Scan

SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

WASTE MANAGEMENT OF NEW YORK, LLC,	**TRIAL/IAS PART: 20 NASSAU COUNTY**
Plaintiff,	**Index No: 013515-09**
	Motion Seq. Nos: 2, 3, 4 and 5
-against-	**Submission Date: 5/18/11**
BANK OF NEW YORK MELLON, FRANKENMUTH MUTUAL INSURANCE COMPANY, and SANITARY DISTRICT NO. 1, TOWN OF HEMPSTEAD,	**Action No. 1**
Defendants.	
FRANKENMUTH MUTUAL INSURANCE COMPANY,	
Plaintiff,	
-against-	**Index No. 022253-09**
WASTE MANAGEMENT OF NEW YORK, L.L.C. and SANITARY DISTRICT NO. 1, TOWN OF HEMPSTEAD,	**Action No. 2**
Defendants.	

Papers Read on these Motions:

Notice of Motion.....x
Affirmation of Cohen in Support.....x
Frankenmuth and BONY's Rule 19-a(1) Statements.....x
Frankenmuth's Memorandum of Law in Support.....x
BONY Notice of Motion, Affirmation in Support and Exhibits...x
BONY Memorandum of Law in Support.....x
Waste Management's Notice of Motion, Affirmation in Support and Exhibits.....x
Waste Management's Rule 19-a Statement.....x
Waste Management's Memorandum of Law in Support.....x

Waste Management Exhibits.....x
District's Notice of Cross Motion,
Affidavit in Opposition/Support and Exhibits.....x
District's Memorandum of Law.....x
District's Response to Rule 19-a Statement.....x
Affirmation of P. Weinstein in Opposition and Exhibits.....x
BONY Memorandum of Law in Opposition/Further Support.....x
BONY Response to Waste Management's Rule 19-a Statement...x
Frankenmuth Memorandum of Law in Opposition.....x
Fihma Affirmation in Opposition and Exhibit.....x
Waste Management Memorandum of Law in Opposition.....x
Waste Management's Response to BONY and Frankenmuth
Rule 19-a Statements.....x
BONY Response to District's Rule 19-a Statement.....x
Weinstein Affirmation in Opposition and Exhibit.....x
BONY Reply Memorandum of Law in Support/Opposition.....x
Fihma Affirmation in Opposition and Exhibit.....x
Waste Management Response to District's Rule 19-a Statement..x
Waste Management Memorandum of Law in Opposition.....x
Waste Management Reply Memorandum of Law.....x
Cohen Affirmation in Opposition/Reply and Exhibits.....x
Frankenmuth Memorandum of Law in Opposition/Reply.....x
Frankenmuth's Rule 19-a Response to District's Statement.....x
Master List of Exhibits.....x

This matter is before the court on 1) the motion by Frankenmuth Mutual Insurance Company ("Frankenmuth"), filed on February 18, 2011 (motion sequence # 2), 2) the motion by Bank of New York Mellon ("BONY"), filed on February 18, 2011 (motion sequence # 3), 3) the motion by Waste Management of New York, LLC ("Waste Management"), filed on February 22, 2011 (motion sequence # 4), and 4) the cross motion by the District, filed on March 18, 2011 (motion sequence # 5), all of which were submitted on May 18, 2011, following oral argument before the Court. [1] For the reasons set forth below, the Court denies the motions.

BACKGROUND

A. Relief Sought

In motion sequence number 2, Frankenmuth moves for summary judgment 1) against the District on its claims and cross claims for breach of contract, promissory estoppel and unjust

[1] Although these two actions have not been formally consolidated under a single caption, the Court has directed that they shall be tried jointly.

enrichment against the District, and 2) against Waste Management on Frankenmuth's counterclaims, and on its claims set forth in the Frankenmuth Complaint against Waste Management.

In motion sequence number 3, BONY moves for an Order, pursuant to CPLR § 3212, 1) dismissing Waste Management's Complaint against BONY; 2) granting BONY judgment on its cross claims against the District; and 3) awarding BONY its costs and expenses, including reasonable attorney's fees, incurred in connection with the defense of this proceeding.

In motion sequence number 4, Waste Management moves for an Order, pursuant to CPLR § 3212, 1) as to Count One, directing a declaratory judgment that Waste Management owns and is immediately entitled to the funds in the Debt Service Reserve Fund ("Account"), which total at least $409,889.28, and that it is entitled to recover the $343,500 payment made on November 1, 2007, 2) as to Count Two, alleging unjust enrichment, directing that Defendants BONY and Frankenmuth were unjustly enriched in the amount of $343,500 based on the November 1, 2007 payment and by BONY's retention of the Account, and that those Defendants are liable for a money judgment to Waste Management in the amount of $343,500, plus the amount in the Account, 3) as to Count Three, alleging breach of contract, directing that BONY is liable to Waste Management for a money judgment of $343,500, plus the amount in the Account, and 4) as to Action No. 2, entering summary judgment in favor of Waste Management and against Frankenmuth on Counts One and Three, alleging breach of contract and promissory estoppel in connection with the Amended and Restated Lease.

In motion sequence number 5, the District cross moves for 1) an Order, pursuant to CPLR § 3212, dismissing the complaint of Waste Management in Action No. 1, 2) an Order, pursuant to CPLR § 3212, dismissing the First and Second Cross Claims of Waste Management as asserted in its Answer, Cross Claims and Counterclaims interposed in Action No. 2, 3) an Order, pursuant to CPLR § 3212, dismissing the complaint of Frankenmuth in Action No. 2, 4) an Order, pursuant to CPLR § 3212, dismissing Frankenmuth's Eighth Affirmative Defense and Cross Claims seeking relief against the District as contained in Frankenmuth's Answer and Cross Claims in Action No. 1, and 5) an Order, pursuant to CPLR § 3212, dismissing the First and Second Cross Claims of Defendant BONY.

B. The Parties' History

Action No. 1 was the subject of a prior decision of the Court dated December 3, 2009 ("Prior Decision") which addressed Frankenmuth's motion for dismissal of the Complaint ("Prior Motion"), and the Court incorporates the Prior Decision herein by reference. The Court provided the following background in the Prior Decision:

Waste Management seeks to recover a $343,450.00 payment that it made on October 30, 2007 to the District, which was forwarded to Defendant The Bank of New York Mellon, the Trustee, which allegedly released it to Frankenmuth as bond holder on November 1, 2007. Waste Management, which operated a solid waste disposal facility at property owned by the District, alleges that 1) an "Event of Operator Termination" occurred when the District terminated its services; 2) its obligations under its Service Agreement and Amended Lease with the District ended on August 14, 2006; and 3) Waste Management made the payment in error and is entitled to reimbursement for that payment.

The Complaint alleges as follows:

The Industrial Development Agency ("IDA") financed the construction of a solid waste disposal facility ("Facility") in Lawrence, New York via the issuance of $3,600,000 in revenue bonds, all of which Frankenmuth purchased. Payment on those bonds was due semi-annually, in May and November each year. The District leased the property to IDA, which in turn leased it to Waste Management's predecessor, Eastern Waste, and ultimately to Waste Management. Pursuant to a series of agreements, at various times, the rent on the facility was paid either to the District or directly to the Trustee to reduce the amount due on the bonds.

In its complaint, Waste Management tracks the history of the Facility and its relationship with the District. Waste Management alleges that, on the eve of the expiration of its agreement with the District, Waste Management and the District failed to reach a new agreement. By letter dated August 11, 2006, the District rejected Waste Management's proposed agreement and declared that "the current contractual arrangement between the District and [Waste Management] will expire at 5 p.m. on Monday, August 14, 2006, at which time the District expects [Waste Management] to remove its containers and vehicles; to remove the solid waste material pursuant to its contractual obligation and to surrender the Facility and equipment in the condition called for by the terms of the 'Fifth Amendment.' " In addition, the August 11, 2006

letter stated that "it would appear appropriate for [Waste Management] to notify the Trustee of the IDA bonds that the District will no longer be making monthly remittance on behalf of [Waste Management]." Waste Management alleges that this termination by the Sanitary District constituted an "Event of Operator Termination" under their agreement and that, pursuant to their agreement, Waste Management was no longer responsible for payments.

Waste Management alleges that it was the District's obligation to make the bond payments to the Trustee and that, following its termination, the District in fact continued to make those payments. Waste Management alleges, however, that nine months later, on May 14, 2007, the District notified the Trustee that it had been remitting those monthly bond payments merely as "an accommodation," "such monthly sum presumably representing the payment due from Waste Management towards the satisfaction of the reference bonds" (Compl. at ¶ 58) and that the District further advised the Trustee that its relationship with Waste Management had been terminated and that it would no longer remit payments on Waste Management's behalf. The District did not send a copy of this letter to Waste Management. Waste Management alleges that these representations were blatantly incorrect and that they were clearly refuted by the Fifth Amendment to their agreement, pursuant to which the District was contractually responsible for the bond payments to the Trustee.

In the Complaint, Waste Management further alleges that, in reliance on the District's May 14, 2007 correspondence, the Trustee made demand on Waste Management, via telephone on October 30, 2007, for a bond payment of $343,450.00 that was due on November 1, 2007. The Trustee also advised Waste Management that it would be in default if it did not make this payment to the Trustee. Waste Management alleges that, by virtue of its business and contractual relationships with the Trustee, the Trustee was in a position of trust with Waste Management. Based on the Trustee's representation that Waste Management would be in default if it did not make the payment, and because it did not have all of the pertinent documents necessary to assess its obligations, Waste Management made the payment, mistakenly believing that the monies that the Trustee sought related to the time period when Waste Management was operating the Facility, not to a subsequent time period. Waste Management further alleges that when the agreement was terminated, Waste Management was current on its payments and had no obligation to make any further payments. Waste Management alleges that once it realized its

error, it demanded that the Trustee return the monies but he never did. Waste Management also alleges, upon information and belief, that the Trustee distributed the funds to Frankenmuth as the bond holder. Waste Management additionally alleges that the Trustee maintains the Account, whose funds properly belong to Waste Management by virtue of Waste Management's status as successor to Eastern Waste of L.I., Inc., a company that previously entered into agreements related to the development and construction of the Facility. Waste Management specifically seeks to recover from this Account.

In the first cause of action in the Complaint, Waste Management seeks a declaratory judgment that 1) Waste Management owns the funds in the Account, including any accrued interest; 2) the Trustee must pay the funds in the Account, including any accrued interest, to Waste Management; 3) an Event of Operator Termination occurred under the Amended and Restated Lease as of August 14, 2006; 4) Waste Management had no contractual obligation to make the November 2007 payment; 5) Waste Management erroneously paid $343,450 to the Trustee in or about November 2007; 6) neither the Trustee nor Frankenmuth has the right to retain the $343,450 that Waste Management paid in or about November 2007; and 7) the Trustee and/or Frankenmuth must pay to Waste Management the sum of $343,450, representing funds that Waste Management erroneously paid.

In the second cause of action, Waste Management seeks to recover from the Trustee and Frankenmuth on a theory of unjust enrichment. In the third cause of action, Waste Management seeks to recover from the Trustee for breach of contract. In the fourth cause of action, Waste Management seeks to recover from the Trustee on a theory of promissory estoppel. And in the fifth cause of action, Waste Management seeks to recover from the District and the Trustee on a theory of negligent misrepresentation.

Frankenmuth's Prior Motion centered on the issue of whether there was an "Event of Operator Termination" as defined by the applicable agreements. The Court denied the Prior Motion, concluding, *inter alia*, that Frankenmuth had not definitively established that Waste Management was required to give notice and, assuming, *arguendo*, that Waste Management was required to give notice, there was an issue whether the District's three-day termination rendered it impossible for Waste Management to comply with the applicable notice provision.

The complaint in Action No. 2 (Ex. 8 to Master Exhibit List - Vol. 1) contains four (4) causes of action: 1) against Waste Management for breach of contract, 2) against the District for breach of contract, 3) against the District and Waste Management on a theory of promissory estoppel, and 4) against the District on a theory of unjust enrichment.

The determination of the motions *sub judice* involves the application of Section 24 of the IDA-District Lease (Ex. G to Fihma Aff. in Supp.), on which the District relies in support of its argument that it is absolved from financial responsibility for repayment of the Bonds. Section 24, titled "Executory Contract," provides as follows:

> Notwithstanding any other provision of this Agreement, (i) this Agreement shall be deemed executory only to the extent of the moneys budgeted and appropriated and available for the purpose of this Agreement, and no liability on account thereof shall be incurred by the District beyond the amount of such moneys, and (ii) it is understood that neither this Agreement nor any representation by any public employee or officer creates any legal or moral obligation to request, budget, appropriate or make available moneys for the purpose of this Agreement.

C. The Parties' Positions

Frankenmuth submits, *inter alia*, that 1) the District breached its contractual obligations under the Lease by failing to make required payments under the Lease and subletting the Facility; 2) pursuant to the Lease, the District is liable for costs and expenses incurred with respect to the enforcement of the obligations under the Lease; 3) as the sole holder of the Bonds, Frankenmuth is a third-party beneficiary to the obligations and agreements of the District pertaining to the Bonds and, therefore, is a third-party beneficiary of the Lease; 4) Section 24 of the Lease does not relieve the District of its obligations under the Lease; 5) assuming, *arguendo*, that the Court determines that Frankenmuth is not a third-party beneficiary of the agreements related to the Bond and the Facility, Frankenmuth is entitled to judgment on the grounds of promissory estoppel or unjust enrichment; 6) the Lease governs Waste Management's notice obligations; 7) Waste Management abandoned the Facility prior to the termination of the Services Agreement; 8) Waste Management intended to permanently cease operations at the Facility; 9) Waste Management failed to provide the required notice of its cessation of operations at the Facility; and 10) there was no Event of Operator Termination prior to the November 2007 Payment. In addition, Frankenmuth adopts BONY's arguments that 1) BONY,

and Frankenmuth by reference, properly retained the funds in the Account that were held in trust for Frankenmuth; and 2) Waste Management is not entitled to a refund of its November 2007 Bond Payment, because there is no issue of fact that an Event of Operator Termination occurred prior to that payment.

BONY submits, *inter alia*, that 1) the documentary evidence establishes that the funds in the Account may not be released to Waste Management, the Lessee, until the Bonds are fully paid; 2) the occurrence of an Event of Operator Termination does not entitle Waste Management to possession of the funds in the Account; 3) Waste Management's claims are belied by the documentary evidence, which establishes that BONY is properly holding the funds at issue in trust for Frankenmuth; 4) information obtained during discovery establishes that Waste Management did not provide the required notice to invoke the Event of Operator Termination provisions in the Lease and, therefore, Waste Management properly made the November 1, 2007 Bond Payment and is not entitled to recover that payment; 5) Waste Management has not provided support for its claims that it mistakenly made the November 2007 Bond Payment and that it is entitled to the funds in the Account; 6) Waste Management's arguments would require the Court to ignore the plain language of the relevant agreements, which provide that the funds in the Account will not be released to Waste Management until the Bonds are paid in full; 7) Waste Management has failed to raise an issue of material fact disputing that it properly made the November 2007 payment; and 8) BONY is entitled to summary judgment against the District, in light of the District's violation of its contractual obligations.

Waste Management submits, *inter alia*, that 1) its obligation to pay rent for the Facility, and future obligations, terminated upon an Event of Operator Termination, which occurred effective August 14, 2006, the date on which Waste Management ceased operation of the Facility based on the District's instruction; 2) Waste Management had no legal obligation to provide notice; 3) even if notice was required, it was met, excused and/or futile; 4) the failure of BONY, which is acting as trustee for the Bonds, to pay Waste Management the proceeds of the Account constitutes a breach of contract; 5) Waste Management is entitled to return of the November 2007 Payment; 6) the relevant agreements between the parties do not make full payment of the Bond a condition to release of those funds to Waste Management; 7) there is a sufficient relationship between Waste Management and the District to support a claim for

negligent misrepresentation; 8) there exist issues of fact as to whether the information that the District provided in its May 14, 2007 letter to BONY, regarding whether it made payment to the Trustee as an accommodation to Waste Management, constituted misrepresentations; and 9) Waste Management's reliance on the May 14, 2007 letter was reasonable.

The District submits, *inter alia*, that 1) pursuant to Section 24 of the Lease, it had no obligation to make payments on the Bond; 2) while recognizing the policy implications of its proposed interpretation of Section 24 of the Lease, the District clearly communicated its intent not to make the bond payments, and the Lease was drafted accordingly; and 3) the moneys sent by the District to the Trustee were transmitted on behalf of Waste Management.

RULING OF THE COURT

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of a triable issue of fact. *Id.*

The Court is mindful of the policy implications of the interpretation of Section 24 urged by the District. Indeed, the Appellate Division decision in *Rochester Fund Municipals v. Amsterdam Municipal Leasing Corp.*, 296 A.D.2d 785 (3d Dept. 2002) seems to at least question the District's position:

> General Municipal Law § 109-b(2)(f) requires that all contracts with a municipality contain an executory clause providing, in relevant part, as follows: "This contract shall be deemed executory only to the extent of monies appropriated and available for the purpose of the contract, and no liability on account thereof shall be incurred by the political subdivision beyond the amount of such monies." Such clauses are enforceable only where it has been established that funds were not available "in the course of ordinary budgetary procedure[s]" [citations omitted]. Stated another way, "any unavailability of funds must not have been the result of any improper act or omission by the [municipality]" [citations omitted], nor may the municipality make such funds "unavailable" as a matter of convenience [citations omitted].
>
> *Id.* at 786.

This case is complicated, however, by the IDA's involvement in the Facility, the language of Section 24, and the representation of Mr. Swergold, who represented the District and testified on its behalf, that it was never the District's intention to make payments on the Bond because it was financially unable to do so, and that the District communicated that intent and ensured that it was reflected in the Lease. The Court cannot rule, given the numerous agreements at issue in this action and the parties' disputes regarding the interpretation of those agreements, that, as a matter of law, the District's proposed interpretation of Section 24 is untenable.

There are numerous factual disputes before the Court. These include, but are not limited to, whether 1) the parties intended that the District be liable for Bond payments, 2) there was an event of operator termination, 3) Waste Management was required to provide notice to the Trustee, 4) if it was required to provide notice, Waste Management's failure to provide that notice was otherwise remedied, 5) the District made misrepresentations by stating that it was making payments on behalf of Waste Management, and 6) Waste Management properly made the November 2007 payment, the Court concludes that summary judgment is inappropriate and that these issues, and others, must be resolved at a trial of this matter. In light of these disputes, summary judgment is not appropriate at this juncture.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

Counsel for the parties are reminded of their required appearance before the Court for a pre-trial conference on October 14, 2011 at 11:00 a.m.

ENTER

DATED: Mineola, NY
August 15, 2011

HON. TIMOTHY S. DRISCOLL

J.S.C.