STATE OF NEW YORK
SUPREME COURT **ULSTER COUNTY**
STEPHEN PHILLIP ROMINE,

Plaintiff,

-against-

Decision & Order
Index No. 16-1351

JAMES P. LAURITO and STEVEN V. LANT,

Defendants.

Supreme Court, Ulster County
RJI No.: 55-16-01317

Present: Christopher E. Cahill, JSC

Appearances: STEPHEN PHILLIP ROMINE
Plaintiff, Pro Se
8 Fitzsimmons Lane
Woodstock, New York 12498

RIZZO & KELLEY, ESQS.
Attorneys For Defendants
272 Mill Street
Poughkeepsie, New York 12601
By: Christina M. Bookless, Esq.

Cahill, J.:

By separate motions, each dated April 4, 2018, self-represented plaintiff, Stephen Phillip Romine, has moved pursuant to CPLR § 2221 to renew and reargue the decision and order of this court dated February 14, 2018 which granted defendants' motion for summary judgment dismissing the plaintiff's complaint. In addition, by a subsequent notice of motion dated December 28, 2018 and amended notice of motion dated January

2, 2019, plaintiff has moved for an order pursuant to CPLR § 3215 vacating the court's decision/order on the basis of fraud. The defendants oppose the motions.

After reviewing the parties' submissions, and in particular, the voluminous exhibits which plaintiff has submitted with all three motions, the court concludes that the motions to reargue and to renew must be denied. CPLR § 2221 (d) (2) provides that a reargument motion must be based on "matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion . . ." As the defendants state in their opposition papers, reargument is not intended to afford the unsuccessful party repeated opportunities to reargue previously decided issues, or set forth arguments different from those originally asserted (see, e.g. CPA Mutual Ins. Co. of Amer. RKK Retention Group v. Weiss & Co., 80 AD3d 430 [1st Dept. 2011]).

To succeed on a motion to renew, CPLR § 2221 (e) requires that the motion be based on new facts not offered on the prior motion that would change the prior decision, or that it shall demonstrate that there has been a change in the law that would change the prior decision. CPLR § 2221 (e) (2) also requires that the motion must contain reasonable justification for the failure to present such facts on the prior motion. A motion to renew cannot be used to submit facts which could have been presented on the original motion (see, e.g. Rosch v.Town of Milton ZBA, 142 AD2d 765 [3rd Dept. 1988]).

As to the motion to reargue, the court finds that it neither misapprehended relevant

facts nor misapplied controlling law. At the crux of all of these motions is plaintiff's resistance to the legal reality that, as this court decided in its February 14, 2018 decision/order, under the doctrine of primary jurisdiction, the body best placed in the State of New York to determine whether the meter to which plaintiff objects is suitable for public use, the New York State Public Service Commission (PSC), has already determined that it is; and no amount of pre-summary judgment discovery which plaintiff contends that he is entitled to from the defendants will change the fact that the PSC has primary jurisdiction in these matters. Plaintiff cannot now circumvent this well-established doctrine by suing individually executives of the utility which installed the meter to which Mr. Romine objects, particularly where, as will be discussed further in this decision/order, the PSC has determined that the type of meter in question does not pose a health risk to utility customers.

In reaching this conclusion, the court is compelled to address the various arguments that plaintiff has set forth. First, while plaintiff argues that the PSC's 2005 determination approving the use of the GE I-210 digital meter was based solely on the accuracy of the meter and did not address its safety, plaintiff overlooks the fact that the complaint he made in 2013 to the PSC raised the issue of health safety. The PSC rejected his request for an informal hearing, and the petitioner failed to exhaust his administrative remedies and/or commence an Article 78 proceeding to challenge the PSC's decision despite the fact that the PSC decision denying his request specifically informed plaintiff

of his right to appeal the decision. Even more fatal to his position is the fact that, as shown in exhibit B of defendant's attorney's affirmation in opposition to his motion and amended motion to vacate, in the PSC's Order issued December 14, 2018, which denied Stop Smart Meters NY's petition for rehearing and reconsideration of the PSC's Modification Order dated October 20, 2017 in PSC case 14-M-0196, the safety of digital meters was squarely addressed. In the December 14, 2018 order, the PSC also denied the petition of Stop Smart Meters Woodstock NY (a group with which the plaintiff is associated as he acknowledged in his reply to the defendants' opposition to his motion to vacate) to rescind in part, and modify the November 17, 2017 order.

Specifically, the PSC, in denying the petitions, and having considered the scientific evidence submitted by petitioner, affirmed the findings in the Modification Order that "solid state" non-communicating meters (i.e., "digital meters") and electromagnetic frequency (EMF) emissions from the AMR meters equipped with radio frequency (RF) transmitters they replace do not" pose a credible threat to the health and safety of Central Hudson customers." The PSC also affirmed the finding in the Modification Order that "electromechanical meter technology" (i.e., analog meters) is "obsolete and currently not in production by any major meter manufacturer, and that offering customers an electromechanical meter as an alternative to an AMR meter is not an effective long-term solution," thereby justifying Central Hudson's decision to not offer customers an analog meter option.

The Modification Order itself was the result of petitions to the PSC filed in May 2015 by various rate payers to modify the meter "opt out" provisions of Central Hudson tariff amendments which the PSC approved in September 2014 that allowed residential customers to opt out of using AMR meters equipped with radio frequency (RF) transmitters like the GE I-210 and pay a monthly fee reflecting the costs to Central Hudson of manually reading the analog meter. The amended tariffs also allowed Central Hudson to replace the AMR meters with the standard "solid state" non-communicating meter. In summary, in Case 14-M-0196, the PSC has considered the same claims as plaintiff raises here and rejected them.

Second, even if primary jurisdiction did not apply, plaintiff has not submitted any probative medical proof, in admissible form, causally connecting any alleged illness he claims to have suffered, or that his significant other, a non-party, has suffered, to the GE digital meter installed at his residence from 2008 to 2013. Although plaintiff has submitted the "affidavit of fact and truth" of Victoria Alexander, Phd, a self-described expert in Philosophy of Biology and Biosemiotics, the affidavit is deficient as it does not detail her academic qualifications, and she does not explain how her expertise in the disciplines of Philosophy of Biology and Biosemiotics qualifies her to opine on the effects of electromagnetic radiation exposure from wireless devices and from the GE I-210 in particular.

Indeed, plaintiff has not submitted any expert opinion in admissible form stating

that the meter generally is a health risk to occupants of a residence having such a meter. While this court does not view lightly the issue of the effects of electromagnetic radiation on human beings, of the numerous studies and articles concerning electromagnetic frequency radiation which plaintiff has made part of his submissions on his motions, some do not address the type of meter of which he complains or do not involve utility meters at all. To the extent that Mr. Romine continuously argues that the meter in question is a "smart meter", to the extent that certain of the annexed studies deal with "smart meters", and to the extent that GE in its marketing product description stated that the GE I-210 is part of its smart meter "product suite", as indicated in the PSC's letter to Mr. Romine and his significant other, Ms. Nevin, dated July 16,2013 (Exhibit F to defendants' attorney's affirmation in opposition dated February 21, 2019), and as the PSC stated on page 21 of its December 14, 2018, order the PSC does not consider a GE I-210 AMR meter to be a "smart meter" and as the affidavit of Mr. Harkenrider dated February 2, 2018 indicates, the meter at issue is not a "smart meter", and "smart meters" (i.e. two-way AMI meters) had not, to date, been approved for use in New York State. In any event, as discussed above, the PSC has found that the GE I-210 AMR meter is safe.

Third, as Mr. Harkenrider's affidavit and Mr. McGowan's May 15, 2018 affidavit also indicate, under existing PSC rules, and Central Hudson's policies and tariffs, Central Hudson cannot install a refurbished analog meter in Mr. Romine's residence as he attempted to do on his own, and it cannot install any type of analog meter as they were no

longer manufactured in 2013. With regard to Mr. Romine's contention that in response to his FOIL requests he was informed that there are no laws or regulations preventing Central Hudson from doing as he requested, Central Hudson tariff, PSC No. 15 Leaf 51, makes clear that a meter is the company's property, that the company is responsible for selecting the meter that is most appropriate for the customer, and that customer preference is not a consideration. In other words, while it may be the case in other jurisdictions, Central Hudson, as long as it, as in this case, provides customers with a PSC-approved meter, it is under no obligation to provide the plaintff with either an unused analog meter from existing stock or a newly reconditioned analog meter.

Fourth, during the proceedings before the PSC, Central Hudson, pursuant to "opt-out" rights in the tariff, offered Mr. Romine the opportunity to have a non-AMR equipped digital meter installed in place of the GE 1-210 AMR- equipped meter, but he refused.

Fifth, plaintiff's argument that a contract to remove the meter and replace it with an analog meter was created between the parties as a result of the defendants' alleged failure to respond to his March 21, 2013 letter demanding the removal of the digital meter installed at his residence is totally without merit. Central Hudson responded, but not to Mr. Romine's satisfaction. This is hardly a foundation on which to base a claim of contract.

As to plaintiff's motion for renewal, plaintiff points to no change in the law which would justify renewal. As to "new" facts which justify renewal, plaintiff claims to

present new proof that Central Hudson was incorrect in advising him that analog utility meters were no longer manufactured. The GE I-70 meters for which plaintiff has submitted copies of shipping receipts, however, were manufactured in March 2002 and belong to an unused stock which he located in Florida.

Second, contrary to plaintiff's claim, and as already discussed above, Central Hudson has no duty to locate an analog meter for him. Plaintiff cites no legal or regulatory obligation or tariff provision providing that the defendants or Central Hudson were under a duty to locate whatever meter a customer requests and submit it to the PSC individually for approval.

Third, in addition to the fact that neither defendant was employed by Central Hudson at the time Mr. Romine commenced this action, neither of these defendants had any contact with Mr. Romine that could be the basis of a claim against them, and the mere fact that they were co-employees of the Central Hudson employees who interacted with him does not impose liability on them (see Ruszkowski v. Sears Roebuck & Co., 188 AD4 967 [3rd Dept. 1992]). No amount of discovery would change this result. Moreover, based on the fact that the PSC has approved GE I-210 meters both as to accuracy and safety, plaintiff has no factual or legal basis upon which to sue the defendants.

In summary, because plaintiff has shown neither a change in law nor new facts that would support a different result, the motion to renew is denied.

Finally, plaintiff's motion to vacate must also be denied. He alleges that the

court's decision/order must be vacated because of fraud. Specifically, he asserts 26 "counts" of fraud against the defendants. In making this assertion, however, what Mr. Romine is actually saying is that defendants have committed fraud because they disagree with him, both as to the issue of whether digital meters are safe for customers' health and as to the issue of whether suitable analog meters are no longer available as Central Hudson maintains.

As to the former, as evidenced by the PSC determination in case 14-M-0196 discussed earlier in this decision/order, defendants' employer's position that digital meters are safe is not fraud. It was indeed the finding of the PSC in case 14-M-0196. As to the latter, whether or not Central Hudson is correct in stating that the type of meter Mr. Romine wants is no longer manufactured, or if manufactured earlier and unused, or used earlier and reconditioned, is unsuitable, again as discussed above, Central Hudson, under its tariff, is the final arbiter of the meter a customer receives, although a customer can choose the opt-out provisions in its tariff. Therefore, Central Hudson has not engaged in any fraud which would warrant vacating the court's February 14, 2018 decision/order.

With regard to plaintiff's remaining arguments, the court rejects plaintiff's argument that defendants committed fraud in failing to disclose that defendant Laurito, while no longer an officer of Central Hudson, is a director of Central Hudson. It also rejects plaintiff's claim that he and others failed to receive adequate notice of Public

Service Commission proceedings via the New York State Register. This claim is undermined by the litigation pursued by Stop Smart Meters NY and Stop Smart Meters Woodstock NY in case #14-M-0196.

Last, the court has considered plaintiff's claim that an exhaustion of administrative remedies would have been futile, and concludes that it is without merit. This claim would only be relevant had plaintiff commenced an Article 78 proceeding against the PSC, but as discussed above, he did not do so.

This shall constitute the Decision and Order of the court. The original Decision and Order and all other papers are being delivered to the Supreme Court Clerk for transmission to the Ulster County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel is not relieved from the applicable provisions of that rule regarding notice of entry.

SO ORDERED.

Dated: Kingston, New York
Aug. 8, 2019

ENTER,

CHRISTOPHER E. CAHILL, JSC

Papers considered:

1) Combined motion to renew and Romine affidavit dated April 1, 2018, copy of Romine affirmation dated May 30, 2017 in opposition to defendants' summary judgment motion, exhibits A-1 to A-11, and Romine affidavit of fact dated April 11, 2018; Bookless affirmation in opposition dated May 15, 2018 with exhibits A to G; Romine reply dated July 30, 2018 with exhibits A-1 to A-13, AB-1 to AK and L to AA.

2) Combined motion to reargue and Romine affidavit dated April 3, 2018, copy of Romine affirmation in opposition dated May 30, 2017 to defendants' summary judgment motion; Bookless affirmation in opposition dated May 15, 2018 and annexed exhibits A to I; Romine reply dated July 30, 2018 with exhibits A-1 to Q.

3) Notice of motion dated December 27, 2018 combined motion to vacate and enter default judgment and Romine affidavit dated December 28, 2018, Romine affidavit of support dated December 28, 2018, Romine memorandum of law dated December 28, 2018, combined amended notice of motion and Romine affidavit dated January 2, 2019, table of contents and annexed exhibits A to Z and AA to OO, Romine amended affirmation of support affidavit dated December 31, 2018, exhibit M and Romine affidavit dated December 31, 2018; Bookless affirmation in opposition to plaintiff's motion and amended motion to vacate dated February 21, 2019 and annexed exhibits A to O; Romine affidavit of truth and fact dated March 12, 2019 with exhibits PP to XX.

4) In conjunction with motions for reargument and renewal, the court also considered the "Papers Considered" listed on page 11 of its February 14, 2018 decision/order.