed class members as follows:

A. Large service contract customers[1] whose contract contained only "actual cost language" similar the language contained in plaintiff's Contract. These customers are referred to as "actual cost claimants;"

B. Customers whose contracts disclosed that the customer would be assessed defendant's actual cost plus defendant's most recent audited overhead rates. These customers are referred to as "audited overhead rate claimants;"

C. Customers for whom there is documentation showing only that a contractor was paid, but where defendant has not produced any contract between the customer and the defendant. These are referred to as "contractor invoice claimants;" and

D. Customers to whom defendant issued a credit memo and/or an invoice for additional payment but for whom no other documentation has yet been disclosed. These are referred to as "credit memo claimants."

(Affidavit of David T. Archer, Esq., June 6, 2008, ¶¶ 8-12).

The difference between the "actual cost claimants" and the "audited overhead rate claimants" lies in the difference in the contract language used by defendant. Between 1983 and the fall of 2003, defendant utilized a form contract that applied to large service projects. These contracts contained essentially the same type of language as contained in the plaintiff's Contract with the defendant. Specifically, these contracts contained language that the customer would pay the defendant the "entire actual cost" of the connection, with an initial payment of an estimate. As noted above, the contractual language also provides for the possibility of a further

---

[1] A large service is any installation larger than two inches (2") (Affidavit of Stephen D'Amico, April 28, 2008, ¶ 8).

invoice or refund depending on the difference between the estimated amount paid and the "entire actual cost" (Affidavit of Stephen D'Amico, October 26, 2007, ¶¶ 11-15).

Beginning in the fall of 2003, defendant altered the language of these form contracts to read: "Applicant agrees to pay the Authority the entire actual cost ***including the Authority's most recent audited overhead rate to cover administrative costs . . ."*** (Affidavit of Stephen D'Amico, October 26, 2007, ¶ 18) (emphasis added). Defendant elected to "clarify" its form contracts "to eliminate any argument relating to charging customers the annual audited overhead rate and to foreclose the possibility that any future customer would seek to avoid payment of properly calculated overhead using" the plaintiff's argument (Affidavit of Stephen D'Amico, October 26, 2007, ¶ 19).

The pre-motion discovery related to a time period commencing in 2000 (the likely maximum accrual date for any breach of contract actions that might be brought by potential class members) through 2006 (the year in which plaintiff commenced this action). The record before the Court is therefore restricted for the purposes of this motion to that time period.

With respect to the actual cost claimants, the record reflects that there are at least eighty-three (83) claimants who entered into one hundred sixteen (116) contracts containing the "actual cost" language without any mention of the defendant's audited overhead rate (Affidavit of Stephen D'Amico, April 28, 2008, ¶ 23; Affidavit of Michael Risman, Esq., April 28, 2008, ¶ 7; Affidavit of David T. Archer, Esq., June 6, 2008, ¶ 15).

With respect to the audited overhead claimants, the record reflects that these customers were charged "contingency mark-ups" and/or "rounding mark-ups" without any

disclosure of such charges. The "contingency mark-up" is included in the amounts charged by the defendant in order to provide for unanticipated additional expenses that may be encountered during installations and to avoid collection problems after the fact (Affidavit of Stephen D'Amico, April 28, 2008, ¶ 15). The "rounding mark-ups" ensure that the estimate paid by the customer "is conservative and that there will be a refund in most instances" (Affidavit of Stephen D'Amico, April 28, 2008, ¶ 18). As to these types of mark-ups, the best that the defendant could represent to the Court is that a "vast majority receives refunds" (Affidavit of Stephen D'Amico, April 28, 2008, ¶¶ 18 & 30). The audited overhead rate claimants do not involve any customers who were charged overhead because that charge was disclosed by the defendant in the form contracts.

There are one hundred fifty-five (155) contracts entered into by the defendant which are similar to those entered into by audited overhead rate claimants (Affidavit of Hugh M. Russ, III, Esq., October 26, 2007, ¶ 15) and the record reflects that the number of audited overhead rate claimants would be at least one hundred four (104) (Affidavit of John G. Horn, Esq., October 30, 2007, ¶ 10; Affidavit of David T. Archer, Esq., January 18, 2008, ¶ 23).

Plaintiff characterizes the contractor invoice claimants and the credit memo claimants as "potential" members of the class. Plaintiff also concedes that, as to these claimants, it did not have enough documentation to fully or accurately describe the proposed class members (Affidavit of David T. Archer, Esq., June 6, 2008, ¶¶ 25 & 27).

At oral argument, plaintiff argued that "this case is about undisclosed charges." Plaintiff's counsel also defined the proposed class in the following language:

> Any individual or entity who has contracted with the defendant since December 1, 2000, for water connection services and who were as a result of that agreement assessed with one or more charges that were not disclosed and for which there has not been a refund in full.

CONTRACTOR INVOICE CLAIMANTS/ CREDIT MEMO CLASS MEMBERS

As an initial matter, the Court concludes that the proposed class members described in the motion papers as contractor invoice claimants and credit memo claimants are a class based at this time on speculation and an insufficient foundation. The Court will therefore not consider these claimants as possible proposed class members but will rather evaluate the motion solely on the basis of the actual cost claimants and the audited overhead rate claimants. This is not to preclude plaintiff from seeking to enlarge the class depending on documentation and other information obtained during disclosure, but it would be inappropriate to act upon these proposed class members given the admitted lack of documentation supporting their constituencies.

CONCLUSIONS

Article 9 of the CPLR became effective on September 1, 1975 (L 1975, ch 207, § 1). Shortly thereafter, the Appellate Division recognized that Article 9 has a "therapeutic benefit" for the public and that class actions induce:

> . . . socially and ethically responsible behavior on the part of large and wealthy institutions which will be deterred from carrying out policies or engaging in activities harmful to large numbers of individuals . . . [and] engage[ing] in "legalized theft" which is perpetuated and because the injured potential plaintiffs frequently are damaged in a small sum . . .."

Friar v Vanguard Holding Corp., 78 AD2d 83, 94 [2d Dept 1980]). One treatise has recognized that: "class actions make possible prosecution of claims that may be too small to justify a separate lawsuit; representative plaintiffs sue on behalf of others seeking a remedy on behalf of all" (Haig, Commercial Litigation in New York State Courts, § 18:2, at 1083 [2d ed 2005]).

The party moving for class certification has the burden of establishing that all elements set forth in CPLR § 901 are satisfied (*Rallis v City of New York*, 3 AD3d 525 [2d Dept 2004]). These elements should be liberally construed (*Scott v Prudential Ins. Co.*, 80 AD2d 746, 748 [4th Dept 1981], appeal dismissed 54 NY2d 753 [1981]). Moreover, courts have broad discretion to determine if a given case is appropriate for class certification (*Mimnorm Realty Corp. v Sunrise Fed. Sav. & Loan Assn.,* 83 AD2d 936, 938 [2d Dept 1981], appeal denied 58 NY2d 779 [1982]).

(A) <u>Numerosity</u>.

The practicality of joining numerous class members is the essential focus of this factor set forth in CPLR § 901 (a) (1). "The class suit was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity with the usual rules of procedures is impracticable" (*Hansberry v Lee*, 311 US 32, 41 [1940]). The alternative to a class action is multiple separate litigations which might result not only in the inefficient waste of judicial resources, but also in conflicting end results. Moreover, "there is a risk that aggrieved parties might not pursue valid claims on their own because of lack of resources or incentive" (Haig, Commercial Litigation in State Courts, § 18:5, at 1088 [2d ed 2005]).

There is no "set rule for the number of class members which must exist before a class is certified" (*Friar*, 78 AD2d at 96). Class certification has been granted for a class containing twenty-five (25) members (*Philadelphia Elec. Co. v Anaconda Am. Brass Co.*, 43 FRD 452, 463 [ED Pa 1968]; *Caesar v Chem. Bank*, 118 Misc 2d 118 [Sup Ct, New York County 1983], *affd* 106 AD2d 353 [1st Dept 1984], *mod* 66 NY2d 698 [1985]), forty-four (44) members (*Hoerger v Bd. of Educ. of Great Neck Union Free School Dist.,* 98 AD2d 274 [2d Dept 1983]), and two hundred (200) members (*Fleming v Barnwell Nursing Home & Health Facilities, Inc.*, 309 AD2d 1132 [3d Dept 2003]). "Each case depends upon the particular circumstances surrounding the proposed class" (*Friar*, 78 AD2d at 96).

Here, even if the class was limited to eighty-two (82) members comprised of entities that entered into virtually identical contracts with the defendant as did the plaintiff, this class size would be suitably large to make joinder impractical. Further, the record reflects that many of these potential claimants would have suffered money damages of a relatively small amount and which might not be worth pursuing in separate litigation. This is particularly true for those entities that may still do business with the defendant and who may have a business incentive not to pursue litigation seeking a minimal amount in damages. For these reasons, even assuming the class size consists of only eighty-two (82) members, the numerosity factor has been adequately met.

B. <u>Commonality</u>

The commonality question of CPLR § 901 (a) (2) "requires predominance, not identity or unanimity, among class members" (*Cherry v Resource Am., Inc.*, 15 AD3d 1013 [4th Dept 2005], quoting *Friar*, 78 AD2d at 98). The fundamental issue is "whether the group asserting class status is seeking to remedy a common legal grievance" (*Mendelson v Trans World Airlines, Inc.*, 120 Misc 2d 423 [Sup Ct, New York County 1983]). Common questions of law and fact may exist where the claims of the individual members are based on the same or similar written agreements or documents (*Broder v MBNA Corp.*, 281 AD2d 369, 371 [1st Dept 2001]; *Englade v Harper Collins Publs., Inc.*, 289 AD2d 159 [1st Dept 2001]).

Defendant agrees that there are at least eighty-two (82) entities that entered into similar contracts to the Contract defendant entered into with plaintiff. Thus, as to these entities, common questions of law clearly predominate. Further, as to the audited overhead rate claimants, common questions of law predominate there as well because, as to all such claimants, the legal grievance centers around undisclosed overcharges which were not consented to by the claimants or refunded thereto.

C. <u>Typicality</u>

The typicality requirement is satisfied if the representatives' claims "derive from the same practice or course of conduct that gave rise to the remaining claims of other class members and is based upon the same legal theory" (*Dagnoli v Spring Valley Mobile Village*, 165 AD2d 859 [2d Dept 1990], quoting *Friar*, 78 AD2d at 83).

The record establishes that plaintiff falls within the category of actual cost claimants and that there are at least eighty-two (82) such other claimants as proposed class members. Additionally, plaintiff's claim is typical for the audited overhead rate claimants

because they too where charged amounts in excess of actual costs, even including audited overhead charges, in the form of contingency and rounding up mark-ups. As with the plaintiff, these audited overhead rate claimants were purportedly charged amounts to which they did not consent and for which they were not refunded. Plaintiff is therefore typical of the legal question involved for both actual cost claimants and audited overhead rate claimants. As to these proposed class members, the typicality requirement has been met.

D. Adequacy of Representation

The factors New York courts consider when determining whether a given class representative will be able to fairly and adequately represent the class are: (1) whether there is a conflict of interest between the representative and the class members; (2) the representative's background and personal character; (3) the representative's familiarity with the lawsuit; (4) the competence, experience and vigor of class counsel; and (5) the financial resources available to prosecute the action (*Pruitt v Rockefeller Ctr. Props., Inc.*, 167 AD2d 14, 24 [1st Dept 1991]).

There is no conflict between plaintiff and the members of the proposed class consisting of the actual cost claimants and the audited overhead rate claimants. There also is no issue with respect to plaintiff's background and/or personal character, nor the representative's familiarity with the lawsuit. Plaintiff is apparently affiliated with a prominent contractor in the community and has invested significant resources already in familiarizing itself and its counsel with the issues in this case. Further, there can be no issue with respect to the competence, experience and vigor of class counsel, as the record demonstrates their commitment to the cause and diligence in investigating it. Further, there have been significant resources invested in this

litigation already and there is every sign that this will continue on behalf of the class. This factor is therefore met.

E. Superiority

Where there is a large number of potential claimants but a relatively small potential recovery by each individual claimant, "a class action is not only the superior method for the fair and efficient adjudication of the controversy, but the only economical viable means of pursuing redress" (*Jim and Phil's Family Pharm., Ltd. v Aetna U.S. Healthcare, Inc.*, 271 AD2d 281, 282 [1st Dept 2000]). While there is case law indicating that a class action is not appropriate when proposed class members are able to defend and protect their own interests (*see, e.g. Liberty Lincoln Mercury v Ford Mktg. Corp.*, 149 FRD 65 [D NJ 1993]), this does not necessarily mean that individual litigation by each class member is superior to a class action. Rather, in this case, a class action on behalf of the actual cost claimants and the audited overhead rate claimants is far superior to individual litigation because the amounts involved are minimal, the expense and judicial inefficiency with respect to individual lawsuits would be great, and the grievance sought to be aired by the plaintiff and the proposed class would, if found to be meritorious, largely be left unresolved and unremedied. Accordingly, the Court concludes that a class action for these claimants is superior to individual lawsuits.

F. Governmental Operations Rule

Defendant rightfully points out that many New York cases hold that a class action is usually unnecessary to challenge governmental operations. According to the Court of Appeals, class action certification is inappropriate "where governmental operations are involved and where subsequent petitioners will be adequately protected under the principles of

res judicata" (*Martin v Lavine*, 39 NY2d 72 [1976]). However, a recognized exception to this general rule is where the challenged conduct is in the past, essentially a *fait accompli*. In those situations, the governmental operations rule does not apply because injunctive relief will have no impact and the doctrine of *res judicata* will not be an adequate remedy for the proposed class members (*Watts v Wing*, 308 AD2d 391 [1st Dept 2003]; *Holcomb v O'Rourke*, 255 AD2d 383 [2d Dept 1998]). A further exception is with respect to "a large, readily definable class seeking relatively small sums of damages" (*Holcomb*, 255 AD2d at 384). The Court concludes that these exceptions apply here as the only remedy being sought is a relatively minimal amount of damages per claimant and any such award of damages will be retroactive only and not prospective.

G. CPLR § 902 Factors

CPLR § 902 lists five specific matters which the Court "*shall* consider in determining whether the action may proceed as a class action . . .." These matters are often referred to as "feasability considerations" (*See, e.g.*, *Chimenti,* 97 at 352).

The first two of the considerations under CPLR § 902 (interest and individual control over the action and the inefficiency of individual actions) are essentially the same as the adequacy of representation and superiority of class action requirements (*Brandon v Chefetz*, 121 Misc 2d 54 [Sup Ct, New York County 1983], appeal dismissed 106 AD2d 162 [1st Dept 1985]; *Jim and Phil's Family Pharm.*, 271 AD2d at 282). Based on the Court's discussion as to these two factors under CPLR § 901, the Court concludes that there would be very little interest by members of the class in individually controlling the prosecution of this action and further concludes that it would be inefficient to do so because the amounts involved are

relatively minimal and the expense of litigating against a large governmental agency would be extensive. With respect to the third factor under CPLR § 902, this litigation has already been commenced and is well on its way, and at a minimum much farther along than any individual actions would be if they were commenced by other members of the class. As to the fourth factor under CPLR § 902, the desirability of this forum is manifest given the residence of the likely class members and the Commercial Division's familiarity with contract issues and complex litigation. Also, as to the fifth factor under CPLR § 902, the size of the class will not be so unmanageable as to warrant denial of a class certification as it is likely to consist of fewer than three hundred members and will be managed by a typical representative with capable counsel.

CLASS CERTIFICATION

For all of the foregoing reasons, the Court will grant the motion for class certification in part and will certify a class action for a class to be described as follows:

> Any individual or entity who contracted with the Erie County Water Authority since December 1, 2000, for large service contracts involving water connection services and who were as a result of that agreement assessed with one or more charges that were not disclosed in their contracts with the Erie County Water Authority and for which there has not been a refund in full.

Plaintiff's counsel shall prepare the Order accordingly under CPLR § 903 and settle it with defendant's counsel. The Court will conduct a conference with the attorneys on **Wednesday, October 29, 2008 at 2:00 p.m.**, to address whether the Court should limit the class to those members who do not request exclusion from the class within a specified time after the notice

(CPLR § 903), and to discuss the type and form of the notice to be provided to the proposed class members (CPLR § 904).

DATED: October 15, 2008

_____

HON. JOHN M. CURRAN, J.S.C.