

IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

LISA KRAGNES.

Plaintiff,

vs.

CITY OF DES MOINES, IOWA,

Defendant.

NO. CE 49273

RULING ON MOTION FOR
LEAVE TO AMEND TO
INCLUDE A COUNTERCLAIM

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IOWA DISTRICT COURT

INTRODUCTION

The above captioned matter came before the Court for consideration on the Defendant's Motion for Leave to Amend to include a counterclaim for unjust enrichment. After being fully apprised of the arguments of counsel and reviewing the briefs filed by the parties, this Court now enters the following ruling:

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

The suit brought by the Plaintiff is a class action, which arises out of certain electric and gas utility franchise fees paid by the Plaintiff class to the City of Des Moines. On July 27, 2004, the Plaintiff, Lisa Kragnes, filed suit against the Defendant, the City of Des Moines, Iowa, alleging that portions of the gas and electric utility franchise fee paid by the Plaintiff constituted an illegal tax. The Plaintiff class seeks declaratory and injunctive relief, including a refund of any and all fees in excess of the City's costs of administration.

On May 1, 2007, the Defendant filed a Motion for Leave to Amend to include certain affirmative defenses and a counterclaim of unjust enrichment. On June 15, 2007, this Court allowed the Defendant to amend its answer to include the affirmative defenses and reserved the decision as to whether to allow the addition of the counterclaim

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after this particular issue was briefed by both parties. The Defendant wishes to amend its answer to include a counterclaim for unjust enrichment, the premise of which is that, if, as a result of this litigation, the Plaintiff is permitted to recover the gas and electric franchise fees it has paid to the Defendant, the Plaintiff class has received the benefit of many services provided by the Defendant City of Des Moines without having paid for those services.

STATEMENT OF THE LAW AND ANALYSIS

1. Motion for Leave to Amend to add a counterclaim:

Iowa Rule of Civil Procedure 1.402(4) indicates the Motions for Leave to Amend “shall be freely given where justice so requires” IOWA R. CIV. P. 1.402 (4). However, a District Court has the authority to deny an amendment to a party’s answer or petition in certain circumstances:

If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be “freely given.” Davis v. Ottumwa YMCA, 438 N.W.2d 10, 15 (Iowa 1989) (quoting Foreman v. Davis, 371 U.S. 178, 182 (1962)).

This Court concurs with the Plaintiff that the Defendant’s proposed counterclaim of unjust enrichment is nonsensical, as the facts and circumstances in this case do not support any relief for the Defendant on a counterclaim for unjust enrichment. *See Id.* This “counterclaim” is contingent upon the Court’s final judgment that the Plaintiff class is legally entitled to a measure of relief, i.e. that the Defendant’s franchise fees were illegal, at least in part. The Defendant has cited no authority, either in terms of Iowa law

or in federal interpretations of the rules of civil procedure governing the amendment of pleadings that would support this counterclaim, the basis of which is a possible future judgment of the Court. The Court has found no authority which would allow the addition of a counterclaim that arises *after* what the Defendant speculates to be the Court's final judgment. At the time of the filing of suit, the supposed "counterclaim" would not be ripe for adjudication, as the Plaintiff class has not been unjustly enriched. The Plaintiff, though having received the benefit of all City of Des Moines services, has paid the gas and electric utility franchise fees. Ultimately, though the Defendant has laid out the correct law governing the elements for a claim regarding unjust enrichment, there is no state of facts that the Defendant has plead, other than the Defendant's anticipation of an unfavorable court judgment, that the elements of a claim for unjust enrichment could be met. At the time of the filing of suit, the Plaintiff's receipt of City services have not come at any expense to the Defendant. *See State Ex. Rel. Palmer v. Unisys Corporation*, 637 N.W.2d 142, 154 (Iowa 2001) (setting forth the elements of a claim for unjust enrichment). The Court concludes that the amendment to include the counterclaim should be disallowed, as the facts outlined by the Defendant do not afford it a means of relief, and amendment to include such a counterclaim would be futile.

2. Creation of a subclass of Plaintiffs who do not wish a refund:

In support of the Defendant's Motion for Leave to Amend to add a counterclaim for unjust enrichment, the Defendant has submitted the affidavit of City Manager Richard A. Clark. Mr. Clark indicates that at all times material to this litigation, he has been the Manager for the City of Des Moines, a customer of Mid-American Energy, and a member of the Plaintiff class. Mr. Clark indicates that he believes that he has received services


provided by the City of Des Moines and would be unjustly enriched if he were to be given a refund of the franchise fees. Mr. Clark further indicates that if such a refund is awarded as a result of this litigation, he does not wish to receive a refund, and requests to be placed into a sub-class of individuals who do not wish a refund.

At any time prior to the entry of judgment, a court may amend the class certification order. IOWA R. CIV. P. 1.265(1). In an amended class certification order, the Court possesses the authority to create sub-classes, or “eliminate from the class any member who was included in the class as certified.” *Id.* If appropriate, a Court may “divide a class into subclasses and treat each sub-class as a class.” IOWA R. CIV. P. 1.262(3)(c). The Court does not feel that the creation of a sub-class comprised only of those individuals who do not wish to receive a refund of franchise fees from the City is appropriate at this time. The creation of such a sub-class by this Court would likely not meet the numerosity requirement for classes as articulated in Iowa Rule of Civil Procedure 1.261(1). Mr. Clark is the only party that this Court is aware of that desires to be a member of such a sub-class. However, if he so desires, Mr. Clark is free to file a request with this Court to be excluded from the Plaintiff class.

ORDER

IT IS THE ORDER OF THE COURT that the Defendant’s Motion for Leave to Amend to add a Counterclaim is **DENIED**.

IT IS SO ORDERED this 24 day of September, 2007.



DON C. NICKERSON, JUDGE
Fifth Judicial District of Iowa

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