SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

----------X

BLT STEAK LLC and BLT FISH LLC,

Plaintiffs,

Index No. 151293/13

Motion Sequence No. 004

-against-

LIBERTY POWER CORP, L.L.C.,
d/b/a LIBERTY POWER NEW YORK,
and LIBERTY POWER HOLDINGS LLC,

DECISION/ORDER

Defendants.

----------X

HON. SHLOMO S. HAGLER, J.S.C.:

In this action, plaintiffs seek damages from defendants for selling them electricity at allegedly inflated prices. The sole surviving cause of action in plaintiffs' first amended complaint is their claim for breach of contract. Plaintiffs now move pursuant to CPLR 3025 (b) for leave to file and serve a proposed second amended complaint, converting their lawsuit to a class action on behalf of themselves and a class of similarly situated customers of defendants. The proposed second amended complaint contains essentially the same factual allegations as the first amended complaint, and asserts the same legal theory in its sole cause of action for breach of contract.

Amendment

"Leave to amend pleadings under CPLR 3025 (b) should be freely given, and denied only if there is prejudice or surprise resulting directly from the delay, or if the proposed amendment is palpably improper or insufficient as a matter of law." *McGhee v Odell*, 96 AD3d 449, 450 (1st Dept 2012) (internal quotation marks and citations omitted). "Prejudice to warrant denial of leave to amend requires some indication that the [opposing party has] been hindered in the

preparation of [its] case or has been prevented from taking some measure in support of [its] position." *Id.* (internal quotation marks and citation omitted). "[B]y prejudice is meant some special right lost in the interim, some change of position or some significant trouble or expense that 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 Dep't 1991) (internal quotation marks and citation omitted). "The burden of establishing prejudice is on the party opposing the amendment." *Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411 (2014).

This Court has already determined that plaintiffs' identical breach of contract cause of action was sufficient to survive defendants' motion to dismiss the first amended complaint (NYSCEF document numbers 50 and 51), thereby undermining defendants' argument that "plaintiffs have no contract claim against [defendants]." Defendants' opp brief at 16-18. As this Court stated on defendants' prior motion to dismiss, the breach of contract claim may be subject to defendants making a summary judgment motion (NYSCEF document number 50 at 5) or, alternatively, tested at trial. However, the claim was sufficiently stated to survive a motion to dismiss, and it is likewise sufficient to withstand defendants' challenges to plaintiffs' instant motion for leave to amend.

Here, the claims in the first amended complaint were based upon allegations of defendants' inflated electricity charges under their "Variable Rate Plan." NYSCEF document number 35, ¶¶ 1, 36-37, 40. The proposed second amended complaint merely alleges that defendants imposed the same overcharges on all of their similarly situated customers. Proposed second amended complaint, ¶ 1-3, 35-37, 40-46, 52-65. Accordingly, the proposed amendment is not "palpably improper or insufficient as a matter of law." *McGhee*, 96 AD3d at 450.

Nor have defendants shown any prejudice or surprise. In the first amended complaint, plaintiffs alleged that defendants "knowingly and willfully engaged in the misconduct complained of herein, and ha[ve] *engaged in the same or similar misconduct to the injury of others and the consumer public at large*." NYSCEF document number 35, ¶ 43 (emphasis added). Thus, defendants' argument that they are "surprise[d]" by the existence of potential class claims, and plaintiffs' assertion of those claims (Defendants' opp brief at 15), is unpersuasive. As the core factual allegations of the proposed second amended complaint remain the same as the allegations of the first amended complaint, converting the lawsuit to a class action merely exposes defendants to greater liability, which does not constitute prejudice. *Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 (1981) ("[p]rejudice, of course, is not found in the mere exposure of the defendant to greater liability").

Defendants do not identify any rights that they have lost, any changed position, or any expense that could have been avoided if plaintiffs' prior pleadings asserted class claims. *Barbour*, 169 AD2d at 386. Instead, defendants argue that, "[b]ecause of the relatively small dollar amount at issue in this case" (the first amended complaint sought $350,000 in damages), defendants took only two depositions of plaintiffs. Defendants' opp brief at 7. Defendants argue that they "would have performed more exhaustive depositions of Plaintiffs' management, and would have deposed additional employees and former employees of Plaintiffs." *Id.* at 11. Defendants also claim that converting the lawsuit to a class action would raise new class issues, affirmative defenses, and additional discovery. *Id.* In essence, defendants argue that "it would be fundamentally unfair to require [them] to incur the additional time and expense of re-deposing

Plaintiffs' witnesses, and having its witness (who resides in Florida) to be deposed a second time." *Id.*

Presumably, however, defendants would have deposed plaintiffs regardless of whether the instant action is a class action. Other than their conclusory assertion that they would have asked additional questions or conducted additional depositions, defendants fail to identify any rights that they have lost or expenses that could have been avoided. Moreover, defendants have not demonstrated that they will incur additional expenses if leave to amend is granted, especially if the class is certified and the class plaintiffs are deemed similarly situated to the instant plaintiffs. *Frankart Furniture Staten Is. v Forest Mall Assoc.*, 159 AD2d 322, 323 (1st Dep't 1990) ("[n]or was there any showing that defendant would have incurred significant trouble or expense if the amendment were allowed since its preparation against [plaintiff's] claim for property damages was no different from the preparation defendant would need to make as to [plaintiff's new] claim for damages"). To the extent that defendants require additional discovery, they are "still in a position to obtain any information [they] might require about the transaction in issue." *Id.* In other words, if leave to amend is granted, defendants retain their right to serve an answer, assert affirmative defenses, address any new class issues, and pursue additional discovery if so advised by counsel, issues that defendants may raise at the conference set forth below. *Koch v Acker, Merrall & Condit Co.*, 114 AD3d 596, 597 (1st Dep't 2014) (the need for "additional discovery" did not constitute prejudice or otherwise warrant denial of leave to amend); *Cardozo v Midway Motor Hotel*, 251 AD2d 442, 443 (2d Dep't 1998) (leave to amend properly granted "while permitting the defendant to conduct additional discovery"); *Garrison v Clark Mun. Equip.*, 239 AD2d 742, 743 (3d Dep't 1997) (granting leave to amend where discovery completed, stating

that "[m]erely because the amendment may require defendants to conduct additional discovery does not, alone, constitute sufficient grounds to justify denial of the motion").

Defendants argue that plaintiffs' attempt to add class claims is untimely as per CPLR 902. However, CPLR 902 requires a plaintiff, within 60 days of defendants' responsive pleading, to move for an order to determine whether a class action is to be maintained. CPLR 902 applies once the class action claims are asserted and the time for service of a responsive pleading has expired. Nothing contained in the statute or the case law cited by defendants suggests that the conversion of individual claims into a class action relates back to the filing of the initial, individual claims to time-bar the class claims. CPLR 902 merely codifies the requirement for class certification once class claims are asserted, identifying certain factors that must be considered under CPLR 902. Specifically, once the prerequisites of CPLR 901 are satisfied, under CPLR 902, the court will consider "the possible interest of class members in maintaining separate actions and the feasibility thereof, the existence of pending litigation regarding the same controversy, the desirability of the proposed class forum and the difficulties likely to be encountered in the management of a class action." *Ackerman v Price Waterhouse*, 252 AD2d 179, 191 (1st Dep't 1998). Thus, CPLR 902 does not apply until plaintiffs assert class claims.

Nevertheless, this Court must examine if the new pleading is sufficient, even when viewed under "the Legislature's express policy that motions for leave to amend pleadings should be freely granted." *Lucido v Mancuso*, 49 AD3d 220, 226-227 (2d Dep't 2008). Significantly, plaintiffs "need not establish the merit of [their] proposed new allegations" concerning class certification, but rather, they must "simply show that the proffered amendment is not palpably

insufficient or clearly devoid of merit." *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 (1st Dep't 2010) (internal citation omitted).

In this case, the proposed new pleading addresses the requirements of CPLR 901, including numerosity (Proposed second amended complaint, ¶¶ 57-58), the existence and predominance of common questions of law and fact (*id.*, ¶ 59), typicality of claims (*id.*, ¶¶ 60-61), adequacy of representation (*id.*, ¶¶ 62-63), and superiority and manageability of class litigation (*id.*, ¶¶ 64-65). While this Court makes no determination at this juncture concerning the efficacy of plaintiffs' anticipated, future request for class certification, for the limited purpose of analyzing plaintiffs' motion for leave to amend the pleading, the proposed second amended complaint's allegations addressed to the requirements for class certification are neither "palpably improper" nor "insufficient as a matter of law." *McGhee*, 96 AD3d at 450 (internal quotation marks and citations omitted). However, this Court preliminarily notes that class actions may be certified in breach of contract actions "notwithstanding differing damages to individual class members where ... there is a uniformity of contractual agreements." *Emilio v Robison Oil Corp.*, 63 AD3d 667, 668-669 (2d Dep't 2009).

To the extent that defendants' untimeliness argument is based, more generally, upon the prejudice caused by plaintiffs' dilatory assertion of new claims, "[m]ere delay is insufficient to defeat a motion for leave to amend." *Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 (1st Dep't 2011). Moreover, while defendants argue that plaintiffs were "unable to cite a single case where a court permitted a party to amend the complaint to add class claims after discovery was complete" (Defendants' opp brief at 13), the burden of showing prejudice or surprise is not borne by plaintiffs. Rather, as stated above, "[t]he burden of establishing prejudice" is on

defendants as "the part[ies] opposing the amendment." *Kimso Apts., LLC*, 24 NY3d at 411; *see also Otis El. Co. v 1166 Ave. of Ams. Condominium*, 166 AD2d 307, 307 (1st Dep't 1990) ("party opposing the motion to amend must overcome a heavy presumption of validity in favor of the moving party"). As stated above, plaintiffs' have met their burden, and defendants have failed to demonstrate prejudice and to overcome the plaintiffs' showing in favor of the proposed amendment.

Conclusion

Accordingly, it is hereby

ORDERED that plaintiffs' motion for leave to amend the first amended complaint is granted, and the second amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that defendants shall serve an answer to the second amended complaint or otherwise respond thereto within 30 days from the date of said service; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 335, 60 Centre Street, New York, New York, on August 1, 2016, at 11:00 a.m.

Dated: June 8, 2016

ENTER:

J.S.C.
SHLOMO HAGLER
J.S.C.