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

Plaintiff,

-against-

Decision & Order
Index No. 16-1351

JAMES P. LAURITO and STEVEN V. LANT,

Defendants.

Supreme Court, Ulster County
Motion Return Date: June 23, 2017
RJI No.: 55-16-01317

Present: Christopher E. Cahill, JSC

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

RIZZO & KELLEY, ESQS.
Attorneys For Defendants
272 Mill Street
Poughkeepsie, New York 12601
By: Eugene J. Rizzo, Esq.

Cahill, J.:

Defendants move for summary judgment pursuant to CPLR § 3212 on several grounds dismissing the plaintiff's Second Amended Complaint. Plaintiff opposes the motion and contends that questions of fact exist which preclude the granting of summary judgment.

According to the defendants' submissions, on July 31, 2008 the plaintiff applied

for an upgrade of his electric service with Central Hudson Gas and Electric Corporation ("Central Hudson") from 60 amp to 100 amp for his residence in Woodstock, New York. On August 13, 2008, Central Hudson installed a GE I-210 digitally equipped ERT meter which allows the utility to take readings from the utility meter by utilizing a receiver. The GE I-210 meter was approved by the New York State Public Service Commission ("PSC") in 2008. The GE I-210 meter was installed in accordance with Central Hudson's procedures, the PSC's rules and regulations and the utility's controlling Tariff.

After the installation of the digital meter, the plaintiff complained that the meter caused health hazards by emitting microwaves and possible carcinogens. In early 2013, the plaintiff sought to have Central Hudson remove the digital meter. The plaintiff claims that the meter had caused him to become ill and that his partner, Nicole Nevin had suffered a mini stroke ("TIA") on May 7, 2013 because of the meter. On May 16, 2013, the plaintiff removed the meter on his own and installed a used refurbished analog meter. The analog meter installed by plaintiff was not approved by Central Hudson or the PSC. Central Hudson subsequently determined that the installation of the unauthorized meter created safety issues which necessitated the termination of plaintiff's electric service. On May 20, 2013, Central Hudson severed the electrical taps to the meter, and electric service was discontinued to plaintiff's residence. Thereafter, Central Hudson attempted to resolve this issue with the plaintiff and informed him that his request for an analog meter could not be met as "such meters were no longer manufactured and Central Hudson

does not stock any analog meters." The plaintiff rejected settlement proposals from Central Hudson and the PSC, including the installation of a digital non-AMR meter. The GE I-210 ERT is a digital AMR meter, which, unlike the non-AMR digital meter, transmit data to a hand-held receiver.

The plaintiff then filed a complaint with the PSC pursuant to 16 NYCRR § 12.00, et seq challenging the actions of Central Hudson. In a decision dated July 16, 2013, the Commission denied the plaintiff's complaint and found that the digital ERT meter installed on August 13, 2008 was proper and in accordance with Central Hudson's operation procedures, the existing PSC Tariff and the Commission's regulations (Part 92). The PSC found that the installation of a rebuilt analog meter by the plaintiff "created a safety issue that could have caused harm to himself and/or the metering equipment." The PSC determined that "the ERT meters being installed by Central Hudson meet the Commission's safety and accuracy standards" and "Your service will not be restored unless you agree to accept an ERT meter."

Thereafter, petitioner requested that the PSC convene an informal hearing regarding his refusal to accept the digital meter at his residence. In a letter dated March 3, 2014, the PSC denied plaintiff's request and stated that it did not have the authority to direct Central Hudson to install an analog meter. The PSC advised the plaintiff in writing of the appeal procedure to follow which is set forth in 16 NYCRR § 12.13. The plaintiff failed to appeal either the July 2013 determination or March 2014 determination of the

PSC and did not commence a CPLR Article 78 special proceeding challenging either decision. Plaintiff commenced this action on May 19, 2016 against defendants James Laurito and Steven Lant, former executives and CEO's of Central Hudson. Plaintiff admits that on May 25, 2016, he also "filed a separate lawsuit against Central Hudson and the New York Public Service Commission with several of the same causes of action." His Second Amended Complaint in this case alleges various causes of action against the defendants including negligence, private nuisance, abuse of rights, trespass, fraud and civil rights violations under 42 USC 1983.

Defendant Laurito was an employee of Central Hudson from November 1, 2009 to March 31, 2016. He was President of Central Hudson for several years before becoming CEO in October 2014. On April 1, 2016, Mr. Laurito left Central Hudson for other employment. At the time this action was commenced, Mr. Laurito was no longer an employee of Central Hudson.

Defendant Lant was an employee of Central Hudson from October 1980 to October 31, 2014. He was President of Central Hudson for several years before becoming CEO in 2009. Mr. Lant retired from Central Hudson on November 1, 2014. At the time this action was commenced, Mr. Lant was no longer an employee of Central Hudson.

Initially, the plaintiff contends that this motion is premature as he has not had the opportunity to conduct discovery. The motion was originally returnable on February 6,

2017. On April 10, 2017, the plaintiff served a Demand for Interrogatories and Notice to Take Deposition of the defendants. On April 13, 2017, this court "so ordered" defendants' attorney's April 11, 2017 letter to the court requesting a stay of plaintiff's discovery demands pending a decision on this motion. This court granted the stay pursuant to CPLR § 3214 (b). The defendants claim that since they were not employed by Central Hudson at the time this action was commenced, they are not in possession of any of the information the plaintiff seeks. The defendants also maintain that any discovery requests should be made to the non-party, Central Hudson.

CPLR § 3212 (f) permits a party opposing summary judgment to obtain further discovery when it appears that facts supporting the position of the opposing party exist but cannot be stated (Jones v. American Commerce Ins. Co., 92 AD3d 844 [2nd Dept. 2012]). Supreme Court is afforded discretion when presented with a request for disclosure pursuant to CPLR § 3212 (f), and appellate review is guided by whether the court abused its discretion (Svoboda v. Our Lady of Lourdes Memorial Hosp., 20 AD3d 805 [3rd Dept. 2005]). The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion as premature (Burlington Insurance Company v. Casur Corporation, 123 AD3d 965 [2nd Dept. 2014]).

After a review of the record, plaintiff's request under CPLR § 3212 (f) to delay the summary judgment motion as premature must be denied. As stated above, the defendants

are not in possession of any of the discovery the plaintiff seeks. Thus, plaintiff has failed to demonstrate that discovery might lead to relevant evidence or facts essential to oppose the motion which are exclusively within the knowledge and control of the defendants (see, CPLR § 3212 (f); Suero-Sosa v. Cardona, 112 AD3d 706 [2nd Dept. 2013]; Cajas-Romero v. Ward, 106 AD3d 850 [2nd Dept. 2013]).

Proceeding to the merits, it is axiomatic that summary judgment is "a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." (McDay v. State, 130 AD3d 1359 [3rd Dept. 2016]). In deciding whether summary judgment is warranted, the court's main function is issue identification, not issue determination (Barr v. County of Albany, 50 NY2d 247 [1980]). The party seeking summary judgment has the burden of establishing its entitlement thereto as a matter of law (Winegard v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]). The evidence must be construed in a light most favorable to the party opposing the motion (Davis v. Klein, 88 NY2d 1008 [1996]). In order to defeat a motion for summary judgment, the party opposing the motion must produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial of the action (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). Failure to make such a showing requires denial of the motion regardless of the sufficiency of the opposing papers (Voss v. Netherlands Ins. Co., 22 NY3d 728 [2014]).

It is clear that plaintiff's causes of action, whatever their label, all arise from the

same claims that he made to the Public Service Commission. As a utility corporation, Central Hudson is regulated and governed by the rules and regulations of the PSC along with the existing Tariff (see, Public Service Law § 51 [B] [2]). As discussed earlier, a utility customer may file a complaint with the PSC in regard to a service dispute with a utility company pursuant to 16 NYCRR § 12.0 et seq. The plaintiff filed a complaint with the PSC in relation to his electric meter and received, as also discussed earlier, unfavorable determinations on July 16, 2013 and March 3, 2014.

The PSC is the administrative agency having the authority and established procedures for investigating and adjudicating disputes involving disconnecting electrical service (see, Public Service Law § 66). Disputes involving billing or service with a utility company or disconnection by the utility company of such service is subject to the primary jurisdiction of the Public Service Commission (Guglielmo v. Long Is. Lighting Co., 83 AD2d 481 [2nd Dept. 1981)]. The doctrine of primary jurisdiction requires that matters concerning the reasonableness of a utility's rates, rules or practices must first be submitted to the Public Service Commission – the agency vested by the Legislature with authority to regulate and review such matters (Samuel Enterprises, Inc. v. Central Hudson Gas & Elec. Corp., 38 Misc3d 1235(A) [2013]).

The appropriate procedure for a plaintiff utility customer who is disappointed with a Public Service Commission determination after such review is to commence an Article 78 proceeding challenging the Commission's decision (Matter of Curto v. State of New

York Dept. of Pub. Ser. 140 AD3d 1339 [3rd Dept. 2016]). Any CPLR Article 78 proceeding against the PSC must be commenced within four months after the determination is final (see, CPLR § 217; Walton v. NYS Dept. of Correctional Services, 8 NY3d186 [2007]). Plaintiff was informed of the administrative appeal process (see, 16 NYCRR § 12.13) to follow after both decisions but failed to undertake an appeal. As a result, the plaintiff failed to exhaust his administrative remedies (Lehigh Portland Cement Co. v. NYS Dept. of Environmental Conservation, 87 NY2d 136 [1995]). Defendants have, therefore, sustained their burden of proof entitling them to summary judgment. As the PSC maintains primary jurisdiction in matters relating to the termination of service, and as the PSC's exercise of primary jurisdiction has ended unsuccessfully for plaintiff, the court has now only a very limited power of review (Guglielmo v. Long Is. Lighting Co., supra p. 484), and plaintiff has shown no grounds for conducting what would essentially be a "back door" review of the PSC decisions.

The issue of primary jurisdiction aside, the court agrees with the defendants that the doctrine of collateral estoppel precludes the plaintiff from re-litigating the same issues that were determined in the prior proceeding even though the defendants were not named parties in the PSC proceeding. The plaintiff admits that he filed a complaint with the PSC and received the adverse determinations described above. The defendants allege that the plaintiff raises the same issues in this proceeding that he litigated before the PSC.

Collateral estoppel, or issue preclusion, gives conclusive effect to an

administrative agency's quasi-judicial determination when several basic conditions are met: 1) that the issues in both proceedings are identical; 2) that the issue in the prior proceeding was actually litigated and decided; 3) that there was a full and fair opportunity to litigate in the prior proceeding; and 4) that the issue previously litigated was necessary to support a valid and final judgment on the merits (Ryan v. New York Tel. Co., 62 NY2d 494 [1984]). The proponent of collateral estoppel has the burden of demonstrating that the issue in question is identical and decisive, while the opponent must demonstrate the absence of a full and fair opportunity to litigate the issue in the prior determination (Jeffreys v. Griffin, 1 NY3d 34 [(2003]). "In the end, the fundamental inquiry is whether relitigation should be permitted in a particular case in light of what are often competing policy considerations, including fairness to the parties, conservation of the resources of the court and litigants and the societal interests in consistent and accurate results" (Staatsburg Water Co. v. Staatsburg Fire Dist., 72 NY2d 147 [1988]).

This court has reviewed the prior determinations of the PSC and concludes that the plaintiff had a full and fair opportunity to litigate the issues raised here in the prior proceedings. Indeed, the plaintiff has not alleged that he was denied the opportunity to present his complaints to the PSC. As a result, the defendants are entitled to summary judgment and the dismissal of the complaint on the grounds of collateral estoppel (Ackman v. Haberer, 111 AD3d 1378 [4th Dept. 2013]).

Finally, the court also agrees with defendants that they cannot be held liable for the

actions of the corporation or of the employees of Central Hudson. While an employer (here, the non-party corporation) may be held vicariously liable for the intentional or negligent acts of its employees if the employees are acting within the scope of their employment (see e.g. Judith M. v. Sisters of Charity Hosp., 93 NY2d 932 [1999]), a director or officer of a corporation like the defendants are not personally liable for the torts or wrongful acts of the corporation or their co-employees unless they personally participated in the wrongful act or conduct (Aguirre v. Paul, 54 AD3d 302 [2nd Dept. 2008]). For example, when an officer or director acts on behalf of his corporation, he may not be liable for inducing the corporation to violate its contractual obligations unless his activity involves separate tortious conduct or results in personal profit (Stern v. H. DiMarzo, Inc., 77 AD3d 730 [2nd Dept. 2010].

The plaintiff's' theory of personal liability against the defendants arises from their failure to respond to a letter he wrote to them at Central Hudson in March 2013. The defendants claim that they never were aware of or saw the plaintiff's communications, and point out that any complaints to Central Hudson were addressed by service supervisors or legal counsel. They also point out that they played no role in plaintiff's meter dispute.

In this court's opinion, the defendants have adequately demonstrated that they had no knowledge of plaintiff's claims, and that, in any case, neither took action nor failed to take any action which would result in their personal liability (Lloyd v. Moore, 115 AD3d 1309 [4th Dept. 2014]).

In view of the foregoing, the court need not address defendants' additional grounds for seeking summary judgment.

ORDERED that the motion for summary judgment is granted, with costs.

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 CLR 2220. Counsel is not relieved from the applicable provisions of that rule regarding notice of entry.

SO ORDERED.

Dated: Kingston, New York
February 14, 2018

ENTER,

CHRISTOPHER E. CAHILL, JSC

PAPERS CONSIDERED:

1. Notice of Motion dated February 6, 2017;
2. Affirmation of Eugene J. Rizzo, Esq. dated February 6, 2017 with exhibits A-L;
3. Affidavit of James P. Laurito dated January 31, 2017;
4. Affidavit of Steven V. Lant dated February 2, 2017;
5. Affidavit of Daniel Harkenrider dated February 2, 2017;
6. Memorandum of Law dated February 6, 2017;
7. Affirmation of Stephen P. Romine dated May 30, 2017 with exhibits A-AJ;
8. Affirmation of Eugene J. Rizzo, Esq. dated June 21, 2017 with exhibits A-C.