

**Rainess v Consolidated Edison Co. of N.Y., Inc.**

2007 NY Slip Op 30829(U)

March 29, 2007

Supreme Court, New York County

Docket Number: 0109279/1995

Judge: Paul G. Feinman

Republished from New York State Unified Court  
System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

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

PRESENT: HON. PAUL G. FEINMAN  
*Justice*

PART 52

*Errol Rainess et al.*

INDEX NO. 109279/95

MOTION DATE 12/13/06

MOTION SEQ. NO. 009

MOTION CAL. NO. 5

- v -

*Consolidated Edison Company of  
New York, Inc.*

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits \_\_\_\_\_

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

*attached*

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion *and cross motion*  
*are denied in accordance with*  
*the annexed decision & order.*

**FILED**  
APR 20 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

*[Signature]*

Dated: 3/29/07

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: CIVIL TERM: PART 52

-----X  
ERROL RAINESS and ERROL RAINESS, Personal  
Representative of the Estate of KEIKO MACHIDA,  
Plaintiffs,

against

CONSOLIDATED EDISON COMPANY OF  
NEW YORK, INC.

Defendant.

Index Number 109279/1995  
Mot. Submit Date Dec. 13, 2006  
Mot. Seq. No. 009  
Cal. No. 5

**DECISION AND ORDER**

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

Third-Party Plaintiff,

T.P. Index No. 590302/2003

against

CITY OF NEW YORK,

Third-Party Defendants.

-----X  
**For Plaintiffs:**  
Morrell I. Berkowitz, Esq.  
Gallet Dryer & Berkey, LLP  
845 Third Ave., 8<sup>th</sup> Fl.  
New York NY 10022

**For Defendant Con Edison:**  
Richard W. Babinecz, Esq.  
Consolidated Edison of New York, Inc.  
By: Michael J. McNulty, Esq.  
4 Irving Place  
New York NY 10003-3598

**FILED**  
APR 20 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Papers considered in review of this cross-motion for partial summary judgment:

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross-Motion, Exhibits, Affirmation...	<u>2,3,4</u>
Affirmation in Opposition.....	<u>5</u>
Reply Affirmation in Support of Motion.....	<u>6</u>
Reply Affirmation in Support of Con Ed.....	<u>7</u>

**PAUL GEORGE. FEINMAN, J.:**

Defendant Consolidated Edison of New York, Inc. moves to dismiss the complaint.

Plaintiff cross-moves for partial summary judgment on the issue of liability. The motion to dismiss, which was premised on plaintiff's failure to comply with discovery orders of the court

was decided by interim decision and order dated December 12, 2006. Inasmuch as the court has not been advised by movant-defendant Consolidated Edison that the plaintiff failed to comply with the March 15, 2007 deadline for outstanding discovery, the court will now address the cross motion. For the reasons set forth below, the plaintiffs' motion for summary judgment on the issue of liability is denied. Furthermore, upon a search of the record pursuant to CPLR 3212(b), the first, fourth and fifth causes of action are dismissed.

*Factual and Procedural Background*

This is a claim sounding in negligence, nuisance, breach of implied warranty and contract, intentional or wilful disregard of actions, and intentional infliction of mental distress (Cross-Mot. Ex. 1, Summons & Ver. Compl). Plaintiffs allege that due to a defective condition in the gas line leading to their townhouse's water heater, beginning in January 1992, they had no hot water for nearly 15 months and were unable to fully and comfortably live in their home or to rent the first floor commercial space, resulting in loss of income (Not. of Cross-Mot. Ex. 1, Ver. Compl ¶¶ 7-8). They claim \$20,000 in costs to eventually replace gas pipes and valves that have rust inside, which will also require replacing the surrounding walls and heaters (Raines EBT 79, 80).

Plaintiffs cross-move for partial summary judgment as to liability.<sup>1</sup> They allege that there was an infiltration of moisture in the gas lines which resulted in a lack of hot water, and that only when the New York Public Service Commission intervened, did Con Ed rectify the

---

<sup>1</sup>Although plaintiffs make reference to a summary judgment motion by the City of New York seeking to dismiss the third-party action (Berkowitz Corrective Aff. ¶ 1), no motion is currently before the court from the City.

problem. They allege that both plaintiffs suffered from physical ailments which were exacerbated by the lack of hot water,<sup>2</sup> and because of the lack of hot water, they were forced to live elsewhere for extended periods of time.

The premises in question, 210 Seventh Avenue, in the city and county of New York, was acquired by plaintiff Errol Rainess in 1979, and was then a four story home with commercial space on the first floor and a basement (Not. of Mot. Ex. E, McNulty Affirmation [ex. B, Deposition of Errol Rainess, Nov. 20, 2002 (hereinafter Rainess EBT)] 5, 6, 7). In January 1990, Rainess testified that he remembered a water main break had occurred under Fifth Avenue (Rainess EBT 13-14). His home did not suffer water damage (Rainess EBT 14). However, the gas was shut off and it "was freezing cold and we could not live in the house so we went to the Barclay Hotel. We stayed there for a couple of weeks." (Rainess EBT 14). The gas was restored, and plaintiffs moved back (Rainess EBT 20). At that time, they both were in good health, although Machida was very sensitive to cold and would experience joint pain when cold (Rainess EBT 12, 25-26).

In January 1992, the plaintiffs had just returned from a trip when they discovered that there was no hot water and that the pilot light of the hot water heater would not light (Rainess EBT 28-30). Rainess noted that water was seeping out of the pilot light (Rainess EBT 30-31). He called Con Ed (Rainess EBT 31). Although a Con Ed worker came out and drained the heater, the heater would not relight (Rainess EBT 31). The house continued to have heat and gas for cooking however (Rainess EBT 35, 36). Rainess did not remember precisely the chronology

---

<sup>2</sup>Plaintiff Keiko Machida is deceased as of November 4, 2001; her husband has been granted leave to proceed on her behalf as the representative of her Estate.

of events, but stated that Con Ed came back and drained the water from the gas pipe, and that the first time the house had hot water was in April or May of 1993 (Rainess EBT 32-33). He did not have a commercial tenant during this period and he apparently did not try to find one, given the lack of hot water (Rainess EBT 67, 68).

The hot water heater was eventually replaced by a plumber hired by plaintiffs (Rainess EBT 39). Rainess did not have it replaced in January 1992 because "I determined that the cause of the water coming into the building was – it was water coming into the building, and to repair the hot water heater would have been entirely a futile effort." (Rainess EBT 40:9-13). He explained that he is a chemist by training and has "a technical bent" and based on his observations of the pipes and "certain other things," he could tell that the water was coming in as vapor carried along with the gas and condensing in the pipes (Rainess EBT 40:41). He also renovates buildings in Brussels, Belgium (Rainess EBT 46). However, the Con Ed workers did not credit his thinking (Rainess EBT 41). Eventually, the Public Service Commission ordered Con Ed to open the street where it found 40 to 50 gallons of water inside the pipe "exactly where [Rainess] had told them that it was a year earlier." (Rainess EBT 42:23-25, 43).

During the 15 months without hot water, the couple lived in Florida and traveled back and forth to their home in New York (Rainess EBT 33; 91). Neither Rainess nor Machida was under the care of a doctor for any condition, including psychological care for stress, during that time (Rainess EBT 93-94). In December 1993, Rainess was diagnosed with colon cancer (Rainess EBT 36). He believes the lack of hot water "aggravated" his condition and he was told by an oncologist that it could have stressed his immune system (Rainess EBT 82).

Gordon Rogers, section manager in gas engineering, testified on behalf of Con Edison

(Cross-Mot. Ex. 4, Deposition of Gordon Rogers, March 11, 2003 [hereinafter Rogers EBT], 6).

In 1992, he was section manager in Manhattan Gas distribution services, responsible for overseeing inspections and leaks surveillance and complaints (Rogers EBT 8-9). Although he did not do any actual work at 210 Seventh Avenue, he was involved in preparing reports in connection with the premises and he visited it at least once (Rogers EBT 11).

Rogers testified that according to the records, on January 18, 1992, Con Ed was called to Rainess's premises because of the pilot light that would not light and the presence of water. A Con Ed field report noted that after draining the drip leg of the heater, it would not relight because of a "defective control" (Rogers EBT 94-95; Cross-Mot. Ex. 4 [Pl. ex. 25]). The judgment that the control was defective did not include a reason as to why it was defective, such as age of the heater or the presence of water (Rogers EBT 95). Rainess was advised to get the heater fixed. On January 27, 1992, a Con Ed worker again examined the heater and noted that water was found in the meter supplying the boiler (Rogers EBT 99; Cross-Mot. Ex. 4 [Pl. ex. 26]). On February 1, 1992, Con Ed checked the drip leg on the heater and released about an ounce of water, which was "unusual." (Rogers EBT 100, 101; Cross-Mot. Ex. 4 [Pl. ex. 27]). On February 24, 1992, Con Ed was again called to plaintiffs' home and again checked for water, and removed a half of a cup (Rogers EBT 103-104). This was reported on a form dated February 27, 1992, which indicated that it was "owners problem, referred to contractor" (Cross-Mot. Ex. 4 [Pl. ex. 29]). Rogers explained that after the water main break in 1990, about 500 customers were affected, and following the usual procedure, customers would "get the water cleared out and the appliances re-lit," and Con Ed pumped out water, and emptied meters and mains, and then monitored and repeated until things were back to normal (Rogers EBT 52). Rainess would not

follow these procedures.

Con Ed apparently took no further action until contacted by the Public Service Commission on Rainess's behalf (Rogers EBT 110). Because of the intervention of the PSC, Con Ed investigated the reason for the water leakage and ultimately repaired it. Rogers noted that a memo written by a PSC administrator dated February 2, 1993, stated that PSC and Con Ed personnel found that, based on the dew point reading in Rainess's basement, "whenever basement temperature goes below 47, water will collect in house piping" (Rogers EBT 46). This was concededly "extremely high" (Rogers EBT 46). A March 3, 1993 written by PSC administrators directed Con Ed to check drip pots and perform a dew point survey in the surrounding neighborhood (Rogers EBT 47). Dew point tests were taken at various drip pots to find the highest dew point readings, in order to narrow the area of investigation and possible excavation (Rogers EBT 17-18). Con Ed tested a 16-gas main across the street at 210 Seventh Avenue, and the dew point results showed it was dry and not the source of the problem (Rogers EBT 43). When asked why Con Ed tested a gas main across the street, Rogers said "we were trying ... to get rid of Mr. Rainess, so if there is a way we can do it, that the problem will go away in his eyes..." (Rogers EBT: 43:14-17). Other locations tested in Manhattan by Con Ed showed dew points of minus 42.7, minus 44.9, minus 43, minus 49, minus 48.5, minus 46.2, and minus 45.2 (Rogers EBT 33). In comparison, readings from plaintiffs' meters showed readings of plus 22, plus 25 (Rogers EBT 35).

Rogers' recollection is that from the readings taken, they narrowed the area down to the main that supplied Rainess's premises (Rogers EBT 44). Ultimately, Con Ed determined that the problem was the main in front of 210 Seventh Avenue and on March 25, 1993, excavated the

street and pumped out about 40 gallons of water (Rogers EBT 49-50, 54-55). The assumption was that the water was the leftover result of the 1990 water main break (Rogers EBT 52, 53). More water was removed: on March 26: 2 quarts; on March 30: 2 gallons; and on April 2: 1 gallon (Rogers EBT 68).

On April 14, 1993, the 88 year old gas main was replaced (Rogers EBT 75-77). Rogers conceded that the hot water heater was not the problem, although he tried to suggest that after the initial pumping of water, Rainess should have turned the water heater back on, vented, and perhaps repeated the process so as to have had at least intermittent hot water (Rogers EBT 79-80). He acknowledged that this was only viable once Con Ed actively pumped out the water in the spring of 1993 (Rogers EBT 79-80).

Plaintiffs' motion for summary judgment as to liability is premised on the argument that the testimony of the Con Edison witness, along with the documents made over the course of Errol Rainess's repeated contacts with Con Ed, its visits to his premises and the work undertaken after PSC becomes involved, together are admissions that are sufficient to establish plaintiffs' entitlement to summary judgment. They argue that it is clear that Con Ed attempted to evade responsibility by claiming that it was the "owner's responsibility," even though its own witness conceded that the recommendation to buy and install a new water heater would not have resolved the problem. Plaintiffs argue that only when PSC directed Con Ed to conduct a dew point test, was it clearly revealed that their property was likely to have condensation when compared to the properties around them or elsewhere in Manhattan, and thus that it was more likely that water would condense and exist in the gas lines leading to plaintiffs' home than elsewhere (Ex. 3, pp. 16-18, 25-33; 13, 21-23; 18, 47; Ex. 4 [ ex. 1-8]). They note that when Con Ed ultimately

replaced the gas main in the street in front of their home, it pumped out more than 102 gallons of water over the course of several days (Ex. 3, pp. 55, 61, 66, 68).

Con Ed opposes the motion and argues that there are questions of fact, including whether Rainess should have fixed the defective control on the hot water heater, whether Con Ed's actions were reasonable under the circumstances, and whether plaintiffs should have attempted to minimize or reduce the problem, for instance by raising the heat of the basement so that the temperature would never reach the dew point and condensation would not form, or buying an electric heater.

It also points to the language of the a tariff issued to its customers, approved by the Public Service Commission, which states in part that as concerns interrupted or defective service, Con Ed is not liable where "the supply of service shall be interrupted or irregular or defective or fail from causes beyond its control or through the ordinary negligence of employees, servants or agents." (McNulty Aff. in Opp. unnumbered pp. 3-4).<sup>3</sup> Con Ed argues that the 1990 water main break was the probable source for the water, and that the City has already been held liable for the water main break and that therefore the doctrine of collateral estoppel establishes its negligence in this action. Furthermore, under the language of the tariff, Con Ed argues it is not responsible for forces beyond its control.

#### *Legal Analysis*

A motion for summary judgment is a drastic measure and to be used sparingly (*Wanger v Zeh*, 45 Misc 2d 93 [Sup. Ct., Albany County], *aff'd* 26 AD2d 729 [3<sup>rd</sup> Dept 1965]). Summary

---

<sup>3</sup>Although defendant intended to provide a copy of the tariff and citation, the court's copy of the opposition papers do not contain a copy of the tariff or further information.

judgment is proper when there are no issues of triable fact (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Issue finding rather than issue determination is its function (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). The evidence will be construed in the light most favorable to the one moved against (*Weiss v Garfield*, 21 AD2d 156 [3rd Dept 1964]). “Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied.” (*Daliendo v Johnson*, 147 AD2d 312 [2d Dept 1989]).

Plaintiffs’ previous motion for summary judgment on the issue of liability (motion sequence number 005) was denied without prejudice to renewal (Cross-Mot. Ex. A, *Erros Rainess et al. v Consolidated Edison Company of New York*, Index No. 109279, Dec. and Ord., Dec. 16, 2003, p. 3 [Omansky, J.]). As noted by the court, “It is not clear from the papers who as between Con Ed and the City, was responsible, whether a relatively minor repair would have solved the problem, and whether the Con Edison excavation was proximately related to the water main break which occurred more than 10 years earlier.” (Id.).

The plaintiffs assert five causes of action: negligence, nuisance, breach of contract and implied and express warranty, intentional or wilful disregard of actions, and intentional infliction of mental distress. In seeking summary judgment pursuant to CPLR 3212, they must establish that there are no issues of fact as to each cause of action that would prevent the granting of their motion. After assessing the allegations set forth in the verified complaint, the deposition testimony, and documentary evidence presented to the court, as well the opposition papers, the court denies plaintiffs’ motion in its entirety. There are disputed factual issues, in particular as to whether Rainess’s decision not to follow Con Edison’s suggestions concerning fixing the hot water heater control or allowing the bleeding and retooling of the heater’s valves as described by

the Con Edison witness, contributed to the ongoing lack of hot water. In addition, after searching the record pursuant to CPLR 3212(b), the first, fourth, and fifth causes of action are dismissed for the reasons set forth below.

First Cause of Action: Negligence

The first cause of action sounds in negligence. To establish a prima facie case of negligence, a plaintiff must demonstrate (1) that the defendant owed him or her a duty of reasonable care, (2) a breach of that duty, and (3) a resulting injury proximately caused by the breach (*see, Boltax v Joy Day Camp*, 67 NY2d 617 [1986]).<sup>4</sup> The threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 138 [2002]).

“A gas company has a duty to maintain a system of inspection of its gas distribution facilities which will assure reasonable promptness in the detection of leaks that may occur from the deterioration of its own gas pipes and equipment or that may occur from any other cause reasonably to be anticipated.” (New York Pattern Jury Instructions, Civil [2d ed. 2007], PJI 2:187). “If it discovers, or in the exercise of reasonable care should have discovered, a leak or a dangerous condition, it has the duty to repair the leak or dangerous condition . . . .” (PJI 2:187). Moreover, “[i]f a gas company has notice of a defect or dangerous condition in a consumer's gas

---

<sup>4</sup>To establish wilful misconduct, which the complaint also appears to allege, a plaintiff must show that a defendant intentionally acted or failed to act knowing that that conduct would probably result in injury or damage, or acted in so reckless a manner or failed to act where an act was clearly required, that it indicated a disregard for the consequences of the action or inaction (New York Pattern Jury Instructions, Civil [2d ed. 2007], PJI 2:10A). Gross negligence, also defined by PJI 2:10A, is the “failure to use even slight care, or conduct which is so careless as to show complete disregard for the rights and safety of others.”

pipes, or has knowledge which would suggest such defect or dangerous condition to it as a reasonably prudent operator of a gas distributing business, it has the duty to make such inspection as is reasonably required in the exercise of due care under the circumstances to ascertain the condition of the consumer's pipes." (PJI 2:189). "If a defect or dangerous condition is found, it must repair the pipes before continuing to furnish gas through the consumer's pipes; and if necessary to avoid the likelihood of injury to persons or property, it must shut off the gas until repairs are made." (PJI 2:189).

An electric company will not be liable to its customers for interruption of service due to the ordinary negligence of its agents or employees (*Food Pageant, Inc. v Consolidated Edison Co.*, 54 NY2d 167, 172 [1981]). In addition, utility companies are absolved from liability for ordinary negligence claimed as the result of the interruption of the supply of service (*Flex-O-Vit USA, Inc. v. Niagara Mohawk Power Corp.*, 292 AD2d 764, 766 [4<sup>th</sup> Dept. 2002], citing *Zoller v Niagara Mohawk Power Corp.*, 137 AD2d 947, 950 [3<sup>d</sup> Dept. 1988] [emphasis in original]). Con Edison argues that the tariff which is part of the contract with its customers renders it immune from liability for interruption of services due to causes beyond its control or through the ordinary negligence of its employees, servants, or agents. Although it argues that the water in the gas main was "probably" the result of the 1990 water main break and thus caused by the City, this in itself does not sufficiently establish that there are no issues of fact as to the cause of the interruption of service. However, plaintiffs have failed to establish that the interruption of service, despite lasting for 15 months and resolved only after the Public Service Commission interceded, was "gross negligence" under the law.

Gross negligence is defined in the Pattern Jury Instructions as the "failure to use even

slight care, or conduct which is so careless as to show complete disregard for the rights and safety of others.” (PJI 2:10A). Here, the evidence shows only that plaintiffs left New York due to a lack of hot water, periodically returned at which time Rainess made attempts to seek additional help from Con Edison employees, who checked the heater and the pipes and valves on more than one occasion and requested that Rainess fix a control and bleed the heater, and that Rainess did not do either and did not believe that the utility company was properly addressing the underlying problem, and ultimately got relief when the gas main was replaced after the Public Service Commission began monitoring the situation. As plaintiffs fail to establish gross negligence, they fail to state a cause of action against the utility company and the first cause of action in negligence must be dismissed.

Second Cause of Action: Nuisance

The second cause of action sounds in nuisance. To claim private nuisance, a plaintiff bears the burden of establishing an intentional and unreasonable or negligent or reckless interference with the use and enjoyment of land (*Copart Indus., Inc. v Consolidated Ed. Co.*, 41 NY2d 564, 570 [1977]). As set forth in relevant part in the New York Pattern Jury Instructions, plaintiffs must show (1) that conduct of the defendant interfered with plaintiffs’ right to use and enjoy their home, (2) the interference was substantial, (3) the defendant’s conduct was intentional or negligent, and (4) the defendant’s conduct was unreasonable under all of the circumstances (PJI 3:16). “Substantial” is defined as being “real and appreciable, not imagined or petty,” and the “test is not what disturbs or annoys the plaintiff, but whether reasonable persons living in the locality would be appreciably annoyed or disturbed by the interference.” (PJI 3:16). A jury will be required to find that defendant Con Edison “acted for the purpose of interfering with plaintiff’s

use and enjoyment of [his home], or that, though defendant did not, [it either] knew that such interference was substantially certain to result from [its] conduct, became aware that [its] conduct was causing such interference and nevertheless continued it.” Whether Con Edison’s conduct was unreasonable requires consideration of “the need for its conduct, its usefulness and social value, weighed against the gravity of the harm which the plaintiff suffered.” (PJI 3:16). Here, although plaintiffs sufficiently allege the elements of private nuisance, there are issues of fact concerning the actual interference with the use of their home and whether Con Edison’s conduct can be found to be unreasonable under all circumstances. Therefore, the motion for summary judgment as to the second cause of action must be denied.

Third Cause of Action: Breach of Contract

Plaintiffs’ third cause of action asserts a breach of implied and express warranty and contract. In order to plead a breach of contract cause of action, the complaint must allege the provisions of the contract on which the claim is based (*Sud v Sud*, 211 AD2d 423, 424 [1<sup>st</sup> Dept. 1995]). Although they have not provided a copy of the contract or asserted specific clauses at issue, they allege that Con Edison’s failure to repair the condition causing the leakage of water into the gas main and pipes leading into plaintiffs’ premises constituted a breach of its contract to provide continuous service, and was a breach of implied and express warranty to provide such service (Ver. Compl. ¶ 29). Plaintiffs’ bare-bones allegation of a breach of an agreement to provide service is not challenged by Con Edison. Accordingly, it is not dismissed even though it is unclear what specific “implied” or “express” warranty is at issue. Plaintiffs do not establish that they are entitled to summary judgment as to this claim, in particular as Con Edison alleges that Rainess frustrated or prevented the company from properly servicing the heater which would

have allowed, at the very least, intermittent heating (*see, Kooleraire Serv. & Installation Corp. v Board of Ed. of City of N.Y.*, 28 NY2d 101, 106 [1971]). Accordingly, the motion for summary judgment as to the third cause of action is denied.

*Fourth Cause of Action: Intentional Disregard of Actions and Punitive Damages*

The fourth cause of action, intentional or wilful disregard of actions, includes a claim for punitive damages. An award for punitive damages will be made only when it is found that a defendant acted “wantonly” and “recklessly” or “maliciously.” (PJI 2:278). An act is wanton or reckless when done “in such a way and under such circumstances as to show conscious indifference and utter disregard of its effect upon the safety and rights of others.” It is malicious “when it is done deliberately with knowledge of plaintiff’s rights, and with the intent to interfere with those rights.” (PJI 2:278). As set forth in the Pattern Jury Instructions, the jury must assess the nature and “reprehensibility” of what the defendant did, whether the defendant’s conduct demonstrated an indifference to the health or safety of others, how long the conduct went on, its awareness of what harm was being caused, whether there was concealment of the wrongdoing, and how often the defendant had engaged in similar actions of the same type (PJI 2:278). Here, although plaintiff argues that the lack of hot water may have aggravated his colon cancer, diagnosed in December 1993, there are no allegations that Con Edison’s conduct demonstrated indifference to health or safety, or that there was concealment or a repeating pattern of not supplying heat or not investigating heating problems. Plaintiff does not submit an affidavit from his oncologist stating that his health was debilitated or endangered by the lack of hot water and staying away from home for period of time for 15 months. Although it took more than a year before the premises had hot water again, this factor alone is not enough to trigger a proposed

claim for punitive damages given the allegations of Rainess's obstructionism and that plaintiffs often were not in New York. Accordingly, pursuant to CPLR 3212(b), after searching the record, the court dismisses the fourth cause of action for failure to state a cause of action.

*Fifth Cause of Action: Intentional Infliction of Emotional Distress*

The fifth cause of action claims intentional infliction of emotional distress. This claim too, must be dismissed pursuant to CPLR 3212(b). Plaintiffs have not successfully demonstrated (1) extreme and outrageous conduct, (2) intending to cause, or disregarding of a substantial probability of causing, severe emotional distress, (3) a causal connection between the conduct and injury, (4) and severe emotional distress (*Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]). The standard for extreme and outrageous conduct "is incredibly high" (*Carroll v Bayerische Landesbank*, 150 F Supp 2d 531, 538 [SD NY 2001]). The conduct must be beyond all possible bounds of decency and intolerable in a civilized community (*Fischer v Maloney*, 43 NY2d 553, 557 [1978]). Moreover, the tort of intentional infliction of emotional distress has a one year statute of limitation (CPLR 215[3]). Here, the complaint was dated April 11, 1995, and concerns actions which occurred in 1992 and 1993. Accordingly, the claim for intentional infliction of emotional damages must be dismissed.

*Conclusion*

Plaintiffs' cross-motion seeking summary judgment as to liability as against Con Edison is denied and upon a search of the record pursuant to CPLR 3212(b) the first, fourth and fifth causes of action are dismissed. It is

ORDERED that the cross-motion for partial summary judgment is denied; and it is further

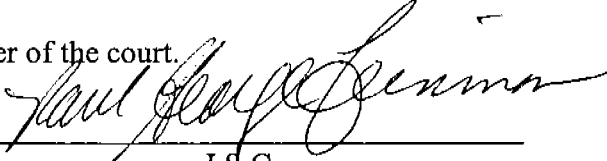
ORDERED that the first, fourth, and fifth causes of action of the verified complaint are dismissed pursuant to CPLR 3212(b) and the Clerk of Court shall enter judgment accordingly; and it is further

ORDERED that the remaining causes of action are severed and shall continue; and it is further

ORDERED that the parties are to appear for their previously scheduled compliance conference on May 16, 2007, at Supreme Court, 80 Centre Street, room 103, at 2:00 p.m.

This constitutes the decision and order of the court.

Dated: March 29, 2007  
New York, New York

  
\_\_\_\_\_  
J.S.C.

**FILED**  
APR 20 2007  
NEW YORK  
COUNTY CLERK'S OFFICE