SHORT FORM ORDER

INDEX
NO.: 24125-02

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 2-4-11; 6-8-11; 12-1-11
SUBMITTED: 1-12-12
MOTION NO.: 011-MD
012-XMG
013-MD; CASE DISP

x

COUNTY OF SUFFOLK, individually and on behalf of the rate payers of THE COUNTY OF SUFFOLK,

Plaintiff,

-against-

LONG ISLAND POWER AUTHORITY, RICHARD M. KESSEL, as Chairman of the Long Island Power Authority,

Defendants.

x

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Upon the following papers numbered 1-54 read on this motion for partial summary judgment, cross-motion for summary judgment, and motion to renew and amend ; Notice of Motion and supporting papers 1-5; 20-31 ; Notice of Cross Motion and supporting papers 6-19 ; Answering Affidavits and supporting papers 32-37 ; Replying Affidavits and supporting papers 38-53 ; Other 54 ; it is,

ORDERED that the motion by the plaintiff (011) for and order appointing the New York State Comptroller as a technical advisor to the court and for partial summary judgment in the amount of $6.7 million is denied; and it is further

ORDERED that the cross motion by the defendants (012) for summary judgment dismissing the first amended complaint is granted; and it is further

ORDERED that the motion by the plaintiff (013): (a) for leave to renew and rehear its prior cross motion for partial summary judgment in the amount of $26 million, (b) for leave to renew and rehear the branch of its motion (011) which is for partial summary judgment in the amount of $6.7 million, (c) for an order appointing the New York State Comptroller as a

technical advisor to the court, (d) for leave to serve and file a second amended complaint, and (e) for an order conforming the pleadings to the evidence is denied.

The history of this case is found in the prior order of this court dated June 3, 2010, which granted a motion by the defendants, inter alia, for partial summary judgment dismissing three unpleaded causes of action and denied a cross motion by the plaintiff for partial summary judgment in the amount of $26 million. The plaintiff moved, inter alia, for reargument and resettlement of that order, which was denied by a subsequent order of this court dated December 22, 2010. The plaintiff now moves for leave to renew its prior cross motion for partial summary judgment in the amount of $26 million, for partial summary judgment in the amount of $6.7 million, and for leave to serve and file a second amended complaint, among other things. The defendants cross move for summary judgment dismissing the first amended complaint.

Partial Summary Judgment in the Amount of $6.7 Million

On January 11, 2000, the Long Island Power Authority ("LIPA"), the County of Suffolk, and the County of Nassau, among others, entered into the Shoreham Settlement Agreement (the "Settlement Agreement"), which resolved various actions and proceedings involving the Shoreham nuclear power plant and other LIPA properties that were pending at that time. To assist Suffolk County and the local taxing jurisdictions to fund their settlement obligations, LIPA agreed to issue bonds, and a surcharge was imposed on Suffolk County ratepayers to pay the debt service, related charges and obligations incurred in connection with the bonds. The funds received by LIPA pursuant to the Settlement Agreement were to provide rebates and credits to ratepayers in Suffolk County, Nassau County, and the Rockaway sections of Queens, the areas served by LIPA. To ensure Nassau County's acquiescence with the Settlement Agreement, LIPA entered into a separate agreement with Nassau County on January 13, 2000 (the "Nassau Agreement"), pursuant to which LIPA agreed, inter alia, to provide additional rebates in the amount of $25 million to ratepayers in Nassau County and the Rockaways (the "Additional Nassau County Rebates").[1] The Additional Nassau County Rebates were funded with the investment earnings of the bonds issued by LIPA to fund the Settlement Agreement ($18.3 million) and cash reserves ($6.7 million). This court determined in its order dated June 3, 2010, that the use of investment earnings to fund the Additional Nassau County Rebates did not violate the Settlement Agreement.

The plaintiff seeks partial summary judgment in the amount of $6.7 million on the ground that nothing in the Settlement Agreement authorized LIPA to use its cash reserves to fund the Additional Nassau County Rebates. The plaintiff argues that LIPA has not asserted, nor can it prove, any defense justifying its discriminatory diversion of $6.7 million in cash for the sole

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[1] LIPA also agreed to provide Nassau County with a $25 million grant from LIPA's Clean Energy Fund (the "Clean Energy Grant").

benefit of Nassau County ratepayers to the detriment of Suffolk County ratepayers, who account for 52% of LIPA's revenues.

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 issues of fact from the case (**Winegrad v New York University Med. Center**, 64 NY2d 851, 853). The failure to make such a showing requires denial of the motion regardless of the sufficiency of the opposing papers (**Id.**). A party does not carry its burden of moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merits of its claim or defense (*see*, **Calderone v Town of Cortlandt**, 15 AD3d 602, 603; **Mennerich v Esposito**, 4 AD3d 399, 400).

The court finds that the plaintiff has failed to meet its burden of establishing entitlement to judgment as a matter of law. While the plaintiff is correct that nothing in the Settlement Agreement authorized LIPA to use its cash reserves to fund the Additional Nassau County Rebates, nothing in the Settlement Agreement prohibited LIPA from using its cash reserves for that purpose either. In fact, the plaintiff has failed to identify any statute, rule, agreement, or case law that LIPA violated by funding the Additional Nassau County Rebates with its cash reserves. The plaintiff merely argues that LIPA has no defense to the County's claim for $6.7 million. Such an argument is insufficient to meet the plaintiff's burden.

As previously noted by this court in its order dated June 3, 2010, Suffolk County was not a party to, nor a third-party beneficiary of, the Nassau Agreement. Thus, Suffolk County does not have standing to challenge that agreement. Moreover, the Nassau Agreement was approved by a resolution of the LIPA Board of Trustees on February 3, 2000, and any challenge to it should have been commenced within four months after the resolution was approved (*see*, CPLR 217[1]). This action was commenced on September 27, 2002. Therefore, any challenge to the propriety or legality of the Nassau Agreement and the Additional Nassau County Rebates is untimely. Suffolk County may not extend the statute of limitations by denominating the action as one for breach of contract, among other things. When, as here, the cause of action sounds as an article 78 proceeding, the petitioner will be held to the four-month limitations period even though it does not assert its claim in the form of such a proceeding (*see*, **Broderick v Board of Educ., Union Free School Dist.**, 253 AD2d 836, 837; 6 NY Jur 2d, Article 78 § 174).

In view of the foregoing, both of the plaintiff's motions are denied insofar as they seek partial summary judgment in the amount of $6.7 million.

Renewal of Partial Summary Judgment in the Amount of $26 Million

In support of renewal of its cross motion for partial summary judgment in the amount of $26 million, the plaintiff repeats on many of the same arguments that it made in

support of its original cross motion, which was denied by an order of this court dated June 3, 2010. The plaintiff repeated those arguments again in support of its motion for reargument and resettlement of the June 3, 2010, order, which was denied by a subsequent order of this court dated December 22, 2010. Although the plaintiff's arguments have been twice rejected by the court, the plaintiff contends that it has new evidence in support thereof. That new evidence consists of: (1) LIPA's 2004 Energy Plan, (2) LIPA's 2009 Debt Service Overview, (3) the October 2011 report of LIPA's consultant, the Brattle Group, on the status of the Shoreham debt, (4) Moody's July 2011 credit rating of LIPA, which shows that LIPA's debt has increased from $6.8 billion in 1998 to almost $10 billion, (5) a decision of the U.S. District Court in **Mahoney v KeySpan** (2007 WL 805813 [EDNY]) dated March 12, 2007, concerning KeySpan's purported overbilling of LIPA for pension costs in the amount of $250 million, and (6) a December 2011 media report that LIPA may be liable to National Grid for pension costs in the amount of $600 million.

A motion for leave to renew must be based on new or additional facts not offered on the prior motion (CPLR 2221 [e] [2]). To succeed on such a motion, the movant must supply new facts substantial enough to change the prior determination (CPLR 2221 [e] [2]) and a justifiable excuse for not placing such facts before the court initially (CPLR 2221 [e] [3]); **Matter of Cooke Ctr. for Learning & Dev. v Mills**, 19 AD3d 834, 837). Renewal will not be granted when the purported new facts were not presented because of the movant's lack of due diligence (**Id.**; **Yarde v New York City Transit Auth.**, 4 AD3d 352, 353).

The court finds that the plaintiff has failed to meet its burden. Two of the documents upon which the plaintiff relies, LIPA's 2004 Energy Plan and the decision of the U.S. District Court in **Mahoney v KeySpan**, were available prior to the submission of the plaintiff's original cross motion for partial summary judgment; and a third, LIPA's 2009 Debt Service Overview, was available prior to the submission of the plaintiff's motion for reargument and resettlement. The plaintiff has provided no excuse for its failure to include those documents in support of its prior motion and cross motion. Moreover, the first three documents, LIPA's 2004 Energy Plan, LIPA's 2009 Debt Service Overview, and the October 2011 report of the Brattle Group, are not even included as exhibits to the plaintiff's current motions. The court's review of the remaining documents, which are included in the record, reveals that they would not change the prior determinations. Moody's July 2011 credit rating of LIPA, the decision of the U.S. District Court in **Mahoney v KeySpan,** and the December 2011 media report concern LIPA's current financial condition and pension costs, issues that have little or nothing to do with the issues that are the subject of this action. Accordingly, the branch of the plaintiff's motion (013) which is for renewal of its prior cross motion for partial summary judgment in the amount of $26 million is denied.

LIPA's Cross Motion for Summary Judgment

The gravamen of the plaintiff's first amended complaint is that LIPA breached the Settlement Agreement, denied Suffolk County ratepayers equal protection under the Federal and State Constitutions, and deprived them of their civil rights under 42 USC § 1983 by providing excessive or additional credits and rebates to ratepayers in Nassau County and the Rockaways including, but not limited to, the Additional Nassau County Rebates and the Clean Energy Grant. The plaintiffs seek an accounting and damages, as well as declaratory and injunctive relief.

LIPA cross moves for summary judgment dismissing the first amended complaint. In support thereof, LIPA has produced an affidavit by Russel Hissom, CPA, a partner with the accounting firm of Baker Tilly Virchow Krause LLP ("Baker Tilly"). Baker Tilly was retained by LIPA as an expert witness to conduct a forensic analysis of its financial records to determine (1) whether LIPA has provided the correct amount of Shoreham rebates and credits consistent with the terms of the Settlement Agreement and (2) whether LIPA charged Suffolk County ratepayers the appropriate surcharge amount, consistent with the terms of the Settlement Agreement. Baker Tilly's opinions are contained in two reports dated October 5, 2009, and May 2, 2011, respectively, which are annexed to the Hissom affidavit.

Baker Tilly concluded, inter alia, that LIPA had provided the correct amount of Shoreham rebates and credits, consistent with the terms of the Settlement Agreement; that LIPA had properly calculated the Shoreham Property Tax Factor[2] and had collected an appropriate amount of the surcharge from Suffolk County ratepayers; that LIPA had appropriately adjusted the Shoreham Property Tax Factor from time to time to ensure that the surcharge being collected was in accord with the Settlement Agreement; that neither the Additional Nassau County Rebates nor the Clean Energy Grant had been or were being recovered through the Shoreham Property Tax Factor; and that Suffolk County ratepayers were not adversely impacted by the Additional Nassau County Rebates or Clean Energy Grant through the Shoreham Property Tax Factor. The Baker Tilly reports are neither speculative nor conclusory, have a factual foundation in the record, and adequately address the allegations of the first amended complaint (*see*, **McGuigan v Centereach Mgt. Group, Inc.**, _____AD2d_____, 2012 NY Slip Op 02846, at *1). Accordingly, the court finds that LIPA has established, prima facie, its entitlement to judgment as a matter of law (*see*, **Chance v Felder**, 33 AD3d 645, 646).

Once the moving party has made a prima facie showing of entitlement to summary judgment, the burden shifts to the opponent, who must produce sufficient evidence in admissible form to establish the existence of a triable issue of fact or demonstrate an acceptable excuse for failing to do so (**Zuckerman v City of New York**, 49 NY2d 557, 562).

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[2] The Shoreham Property Tax Factor is the rate, as a percentage of the Suffolk County portion of estimated revenues to be applied, beginning in June 2003, to Suffolk County ratepayer bills to recover the surcharge.

The plaintiff opposes LIPA's prima facie case by moving for partial summary judgment, among other things. In support thereof the plaintiff has submitted an affirmation by its counsel, with exhibits. The plaintiff has failed to submit an affidavit from an expert in support of its claims and refuting the Baker Tilly reports. Such failure, however, is not fatal. Summary judgment may be denied regardless of whether the opponent submits opposing expert proof if the opponent can show that the expert's opinion is conclusory, fails to address essential factual issues, or is based upon disputed or incorrect facts (*see*, **Novacare Medical P.C. v Travelers Property Casualty Ins. Co.**, 31 Misc 3d 1205[A] at *1). The plaintiff's counsel makes no such arguments. Instead, counsel raises the same arguments that have been previously rejected by the court and new arguments that have little or nothing to do with the issues that are the subject of this action. The exhibits annexed to counsel's affirmation consist of the prior orders of this court, documents the plaintiff's interpretation of which the court has already rejected, correspondence regarding the plaintiff's FOIL request, the proposed second amended complaint and documentary evidence in support thereof. In the absence of an affidavit from the plaintiff's own expert, these exhibits and the affirmation of the plaintiff's counsel fail to raise a triable issue of fact (*see*, **Thomas v Richie**, 8 AD3d 363, 364; **McGuigan v Centereach Mgt. Group, Inc.**, *supra* at *1).

The reply affirmation of plaintiff's counsel and the exhibits annexed thereto also fail to raise a triable issue of fact. They consist of previously rejected arguments and documents, as well as new arguments and evidence proffered for the first time on reply. The plaintiff's reply papers are rejected insofar as they seek to introduce new arguments and evidence to which LIPA has had no opportunity to respond absent leave of court (*see*, **DiPalma v Metropolitan Transp. Auth.**, 20 Misc 3d 1128[A] [and cases cited therein]). In any event, the plaintiff's reply papers do not contain an expert's affidavit or contest the findings of LIPA's expert, Baker Tilly (*see*, **Novacare Medical P.C. v Travelers Property Casualty Ins. Co.**, *supra*). The plaintiff contends that LIPA's production of electronic documents responsive to Suffolk County's FOIL request may uncover additional facts relevant to unresolved factual issues. For a court to delay action on a summary judgment motion, there must be a likelihood of discovery leading to evidence essential to justify opposition to the motion (**Frouws v Campell Foundry Co.**, 275 AD2d 761). The plaintiff cannot make such a showing. By an order dated April 3, 2012, this court found that LIPA had properly denied Suffolk County's FOIL request for certain electronic documents and e-mails.

In view of the foregoing, the court finds that the plaintiff has failed to meet its burden of establishing the existence of a triable issue of fact. Accordingly, LIPA's cross motion is granted.

The Proposed Second Amended Compliant

The plaintiff seeks to amend the complaint to add allegations that LIPA breached

an agreement to settle this action. The plaintiff alleges that, pursuant to a letter to Suffolk County Executive Steve Levy dated September 7, 2006, the defendant Richard Kessel agreed to settle this action for $16 million. The following is body of the letter:

> Consistent with our discussions and subject to any and all necessary approvals, the Long Island Power Authority agrees with Suffolk County to enter into a settlement for $16 million. The money would resolve pending litigation between LIPA and Suffolk County. LIPA believes such an agreement would be in the interest of all parties and appreciates your cooperation in this matter.

The plaintiff also alleges that, after further negotiations, LIPA and Suffolk County agreed to the following alternative settlement: In lieu of the payment of $16 million, LIPA agreed to send more than 2.1 million compact florescent light bulbs, at an approximate cost of $3 million, to the residential electric ratepayers in Suffolk County. LIPA also agreed to create a Green Energy Fund in the amount of approximately $15 million for Suffolk County facilities. The alternative settlement agreement was not memorialized in a writing.

CPLR 3025 (b) provides that leave to amend the pleadings "shall be freely given upon such terms as may be just." Thus, motions for leave to amend should liberally granted absent prejudice or surprise resulting from the delay in seeking the amendment (**Vista Properties, LLC v Rockland Ear, Nose & Throat Assoc., P.C.**, 60 AD3d 846, 847; **Mackenzie v Croce**, 54 AD3d 825, 826). A court hearing a motion for leave to amend need not examine the merits of the proposed amendment unless the insufficiency or lack of merit is clear and free from doubt. Leave to amend should be denied where the proposed amendment is palpably insufficient or totally devoid of merit (**Id.**; *see also*, **Rosicki, Rosicki & Assoc., P.C. v Cochems**, 59 AD3d 512, 514).

Stipulations of settlement are contracts and are, thus, subject to the rules of contract law (**Diarassouba v Urban**, 71 AD3d 51, 57). They are to be enforced with rigor and without a searching examination into their substance as long as they are clear, final, and the product of mutual accord (**Persalta v All Weather Tire & Sales Service, Inc.**, 58 AD3d 822, *citing* **Bonnette v Long Is. Coll. Hosp.**, 3 NY3d 281, 286). The parties' first settlement agreement in the amount of $16 million was subject to any and all necessary approvals. The record does not reflect that either the LIPA Board of Trustees or the Suffolk County Legislature approved the first settlement agreement, nor does the record reflect that Richard Kessel and Steve Levy had the authority to bind LIPA and Suffolk County, respectively, without such approvals. Contrary to the plaintiff's contentions, both the Nassau Agreement and the Shoreham Settlement Agreement were approved by the LIPA Board of Trustees. Additionally, by the plaintiff's own admission, the first settlement agreement was renegotiated, resulting in the alternative settlement agreement. The court finds that, under these circumstances, the first settlement agreement was

not final and is, therefore, unenforceable.

To be enforceable, stipulations of settlement must conform to the requirements of CPLR 2104 (**DeVita v Macy's East, Inc.**, 36 AD3d 751). The plain language of CPLR 2104 requires that such an agreement be in writing and signed by the parties to be bound by it or by their attorneys (**Id.**, *citing* **Bonnette v Long Is. Coll. Hosp.**, *supra*). The alternative settlement agreement does not meet this requirement since it was never reduced to writing. Accordingly, it is also unenforceable.

The proposed amended complaint contains an additional cause of action for breach of fiduciary duty, which the plaintiff's papers only fleetingly address. A review of the proposed amended complaint reveals that the breach-of-fiduciary-duty cause of action is based on the same factual allegations as the breach-of-contract cause of action, as amended. A claim for breach of fiduciary duty cannot be based on the same facts and theories as a breach-of-contract claim (**Brooks v Key Trust Co. Natl. Assoc.**, 26 AD3d 628, 630). In order to be actionable, the breach-of-fiduciary-duty claim must be independent of the contract itself (**Sally Lou Fashions Corp. v Camhe-Marcille**, 300 AD2d 224; *see also*, **Coventry Real Estate Advisors, L.L.C. v Developers Diversified Realty Corp.**, 84 AD3d 583, 585). The plaintiff does not posit any independent source for LIPA's purported fiduciary duty. Accordingly, the proposed additional cause of action for breach of fiduciary duty is not actionable because it is duplicative of the cause of action for breach of contract, as amended.

In view of the foregoing, the plaintiff's proposed amended complaint is palpably insufficient or totally devoid of merit. Moreover, the plaintiff proffers no explanation for its delay in seeking to amend the complaint. The court notes that this action has been pending for approximately 10 years. According to the plaintiff, it was settled in 2006, yet the plaintiff continued to prosecute the action until 2011 without seeking to enforce either of the purported settlements. In fact, the plaintiff opposed LIPA's motion for partial summary judgment and cross moved for partial summary judgment in 2009. The plaintiff then moved for reargument and resettlement of this court's order granting LIPA's motion and denying its cross motion in 2010. Such a course of action is inconsistent with the plaintiff's contention that the matter has been settled. The court finds that, at this late stage of the proceedings, LIPA would be prejudiced by the plaintiff's delay in seeking to amend the complaint to enforce a purported settlement. Accordingly, the branch of the plaintiff's motion (013) which is for leave to serve and file a second amended complaint is denied.

The plaintiff also moves pursuant to CPLR 3025 (c) to conform the pleadings to the evidence. An application to amend under subdivision (c) of CPLR 3025 is addressed to the sound discretion of the court and should be determined in the same manner and by weighing the same considerations as a motion to amend under subdivision (b) of CPLR 3025 (**Murray v City of New York**, 43 NY2d 400, 405). Accordingly, the branch of the plaintiff's motion (013)

which is to conform the pleadings to the evidence is also denied.

Finally, in view of the fact that LIPA's cross motion for summary judgment dismissing the first amended complaint has been granted, both of the plaintiff's motions are academic insofar as they seek an order appointing the New York State Comptroller as a technical advisor to the court to assist it in auditing LIPA's books and records and in resolving the outstanding factual issues. According, both motions are denied insofar as they seek such relief.

DATED: May 8, 2012

HON. ELIZABETH HAZLITT EMERSON

J. S.C.