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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Shulman PART 1

Aldrich, Bradley

-v-

Northern Leasing

INDEX NO. 602803/07

MOTION DATE

MOTION SEQ. NO. 011

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits A, * 1	1
Answering Affidavits — Exhibits A-B	2
Replying Affidavits	3
Sur-Reply Letters	4, 5

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

Dated: Aug. 9, 2013

MARTIN SHULMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

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BRADLEY C. ALDRICH, MICHAEL ARNOLD, ESTELA SALAS and STEPHANIE WEIER, on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

NORTHERN LEASING SYSTEMS, INC., JAY COHEN STEVE BERNARDONE, RICH HAHN, SARA KRIEGER AND JOHN DOES 1-50,

Defendants.

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Index No. 602803/07

Decision & Order

MARTIN SHULMAN, J.:

Plaintiffs move by order to show cause ("OSC") for leave to amend their complaint in this purported class action lawsuit. Defendants Northern Leasing Systems, Inc. ("NLS") and individual defendants Jay Cohen, Steve Bernardone, Rich Hahn and Sara Krieger (together with NLS, "defendants") oppose the motion.

Background

Plaintiffs commenced this action based upon defendants' alleged practice of unlawfully accessing and/or making adverse entries in their consumer credit reports (CCR). The original complaint alleged violations of the Fair Credit Reporting Act ("FCRA"), 15 USC §§ 1681, *et seq.*; General Business Law ("GBL") §380, *et seq.* ("NYFCRA"); GBL §349 (deceptive trade practices); and defamation. By decision and order dated March 12, 2009, this court dismissed the GBL §349 and defamation causes of action (Counts IX and X, respectively). Plaintiffs' remaining causes of action for violations of the FCRA and NYFCRA allege that defendants: (1) willfully obtained plaintiffs' CCRs without a permissible purpose (Counts I and V); (2) negligently obtained

plaintiffs' CCRs without a permissible purpose (Counts II and VI); (3) negligently refused or failed to investigate and/or rectify errors in reporting (Counts III and VII); and (4) willfully refused or failed to investigate and/or rectify errors in reporting (Counts IV and VIII).

Subsequently, plaintiffs moved for class certification on the unlawful access causes of action (Counts I, II, V and VI) as well as partial summary judgment thereon. Defendants cross-moved for partial summary judgment dismissing these four causes of action. By decision and order dated August 16, 2012 (the "8/16/12 decision"), this court *inter alia*: denied plaintiffs' motion for class certification and partial summary judgment; granted defendants' cross-motion for summary judgment dismissing Counts I and V alleging defendants willfully obtained plaintiffs' CCRs without a permissible purpose in violation of the FCRA and the NYFCRA against all defendants and further dismissing Counts II and VI alleging defendants negligently obtained plaintiffs' CCRs without a permissible purpose in violation of the FCRA and NYFCRA solely as against the individual defendants.

Plaintiffs' Proposed Amendments

The proposed amended complaint ("AC") primarily seeks to add the allegation that defendants failed to give advance written notice to plaintiffs prior to accessing their CCRs as the NYFCRA (GBL §380-b[b]) requires. It also seeks to streamline plaintiffs' allegations by removing plaintiff Stephanie Weier from the caption due to her bankruptcy filing, deleting references to her within the AC and deleting dismissed Counts I (wilful violation of FCRA §1681b[f] by accessing CCRs without a permissible

purpose), IX (GBL §349) and X (defamation). Plaintiffs contend NLS will not be "unduly prejudiced" by the amendment since discovery is ongoing and no further proceedings are presently scheduled.

Opposition

Defendants oppose the proposed amendment on the following grounds:

- as this court remarked in its 8/16/12 decision, plaintiffs waited over five (5) years (and over five months after the 8/16/12 decision) to bring a claim they could have asserted from the outset of this litigation, without offering any excuse for their excessive delay;

- the proposed amendment will prejudice defendants because it is barred by the two (2) year statute of limitations for NYFCRA violations (GBL §380-n), which began to run at the time plaintiffs' CCRs were accessed;[1]

- even if the proposed amendment were not time barred, defendants would still be prejudiced because: the claims plaintiffs seek to raise involve issues dating back to 1991; there has been no discovery on such issues; and it is likely that relevant documents may have been lost or discarded and memories will have faded, thus impairing defendants' ability to obtain relevant discovery to aid their defense;

- prejudice to defendants is not limited to the three (3) named plaintiffs since the AC seeks to assert time-barred claims on behalf of more than 500,000 class members when only those class claims arising after December 2010 (two years prior to plaintiffs' within OSC) would be timely;

- the proposed amendment is palpably insufficient because it attempts to assert a class claim for which the named plaintiffs are not suitable representatives (i.e., the statute of limitations defense applicable to the named plaintiffs would not be typical of the defenses applicable to putative class members whose claims are not time barred); and

- the proposed amendment is palpably insufficient because it seeks to assert claims this court has already rejected (for example, the AC continues to assert impermissible access claims against the individual

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[1] Defendants accessed: plaintiff Aldrich's CCR on June 22, 2006 and March 6, 2007; plaintiff Salas' CCR on February 7, 2007; and plaintiff Arnold's CCR on May 22, 2007.

defendants [AC Counts I, IV and V] and a wilful impermissible access claim against NLS [AC Count IV], all of which were dismissed in the 8/16/12 decision, and two impermissible access claims on behalf of a class [AC Counts II[2] and V], despite the fact that the 8/16/12 decision denied certification on such claims).

Plaintiffs' Reply

In reply, plaintiffs counter that:

- mere delay does not bar amendment and even if it did, defendants caused the delays in this case and, in any event, plaintiffs moved to amend as soon as unsuccessful mediation discussions conducted in the fall of 2012 ended;

- defendants cannot establish significant prejudice to justify denying the proposed amendment, as discovery is continuing and the case is not trial ready;

- no statute of limitations issue arises because the proposed amendment relates back to plaintiffs' original NYFCRA claim (*see* CPLR § 203 [f]);

- defendants cannot claim discovery prejudice because evidence concerning statutorily mandated notice to plaintiffs is in defendants' exclusive possession, thus plaintiffs' recollections are of no moment, and defendants were obligated to preserve evidence of their having issued such notice; and

- the proposed amendment does not assert previously rejected claims as evidenced by the following: the AC does not include Count I of the original complaint (FCRA wilful improper access); the AC's NYFCRA improper access causes of action (AC Counts IV [wilful] and V [negligent]) are now based upon the previously unpleaded lack of notice claim and thus could not have been dismissed; class certification was not sought for plaintiffs' causes of action for alleged violations of the FCRA and NYFCRA based upon failure to investigate and/or rectify errors in reporting and as such AC Counts II, III, VI and VII properly include class claims; and the NYFCRA lack of notice claims (AC Counts IV and V) are properly certifiable because they allege that defendants never gave

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[2] As plaintiffs' counsel accurately notes, AC Counts IV and V are the only two impermissible access claims asserted on behalf of the class. Presumably defendants' reference to AC Count II (FCRA violation based upon failure to investigate and/or rectify reporting error) was merely a typographical error.

advance notice to anyone prior to accessing CCRs and this issue should be decided in the context of a certification motion rather than a motion to amend a pleading.

Sur-Replies

By letter dated February 6, 2013, defense counsel addresses plaintiffs' position that the statute of limitations does not bar the proposed amendment because it relates back to the original complaint under CPLR §203(f). Defendants urge that the relation back doctrine does not apply because the original complaint does not give notice of the transactions and/or occurrences to be proved in the AC, a fact this court implicitly noted in its 8/16/12 decision by referring to it as an unpleaded claim.

Defendants also reiterate that plaintiffs could have brought the proposed new claim five (5) years ago when they commenced this action. As a result, under no circumstances could any delay on defendants' part have contributed to plaintiffs' five (5) year delay in seeking amendment.

In response, by letter dated February 7, 2013 plaintiffs' counsel objects to defendants' sur-reply and reiterates that the proposed amendment relates back to the original complaint since it merely adds a new theory of recovery on the issue already being litigated.

Discussion

Leave to amend a pleading pursuant to CPLR 3025 (b) should be freely granted absent prejudice or surprise resulting from the delay (*see Edenwald Contr. Co., Inc. v City of New York*, 60 NY2d 957, 959 [1983]; *Probst v Cacoulidis*, 295 AD2d 331 [2d Dept 2002]). While the decision to allow or disallow an amendment is left to the court's

sound discretion (*see Edenwald Contr. Co. v City of New York*, *supra*), a court need not grant leave to amend a pleading where the proposed amendment is palpably without merit (*see Probst v Cacoulidis*, 295 AD2d at 332; *Reuter v Haag*, 224 AD2d 603 [2d Dept 1996]).

Mere lateness does not establish grounds to reject a proposed amendment. Instead, a delayed request must be accompanied by extreme prejudice as well. *Edenwald Contr. Co. v City of New York, supra*. In this context, the courts define prejudice as "some special right lost in the interim, some change of position, or some significant trouble or expense which 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 Dept 1991) (citations omitted). Prejudice may also be demonstrated where a party "is hindered in its preparation of its case, where there is significant expansion of the claims, or where the amendment is sought after the parties have completed discovery (citations omitted)." *JP Morgan Chase Bank v Orleans*, 2007 WL 6882391 (Sup Ct, NY County). However, "while delay alone is not a sufficient ground to deny a motion to amend '[l]ateness in making a motion to amend, coupled with the absence of a satisfactory excuse for the delay and prejudice to the opposing party, justifies denial of such a motion' (internal citations omitted)." *Moon v Clear Channel Communications, Inc.*, 307 AD2d 628, 629-630 (3d Dept 2003).

At the outset, the portions of plaintiffs' OSC seeking to amend the complaint to delete references to plaintiff Weier and to delete Counts I, IX and X, all of which have been dismissed, are granted without opposition. Plaintiffs' OSC is similarly granted as

to the proposed amendments set forth in AC Counts II, III, VI and VII for wilful and negligent violations of the FCRA and NYFCRA based upon alleged failure to investigate and/or rectify reporting errors. These causes of action were not addressed in the 8/16/12 decision and defendants have not objected to the minor amendments thereto.[3]

With respect to AC Count I alleging violations of the FCRA (15 USC §1681[o]) by negligently accessing plaintiffs' CCRs without a permissible purpose, the AC properly deletes references to class members in accordance with the 8/16/12 decision (see ¶¶ 68 and 72). However, AC Count I does not reflect the 8/16/12 decision's dismissal of this cause of action as against the individual defendants (see ¶69 and references throughout to "defendants", rather than solely to NLS) and as such, amendment is granted subject to plaintiffs revising this claim accordingly.

Turning to AC Counts IV and V alleging lack of notice under the NYFCRA (GBL §380-b[b]), plaintiffs' unexplained delay in moving to amend the complaint is yet another example of the inefficient, piecemeal approach to litigation that has characterized this action and the related *Pludeman* action, wherein this court denied plaintiffs' motion to amend on February 28, 2013. Nonetheless, this court declines to deny amendment solely on the grounds of delay. See *Edenwald, supra*.

This court agrees that the statute of limitations bars plaintiffs' proposed amendment, but finds that with respect to the named plaintiffs, the amendment relates back to the original complaint. Specifically, the original complaint alleges with respect

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[3] Contrary to defendants' claim, Count II's reference to the class at paragraph 78 is not improper since the 8/16/12 decision only addressed class certification on the improper access causes of action.

to all three remaining plaintiffs that NLS lacked authority to access each plaintiff's CCR and "never notified" each plaintiff "before accessing [his/her] credit report." See Complaint at ¶¶ 24, 41 and 49. True, plaintiffs' complaint neither connects these factual allegations to any of its pleaded causes of action nor does it expressly assert a GBL §380-b(b) violation. Nonetheless, it cannot be said that the original complaint "does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." CPLR §203(f).

However, the same cannot be said of those putative class members whose lack of notice claims are time barred. Nowhere in the original complaint is there any indication that the proposed class might seek recovery based upon a sweeping, wide scale claim that defendants have never complied with the NYFCRA's notice requirement. As such, the relation back doctrine is unavailing to any potential class members whose claims are untimely (i.e., claims arising before December 2010 [two years prior to plaintiffs' within OSC]). Defendants would be substantially prejudiced since the proposed amendment significantly expands the complaint's allegations to include time barred claims of hundreds of thousands of potential plaintiffs. Such untimely claims are palpably without merit. *Probst*, *supra*; *Reuter v Haag*, 224 AD2d at 604 (proposed amendment lacked merit where statute of limitations barred claim).

Having determined that the proposed amendment to add allegations regarding the failure to give notice as mandated by the NYFCRA can only be interposed by the three named plaintiffs and any putative class members whose claims are not time barred, it is necessary to address whether proposed Counts IV and V, as written, accurately reflect the 8/16/12 decision's rulings.

Proposed Count IV, delineated in the original complaint as "Willfully Obtaining Consumer Reports Without A Permissible Purpose", is renamed "Willfully Obtaining Consumer Reports Without Authority." The proposed amendment adds the new allegation that defendants failed to give plaintiffs notice as the NYFCRA requires (AC ¶88). Defendants correctly note that plaintiffs, notwithstanding their attempt to "streamline" the complaint to reflect the current case posture, also continue to improperly allege that all of the defendants wilfully obtained their CCRs without a permissible purpose (AC ¶88), despite the fact that the 8/16/12 decision dismissed this claim entirely. The proposed amendment is granted subject to the removal of this offending language and, upon deletion of same, reference to the class and the individual defendants may remain, as the 8/16/12 decision did not address the merits of this newly alleged failure to notify claim as against the individual defendants or on behalf of the class.

Proposed Count V is the negligent counterpart to proposed Count IV. The 8/16/12 decision left the cause of action for negligent impermissible access against NLS in tact but dismissed it as to the individual defendants and denied class certification thereon. Proposed Count V does not reflect the foregoing (see AC ¶95). Plaintiffs also propose to add allegations pertaining to the alleged violation of GBL §380-b(b) within the same cause of action and paragraph as the impermissible access allegations. However, for the same reasons cited in the above analysis of proposed Count IV, the new lack of notice allegations, unlike the negligent impermissible access allegations against NLS, may be alleged against the individual defendants and on behalf of the class. Amendment is thus granted subject to the removal of the negligent

impermissible access allegations on behalf of the class as against the individual defendants.[4]

For all of the foregoing reasons, it is

ORDERED that plaintiffs' motion to amend is granted to the extent set forth herein, and is otherwise denied; and it is further

ORDERED that plaintiffs shall serve the proposed amended complaint, revised in accordance with the terms of this decision and order, so as to be received on or before August 19, 2013.

Counsel for the parties shall appear for a status conference on September 10, 2013 at 9:30 a.m., at 60 Centre Street, Room 325, New York, New York.

The foregoing is this court's decision and order. Courtesy copies of this decision and order have been provided to counsel for the parties.

Dated: New York, New York
August 9, 2013

HON. MARTIN SHULMAN, J.S.C.

[4] For the sake of clarity, it may be advisable to allege the negligent failure to notify and negligent impermissible access claims as separate causes of action.