

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

STEPHEN PHILLIP ROMINE

Index No.: 16-1351

Plaintiff,

-against-

JAMES P. LAURITO and STEVEN V. LANT,

Defendants.

**AFFIRMATION IN
OPPOSITION TO
PLAINTIFF'S MOTION
And AMENDED MOTION
TO VACATE**

CHRISTINA M. BOOKLESS, an attorney duly admitted to practice in the Courts of the State of New York respectfully affirms under penalty of perjury, states as follow:

1. I am a member of Rizzo & Kelley, PLLC, attorneys for defendants, James P. Laurito and Steven V. Lant (hereinafter referred to as "Laurito" and "Lant") in the above captioned action.
2. I make this affirmation in opposition to the plaintiff's motion and amended motion to vacate the February 14, 2018 Decision & Order and for such other and further relief as to this court seems just and proper. A copy of the Decision & Order is annexed as **Exhibit "A"**.
3. Plaintiff seeks to vacate the February 14, 2018 Decision & Order pursuant to CPLR §5015(a)(2)(3), CPLR §2221(a) and CPLR §3016(b).
4. CPLR §3016(b) does not provide a basis to vacate a prior decision but merely stands for the proposition that allegations of fraud must be stated with specificity.
5. Plaintiff's allegations of "fraud" and "misrepresentation" as defined in CPLR §5015(a)(2)(3) are the same allegations that have been made throughout the pendency

of this litigation and were insufficient to defeat the summary judgment motion and do not support this motion to vacate.

6. Plaintiff also moves pursuant to CPLR §2221(a) to vacate the February 14, 2018 Decision & Order. There are currently motions to renew and reargue before this court which are fully submitted and waiting for a decision to be rendered.

7. Plaintiff is still making all the same arguments that were made previously, he merely calls every allegation or defense a fraud and incorrectly argues that the February 14, 2018 Decision & Order should be vacated. In fact, the decision should be affirmed in its entirety.

8. None of the cases cited by plaintiff in support of this motion stand for the proportions he argues and should be disregarded in their entirety.

9. Additionally, the Public Service Commission issued a decision that addressed many of the issues raised by plaintiff in this litigation. A copy of the Decision on case 14-M-0196 is annexed hereto as **Exhibit "B"**.

10. This decision dealt with Central Hudson's tariff and automated meter reading devices and involved Stop Smart Meters NY (SSMNY) and Stop Smart Meters Woodstock NY (SSMWNY) groups that plaintiff, Romine, is involved with. In fact, he submitted comments in connection with the hearing. (Exhibit "B")

11. The PSC determined that available research shows that neither solid-state meters nor the AMR meters they replace pose a credible threat to the health and safety of Central Hudson customers. The Commission further found that electromechanical meter technology (analog meters) are obsolete and currently not in production by any major meter manufacturer and that offering customers an electromechanical meter (analog) as an alternative to an AMR meter is not an effective long term solution. The

Commission therefore declined to order Central Hudson to offer customers an electromechanical (analog) meter option. (Exhibit "B", p. 3)

12. The Commission determined that the AMR meters deployed by Central Hudson are not "Smart Meters" and do not use the technology being complained about. (Exhibit "B", p. 21, paragraph 2)

13. It was further noted that while refurbished electromechanical (analog) meters are commercially available, the fact that no new electromechanical (analog) meters are being produced necessarily means that refurbished devices will be in even diminishing supply and no New York State utility company has chosen to use them. (Exhibit "B", pp. 21-22)

14. Finally, the Commission determined that given the uncertainties surrounding the use of refurbished meters, Central Hudson and other New York State utilities have, to date, been unwilling to sponsor them and the Commission will not require Central Hudson to do so now. (Exhibit "B", p. 22)

15. As this Court recognized in the February 14, 2018 Decision & Order, disputes involving billing or service with a utility company is subject to the primary jurisdiction of the PSC. *Guglielmo v. Long Is. Lighting Co.*, 83 A.D.2d 481 [2nd Dept., 1981]. Deference should be given to the PSC as the administrative agency having the authority and established procedures for investigating and adjudicating disputes involving disconnecting electrical service. (See Public Service Law §66).

16. The PSC has determined that Central Hudson's use of the GE I-210 meters is appropriate, so to allege that Central Hudson's actions constitute fraud is unsupported by any evidence and as the foregoing and following show, plaintiff's motion to vacate the February 14, 2018 Decision should be denied in its entirety.

PROCEDURAL HISTORY

17. This lawsuit revolves around the installation of a digital ERT utility meter by the non-party Central Hudson Gas & Electric Corporation (hereinafter referred to as "Central Hudson") on August 13, 2008 at plaintiff's residence located at 86 Fitzsimmons Lane, Woodstock, New York, where he was a tenant. (See affidavit of Daniel Harkenrider, **Exhibit "C"**, paragraph 7.)

18. Daniel Harkenrider is a Service Supervisor with Central Hudson who is familiar with this litigation. An application was made on plaintiff's behalf to have the service at 86 Fitzsimmons Lane, Woodstock, NY upgraded from a 60 amp to 100 amp service. (Exhibit "C", paragraph 7)

19. A contractor, James Ferraro, was involved with the upgrade. Plaintiff attempts to provide an affidavit attesting to facts on Mr. Ferraro's behalf. This affidavit should be disregarded in its entirety. (See Moving Papers, Exhibit "JJ").

20. Central Hudson installed a General Electric GE I-210 digital ERT equipped utility meter in place of the existing analog meter. (Harkenrider affidavit, Exhibit "C", paragraph 8)

21. Plaintiff first objected to the meter almost five years later in March, 2013. The meter was approved for use, in 2005, by the Public Service Commission (hereinafter "PSC"). (Exhibit "C", paragraph 8)

22. On May 16, 2013 plaintiff, himself, removed the digital meter and personally installed a remanufactured analog meter from Hilea Meter Company in Florida. (Exhibit "C", paragraphs 8-9 and Exhibit "F")

23. Plaintiff mailed the digital meter to Central Hudson and refused any meter other than an analog meter despite attempts to resolve the issue. As a result Central Hudson terminated his electric service on May 20, 2013. (Exhibit "C", paragraphs 8-9)

24. Plaintiff's allegations of fraud are based on the same facts which have been raised from the beginning and repeated in the motions to renew and reargue. The court is asked to incorporate all arguments raised in the underlying motion for summary judgment and reply, as well as the motions to renew and reargue as if fully repeated as part of this opposition.

25. The first category of allegations of fraud raised by plaintiff relates to the meter itself. Plaintiff alleges that it is fraud to state that analog meters are no longer manufactured, to claim that ERT meters are safe, to argue that GE I-210 is not a smart meter, he argues that the meter was improperly approved by the PSC and that the public was not aware of the comment period and therefore unintentionally consented to the use of the meter; he argues that the plaintiff had the right to remove the meter installed by Central Hudson and install his own remanufactured meter and fraud to state otherwise; that the analog meter did not need to be upgraded when his service was upgraded; and that it was a fraud to argue that installing an analog meter requires PSC approval.

26. By Petition dated October 4, 2004, General Electric and Niagra Mohawk Power Corporation requested that the Public Service Commission approve a line of electric watt-hour meters known as GE I-210 single phase meters. See Petition annexed as **Exhibit "D"**.

27. During the approval process, testing was performed by the PSC and extensive studies reviewed regarding the safety of the meter. The meter was approved for use in 2005. (See Exhibit "D")

28. Plaintiff wrote multiple letters in 2013, and after, including a letter dated June 25, 2013 to the PSC complaining about the meter installed by Central Hudson in 2008 and requesting approval to install his own refurbished analog meter. (See letter of June 25, 2013, **Exhibit "E"**) The PSC responded to Mr. Romine's many phone calls and letters in a letter dated July 16, 2013 and signed by Karen Andersen, Office of Consumer Services (**Exhibit "F"**), as well as later referenced correspondence.

29. In addition to confirming the factual testimony detailed earlier, the letter states that Central Hudson exchanged electric meters in Woodstock in compliance with commission regulations. (Exhibit "F", paragraph 2)

30. The PSC advised that a meter equipped with an ERT does not render the meter a so-called "smart meter" as alleged by plaintiff. (Exhibit "F", paragraph 3)

31. The PSC also determined that plaintiff was not authorized to exchange the existing ERT meter with a refurbished analog meter, which was not approved by the commission. (Exhibit "F", page 3)

32. A March 3, 2014 letter from Maria Munoz, with the PSC Hearing Unit, denied plaintiff's request for an informal hearing and outlined the procedures for appeal if he disagreed with the decision. The letter also provided the timeframes to appeal (fifteen days) which plaintiff chose not to avail himself of. (**See Exhibit "G"**)

33. David McGowan, the Director of Meter Services with Central Hudson provided an affidavit in connection with this litigation. A copy is attached hereto as **Exhibit "H"**.

34. Mr. McGowan's job responsibilities include, but are not limited to selecting meters for purchase from the approved meter list, to obtain approval for new meter types and oversee the testing of gas and electric meters. (Exhibit "H")

35. Mr. McGowan confirmed that the PSC has not approved refurbished analog meters for use in New York, either now or at the time of this meter installation. (Exhibit "H") Nor are analog meters that have been removed from other properties stored and reused by Central Hudson. (Exhibit "H")

36. Plaintiff also confuses the distinction between new and old unused analog meters. Plaintiff claims to have purchased 13 new analog meters when in fact they were unused analog meters from 2002 that are no longer manufactured and obsolete. A copy of the Shipping Label is annexed as **Exhibit "I"**.

37. As detailed at length by Daniel Harkenrider and David McGowan in their affidavits, analog meters were no longer being manufactured in 2013 when plaintiff installed his own refurbished analog meter. See Exhibit "C" and Exhibit "H".

38. Mr. Romine is essentially arguing that Central Hudson should locate any type of meter a customer requests and submit it to the PSC on an individual basis for approval permitting the customer to choose their metering equipment. Such is not the case and is an unrealistic request. Approvals are only sought for meter types that are currently being manufactured and available for use throughout the service territory. (Exhibit "H", paragraph 8)

39. Plaintiff was advised, by the PSC, that in order to have service at his residence, he was required to have an ERT meter and without the same his service would not be restored. See Exhibits "F" and "G" Both Mr. Harkenrider and Mr. McGowan advised analog meters were no longer available to Central Hudson and that plaintiff could not install his own refurbished analog meter. Exhibits "C" and "H".

40. Despite being advised by multiple entities on numerous occasions to the contrary, plaintiff still believes it is his right to choose the metering equipment for his

service. The PSC has made it clear that utilities in New York State do not use refurbished analog meters. Exhibits "B", "F" and "G". Plaintiff's argument that refurbished meters are permitted in other states is not relevant to this motion. Without a change in the regulations, it cannot be done in New York.

41. Next, plaintiff makes complaints of fraud based upon his purported Notice of Demand for Removal of Digital Meters dated March 21, 2013. A copy is annexed as **Exhibit "J"**.

42. Plaintiff suggests that there is a contract between the parties as a result of his mailing the March 21, 2013 letter and demanding a sworn response. (Exhibit "J")

43. Plaintiff argues that he did not receive a proper response to his letter and failing to respond properly constituted acquiescence to the meter being removed. Nothing can be further from the truth. While there is no such thing as a demand for removal of digital meters, Daniel Harkenrider, a Service Supervisor with Central Hudson and Paul A. Colbert, Associate General Counsel provided responses. See **Exhibit "K"**.

44. Each advised he could not choose his own meter and needed to have an approved ERT meter. (Exhibits "C" and "K")

45. Plaintiff's attempt to argue that acceptance by silence created a contract between the parties must be disregarded as it has long been recognized that no such theory exists. *Gray v. Kaufman Dairy & Ice Cream*, 162 N.Y. 388 [1900]

46. Mr. Romine concedes that he received a response to his writing. The mere fact that plaintiff was dissatisfied with the responses does not mean a response was not provided as suggested by plaintiff. See **Exhibit "L"**.

47. In 2005, the Public Service Commission approved the meter used by Central Hudson. It has been held that decisions, opinions and determinations of the PSC

concerning the operations of New York State utilities will not be set aside unless they are unsupported by substantial evidence or are arbitrary and capricious or an abuse of discretion. *Consumer Protection Bd v. The Public Service Com.*, 97 A.D.2d 320, 323, 471 N.Y.S.2d 332 [3rd Dept., 1983]. Approval of this meter can hardly be found arbitrary and capricious or an abuse of discretion.

48. A Petition was filed, studies were provided, a comment period was allowed and the meter was approved in compliance with the State Administrative Procedures Act. (Exhibit "D")

49. The plaintiff was advised on numerous occasions that PSC determinations could be appealed and/or an Article 78 proceeding filed if he disagreed with the results and he failed to do either. (Exhibit "G")

50. Mr. Romine's allegation that an appeal would have been futile does not change the fact he did not appeal and did not exhaust his administrative remedies warranting dismissal of his claims.

51. An Article 78 judicial review could have been requested as well. If plaintiff felt that this meter was improperly approved, his remedy was to initiate an Article 78 proceeding challenging the approval. His time to do so has passed and this lawsuit and resultant motions are not proper and barred by judicial estoppel. *Allied Chemical v. Niagra Mohawk Power Corp.*, 72 N.Y.2d 271, 277, 532 N.Y.S.2d 230 [1988]; *Matter of Curto v. State of New York Dept. of Pub. Serv.*, 140 A.D.3d 1339, 33 N.Y.S.3d 539 [3rd Dept., 2016].

52. Plaintiff's final category of fraud allegations revolves around the employment status of James P. Laurito and Steven V. Lant and the stay of the responses to the interrogatory demands served by plaintiff while the motion for summary judgment

was pending. This court held that discovery was stayed pending a decision on the motion. See **Exhibit "M"**.

53. The defendants, Laurito and Lant were sued in their individual capacities. Plaintiff's theories of liability asserted against both defendants are predicated upon their past employment and positions as executive officers of Central Hudson.

54. The defendants moved for and were granted summary judgment on multiple procedural grounds and no amount of discovery changes that result.

55. Plaintiff's claim that he could not properly oppose the motion or prosecute this case without responses to his interrogatories is wholly without merit.

56. Plaintiff does not specifically set forth how further discovery would reveal the existence of essential and/or material facts currently within the exclusive knowledge of the proponent making summary judgment appropriate. *In re Estate of Venner*, 235 A.D.2d 805, 653 N.Y.S.2d 150 [3rd Dept., 1997].

57. The doctrines of primary jurisdiction, collateral estoppel and failure to exhaust his administrative remedies do not rely on the facts he seeks in order to reach a determination and are legal theories that do not need these "missing facts" to reach a proper conclusion as suggested by plaintiff.

58. Further, plaintiff argues that the employment status of the defendants, Laurito and Lant, was the sole basis for finding no liability against them and that they were employed by Central Hudson and should have responded to his demands. As can be seen from their affidavits, neither were employees of Central Hudson at the time the lawsuit was filed. See **Exhibits "N" and "O"**.

59. The defendants' employment was only one of the factors the court considered when reaching its decision to dismiss the claims against the defendants. It is

clear from the underlying affidavits and the court's decision that neither defendant had any contact or interaction with Mr. Romine and this situation was handled by other employees. (Exhibits "N" and "O")

60. Merely being co-employees of the ones who interacted with Mr. Romine does not impose liability on an individual defendant for the alleged negligence or wrongful acts or omissions of their co-employees. *Ruszkowski v. Sears Roebuck & Co.*, 188 A.D.2d 967, 968 [3rd Dept., 1992].

61. The general rule of law is that officers and directors of a corporation are not personally liable for the torts or wrongful acts of the corporation unless they personally participated in the tort or wrongful act. *Howell Mfg. Corp. v. Leiblein*, 32 Misc.2d 50, 51 [2nd Dept., Nassau Cty, 1962].

62. Therefore all claims against defendants, Laurito and Lant, were properly dismissed.

63. Plaintiff has failed to provide any basis to vacate the February 14, 2018 Decision & Order.

WHEREFORE, the February 14, 2018 Decision & Order should not be vacated as suggested by plaintiff and his motion should be denied in its entirety and for such other and further relief as to this court deems just and proper.

Dated: Poughkeepsie, New York
February 21, 2019


CHRISTINA M. BOOKLESS