

**Riverdale Jewish Ctr. v Consolidated Edison Co. of
N.Y., Inc.**

2023 NY Slip Op 33777(U)

October 24, 2023

Supreme Court, New York County

Docket Number: Index No. 651032/2022

Judge: Margaret A. Chan

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

PRESENT: HON. MARGARET A. CHAN PART 49M

Justice

-----X
Riverdale Jewish Center, on behalf of itself and all others
similarly situated

Plaintiff,

INDEX NO. 651032/2022

MOTION DATE 09/23/2022

MOTION SEQ. NO. (MS) 002

- v -

Consolidated Edison Company of New York, Inc.

Defendant.

**AMENDED DECISION + ORDER
ON MOTION**

-----X
The following e-filed documents, listed by NYSCEF document number (Mo 002) 32, 33, 34, 35, 36, 37, 38, 39, 40, 44

were read on this motion to/for

DISMISS

Plaintiff Riverdale Jewish Center claims that defendant Consolidated Edison Company of New York, Inc. engaged in deceptive business practices and affirmative misrepresentation because its informational billing inserts gave misleading information, which caused it and similar organizations to pay a higher gas rate. Plaintiff commenced this action seeking a declaratory judgment that defendant violated New York General Business Law § 349 and an injunction barring plaintiff from further violation. As to damages, plaintiff asserts causes of action for unjust enrichment, fraudulent concealment, and money had and received. Plaintiff also seeks certification this class action¹ and certifying plaintiff as class representative with plaintiff's counsel as class counsel, and cost and damages. Defendant moves to dismiss plaintiff's amended complaint based on the primary jurisdiction doctrine, the filed rate doctrine and failure to state a cause of action. Plaintiff opposes the motion.

For the reasons below, defendant's motion is granted.

Background

Unless otherwise indicated, the information for this background is derived from allegations in the plaintiff's amended complaint (NYSCEF # 36, Amended

¹ The class action members, who are too numerous and unidentified as yet absent discovery, are all Section 76 ratepayers receiving ConEd gas service and billed on the residential rate from 1994 through the date of the complaint (NYSCEF # 36, Amended Compl. ¶¶ 45, 46).

Compl), which are accepted as true for the purposes of this motion to dismiss. Plaintiff Riverdale Jewish Center (RJC) is a religious organization in Bronx county, New York. Defendant Consolidated Edison Company of New York, Inc. ("ConEd"), is a public utility company that provides gas and electric service to various parts of New York state and is regulated by the Public Service Commission (PSC). Plaintiff receives gas services from ConEd, and, as a religious organization, it qualifies as a 'Section 76'² ratepayer (Public Service Law § 76) (Amended Compl. ¶ 3).

Plaintiff states that "ConEd has historically purported to comply with Section 76 by permitting its Section 76 ratepayer customers to choose whether to be billed on a commercial or residential rate" (*id.* ¶ 5). For Section 76 ratepayers who use gas for heating purposes, the commercial rate was lower than the residential rate (*id.* ¶¶ 5, 6). Thus, ConEd's commercial rates for the use of gas for anything other than cooking is better than the residential rate (*id.* ¶ 6). Per plaintiff, this fact, which the Attorney General had observed and relayed in a 1994 Assurance of Discontinuance Pursuant to Executive Law § 63(15), is not common knowledge (*id.* ¶¶ 6, 7).

Plaintiff informs that ConEd, in line with their business practices, distributes annual inserts with their bills to every customer. The inserts are distributed to both residential and non-residential customers, and the inserts to both contain different information and assertions (*id.* ¶ 23). The non-residential rate customers receive inserts titled "Your Rights and Responsibilities as a Non-residential Customer" (the "Non-residential Insert"), and the residential or religious rate customers receive inserts titled "Your Rights and Responsibilities as a Customer Billed under Residential or Religious Rates" (the "Residential Insert") (*id.*).

The non-residential inserts state: "Typically, residential electric rates are more economical, but nonresidential rates may benefit some customers". In contrast, the residential inserts state: "Religious institutions, veterans' organizations, and some community residences have the choice of being billed under either residential or non-residential rates. While residential rates are more economical for most customers, non-residential rates can be more favorable for certain customers." (*id.* ¶¶ 25-27). Plaintiff opted to be billed at the residential rate and has been billed accordingly over the years (*id.* at ¶ 44). Plaintiff claims that ConEd's representation in its billing inserts to Section 76 ratepayers, which are organizations rather than domestic households, that the residential rates are lower than the commercial rate is an affirmative misrepresentation since Section 76 ratepayers use gas for more than just moderate cooking (*id.* ¶¶ 10-12).

Plaintiff alleges that defendant has the knowledge, expertise, and insight into what rate is favorable to Section 76 ratepayers and posits that consumers such

² To qualify for Section 76's protection, ratepayers must be a place with a religious purpose (such as places of worship or religious schools), veterans' organizations, or qualifying community residences.

as plaintiff and the Class have a reasonable expectation that a public utility company would give reliable and accurate information (*id.* ¶¶ 35, 36). Thus, ConEd's misrepresentation in its inserts was designed to lull unaware Section 76 ratepayers into remaining on the residential rate and continuing to pay higher fees. Plaintiff shows a contrasting insert by a subsidiary of ConEd's parent company, which discloses to its customers: "While residential rates are more economical for most customers, non-residential rates can be more favorable for customers who use large amounts of electricity or use gas for heating." (*id.* ¶ 29).

Plaintiff posits that the PSC could not have reviewed ConEd's annual billing inserts since the PSC reports did not discuss the contents of the inserts, which means that the insert may not have been attached for review despite being listed in the "Material Distributed" list. And the most recent version of the insert, which was issued to the ratepayers in April/May 2020, preceded the submission to the PSC in October 2020 (*id.* ¶¶ 41, 42).

Plaintiff concludes that due to ConEd's deceptive insert, plaintiff and the Class Action plaintiffs paid the higher residential rate. In 2020 alone, had plaintiff switched to the non-residential rate, it would have saved about \$2,000 (*id.* ¶ 44).

In support on its motion to dismiss, defendant claims that plaintiff's selection of a part of a sentence in the insert regarding non-residential gas rate does not paint the whole picture. Defendant lays out the entire sentence (the italicized part signifies the omitted part of the sentence central to plaintiff's claim): "*While residential rates are more economical for most customers, non-residential rates can be more favorable for certain customers.*" Defendant asserts that when the sentence is read as a whole, it shows that "there is no 'one size fits all' approach to choosing the most favorable rate." (NYSCEF # 33 at 1). Defendant points out that the insert directs the reader to the publicly available gas tariffs, which states: "For gas service, non-residential rates may be lower than residential rates for some religious organizations" (*id.* at 2 quoting from Gas Tariff, Leaf 187 [as hyperlinked in def't's mol]). Defendant sees no deception in this statement and points out that while plaintiff now finds part of a sentence to be deceptive, "[p]laintiff has voluntarily chosen to switch between different rates for different services." (*id.* at 2).

Defendant bases its motion to dismiss the amended complaint on the primary jurisdiction doctrine; the filed rate doctrine; failure to state an action for claims alleged under GBL § 349, unjust enrichment, and money had and received. Defendant first argues that the amended complaint should be dismissed based on the primary jurisdiction doctrine. Defendant asserts that the PSC has broad jurisdiction over public utilities' rates and, specific to this case, billing inserts. And as it is a billing insert that gave rise to plaintiff's action, defendant argues that plaintiff's claims should be addressed by the PSC under the primary jurisdiction doctrine.

Discussion

The Primary Jurisdiction Doctrine

The PSC has the core duty to regulate utilities and is empowered to oversee complaints from customers in relation to services provided to those customers by utilities (Public Service Law § 43). The PSC has broad and exclusive original jurisdiction over utilities' rates, operating procedures, and the reasonableness of their conduct and practices (*see Porr v NYNEX Corp*, 230 AD2d 564, 570 [2d Dept 1997]).

Under the primary jurisdiction doctrine, even when an action is within the court's jurisdiction, but raises an issue that, under a regulatory scheme, falls within the expertise and experience of an administrative agency, the court should defer its jurisdiction to the agency (*Davis v Waterside Hous. Co.*, 274 AD2d 318, 319 [2000]). This is because

“[t]he doctrine of primary jurisdiction is intended to co-ordinate the relationship between courts and administrative agencies to the end that divergence of opinion between them not render ineffective the statutes with which both are concerned and to the extent that the matter before the court is within the agency's specialized field, to make available to the court in reaching its judgment the agency's views concerning not only the factual and technical issues involved but also the scope and meaning of the statute administered by the agency.”

(*Capital Telephone Co., Inc. v Pattersonville Telephone Co., Inc.*, 56 NY2d 11, 22 [1982]).

Defendant states that the inserts are required by Section 44(3) of the Public Service Law and its contents are reviewed by the PSC for compliance throughout the putative class period (NYSCEF # 33, deft's mol at 11). Addressing plaintiff's claim that the PSC had not reviewed the insert at issue, defendant states that even if that were true, “the primary jurisdiction doctrine applies anyway because the sufficiency of the insert is squarely within the PSC's regulatory purview and technical competence, whether or not the agency approved any particular language in advance” (*id.*). Defendant informs that in May 2022, the PSC had occasion to examine ConEd's residential and non-residential inserts and determined that “each contained language that reasonably informed Complainant of the availability of alternate rates” (*id.* quoting Case No. 19-E-009, Ecclesiastical Assist Corporation of the Archdiocese of New York (*Archdiocese* decision) at 13 [see deft's mol at 4, fn3 for hyperlink to *Archdiocese* decision]).

Plaintiff disagrees and argues that the primary jurisdiction is inapplicable here because its claims are not about tariffs, rates setting, billing or service that would require the expertise of the PSC (NYSCEF # 39, pltf's mol at 3, 6-7). Plaintiff posits that its claim requires only a determination on whether the insert at issue is misleading, which does not require the PSC's technical or specialized knowledge. The thrust of plaintiff's claim is this statement in defendant's insert – "residential rates are more economical for most customers" (*id.* at 1). Plaintiff claims that customers, in reliance of a public utility's information, are misled to choose the residential rate for gas rather than lower non-residential rate (*id.* at 2). Plaintiff maintains that this misrepresentation is well-suited for courts to adjudicate in the first instance (*id.* at 3).

Plaintiff also contradicts defendant's use of the *Archdiocese* decision asserting that *Archdiocese* is neither a Section 76 case nor a misrepresentation claim. And considering that defendant could offer only two cases on the PSC's review of inserts to support its primary jurisdiction argument, plaintiff argues that it is clear that the PSC has rarely, rather than frequently, as defendant claims, dealt with inserts or the misrepresentation that is at issue here (*id.* at 6).

This court agrees with defendant. The primary jurisdiction doctrine applies to plaintiff's claim on the alleged deceptive insert; this issue should be addressed by the PSC in the first instance. While plaintiff argues that determining whether a statement is misleading does not require agency technical or specialized knowledge, this court sees more than just a fragment of a sentence as the sole concern in this issue. Plaintiff's request for the court to view the statement at issue in a vacuum cannot be entertained. It is not just one phrase that needs examining. If it were, and this court did as this plaintiff invites, it would upend the statutes empowering agencies' scope of authority rendering them ineffective and have courts second guess the agencies' expertise. Thus, issues concerning the "[c]lassifications of rates and the advantages of such classifications" are for the agency, not the courts" (*Grenadier Realty Corp. v Pub. Serv. Comm'n*, 218 AD2d 883, 885 [3d Dept 1995] [internal quotations omitted]). In sum, under the primary jurisdiction doctrine, this court defers jurisdiction to the PSC.

Given this determination, the causes of action raised in the amended complaint will not be addressed here. As such, it is

ORDERED that plaintiff Riverdale Jewish Center's amended complaint is dismissed without prejudice, and it is further

ORDERED that defendant Consolidated Edison Co. of New York shall serve a copy of this Decision and Order with a notice of entry upon plaintiff within fourteen days of this order.

This constitutes the Decision and Order of the court.

<u>10/24/2023</u>			
DATE		MARGARET A. CHAN, J.S.C.	
CHECK ONE:	☒ CASE DISPOSED	☐ NON-FINAL DISPOSITION	
	☒ GRANTED ☐ DENIED	☐ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE