

Pludeman v Northern Leasing Sys., Inc.

2013 NY Slip Op 30428(U)

February 28, 2013

Sup Ct, New York County

Docket Number: 101059/04

Judge: Martin Shulman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SHULMAN
Justice

PART 1

PLUDEMAN, KEVIN, ET AL.

INDEX NO. 101059/04

MOTION DATE: _____

MOTION SEQ. NO. 26

NORTHMAN LEASING SYSTEMS, INC., ET AL.

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to amend

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits <u>A-</u>	<u>1</u>
Answering Affidavits — Exhibits <u>A-N</u>	<u>2</u>
Replying Affidavits — Exhibits <u>1-10</u>	<u>3</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED

MAR 04 2013

NEW YORK COUNTY CLERK'S OFFICE

Dated: Feb. 26, 2013

MARTIN SHULMAN
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

-----x
KEVIN PLUDEMAN, CHALLENGER DEEP IMPORTS,
INC., CHRIS HANZSER d/b/a HANZSER AUDIO,
SARA JANE HUSH, OZARK MOUNTAIN GRANITE
& TILE CO., and DENNIS E. LAUCHMAN, on behalf
of themselves and all others similarly situated,

Index No. 101059/04

Plaintiffs,

-against-

NORTHERN LEASING SYSTEMS, INC., JAY COHEN,
STEVE BERNADONE, RICH HAHN, and SARA KRIEGER,

Defendants.

-----x
MARTIN SHULMAN, J. :

FILED

MAR 04 2013

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiffs move by order to show cause ("OSC") for leave to amend their first amended complaint. Plaintiffs commenced this former class action suit against defendants in January 2004 alleging *inter alia* breach of contract and a scheme to defraud plaintiffs, who consist of small businesses which entered into equipment finance lease agreements for credit card point of sale terminals. The principals of these businesses simultaneously entered into personal guarantees. Plaintiffs allege that defendants concealed material terms in these agreements to their detriment.

With respect to plaintiffs' breach of contract cause of action, this court (Heitler, J.) granted defendants' motion dismissing this claim¹ and on appeal, the Appellate Division, First Department, reinstated it.² Subsequently, this court granted class

¹ *Pludeman v Northern Leasing Sys., Inc.*, 2005 WL 5960260 (Sup Ct, NY County).

² *Pludeman v Northern Leasing Sys., Inc.*, 40 AD3d 366 (1st Dept 2007), *affd* 10 NY3d 486 (2008).

certification solely as to the breach of contract claim against defendant Northern Leasing Systems, Inc.³ (“NLS”) and later granted plaintiffs partial summary judgment as to liability thereon.⁴ In September 2011, the Appellate Division reversed that decision.⁵

After the reversal, defendants moved to decertify the class and plaintiffs cross-moved for the second time for summary judgment on their breach of contract claim, albeit on different grounds. Plaintiffs based their cross-motion upon facts allegedly revealed during discovery in May and June of 2010, wherein plaintiffs claim to have learned that NLS’s Loss and Destruction Waiver (LDW) program was allegedly a fictitious ruse to collect money under false pretenses.⁶ By decision and order dated July 13, 2012 (the “decertification order”), this court granted decertification⁷ and denied plaintiffs’ cross-motion for summary judgment, finding it improper to grant summary judgment on an unpleaded cause of action which was also predicated upon a contradictory theory of recovery.⁸ This court noted that “the more appropriate course of

³ *Pludeman v Northern Leasing Sys., Inc.*, 2009 WL 1812532 (Sup Ct, NY County), *affd in part, mod in part* 74 AD3d 420 (1st Dept 2010).

⁴ *Pludeman v Northern Leasing Sys., Inc.*, 2010 WL 1254550 (Sup Ct, NY County).

⁵ *Pludeman v Northern Leasing Sys., Inc.*, 87 AD3d 881 (1st Dept 2011).

⁶ Plaintiffs’ prior motion for summary judgment on their breach of contract cause of action was based upon the allegation that NLS improperly collected an unauthorized \$4.95 LDW charge not expressly reflected in plaintiffs’ perceived one-page form leases.

⁷ Upon information and belief, the Appellate Division, First Department will hear the appeal(s) from this court’s decertification order in the April 2013 term.

⁸ As noted in the decertification order, central to plaintiffs’ new breach of contract claim is the assumption that their form leases include an LDW provision. As originally pleaded, the theory behind the breach of contract cause of action was that plaintiffs’

action is for plaintiffs to move to amend the complaint, if they so choose”, to include the aforesaid allegations.

Taking this court at its word, plaintiffs now move to amend their first amended complaint to include a new cause of action for breach of contract against NLS premised upon the LDW program’s alleged illusory nature. The proposed amended complaint also deletes claims that were previously dismissed or withdrawn. Plaintiffs reiterate that they brought this OSC after learning through discovery that the LDW program was a “sham”. They contend NLS will not be prejudiced by the amendment since it provided the discovery upon which the claim is based “relatively recently”.

Referring to the recent class decertification, NLS contends in opposition that plaintiffs “should not be permitted to continually morph their claims in this eight year old case every time that they are confronted with an adverse ruling . . .” NLS raises the following points:

- plaintiffs’ delay in moving to amend is prejudicial since this action was commenced over eight years ago after “extensive discovery on issues that are totally at odds with their new theory” and after multiple motions and appeals;
- the allegations in the proposed second amended complaint are not based on any new revelation allegedly discovered by plaintiffs, i.e., plaintiffs could have moved to amend the complaint at an earlier time,⁹ but chose not to do so;

form leases did not include an LDW provision or any other provision that did not appear on the first page.

⁹ Defendants maintain this claim could have been alleged at the outset of the litigation or, at the latest, over two years ago when plaintiffs received the discovery in question (May/June 2010).

- to overcome the decertification order's adverse ruling, plaintiffs are merely attempting to manufacture a claim that might survive a new motion for class certification;
- NLS will be prejudiced by virtue of the fact that plaintiffs' undue delay has impaired its ability to obtain relevant discovery on the issues plaintiffs seek to raise and necessary to its defense thereof;
- NLS will be prejudiced if the OSC is granted since it will be forced to defend against claims dating back to 1999, despite the six-year statute of limitations for breach of contract claims;
- similar litigation is pending between the parties in federal court, where plaintiffs are also allegedly challenging the LDW program; and
- the OSC is procedurally defective because plaintiffs failed to redline the changes made in the proposed new pleading as CPLR 3025(b) now requires.

In reply, plaintiffs belatedly provide a redlined version of the proposed second amended complaint (as NLS predicted they would) and counter that:

- in an effort to create the appearance of prejudice, NLS misstates the nature of the proposed amendment (i.e., the thrust of the amendment is that the LDW program is non-existent, yet NLS focuses on the proposed second amended complaint's allegations that the LDW charges are unreasonable, inconsistent with industry standards, unauthorized due to NLS's failure to request evidence of insurance as provided in certain of the form leases, etc.), and disingenuously claims there has been no discovery on these non-issues;
- evidence as to the LDW program's fictitious nature is in NLS's exclusive possession and it was obligated to preserve such material evidence;
- NLS's claims of prejudice are disingenuous because NLS allegedly delayed in providing discovery to plaintiffs;
- no statute of limitations issue arises because the proposed amendment relates back to this action's commencement (see CPLR § 203 [f]);
- there is no prior action pending because the federal litigation NLS refers to alleges the LDW program is unconscionable (as opposed to fictitious), involves different parties and claims and was commenced at a later time than this action;

- discovery in this action is continuing and no trial date has been set; and
- there was no reason for plaintiffs to move to amend in May/June 2010 when they obtained the relevant discovery from NLS, as they had just prevailed on the originally pleaded breach of contract cause of action alleging the LDW charges were unauthorized.¹⁰

Discussion

Leave to amend a pleading pursuant to CPLR 3025 (b) should be freely granted absent prejudice or surprise resulting from the delay (*see Edenwald Contr. Co., Inc. v City of New York*, 60 NY2d 957, 959 [1983]; *Probst v Cacoulidis*, 295 AD2d 331 [2d Dept 2002]). While the decision to allow or disallow an amendment is left to the court's sound discretion (*see Edenwald Contr. Co. v City of New York, supra*), a court need not grant leave to amend a pleading where the proposed amendment is palpably without merit (*see Probst v Cacoulidis*, 295 AD2d at 332; *Reuter v Haag*, 224 AD2d 603 [2d Dept 1996]).

Mere lateness does not establish grounds to reject a proposed amendment. Instead, a delayed request must be accompanied by extreme prejudice as well. *Edenwald Contr. Co. v City of New York, supra*. In this context, the courts define prejudice as "some special right lost in the interim, some change of position, or some significant trouble or expense which could have been avoided had the original pleading contained what the amended one wants to add." *Barbour v Hospital for Special Surgery*, 169 AD2d 385, 386 (1st Dept 1991) (citations omitted). Prejudice may also be demonstrated where a party "is hindered in its preparation of its case, where there is

¹⁰ See *Pludeman v Northern Leasing Sys., Inc.*, 2010 WL 1254550 (Sup Ct, NY County), *revd* 87 AD3d 881 (1st Dept 2011).

[* 7]

significant expansion of the claims, or where the amendment is sought after the parties have completed discovery (citations omitted).” *JP Morgan Chase Bank v Orleans*, 2007 WL 6882391 (Sup Ct, NY County). However, “while delay alone is not a sufficient ground to deny a motion to amend ‘[l]ateness in making a motion to amend, coupled with the absence of a satisfactory excuse for the delay and prejudice to the opposing party, justifies denial of such a motion’ (internal citations omitted).” *Moon v Clear Channel Communications, Inc.*, 307 AD2d 628, 629-630 (3d Dept 2003).

In the case at bar, this court agrees that NLS will be substantially prejudiced if the proposed amendment is permitted. While it is not clear to this court that plaintiffs were aware of the proposed claims at the outset of this now nine year old action as NLS maintains, they nevertheless were aware of them for more than two years before they finally moved to amend. As detailed above, prior to seeking amendment plaintiffs improperly cross-moved for summary judgment on the proposed claim when it was an unpleaded cause of action. Plaintiffs’ excuse for this delay is that they had already prevailed on the original breach of contract claim at the time they obtained the discovery upon which they base the proposed claim. While understandable, this excuse is not entirely satisfactory. Plaintiffs made a strategic choice to “wait and see” while the summary judgment decision was appealed, at their own peril. *See Baidzar v Farman-Farma*, 2009 WL 4543039, 2009 Slip Op 32780(U) (Sup Ct, NY County) (motion for leave to amend a pleading should be made promptly after discovery or awareness of facts upon which amendment is predicated).

Plaintiffs' piecemeal approach to prosecuting this action is inefficient and prejudices NLS by delaying the ultimate resolution of this case. In addition, NLS will be prejudiced by incurring further expenses in conducting additional discovery on the new claims. While plaintiffs contend discovery is still ongoing in this action, thus far it has been extensive and costly and it is unclear when it will be completed.¹¹ While plaintiffs attempt to fault NLS for the many discovery delays in this action, plaintiffs are reminded that many of their past demands have been overbroad and unduly burdensome, resulting in this court sustaining certain of defendants' objections thereto.

The proposed amendment also significantly expands the claims alleged in the original pleading. See *Thibeault v Palma*, 266 AD2d 616, 617 (3d Dept 1999). In *Moon v Clear Channel Communications, Inc.*, *supra*, as in the instant case, the original complaint contained breach of contract and fraud claims and the proposed amendment contained several new factual allegations and theories in support thereof. The Third Department upheld the denial of plaintiff's motion to amend on the grounds that the proposed amendment was "a substantial expansion of the original complaint" and an attempt to replead plaintiffs' case. *Id.*, 307 AD2d at 630.

Here, the proposed second amended complaint seeks to add multiple new factual allegations (OSC at Exh. A, ¶¶ 2, 52-65) and a new theory to recover for breach of contract. As in *Moon*, this court must conclude that the plaintiffs here also seek to replead their case, presumably in order to proffer a claim that ultimately can be certified for class action status. Permitting such a repleading is improper and would prejudice

¹¹ Notwithstanding that the case was not ready for trial, plaintiffs filed a note of issue early in the case on June 13, 2005.

NLS given the age of this case and its extensive history, the likely need for further discovery together with the costs attendant thereto and plaintiffs' lack of a compelling excuse for not moving to amend earlier. See also *Weston v Smith*, 21 Misc3d 1107(A), 2006 Slip Op 52617(U) at *3 (Sup Ct, Jefferson County 2006), *affd* 38 AD3d 1224 (4th Dept 2007) (amendment denied where it substantially expanded and repleaded original pleading and where defendant would have to conduct additional discovery after already having engaged in extensive discovery).

This court also agrees that the proposed amendment will substantially prejudice NLS because it is time barred by the six year statute of limitations for breaches of contractual obligations. See CPLR § 213. A party may not amend a complaint to assert a claim that is barred by the statute of limitations. However, under CPLR § 203(f) a claim in an amended pleading "is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading."

Here, plaintiffs summarily contend the proposed amendment is timely because it relates back to the original complaint, which has always contained a breach of contract cause of action and focused on the LDW lease provision. As the Court of Appeals held in *Duffy v Horton Mem. Hosp.*, 66 NY2d 473, 476-477 (1985), "[a]n amendment which merely adds a new theory of recovery or defense **arising out of a transaction or occurrence already in litigation** clearly does not conflict" with the policies underlying statutes of limitations, viz., "fairness to a defendant" and "the need to protect the judicial

system from the burden of adjudicating stale and groundless claims (citations omitted and emphasis added).”

However, the new theory of recovery for breach of contract proposed in the second amended complaint does not arise from a transaction or occurrence already being litigated. The issues being litigated from this case’s inception involve the alleged misrepresentation and/or concealment of lease terms with respect to alleged unauthorized charges automatically being deducted from plaintiffs’ bank accounts. Determination of these issues required this court to objectively interpret the form leases as a whole to establish their terms. Contrarily, the existence and operation of the LDW program, as opposed to the validity of LDW charges, thus far has not been litigated and nothing in the prior pleadings would give NLS notice of such a claim. Moreover, determination of the newly raised issues in the proposed second amended complaint will require far more extensive inquiry than mere lease interpretation.

Finally, notwithstanding the fact that the proposed second amended complaint alleges the new breach of contract claim as an alternative form of relief (OSC at Exh. A, ¶119), this court cannot reconcile the inherent contradiction (as noted above and in the decertification order) between the existing and proposed breach of contract causes of action, as one presumes plaintiffs’ form leases do not include an LDW provision and the other presumes the very opposite. Given such a discrepancy, relation back is tenuous. *See, e.g., Maxon v Franklin Traffic Serv., Inc.*, 261 AD2d 830, 831 (4th Dept 1999)(proposed causes of action arising from formal termination of a contract did not relate back to original pleading and were time barred where they “would impermissibly

shift the focus of this action away from" original claims sounding in anticipatory repudiation).

In light of the foregoing this court need not consider the parties' remaining arguments. Accordingly, it is

ORDERED that plaintiffs' motion to amend is denied.

Counsel for the parties shall appear for a status conference on March 19, 2013 at 9:30 a.m., at 60 Centre Street, Room 325, New York, New York.

The foregoing is this court's decision and order. Courtesy copies of this decision and order have been provided to counsel for the parties.

Dated: New York, New York
February 28, 2013



HON. MARTIN SHULMAN, J.S.C.

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