

SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. IRA B. WARSHAWSKY,
Justice.**

TRIAL/IAS PART 7

LONG ISLAND POWER AUTHORITY

Plaintiff,

INDEX NO.: 015325/2007
MOTION DATE: 12/17/10
MOTION SEQUENCE: 03, 04

-against-

GILBERT ANDERSON, P.E., as Administrative Head
of Suffolk County Sewer Districts and as Commissioner
of Public Works of the County of Suffolk, SUFFOLK
COUNTY SEWER DISTRICT NO. 3-SOUTHWEST,
SUFFOLK COUNTY SEWER AGENCY, SUFFOLK
COUNTY DEPARTMENT OF PUBLIC WORKS, SUFFOLK
COUNTY LEGISLATURE and COUNTY OF SUFFOLK

Defendants.

The following papers read on this motion:

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PRELIMINARY STATEMENT

Motion (seq. no. 3) by the attorney for the plaintiff for an order in favor of the plaintiff awarding it summary judgment pursuant to CPLR 3212 is granted. Cross-motion (seq. no. 4) by the attorneys for the defendants for an order in favor of the defendants awarding them summary judgment pursuant to CPLR 3212 is denied.

BACKGROUND

The plaintiff, Long Island Power Authority (LIPA) seeks a judgment exempting LIPA from the imposition of commercial sewer use assessments, fees or charges against a property located within Islip, known as Brentwood (hereinafter the Property) and an order enjoining defendants from imposing commercial sewer use fees or charges against LIPA on the Property. Defendants counterclaim for the sum of \$2,007,995, of which \$1,007,995 is allegedly owed by plaintiff to defendants as a result of the assessments. Plaintiff LIPA is exempt from taxes and assessments pursuant to the Public Authorities Law § 1020-p (the "LIPA ACT"). However, LIPA is required to make disbursements known as PILOTS (payments in lieu of taxes) to municipalities negatively impacted by the removal of local properties from the tax rolls during LIPA's acquisition of the assets of the Long Island Lighting Company (LILCO) in the 1990s. *Id.* § 1020-q. In addition, LIPA has the power to enter into discretionary agreements with any municipality to pay annual sums in lieu of taxes in respect to properties owned within the municipality. *Id.* § 1020-f(w).

In 2003, LIPA acquired a parcel of land that was once part of the now defunct Pilgrim State Psychiatric Center, located in Islip, New York. The previous owners of the Property had entered into a Connection Agreement in 1991 with the local sewer agencies that set out sewer design and a fee structure. LIPA subsequently improved its newly acquired property with two gas-fired electric generation units. LIPA asserts the generation units are not attached to the local sewer system, do not generate, and are not capable of generating sewage. In 2006, LIPA settled a civil action involving the Property through a PILOT agreement with the Assessors of the Town of Islip agreeing to voluntarily pay approximately \$2,000,000 for each tax year from 2003/04 through 2008/09.

In 2005, Suffolk County Sewer Districts notified LIPA that an assessment would be imposed on the Property for commercial sewer use for the previous two (2) years and

subsequent years. The November 2005 notice stated that LIPA owed the Suffolk County Sewer District No. 3-Southwest (the District) \$804,192, the bulk of which was predicated upon an *ad valorem*, or value of the property assessment. LIPA contested the assessments, but defendants rejected the requests for reconsideration. Subsequently, an additional statement dated May 1, 2007 assessed a further \$203,803 against LIPA for commercial sewer use in the period of 1/1/07 to 12/31/07, raising the total amount charged to LIPA by the sewer district to \$1,007,995. As a result of the defendant's failure to grant the plaintiff the relief it requested, LIPA commenced the within action for a judgment declaring that LIPA be exempt from these assessments and a permanent injunction prohibiting the imposition of commercial sewer use fees on the Property.

In this summary judgment motion for a declaratory judgment, plaintiff predicates its motion on three claims: 1) LIPA is exempt from the imposition of commercial sewer use assessments; 2) the connection agreement, upon which defendants rely, does not authorize the imposition of commercial sewer use charges in this case; and 3) LIPA cannot be assessed for commercial sewer use if the Property is unconnected and does not use sewer facilities. LIPA argues the District is wrongfully assessing LIPA for "Commercial Sewer Use" even though LIPA does not use it, and the property is not connected to the District's sewer facilities.

In or about 1991 the New York State Office of Mental Hygiene (OMH) had to abandon its then existing sewage treatment plant located on the Pilgrim State Premises in order to meet wastewater discharge standards of the New York State Department of Environmental Conservation (NYSDEC). OMH was required to enter into a contract with the District in order to connect to and receive sewer services from the District's sewer system, since the Pilgrim State Premises is not located within the boundary of the District, or within the boundary of any other Suffolk County sewer district.

The 1991 Connection Agreement provided for an "Initial Capacity" of 480,000 gallons per day allocated for OMH and an Additional Capacity of 250,000 per day, 20,000 of which was allocated to Suffolk County Community College ("SCCC"), located on the Northeast portion of the Pilgrim State Premises. Payment for the sewer services under the 1991 Connection Agreement is set forth in § 6(a) entitled "Fees and Charges Payable to the District" and was based on the following: a per parcel charge; an *ad valorem* charge; a user charge; a metered pretreatment fee; and an administration fee.

Section 6(c) of the 1991 Connection Agreement provides: “All fees and charges payable by OMH under Sections 6(a)(i) through 6(a)(v) hereof shall commence upon the date the Project Facilities are first placed into operational use for the benefit of OMH.”

The 1991 Connection Agreement provides that if other parties desired to connect to the District’s sewer facilities to be constructed and installed on the Pilgrim State Premises, written notice to the District is required.

“No properties, parties, persons, corporations or other entities shall be permitted to connect to the Project Facilities or any other sewerage facilities of OMH, whether or not situate in, under or upon the Premises, nor to any sewerage facilities in, under or upon the Premises, whether or not owned by OMH, whether inside or outside the boundary lines of the District, without prior written notice to the District.”

The 1991 Connection Agreement also contains a provision (Section 24) to protect the District’s sewer system if there were a change in ownership or use that would adversely affect the District’s facilities.

The District began billing OMH for sewer services in 1997 when the Pilgrim State Premises were actually connected to, and began using, the District’s sewer facilities.

According to Benjamin Wright, an employee of the Suffolk County Department of Public Works, who was familiar with the 1991 Connection Agreement, the intention was that OMH would be charged for sewer services once the connection was completed. Defendants claim they became aware in the early 2000s that several entities had acquired portions of the Premises no longer used by OMH, namely: LIPA, the New York Power Authority (“NYPA”), the Wingate Inn, the Town of Islip IDA, and the New York State Department of Parks and Recreation (“Parks Department”).

The evidence shows that SCC, Wingate Inn and NYPA all executed separate connection agreements in their own names. According to Mr. Wright, there is a procedure applicable to new owners who wanted to connect to the District’s facilities, which involved executing their own connection agreements with the District, and which had to be ratified by the Legislature before the connection could be effectuated.

The District began billing SCC for sewer charges in 1997 when SCC connected to, and

wastewater began flowing, into the District's sewer system. The District began billing the Wingate Inn for sewer charges when the Wingate Inn connected to the District's sewer system in 2003, because, according to Mr. Clausen, a Department of Public Works (DPW) accountant, it was only then that "billing begins." NYPA connected to the District's sewer facilities in 2002 and the District commenced billing NYPA for sewer charges in 2003.

It was not until 2005, that Mr. Clausen, the DPW accountant, admittedly made a unilateral decision to begin billing LIPA, retroactive to 2003, for "commercial sewer use," even though he knew LIPA did not use, and was not connected to the District's sewer facilities. Mr. Clausen testified that he did not discuss sending bills to LIPA with anyone in the department; he simply decided to bill LIPA when he "found out," sometime in 2004, that portions of the Pilgrim State premises had been transferred to LIPA, as well as NYPA and the Islip IDA. Mr. Clausen also "found out" about the transfer to the Parks Department in 2004, but only began billing the Parks Department in 2009, over five years after he learned of the transfer and during the pendency of this lawsuit." The plaintiff's Statement of Uncontested Material Facts states:

The Property is not connected to the District's sewer facilities. See Nicolino Aff., at ¶ 10, Exhibit 7; Complaint at ¶ 12, Exhibit 1; Deposition Testimony of Benjamin Wright, employed by defendant Suffolk County Department of Public Works ("DPW"), taken April 15, 2010 ("Wright Dep."), at Tr. 32, 74, Exhibit 10; Deposition Testimony of Martin Edward Clausen, employed by defendant DPW, taken April 29, 2010 ("Clausen Dep."), at Tr. 95, 102, Exhibit 11.

LIPA's Property has never been connected to the District's sewer facilities or any other sewer system within Suffolk County. See Nicolino Aff., at ¶ 11, Exhibit 7; Complaint at ¶ 13, Exhibit 1; Wright Dep., at Tr. 32, 74, Exhibit 10; Clausen Dep., at Tr. 95, 102, 99-101, Exhibit 11.

LIPA has never used the District's sewer facilities. See Wright Dep., at Tr. 32, 37, 74, 76, Exhibit 10; Clausen Dep., at Tr. 99-101, Exhibit 11.

The defendants' Statement of Uncontested Material Facts states:

The subject property generates sanitation waste (sewage) upon the property. See Exhibit "F."

Plaintiff's Counter Statement of Defendants' Statement of Uncontested Material

Facts states:

LIPA disputes Paragraph 6 of Defendants' Statement insofar as it states that the Property "generates sanitation waste (sewage) upon the property," whatever that means, but does not dispute that there is an on-site septic tank for disposal of sewage generated on the Property.

Exhibit F (annexed to defendants' moving papers in opposition to plaintiff's motion and in support of defendants' cross-motion) is a transcript of the testimony of Walter Hoefler, assistant to the Chief of Staff of LIPA. Mr. Hoefler testified that there are two bathrooms at the power plant (pg. 12 and pg. 14).

Plaintiff has established by documentary evidence that the 4.81 acres is improved by two gas-fired electric generation units and an on-site septic tank for disposal of sewage from a bathroom within a small structure utilized in connection with the maintenance of the electric generation units.

On a motion for summary judgment, the Court's function is to decide whether there is a material factual issue to be tried, not to resolve it. *Sillman v Twentieth Century Fox Films Corp.*, 3 NY2d 395, 404. A *prima facie* showing of a right to judgment is required before summary judgment can be granted to a movant. *Alvarez v Prospect Hospital*, 68 NY2d 320; *Winegrad v New York University Medical Center*, 64 NY2d 851; *Fox v Wyeth Laboratories, Inc.*, 129 AD2d 611; *Royal v Brooklyn Union Gas Co.*, 122 AD2d 133. The plaintiff has made an adequate *prima facie* show of entitlement to summary judgment.

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. *Friends of Animals, Inc. v Associated Fur Mfgs., Inc.*, 46 NY2d 1065. Conclusory statements are insufficient. *Sofsky v Rosenberg*, 163 AD2d 240, *aff'd* 76 NY2d 927; *Zuckerman v City of New York*, 49 NY2d 557; *see Indig v Finkelstein*, 23 NY2d 728; *Werner v Nelkin*, 206 AD2d 422; *Fink, Weinberger, Fredman, Berman & Lowell, P.C. v Petrides*, 80 AD2d 781, *app. dism.* 53 NY2d 1028; *Jim-Mar Corp. v Aquatic Construction, Ltd.*, 195 AD2d 868, *lv app. den.* 82 NY2d

660.

In opposition to the within motion and in support of the cross-motion, defendants argue that although the sewer charge is not an assessment, LIPA receives a direct benefit thereby validating the charges. The Appellate Division Second Department, in *Long Island Power Authority v Anderson et al.*, 67 AD3d 652, 653 (2009) in reversing this court's decision and order dated March 4, 2009 stated that:

It is undisputed that the plaintiff's property is not located within the Suffolk County Sewer Districts (hereinafter the Sewer Districts), and that the disputed sewer charges were imposed upon the property pursuant to a contract between the Sewer Districts and the previous owner of the property. **Accordingly, the sewer charges are not assessments**, and the plaintiff, despite its statutory exemption from liability for assessments, may ultimately be responsible for these fees. (*cf. City of New York v Long Island Power Authority*, 14 AD3d 642, 789 NYS2d 309 [2nd Dept. 2005] [emphasis added]).

See also LIPA Act; Public Authorities Law §§ 1020-a; 1020-P(2); Public Authorities Law § 1685; *New York State Dormitory Authority v Board of Trustees of Hyde Park Fire and Water Dist.*, 86 NY2d 72 (1995); *Elmwood-Utica Houses, Inc. v Buffalo Sewer Authority*, 65 NY2d 489 (1985).

Defendants also argue, a finding should be made in favor of the defendants under the "balancing of public interest" test. Defendants' position is misplaced. This test was adopted by the Court of Appeals in *Matter of the County of Monroe (City of Rochester)*, 72 NY2d 338, (1988) and contemplates a thorough examination and a balancing of the several enumerated factors deemed necessary and material by the Court of Appeals in determining the competing interests of municipalities with respect to the land use project at issue in an action. In that case, the Court of Appeals held that the Rochester City Code and permit requirements did not apply to the County of Monroe's expansion of a county airport situated within the city limits.

In *City of New York v Long Island Power Authority*, 14 AD3d 642, 643 (2005) the court concluded that LILCO, the predecessor to LIPA, had the responsibility to pay all costs associated with removal, protection and relocation work for defendants' utility equipment during the municipal public works projects. In *City of New York v LILCO, supra*, the utility was

responsible for rectifying any burden it may have imposed on the City.

The record before the court demonstrates that the defendants did not bill OMH, SCC, the Wingate Inn or the NYPA for sewer service rental until after they actually connected to the District's sewer system and sewage began to flow into the District's sewer system. The District's practice and procedure was to bill subsequent owners of the part of the subject property only after they connected to the District's sewer facilities. The plaintiff asserts that it is incredulous that the District began billing LIPA in 2005, retroactive to 2003, based upon the unilateral decision of an accountant in DPW's offices, who had nothing to do with negotiating or drafting the 1991 Connection Agreement, did not understand what, if any, methodology should be applied if more than one user was located on an individual parcel and who only "assumed" LIPA, a non-user was subject to the 1991 Connection Agreement because the tax records showed that LIPA owned a portion of one of the four parcels formerly known as the Pilgrim State Premises. Moreover, plaintiff contends the huge sums sought to be collected from LIPA are all the more improper when considering Subsection (ii)(b) of Schedule C, which provides that the *ad valorem* charge should be based on the "assessed value of square footage and acreage of the use" of the Excess capacity reserved for those other than the OMH. Moreover, according to Mr. Clausen, the *ad valorem* charges imposed on LIPA are based on an *ad valorem* assessment calculated by and received from the Town of Islip Assessor's Office, namely, \$16,715,000 which is the value of LIPA's land and the improvements. The Assessor's Office was apparently not aware, until recently, that the assessed value it placed on LIPA's property was being used by the District as a basis for imposing an *ad valorem* sewer use charge on LIPA. The Town of Islip Assessor produced a "post-it" upon which he had written "1 m pr megawatt" and explained that he reached the assessed value of LIPA's Property by multiplying the 79.9 megawatts by an estimated \$1 million per megawatt and then applied the Town of Islip equalization rate to arrive at \$16,715,000 as the assessed value. See Deposition Testimony of Ronald F. Devine, Jr., Town of Islip Assessor, Tr. 9-11, 20, annexed as Exhibit 25 to plaintiff's motion. A copy of the handwritten note ostensibly providing the basis for calculating the assessed value of LIPA's Property is annexed as Exhibit 26 to plaintiff's motion. The Town of Islip lists the subject property as tax exempt on its tax rolls and LIPA has voluntarily made payments in lieu of taxes in accordance with a PILOT agreement with the Town of Islip.

handwritten note ostensibly providing the basis for calculating the assessed value of LIPA's Property is annexed as Exhibit 26 to plaintiff's motion. The Town of Islip lists the subject property as tax exempt on its tax rolls and LIPA has voluntarily made payments in lieu of taxes in accordance with a PILOT agreement with the Town of Islip.


After lengthy discovery, including depositions, other than the statement by Mr. Hoefer that there are two bathrooms at the power plant with an on-site septic tank for disposal of sewage generated on the property, there is no documentary evidence before the court to refute plaintiff's assertion that the property is not connected to, and LIPA does not use or benefit from the District's sewer facility. See *Chelsea Piers Management, Inc. v Chapin*, 7 AD3d 389 (1st Dept. 2004); *Rock Hill Sewerage Disposal Corp. v Town of Thompson*, 27 AD2d 626 (3rd Dept. 1966). Defendants have cited no statute or case for authority to allow the defendants to impose a special *ad valorem* levy on the plaintiff simply because the plaintiff installed a septic tank on the premises and is not hooked up to the sewer system.

Defendants are precluded from imposing *ad valorem* sewer assessments on LIPA. The charges or fees levied against LIPA in connection with the subject property are unlawful and improper under statutory and common law. The plaintiff's application for a mandatory injunction is granted only to the extent that in the future the defendants are precluded from imposing a special *ad valorem* levy on LIPA for which LIPA receives no benefit. See *New York Telephone Co. v Town Supervisor*, 7 NY3d 387 (2005); see also *Applebaum v Town of Oyster Bay*, 176 AD2d 773 (2nd Dept. 1991). The balance of the plaintiff's summary judgment motion is granted.

Defendants's cross motion for summary judgment is denied.

This decision is the order of the Court.

Dated: February 23, 2011



J.S.C.

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