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

CSC HOLDINGS, INC., d/b/a CABLEVISION,

Plaintiff,

Index No. 453209/2017
**DECISION/ORDER**
Motion Seq. No. 003

-against-

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. and JOHN DOE, a fictious name, being, and intending to be, a contractor working at or near Cablevision's facilities as set forth in the body of the complaint,

Defendant.

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendant's motion to dismiss.

| **Papers** | **NYSCEF Documents** |
|---|---|
| Notice of Motion (Motion# 003) | 31 |
| Affirmation in Support of Motion | 32 (33-39) |
| Affirmation in Opposition to Motion | 41 (42-48) |

*Neal S. Dobshinsky, Esq.*, New York (Jay B. Zimner), for plaintiff.
*Nadine Rivellese, Esq.*, New York (John A. Howard), for defendant.

Gerald Lebovits, J.

Defendant, Consolidated Edison Company of New York (Con Ed), moves to dismiss the above-captioned action by plaintiff, CSC Holdings, Inc. d/b/a Cablevision (Cablevision), as time-barred or under the laches doctrine. Defendant's motion is granted.

**Background**

Plaintiff alleges that on December 13, 2007, Con Ed's facilities caught fire and exploded, damaging plaintiff's property and interrupting service. (Aff. in Support, Exhibit A, Complaint, at ¶ 8.) Plaintiff argues that the property damage resulted from defendant's negligent, reckless, and careless ownership, operation, management, maintenance, and control of its facilities located at or near the intersection of East New York Avenue and Mother Gaston Boulevard in Brooklyn, New York. (*Id.*, at ¶ 7.) Plaintiff requests judgment against defendant for $116,500, with interest, from December 13, 2007, as well as additional costs and disbursements and attorney fees. (*Id.*, at ¶ 10.)

This action is one of six that was severed, by Justice Carol Edmead's April 29, 2010, decision and order, from an action plaintiff commenced against defendant on May 22, 2009. The

court severed the property-damage claims because each "relate to different locations in two different counties on six different dates." (Aff. in Support, Exhibit G, Decision and Order.) Plaintiff was directed to obtain six no-fee index numbers and file six RJIs. (*Id.*)

Plaintiff purchased a new index number on December 14, 2017, and filed the instant action on January 9, 2018, in this court. (Aff. in Support, Exhibit A, Complaint, at ¶ 3.) Defendant responded by filing a motion to dismiss, asserting that, under CPLR 3211 (e), plaintiff's claims should be dismissed as time-barred. (*Id.*, at 1.) Plaintiff mistakenly referred to its motion opposition papers as supporting defendant's motion, leading this court to grant the motion unopposed in an order dated February 26, 2018. (Aff. in Support, at ¶ 2.) This court granted plaintiff's motion to vacate the February 26 order to restore the action. This court also granted defendant leave to renew its motion to dismiss. (*Id.*) On May 9, 2018, defendant filed the instant motion requesting dismissal of plaintiff's claims as time-barred under CPLR 214 or the doctrine of laches. (*Id.*, at ¶ 1.)

CPLR 214 provides that an action to recover damages for an injury to property must be commenced within three years. Defendant argues that the instant action is one that is "distinctly and newly commenced" and that plaintiff is attempting to recover damages for an injury that occurred 10 years ago. (Aff. in Support, at ¶ 5.) Defendant claims that this action does not fall under the CPLR 214 (c) exception, in which the time the action must be commenced is computed from the "date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier." (CPLR 214 [c].) Defendant contends that because plaintiff's complaint alleges that its services were "interrupted," plaintiff was immediately notified of the damage. (Aff. in Support, at ¶ 6.) Plaintiff argues that the instant action continues from the one commenced in 2009, making defendant's argument academic. (Answering Aff., at ¶ 9.)

Alternatively, defendant argues that the action should be dismissed under the doctrine of laches, which is an equitable doctrine based on fairness. (*See e.g. Continental Cas. Co. v Employers Ins. Co. of Wausau*, 60 AD3d 128, 136 [1st Dept 2008].) Laches is founded on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party. (*Bank of America Nat. Ass'n v Lam*, 124 AD3d 430, 431 [1st Dept 2015].) The doctrine is unavailable in an action at law commenced within the period of limitation. (*Premier Capital, LLC v Best Traders, Inc*, 88 AD3d 677, 678 [2d Dept 2011].) Mere delay alone, without actual prejudice, does not constitute laches. (*Bank of America Nat. Ass'n*, 124 AD3d at 431.)

Defendant argues that because plaintiff delayed obtaining the new index number and filing the complaint for eight years, it was "lulled . . . into the belief that plaintiff was abandoning its baseless claim." (Aff. in Support, at ¶ 10.) Defendant contends that it is prejudiced by the delay because of the difficulty in locating witnesses and the requisite documents for litigation "well beyond its 8-year retention period." (*Id.*, at ¶ 10.)

**Discussion**

It is unnecessary to determine whether plaintiff commenced a new action or was continuing the litigation from 2009. In both scenarios, plaintiff's delay is unreasonable. If viewed

as a newly commenced action, then, under CPLR 214 (4), plaintiff failed to commence the action within the three-year statute of limitations. Because laches is an equitable doctrine unavailable in an action at law when the action has been commenced within the limitations period, laches also applies if the instant action is viewed as newly commenced. Plaintiff was aware of the property damage in 2009, had commenced an action to recover damages, which was severed, but waited until years later to file a new index number, RJI, and summons and complaint. Defendant claims it suffered prejudice as a result, alleging that the necessary witnesses and records may no longer be available. (Aff. in Supp., at ¶ 10.)

Alternatively, if the instant action is viewed as a continuation of the 2009 litigation, the motion should still be granted. Plaintiff has provided no adequate excuse for the filing postponement. Plaintiff contends that, following severance, it "engaged in on again and off again discussions with Con Edison claims representatives in an effort to resolve the underlying claims without the need for additional, continuing litigation." (Aff. in Opp., at ¶ 10.) Plaintiff states that its efforts were "fruitless" and that recently, one of Con Ed's representatives stated that it is necessary to have separate court cases before the discussions can continue. *(Id.)*

In *Missos v General Motors Corporation*, the court held that in an action seeking damages for injuries, in which no meaningful activity occurred in over six years and which was filed seven years before its last meaningful activity, was properly dismissed for want of prosecution. (30 AD3d 303 [1st Dept 2006].) Plaintiff provides no names or affidavits of the Con Ed representatives it was allegedly conferring with. Moreover, these alleged discussions are insufficient to warrant delaying, by eight years, the filing of a new index number and RJI per the court's order. Plaintiff has the burden of showing a reasonable excuse for its delay in bringing the action to trial, without which the court must grant defendant's motion to dismiss. (*MacDonnell v Press Pub. Co.*, 160 AD 872, 872 [1st Dept 1913].) The Appellate Division has held that dismissal for lack of prosecution is required when a plaintiff fails to supply an affidavit of merit and satisfactorily to explain or excuse a delay of 73 months between time of joinder of issue and serving and filing a note of issue. (*White v Good Operating Corp.*, 19 AD2d 802, 802 [1st Dept 1963].) In the instant case, plaintiff had the requisite means to prepare and commence the separate action following the court-ordered severance, regardless of plaintiff's alleged decision to confer with Con Ed claims representatives instead of defendant's counsel. Absence of an acceptable excuse for the eight-year delay is determinative. (*Merchandising Presentation, Inc. et al. v Blumenfeld*, 74 AD2d 523, 523 [1st Dept 1980].)

Accordingly, it is

ORDERED that defendant's motion to dismiss is granted; and it is further

ORDERED that the complaint is dismissed in its entirety as against defendant Consolidated Edison Company of New York, Inc., with costs and disbursements to said defendant, Consolidated Edison Company of New York, Inc., as taxed by the County Clerk's Office; and it is further

ORDERED that movant, Consolidated Edison Company of New York, Inc., shall serve a copy of this order on plaintiff, CSC Holdings, Inc. d/b/a Cablevision, and on the County Clerk's Office, which shall enter judgment accordingly; and it is further

ORDERED that this action is [redacted] against defendant John Doe.

Date: August 3, 2018

J.S.C.

HON. GERALD LEBOVITS J.S.C.