

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

| | | |
|------------------------------------|---|-------------------------------|
| | x | Index |
| ROBERT J. REIDT, | | Number <u>3899</u> 2003 |
| Plaintiff, | | Motion |
| -against- | | Date <u>February 22,</u> 2006 |
| CONSOLIDATED EDISON COMPANY OF NEW | | Motion |
| YORK, INC., et al., | | Cal. Number <u>27</u> |
| Defendants. | | |
| | x | |

The following papers numbered 1 to 4 read on this motion by the attorney of record for Constellation Operating Services, Inc., for the pro hac vice admission of Damon L. Krieger and Emmett F. McGee, Jr.

Papers
Numbered

Notice of Motion - Affirmation - Exhibits 1-4

Upon the foregoing papers it is ordered that this motion is decided as follows:

The policy of this State is to give recognition to "a party's entitlement to be represented in ongoing litigation by counsel of its choosing" (Giannotti v Mercedes Benz U.S.A., LLC, 20 AD3d 389 [2005]; Zutler v Drivershield Corp., 15 AD3d 397 [2005]; see Neal v Ecolab, Inc., 252 AD2d 716 [1998]).

The attorney of record for defendant Constellation Operating Services, Inc. is the law firm of DLA Piper Rudnick Gray Gary US LLP. Emmett F. McGee, Jr., a partner in the Baltimore office of said law firm, has submitted evidence that he is an attorney in good standing admitted to practice in Maryland, and states in an affidavit that he has read and agreed to comply with the CPLR and all rules of the court, including all disciplinary provisions governing the conduct of members of the bar in this State.

Damon L. Krieger, an associate in the Baltimore office of said law firm, has submitted evidence that he is an attorney in good standing admitted to practice in Maryland, and states in his affidavit that he has read and agreed to comply with the CPLR and all rules of the court, including all disciplinary provisions governing the conduct of members of the bar in this State.

Therefore, as the moving papers comply with the provisions set forth in 22 NYCRR 520.11(a)(1) and 22 NYCRR 690.3(a), this unopposed motion to admit Emmett F. McGee, Jr. and Damon L. Krieger, pro hac vice is granted.

Dated: May 8, 2006

J.S.C.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

ROBERT J. REIDT, x Index
Number
3899/2003

Plaintiff,

Motion
Date
February 22, 2006

-against-

CONSOLIDATED EDISON COMPANY OF
NEW YORK, INC., COSI ASTORIA, INC.,
CONSTELLATION OPERATING SERVICES, INC.
and ASTORIA GENERATING, LP,

Motion
Cal. Numbers 26 & 28

Defendants.

x

The following papers numbered 1 to 31 read on this motion by defendant Constellation Operating Services for an order granting summary judgment dismissing the complaint. Defendants Astoria Generating Company, LP and Orion Power Operating Services Astoria, Inc. separately move for an order granting summary judgment dismissing the complaint. Defendant Consolidated Edison Company of New York cross-moves for an order granting summary judgment dismissing the complaint.

| | Papers Numbered |
|--|--------------------|
| Notice of Motion - Affidavit - Statement of Undisputed Material Facts - Memorandum of Law | 1-4 |
| Supporting Affirmation - Exhibits (A-C) | 5-7 |
| Plaintiff's Counter-Statement of Material Facts in Dispute | 8-9 |
| Opposing Affirmation - Exhibits (1-9) | 10-12 |
| Memorandum of Law | |
| Reply Memorandum of Law | |

| | |
|--|-------|
| Notice of Motion-Affirmation - Exhibit (A) | 13-16 |
| Supporting Affirmation - Exhibit (A) | 17-19 |
| Opposing Affirmation | 20-22 |
| Reply Memorandum of Law | |
| | |
| Notice of Cross Motion - Affirmation - | |
| Exhibits (A-B, A, C, A) | 23-27 |
| Statement of Material Undisputed Facts | 28 |
| Opposing Affirmation - Exhibits (1-5) | 29-31 |
| Memorandum of Law | |
| Reply Memorandum of Law | |

Upon the foregoing papers it is ordered that these motions are consolidated for the purpose of a single decision and are decided as follows:

Plaintiff Robert J. Reidt seeks to recover severance pay and benefits, as a third-party beneficiary of an assets sales contract entered into by Consolidated Edison Company of New York (Con Ed) and Astoria Generating, LP, dated March2, 1999. Plaintiff was employed by Con Ed for 27years, and was a Supervisor of Instruments and Controls at a power generating plant located in Astoria, New York, at the time of the March2, 1999 agreement. On June28, 1999, Mr. Reidt, became absent from work with the knowledge of his employer, due to a then recently diagnosed heart condition. Mr. Reidt asserts that although he was entitled to weekly sick pay for a period of approximately 46 weeks, Con Ed did not process his sick pay following his absence from work. He states that while he was on sick leave he made numerous telephone calls to Con Ed's payroll and personnel departments and was advised that he was no longer a Con Ed employee, and that his employment had been transferred to Constellation Operating Services (Constellation). He then contacted Constellation, but received no assistance with regard to his claim for sick leave pay. Constellation formerly owned all of the capital stock of defendant COSI Astoria. COSI Astoria, Inc. was responsible for operating and maintaining the Astoria plant under an agreement entered into with Astoria Generating on August11, 1999.

In a letter dated July21, 1999, COSI Astoria, Inc. offered plaintiff employment as a Technical Supervisor, at the Astoria plant, which would "commence with the formal transfer of assets/operations from Con Ed to Astoria Generating LP/COSI". In a letter dated August16, 1999, Constellation informed plaintiff that in his case "the staffing needs of the new employer, COSI Astoria Inc. differ from those of Con Ed. Thus, while COSI Astoria, Inc. is making an offer of employment to you, the position is one that we expect will be terminated at or shortly after the

Closing Date and you will be eligible for Severance Pay benefits in accordance with the terms of the Asset Purchase & Sale Agreement." The letter set forth the terms of the offer of employment, and additional benefits, if plaintiff signed the extended severance agreement and release. Constellation included in this letter the ExtendedSeverance Agreement and Release, which stated that the it was "entered into by RobertReidt (herewith referred to as 'the Employee') and COSI Astoria Inc., including its parents, subsidiaries, officers, employers, agents, assigns and affiliates (including Astoria Generating Inc., its parents, employee and affiliates)(herewith referred to collectively as 'the Company')." This agreement stated that Mr.Reidt's employment with the Company would terminate on August20, 1999, and set forth the terms of the severance agreement. On September12, 1999, plaintiff met with Constellation's representative at the Astoria plant and was provided with a severance package. Plaintiff did not execute the severance agreement at that time, as he sought information regarding ConEd's long term disability insurance plan. Plaintiff asserts that when he later attempted to accept the severance offer, he was advised that he was not entitled to severance. He also states that ConEd at some later date offered to compensate him for lost sick pay, lost 401(k) employer matching funds and the lost value of the discount stock plan. Plaintiff, however, rejected ConEd's offer as he believed the amounts were not accurately computed, and as defendants had rejected his request that such payments not be considered a waiver of any claim to the severance package. Plaintiff ceased to receive any wages as of August1999, and did not resume working for any of the defendants or any other employer. On March17, 2000, plaintiff processed his retirement papers with ConEd, and made a claim for long term disability.

On April26, 2000, Constellation entered into an agreement with OrionPower Holdings, Inc. whereby it sold all of the shares of capital stock in COSIAstoria to Orion. COSIAstoria is now known as OrionAstoria, and this entity served an answer on behalf of COSIAstoria.

Defendant Constellation now seeks an order granting summary judgment dismissing the complaint on the grounds that it was not a party to the AssetPurchase Agreement between ConEd and AstoriaGenerating which plaintiff alleges was breached. It is also asserted that as said agreement expressly states that it may not be enforced by a thirdparty, plaintiff lacks standing to maintain a claim for breach of said contract.

Defendants AstoriaGenerating and OrionPower Operating Services Astoria, Inc. seek an order dismissing the complaint on the grounds that plaintiff is not a third-party beneficiary of the March2, 1999

assets sale agreement, and that neither of these defendants entered into any employment relationship with the plaintiff.

Defendant ConEd cross-moves for an order granting summary judgment and asserts that plaintiff, a ConEd employee, began a paid sick absence on June 28, 1999 and that he ceased being an employee of ConEd on August 20, 1999, pursuant to the terms of the March 2, 1999 assets sale agreement. ConEd asserts that under the terms of the March 2, 1999 agreement, plaintiff lacks standing to bring this action for breach of contract. It is noted that ConEd has not submitted any documentary evidence in support of its claim that it paid plaintiff sick leave for the period in question.

Plaintiff, in opposition, asserts that as a third-party beneficiary of the March 2, 1999 contract, he was entitled to either an offer of employment for three years or a severance agreement, which he values at \$106,218.26, and that defendants ConEd and Astoria Generating breached this agreement. Plaintiff asserts that the present value of the severance agreement, including interest is \$186,155.00. Plaintiff also alleges that COSI Astoria, Constellation and Astoria Generating acted as either agents of one another, or assumed the obligations of one another under the subject contract, and, therefore, are also liable to the plaintiff.

It is well settled that an agreement that is clear and unambiguous will be enforced in accordance with its terms (South Road Assocs., LLC v International Business Machines Corp., 4 NY3d 272 [2005]; Greenfield v Philles Records, Inc., 98 NY2d 562 [2002]; W.W.W. Assocs. v Giancontieri, 77 NY2d 157 [1990]; Karafiol v Karafiol, 259 AD2d 522, 522-523 [1999]). Terms of a contract are to be interpreted in accordance with their plain meaning (Computer Associates International, Inc. v U.S. Balloon Manufacturing Co., Inc., 10 AD3d 699 [2004]; Tikotzky v New York City Transit Auth., 286 AD2d 493 [2001]). The court is to give "...practical interpretation to the language employed and the parties' reasonable expectations" (Slamow v DelCol, 174 AD2d 725, 726 [1991], aff'd 79 NY2d 1016 [1992]; see also AFBT-II, LLC v Country Village on Mooney Pond, Inc., 305 AD2d 340 [2003]; DelVecchio v Cohen, 288 AD2d 426 [2001]). The court may not add or delete provisions of an agreement under the guise of interpretation nor may the court interpret the language of an agreement in such a way as would be contrary to the intent of the parties (Petracca v Petracca, 302 AD2d 576 [2003]; Tikotzky v New York City Transit Auth., supra). Here, Article XII of the March 2, 1999 contract of sale between ConEd and Astoria Generating, provides, in pertinent part, that: "(b) Nothing in this Agreement is intended to confer upon any other person except the Parties any rights or remedies hereunder or shall

create any thirdparty beneficiary rights in any person, including with respect to continued or resumed employment, any employee or former employee of Seller (including any beneficiary or dependent thereof). No provision of this Agreement shall create any rights that might be provided, directly or indirectly, under any employee benefit plan or arrangement except as expressly provided for thereunder." This provision, however, only refers to continued or resumed employment and makes no reference to severance pay or severance benefits. The subject agreement contains separate provisions pertaining to severance pay and benefits for Con Ed employees who would not be employed by the new owner or whose employment was thereafter terminated by the new owner. Therefore, the court finds that plaintiff, a former ConEd employee, is not barred from bringing a third-party beneficiary claim for severance pay and benefits. Defendants' requests to dismiss the complaint on the grounds of lack of standing, therefore, are denied.

The court further finds, that although defendants COSI Astoria (now Orion) and Constellation were not parties to the subject assets sale agreement, these defendants made offers to the plaintiff consistent with the provisions of the March 2, 1999 agreement, regarding employment up until the closing date of August 20, 1999 and also offered severance package after that date which was allegedly withdrawn in violation of said agreement. Therefore, as sufficient evidence exists that these defendants acted as agents or representatives of Astoria Generating, their requests to dismiss the complaint are denied.

In view of the foregoing, defendants' motions and cross motions to dismiss the complaint are denied in their entirety.

Dated: May 8, 2006

J.S.C.