

United States District Court
Northern District of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ANGELE GIROUX,
Plaintiff,
v.
ESSEX PROPERTY TRUST, INC.,
Defendant.

Case No. 16-cv-01722-HSG

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS AND DENYING
AS MOOT PLAINTIFF'S MOTION FOR
LEAVE TO SUBMIT ADDITIONAL
MATERIALS**

Re: Dkt. No. 33, 38

Pending before the Court are two motions: (1) Defendant Essex Property Trust, Inc.'s motion to dismiss or, in the alternative, motion for judgment on the pleadings ("Motion to Dismiss") and (2) Plaintiff Angele Giroux's motion for leave to submit additional materials ("Motion for Leave"). Dkt. Nos. 33, 38. For the reasons articulated below, Defendant's Motion to Dismiss is GRANTED WITH LEAVE TO AMEND, and Plaintiff's Motion for Leave is DENIED AS MOOT.

I. BACKGROUND

On April 5, 2016, Plaintiff Angele Giroux filed this action under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2), against her employer, Defendant Essex Property Trust. Dkt. No. 1. The complaint alleges that in March 2016, Defendant experienced a cybersecurity data breach, which resulted in the theft of the personal identifying information of over 1,500 of Defendant's current and former employees. Id. ¶¶ 1-2. Plaintiff asserts that the data breach resulted from Defendant's failure to implement reasonable security measures to detect and prevent cyberattacks. Id. ¶ 4.

Plaintiff purports to assert four claims for relief on behalf of a class comprised of Defendant's current and former employees: (1) negligence; (2) breach of implied contract; (3)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

invasion of privacy; and (4) a request for a declaration that Defendant’s current cybersecurity measures are inadequate. Plaintiff seeks both damages and injunctive/declaratory relief.

II. ANALYSIS

On August 31, 2016, Defendant filed the pending Motion to Dismiss. Dkt. No. 33. On September 14, 2016, Plaintiff’s deadline to oppose Defendant’s motion, Plaintiff filed a one-page request to amend her complaint that did not respond to the substance of Defendant’s Motion to Dismiss. Dkt. No. 35.¹ Defendant indicated in its reply in support of its Motion to Dismiss that it does not oppose Plaintiff’s request for leave to amend. Dkt. No. 40.

Without ruling on the merits of Defendant’s Motion to Dismiss, the Court interprets Plaintiff’s failure to oppose the motion as a concession that her original complaint should be dismissed. See *Marziano v. Cty. of Marin*, No. C-10-2740 EMC, 2010 U.S. Dist. LEXIS 109595, at *10 (N.D. Cal. Oct. 4, 2010) (failure to oppose motion to dismiss interpreted as a concession that the claim at issue should be dismissed); see also *GN Resound A/S v. Callpod, Inc.*, No. C 11-04673 SBA, 2013 U.S. Dist. LEXIS 40402, at *13 (N.D. Cal. Mar. 21, 2013) (construing plaintiff’s failure to oppose defendant’s argument as a concession of said argument). Because Defendant does not oppose the filing of Plaintiff’s first amended complaint (“FAC”), the Court dismisses Plaintiff’s complaint with leave to amend. *Baker v. Holder*, 475 F. App’x 156, 157 (9th Cir. 2012) (“Dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment.”).

On September 20, 2016, Plaintiff filed her Motion for Leave, seeking belatedly to submit materials in opposition to Defendant’s Motion to Dismiss her original complaint. Dkt. No. 38. Given that the Court has dismissed Plaintiff’s complaint with leave to amend, Plaintiff’s Motion for Leave is DENIED AS MOOT.

//
//
//

¹ Plaintiff attached her proposed first amended complaint to her September 14, 2016, response. Dkt. No. 35, Ex. A.


1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

III. CONCLUSION

For the aforementioned reasons, Defendant’s Motion to Dismiss is GRANTED WITH LEAVE TO AMEND, and Plaintiff’s Motion for Leave is DENIED AS MOOT. Plaintiff may file her first amended complaint within 7 days of this Order.

IT IS SO ORDERED.

Dated: 9/27/2016


HAYWOOD S. GILLIAM, JR.
United States District Judge