Mirkin v. Energy

United States District Court for the Eastern District of New York

November 2, 2018, Decided; November 2, 2018, Filed

18-cv-2949 (ARR) (RER)

Reporter
2018 U.S. Dist. LEXIS 189578 *

SUSANNA MIRKIN and BORIS MIRKIN, individually and on behalf of all others similarly situated, Plaintiffs, -against- XOOM ENERGY, LLC and XOOM ENERGY NEW YORK, LLC, Defendants.

Notice: NOT INTENDED FOR PUBLICATION IN PRINT

Core Terms

plaintiffs', amend, costs, reconsideration, factors, leave to amend, electricity, Energy, allegations, defendants', consumer, prices, manifest injustice, amended complaint, sale agreement, estimated, wholesale, futile

Counsel: **[*1]** For Susanna Mirkin, individually and on behalf of all others similarly situated, Boris Mirkin, individually and on behalf of all others similarly situated, Plaintiffs: Steven L. Wittels, LEAD ATTORNEY, Law Offices of Steven L. Wittels, Armonk, NY; Andrey Belenky, Kheyfits Belenky LLP, New York, NY; Daniel Hymowitz, Hymowitz Law Group, PLLC, Brooklyn, NY; Dmitry Kheyfits, Kheyfits Belensky LLP, New York, NY; James Burkett McInturff, III, Law Offices of Steven L. Wittels, Armonk, NY; Tiasha Palikovic, Wittels Law, P.C., Armonk, NY.

For XOOM Energy, LLC, XOOM Energy New York, LLC, Defendant: Christopher Andrew Rojao, LEAD ATTORNEY, McCarter & English LLP, Newark, NJ; Jean Paige Patterson, LEAD ATTORNEY, McCarter & English LLP, Gateway Four, Newark, NJ; Zane Christian Riester, LEAD ATTORNEY, McCarter & English, Newark, NJ.

Judges: Allyne R. Ross, United States District Judge.

Opinion by: Allyne R. Ross

Opinion

OPINION & ORDER

ROSS, United States District Judge:

Plaintiffs, Susanna and Boris Mirkin (collectively, "plaintiffs"), have filed a motion under *Rules 59(e)* and *60(b) of the Federal Rules of Civil Procedure*. *See* Mem. in Supp. of Pls.' Mot. to Alter or Amend J., or Alternatively, for Relief from J. or Order, ECF No. 27 ("Pls.' Br."). They seek reconsideration of the court's **[*2]** opinion and order dismissing their complaint pursuant to a motion brought by defendants, XOOM Energy LLC and XOOM Energy New York, LLC (collectively, "defendants"), under *Rule 12(b)(6) of the Federal Rules of Civil Procedure*. They also seek leave to amend their complaint. *Id.* For the reasons that follow, I deny the motion for reconsideration, as I find that plaintiffs have not met the stringent standards necessary to justify the extraordinary relief provided under either *Rule 59(e)* or *Rule 60(b)*. I also deny their request for leave to amend the complaint, as I find that amendment of the pleadings would be futile.

BACKGROUND

I assume familiarity with the facts underlying this case, which were set forth in detail in this court's September 21, 2018 opinion and order. *See* Op. & Order 2-5, ECF No. 24 ("September 21 Opinion"). Plaintiffs commenced this action on April 18, 2018, in New York State Supreme Court in Kings County. *See* Class Action Compl., ECF No. 1-2 ("Compl."). Defendants subsequently removed the complaint to federal court, pursuant to *28 U.S.C. § 1332*. Notice of Removal, ECF No. 1. In their complaint, plaintiffs asserted claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and unjust enrichment. Compl. ¶¶ 67-84. Their claims **[*3]** arise out of a March 2013 electricity sales agreement in which defendants

agreed to provide residential electricity services to plaintiffs. *Id.* ¶ 41. They asserted claims on behalf of themselves and a class of similarly-situated electricity consumers. *Id.* ¶¶ 58-66. Plaintiffs' claims all stem from their allegation that defendants' electricity prices were not based on defendants' "actual and estimated supply costs"—as promised in the electricity sales agreement that constituted the contract between the parties. *See id.* ¶¶ 27, 44. On October 19, 2018, plaintiffs filed the instant motion for reconsideration, *see* Pls.' Br., and attached as an exhibit a proposed amended complaint, *see* First Am. Class Action Compl., ECF No. 27-1 ("Am. Compl.").[1]

DISCUSSION

A motion for reconsideration of a previous order is held to a strict standard and is intended to be "employed sparingly in the interests of finality and conservation of scarce judicial resources." *In re Health Mgmt. Sys., Inc. Sec. Litig., 113 F. Supp. 2d 613, 614 (S.D.N.Y. 2000)* (quoting *Wendy's Int'l, Inc. v. Nu-Cape Constr., Inc., 169 F.R.D. 680, 685 (M.D. Fla. 1996)*). In this case, plaintiffs bring their motion to reconsider under two *Rules: 59(e)* and *60(b)*. *See* Pls.' Br. 1. They seek reconsideration of the court's order so that they may be given permission to file an amended complaint. *Id.* Though plaintiffs correctly **[*4]** note that *Rule 15* instructs a court to "freely give leave [to amend] when justice so requires," *see Fed. R. Civ. P. 15(a)(2)*, it is well-established that the liberality behind *Rule 15* is "'tempered by considerations of finality' when leave to file an amended complaint is sought post-judgment." *Becnel v. Deutsche Bank AG, 838 F.Supp.2d 168, 170 (S.D.N.Y. 2011)* (quoting *Williams v. Citigroup Inc., 659 F.3d 208, 2013 (2d Cir. 2011)*). Accordingly, "[a] party seeking to file an amended complaint postjudgment must first have the judgment vacated or set aside pursuant to *Fed. R. Civ. P. 59(e)* or *60(b)*." *Ruotolo v. City of New York, 514 F.3d 184, 191 (2d Cir. 2008)*. Still, "considerations of finality do not always foreclose the possibility of amendment, even when leave to replead is not sought until after the entry of judgment." *Williams, 659 F.3d at 213*. As such, the Second Circuit has held that it is "reversible error for a court to address only concerns of finality" while ignoring the proposed changes to the pleadings and their likelihood of curing the court's previously-identified deficiencies. *Becnel, 838 F.Supp.2d at 170-71*.

Mindful of the Second Circuit's observation that "it might be appropriate in a proper case to take into account the nature of the proposed amendment in deciding whether to vacate the previously entered judgment," *Williams, 659 F.3d at 213* (quoting *Ruotolo, 514 F.3d at 191*), I begin by analyzing whether plaintiffs' motion meets the standards for reconsideration, and then address the proposed amended complaint, before **[*5]** concluding that plaintiffs' brief fails to demonstrate that they are entitled to relief.

I. Plaintiffs have failed to demonstrate that they are entitled to the extraordinary remedy of reconsideration.

"[A] motion to reconsider should not be granted where the moving party seeks solely to relitigate an issue already decided." *Shrader v. CSX Transp., 70 F.3d 255, 257 (2d Cir. 1995)*. Instead, motions brought under either *Rule 59(e)* or *60(b)* must meet strict standards to ensure that the losing party is not simply "examining a decision and then plugging the gaps of the lost motion with additional matters." *Range Rd. Music, Inc. v. Music Sales Corp., 90 F. Supp. 2d 390, 392 (S.D.N.Y. 2000)*.

Reconsideration under *Rule 59(e)* is "an extraordinary remedy." *Berman v. Morgan Keegan & Co., No. 10 Civ. 5866(PKC), 2011 WL 2419886, at *1 (S.D.N.Y. June 3, 2011)* (quoting *Cordero v. Astrue, 574 F. Supp. 2d 373, 380 (S.D.N.Y. 2008))*, *aff'd*, *455 F. App'x 92 (2d Cir. 2012)*. A court is permitted to amend a judgment under the rule "if 'there is [an] intervening change in controlling law, new evidence not previously available comes to light, or it becomes necessary to remedy clear error of law or to prevent obvious injustice.'" *Medina v. Tremor Video, Inc.*, No. 13-cv-8364 *(PAC), 2015 WL 3540809, at *1 (S.D.N.Y. June 5, 2015)* (quoting *Grubb v. Barnhart, No. 98 Civ. 9032(RPP), 2004 WL 405933, at *1 (S.D.N.Y. Mar. 3, 2004))*, *aff'd*, *640 F. App'x 45 (2d Cir. 2016)*. Generally, such a motion is only granted if the moving party can "point to controlling decisions or data that the court overlooked." *Berman, 2011 WL 2419886, at *1* (citation omitted).

[1] Plaintiffs timely filed this motion according to the deadlines provided in both *Rule 59(e)* and *60(b)*, as the motion was filed 24 days after the clerk of court entered judgment on the motion to dismiss—three days after the court's opinion and order on September 21, 2018. *See Fed. R. Civ. P. 59(e)* ("A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment."); *Fed R. Civ. P. 60(c)* ("A motion under *Rule 60(b)* must be made within a reasonable time . . . no more than a year after the entry of the judgment or order or the date of the proceeding.").

In their brief, plaintiffs do not identify any case law or factual allegations that they believe the court overlooked **[*6]** in its September 21 order. Instead, they state generally—without providing specific analysis—that the "judgment may be altered or amended . . . to, *inter alia*, 'prevent manifest injustice.'" Pls.' Br. 1 (quoting *Schwartz v. Liberty Mut. Ins. Co., 539 F.3d 135, 153 (2d Cir. 2008)*). In response, defendants argue that plaintiffs "never specify anywhere in their motion papers what that manifest injustice could be," and, therefore, plaintiffs have not met the standards of *Rule 59(e)*. Defs.' Br. in Opp'n to Pls.' Mot. to Alter or Amend J. or for Relief from J. 9, ECF No. 29 ("Defs.' Br."). While I agree that plaintiffs have failed to clearly identify the manifest injustice they seek to correct, a liberal reading of their motion suggests that they take issue primarily with the court's decision to dismiss their complaint with prejudice without granting leave to amend. *See* Pls.' Br. 3-4 ("Denying Plaintiffs an opportunity to address the Court's perceived flaws . . . in Plaintiffs' complaint would result in a manifest injustice . . . ."); *see also Dynamic Worldwide Logistics, Inc. v. Exclusive Expressions, LLC, No. 14 Civ. 1370(ER), 2015 WL 5439217, at *1 (S.D.N.Y. Sept. 14, 2015)* (noting that the plaintiff moved for reconsideration "only to the extent that [the court] dismissed Plaintiff's claims with prejudice").

Though leave to amend should be "freely give[n] . . . when justice so requires," *Fed. R. Civ. P. 15(a)(2)*, a court **[*7]** need not grant leave to amend "when amendment would be futile." *Ellis v. Chao, 336 F.3d 114, 127 (2d Cir. 2003)*. In the September 21 opinion, I held that plaintiffs' complaint rested on a fundamentally untenable theory; because the contract between the parties clearly and unambiguously stated that XOOM could set its prices based on its "actual and estimated supply costs"—which it defined using a non-exhaustive set of factors—plaintiffs could not state a claim by "conflat[ing] XOOM's *internal* costs with complicated [market-related] factors that appear nowhere on the face of the agreement." Sept. 21 Opinion 13 (emphasis added). As a result, I dismissed their complaint without granting leave to amend, finding that no set of factual allegations could state a claim given the clear language of the contract. Furthermore, plaintiffs never *asked* that I grant them leave to amend or that I dismiss without prejudice;[2] as the Second Circuit has held, "the contention that 'the District Court abused its discretion in not permitting an amendment that was never requested' [is] 'frivolous.'" *Williams, 659 F.3d at 212* (quoting *Horoshko v. Citibank N.A., 373 F.3d 248, 249-50 (2d Cir. 2004)*). As defendants point out, plaintiffs could have sought leave to amend earlier in the briefing of the motion to dismiss, but they did not. Defs.' Br. **[*8]** 5. My failure to grant them "leave to replead *sua sponte*," when they had never indicated an intention to replead, was not error. *Williams, 659 F.3d at 212*. Furthermore, it does not constitute "manifest injustice," particularly because the "movant's arguments for relief 'were available . . . and [the party] proffer[s] no reason for [its] failure to raise the arguments.'" *Corsair Special Situations Fund, L.P. v. Nat'l Res., 595 F. App'x 40, 44 (2d Cir. 2014)* (quoting *In re Johns-Manville Corp., 759 F.3d 206, 219 (2d Cir. 2014)*).

Likewise, plaintiffs have not demonstrated an entitlement to relief under *Rule 60(b)*, which can relieve a party from a final judgment based on "mistake, inadvertence, surprise or excusable neglect," or for "any other reason that justifies relief." *Fed. R. Civ. P. 60(b)(1)*, *(6)*. "A motion to vacate a judgment under *Fed. R. Civ. P. 60(b)* is addressed to the sound discretion of the trial court, whose disposition of the motion will not be disturbed on appeal absent an abuse of that discretion." *Nat'l Petrochemical Co. of Iran v. M/T Stolt Sheaf, 930 F.2d 240, 244 (2d Cir. 1991)*. A 60(b) motion is "generally not favored and is properly granted only upon a showing of exceptional circumstances." *Marrero Pichardo v. Ashcroft, 374 F.3d 46, 55 (2d Cir. 2004)* (citation omitted). Courts in the Second Circuit have identified three factors that may justify such relief: (1) "highly convincing evidence supporting the motion;" (2) "good cause for failing to act sooner"; and (3) a showing that "granting the motion will not impose **[*9]** an undue hardship on the other party." *Williams v. N.Y.C. Dep't of Corr., 219 F.R.D. 78, 84 (S.D.N.Y. 2003)* (quoting *Broadway v. City of New York, No. 96 Civ. 2798(RPP), 2003 WL 21209635, at *3 (S.D.N.Y. May 21, 2003)*). Aside from repeating the standard for a 60(b) motion, plaintiffs provide no arguments regarding why they should be entitled to this "extraordinary" form of relief, so I decline to grant it.

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[2] Plaintiffs' opposition brief to defendants' motion to dismiss included a footnote indicating that plaintiffs may in the future amend their complaint to add *new* theories based on plaintiffs' contract for XOOM's *gas services*, *see* Pls.' Mem. of Law in Opp'n 21 n.15, ECF No. 20, but they said nothing about an intention to amend their complaint to address the deficiencies identified in defendants' motion to dismiss in the event that the court was persuaded by XOOM's arguments.

II. Even if plaintiffs' motion met the standards of 59(e) or 60(b), I would deny leave to amend their complaint because amendment would be futile.

"Unless there is a valid basis to vacate the previously entered judgment, it would be contradictory to entertain a motion to amend the complaint." *Nat'l Petrochemical Co. of Iran, 930 F.2d at 245*. Still, I consider the sufficiency of plaintiffs' proposed amended pleading, though I ultimately conclude that their proposed amendment "would nevertheless be denied as futile." *Singh v. Schikan, No. 14 Civ. 5450(NRB), 2015 WL 4111344, at *3 (S.D.N.Y. June 25, 2015)*.

Plaintiffs intend to amend their complaint to address "three central flaws" identified by the court's September 21 opinion. Pls.' Br. 4. They wish to do the following: (1) add factual allegations that demonstrate that XOOM "purchases its energy on New York's wholesale energy markets," *id.*; (2) disclose the factors used to calculate the Market Supply Cost, *id.* at 8; and (3) remove allegations that compare the rates charged by XOOM to those that a "reasonable consumer" would expect to be charged, **[*10]** *id.* at 8-9. They also wish to remove two causes of action originally pleaded in their first complaint: breach of the implied covenant of good faith and fair dealing, and unjust enrichment. *See* Am. Compl. None of these proposed changes, however, address the court's primary concern: that the contractual language allowing XOOM to set its prices in accordance with its "actual and estimated supply costs" does not require that XOOM set its prices in accordance with any of the market-related factors identified by plaintiffs—*regardless* of new allegations about XOOM's electricity-purchasing arrangements. *See* September 21 Opinion 13-14.

As plaintiffs acknowledge at the end of their brief, the term "actual and estimated supply costs" is "unambiguous," and, under North Carolina law, a contract should be interpreted based on "its four corners, and the four corners are to be ascertained from the language used in the instrument." Pls.' Br. 10 (quoting *Lynn v. Lynn, 689 S.E.2d 198, 205 (N.C. Ct. App. 2010)*). Plaintiffs wish to include allegations about extraneous information—including information provided on XOOM's website and in marketing materials. *See* Am Compl. ¶¶ 48-52. But these new allegations do not change the fact that the contractual language used by XOOM **[*11]** in its electricity sales agreement does *not* commit XOOM to charge rates that match market-based prices or wholesale rates. Furthermore, the electricity sales agreement explicitly states that it "constitutes the entire Agreement between you and XOOM Energy." Am. Compl., Ex. 1 at 2, ECF No. 27-1. "The court must construe the contract as a whole," including all relevant provisions in its analysis. *WakeMed v. Surgical Care Affiliates, LLC, 778 S.E.2d 308, 313 (N.C. Ct. App. 2015)* (quoting *Schenkel & Shultz, Inc. v. Hermon F. Fox & Assocs., P.C., 658 S.E.2d 918, 921 (N.C. 2008)*).

Furthermore, while the plaintiffs' proposed inclusion of the Market Supply Cost calculations would provide additional context for their allegations, this information still demonstrates that the factors the plaintiffs included in their calculation *do not* appear on the face of the contract. *See* Am. Compl., Ex. 3. And while plaintiffs allege that the factors that determine wholesale energy costs "make[] up over 90% of Defendants' supply costs," Am. Compl. ¶ 4, nothing in the electricity sales agreement itself represents that defendants' supply costs will be based on these factors, or that plaintiffs' costs, in turn, will rise and fall as these factors fluctuate. *Cf. Brown v. Agway Energy Servs., LLC, No. 18-321, 2018 WL 4362490, at *10 (W.D. Pa. Sept. 13, 2018)* ("So long as the contractual price structure incorporates some factor beyond market factors, 'a simple comparison of [the **[*12]** ESCO's] rate to the local public utility rate is not sufficient to support the reasonable inference that [the ESCO] did not adhere to that formula."), *appeal docketed*, No. 18-3285 (3d Cir. Oct. 18, 2018); *Hamlen v. Gateway Energy Servs. Corp., No. 16 CV 3526 (VB), 2017 WL 892399, at *4 (S.D.N.Y. Mar. 6, 2017)* (dismissing a breach of contract claim because "plaintiff conflates wholesale rates with defendant's natural gas costs.").

Furthermore, plaintiffs do not adequately address these concerns by removing all references to the expectations of a "reasonable consumer" and alleging instead that the term "actual and estimated supply costs" is "unambiguous." Pls.' Br. 10. Regardless of the expectations of a "reasonable consumer"—and regardless of whether or not a consumer actually reads the terms of the electricity sales agreement—plaintiffs can plead a breach of contract only if their proposed interpretation of the contract is reasonable. Furthermore, the expectations and understanding of a consumer—based on the plain language of the contract—are always relevant to the court's analysis of a contract's terms. *See Salvaggio v. New Breed Transfer Corp., 564 S.E.2d 641, 689 (N.C. Ct. App. 2002)* ("The principal objective in the interpretation of a contract's provisions is to ascertain the *intent* of the parties." (citation omitted)); *see also Mirkin v. Viridian Energy, Inc.* ***[*13]*** , No. 3:15-cv-1057 *(SRU), 2016 WL 3661106,*

*at *8 (D. Conn. July 5, 2016)* (finding that there was a breach of contract because the defendant acted "beyond the limits established by the contract and in a manner that will frustrate *the expectations of the other party* to that contract" (emphasis added)). Thus, plaintiffs' proposed amendments would not alter my conclusion that the contract does not require defendants to set their prices in accordance with market-related factors or wholesale rates—as calculated in plaintiffs' Market Supply Cost. *See Dervan v. Gordian Grp. LLC, No. 16-CV-1694 (AJN), 2017 WL 4838318, at *3 (S.D.N.Y. Oct. 23, 2017)* ("[A] motion to amend may be denied as futile if the 'amended portion of the complaint would fail to state a cause of action.'").

CONCLUSION

For the foregoing reasons, I deny plaintiffs' motion for reconsideration under both *Rule 59(e)* and *60(b)*, and I deny them leave to amend their pleadings.

SO ORDERED.

/s/ Allyne R. Ross

United States District Judge

Dated: November 2, 2018 Brooklyn, New Yo

Brooklyn, New York

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