

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D27032
H/kmg

_____AD3d_____

Argued - January 19, 2010

STEVEN W. FISHER, J.P.
DANIEL D. ANGIOLILLO
ARIEL E. BELEN
PLUMMER E. LOTT, JJ.

2008-10107

DECISION & ORDER

Kochumathen A. Babu, appellant, v Consolidated
Edison Company of New York, Inc., respondent.

(Index No. 19488/06)

Dominick Sorrentino, Valhalla, N.Y., for appellant.

Scott A. Levinson, New York, N.Y. (Thomas J. Deas of counsel), for respondent.

In an action to recover the costs of installing gas line connections and for injunctive relief, the plaintiff appeals from an order of the Supreme Court, Westchester County (Loehr, J.), entered September 25, 2008, which granted the defendant's motion, *inter alia*, in effect, pursuant to CPLR 3211(a)(5) to dismiss the complaint as time-barred.

ORDERED that the order is affirmed, with costs.

In this action, the plaintiff seeks, *inter alia*, to recover from the defendant the expenses he incurred in installing gas lines to several homes he built between 1983 and 1990. The plaintiff first made a claim against the defendant for reimbursement of such costs in 2004, 21 years after he completed the first house and 14 years after he completed the last house. The defendant rejected the claim as untimely. The plaintiff commenced the instant action in September 2006. The plaintiff does not dispute that the instant action is governed by a six-year statute of limitations period (*see* 16 NYCRR 230.2; *see also* CPLR 213[1]).

In support of its motion, the defendant established, *prima facie*, that the action was untimely because the six-year statute of limitations expired before the plaintiff commenced this action

(see *Swift v New York Med. Coll.*, 25 AD3d 686, 687; *Savarese v Shatz*, 273 AD2d 219). The burden then shifted to the plaintiff to establish the applicability of an exception to the statute of limitations, raise an issue of fact as to the applicability of any such exception, or submit evidence sufficient to toll the statute of limitations (see *Philip F. v Roman Catholic Diocese of Las Vegas*, 70 AD3d 765; *Pate v Pate*, 17 AD3d 334; *Savarese v Shatz*, 273 AD2d 219). Even accepting the facts set forth in the complaint as true and according the plaintiff the benefit of every reasonable inference (see CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87-88), the plaintiff failed to meet this burden (see *Philip F. v Roman Catholic Diocese of Las Vegas*, 70 AD3d 765; *Reiner v Jaeger*, 50 AD3d 761). Accordingly, the Supreme Court properly dismissed the complaint as time-barred.

In light of our determination, we need not reach the plaintiff's remaining contentions.

FISHER, J.P., ANGIOLILLO, BELEN and LOTT, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court