SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED JUSTICE OF SUPREME COURT PART 5

Justice

Index Number : 654239/2012
LUCENO, CHARLES
vs
CITY OF NEW YORK
Sequence Number : 001
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

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

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

Replying Affidavits _____ | No(s). _____

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 12-5-13
DEC DEC 05 2013

_____, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

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 5

----------X

CHARLES LUCENO, RICHARD MARKS and BRIAN HUGHES, individually and on behalf of others similarly situated,

Plaintiffs,

-against-

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, and UNIDENTIFIED ENTITIES A THROUGH Z,

Defendants.

----------X

DECISION/ORDER
Index No. 654239/2012
Seq. No. 001

PRESENT:
Hon. Kathryn E. Freed
J.S.C.

HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR§2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
Seq. 001	
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	...1-2(Ex A)...
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	.....
ANSWERING AFFIDAVITS.....	.....
REPLYING AFFIDAVITS.....	.....
EXHIBITS.....	.....
OTHER.....	.....

PAPERS	NUMBERED
Seq. 002	
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	.1-2(Ex A-B)..
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	.....
ANSWERING AFFIRMATION.....	...3(Ex A-E)...
REPLYING AFFIDAVITS.....	.....
OTHER. (Memo of Law).....	.....4.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In Sequence No. 001, the City of New York and New York City Department of Transportation (collectively, "municipal defendants"), move for an Order dismissing the putative class action complaint pursuant to CPLR§ 3211 (a)(2) and §3211(a)(7), on the grounds that: (1) plaintiffs' claims against municipal defendants fail because an Article 78 proceeding is the only proper procedural vehicle for judicial review of an administrative determination and plaintiffs pled guilty before the administrative agency thereby failing to pursue their administrative remedies; (2) plaintiffs have failed to state a cause of action of fraud against municipal defendants; and (3) plaintiffs' requests for injunctive and declaratory relief are without merit and should be denied. Plaintiffs have not opposed this motion at this time, in that the parties, stipulated to stay the briefing of the City's motion to dismiss until a decision was rendered on the plaintiffs' motion to amend the complaint as set forth in sequence No. 002.

In Sequence No. 002, plaintiffs Charles Luceno, Richard Marks and Brian Hughes, having brought a class action seeking, inter alia, declaratory and injunctive relief, move, pursuant to CPLR§ 3025(b), to amend the complaint to reflect their replacement as putative class representatives by David Halberstam and Kelly Ann Williams. The plaintiffs also seek to amend the complaint to assert violations of Article I, Section 6 of the New York State Constitution, the Fifth and Fourteenth Amendments to the United States Constitution, and Sections 1983 and 1988 of the United States Code. Defendants oppose. For the reasons set forth below, this motion is granted.

On December 5, 2012, the plaintiffs commenced this lawsuit against the City of New York, the New York City Department of Transportation, and certain unidentified entities (hereinafter collectively "the City"). In their complaint, the plaintiffs claimed that the City

improperly issued citations and collected fines through its "Red Light Camera Monitoring Program" (hereinafter "the program"). The plaintiffs claimed that the program, which enabled the City to photograph vehicles which failed to stop at red lights, was improper since certain traffic lights in the City remained yellow for less than three seconds, the duration allegedly required by law, before turning red. The individually named plaintiffs and the putative class consist of individuals who allegedly received notices of liability under the program, pleaded guilty to the charge of violating New York Vehicle and Traffic Law Section 1111(d), and paid a fine to the City. The plaintiffs alleged claims of unjust enrichment, fraud, and violations of New York Civil Rights Law Section 11. They also sought a declaration that the City operated the program in violation of federal standards and to enjoin the City from operating the program until it complied with state and federal laws regarding the duration of yellow signals. Further, the plaintiffs sought an order directing the City to conduct an audit to determine the identities of persons who were fined under the program and allegedly owed refunds. By notice of motion returnable March 27, 2013, the City moved to dismiss the complaint. The parties thereafter entered into a stipulation, dated March 4, 2013, allowing the plaintiffs to submit opposition to the defendants' motion by March 27, 2013 and allowing the City to serve a reply affirmation by April 10, 2013. On March 22, 2013, the parties further stipulated that the plaintiffs had until March 28, 2013 to move to amend the complaint, that the City had until May 2, 2013 to oppose the motion to amend, and that the plaintiffs had until May 16, 2013 to serve a reply. The stipulation also stayed the briefing schedule on the City's motion to dismiss until after a decision was rendered on the plaintiffs' motion to amend the complaint.

By notice of motion returnable May 17, 2013, the plaintiffs now move to amend the

complaint to 1) substitute Halberstam and Williams as plaintiffs in lieu of Luceno, Marks and Hughes; and 2) to assert violations of Article I, Section 6 of the New York State Constitution, the Fifth and Fourteenth Amendments to the United States Constitution, and Sections 1983 and 1988 of the United States Code. In the proposed amended complaint, Halberstam and Williams claim that they were each improperly fined by an administrative law judge (hereinafter "ALJ") as a result of the program. Halberstam claims that he did not appeal the determination of the ALJ because it would have been futile. Williams claims that she filed an appeal and the City, in opposition, asserts that she did not.[1]

The City opposes the motion, asserting that it will be prejudiced if new plaintiffs are substituted for the initially named plaintiffs. The City further asserts that the amended complaint is patently devoid of merit since Halberstam and Williams can only obtain judicial review of their adverse determinations in an Article 78 proceeding and, since both failed to exhaust their administrative remedies by appealing the decisions of the ALJs, they cannot succeed in such a proceeding.

It is well settled that "[l]eave to amend a pleading pursuant to CPLR 3025(b) should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit, or unless prejudice or surprise to the opposing party results directly from the delay in seeking leave to amend" *Seidman v Industrial Recycling Properties, Inc.*, 83 AD3d 1040, 1040-1041 (2d Dep't 2011) (citations omitted); see also *JPMorgan Chase Bank, N.A. v Low Cost*

[1]In its sur-reply affirmation, the City asserts that the plaintiffs conceded in their reply affirmation that Williams did not appeal. Although the plaintiffs state in their reply affirmation that the "[p]laintiffs did not appeal," they do not specifically state that Williams, one of the proposed new plaintiffs, did not appeal.

Bearings NY Inc., 107 AD3d 643, 644 (1st Dep't 2013); *Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 (1st Dept 2011). Leave to amend should be freely granted even if the amendment substantially alters the theory of recovery. See *Dittmar Explosives, Inc. v A.E. Ottaviano, Inc.*, 20 NY2d 498, 502 (1967).

While there are some shortcomings to the plaintiffs' explanation of why the complaint should be amended, the City has failed to demonstrate that the proposed new theories of recovery, i.e., violations of the New York State and United States Constitution, as well as U.S.C. Sections 1983 and 1988, are patently without merit. See *JPMorgan Chase Bank, N.A.*, supra at 644; *Degregorio v American Mfrs. Mut. Ins. Co.*, 90 AD3d 694, 696 (2d Dep't 2011). The City has articulated several defenses which may ultimately prove fatal to the plaintiffs' claims, including the statute of limitations, failure to exhaust administrative remedies, and failure to properly plead the claim of fraud. This Court need not resolve them at this juncture, however, since its limited function on this motion to amend is, as set forth above, to determine whether the newly asserted claims are prejudicial or patently devoid of merit.

Despite the City's conclusory contention that it will be prejudiced by "complicated class definition issues" if Halberstam and Williams are substituted as plaintiffs, it fails to explain the nature of such prejudice or how it will arise. Indeed, the record is devoid of any evidence that the City would be prejudiced by the amendment of the complaint. See *Degregorio,* supra at 696.

In light of the above, the plaintiffs' motion to amend the complaint is granted. The plaintiffs are directed to serve, within 15 days after service of this order with notice of entry, an amended complaint in a form substantially similar to the proposed amended complaint attached to the plaintiffs' moving papers, except that the plaintiffs are permitted to modify, if so advisable,

the allegation that plaintiff Williams appealed from the determination of the administrative law judge.

As noted above, the parties stipulated to stay the briefing of the City's pending motion to dismiss until a decision was rendered on the plaintiffs' motion to amend the complaint. Given that the service of the amended complaint will not render moot the pending motion to dismiss the initial complaint (see *Fownes Bros. & Co., Inc. v JPMorgan Chase & Co.*, 92 AD3d 582, 582-583 [1st Dep't 2012]), the Court directs the City to notify the Court by mail, within 60 days after the service of the amended complaint, whether it will (1) proceed with its motion to dismiss the initial complaint or (2) withdraw its pending motion and move, within 60 days after service of the amended complaint, to dismiss the same. The parties may agree to an appropriate briefing schedule that provides for an alternative filing date for a new motion to dismiss or for the service of papers in connection with the pending motion to dismiss the initial complaint. If the parties are unable to stipulate to a briefing schedule regarding the motion to dismiss the initial or amended complaint, the Court must be notified by letter so that it can set forth a schedule in an order.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that the plaintiffs' motion to amend the complaint is granted; and it is further,

ORDERED that the plaintiffs are directed to serve, within 15 days after service of this order with notice of entry, an amended complaint in a form substantially similar to the proposed amended complaint attached to the plaintiffs' moving papers, except that the plaintiffs are permitted to modify the allegation that Williams appealed from the determination of the administrative law judge; and it is further,

ORDERED that the City is to notify the Court and its adversaries, within 60 days after service of the amended complaint, whether it will prosecute its pending motion to dismiss or withdraw the same in favor of a newly briefed motion to dismiss the amended complaint. If the parties cannot stipulate to an appropriate briefing schedule of the pending motion or a motion to dismiss the amended complaint, the Court must be notified by letter so that a schedule can be set forth in an order; and it is further,

ORDERED that the caption will henceforth read as follows:

"SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
----------X
DAVID HALBERSTAM and KELLY ANN WILLIAMS, Individually and on behalf of others similarly situated,

Plaintiffs,

Index No.: 654239/12

-against-

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, and UNIDENTIFIED ENTITIES A THROUGH Z,

Defendants.
----------X"

and it is further

ORDERED that the plaintiffs are directed to serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158); and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: December 5, 2013

ENTER:

DEC 05 2013

Hon. Kathryn E. Freed
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT