Knight v Family Energy Inc.
2026 NY Slip Op 31264(U)
March 27, 2026
Supreme Court, New York County
Docket Number: Index No. 650903/2023
Judge: Nicholas W. Moyne
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41M

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KEVIN KNIGHT, CAROLINE O'HARA

Plaintiff,

- v -

FAMILY ENERGY INC.,

Defendant.

INDEX NO. 650903/2023

MOTION DATE 01/24/2025

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

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HON. NICHOLAS W. MOYNE:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 99, 121

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

Defendant Family Energy Inc. ("Family Energy" or "Defendant") moves pursuant to CPLR §§ 3211(a)(1), (a)(5), and (a)(7) to dismiss the putative class action complaint filed by the plaintiffs Kevin Knight and Caroline O'Hara ("Plaintiffs"). The plaintiffs assert causes of action for breach of contract, violations of New York General Business Law ("GBL") §§ 349 and 349-d, and unjust enrichment, alleging that Family Energy charged them rates for natural gas and electricity supply that exceeded the fixed rates promised in their customer agreement, and improperly added an undisclosed Tariff Surcharge.

For the reasons set forth below, Defendant's motion to dismiss is granted in part and denied in part.

On a motion to dismiss pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87 [1994]). When evidentiary material is submitted, the criterion becomes whether the

proponent of the pleading has a cause of action, not whether they have stated one (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

The defendant argues that all of the plaintiffs' claims should be dismissed under the common law voluntary payment doctrine because the plaintiffs paid their utility bills, which displayed the allegedly inflated rates and the Tariff Surcharge, for months without protest or inquiry. It is well-settled that the voluntary payment doctrine is an affirmative defense, and courts are generally reluctant to dismiss claims under this doctrine at the pleading stage. (*see e.g. Cammayo v 1AND8, Inc*., 2024 NY Slip Op 34334[U], *5 [Sup Ct, Richmond County 2024] [denying motion to dismiss and holding that "it would be pre-mature for the Court to determine if the Voluntary Payment Doctrine applies at this pre-discovery stage of the case."]; *TW Telecom of N.Y., L.P. v Ackerman*, 2012 NY Slip Op 33295[U], *6 [Sup Ct, NY County 2012] [holding that "at this pleading stage of the action, dismissal on [] ground [of the voluntary payment doctrine] is not warranted; *Fishon v Peloton [Interactive, Inc*., 620 FSupp3d 80, 106 [SD NY 2022] ["Whether the doctrine will limit the recovery of Plaintiffs for payments made during certain time periods is a question not fit for resolution at this stage of the proceeding."]).

Dismissal is premature where the pleadings do not conclusively establish whether the plaintiffs knew or should have known that the charges were improper or misleading. Here, the plaintiffs allege that Family Energy intentionally deceived them by quoting specific rates on the front page of the signed contract (58.9 cents per therm and 7.59 cents per kWh) while intending to charge significantly higher rates. The plaintiffs should not be compelled to preemptively plead facts refuting the voluntary payment doctrine, particularly given that their claims are predicated on a lack of full disclosure or deception by the defendant. Indeed, the defendant's argument relies upon imputing full knowledge of additional program costs onto the plaintiffs via an unattached "Four-Page Terms" document. As this Court previously found in denying the defendant's motion to compel arbitration, the defendant failed to submit sufficient evidence establishing that the plaintiffs ever received those additional pages at the time of execution. Accepting the plaintiffs' allegations as true, they were deceived by the rates listed on the single-page contract and lacked full knowledge of the material facts when paying their utility bills. Therefore, the voluntary payment doctrine does not warrant dismissal at this stage.

The defendant also moves to dismiss the GBL §§ 349 and 349-d causes of action as time-barred under CPLR 3211(a)(5). The statute of limitations for GBL claims is three years (CPLR 214(2)). Family Energy argues the claims accrued

when the Agreement was executed on January 21, 2020 (or when the three-day cancellation period ended on January 24, 2020), which is more than three years prior to the commencement of this action on February 17, 2023.

A GBL claim accrues at the time the plaintiff has been injured by a deceptive act or practice violating GBL § 349(h) (*see Gaidon v Guardian Life Ins. Co. of Am.*, 96 NY2d 201, 210 [2001]). Where a plaintiff's claim is based on deceptive practices inducing unrealistic expectations about future performance or billing, the injury occurs when those expectations are actually not met—i.e., when the defendant breaks its promise and demands the inflated payment (*see id.* at 212). The plaintiffs allege they were not injured until they were first billed at the inflated rates in May 2020. Because May 2020 falls within three years of the February 17, 2023 filing date, the claims are timely. Additionally, when energy service company repeatedly charges periodic, allegedly unlawful rates, each individual overcharge on the monthly bill constitutes a distinct wrongful act, tolling the limitations period until the final wrongful charge. Thus, the GBL claims survive.

The defendants also argue that the complaint fail to state a claim under GBL § 349-d(3) and § 349-d(5). Regarding § 349-d(5), which places limits on early termination fees, the plaintiffs do not allege they paid any such fee and have conceded they are not pursuing this specific claim at this time. Accordingly, the GBL § 349-d claim is dismissed to the extent it relies on § 349-d(5). Regarding § 349-d(3), the statute prohibits deceptive acts or practices "in the marketing of energy services." The defendant points out that a signed contract is not marketing material. However, the plaintiffs allege that during the state-mandated three-day recessionary period—before the agreement becomes legally binding—the contract functions solely as a solicitation or advertisement or inducement to participate. While there does not appear to be any caselaw from New York state courts that directly addresses this issue, persuasive federal case law interpreting New York law has explicitly sustained consumer protection claims against ESCOs on the theory that misrepresentations concerning rates within a customer agreement can constitute deceptive marketing under the statute (see *Claridge v. N. Am. Power & Gas, LLC*; 2015 WL 5155934 *4-7 [SDNY 2015]; *Chen v. Hiko Energy, LLC*, 2014 WL 7389011 [SDNY 2014]).

The issue is not the type of document in which the misrepresentations were allegedly made but rather the nature of the alleged misrepresentations and the likelihood that they would deceive a reasonable consumer. The defendant has not citied any caselaw which holds that promises made in a marketing solicitation that later becomes a contract (after the recessionary period) cannot constitute actionable

deceptive acts under the GBL. Nor does the fact that regulations require energy service companies to provide a customer agreement with a recessionary period, and separately forbids deceptive marketing, mean that a company cannot be held liable for deceptive statements made in that agreement. Accordingly, the Court denies the motion to dismiss the § 349-d(3) claim.

Finally, the unjust enrichment claim should be permitted to go forward at this juncture as an alternative to a cause of action alleging breach of contract. (*see Whitsin's Food Serv. LLC v A.R.E.B.A.-Casriel, Inc.*, 210 AD3d 643, 646 [2d Dept 2022). The motion to dismiss the unjust enrichment claim is therefore denied.

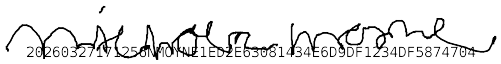
Accordingly, it is hereby:

ORDERED that Defendant's motion to dismiss is GRANTED IN PART solely to the extent that Plaintiffs' Third Cause of Action under GBL § 349-d is dismissed insofar as it relies upon GBL § 349-d(5); and it is further

ORDERED that Defendant's motion to dismiss is otherwise DENIED in its entirety; and it is further

ORDERED that Defendant shall serve an answer to the Complaint within 20 days of notice of entry of this Decision and Order, unless otherwise previously stipulated to by the parties

This constitutes the decision and order of the Court.



3/27/2026
DATE

NICHOLAS W. MOYNE, J.S.C.

CHECK ONE:		**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[X] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**