H

Supreme Court, Appellate Division, Second Department, New York.
Vincent J. EMILIO, appellant,
v.
ROBISON OIL CORP., d/b/a Robison, respondent.
June 2, 2009.

Background: Customer, individually and as proposed representative of putative class, brought action against supplier, alleging breach of contract, breach of implied covenant of good faith and fair dealing, and violation of deceptive acts and practices statute, based upon supplier's purported unilateral adjustment of alleged fixed-price electrical supply charges mid-term. The Supreme Court, Westchester County, Liebowitz, J., denied customer's motion for **class** action **certification**. Customer appealed.

Holding: The Supreme Court, Appellate Division, held that customer satisfied prerequisites for **class** action **certification** and certification was warranted.

Reversed.

West Headnotes

[1] Parties 287 35.9

287 Parties
287III Representative and Class Actions
287III(A) In General
287k35.9 k. Discretion of Court. Most Cited Cases
Although determination to grant or deny **class** action **certification** rests in the sound discretion of trial court, it must be grounded upon a consideration of statutory factors. McKinney's CPLR 901(a), 902.

[2] Parties 287 35.33

287 Parties
287III Representative and Class Actions
287III(B) Proceedings
287k35.33 k. Evidence; Pleadings and Supplementary Material. Most Cited Cases
Class representative has the burden of establishing the prerequisites of **class** action **certification**. McKinney's CPLR 901(a), 902.

[3] Parties 287 35.1

287 Parties
287III Representative and Class Actions
287III(A) In General
287k35.1 k. In General. Most Cited Cases
Article setting forth statutes governing class actions is to be liberally construed. McKinney's CPLR 901 et seq.

[4] Parties 287 35.71

287 Parties
287III Representative and Class Actions
287III(C) Particular Classes Represented
287k35.71 k. Consumers, Purchasers, Borrowers, or Debtors. Most Cited Cases
Customer satisfied prerequisites for **class** action **certification**, and certification was warranted, in action against supplier for breach of contract, breach of implied covenant of good faith and fair dealing, and violation of deceptive acts and practices statute based upon supplier's purported unilateral adjustment of alleged fixed-price electrical supply charges mid-term; members of class appeared to number in multiple hundreds and shared common questions of fact or law regarding supplier's alleged conduct, claims of customer, as representative, were typical of those of class, customer showed that he could fairly and adequately protect interests of class, and class action procedure appeared to be superior method of adjudicating controversy, particularly given trial court's ability to use sub-classes to address different versions of similar contracts issued to members during pertinent time period. McKinney's CPLR 901(a), 902; McKinney's General Business Law § 349.
***178** Sanford Wittels & Heisler, LLP, New York, N.Y. (Michael Katz and William R. Weinstein of

counsel), for appellant.

Bleakley Platt & Schmidt, LLP, White Plains, N.Y. (Susan E. Galvao of counsel), for respondent.

WILLIAM F. MASTRO, J.P., MARK C. DILLON, JOSEPH COVELLO, and THOMAS A. DICKERSON, JJ.

In an action, inter alia, to recover damages for violation of General Business Law § 349, the plaintiff appeals from an order of the Supreme Court, Westchester County (Liebowitz, J.), entered October 31, 2007, which denied his motion for **class** action **certification**.

ORDERED that the order is reversed, on the law and in the exercise of discretion, with costs, and the plaintiff's motion for **class** action **certification** is granted.

The plaintiff, individually and as a proposed representative of a putative class, commenced this action against the defendant alleging for breach of contract, breach of the implied covenant of good faith and fair dealing, and violation of General Business Law § 349 for unilaterally adjusting alleged fixed-priced electrical supply charges mid-term. The plaintiff moved for **class** action **certification**, which the Supreme Court denied. We reverse.

[1][2][3][4] While the determination to grant or deny **class** action **certification** rests in the sound discretion of the court (*see Small v. Lorillard Tobacco Co.*, 94 N.Y.2d 43, 52-53, 698 N.Y.S.2d 615, 720 N.E.2d 892; *Tosner v. Town of Hempstead*, 12 A.D.3d 589, 590, 785 N.Y.S.2d 101), it must be grounded upon a consideration of the factors set forth in CPLR 901(a) and 902. The five factors enumerated in CPLR 901(a) are (1) the class is so numerous that joinder of all members is impractical, (2) the existence of common questions of fact or law that predominate over questions ***179** affecting individual members, (3) typicality of the class representative's claims or defenses with that of the class, (4) adequacy of protecting the class by the representative, and (5) superiority of the class action to other available methods of adjudicating the controversy (*see Globe Surgical Supply v. GEICO Ins. Co.*, 59 A.D.3d 129, 871 N.Y.S.2d 263; *Matter of Colt Indus. Shareholder Litig.*, 77 N.Y.2d 185, 194, 565 N.Y.S.2d 755, 566 N.E.2d 1160). CPLR 902 also requires, if the prerequisites of CPLR 901 are satisfied, consideration of (1) whether class members have an individual interest in controlling the litigation, (2) the impracticality or inefficiency of prosecuting or defending separate actions, (3) the extent and nature of existing litigation, (4) the desirability or undesirability of concentrating the claim in a particular forum, and (5) difficulties likely to be encountered in managing the class. The class representative has the burden of establishing the prerequisites of certification (*see Kings Choice Neckwear, Inc. v. DHL Airways, Inc.*, 41 A.D.3d 117, 836 N.Y.S.2d 605; *Beller v. William Penn Life Ins. Co. of N.Y.*, 37 A.D.3d 747, 748, 830 N.Y.S.2d 759). CPLR article 9 is to be liberally construed (*see Globe Surgical Supply v. GEICO Ins. Co.*, 59 A.D.3d 129, 871 N.Y.S.2d 263; *Beller v. William Penn Life Ins. Co. of N.Y.*, 37 A.D.3d at 748, 830 N.Y.S.2d 759; *Friar v. Vanguard Holding Corp.*, 78 A.D.2d 83, 93, 434 N.Y.S.2d 698).

Upon a balanced consideration of all relevant circumstances, we find that the plaintiff meets all of the prerequisites of CPLR 901(a), and that the Supreme Court improvidently exercised its discretion in denying **class** action **certification**. Members of the class appear to number in the multiple hundreds. The members share common questions of fact or law regarding the defendant's alleged unilateral adjustment of prices in the middle of alleged fixed price terms. The claims of the representative are typical of those of the class. The representative has demonstrated that he can fairly and adequately protect the interests of the class. Finally, the class action procedure appears to be superior to other potential available methods of adjudicating the controversy. A consideration of the factors contained in CPLR 902 does not warrant a different result.

We note, in particular, that class actions are uniformly certified in breach of contract actions, notwithstanding differing damages to individual class members where, as here, there is a uniformity of contractual agreements (*see e.g. Globe Surgical Supply v. GEICO Ins. Co.*, 59 A.D.3d 129, 871 N.Y.S.2d 263; *Beller v. William Penn Life Ins. Co. of N.Y.*, 37 A.D.3d at 747, 830 N.Y.S.2d 759; *Wilder v. May*

Dept. Stores Co., 23 A.D.3d 646, 649, 804 N.Y.S.2d 423; *Englade v. HarperCollins Publs.*, 289 A.D.2d 159, 160, 734 N.Y.S.2d 176). We also note that to the extent the defendant may have issued three similar contract versions to customers at different times between 1998 and 2006 that are at issue here, nothing would prevent the Supreme Court, in the management of the class, from establishing sub-classes based upon the particular contract at issue given the commonality of the class members' general claims (*see Super Glue Corp. v. Avis Rent A Car Sys.*, 132 A.D.2d 604, 607, 517 N.Y.S.2d 764).

The parties' remaining contentions have been rendered academic in light of our determination or are without merit.

N.Y.A.D. 2 Dept.,2009.
Emilio v. Robison Oil Corp.
63 A.D.3d 667, 880 N.Y.S.2d 177, 2009 N.Y. Slip Op. 04373

END OF DOCUMENT