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SHORT FORM ORDER

INDEX No. 13-20909

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 7-7-15
ADJ. DATE
Mot. Seq. # 001 - MotD
002 - XMD

LONG ISLAND POWER AUTHORITY,

Plaintiff,

- against -

TOWN OF SOUTHAMPTON,

Defendant.

SIVE PAGET & RIESEL, P.C.
Attorney for Plaintiff
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New York, New York 10022

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the plaintiff, dated June 11, 2015, and supporting papers 1 - 18 (including Memorandum of Law dated June 10, 2015); (2) Notice of Cross Motion by the defendant, dated June 30, 2015, and supporting papers 19 - 24 (including Memorandum of Law dated June 30, 2015) ; (3) Reply Affirmation by the plaintiff, dated July 6, 2015, and supporting papers 25 - 31 (including Memorandum of Law dated July 6, 2015); (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by plaintiff Long Island Power Authority for an order pursuant to CPLR 3212 granting summary judgment on the plaintiff's claims in their entirety and dismissing the defendant's counterclaims, and pursuant to CPLR 5104 and Judiciary Law § 753 holding the defendant Town of Southampton in civil contempt, is granted to the extent that the parties are directed to appear for a hearing to determine whether the defendant Town of Southampton should be held in civil contempt for disobedience to a lawful order of this court as set forth herein; and it is further

ORDERED that the cross motion by the defendant Town of Southampton for an order pursuant to CPLR 3212 granting summary judgment in its favor is denied; and it is further

ORDERED that a Conference will be held on **April 19, 2016**, at 2:30 p.m., in the Courtroom of the undersigned, located at One Court Street, Room A-257, Riverhead, New York 11901, at which all parties are directed to appear and to be prepared to disclose the names of witnesses, exchange of

documentary evidence and all other issues related to the hearing on the question of whether the Town of Southampton should be held in civil contempt.

This hybrid action/special proceeding arises out of prior litigation between the parties regarding the plaintiff Long Island Power Authority's (LIPA's) plans, circa 2008, to place an electrical transmission line between the villages of Bridgehampton and Southampton, New York. The defendant Town of Southampton (the Town) commenced an CPLR article 78 proceeding on April 17, 2008 challenging LIPA's determination to place approximately 45% of said line above ground arguing, among other things, that it disturbed the visual aesthetics of the village.[1] After extensive negotiations, the parties settled the special proceeding by stipulation so-ordered by the undersigned on May 15, 2008 (the stipulation). In summary, the stipulation required LIPA to place the entire transmission line underground, permitted LIPA to bill the electric customers who benefitted from said work for the extra cost of burying the line, and set forth a mechanism by which the Town would indemnify and pay LIPA for any amount not collected from said customers. Said additional billing of LIPA's electric customers was designated as a "visual benefits assessment" (VBA) pursuant to the stipulation.

LIPA commenced this hybrid action on August 16, 2013 alleging that the Town has failed to remit payment on an annual basis for LIPA's unrecovered costs (VBAs) pursuant to the stipulation. In its complaint, LIPA sets forth causes of action for breach of contract, indemnification, and civil contempt. The Town's answer sets forth five affirmative defenses, and asserts two counterclaims for LIPA's alleged violations of the Town Code of the Town of Southampton (Town Code) regarding lighting and utility poles in the village. The Town's affirmative defenses are: (1) failure to file a timely notice of claim pursuant to Town Law § 65[3]; (2) failure to timely file suit pursuant to Town Law § 65[3]; (3) failure to comply with a contractual condition precedent; (4) that the Town acted in good faith; and (5) failure to state a cause of action.

It is undisputed that LIPA completed the work of placing the entire transmission line underground, that LIPA delivered some form of requests for payment to the Town for LIPA's unrecovered costs for the years 2009, 2010, 2012, and 2013, and that the Town has not paid any amount to LIPA pursuant to those requests. In addition, LIPA delivered additional requests for payment to the Town for the years 2014 and 2015 which have not been paid.

LIPA now moves for summary judgment in its favor on its claims, and for an order holding the Town in civil contempt. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). CPLR 3212(b) provides in pertinent part: "A motion for summary judgment shall be supported by affidavit ... and by other available proof ... and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit." Therefore, to succeed on a motion for summary judgment the

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[1] *Town of Southampton v Long Island Power Authority,* Index No. 08-15359, Supreme Court, Suffolk County).

plaintiff must demonstrate the absence of triable issues of fact on every issue raised by the pleadings, and that any affirmative defenses and the counterclaims in the answer have no merit (*see* ***Hoffman v Wyckoff Hgts. Med. Ctr.***, 129 AD3d 526, 11 NYS3d 154 [1st Dept 2015]; ***Aimatop Rest., Inc. v Liberty Mut. Fire Insurance. Co.***, 74 AD2d 516, 425 NYS2d 8 [1st Dept 1980]; ***Stone v Continental Insurance. Co.***, 234 AD2d 282, 650 NYS2d 772 [2d Dept 1996]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trail of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

In support of its motion, LIPA submits, among other things, the pleadings, the affidavits of two of its employees, and the Town's response to interrogatories. In his affidavit, John Little (Little) swears that he is the director of strategic planning and rates for LIPA, that as of the filing of this hybrid action in August 2013 the Town owed LIPA $201,496.45 in unpaid VBAs, and that he sent the Town an updated list of unpaid VBA charges for the years 2009 to 2013 on April 10, 2014 totaling $290,275.32. He states that he sent the Town an updated list of unpaid VBA charges for the years 2009 to 2014 on April 10, 2015 totaling $386,457.75.

In his affidavit, Fred Vaupel (Vaupel) swears that he was employed by National Grid Electric Services LLC from August 2007 to June 2011, and that in that capacity he worked as a service provider with LIPA. He states that it is his understanding that the Town brought a counterclaim against LIPA in September 2013 alleging that LIPA failed to repair or remove a number of "double poles" that the Town had brought to LIPA's attention in January 2011. He indicates that LIPA had completed its inspection of the subject utility poles by February 9, 2011, and that LIPA had completed all of the required work on said poles by April 5, 2011. Vaupel further swears that his correspondence to the Town dated April 5, 2011 indicating that all work on said poles had been completed was the last correspondence between the Town and LIPA regarding the issue.

In the first affirmative defense, the Town alleges that LIPA failed to file a timely notice of claim pursuant to Town Law § 65[3]. Said statute provides in pertinent part that no action shall be maintained against a town upon or arising out of a contract entered into by the town unless the same shall be commenced within eighteen months after the cause of action thereof shall have accrued, and unless a written verified claim shall have been filed with the town clerk within six months after the cause of action shall have accrued, but no such action shall be brought upon any such claim until forty days have elapsed after the filing of the claim in the office of the town clerk. The record reveals, and it is undisputed, that by letter dated June 20, 2013 LIPA served a written notice of claim upon the Town regarding its breach of contract and contractual indemnification claims for the years 2009, 2010, 2011, and 2012 which was filed in the Town Clerk's office on June 26, 2013, and that said letter contained a certified copy of the stipulation pursuant to CPLR 5104.

Here, the stipulation provides in its seventh whereas clause that the Town "will act as the guarantor of the actual incremental costs associated with undergrounding (*sic*) the 45% of the transmission line," and sets forth the mechanism for the payment of said costs as follows:

> 8. Within 31 days of the end of each calendar year, LIPA shall provide the Town with a list, by meter, of each customer that failed to pay all or any portion of the VBA during that period, specifying each VBA not paid, in whole or in part, by date and amount not paid, and shall also include the name and address of the account holder, and to the extent known by LIPA, the name of the property owner.
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> 9. The Town shall have 30 days upon receipt of all of the materials required to be provided by LIPA under paragraph 8 above to review these materials to determine the appropriateness of LIPA's allocation of payments to the VBA and remit to LIPA payment of undisputed, uncollected VBA amounts and a statement of any challenged allocation of the VBA.
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> 10. LIPA shall have 30 days upon receipt of the Town's statement under paragraph 9 above to provide the Town with any additional information to support its claim for these challenged charges and if acceptable to the Town, which acceptance shall not be unreasonably withheld, the Town will remit payment for these charges within 30 days.

It is undisputed that paragraph 8 of the stipulation was amended by agreement of the parties on March 1, 2010 to require LIPA to provide the required information by March 31 of each following calendar year regarding the amount claimed to be due from the Town. It is also undisputed that, setting aside any other issues, the Town did not make the payments due on or about April 30, 2010, April 30, 2011, and April 30, 2012 for the years 2009, 2010, and 2011, and that each of those dates falls more than six months before LIPA's filing of a notice of claim herein. It is well settled that the timely filing of a notice of claim is a condition precedent to the maintenance of an action against a town arising out of the contractual relationship between a plaintiff and a town (***W.O.R.C. Realty Corp. v Town of Islip***, 104 AD3d 677, 960 NYS2d 448 [2d Dept 2013]; ***McCulloch v Town of Milan***, 74 AD3d 1034, 907 NYS2d 19 [2d Dept 2010]). It is determined that LIPA's causes of action for breach of contract and indemnification for the years 2009, 2010, and 2011 are time-barred pursuant to Town Law § 65(3) for the failure to timely file a notice of claim with the Town for the amount allegedly due for those years.

However, it is well settled that when an obligation is due in installments "there are separate causes of action for each installment accrued, and the statute of limitations begins to run on the date each installment becomes due and is defaulted upon ..." (***Morrison v Zaglool***, 88 AD3d 856, 931 NYS2d 81 [2d Dept 2011]; ***Sce v Ach***, 56 AD3d at 457, 867 NYS2d 140 [2d Dept 2008]). It is undisputed, in fact the Town implicitly admits, that LIPA's notice of claim filed on June 26, 2013 was timely regarding LIPA's claim for monies due for 2012. In addition, the record reveals that LIPA timely served two

additional notices of claim for the amount allegedly due for the years 2013 and 2014.[2] Nonetheless, the Town contends that the VBA payments allegedly due for 2013 and 2014 "are not properly before this Court."

It has been held that summary judgment may be awarded on an unpleaded cause of action (***E. Tetz & Sons, Inc. v Polo Elec. Corp.***, 129 AD3d 1014, 12 NYS3d 224 [2d Dept 2015]; ***Boyle v Marsh & McLennan County of Suffolk., Inc.***, 50 AD3d 1587, 856 NYS2d 428 [4th Dept 2008]). In the first cause of action for breach of contract, LIPA alleges that "[t]he Town has failed to reimburse LIPA on an annual basis for LIPA's unrecovered incremental costs associated with burying the Southampton to Bridgehampton power transmission line." In the second cause of action for contractual indemnification, LIPA alleges that "the Town is required to indemnify LIPA for unrecovered incremental costs associated with burying the Southampton to Bridgehampton power transmission line." It is determined that the complaint adequately apprises the Town that LIPA's first and second causes of action seek damages for the failure to pay the annual installments allegedly due under the stipulation and the issues are properly before this Court. Regardless, a party may raise even a completely unpleaded issue on summary judgment, as long as other party is not taken by surprise and does not suffer prejudice (***Valenti v Camins***, 95 AD3d 519, 943 NYS2d 504 [1st Dept 2012]). Here, the Town has failed to indicate, and the undersigned cannot discern, any prejudice to the Town in determining whether any payments are due for the years 2013 and 2014. Accordingly, LIPA's causes of action for breach of contract and contractual indemnification for the years 2009, 2010, and 2011 are dismissed, and said causes of action for the years 2012 and beyond may be maintained.

Here, LIPA has failed to establish its prima facie entitlement to summary judgment on its first and second causes of action. LIPA has failed to submit any evidence as to when, and in what form and manner, it supplied the list of information required under paragraph 8 of the stipulation and amended stipulation. In its complaint, LIPA alleges that it sent the Town the required list on April 1, 2010, sent an "invoice" dated May 21, 2011, and sent the required list on or about April 20, 2012. However, the Town has denied each of those allegations in its answer and, as noted above, LIPA has not submitted evidence to resolve the issue as a matter of law. Failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Alvarez v Prospect Hospital.***, *supra*; ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]). Accordingly, that branch of LIPA's motion which seeks summary judgment on its causes of action for breach of contract and indemnification is denied.

In light of the determination above, the Town's second affirmative defense, which correctly alleges that LIPA failed to bring suit within the 18-month period set forth in Town Law § 65(3) for the payments allegedly due for 2009 and 2010 is deemed academic. In its third affirmative defense, the Town alleges that LIPA failed to satisfy a condition precedent of the stipulation. Setting aside for the purposes of this motion only the bare nature of the allegation, LIPA has failed to address the issue in its submission requiring a denial of that branch of its motion for summary judgment on its first and second

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[2] As of the date of this decision, the mechanism set forth in the stipulation for the payment of VBAs for the year 2015 has not been triggered.

cause of action (*see* ***Hoffman v Wyckoff Hgts. Med. Ctr.***, *supra*; ***Aimatop Rest., Inc. v Liberty Mut. Fire Insurance. Co.***, *supra*; ***Stone v Continental Insurance. Co.***, *supra*).

The Town's fourth affirmative defense alleges that the Town "has acted in good faith regarding a legitimate dispute about the amounts due and owing [LIPA], thus precluding relief under [LIPA's cause of action for contempt]." For reasons that will become obvious, the undersigned will address this issue below. The Town's fifth affirmative defense contends that the complaint fails to state a cause of action. In examining the sufficiency of the pleading, the Court must accept the facts alleged therein as true and interpret them in the light most favorable to the [pleader] (***DelBene v Estes***, 52 AD3d 647, 860 NYS2d 612 [2d Dept 2008] *application dism* 11 NY3d 808, 591 NYS2d 28; ***Danna v Malco Realty, Inc.***, 51 AD3d 621, 857 NYS2d 688 [2d Dept 2008]. The Town fails to address this issue in its opposition to the Trust's motion. Here, a review of the complaint reveals that LIPA has plead cognizable causes of action for breach of contract, contractual indemnification, and contempt. Accordingly, the Town's fifth affirmative defense is dismissed.

The Town's first counterclaim alleges that LIPA violated Sections 330-342 and 330-346 of the Town Code regarding outdoor lighting, that a notice of violation was issued to LIPA on June 28, 2013, and that "[t]o date, LIPA has failed to bring all of its lights into compliance with the Town Code." It is undisputed that LIPA removed the lights which were the subject of the notice of violation and that the matter was dismissed in the Town Justice Court on June 5, 2015. Accordingly, the Town's first counterclaim is dismissed as academic.

The Town's second counterclaim alleges that the Town "began communicating with LIPA regarding several of its utility poles which were not in compliance with the Town Code," that LIPA never sufficiently addressed the issue, and that "[t]o date, LIPA has failed to bring all of its utility poles into compliance with the Town Code." In his affidavit, Vaupel swears that the work on the subject poles was completed by April 5, 2011, and the Town has indicated that "[t]he Town is now satisfied that all double wood poles have been removed" in its opposition to the motion. Accordingly, the Town's second counterclaim is dismissed.

The Court now turns to that branch of LIPA's motion for summary judgment on the third cause of action under CPLR 5104 and Judiciary Law § 753 for an order enforcing the order of the court embodied in the so-ordered stipulation, and for a ruling holding the Town in civil contempt for its alleged disobedience in failing to indemnify and reimburse LIPA as required therein. CPLR 5104 provides that "[a]ny interlocutory or final judgment or order, or any part thereof, not enforceable under either article fifty-two or section 5102 may be enforced by serving a certified copy of the judgment or order upon the party or other person required thereby or by law to obey it and, if he refuses or wilfully neglects to obey it, by punishing him for a contempt of the court. As set forth above, it is undisputed that LIPA served a certified copy of the so-ordered stipulation upon the Town by letter dated June 20, 2013.

Judiciary Law § 753 provides that:

> A. A court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, in any of the following cases:
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> 3. A party to the action or special proceeding, an attorney, counsellor, or other person, for the non-payment of a sum of money, ordered or adjudged by the court to be paid, in a case where by law execution can not be awarded for the collection of such sum except as otherwise specifically provided by the civil practice law and rules; or for any other disobedience to a lawful mandate of the court.

To prevail on a motion to punish for civil contempt, the movant must demonstrate that the alleged contemnor disobeyed "a lawful judicial order expressing an unequivocal mandate" (***McCain v Dinkins***, 84 NY2d 216, 226, 616 NYS2d 335 [1994]), that the alleged contemnor had knowledge of such order, and that the offending conduct defeated, impaired, impeded or prejudiced a right of another party to the litigation (*see* Judiciary Law §753; ***DeMaio v Capozello***, 114 AD2d 899, 981 NYS2d 121 [2d Dept 2014]; ***El-Dehdan v El-Dehdan***, 114 AD3d 4, 978 NYS2d 239 [2d Dept 2013]). It is not necessary that the disobedience is deliberate, as the mere act of disobeying is sufficient if such disobedience defeats, impairs, impedes or prejudices the rights of a party (*see* ***Matter of Philie v Singer***, 79 AD3d 1041, 913 NYS2d 745 [2d Dept 2010]; ***Bais Yoel Ohel Feige v Congregation Yetev D'Satmar of Kiryas Joel, Inc.***, 78 AD3d 626, 910 NYS2d 174 [2d Dept 2010]). The burden of proof is on the party seeking a contempt order, and the contempt must be established by clear and convincing evidence (*see* ***Penavic v Penavic***, 109 AD3d 648, 972 NYS2d 269 [2d Dept 2013]; ***Gomes v Gomes***, 106 AD3d 868, 965 NYS2d 187 [2d Dept 2013]).

In addition, "Judiciary Law § 773 permits recovery of attorney's fees from the offending party by a party aggrieved by the contemptuous conduct . . . [C]ounsel fees that are documented and directly related to contemptuous conduct are generally recoverable unless proven excessive or reduced in a court's reasoned decision" (***Vider v Vider***, 85 AD3d 906, 908, 925 NYS2d 189, 192 [2d Dept 2011] [internal quotation marks and citations omitted]). It has been held that the intent of Judiciary Law § 773 is "to indemnify the aggrieved party for costs and expenses incurred as a result of the contempt" (***Children's Vil. v Greenburgh Eleven Teachers' Union Fedn. of Teachers, Local 1532, AFT, AFL-CIO***, 249 AD2d 435, 435, 671 NYS2d 503, 503 [2d Dept 1998]).

Here, neither party has established whether the so-ordered stipulation can be deemed unequivocal regarding the obligation of the Town to pay the unrecovered VBAs. In the fourth affirmative defense, the Town alleges that it acted in good faith regarding a legitimate dispute about the amounts due and owing, precluding the granting of relief under LIPA's cause of action for contempt. It appears that the Town's allegation involves the questions whether LIPA provided the lists required pursuant to paragraph 8 of the stipulation for the years in question and, if not, whether the Town acted in

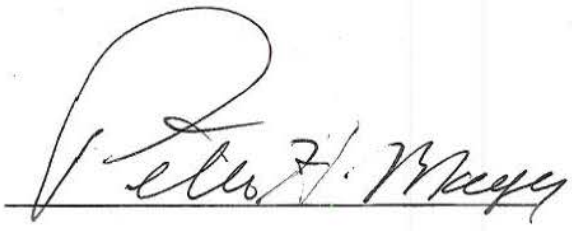
good faith in its response to that alleged failure. LIPA has not established by clear and convincing evidence that the Town's actions were without justification, excuse or reason for non-compliance for the years 2009 through 2012. Nonetheless, the Town admits that LIPA has delivered the required list and information pursuant to the stipulation for 2013 and 2014, and the Town does not dispute that it has not paid those charges or questioned the appropriateness thereof. Thus, there is a question whether the Town has disobeyed a lawful court order and, if so, the amount due for said charges and the amount due for LIPA's reasonable attorney's fees.

Nonetheless, the Town cross-moves for summary judgment in its favor. In support of the motion, the Town submits the affirmation of its attorney, a copy of the notice of claim filed by LIPA with the Clerk of the Town of Southampton on July 22, 2014, and LIPA's response to the Town's Notice of Discovery and Inspection dated January 6, 2014. The affidavit of the attorney for the Town, who has no personal knowledge of the facts herein, is insufficient on a motion for summary judgment (***Sanbria v Paduch***, 61 AD3d 839, 876 NYS2d 874 [2d Dept 2009]; ***Warrington v Ryder Truck Rental, Inc.***, 35 AD3d 455, 826 NYS2d 152 [2d Dept 2006]). The Town has failed to submit any evidence regarding its allegations that it acted in good faith relative to its contractual or legal obligations under the stipulation, whether it was able to determine if any portion of LIPA's requests for payment were "appropriate" under the stipulation, and why its has failed to pay any amount over the six years which are the subject of this motion and cross motion.

In addition, defendant moving for summary judgment cannot satisfy its initial burden of establishing his or her entitlement thereto merely by pointing to gaps in the plaintiff's case (***Coastal Sheet Metal Corp. v Martin Assoc., Inc.***, 63 AD3d 617, 881 NYS2d 424 [1st Dept 2009]; *see also* ***Tsekhanovskaya v Starrett City, Inc.***, 90 AD3d 909, 935 NYS2d 128 [2d Dept 2011]). Accordingly, the Town's cross motion for summary judgment is denied.

Accordingly, that branch of LIPA's motion which seeks summary judgment on the third cause of action is granted to the extent that the parties are directed to appear for a hearing as set forth herein. It appears that LIPA's causes of action for breach of contract and contractual indemnification will become academic should LIPA be granted the relief requested pursuant to said third cause of action.

Dated: March 7, 2016



PETER H. MAYER, J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**