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Sutter Medical Foundation

Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse

Theiding Plaintiff/Petitioner(s) VS. Sutter Medical Foundation Defendant/Respondent(s) (Abbreviated Title)	No. RG14712117 Order Motion to Strike Granted

The Motion to Strike filed for Sutter East Bay Hospitals and Sutter Health was set for hearing on 03/13/2015 at 08:30 AM in Department 21 before the Honorable Wynne Carvill. The Tentative Ruling was published and was contested.

The matter was argued and submitted, and good cause appearing therefore,

IT IS HEREBY ORDERED THAT:

On March 13, 2015, the Motion of defendants Sutter East Bay Hospitals dba Alta Bates Summit Medical Center and Sutter Health ("Sutter") To Strike Portions Of Plaintiff's Second Amended Complaint ("Motion"), which was joined by defendant Nelson Family Of Companies, came on for hearing. The court rules as follows:

BACKGROUND:

Plaintiff Kara Theiding ("Plaintiff"), a former medical patient of Sutter, received a letter from Sutter dated June 5, 2013, informing her that personal information pertaining to her had been recovered by the Alameda County Sheriff's office in the course of an investigation ("Notice Letter"). The Notice Letter indicated that the information "may have included the following: your name, Social Security number, date of birth, gender, address, zip code, home phone number, marital status, name of your employer and your work phone number."

Plaintiff filed her original complaint in this case on January 30, 2014, and her First Amended Complaint ("FAC") on April 10, 2014. The FAC contained a single cause of action for violation of the California Confidentiality of Medical Information Act (Civil Code ["CC"] sections 56, et seq., "CMIA") and was pled as a class action. The only casualty to the FAC from Sutter's demurrer and motion to strike was the prayer for attorney's fees. (Orders dated July 10, 2014.)

Plaintiff filed her currently operative Second Amended Complaint on December 16, 2014 ("SAC"). Gone from the SAC is any reference to, or cause of action based on, the CMIA. The SAC includes a cause of action for negligence against Sutter and a separate cause of action for negligence against newly named defendant Nelson Family Of Companies ("Nelson"). Like the FAC before it, the SAC includes a copy of the June 5, 2013 letter as an exhibit (filed separately on December 18, 2014) and is pled as a class action.

The court notes that the elimination by Plaintiff of the cause of action based on alleged violations of the CMIA falls within the scope of California Rule of Court ("CRC") 3.770, yet Plaintiff did not request court approval. Plaintiff is hereby ordered to do so forthwith by way of an ex parte application (CRC 3.1200, et seq.) supported by a fully rule compliant declaration. A COMPLIANCE HEARING IS SET FOR APRIL 2, 2015, TO ENSURE THAT THERE IS COMPLIANCE WITH CRC 3.770.

MOTION:

Sutter moves now to strike all references to class treatment in the body and prayer of the SAC, as well as item (4) in the prayer, "[r]easonable attorneys' fees and costs of suit." The notice of motion properly quotes the portions sought to be stricken as required by California Rule of Court ("CRC") 3.1322(a). The Motion is joined by Nelson (Sutter and Nelson collectively, "Defendants").

Defendants argue that the invalidity of class treatment is apparent from the face of the SAC, as the allegations show that a separate trial would be required for each potential class member based on individualized evidence concerning whether the incident alleged in the SAC or some other event or events was/were the cause of the particular individual's alleged damages. Because the SAC seeks compensatory damages based on alleged breach of private or personal information, individualized causation issues predominate because it is the essence of the cause of action. (Citing, inter alia, Stilson v. Reader's Digest (1972) 28 Cal.App.3d 270, 272-274 ("Stilson").)

Defendants further argue that individualized issues regarding potential class members' mitigation efforts will also predominate (citing Kennedy v. Baxter Healthcare Corp. (1996) 43 Cal.App.4th 799, 811). The SAC pleads Plaintiff's unique mitigation efforts (SAC, paragraph 19) and Exhibit A to the SAC shows that free credit monitoring and insurance was offered by Sutter. Defendants would be entitled to find out if the potential class member signed up, if not, why not, etc.

Defendants also assert that by limiting the damages sought on behalf of the class to economic damages, as opposed to noneconomic damages, Plaintiff breaches her fiduciary duty to all of the putative class members. (Citing, inter alia, City of San Jose v. Sup.Ct. (1974) 12 Cal.3d 447, 464-465.)

Finally, Defendants assert that the SAC demonstrates on its face that the class action method is not superior to other available methods, such as consolidation of individual actions. The class action device cannot be used where it would abridge a party's rights and/or not be manageable. (Citing Duran v. U.S. Bank Nat. Assoc. (2014) 59 Cal.4th 1, 28-30 ("Duran").)

OPPOSITION:

Plaintiff argues in opposition that she is not required to negate all possible alternative causes for the compromising of the putative class members' personal data at the pleading stage. All that is required of Plaintiff is to show a "reasonable possibility" of pleading community of interest among class members. (Citing Brown v. Regents of the University of California (1984) 151 Cal.App.3d 982, 988.)

Plaintiff further argues that individual mitigation efforts, like individual damages, do not vitiate commonality. In support of this argument Plaintiffs cite, inter alia, Sav-on Drug Stores, Inc. v. Sup. Ct. (2004) 34 Cal.4th 319, 333, for the more general proposition that "a class action is not inappropriate simply because each member of the class may at some point be required to make an individual showing as to his or her eligibility for recovery or as to the amount of his or her damages." (Ibid, citing EDD v. Sup. Ct. (1981) 30 Cal.3d 256, 266.)

Plaintiff also responds to Defendants' assertion that she has improperly limited the recovery she seeks on behalf of the class.

DISCUSSION:

First, Plaintiff effectively concedes that the SAC does not support a prayer for attorneys' fees. Accordingly, the prayer for attorneys' fees is HEREBY STRICKEN. The court notes, however, that Defendants have lumped "costs of suit" together with "reasonable attorneys' fees" in their notice of motion. Only "reasonable attorneys' fees" is stricken.

In its July 10, 2014 order denying Defendant's Motion to Strike the class allegations in the FAC, the

court observed that the factual allegations in the FAC fell solely within the scope of CC section 56.36(b), with no allegations that implicated CC section 56.35. The important of the distinction is that section 56.36(b) provides a statutory remedy of "nominal damages of one thousand dollars ($1,000)" with no need to show actual damages, while section 56.35 requires a showing of "economic loss or personal injury." The court's conclusion that the question of whether a class was certifiable was premature was based in no small part on that limitation to Plaintiff's proposed class recovery. Indeed, the court went on to say "Plaintiff cannot have it both ways. Either she pursues claims for nominal relief (CC section 56.36(b)(1)) on behalf of herself and the putative class of persons whose personal information was included in the same alleged data security breach, or she changes course to pursue claims under CC section 56.35, rendering potential class certification highly unlikely." The SAC constitutes an even more dramatic change of course, i.e., a change from any claim under the CMIA to those sounding solely in negligence.

The facts alleged in the SAC reveal that the only issue common to all putative class members is whether their personal information was involved in the data breach incident. But this is arguably not an "issue" at all, since the manner in which Plaintiff seeks to define the putative class demonstrates that Defendants are not expected to take issue with who falls within the definition. A fundamental flaw in Plaintiff's opposition arguments is her assertion that Defendants' liability to each putative class member will be determined by this one common issue. Not so. Unlike section 56.36(b)(1) of the CMIA, the common law of negligence requires a showing of actual injury. (Fields v. Napa Milling Co. (1958) 164 Cal.App.2d 442, 447-449.)

As Defendants correctly argue, the allegations in paragraphs 19, 23, 40 and 41 of the SAC give rise to a predominance of individualized causation issues. In other words, to the extent Plaintiff and other putative class members suffered the damages alleged, each would be required to prove that the damages resulted from the data breach. (See, e.g., Bozaich v. State of Cal. (1973) 32 Cal.App.3d 688, 695.) This is more than a simple calculation of damages. Causation must be proven to establish liability. Defendants are also correct that they would be entitled to raise and litigation their affirmative defenses, including failure to mitigate (Duran, at 28-30 & 34-35), against each putative class member, again increasing the number of individualized issues.

At the hearing the court went further and inquired what common issues could Plaintiff even identify that might be resolved on a class-wide basis - i.e., what would be the questions on a hypothetical verdict form might even be posed. As best the court could determine, there might be a question of whether Defendant breached a duty of care with respect to the personal data of class members. It is unclear whether this is even a matter of factual dispute, but assuming that may be disputed, any such common issue is clearly overwhelmed by individualized issues of causation and damages that would predominate.

While the court does not necessarily agree with Defendant's additional arguments regarding the adequacy of Plaintiff's representation, it concludes that given the facts alleged in the SAC, Plaintiff cannot show sufficient commonality among the members of the putative class, that whatever common issues may exist predominate or that a class action would be a superior method by which to adjudicate their claims.

The Motion is GRANTED. The class allegations, as set forth in the notice of motion, are HEREBY STRICKEN.

Dated: 03/13/2015

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Judge Wynne Carvill

SHORT TITLE:	CASE NUMBER:
Theiding VS Sutter Medical Foundation	RG14712117

ADDITIONAL ADDRESSEES

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Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse

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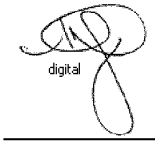
DECLARATION OF SERVICE BY MAIL

I certify that I am not a party to this cause and that a true and correct copy of the foregoing document was mailed first class, postage prepaid, in a sealed envelope, addressed as shown on the foregoing document or on the attached, and that the mailing of the foregoing and execution of this certificate occurred at 1225 Fallon Street, Oakland, California.

Executed on 03/16/2015.

Leah T. Wilson Executive Officer / Clerk of the Superior Court

By 

Deputy Clerk