SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SHIRLEY WERNER KORNREICH J.S.C. Justice PART 54

Index Number : 104784/2011
EGLESTON, GREGORY M.
vs.
VERIZON COMMUNICATIONS, INC.
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____
MOTION DATE 2/7/12
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for E-Filed

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 16-22

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

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

Dated: 7/16/12

SHIRLEY WERNER KORNREICH J.S.C.
_____, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----------X

GREGORY M. EGELSTON, on behalf of himself and all others similarly situated,

Plaintiffs,

-against-

VERIZON NEW YORK, INC. and VERIZON COMMUNICATIONS INC.,

Defendants.

----------X

DECISION & ORDER

Index No.: 194784/2011

SHIRLEY WERNER KORNREICH, J.

In this putative class action for alleged billing errors, defendants move to dismiss the amended complaint, based upon documentary evidence and inability to prove damages. CPLR 3211(a)(1) and (7). Plaintiff opposes and requests leave to amend his pleading.

Background

Plaintiff is a business, land-line customer of defendant Verizon New York, Inc. (Verizon NY). Defendant Verizon Communications, Inc. (Verizon), is a holding company that owns non-party NYNEX Corporation, which owns defendant Verizon NY. The parties agree that the amount Verizon NY can bill is governed by a tariff filed with the New York State Public Service Commission (PSC) (Tariff). However, plaintiff questions whether his account is governed by the excerpts of the Tariff submitted by defendants, without authentication.

Plaintiff asserts the following causes of action, numbered here as they are in the amended complaint: 1) breach of contract; 2) violation of General Business Law (GBL) 349; 3) violation of GBL 350; 4) unjust enrichment; and 5) money had and received. All of the claims pleaded

relate to billing for "Installation Charges." The Service Order Charge that plaintiff complains of in his affidavit in opposition is not mentioned in the amended complaint. But, in his opposition, plaintiff requested leave to amend to include claims relating to it.

The grounds for defendants' motion are: 1) pursuant to the applicable contract, embodied in the Tariff, the charges were either permitted or were credited to plaintiff within thirty days, leaving him with no damages; 2) the Tariff provides that Verizon NY can only be liable for overcharges that result from gross negligence or willful misconduct, which cannot be inferred from plaintiff's allegations; 3) Verizon is not a proper defendant simply because it is a parent of Verizon NY.

Plaintiff's Allegations

The facts in this section are drawn from the amended complaint and plaintiff's affidavit in opposition to the motion. As this is a motion to dismiss, the court must accept the plaintiff's allegations as true and afford them the benefit of every favorable inference. *Cron v Hargro Fabrics*, 91 NY2d 362, 366 (1998).

Plaintiff alleges that defendants improperly billed him for installation and service charges when he switched plans and the phone number to which his calls were forwarded. All of the charges were reversed. The damages plaintiff alleges are the loss of use of his money before he received the benefit of the credit for the reversed charges.

All of the bills in the record say that payment should be made to Verizon, not Verizon NY. In a section called "Service Providers", the bills state that "with Verizon Solutions for Business, Verizon NY provides local service and related features and other voice services, unless otherwise indicated." The bills in the record include charges for internet and long distance

service, as well as local service.

January 2011 Charge

The first alleged overcharge was in January 2011 and appeared on the February 2011 bill. Plaintiff says that he was improperly billed $10.55 for an "Installation Charge" on his February 2011 bill, when he changed his plan from a Regular Dial Tone Plan (Regular) to Centrex Plus Service (Assumed Dial 9)(Centrex). Defendants concede that the charge was improper. Tr. 1/17/11, p 5. Their reasoning is that the plan change was a non-billable Initial Installation, pursuant to the Tariff. Plaintiff, on the other hand, claims that it was not an installation. He says that nothing was installed and it only was a change of service plan.

The February 2011 bill was in the amount of $402.82. On February 7, plaintiff mailed a check in that amount. On February 9, he called to complain about the Installation Charge. A telephone representative in the customer service department allegedly said that an Installation Charge is automatically billed when customers switch plans, due to a "glitch" in the system. The representative refused to a send plaintiff a refund check. Plaintiff was advised that he would receive a future credit. When asked whether a future credit would have been issued if plaintiff had not called, the representative said "probably not." On February 15, 2011, the amount of $402.82 was debited from plaintiff's bank account. A credit in the amount of $10.55 appeared on the next bill, dated February 16, 2011. Payment was due March 14 and plaintiff paid it on March 15, 2011. The check was debited from his account on March 18, 2011. Plaintiff says this proves that he was damaged because Verizon[1] had use of his $10.55 from February 15 until March 18, more than thirty days. Defendants claim that they agreed to the credit before

[1]Plaintiff's affidavit does not distinguish between Verizon and Verizon NY.

plaintiff's check cleared so there was no damage. Thirty days from February 15, 2011 is March 17, 2011.

June 2011 Charges

Plaintiff alleges that he switched the phone number to which his calls were forwarded on June 3, 2011. The July 2011 bill in the amount of $186.35 reflected another $10.55 "Installation Charge" and a "Service Order Charge" in the amount of $60.00. The $60.00 Service Order Charge is not pleaded. Plaintiff asserts that the number to which a call is forwarded is neither an installation nor a service change, but rather a change in a "feature." Plaintiff mailed a check in the amount of $186.35 on July 14, 2011, which was debited from his account on July 19, 2011. He called about the Installation Charge and allegedly was informed by a representative that it should not have been added for switching the forwarding phone number. Plaintiff's affidavit does not say when the phone call took place. Plaintiff did not receive a refund check. On November 18, 2011, he called to inquire about the Service Order Charge (Service Charge) and the Installation Charge on the July bill. The phone representative confirmed that both charges were improper, stated that the system automatically generates them, and a future credit was issued for them.

Plaintiff alleges violations of GBL 349 and 350. He says that it is a deceptive practice to knowingly maintain a billing system that routinely bills in error and that Verizon's advertising omitted to state that an Installation Charge would result from changing plans.

Documentary Evidence

In support of the motion, defendants offered excerpts from 2001 and 2003 amendments to the Tariff, as well as copies of the bills containing the alleged erroneous charges. There is no

affidavit based upon personal knowledge stating that the Tariff excerpts apply to plaintiff's account. The 2003 amendment states that as of August 1, 2000, the New York Telephone Company changed its name to Verizon New York, Inc., and that all references in the Tariff to New York Telephone Company or "the Company" refer to Verizon NY, Inc. For the first time in reply, defendants offered an additional Tariff excerpt, which they claim is dispositive of the $60.00 Service Order Charge. That is because the $60.00 charge was mentioned for the first time in plaintiff's opposition to this motion.

Defendants point to section 30.3 of the Tariff to support the propriety of the June Installation Charges:

RATES AND CHARGES

30.3 PRIVATE BRANCH EXCHANGE SERVICE (Cont'd)

1. CENTREX SERVICE (Cont'd)

NYNEX Digital Centrex Plus Service

f. Rates and Charges

5) Non-recurring Charges @ (C)

Centrex Plus nonrecurring charges may be spread over a period of six months. In addition to the standard nonrecurring charges specified in section 30.14, the following non-recurring charges apply to the connection of Centrex Plus features.

	Initial Installation	Subsequent Installation
(a) Standard Feature Activation Charge, per feature, per line	None	$10.55
(b) Optional Feature Activation Charge,		

per feature, per line

Automatic Callback	$5.00	10.00
Call Waiting	20.00	25.00
Directed Call Pickup	15.00	15.00
Inside/Outside Ringing	15.00	15.00
Speed Dialing - Two Digit	55.00	60.00
Trunk Answer Any Line	60.00	60.00

Defendants urge that this provision demonstrates that: 1) the January Installation Charge for Centrex was an error because it was the "Initial Installation;" and 2) the June 2011 charge for the change in the call forwarding number was correct because it was a Subsequent Installation. Call forwarding is not mentioned in the portions of the Tariff that defendants provided to the court. The court notes that the excerpt submitted by defendants does not describe "the standard nonrecurring charges specified in section 30.14," which are referred to in section 30.3.

Defendants point to a section 14, issued in 2001 to support the Service Order charge on the July bill. Section 14, entitled "CONNECTION, RESTORAL AND CONSTRUCTION CHARGES," contains the following provision:

1. General

Service Connection Charges are non-recurring charges which apply to the ordering, installing, moving, changing, rearranging or furnishing of telephone service, miscellaneous and supplemental equipment and other telephone facilities. Charges for Service Connection include: ...

(1) SERVICE CHARGE OR RECORD ORDER CHARGE ...
(3) CENTRAL OFFICE LINE OR PORT CHARGE

2. Regulations

a. Service Charge or Record Order Charge

(1) A Service Charge applies per customer order, for all work and services ordered to be provided at one time, on the same premises

> for the same customer, provided, however, that no additional Service Charge shall apply for connection of a line between different premises.
>
> (a) The Service Charge applies for work performed by the Telephone Company in connection with the receiving, recording and processing of customer requests for service.
>
> (b) The Service Charge applies for connections, moves, changes of equipment or service, changes of telephone number and wherever line or port, installation, connection, initial or other one time charges apply, except where otherwise specified.

Section 14 states that a Service Charge is in the amount of $60.00.

In support of the prong of its motion asserting that plaintiff suffered no damages, defendants offer excerpts from Sections 1(D)(2)(f) and (H)(16) of the Tariff, which provide:

> D. Liability (Cont'd)
>
> 2. Liability of Telephone Company for Service Interruptions, Errors, etc. (Cont'd)
>
> f. Exclusivity of Allowance in absence of gross negligence or wilful misconduct
>
> Apart from the interruption allowance stated above, no liability shall attach to the Telephone Company for damages arising from errors, mistakes omissions, interruptions, or delays of the Telephone Company, its agents, servants or employees, in the course of establishing, furnishing, rearranging, moving, terminating, or changing the services or facilities ... in the absence of gross negligence or willful misconduct.

Subsections 2 (c), (d) and (e), which precede the provision limiting liability to gross negligence and willful misconduct, speak of interruptions of lines or trunks associated with equipment; equipment malfunction, and interruption for Group Channel Service.

> 16. Billing Discrepancies
>
> General
>
> The following provisions govern the disposition of billing discrepancies related to

> recurring monthly charges for exchange access lines, private lines, service features, such as Custom Calling Service and equipment. Except for the provision or [sic] interest (as set forth in subparagraph (3)), these provisions shall not apply to charges related to the Company's usage services, including access to interexchange carriers. ...
>
> > 3. Interest, compounded monthly, will be paid on customer overpayments. Customer overpayments are considered to have occurred when payment in excess of the correct charges for service is made and is caused by erroneous company billing. ...
> >
> > Interest will not be paid on customer overpayments that are refunded within 30 days after such overpayment is received by the Company.

Discussion

Dismissal Based Upon Documentary

Where a defendant seeks to dismiss the complaint based upon documentary evidence, the motion should be denied unless "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law [citation omitted]." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002); *Leon v Martinez*, 84 NY2d 83, 88 (1994). The interpretation of an unambiguous contract is a question of law for the court. *West, Weir & Bartel, Inc. v. Mary Carter Paint Co.*, 25 NY2d 535, 540 (1969)("The construction of a plain and unambiguous contract is for the court to pass on, and ... circumstances extrinsic to the agreement will not be considered when the intention of the parties can be gathered from the instrument itself."). A provision is unambiguous on its face if it is reasonably susceptible of only one meaning. *White v Continental Cas. Co.*, 9 NY3d 264, 267 (2007).

Defendants contend that the June Installation Charge for changing the call forwarding number can be determined to be proper under the Tariff as a matter of law. They also claim that

the court cannot consider the alleged statement by the telephone representative that the charge was improper and automatically generated because there is no showing that the representative had authority to speak for defendants.

The court rules that the Tariff is ambiguous on this point. It is not at all clear that changing the number to which calls were forwarded is the activation of a new feature or an installation, especially in light of the lack of any definition of the standard features and the missing provision relating to standard nonrecurring charges specified in section 30.14. Further, at this juncture, without any disclosure having taken place, plaintiff is entitled to an inference that the June 2011 Installation Charge for changing the call forwarding number was an automatically generated, improper charge. While there is no showing that the representative to whom plaintiff spoke had authority to make binding admissions for defendants, admissible evidence need not be offered on a motion to dismiss. Plaintiff is entitled to discovery to determine whether or not defendants were aware that the system was automatically generating improper charges.

Finally, plaintiff's objection that there is no affidavit to authenticate the Tariff is rejected. The affidavit of an attorney without personal knowledge may be used as a vehicle to present documentary evidence. *Zuckerman v City of New York*, 49 NY2d 557, 563 (1980).

Dismissal Based Upon Inability to Prove Damages

Defendants contend that plaintiff cannot prove damages because: 1) the January Installation Charge was credited in less than thirty days; 2) pursuant to the filed-rate doctrine, plaintiff cannot sue for charges authorized by the Tariff; 3) plaintiff was not injured by the June Installation and Service Order Charges because they were authorized by the Tariff; and 4) pursuant to the Tariff, defendants can only be held liable for billing errors caused by gross

negligence or wilful misconduct.

Plaintiff counters that the January Installation Charge was not credited within thirty days; the filed-rate doctrine applies only to the rates defendants can charge, not to the practice of automatically generating bills for services not rendered; the June charges were not authorized by the Tariff; and plaintiff is claiming that defendants knew about and failed repair a systemic glitch that improperly billed, which amounts to gross negligence or wilful misconduct.

Installation Charges

Defendants have established as a matter of law that plaintiff suffered no contract damages due to the January Installation Charge. The Tariff provides that "[i]nterest will not be paid on customer overpayments that are refunded within 30 days after such overpayment is received by the Company." Interest for loss of use of money is the damage plaintiff claims. Although it appears that this charge might have been credited in less than thirty days after defendants received payment, if plaintiff paid his bill on time, plaintiff paid his bill one day late, and the check cleared on March 18, thirty-one days after his account was debited on February 15. Payment for the March bill was due twenty-seven days after February, on March 14. As a jury would have to speculate as to whether the payment would have been refunded within thirty days if plaintiff had paid on time, no damage can be proven for this January Installation Charge. *See generally, Fruition, Inc. v Rhoda Lee, Inc.*, 1 AD3d 124, 125 (1st Dept 2003).

With respect to the June Installation Charge, it is undisputed that it was not credited within thirty days. Hence, based upon the Tariff, the breach of contract claim stands. The court rejects defendants claim that there cannot be a claim for lost interest. The Tariff provides for interest for overpayments not refunded within thirty days.

Plaintiff's claims for unjust enrichment and money had and received relating to the Installation Charges cannot be maintained because the Tariff is a written contract. *Morales v Grand Cru Assoc.*, 305 AD2d 647 (2d Dept. 2003), *citing Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 (1987)(cannot recover for unjust enrichment if there is oral or written agreement for events arising from same subject matter); *Rocks & Jeans v Lakeview Auto Sales & Serv.*, 184 AD2d 502 (2d Dept 1992)(same holding in case for money had and received).

However, the GBL claims are still viable. GBL 349 provides that a cause of action may be maintained for injunctive relief to enjoin a deceptive business practice, and that the plaintiff may recover $50 or actual damages, whichever is greater. In addition, treble damages may be awarded. GBL 350 governs claims for advertising that is materially deceptive or misleading to reasonable consumers and causes an injury. *Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 324 (2002). The amended complaint alleges that defendants' advertising is deceptive because it does not say that Installation Charges will result from changing plans and forwarding numbers.

The court disagrees that the filed-rate doctrine precludes claims encompassing improper bills generated due to a known billing system flaw and charges omitted from advertising materials. The filed-rate doctrine applies to claims for rates that can be charged. *Porr v NYNEX Corp.*, 230 AD2d 564 (2d Dept 1997). The doctrine precludes recovery of damages for the collection of the rates approved by a regulatory agency. *Id.* However, it does not apply to claims under the GBL that do not involve the reasonableness of the approved rates. *Naevus International, Inc. v AT & T Corp.*, 283 AD2d 171 (1st Dept 2001). Here, the claims are that defendants deliberately ignored a system billing error and failed to advertise the cost of changing plans. These are not claims relating to the approved rates.

Lastly, the court disagrees that plaintiff's claims must be dismissed because he cannot prove gross negligence or wilful misconduct. First of all, it is not clear from the Tariff excerpts submitted that the clause defendants rely on applies to billing errors. One plausible reading is that it applies to service interruptions and malfunctions, not billing. Further, giving plaintiff the benefit of every favorable inference, the contentions that defendants ignored their billing system flaws and failed to reveal Installation and Service charges for plan changes and different forwarding numbers in their advertising materials, may be sufficient to establish gross negligence or wilful misconduct.

The $60 Service Charge

The court grants plaintiff leave to amend to assert claims for breach of contract and under GBL 349 for the $60 Service Charge. A motion to amend should be freely granted in the absence of prejudice, unless that amendment is clearly lacking in merit. CPLR 3025(b); *Heller v. Provenzano, Inc.*, 303 AD2d 20, 22 (1st Dept. 2003); *Pasalic v. O'Sullivan*, 294 A.D.2d 103, 104 (1st Dept. 2002).

It is not clear from the documents defendants submitted that the Tariff permits a Service Charge for the change of a phone number to which calls are forwarded. The same rulings would apply regarding the Service Charge with respect to the claims regarding the Installment Charges, except for the GBL 350 claim. There is no evidence in the record to support a claim for misleading advertising concerning the Service Charge. "It is incumbent upon the movant to make some evidentiary showing that the claim can be supported." *Morgan v Prospect Park Associates Holdings, L.P.*, 251 AD2d 306 (2d Dept. 1998), quoting *Cushman & Wakefield, Inc. v John David, Inc.*, 25 AD2d 133, 135 (1st Dept. 1966).

Dismissal of Verizon as a Party

The bills submitted by defendants do not make clear that Verizon NY is the only entity whose services plaintiff used. It is not at all apparent that plaintiff was only provided local service. The bills appear to be from Verizon, not Verizon NY. Without discovery, the claims against Verizon cannot be dismissed as a matter of law. Accordingly, it is

ORDERED that the motion by defendants Verizon New York, Inc. and Verizon Communications, Inc., to dismiss the amended complaint of plaintiff Gregory M. Egelston, is granted solely to the extent of dismissing the portion of the first cause of action for breach of contract for the Installment Charge contained in the February 2011 bill and the causes of action for unjust enrichment and money had and received; and in all other respects the motion is denied; and it is further

ORDERED that plaintiff may amend his pleading within twenty days of entry of this decision in the New York State Courts Electronic Filing System to assert claims for breach of contract and violation of GBL 349 regarding the $60 Service Charge that appeared on his July 2011 bill.

Dated: July 16, 2012

ENTER:

J.S.C.