

**Consolidated Edison Company of New York v  
Dependable Industrial Supply Company, Inc.**

2006 NY Slip Op 30231(U)

January 9, 2006

Supreme Court, New York County

Docket Number: 0601331/2005

Judge: Richard B. Lowe

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SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY

PRESENT: HON. RICHARD B. LOWE, III

PART 56

Index Number : 601331/2005

CON. ED. CO. OF NY, INC.

vs

DEPENDABLE INDUSTRIAL

Sequence Number : 001

DISMISS

DEX NO. \_\_\_\_\_

OTION DATE 12/7/05

OTION SEQ. NO. \_\_\_\_\_

OTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_


PAPERS NUMBERED


Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 1/9/06

  
HON. RICHARD B. LOWE, III

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X  
CONSOLIDATED EDISON COMPANY  
OF NEW YORK, INC.,

Plaintiff,

Index No. 601331/05

-against-

DEPENDABLE INDUSTRIAL SUPPLY COMPANY, INC.,  
GLENN TESTA, RAYMOND P. NAPPI, STEPHEN  
DINARDO, JANE DOES #1-3 and JOHN DOES #1-3  
-----X

**Honorable Richard B. Lowe, III:**

Defendant Dependable Industrial Supply Company, Inc. (“Dependable”) moves pursuant to CPLR §§ 3211(a)(5) and (8) for an order dismissing the action against it. Defendant Glenn Testa also moves for dismissal of the causes of action against him.

**Background**

Plaintiff Consolidated Edison Company of New York, Inc. (“Con Ed”), a utility company, was a customer and purchaser of supplies from defendant Dependable for several years. One of the materials that Con Edison regularly purchased from Dependable was a specialty grease or lubricant used for its “cable pulling” operations. In or about August 1995, and again in or about August 2001, plaintiff entered into a contract with Dependable for the supply of lubricant to the plaintiff (hereinafter “supply contracts”).

Pursuant to the terms of the supply contracts, Dependable was obligated to fill orders placed by Con Edison by delivering the lubricant directly to the Con Edison facility specified in the orders. Con Edison would then be obligated to pay Dependable for the merchandise, on the condition that it had been properly filled. Con Edison would regularly make payments to

Dependable in lump sums for supplies and materials ordered across multiple contracts it had with Dependable via checks. The payments made by Con Edison to Dependable on the contracts were deposited into a bank account maintained by Dependable, and the payments were used for the benefit of Dependable.

Con Edison alleges defendant Glenn Testa ("Testa"), vice president of Dependable, bribed and conspired with certain Con Edison employees, including defendants Stephen Dinardo and Raymond Nappi, to place fraudulent orders for supplies, which orders defendant Testa and the others knew would not be filled by Dependable. Defendant Testa allegedly paid the defendant employees of Con Edison to falsely confirm receipt of the materials in the fraudulent orders, and to list said materials as having been received in Con Edison's records, thereby defrauding Con Edison into paying on the fraudulent orders.

Con Edison discovered the scheme in or about April 2003, and conducted an investigation of the scheme. On or about October 13, 2004, defendant Stephen Dinardo pled guilty in United States District Court for the Southern District of New York to certain felony crimes committed during his role in the scheme. On November 9, 2004, defendant Testa was indicted for his role in the scheme and later entered a plea agreement whereby he pled guilty of one count each of conspiracy to commit mail fraud, wire fraud and commercial bribery.

On or about June 1, 2005, Testa was sentenced to 12 months incarceration based on his guilty plea. The United States Attorney requested restitution in the amount of \$126,243.00, the amount of orders submitted by defendant Stephen Dinardo. However, Con Edison requested restitution for the full amount of its loss (\$1,293,976.00), which allegedly included the amount that defendant Testa conspired to and fraudulently converted from Con Edison with Raymond

Nappi. The court ultimately ordered Testa to pay restitution in the amount of \$126,243.00, jointly and severally with defendant Stephen Dinardo. The ruling was based on the fact that the United States Attorney and defendant Testa had previously stipulated in Testa's plea agreement to a restitution amount of more than \$120,000.00, but less than \$200,000.00

Con Edison filed a Summons with Notice in this court on or about April 14, 2005 and served same on all defendants. Plaintiff filed its Verified Complaint in this action on or about July 12, 2004. In the complaint, Con Edison asserts causes of action against Testa and Dependable for fraud, aiding and abetting fraud, and aiding and abetting breach of fiduciary duty. Con Edison also asserts additional causes of action against Dependable for rescission of contract, breach of contract, monies had and received and unjust enrichment. Con Edison seeks damages against all defendants for an amount not less than \$1,523,730.00, consisting of the amount of at least \$1,293,976.00 which Con Edison allegedly paid to Dependable on the orders described above. Con Edison also seeks compensatory damages, including investigative costs, consequential and incidental damages, attorneys fees, and punitive damages.

In the instant motion defendant Dependable moves to dismiss, alleging a failure to properly serve and file the summons and complaint in this action and failure to properly sign the summons and complaint. Both Dependable and Testa both move to dismiss alleging that the action is barred by the doctrine of collateral estoppel and the action is barred by the applicable statute of limitations.

### **Discussion**

#### *Failure to Properly Serve*

Subsequent to the filing of this motion, Dependable agreed to withdraw from its motion

all purported grounds of dismissal based upon lack of personal jurisdiction and/or lack of signature on the complaint (Aff. of Anthony Cotroneo, November 14, 2005). Therefore the issue is moot.

### *Collateral Estoppel*

Defendants Testa and Dependable both assert in their respective motions to dismiss that this action is barred by the doctrine of collateral estoppel based on the findings in the criminal action.

For collateral estoppel to apply four elements must be met: a) the issues at both proceedings must be identical; b) they must have been actively litigated and decided in the prior proceeding; c) there must have been a full and fair opportunity for litigation of the issues in the prior proceeding; and d) the issues were necessary to support a valid and final judgment on the merits (*Allen v Hoffinger*, 283 AD2d 346, 726 NYS2d 18 [1st Dept 2001]). Defendants claim that issues raised by Con Edison in the instant action are the same issues that were fully litigated and decided in the criminal case against defendant Testa, and defendants assert that plaintiff had a full opportunity to litigate the very same issues in the criminal proceedings.

The law in this state is well settled that the doctrine of collateral estoppel prevents a party from relitigating an issue that was clearly raised in a prior action or proceeding and decided against that party (*Id.*). Collateral Estoppel has also been applied if the issue in the second action is identical to an issue that was raised, decided and material in the first action, and if the party had a full and fair opportunity to litigate the issue in the first action (*Id.*). However, neither criteria is applicable in this action. First, plaintiff did not have a full and fair opportunity to

litigate the issues of the defendants' liability to Con Edison in the prior criminal proceeding against Testa, since Con Edison was not even a party to that action and had no opportunity to participate in the prosecution of Testa. Further, the issues as to the measure of loss was not fully litigated against Testa, since he reached a plea agreement with the United States Attorney. In addition, defendant Dependable was not even a party to the criminal proceeding. Thus, the claims asserted against Dependable in the instant action, including Dependable's alleged breach of the supply contract, unjust enrichment to Dependable, and Dependable's liability for the acts of its employee Testa, were never addressed in the criminal proceeding. Therefore, the claims in this action against Testa and Dependable are not barred by collateral estoppel.

Defendants assert Con Edison had a full and fair opportunity to litigate the issue of restitution. However, the doctrine of collateral estoppel does not bar Con Edison from seeking damages in an amount greater than those awarded in restitution against defendants on the basis that Con Edison had an opportunity to put in documentation as to its losses in the criminal proceeding.

Courts of this state have held that an award of restitution to the victim does not bar a victim from seeking more substantial damages against the defendant in a civil action because a discretionary order of restitution in a criminal case in no way decides the amount of damages due to the plaintiff so as to preclude relitigation of that issue in a civil case (*Searles v Dalton*, 299 AD2d 788 [3rd Dept 2002]). In addition, N.U. Penal Law § 60.27, subsection 6 specifically states that payment of restitution "shall not limit, preclude or impair any liability for damages in a civil action or proceeding for an amount in excess of such payment" (*Farber v Stockton*, 490 NYS2d at 687 [N.Y.C. Civ. Ct.]).

In the criminal action, the amount of \$126,243.00 was awarded as restitution by the U.S. District Court. In that action, in exchange for Testa's plea agreement, it was stipulated that restitution would be no less than \$120,000.00, but less than \$200,000.00, to which he agreed not to appeal. Con Edison did not have an opportunity to fully litigate its damages in the criminal action.

Accordingly, the motion to dismiss the action based upon collateral estoppel is denied.

#### *Statute of Limitations*

Con Edison sustained the losses alleged in the complaint from in or about January 2000 through in or about April 2003. This action was commenced on April 14, 2005. Defendants allege that the causes of action sound in conversion and therefore are barred by a three year statute of limitations.

As to Testa, because he admitted to his actions in the criminal proceeding, he argues conversion is the proper cause of action. However, Testa also pled guilty to two separate counts of committing and conspiring to commit fraud. In his plea allocution, he admitted that he knowingly conspired to defraud Con Edison (Levinson Aff., Exhibit 7, page 8). Therefore the causes of action for fraud, aiding and abetting fraud, and aiding and abetting breach of fiduciary duty are proper causes of action. Because a six year statute of limitations applies to these causes of action, the motion to dismiss is denied.


As to Dependable, it too argues the proper cause of action against it is for conversion because the theft of the monies was not by Dependable, but its employee. Con Edison has alleged breach of contract, unjust enrichment, fraud, aiding and abetting fraud, and aiding and abetting breach of fiduciary duty; all of which carry a six year statute of limitations. Even if Con


Edison was unaware of the fraud committed by its employce, which remains an issue of fact, at the very least there is a cause of action for breach of contract. Dependable does not address the other causes of action and the reason why dismissal is warranted. Therefore, as to the other causes of action, Dependable has failed to show that they should be dismissed as a matter of law. Accordingly, the motion to dismiss on these grounds as to Dependable is denied as well.

**Conclusion**

Accordingly, based on the foregoing the motion to dismiss the complaint is denied.

This shall constitute the order and decision of the court.

Dated: January 9, 2005 

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