COURT OF APPEALS
STATE OF NEW YORK

(Names of parties as set forth in the Appellate Division caption)

STEPHEN PHILLIP ROMINE

Appellant .*

v.

JAMES P. LAURITO AND STEVEN V. LANT

Respondents .*

ULSTER
(*Indicate name of county*)
County Clerk Index No.: 16-1351

NOTICE OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS [AND FOR *(Specify additional relief, if any)* _____]**

PLEASE TAKE NOTICE that, upon the annexed statement pursuant to Rules 500.21 and 500.22 of the Court of Appeals Rules of Practice, signed on 1st day of December 2020, Stephen Romine (*Your Name*) will move this Court, at the Court of Appeals Hall, Albany, New York on December 21, (*Return Date*)*** 2020 for an order granting leave to appeal to this Court from the order or judgment of the Appellate Division Third Department (*Name of Court*), dated August 6, 2020 [, and for _____ (*Specify additional relief, if any*)**].

*If you are moving for leave to appeal, you are the appellant in this Court; the opposing party is the respondent.

** Add information within the brackets only if you are seeking relief in addition to leave to appeal.

***Return Date (see Rule 500.21[a], [b]) - Court of Appeals motion returns days are only on Mondays, unless Monday is a legal holiday, in which case the return date shall be on the next available business day. If the motion is served in person, you must give 8 days' notice. If the motion is served by regular mail, you must give 13 days' notice. Set the return date of your motion for the first Monday on or after the notice period. If that Monday is a legal holiday, set the return date of your motion for the next available business day.

Answering papers, if any, must be served and filed in the Court of Appeals with proof of service on or before the return date of the motion.

There is no oral argument of motions, and no personal appearances are permitted.

Signature: Stephen Phillip Romine

Print Name: Stephen Phillip Romine

Address: P.O. BOX 657
Woodstock, New York 12498

Phone: (845) 532-5120

To: Clerk of the Court of Appeals
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207

Insert the names and addresses of all other parties:

CHRISTINA M. BOCKLESS Esq.
RIZZO and KELLEY LAW FIRM
272 Mill Street
Poughkeepsie New York
12601

STATEMENT IN SUPPORT OF MOTION

Service of judgment or order sought to be appealed (Check which items apply, and fill in the blanks, if applicable.)

☑ On August 14 2020, my adversary served me with the order or judgment I am seeking leave to appeal from dated August 6, 2020, with notice of entry.

My adversary served me by (check one):

❑ personal service
☑ overnight delivery
❑ regular mail

- OR -

❑ My adversary did not serve me with the order or judgment that I am seeking leave to appeal from with notice of entry.

- OR -

❑ On _____, 20___, I served my adversary with the order or judgment that I am seeking leave to appeal from with notice of entry. I served my adversary by (check one):

❑ personal service;
❑ overnight delivery;
❑ regular mail.

Select Item 1 or Item 2 below:

❑ (1) I did not move for leave to appeal to this Court at the Appellate Division, but came directly here. (If you check this box, go directly to QUESTIONS PRESENTED.)

- OR -

☑ (2)(a) I made a motion for permission to appeal to the Court of Appeals in the Appellate Division upon my adversary by (check one):

❑ personal service;
❑ overnight delivery;
☑ regular mail;

on September 3 20 20. (If you filled in subsection 2a, go to subsection 2b.)

☑ (2)(b) The Appellate Division denied my motion for permission to appeal to the Court of Appeals on October 29, 20 20. My adversary (check one):
❑ never served me with the order;
☑ served the Appellate Division order with notice of entry upon me on November 9, 2020
20___ by (check one):

❑ personal service;
❑ overnight delivery;
☑ regular mail

QUESTIONS PRESENTED *(The legal issues you addressed in the courts below that you desire this Court to review. Please identify where in the record or appendix these issues were raised in the courts below. You may use additional paper if necessary.)*

* please REVIEW ATTACHED documents

WHY THE COURT OF APPEALS SHOULD GRANT THE MOTION *(For example, novel issue of law, issue of statewide importance, conflict in the law on the issue. You may use additional paper if necessary.)*

* please REVIEW ATTACHED documents

*

Notice: I HAVE ALSO FILED FOR AN APPEAL VIA: Notice of Appeal dealing with constitutional questions

DATED: December 1, 2020

Signature: Stephen Phillip Romine

Print Name: Stephen Phillip Romine

Address: P.O. BOX 657
WOODSTOCK, NY 12498

Phone: (845) 532-5120

QUESTIONS ON MATTERS OF LAW

I- Whether the Third Department agreeing with Supreme Court of Ulster County ("the lower court"), that granting respondents' motion for summary judgment was not premature, conflicts with the Third Department's own case law (Timothy K. Fultz v. Benvenuti 1989) that held a party having "*less than a year*"..... "*were not afforded a reasonable opportunity complete discovery*?"
(Issue location: appeal brief-pages 13, 19-26; appellant's reply-pages 15-16)

II- Whether consideration for a pro se litigant should be given when determining what a "*reasonable opportunity to complete discovery*" is?
(Issue location: appeal brief-pages 20-21; appellant's reply-pages 16-17)

III- Whether CPLR 3212(f) was intended to be imposed on a litigant who had no previous discovery or on a litigant who was seeking "further discovery" as Third Department case law implies in JP Morgan Chase Bank, N.A. v Hill (2015); Ivory Dev., LLC v Roe (2016) and in respondents' reply brief citation "In re Estate of Venner" (3rd Dept.1997)?
(Location of issue: appellant's brief-pages 20, 21; appellant's reply-page 16; respondents' reply brief-page 7)

IV- Whether the Third Department, affirming the application of the doctrine of primary jurisdiction to appellant's case, was improper and a misapplication of law?
(Issue location: appeal brief-pages 13, 43-45; appellant's reply-pages 23-26)

V- Whether the Third Department, affirming the application of the doctrine of failure to exhaust administrative remedies to appellant's case, was improper and a misapplication of law?
(Issue location: appeal brief pages 14, 45-50; appellant's reply-pages 27-28)

VI- Whether the Third Department, affirming the application of the doctrine of the collattera1 estoppel to appellant's case, was improper and a misapplication of law?
(Issue location: appeal brief-pages 14, 50-55; appellant's reply-pages 29-31)

VII- Whether respondents are legally bound to a tacit agreement/contract they were given direct notification of multiple times and raised no objections to, when respondents simultaneously allege that New York State ("NYS") utility customers are legally bound, under the "*force of law,*" to a tacit agreement/contract called the "Tariff," most have never seen and were only given indirect notice of and raised no objections to?
(Issue location: the record on appeal R56-#5; appeal brief-pages 14, 56-66; appellant's reply-pages 32-36)

VIII- Whether the lower court and the Third Department were touched by fraud, and whether the appellant was a victim of fraud on the court?
(Issue location: appeal brief-pages 14, 15, 39- 43, 69-72; appellant's reply-pages 22, 38-39)

IX- Whether the motion for summary judgment was premature because of the subject matter's far-flung importance and statewide impact requiring a thorough discovery process?
(Issue location: appeal brief-pages 15, 67-69; appellant's reply-page 37)

X- Whether the Third Department, affirming the lower court order, improperly included appellant's claims of breach of contract, fraud, continuing a private nuisance, constitutional violations, international human right violations and Nuremberg Code violation as under the jurisdiction of the NYS Public Service Commission ("PSC")?
(Issue location: August 6, 2020 Order-page 4 bottom of top Par., appeal brief-pages 33-36, 43-55; appellant's reply-pages 23-26)

XI- Whether the PSC loses jurisdiction in a matter brought before it, by declaring officially it does not have the power to grant the relief requested?
(Issue location: appeal brief-pages 43-55; appellant's reply-pages 23-26)

XII- Whether the PSC having no qualifications in the field of health and medicine and having not personally reviewed or submitted any peer-reviewed medical studies on the biological safety of smart meters, can be considered an authority on biological impacts of microwave radiation on human health, and its decisions being given deference in a lawsuit involving biology and health?
(Location of issue: appellant's brief-page 40, 70; appellant's reply-page 38)

XII- Whether the Third Department in tandem with the lower court viewed the appellant's evidence in a light most favorable to him and gave him the benefit of every favorable inference as the non-moving party in a summary judgment motion, as the Third Department's own case law mandates (McKenna v. Reale [137 AD3d] 2016); or whether disregarding appellant's 41 undisputed exhibits created an appearance of bias instead?
(Issue location: appellant's brief-pages 28-38; appellant's reply-pages 19-21)

XIII- Whether the Third Department, affirming the lower court order, misapplied law by not addressing the failure of respondents to controvert or even respond to sworn statements in appellant's brief on the "*appearance of bias*" and "liability", and whether said failure made appellant's sworn statements fact on the record and *prima facie* evidence admissible in court proceedings, mandating a reversal of the lower court order?
(Issue location: appellant's appeal brief-pages 28-38, 61-63;respondnets' reply-pages 10-11, 17; appellant's reply-pages 19-22, 32)

XIV- Whether the Third Department, affirming the lower court order, misapplied law by disregarding U.S. Supreme Court case law, cited throughout appellant's appeal brief and reply-brief, when constructing its August 6th, 2020 decision?
(Issue location: August 6, 2020 Order-pages 1-5; appellant's appeal brief-pages 21, 28, 40, 43, 51, 68; appellant's reply brief-pages 16, 17, 19, 22, 30, 37, 39, 40)

XV- Whether the Third Department, affirming the lower court order, misapplied law and created the appearance of bias and impropriety by

allowing respondents' to change the wording and grievance in appellant's submitted appeal questions, against his objections, for wording and grievance respondents' decided they would prefer to respond to?
(Issue location: appellant's brief-pages 13-15; respondent's reply brief pages I, II; appellant's reply brief pages 5, 19-20)

XVI- Whether the Third Department August 6, 2020 Order not addressing all the questions in appellant's appeal brief or any of his rebuttals in his reply brief, created an appearance of bias and impropriety by affirming the lower courts February 14, 2018 decision/order?
(Issue location: August 6, 2020 decision/order-pages 1-5, appellant's appeal brief-pages 13-15; appellant's reply-pages 4-40)

XVII- Whether not obtaining the physical informed consent of utility customers before deploying smart utility meters, that emit toxic pulses and spikes of microwave radiation into the customers living environment every few seconds twenty four (24) hours a day, violates the Nuremberg Code that protects human beings from being part of an experiment without their consent.
(Location of issue: appellant's brief-page 16 appellant's reply-page 10, the record (R575-576).

XVIII- Whether the appellant's written communications addressed and sent to respondents, when they were employed by Central Hudson Gas and Electric Corporation, were "lawful notices" or merely a "letter"?
(Location of issue: appellant's brief-pages 58-61)

XIX- Whether the doctrine of imputed notice applies to the respondents when they were employed by Central Hudson Gas and Electric Corporation, and the appellant sent them lawful notices that stated "*notice to agent is notice to principal and notice to principal is notice to agent*" their agents signed return receipts for?
(Location of issue: appellant's brief-pages 56-61)

XX- Whether the aforementioned questions in sum or in part warrant reversing the Third Department August 6th, 2020 order?

WHY THE COURT OF APPEALS SHOULD GRANT THE MOTION

I- The overarching issue of involuntary implementation of new technologies being forced on private homes and businesses and communities in New York State ("NYS") is definitely novel. This is the first case in NYS dealing with it and in this instance regarding first generation smart utility meters also called AMR-automatic meter reading. The rollout of this new technology of smart utility meters paved the way for this issue to develop, as utilities were eager to deploy this purported cost saving technology for them, meanwhile emitting harmful microwave radiation pulses to the occupants of residences and business considering the chronic exposure over a long period of time. The occupant's rights need to be protected and this case was an attempt to do just that. The aggrieved appellant and his significant other being denied a time tested safe electromechanical analog utility meter that could have been easily made available to them, were instead forced to live without electrical service from the utility for six (6) years, to protect themselves from the biologically harmful effects of chronic/cumulative exposures of smart meter radiation. There can be no doubt this case is novel in NYS.

II- This case has statewide impact because although this case regards the appellant, its conclusions will affect every NYS resident and business owner who uses the electrical power of the utilities grid. Utility customers, for the most part, are unaware that time tested biologically safe electromechanical analog meters that have been used for the past 80 years, are being switched out for controversial first and second generation smart meters, without being physically informed or giving their informed consent. The issues in this case revolve around utility customers in NYS being properly informed and being given the realistic opportunity to have a say if something potentially toxic will be placed on their homes and businesses and to have an option of a time tested biologically safe electromechanical analog utility meter that is being offered by utilities in 12 other states. There can be no doubt this case has a societal interest beyond the appellant and his significant other.

III- This case has far flung importance because currently in NYS the matter of biological health risks from smart meter technologies is being decided by the PSC, an agency whose specialty does not include the health profession, as they have no health professionals on their staff. The respondents' sole source of information as to the biological safety of microwave emitting utility meters in this case is the PSC, who are not medically qualified to make such decisions. The appellant on the other hand has provided undisputed scientific peer-reviewed medical studies, testimonies of medical professionals and statements from the Environmental Protection Agency and the US Department of Interior that dispute the PSC claims of biological safety from chronic exposure to microwave emissions that get generated by smart meters. None of the appellant's exhibits, and they have been many on the biological harm of being chronically exposed to microwave radiation, have been disputed by the respondents. It is for this reason that a complete and thorough process of discovery involving deposing the respondents, medical professionals, expert witnesses and an examination of purported "scientific medical studies" should have been allowed to proceed. To sweep this issue under the rug with a summary judgment is an injustice to all New York residents.

IV- This case provides an opportunity for the examination of whether the law regarding indirect notice and direct notice as proper notice are conflicting and how the latter is the proper notice, considering what the potential biological health ramifications are for most of the public who never saw the indirect notice of the plan to retrofit controversial technologies on their homes and communities. The issue of notice is of paramount importance when abiding by the rules of the Nuremberg Code to not experiment on the public without their knowledge or physical informed consent, which the appellant alleges is being done with the deployment of smart utility meters.

V- This case also provides for an examination of the laws regarding the use of the legal principle of securing a tacit agreement through acquiescence by silence that has been used by the utilities, specifically Central Hudson under the supervision of the respondents, and the NYS Public Service Commission to ratify the Tariff, an alleged contract between the utility and the public, and the purported agreement of the public to the deployment of smart meters on their homes without them

actually having given their physical informed consent. Also under review will be whether the same principle of a tacit agreement can be used by the appellant or any NYS resident, to make liable executive officers, such as the respondents, who attempt to make themselves not liable with convenient provisions in the Tariff the public has never seen, and with regard to appellant defending his family and himself through lawful means. The resolution of these matters by the NYS Court of Appeals will identify whether the use of the laws around these issues are conflicting, one sided or whether the law is in fact a two way street.

VI- Of importance to all litigants in New York State is the law on how long does one have to complete discovery before the granting of a summary judgment motion will be permitted. Currently the Appellate Division, Third Dept. case law has been recently conflicted with the addition of its Romine v. Laurito et al., August 6, 2020 order with its Timothy K. Fultz v. Benvenuti, order of 1989. The outcome of this appeal to the New York Court of Appeals will help clarify what the time limit is for a reasonable opportunity to complete discovery and whether there is consideration for a pro se litigant. Additionally a review of whether CPLR 3212(f) was intended to be imposed on a litigant who had no discovery or on a litigant who is seeking "further discovery" is needed to keep the balance of the principles of fundamental fairness in New York Courts.

VII- Lastly the appellant has been aggrieved for 6 years initiated by the actions and lack of actions of the respondents and is seeking remedy in the courts of New York State to compensate him for being forced to live without electrical service for six (6) years. The plight of the appellant could happen to any New York resident who values their health and seeks to protect their family from the potential biological harm of chronic exposure to smart meter radiation. Besides all the important aforementioned reasons for the Court of Appeals to hear this appeal, the interest of justice and fairness should be of paramount importance and good cause to hear this case and provide remedy for the aggrieved party submitting this appeal.

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: August 6, 2020 528147

STEPHEN P. ROMINE,
Appellant,
v MEMORANDUM AND ORDER

JAMES P. LAURITO et al.,
Respondents.

Calendar Date: June 11, 2020

Before: Egan Jr., J.P., Lynch, Devine, Pritzker and Reynolds Fitzgerald, JJ.

Stephen P. Romine, Woodstock, appellant pro se.

Rizzo & Kelley, PLLC, Poughkeepsie (Christina M. Bookless of counsel), for respondents.

Reynolds Fitzgerald, J.

Appeal from an order of the Supreme Court (Cahill, J.), entered February 20, 2018 in Ulster County, which granted defendants' motion for summary judgment dismissing the second amended complaint.

Plaintiff rents a residence located in the Town of Woodstock, Ulster County. In 2008, the owner upgraded the electric service at the residence. As part of the upgrade, Central Hudson Gas & Electric Corporation, a utility corporation that provides gas and electric services, replaced the analog meter with a Public Service Commission (hereinafter PSC) approved General Electric I-210 digital encoder receiver

transmitter (hereinafter ERT).[1] Defendant James P. Laurito was employed as president and/or chief executive officer of Central Hudson between 2009 and March 2016. Defendant Steven V. Lant was employed by Central Hudson between 1980 and 2014, and served as president and/or chief executive officer between 2004 and 2014. In March 2013, plaintiff wrote to defendants demanding that Central Hudson remove the ERT, alleging that it emitted carcinogenic radiation and caused both his partner and him to become ill. He further demanded that Central Hudson replace the ERT with, in his words, a "safe and lawful analog meter." Central Hudson refused. Plaintiff then personally removed the ERT and replaced it with what he contended was a "remanufactured" and "safe" analog meter[2] and mailed the discarded ERT to defendants, along with a DVD documenting his removal and replacement of the ERT.

Central Hudson thereafter concluded that plaintiff's actions had created a safety issue and disconnected plaintiff's electric service. As a result, plaintiff contacted the PSC[3] with his complaints. The PSC sent a letter to plaintiff, dated July 16, 2013, informing him that it had determined that the ERT employed by Central Hudson met PSC safety and accuracy standards, and that plaintiff's actions in removing and replacing the meter created a safety issue. Further, the PSC informed plaintiff that his electric service would not be restored until he accepted a new ERT meter. In response, plaintiff requested an informal hearing regarding his complaint (see 16 NYCRR 12.5 [a] [1]). By way of a letter dated March 3, 2014, the PSC denied plaintiff's request, informed plaintiff of his ability to appeal the denial, and articulated the appeal procedure and time limits for doing so. Plaintiff did not appeal the PSC's determination. Instead, in May 2016, plaintiff

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[1] Central Hudson's operations are governed and regulated by the PSC pursuant to Public Service Law § 66.

[2] This meter was not approved by Central Hudson or the PSC.

[3] Pursuant to 16 NYCRR 12.1 (b), plaintiff did this via telephone calls, correspondence and emails.

commenced this action[4] alleging, among other things, constitutional and international law violations, breach of contract, negligence, trespass and fraud. Defendants duly answered and, in February 2017, moved for summary judgment dismissing the second amended complaint.

Approximately two months later, in April 2017, plaintiff served his first demands for discovery. Defendants moved to stay discovery pending Supreme Court's decision on their motion; the court granted that motion. Thereafter, plaintiff opposed defendants' summary judgment motion, contending that it was premature because he was not afforded an opportunity to conduct discovery (see CPLR 3212 [f]). After determining that defendants' motion was not premature, Supreme Court granted the motion, finding that plaintiff's proper remedy was a CPLR article 78 proceeding to challenge the PSC's determination and, in any event, plaintiff failed to exhaust his administrative remedies. Finally, the court held that because plaintiff had a full and fair opportunity to litigate his claim before the PSC, collateral estoppel precluded him from maintaining this action. Plaintiff appeals.

Initially, we agree with Supreme Court that the motion for summary judgment was not premature. Plaintiff waited 11 months to serve discovery demands and served the demands after the motion was scheduled to be heard. Moreover, the majority of plaintiff's demands are more appropriately addressed to a nonparty – defendants' previous employer – rather than defendants. Plaintiff failed to demonstrate that the information sought through discovery was in the exclusive possession of defendants (see CPLR 3212 [f]; Park Place at Malta, LLC v Berkshire Bank, 148 AD3d 1414, 1417 [2017]; Herba v Chichester, 301 AD2d 822, 823 [2003]).

Turning to the merits, we find that Supreme Court was correct in its interpretation of the doctrine of primary jurisdiction. Under the doctrine of primary jurisdiction, a court has the discretion to refrain from exercising jurisdiction

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[4] Plaintiff amended the original complaint twice, expounding on the same claims.

over a matter where an administrative agency also has jurisdiction, and the determination of the issues involved, under a regulatory scheme, depends upon the specialized knowledge and experience of the agency (see Staatsburg Water Co. v Staatsburg Fire Dist., 72 NY2d 147, 156 [1988]; Capital Tel. Co. v Pattersonville Tel. Co., 56 NY2d 11, 22 [1982]; Matter of Hessney v Board of Educ. of Pub. Schools of Tarrytowns, 228 AD2d 954, 955 [1996], lv denied 89 NY2d 801 [1996]). Here, the issues concern the particular meter used by Central Hudson, plaintiff's removal and replacement of same, the safety concerns caused by his actions and the validity of the disconnection of his service. These matters fall under the doctrine and, thus, were appropriate for PSC determination. We also agree with Supreme Court's assessment that the causes of action found in plaintiff's complaint amount to little more than a rebranding of his PSC claim and were properly dismissed (see Township of Thompson v New York State Elec. & Gas Corp., 25 AD3d 850, 852 [2006], lv denied 6 NY3d 713 [2006]).

Lastly, we agree with Supreme Court's determination that review of a PSC ruling is limited to a CPLR article 78 proceeding. "Supreme Court, in determining the motion for [summary judgment,] properly considered whether the . . . primary jurisdiction doctrine[] precluded the causes of action propounded by plaintiff[]" (Lauer v New York Tel. Co., 231 AD2d 126, 129 [1997]), and that, in order to review the original ruling, it was incumbent upon plaintiff to bring an article 78 proceeding (see Matter of City of New York [Grand Lafayette Props. LLC], 6 NY3d 540, 547 [2006]; Matter of Rochester Tel. Corp. v Public Serv. Commn. of State of N.Y., 87 NY2d 17, 28 [1995]; Matter of Public Serv. Commn. of State of N.Y. v Rochester Tel. Corp., 55 NY2d 320, 325 [1982]). "An [a]rticle 78 proceeding must be commenced within four months after the administrative determination . . . becomes final and binding" (Matter of Yarbough v Franco, 95 NY2d 342, 346 [2000] [internal quotation marks and citations omitted]; see Matter of City of New York [Grand Lafayette Props. LLC], 6 NY3d at 547). As the PSC rendered its determinations on July 16, 2013 and March 3, 2014, the latest date that plaintiff could have commenced a proceeding was July 2014. Having commenced this action on May

19, 2016, the matter, even if brought as an article 78 proceeding, is time-barred. Given our decision, plaintiff's remaining contentions are academic.

Egan Jr., J.P., Lynch, Devine and Pritzker, JJ., concur.

ORDERED that the order is affirmed, without costs.

ENTER:

Robert D. Mayberger
Clerk of the Court

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.

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: October 29, 2020 528147

STEPHEN P. ROMINE,
Appellant,

v

JAMES P. LAURITO et al.,
Respondents.

DECISION AND ORDER
ON MOTION

Motion for leave of Court to appeal to NYS Court of Appeals and reargument.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied, without costs.

Egan Jr., J.P., Lynch, Devine, Pritzker and Reynolds Fitzgerald, JJ., concur.

ENTER:

Robert D Mayberger

Robert D. Mayberger
Clerk of the Court

AFFIDAVIT OF SERVICE

STATE OF New York
COUNTY OF ULSTER SS.:

Nicole Nevin, being duly sworn, says: I am not a party to the action, am over 18 years of age and reside at:

P.O. BOX 457 WOODSTOCK NY 12498

On the 2 day of December, I served ___ copies of the annexed Notice of Motion with supporting papers for leave of Appeal to NY Court of Appeals to the following at their last known address(es) set forth below:

CHRISTINA M. Bockless Esq.
RIZZO KELLEY LAW FIRM
272 MILL STREET
Poughkeepsie NY 12601

by the following method (choose one):

☐ personally delivering the papers and giving them to the following individual:

_____.

☑ mailing the papers enclosed in a sealed envelope, with postage prepaid thereon, in a post office or official depository under the exclusive care and custody of the U.S. Postal Service within the State of New York.

☐ placing the papers in the custody of an overnight delivery service prior to the latest time designated by the overnight delivery service for overnight delivery.

(Signature) Nicole Nevin
(Print Name) Nicole Nevin

Sworn to before me this 2
day of December, 2020

Amy Beth Kulesza
Notary Public

AMY BETH KULESZA
Notary Public, State of New York
No. 01KU6368734
Qualified in Ulster County
Commission Expires December 18, 20 21