GMMM Westover LLC v New York State Elec. & Gas Corp.
2016 NY Slip Op 32881(U)
December 6, 2016
Supreme Court, Broome County
Docket Number: 2015-0449
Judge: Jeffrey A. Tait
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At a Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Broome County Courthouse, in the City of Binghamton, New York on the 2nd day of September 2016.

PRESENT: HONORABLE JEFFREY A. TAIT
JUSTICE PRESIDING

STATE OF NEW YORK
SUPREME COURT : COUNTY OF BROOME

GMMM WESTOVER LLC,

Petitioner,

vs.

NEW YORK STATE ELECTRIC AND GAS CORPORATION,

Respondent.

DECISION AND ORDER
Index No.: 2015-0449
RJI No.: 2015-0227-M

APPEARANCES:

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HON. JEFFREY A. TAIT, J.S.C.

This matter is before the Court on the motion by Order to Show Cause filed by New York State Electric and Gas Corporation (NYSEG) seeking leave to reargue and clarify this Court's Decision and Order dated June 2, 2016. GMMM Westover LLC opposes the motion.

Background

This is one of those situations where the relationship of the parties has deteriorated to the point that each is looking to enforce the strict language of the applicable agreements even if that does not comport with their likely, or at least logical and practical, intent when they entered into those agreements.

How did we get to this point? It certainly appears we arrived here as follows:

GMMM acquired the property with the avowed purpose of demolishing it, selling the material from the demolished building, and then developing or selling the site for some alternate use. Before they could do that, everyone was aware NYSEG had live electrical and/or transmission equipment in the former coal fired power generating facility (known as Goudey Station) on the property which had to be removed and relocated. Agreements were negotiated and signed, bankruptcy court proceedings occurred, and orders were issued.

Several agreements control and govern the relationship of these parties. As pertinent here, they include: the Interconnection Agreement (ICA), the Amended and Restated Reciprocal Easement Agreement (REA), the Settlement Agreement Resolving Transmission and Interconnection Issues, and the Assignment and Assumption Agreement.

The ICA and the REA governed the relationship between NYSEG and the separate entity that purchased and then operated the former NYSEG power generating facility known as Goudey Station. The ICA governed how the power generating facility would be connected and provide electric power to be transmitted over to the NYSEG transmission system. The REA provided easements and related property rights needed for the parties to conduct certain operations on the property. The Settlement Agreement Resolving Transmission and Interconnection Issues provided terms by which the Goudey Station[1] would be sold or transferred as part of a bankruptcy proceeding. The Assignment and Assumption Agreement provided terms by which purchaser GMMM acquired the Goudey Station facility and property and its rights and obligations in connection therewith.

The Assignment and Assumption Agreement provided that GMMM assumed certain rights and obligations of the Settlement Agreement. The Settlement Agreement identified what is referred to as the "Separation Project." That project is the separation of NYSEG's "Transmission System from the GMMM property" by what was referred to as the 'Project

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And other former NYSEG power generating facilities.

Completion Date.'" The "Project Completion Date" was ***the earlier of*** (emphasis added) completion of the separation of the transmission system from the former coal fired power generating building or October 14, 2014.[2]

The Project Completion Date came and went and NYSEG's live electrical and/or transmission equipment remained in the building. GMMM became impatient and pressed for completion of the project and unfettered access to its building. NYSEG resisted, citing an inability to complete the project and noting that it was continuing to pay the costs of maintaining the property. Eventually, GMMM's impatience came to a head and it commenced this proceeding to force NYSEG from the premises based on several alternative theories. In response, NYSEG raised several procedural and substantive objections.

It is at this point that the parsing of the language of the numerous agreements, orders, and documents began in earnest.

GMMM asserted that the Settlement Agreement Resolving Transmission and Interconnection Issues and the Assignment and Assumption Agreement together provide that NYSEG's time to complete the Separation Project has expired and it is entitled to unfettered access to the building.

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2 Which is twenty-two (22) months from the Deemed Rejection Date, as set forth in the agreement. The Deemed Rejection Date is the date established by the Bankruptcy Court on which the ICA is deemed rejected.

In response, NYSEG argued that a careful reading of the two agreements reveals that the "Project Completion Date" is not a date for completion of the project. Rather, it is the date when NYSEG must pay the carrying costs of the property for as long as its Transmission Equipment remains in place. NYSEG takes the position that, under these circumstances, it could, if it wanted, leave its Transmission Equipment in place for as long as it chose – though it did not actually plan to do that. Despite this, NYSEG consistently stated it would remove the Transmission Equipment as soon as possible.

Surprised by this interpretation of the agreements, GMMM noted that after the Project Completion Date it is excused from certain obligations – namely, the obligation to maintain the facility (§ 2.5) and the duties to cooperate with NYSEG (§ 2.6), coordinate regarding demolition (§ 2.7), and condition any sale on the buyer's assumption of these obligations (§ 2.8). GMMM's point is that, under these circumstances, NYSEG's interpretation that it could leave its Transmission Equipment in place and operational as long as it wanted could hardly have been what the parties intended when they entered into these agreements. Rather, GMMM believes the agreements establish that the parties intended that NYSEG's Transmission Equipment would be removed or separated from the building after that date and GMMM would be free to demolish the building.

All parties agree that the Transmission Equipment and other NYSEG facilities or equipment on the property are there by virtue of pre-existing agreements, one of which is the REA. GMMM contends the REA is no longer in effect, as it was terminated when the ICA was deemed rejected as part of a Bankruptcy Court proceeding. NYSEG contends the REA

survives, as there is nothing that specifically directs that it is terminated and, even if there were, it survives by virtue of the Bankruptcy Court Approved Deed to GMMM, which includes a provision providing the transfer is subject to the REA.

This Court's Decision and Order dated June 2, 2016 holds that the REA is no longer in effect as it expired with the ICA and the fact that it is referred to in the deed does not change that conclusion. The rationale behind that Decision and Order is set forth therein and will not be repeated here.

Law

Pursuant to CPLR 2221(d), a motion for leave to reargue:

1. shall be identified specifically as such;
2. shall be based on matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include matters of fact not offered on the prior motion; and
3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry.

"A motion for reargument is addressed to the sound discretion of the court and may be granted upon a showing that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law. It is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented" (*McGill v. Goldman*, 261 AD2d 593 [2d Dept 1999] [internal citations omitted]; *see Wasson v. Bond*, 134 AD3d 1224, 1225 [3d Dept 2015], citing *Blair v. Allstate Indem. Co.*, 124 AD3d 1224 [4th Dept 2015]).

Where, as here, the Court actually addresses the merits on a motion for reargument, such motion is deemed granted (*Rodriguez v. Jacoby & Meyers, LLP*, 126 AD3d 1183 [3d Dept 2015]). The real issue is whether the Court will adhere to or modify the prior Decision and Order.

Analysis

What is now crystal clear is that NYSEG has two parcels of property that are surrounded by the GMMM property, rendering them effectively landlocked.[3] What also seems clear is that NYSEG does not have a defined metes and bounds described easement providing it access to these parcels. Instead, NYSEG relies on the broad language of the REA to provide its right of access to these parcels. If the prior Decision and Order holding that the REA is no longer in effect stands unmodified, NYSEG does not have any practical access to the parcels.[4]

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3 It was clear before that NYSEG had fee owned property bordering the GMMM property. The Court was not clear and did not appreciate that it was effectively landlocked unless the REA provided an easement for ingress to and egress from it.

4 It appears both parcels have frontage on the Susquehanna River. Access could be achieved by small boat via the riverfront, which assumes NYSEG can achieve access to the river elsewhere and navigate to the parcels via the river. There is nothing in the record to indicate this is practical or affords effective access for NYSEG's needs.

There are numerous easements of record in favor of NYSEG that exist over the GMMM property apart from those in the REA. What the Court did not realize when it issued the June 2, 2016 Decision and Order is that none of these provides access to the two NYSEG fee owned parcels to maintain and service the equipment and facilities there.

The question is not whether the parties intended that the Separation Project would be completed by October 14, 2014 at the latest, NYSEG would have all of its Transmission Equipment removed from the building, GMMM would have control of the building and could demolish it, and NYSEG would have access to its parcels located inside the GMMM property. They did. Did they actually provide that in the applicable agreements? Not so clear.

In light of this and the inclusion of language in the Bankruptcy Court Approved Deed that the transfer to GMMM is subject to the REA, the REA survives and the parties have whatever respective rights and obligations it provides except as may be affected by the fact that the ICA is no longer in effect by reason of the bankruptcy court proceedings.

NYSEG acknowledges in a letter of its counsel that the ICA is no longer in effect, but asserts that "a key provision of the IA remains in effect via the REAs" (*see* Thomas Letter to Hon. Jeffrey A Tait dated August 19, 2015). That provision – § 3.1(a) of the REA – according to the letter, provides "an easement that: 1. permits any and all 'NYSEG Interconnection Facilities' and 'Excluded Assets' to remain in their present locations; and 2. permits NYSEG to use those Interconnection Facilities and Excluded Assets in the normal course of NYSEG's business, current and future."

NYSEG's position in this regard seems to be that despite the termination of the ICA, it still has the easements necessary to interconnect its transmission system with the power generating facility despite the fact the facility is no longer operating and it no longer has the right or obligation to connect to the facility or transmit power from it.

At this point, NYSEG asserts the REA provides them with easements for ingress and egress to its fee owned parcels. The fee owned parcels are described in the REA in Exhibit B and referred to in the REA as "NYSEG Property" (REA § 2.3[o]). The easements granted to NYSEG are set forth in REA § 3.1. Only two of them make substantive reference to NYSEG Property.[5]

There is language which states that except as provided in § 3.3(b), "each easement granted hereby is and shall be a perpetual grant, transfer, conveyance, and right of use, as well as an easement, subject to the terms of this Agreement, for the benefit of the Grantee, whether NYSEG or AEE . . ." (REA § 3.3[a]). REA § 3.3(b) provides:

> Any easement, license, right, or right of way granted for purposes of enabling a Party to exercise any right or fulfill any obligation set forth in the ICA will last for the term of the ICA or longer if the right or obligation either (i) survives the ICA, or (ii) is necessary for the conduct of business by a Party hereto or by a future owner of the Facilities, Property, and/or Improvements of a Party hereto.

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They are §§ 3.1(d) and 3.1(h).

Parsing this language provides that easements granted to NYSEG in the REA (REA § 3.3[a]):

are perpetual except as provided in REA § 3.3(b) (REA § 3.3[a]); and

are subject to the terms of the REA (REA § 3.3[a]); and

last for the term of the ICA (REA § 3.3[b])

or

last longer than the term of the ICA if the right or obligation either (REA § 3.3[b])

survives the ICA (REA § 3.3[b][i])

or

is necessary for the conduct of business by a Party [for these purposes, NYSEG] (REA § 3.3[b][ii])

Section 3.4 provides guidance on interpreting easements granted by the REA.

Neither §§ 3.3 nor 3.4 creates or establishes easements. Rather, § 3.3 defines the term of easements[6] and § 3.4 provides guidance in interpreting easements provided for elsewhere in the REA.

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6 It does provide the prospect that certain easements may survive the termination of the ICA.

The next focus is finding language in the REA or any other agreement that provides NYSEG with ingress and egress access to its fee owned parcels.

The grant of easements to NYSEG is in § 3.1 of the REA, which contains 13 separate subparagraphs – none of which provides a specifically referenced easement for ingress and egress to the NYSEG fee owned parcels. No party claims there is a metes and bounds described or delineated easement providing for such access. Section 3.1(a) provides an easement on GMMM property for Interconnection Facilities and Excluded Assets on GMMM property to remain there and be used by NYSEG. Section 3.1(b) provides an easement for Electric Facilities on GMMM property to remain there and be used by NYSEG. Section 3.1(c) provides an easement for Gas Facilities and Communication Facilities on GMMM property to remain there and be used by NYSEG. Section 3.1(d) provides an easement for Communication Facilities on GMMM property to remain there and be used by NYSEG. This is one of the two sections that refers to "NYSEG Property" and provides a right to have and maintain communications facilities connected to the NYSEG Property. Section 3.1(e) provides an easement for Substation Improvements on GMMM property to remain in their present locations and be used by NYSEG. Section 3.1(f) provides an easement on GMMM property for Revenue Meters and other described items to remain on GMMM property and be used by NYSEG. Section 3.1(g) provides an easement on GMMM property permitting future installation of items to connect to electrical substations owned by NYSEG and to use those items. Section 3.1(h) provides an easement for environmental investigation and remediation in connection with an Environmental Condition on GMMM property, NYSEG property, or

property of any third parties "arising from or interconnection with NYSEG's use or operation of NYSEG Property." This is the other section that refers to "NYSEG Property." As noted, it provides the right to perform environmental investigation and remediation. Section 3.1(i) provides an easement on GMMM property for drainage systems that serve the NYSEG Property. Section 3.1(j) provides an easement on GMMM property for grounding wire or conductors around the Substation Improvements and on the Buyer property to remain in their present location or be newly installed within 6 feet of the perimeter fence of the Substation Improvements and to use those items. Section 3.1(k) provides an easement permitting future installation of Communication Facilities on GMMM property and to use those items. Section 3.1(l) provides an easement "for all purposes deemed reasonably necessary or convenient by NYSEG in exercising any right or fulfilling any obligation under [the REA] or the ICA."[7] Section 3.1(m) provides an easement on GMMM property for temporary parking of vehicles and material in the exercise of any easement, license, right, or right of way under the REA.

In light of the foregoing, an easement for ingress to and egress from the NYSEG fee owned parcels, if there is one, will be found in general language. That requires reference to facts beyond the four corners of the REA, which cannot be resolved on a motion for summary determination. Given the circumstances present here, the Court is convinced there are fact

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7 As the ICA is no longer in effect by virtue of the bankruptcy, there may be no right or obligation for NYSEG to fulfill under it.

issues which preclude summary judgment in favor of either party on the existence of easements in favor of NYSEG for access to its fee owned property under the REA.

Conclusion

The motion to reargue is granted. The Decision and Order dated June 2, 2016 is modified as follows: The REA survives by virtue of the deed language providing that the grant is subject to the REA. There are fact issues regarding the existence, nature, and extent of any easement NYSEG claims for access to its fee owned property which prevent judgment in favor of either party on that issue.

This Decision shall also constitute the Order of the Court pursuant to rule 202.8(g) of the Uniform Rules for the New York State Trial Courts and it is deemed entered as of the date below. To commence the statutory time period for appeals as of right (CPLR 5513[a]), a copy of this Decision and Order, together with notice of entry, must be served upon all parties.

Dated: December 6, 2016
Binghamton, New York

HON. JEFFREY A. TAIT
Supreme Court Justice