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

BLT STEAK LLC and BLT FISH LLC,

Plaintiffs,

-against-

LIBERTY POWER CORP., LLC, d/b/a LIBERTY POWER NEW YORK, and LIBERTY POWER HOLDINGS LLC,

Defendants.

Index No.: 151293/13

Motion Seq. No.: 005

DECISION/ORDER

HON. SHLOMO S. HAGLER, J.S.C.:

In this action for breach of contract, defendants Liberty Power Corp., LLC d/b/a Liberty Power New York and Liberty Power Holdings LLC (collectively, "Liberty Power" or the "defendants") move pursuant to CPLR 3212 for an Order granting summary judgment dismissing plaintiffs' Second Amended Complaint in its entirety, with prejudice.[1] Plaintiffs oppose the motion.

BACKGROUND

Plaintiff BLT Steak LLC ("BLT Steak") is a Delaware limited liability company that owns and operates a restaurant located at 110 East 57th Street in New York, New York. Plaintiff BLT Fish LLC ("BLT Fish") is a Delaware limited liability company that owns and operates a restaurant located at 21 West 17th Street in New York, New York (BLT Steak and BLT Fish, collectively, the "plaintiffs").

[1] By Decision/Order, dated June 8, 2016, this Court granted plaintiffs' motion for leave to file and serve a second amended complaint converting this lawsuit to a class action on behalf of themselves and a class of similarly situated customers of defendants. Plaintiffs state that they have not yet moved to certify the class (Plaintiffs' Memorandum of Law at 9 of 29, footnote 1).

Allegations in Plaintiffs' Second Amended Complaint

In the Second Amended Complaint (the "Complaint"), plaintiffs allege that defendants are Energy Services Companies ("ESCOs") that "supply[] electricity to residential and commercial customers" (Complaint, ¶ 1). The Complaint describes Liberty Power's services with customers as follows. Plaintiffs maintain that "Liberty Power offers different rate plans" to its customers, "which generally run for a fixed period of time" (*id.*, ¶¶ 1, 35). "[W]hen a Liberty Power customer's rate term ends and that customer does not explicitly renew that or another rate plan, rather than return the customer to Con Ed [,] Liberty Power instead places the customer into the Variable Rate Plan [(the "Plan")], which Liberty Power refers to as its 'default' plan" (*id.*, ¶ 35). Under the Terms and Conditions of the Variable Rate Plan (the "Terms and Conditions"), "a customer's enrollment automatically renews every thirty days" (*id.*, ¶ 36). The rate that a customer is charged under the Plan varies from month to month, based upon various factors (*id.*, ¶ 37). "[T]he [T]erms and [C]onditions of the Variable Rate Plan unambiguously promise[d] that Liberty Power customers on that Plan will be charged a competitive price tied to the market price paid by Liberty Power to purchase the electricity on the customer's behalf" (*id.* ¶ 40).

Plaintiffs allege that, in reality, one of the components of the rate that they were charged under the Plan was a hidden, fixed fee that "was not 'established each month' but rather remained unchanged for long periods of time" (*id.*, ¶ 37). This fixed fee is a so-called margin fee "that represents [Liberty Power's] pre-determined profit on the sale of electricity" (*id.*, ¶ 42). The margin fee under fixed rate plans is low and is adjusted frequently (*id.*). By contrast, under the Plan, the margin fee "is as much as 17 times higher than on its fixed rate plans" (*id.*, ¶ 43) and often remains unchanged for more than three years (*id.*, ¶ 44). As a result, the rates charged

under the Plan were not "remotely" tied to the wholesale price of electricity and were significantly higher that the rates charged by Consolidated Edison ("Con Edison") (*id.*, ¶ 45).

The restaurants operated by BLT Steak and BLT Fish originally received electricity through Con Ed.[2] In March 2005, upon deregulation of electricity delivery in New York, both restaurants switched to Liberty Power as their electricity supplier (*id.*, ¶ 48, 49).[3] BLT Fish and Liberty Power allegedly entered into a contract, which remained in effect until approximately May 31, 2012 (*id.*, ¶ 48). BLT Steak and Liberty Power allegedly entered into a contract, which remained in effect until approximately June 30, 2012 (*id.*, ¶ 49). Plaintiffs allege that at the time of termination, plaintiffs were enrolled in the Plan and were charged at least $350,000 more than under "the market rate for a full requirements contract" (*id.*, ¶¶ 50, 51).

On these facts, plaintiffs assert a claim for breach of contract.[4] Specifically, plaintiffs allege that, under the Plan, Liberty Power "was obligated to charge [p]laintiffs and class members only a market-based supply charge based on the purchase of electricity in a

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[2]The Complaint alleges that Con Ed was the electricity supplier to BLT Steak from May 2004, when the restaurant opened, through March 2005, and to BLT Fish from July 2004, when that restaurant opened, also through March 2005 (*id.*, ¶ 48, 49).

[3]Electricity is delivered by Con Ed regardless of whether it is purchased by a customer from Con Ed or from an ESCO.

[4]In its first complaint, filed on or about February 11, 2013, plaintiffs asserted causes of action for (1) slamming-deceptive business practices under General Business Law ("GBL") §§ 349, 349-d; (2) inducement-deceptive business practices under GBL §§ 349, 349-d; (3) false advertising under GBL §§ 350, 350-e; (4) fraud; (5) tortious interference with contract; (6) unjust enrichment; (7) breach of the implied covenant of good faith and fair dealing (Affirmation of Cynthia Neidl in Support ["Neidl Affirmation in Support"], Exhibit "M"). By Order, dated September 16, 2013, this Court granted defendants motion to dismiss to the extent of dismissing the action unless plaintiffs amended the complaint within thirty days. Plaintiffs filed a First Amended Complaint on or about October 17, 2013 alleging causes of action for (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; and (3) deceptive business practices (NYSCEF No. 35). By Order, dated January 6, 2014, this Court granted defendants' motion to dismiss to the extent of dismissing plaintiffs' cause of action for breach of the implied covenant of good faith and fair dealing as duplicative of plaintiffs' breach of contract cause of action and permitting plaintiffs to replead their deceptive business practices cause of action within thirty days. Defendants' motion to dismiss was denied as to plaintiffs' breach of contract cause of action.

competitive market" (*id.*, ¶ 69). Instead, Liberty Power "charg[ed] [p]laintiffs arbitrary and exorbitant amounts well in excess of market rates, including by assessing a hidden fee that frequently doubled the price customers paid" (*id.*, ¶ 70).

DISCUSSION

Summary Judgment

A party moving for summary judgment must show that there are no disputed issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). To prevail on a motion for summary judgment, a defendant must establish that the plaintiff is unable to prove all the elements of its causes of action (*see Correa v Saifuddin*, 95 AD3d 407, 408 [1st Dept 2012]). Unless the defendant meets this burden, the plaintiff's opposing evidence is not regarded (*id.*). Once the movant meets this burden, it is incumbent upon the opposing party to proffer evidence sufficient to establish the existence of a material issue of fact requiring a trial (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). On a summary judgment motion, the court views the moving party's evidence in a light most favorable to the other party (*Branham v. Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 931 [2007]).

Standing

Defendants claim that plaintiffs lack standing to assert a claim for breach of contract, because "the Accounts at issue in this litigation were held by [non-party] ETA Restaurants Inc., not the [p]laintiffs" (*see* Defendants' Memorandum of Law in Support at 29 of 33; *see also* Affidavit of Harris Rosen ("Rosen"), Vice President of Law and General Counsel of Liberty Power Corp., parent company of defendants ("Rosen Affidavit"), ¶ 29 and Exhibits "C"-"H" thereof [account information and communications history between Liberty Power and ETA Restaurants Inc.]). Defendants plead an affirmative defense of lack of standing in their Answer

(*see* Neidl Affirmation in Support, Exhibit "B" [Answer, ¶ 77] [*cf. Bank of N.Y. Mellon Trust Co. v Ungar Family Realty Corp.*, 111 AD3d 657, 658 [2d Dept 2013] [a defendant waived a defense of standing "by failing to challenge the plaintiff's standing in its answer or in a pre-answer motion to dismiss"]).

"Standing is a threshold determination . . . that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria" (*Matter of Association for a Better Long Is., Inc. v New York State Dept. of Envtl. Conservation*, 23 NY3d 1, 6 [2014] [internal quotation marks and citation omitted]). In order to have standing, a litigant must assert "an injury in fact-an actual legal stake in the matter being adjudicated" (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 772 [1991]; *Security Pac. Natl. Bank v Evans*, 31 AD3d 278 [1st Dept. 2006]). "The injury, harm or damage cannot be conjectural, tenuous or hypothesized" (*Matter of Niagara County v Power Auth. of State of N.Y.*, 82 AD3d 1597, 1599 [4th Dept 2011]).

The fact that plaintiffs and ETA Restaurants Inc. may be affiliated is insufficient by itself to give plaintiffs standing. "[O]ne corporation will generally not have legal standing to exercise the rights of other associated corporations" (*Alexander & Alexander of N.Y. v Fritzen*, 114 AD2d 814, 815 [1st Dept 1985]). "[A] corporation does not generally have standing to exercise the legal rights of another corporation, even when the entities are affiliated through their ownership or management" (*Ivory Dev., LLC v Roe*, 135 AD3d 1216, 1219 [3d Dept 2016]).

In support, defendants offer Liberty Power's electronic records that show that account number 427203076700058 was opened on March 7, 2005 to supply electricity to a restaurant located at 110 East 57th Street in Manhattan, which is the restaurant that is currently operated by BLT Steak (Rosen Affidavit, Exhibit "C"; *see also* Complaint, ¶ 4). Liberty Power's records list

ETA Restaurant Inc. with an address of 950 3rd Avenue, New York, NY 10022-2705 ("950 3rd Ave") as the customer on the account (Rosen Affidavit, Exhibit "C"). Con Edison bills for this account were addressed to ETA Restaurants Inc. (*see* Neidl Affirmation in Support, Exhibit "K"). Defendants argue alternatively that in any event ETA Restaurants Inc. is precluded from bringing action by Business Corporation Law ("BCL") § 1312(a) as a foreign corporation doing business in New York without authority.

With respect to the restaurant located at 21 West 17th Street in Manhattan, or the restaurant currently operated by BLT Fish, the account with Liberty Power (account number 436213094000026)[5] was also opened on March 7, 2005, listing ETA Restaurant Inc. as the customer with the 950 3rd Avenue address (*see* Rosen Affidavit, Exhibit "D"; *see also* Complaint, ¶ 5). However, Con Edison bills for this account and this location were addressed to "Diversified Capitol Investors Corp." (*see* Neidl Affirmation in Support, Exhibit "L").[6]

Defendants also provide an undated letter to Liberty Power from ETA Restaurants Inc. listing individuals who, on behalf of ETA Restaurants Inc., are authorized to communicate with Liberty Power with respect to both Accounts, and an undated letter from "Esquared Hospitality" to Liberty Power listing an authorized individual with respect to the ETA Restaurants Inc. account number covering the BLT Fish location (*see* Rosen Affidavit, Exhibits "G", "H"). The records produced by defendants show that plaintiffs' names are not listed in any of Liberty Power's internal account information documents, nor in the letters that were sent to Liberty Power with respect to the aforementioned Accounts.

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[5] Account number 427203076700058 and account number 436213094000026 are referred together as the "Accounts".

[6] Con Edison was delivering electricity and, was the entity which billed ETA Restaurants Inc. for BLT Steak and Diversified Capitol Investors Corp for BLT Fish (*see* Neidl Affirmation in Support, Exhibits "K", "L").

In opposition, plaintiffs contend that they have standing because: (1) "Liberty Power supplied electricity to the plaintiffs and . . . the plaintiffs paid the bills" [emphasis omitted]; (2) "[t]he fact that bills continued to be sent in the name of predecessor entity (ETA merged into BLT Steak) is of no legal moment"; and (3) plaintiffs are "Delaware LLCs authorized to do business in New York and, accordingly, have standing to sue in the courts of this State" (*see* Plaintiffs' Memorandum of Law in Opposition at 21 of 29).

In a letter to this Court, dated April 26, 2017 (the "April 26 Letter"), submitted after oral argument on this motion, counsel for plaintiffs maintains that more than eighteen months before the subject motion for summary judgment was filed, plaintiffs provided a response to defendants' discovery requests regarding the corporate identities of plaintiffs (*see* April 26 Letter, Exhibit "A" [February 26, 2015 plaintiffs' discovery response]). Said response states that: (1) in December 2004, ETA Restaurants Inc. and ETA Restaurants II LLC merged "to become BLT Steak LLC" (*see* February 26, 2015 plaintiffs' discovery response, ¶ 1; *see also attached* Agreement and Plan of Merger between ETA Restaurants Inc. and ETA Restaurants II LLC);[7] (2) in 2002, a nonparty, Diversified Capital Investors Corporation ("Diversified"), changed its name to AZ NYC Inc., and, in December 2004, AZ NYC Inc. merged with and into BLT Fish LLC (*see* February 26, 2015 plaintiffs' discovery response, ¶ 1; *see also attached* Agreement and Plan of Merger between AZ NYC Inc. and BLT Fish LLC, and NYS Department of State, Division of Corporations entity information for Diversified).[8]

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[7]Defendants submitted a NYS Department of State Division of Corporations entity information for ETA Restaurants Inc. showing it as a foreign business corporation "inactive - termination (Oct 26, 2005)" (Neidl Affirmation in Support, Exhibit "J").

[8]The NYS Department of State Division of Corporations entity information shows that as of February 25, 2015, the "current entity name" for Diversified Capital Investors Corporation is AZ NYC Inc., a Delaware foreign business corporation which is inactive, as dissolved by proclamation on April 29, 2009 (*see* attachment to the April 26 Letter). The Con Edison bills refer to Diversified as Diversified Investors Capitol Corp.

By letter, dated April 27, 2017, defendants object to plaintiffs' April 26 Letter as an impermissible sur-rely not in admissible form. As such, defendants argue that the April 26 Letter should be disregarded by this Court. In any event, defendants maintain that the April 26 Letter does not change the fact that ETA Restaurants Inc. is precluded from bringing action by Business Corporation Law ("BCL") § 1312(a) and that BLT Fish is not a successor-in-interest to ETA Restaurants.

As to BLT Steak, plaintiffs have produced evidentiary proof showing that, effective December 31, 2004, or approximately two and one-half months before Liberty Power account 427203076700058 was opened, ETA Restaurants Inc. merged with and into ETA Restaurants II LLC, and the latter continued its existence under the new name of BLT Steak LLC (*see* plaintiffs' February 26, 2015 discovery response [Agreement and Plan of Merger between ETA Restaurants Inc. and ETA Restaurants II LLC, §§ 1.1, 1.3]). As such, plaintiffs have demonstrated that BLT Steak has standing to commence the subject action.

As to BLT Fish, plaintiffs have not demonstrated that BLT Fish is a successor-in-interest to ETA Restaurants Inc., an entity which Liberty Power has shown was its client with respect to account number 436213094000026. The record also reflects that BLT Fish is a successor-in-interest to Diversified pursuant to an Agreement and Plan of Merger effective December 31, 2004, an entity to which Con Edison bills were addressed (*see* Agreement and Plan of Merger between AZ NYC Inc. and BLT Fish LLC, §§ 1.1, 1.3; Neidl Affirmation, Exhibit "L"). It appears that Con Edison was listing Diversified as its client for the 21 West 17th Street location (*see* Neidl Affirmation, Exhibit "L"), whereas Liberty Power was listing ETA Restaurants Inc. as its client for the same location (Rosen Affidavit, Exhibit "D", "F") . Given there is insufficient evidence in the record regarding the relationship of BLT Fish with Diversified and ETA

Restaurants, there is an issue of fact as to whether BLT Fish has standing to commence the subject action.

Breach of Contract

The requisite elements of a breach of contract claim are existence of a contract, plaintiff's performance pursuant to the contract, defendant's breach of the contract, and damages resulting from that breach (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). "Generally, a party alleging a breach of contract must demonstrate the existence of a . . . contract reflecting the terms and conditions of their . . . purported agreement" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 181-182 [2011] [internal quotation marks and citation omitted]).

A pleading alleging a breach of contract should specify "the terms of the agreement, the consideration, the performance by plaintiffs and the basis of the alleged breach of the agreement by defendant" (*Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]; *see also Sebro Packaging Corp. v S.T.S. Indus.*, 93 AD2d 785, 785 [1st Dept 1983]).

In support of their contention that the parties never entered into a contract, defendants proffers the Rosen Affidavit which states that: (1) "at the time [A]ccounts switched to Liberty Power in 2005 until about early 2009, "Liberty Power's contracts either did not state what would happen at the end of the initial term of the contract, or stated that at the end of the term, if no other action was taken by the customer, the customer's contract would automatically renew at a default variable rate" (Rosen Affidavit, ¶ 13); (2) "customers who enrolled with Liberty Power prior to 2009 and who continued to be served at a default variable rate after the initial term of their cont[r]act were either not subject to any terms and conditions or were subject to the terms and conditions set forth in their initial contracts" (*id.*, ¶ 14); (3) in 2009, "Liberty Power revised its contracts to provide that if [at the conclusion of the initial term of a contract] the customer did

not cancel service or renew, service would continue at a default variable rate, subject to specific terms and conditions"[9] (*id.*, ¶¶ 16-18; Exhibit "A" [Customer Terms and Conditions (the "Terms and Conditions"), § "Term and Automatic Renewal"])[10]; and (4) these Terms and Conditions "only apply to customers who entered into a contract with Liberty Power after 2009, and whose initial contracts expressly provided that the Terms and Conditions would apply at the end of term of the customer's initial contract" (*id.*, ¶ 22). Defendants also argue that plaintiffs became aware of the Terms and Conditions only after the subject action was commenced.

The Rosen Affidavit further states that with regard to the Accounts: (1) "[d]ue to the age of the Accounts, Liberty Power does not know the circumstances by which the Accounts came to be enrolled with Liberty Power" (*id.*, ¶ 30); (2) "According to Liberty Power's records, the Accounts were enrolled with Liberty Power on or about March 7, 2005, for a 24-month term" (*id.*, ¶ 32); (3) "the Accounts were enrolled [on behalf of plaintiffs] via the voice authorization of a 'Brandon Suk,'" (voice authorization permitted by the Public Service Commission) (*id.*, ¶¶ 35-36); (4) "[a] voice authorization includes certain of the terms and conditions that apply to the customer's account, as well as the customer's agreement to those terms and conditions" (*id.*, ¶ 37); (5) "Liberty Power does not have a copy of the voice authorization," because "[a]t the time

[9] Rosen maintains that "in or about early 2009, as a result of certain regulatory changes, Liberty Power changed its practices and modified its contracts to ensure that, going forward, there would be uniform terms and conditions applicable to customers whose initial contract terms had expired and thus were subject to the default variable rate" (*id.*, ¶ 16). The contracts constituted a Rollover Variable Rate Plan. Prior to 2009, there was no such plan (*id.*, ¶¶ 15, 20).

[10] Rosen states that after 2009, the Rollover Variable Rate Plan contracts began to include provisions such as the following: in "Customer Terms and Conditions" a section entitled "Term and Automatic Renewal", which provided in relevant part: "The initial Term of this Agreement is listed in your Plan Description. Upon completion of the Term, this Agreement will renew automatically with a variable rate for an additional year term unless cancelled or renewed by Customer or Liberty Power, with 45-days written notice, or as otherwise applicable in this Agreement. Terms and Conditions applicable to the variable rate renewal period will be made available to Customer via mail or Web site approximately 30 days prior to the end of the initial term. Cancellation must be in writing to Liberty Power" (*see* Rosen Affidavit, Exhibit "A" [Customer Terms and Conditions at 1]).

the Accounts were enrolled, Liberty Power was under no obligation to maintain voice authorizations beyond the initial term of a customer's contract" (*id.*, ¶ 38); (6) "Liberty Power also does not have a copy of the written contract that would have been sent to ETA Restaurants Inc. when the Accounts were initially enrolled, and due to the age of the Accounts, is unable to determine what terms might have applied to the Accounts" (*id.*, ¶ 39); (7) "[a]lthough Liberty Power has produced in this litigation various historical template terms and conditions applicable to a variety of products, there is no way to identify which, if any, of these terms and conditions applied to the Accounts" (*id.*, ¶ 40); (8) "[w]hile the Accounts were subject to the default variable rate, they were not enrolled in the Rollover Variable Rate Plan and were not subject to or bound by the Terms and Conditions, which did not exist until late 2009, well after the expiration of any initial contract applicable to the Accounts" (*id.*, ¶ 42); and (9) "[o]nce the initial term of the contract governing the Accounts expired, the Accounts were serviced on a month-to-month basis, and were not subject to any written terms and conditions" and "[p]laintiffs could have cancelled at any time" (*id.*, ¶ 43).

Defendants also rely on a testimony of James Haber ("Haber"), one of plaintiffs' witnesses, a manager of BLT Restaurant Group, an entity that owns both plaintiffs (*see* Neidl Affirmation in Support, Exhibit "G" [Haber Deposition at 9-10]). Haber testified that he neither authorized his employees to enter into a contract with Liberty Power, nor was he aware of the existence of a contract between plaintiffs and Liberty Power (*id.* at 19- 21). Haber testified that in order for plaintiffs to enter into any agreement, his authorization to do so was required (*id.* at 9-10, 21).

In opposition, plaintiffs state that the only claim remaining in this case, is whether defendants breached contractual terms between the parties from 2009 onward. Plaintiffs

maintain that the "Terms and Conditions" does not constitute a contract requiring execution but a published set of provisions which is the default plan imposed on customers who do not explicitly renew or cancel their contracts (Plaintiffs' Memorandum of Law in Opposition at 14 of 29). Plaintiffs further maintain that (1) defendants should be estopped from arguing that the Variable Rate Plan is not the governing contract between the parties given defendants' position on their prior motion to dismiss that there was in fact such a contract' (2) Jose Albarran ("Albarran"), a representative of Liberty testified that when a customer "goes into" default variable, the Terms and Conditions apply; (3) the Variable Rate Plan does not even contain signature lines but rather is a default plan which applies when any other contract expires; (4) defendants' electronic records show the legal status of the relationship between the parties as contractual; and (5) whether or not plaintiffs were subject to the Terms and Conditions or a contract in effect prior to 2009, defendants breached its contractual obligations by charging a price that was not market-based but rather included a hidden fee.

In reply, defendants maintain that (1) plaintiffs have failed to produce evidence, including an affidavit demonstrating that the parties agreed to be bound by the Terms and Conditions; (2) in its motion to dismiss, defendants were required to accept as true plaintiffs' factual allegations, including that the parties were bound by the Terms and Conditions; (3) there is no evidence that plaintiffs were subject to the Terms and Conditions; "just because plaintiffs were charged a variable rate does not mean plaintiffs were bound by the Terms and Conditions; (4) in fact the evidence in the form of defendants' electronic records shows that plaintiffs were told they were no longer under contract; and (5) even if the rate provision in the Terms and Conditions applied, there is nothing in its plain language that Liberty Power was precluded from charging a margin of profit or evidence to suggest that Liberty Power was obligated to charge

less than Con Edison would have charged for electricity (Rosen Affidavit, Exhibits "A", "B"; Rosen Affidavit, Exhibits "A", "B"; Defendants' Reply Memorandum of Law).

It is undisputed that payment was made to Con Edison for electrical service covering plaintiff restaurants and that the Con Edison bills for the period 2005 through 2012 listed Liberty Power as the electrical supplier. The parties' differing accounts regarding what agreement, if any, governed the parties' relationship after 2009, which according to plaintiff is the claim remaining in this matter, raises an issue of fact, as to whether there was an enforceable contract between the parties. Although defendants claim that the Terms and Conditions only apply to customers who enrolled with defendants after 2009, plaintiffs contend that the Variable Rate Plan applies to all customer who do not explicitly renew or cancel their contracts. In addition, as a matter of law, if, after expiration of a contract, the parties continue to conduct business in the same manner as they did before, they impliedly assent to a new contract on the same terms as the prior one (*see e.g. North Am. Hyperbaric Ctr. v City of New York*, 198 AD2d 148, 149 [1st Dept 1993]; *see also Curreri v Heritage Prop. Inv. Trust, Inc.*, 48 AD3d 505, 506-507 [2d Dept 2008]). As such, if there was a contractual obligation, there is also an issue of fact as to whether defendants breached an agreement by imposing the rates charged to plaintiffs.

Voluntary Payment Doctrine

Defendants further argue that plaintiffs "are barred from recovery of payments pursuant to the voluntary payment doctrine" (Defendants' Memorandum of Law in Support at 30-33 of 33). Defendants asserted this affirmative defense in their answer (*see* Neidl Affirmation in Support, Exhibit "B" [Answer, ¶ 87]). "That common-law doctrine bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law" (*Dillon v U-A Columbia Cablevision of Westchester*, 100 NY2d 525, 526

[2003]). "The onus is on a party that receives what it perceives as an improper demand for money to take its position at the time of the demand, and litigate the issue before, rather than after, payment is made" (*DRMAK Realty LLC v Progressive Credit Union*, 133 AD3d 401, 403 [1st Dept 2015] [internal quotation marks and citation omitted]).

Defendants contend that plaintiffs voluntarily paid their electric bills without protest for seven years (2005-2012). In support, defendants offer Con Edison electric bills identifying Liberty Power as the electricity supplier and the rate that was charged. (*see* Neidl Affirmation in Support, Exhibits "K", "L"). Furthermore, it is undisputed that in 2008 as to the BLT Fish Account, and in 2011 as to both Accounts, a representative of plaintiffs called defendants regarding the Accounts and thereafter continued using defendants' services.[11] Defendants argue that as such, the record demonstrates that plaintiffs had full knowledge that Liberty Power was their electric supplier and were not under a mistake of law or fact. On May 11, 2012, plaintiffs' representatives requested that the Accounts be terminated (*id.*, ¶ 55).

Defendants also proffer the transcript of the deposition of Christopher Romano, Chief Financial Officer of BLT Restaurant Group LLC since 2011, and who testified that: (1) BLT Restaurant Group LLC owns and manages both BLT Fish and BLT Steak, and that the

[11]Rosen in his affidavit states that: (1) on August 13, 2008, a representative of plaintiffs called Liberty Power to find out why there was an increase in rate for the service address at 21 W. 17th Street (BLT Fish), but the caller was not an authorized person and did not provide authorization allowing Liberty Power to communicate with the caller (*id.*, ¶ 47; Exhibit "F"); (2) on January 5, 2011, a representative of plaintiffs called again to discuss the Accounts. This time, that person provided defendants with a letter in which ETA Restaurants authorized three individuals to communicate with Liberty Power, including the caller, Jose. Jose was allegedly told that there was no contract on file "anymore", that the initial agreement was a voice contract which was no longer available "due to the time". Jose asked whether plaintiffs could go to another company and was informed that the customer could switch to another provider or sign up for Liberty Power's fixed rates (*id.*, ¶ 49; Exhibit "E"); and (3) on May 7, 2012, another representative called Liberty Power and was advised that the original contract was a twenty-four month agreement which commenced in 2006 and ended in 2008. As such, Liberty stated that a variable rate applied to the Accounts, which meant that there was no penalty for cancelling and that the customer could "be quoted for new low rates" (*id.*, ¶ 53).

accounting department of BLT Restaurant Group LLC is responsible for payment of energy bills for both entities (*see* Neidl Affirmation in Support, Exhibit "H" [Romano Deposition at 8-11]); (2) it was only in May 2012 that he became aware that Liberty Power was plaintiffs' electricity provider and noticed that plaintiffs' energy bills were high; (3) as a result, his staff performed an analysis of energy costs for all New York restaurants that BLT Restaurant Group manages and realized that it was the rate that Liberty Power charged that resulted in higher energy bills for plaintiffs (*id.* at 26-28); and (4) neither he nor his predecessor at BLT Restaurant Group lacked any information which would have prevented this analysis from being done in prior years (*id.* at 29). Romano also acknowledged that BLT Restaurant Group had been receiving Con Ed bills since 2005, which indicated that Liberty Power was the electric supplier (*id.* at 27). When asked to describe the process plaintiffs reviewed their Con Edison bills, in response to interrogatories, plaintiffs stated, ""[A]ccounts payable personnel employed by BRG [BLT Restaurant Group LLC] would receive Con Edison bills in the mail, ensure their payment by the appropriate entity, and record payments in the appropriate general ledger" (Neidl Affirmation, Exhibits "C", "D" [Interrogatories "9", "10").

Defendants have established therefore that plaintiffs voluntarily paid the monthly bills without protest from 2005 until May 2012. Plaintiffs have not disputed that from 2005 through 2012 they paid the Con Ed bills listing Liberty Power as the electricity supplier, and that a representative of plaintiffs communicated with defendants in 2011 about the Accounts, and in 2008 telephoned defendants inquiring why there was an increase in the rates Liberty was charging with respect to the BLT Fish Account.

In opposition, plaintiffs raise an issue of fact as to whether or not the voluntary payment doctrine applies. Plaintiffs argue that as they lacked full knowledge of the facts given they were

not participants in the wholesale electricity market and "had no feasible way to determine that the monthly price charged by Liberty Power was not in conformity with Liberty Power's contractual promise to charge only a market-based price", and as such, the voluntary payment doctrine does not apply (Plaintiffs' Memorandum of Law in Opposition at 23 of 29). Plaintiffs offer as support the affidavit of Robert Sinclair, Ph.D. ("Sinclair Affidavit") who opines that determining the price plaintiffs should have paid requires a sophisticated knowledge of electricity markets and economics, which knowledge plaintiffs did not possess (*see* Plaintiffs' Memorandum of Law in Opposition at 23-24 of 29); *see also* Sinclair Affidavit, ¶¶ 3-5). Plaintiffs argue that Liberty Power's conduct was deceptive because although it was obligated to charge a market-based price, it charged a higher price that included a margin that was known only to Liberty Power[12] (*see* Plaintiffs' Memorandum of Law in Opposition at 16-21of 29; *see also* Affirmation of Julian Schreibman in Opposition, Exhibit "C" [Albarran Deposition at 116-120]).[13]

Although defendants argue that Con Ed billing statements provided specific rates at which plaintiffs were billed, the record fails to establish that plaintiffs possessed sufficient information necessary for them to determine if they were being overcharged and by how much (*see Rite Aid of N.Y., Inc. v Chalfonte Realty Corp.*, 105 AD3d 470 [1st Dept 2013]. Accordingly, there is an issue of fact as to whether plaintiffs had full knowledge of the facts, necessary to invoke the voluntary payment doctrine.

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[12]Plaintiffs proffer a partial deposition transcript of Albarran, a representative of defendants, to support its contention that only defendants could explain the different components of Liberty Power's variable rate pricing (Shreibman Affidavit, Exhibit "C").

[13]Plaintiffs argue that the cases relied upon by defendants involve simple fact patterns for the most part involving discrepancies between the terms of a lease and amounts paid to a landlord (*see e.g. Citicorp N. Am.; Inc. v Fifth Ave. 58/59 Acquisition Co.*, 70 AD3d 408 [1st Dept 2010]; *Eighty Eight Bleecker Co., LLC v 88 Bleecker St. Owners, Inc.*, 34 AD3d 244 [1st Dept 2006]; *Gimbel Bros. v Brook Shopping Ctrs.*, 118 AD2d 532 [2d Dept 1986].

Having denied defendants' motion for summary judgment, it is not necessary to consider plaintiffs' alternative grounds for denial, namely that further discovery is needed [*see* CPLR 3212(f)].

CONCLUSION

For the foregoing reasons, it is

ORDERED, that the motion by defendants Liberty Power Corp., LLC d/b/a Liberty Power New York and Liberty Power Holdings LLC for summary judgment pursuant to CPLR 3212 is denied.

Dated: March 13, 2018

ENTER:

J.S.C.

SHLOMO HAGLER
J.S.C.