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

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

----------x	**TRIAL/IAS PART: 16**
FRANKENMUTH MUTUAL INSURANCE COMPANY,	**NASSAU COUNTY**
Plaintiff,	
-against-	**Index No. 022253-09**
WASTE MANAGEMENT OF NEW YORK, L.L.C. and SANITARY DISTRICT NO. 1, TOWN OF HEMPSTEAD,	
Defendants.	
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DECISION AFTER TRIAL

This action was commenced by plaintiff Frankenmuth Mutual Insurance Company ("Plaintiff" or "Frankenmuth") against defendants Waste Management of New York, L.L.C. ("Waste Management") and Sanitary District No. 1, Town of Hempstead ("District" or "Defendant"). Plaintiff's action against Waste Management, as well as an earlier action filed by Waste Management against Plaintiff and other entities, was settled before trial. Thus, the trial before this Court addressed the only remaining allegations, which are Frankenmuth's claims against the District for (1) breach of contract, (2) unjust enrichment, and (3) promissory estoppel. The action was tried before the Court on November 14, 15 and December 15, 2011. The parties then submitted post-trial memoranda in March 2012.

Plaintiff's case at trial consisted of the testimony of Nathaniel Swergold and Brian McLeod. The defense case consisted of the testimony of John Cameron. Each witness was

subject to cross-examination, and various documents were admitted in evidence both by stipulation and during the course of the testimony.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In approximately 1992, the District, which is a municipal entity within the Town of Hempstead ("Town"), reached an agreement with the New York State Department of Environmental Conservation in which the District would build a new recycling facility to treat the solid waste generated by the 18,000 homes and commercial properties in the District. In order to finance the project, some $3.6 million in bonds were issued in 1994 by the Nassau County Industrial Development Agency ("IDA").

Cameron is a licensed professional engineer whose company worked on retrofitting the District's old solid waste operation to become a recycling facility. He was also a principal of Five Towns, which operated the recycling facility until 1997. Since 1999, his engineering firm, Cameron Engineering, has served as a consulting engineer to the District. He testified about the process by which the IDA issued bonds to finance the development of the recycling facility. According to Cameron, the IDA became involved because neither Cameron nor his business partner nor the District was willing to guarantee the debt for the facility, and conventional banks would not make a loan without such a guarantee.

The bonds were issued pursuant to a limited offering memorandum ("LOM") (Px 16). It is the obligations of the LOM that are the focus of this case. Based on representations in the LOM, Frankenmuth believed the bonds to be investment grade securities when it purchased the bonds for its investment portfolio in 2004.

Frankenmuth points to various provisions in the LOM that, it asserts, impose upon the District an obligation to seek appropriation from the Town to pay for the bonds. Among these provisions is the following language:

> The District has covenanted to use its best efforts to include in each budget submitted to the Town of Hempstead, beginning with the budget to be submitted for the year beginning January 1, 1995, an amount designated to and sufficient for the purpose of paying the full amount of District rent due in the next succeeding fiscal year of the District.

Px 16 at p. 11.

As further support for its claim, Frankenmuth cites to the November 1, 1994 Lease Agreement between the District and the IDA (Px 12). That agreement includes the following provisions:

> District reasonably believes that funds will be available to make all lease payments during the lease term and hereby represents that it intends to do all things lawfully within its power to obtain, maintain and properly request and pursue funds from which the lease payments may be made, including requesting funds from the Town for such payment in the District budget.
>
> District shall use its best efforts to include in each proposed District budget submitted to the Town's board an amount designated to and sufficient for the purpose of paying the full amount of the base rent and additional rent payable during the applicable fiscal year of the District.
>
> District shall notify the agency and the trustee on or before the business day next succeeding (1) any date on which the District submits a proposed District budget to the Town's board that does not include an amount designated to appear sufficient for the purpose of paying base rent and additional rent, if any, payable during the applicable fiscal year of the District, or (2) any date on which the Town adopts a budget that does not include such an amount.
>
> In the event that the District submits a proposed District budget to the Town's board that does not include an amount designated to and sufficient for the purpose of paying base rent and additional rent if any payable during the applicable fiscal year of the District, the District shall include in such budget a conspicuous statement as to the amount of base rent and

> additional rent if any that has been omitted therefrom and the possible consequences of such omission.

The District never prepared, much less submitted, a budget that sought an appropriation for payment of the bonds. It never notified Frankenmuth of its failure to do so, but nevertheless maintains that Frankenmuth was informed by its investment adviser that the District was not obligated to make bond payments as suggested by Frankenmuth.

The District relies on Section 24 of the LOM as support for its position that it had no obligation to seek any appropriations for the bonds:

> Notwithstanding any other provision of this Agreement . . . 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 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.

The District further relies on Section 5 of the LOM, which is captioned "Nonappropriation of Funds." That provision states that, upon nonappropriation, "This agreement shall terminate without penalty or expense to the District of any kind whatsoever."

Swergold is the general counsel for the District, and has been employed by the District since May 1972. As general counsel, he draws up and interprets contracts, prepares bid documents, and advises the District's board. Swergold testified that he continuously believed that the District would never be liable for payment on the bonds. He maintained that Section 24, by its very terms, vitiates any other presumed obligation by the District to pay any amount due on the bonds. Indeed, he characterized the bonds as a "stupid, lousy investment." He stated that he did not have concern that the public might be misled about any obligations by the

District to fund the bonds because "anybody who would be buying these bonds I presumed would have the advice of people who knew what they're doing." He characterized the provisions cited by Frankenmuth as "magic language" to assuage the underwriters, and maintained that all of the relevant documents, taken together, did not impose an obligation on the District to seek any funding. In sum, Swergold described Frankenmuth's purchase of the bonds as a "mere gamble" that Frankenmuth had "won" for many years.

Swergold further stated that "everybody knew" that the "escape clauses" in Section 24 and 5 of the LOM meant that the bonds were risky. He noted that, in addition to the plain language of these clauses, the interest rate on the bonds (7.9 percent per annum) was higher than prevailing interest rates. Swergold testified credibly that, at the time the bonds were prepared, he told bond counsel Hawkins Delafield that the "District has no interest in going forward in any way unless it's absolutely clear that they have no liability on the bonds." Swergold noted that although Frankenmuth paid $3.6 million for the bonds, they recovered in excess of $5 million. In sum, he said that the bonds were a "risky investment . . .you take a risk because there was the higher interest rate at the time." In a non-jury trial, "evaluating the credibility of witnesses is a matter committed to the discretion of the trial court." *Cameron Eng'g & Assoc., LLP v. JMS Architect & Planner, P.C.*, 903 N.Y.S.2d 755 (2d Dept. 2010). The Court was able to evaluate the demeanor and temperament of Swergold, as well as the manner in which he responded to questions on direct and cross examination, and fully credits Swergold's testimony. Swergold responded to all questions posed to him in a clear and instructive manner, and was able to refer to specific provisions in relevant documents, as well as relevant conversations, in support of his testimony.

The original operator of the facility was an entity known as "Five Towns." The agreement between the District and Five Towns required the District to pay Five Towns a certain dollar amount for each ton of refuse that passed through the facility. This fee is known as a "tipping fee." Five Towns would become the owner of the waste material collected in the District, and in turn could resell the recyclables extracted from the material. This arrangement was not economically advantageous to Five Towns, however, because of the fluctuations of the recyclable market. Five Towns thus could not meet its obligations under the bonds, and went into default.

Cameron confirmed that Five Towns was unable to continue to operate the facility in a financially viable manner, and thus could not meet its obligations under the bonds. Five Towns ultimately obtained a modification of its agreement with the District (Px 25). Under that modification, the District would deduct from the operator's fee that portion which was due to the bondholders, and pay that amount directly to the bondholders. That modification, along with all of Five Towns' other obligations, was eventually transferred to Waste Services Inc. ("WSI"). WSI was acquired by Eastern Waste, which was in turn acquired by Waste Management.

Cameron stated that he understood that payment of the bonds "would most likely stop" if Waste Management defaulted, and that the "responsibility for repayment of the bonds was with the operator." He corroborated Swergold's testimony that "The District would never agree to guarantee the bonds from day one, which is why we could not finance with the bank, and with the IDA that was always an issue." Cameron did, however, acknowledge that nowhere in the bonds does it say that the District did not guarantee payment if the operator defaulted. The Court also fully credits all of Cameron's testimony. Like Swergold, Cameron responded to all questions posed to him in a clear manner, and his credible testimony buttresses Swergold's

assertion that it was never the intention of the parties that the District would be obligated to make bond payments.

In 2006, Waste Management approached the District about renegotiating its arrangement with the District. Those discussions are memorialized in Px 33. In sum and substance, Waste Management advised the District that the financial results achieved under Waste Management's contract with the District were not acceptable to Waste Management, and sought modification of the contract. Among the modifications sought by Waste Management were that the District should assume responsibility for the monthly payments of approximately $37,000 on the bonds. According to the District, this provides further support for the conclusion that Waste Management, as operator, was solely responsible for payment on the bonds because there would be no basis for Waste Management to seek a modification in which the District would be responsible for the bonds if the District were in fact responsible all along.

Brian McLeod, who is the treasurer of Frankenmuth, testified as to plaintiff's alleged damages. He testified that Plaintiff did not receive payment due of approximately $432,000 on November 1, 2008. Moreover, an interest payment of approximately $16,000 was not made on May 1, 2009. Finally, on November 1, 2009, a payment of principal and interest of approximately $416,000 was not made. There was no credible evidence to the contrary regarding Frankenmuth's damages.

The District counters that it was not required to pay the bonds. Moreover, it claims that it has never received any of the proceeds of the sale of the bonds, and thus has not been unjustly enriched. Finally, it states that because it never promised to pay the bonds, it should not be liable under promissory estoppel.

The Court concludes that Frankenmuth is not entitled to recover on its breach of contract claim. A party seeking to recover for breach of contract must establish (1) formation of a contract between the parties, (2) performance by the plaintiff, (3) failure to perform by the defendant, and (4) resulting damages. *See, e.g., JP Morgan Chase v. J.H. Elec.*, 69 A.D.3d 802 (2d Dept. 2010); *Brualdi v. Iberia*, 79 A.D.3d 959 (2d Dept. 2010). Here, the District did not have the obligation to seek appropriations for, much less pay any amounts on, the bonds at issue. That is apparent from the plain language of Section 24 of the LOM. That section expressly provides that the LOM is executory "only to the extent of the moneys budgeted and appropriated and available for the purpose of this Agreement," and further provides that the District did not have any "legal or moral obligation to request, budget, appropriate or make available moneys for the purpose of this Agreement." It further states that the limitations in Section 24 are effective "[n]otwithstanding any other provision" of the LOM. Accordingly, not only does Section 24 eliminate any requirement that the District seek, much less pay, any amount on the bonds, but it also expressly states that its terms are effective regardless of any other language in the LOM. Frankenmuth's interpretation of the LOM would thus impermissibly render Section 24 meaningless. *Two Guys from Harrison-N.Y., Inc. v. S.F.R. Realty Associates*, 63 N.Y.2d 396, 403 (1984), citing *Corhill Corp. v. S.D. Plants, Inc.*, 9 N.Y.2d 595, 599 (1961) and *Muazk Corp. v. Hotel Taft Corp.*, 1 N.Y.2d 42, 46 (1956) (court must avoid contractual interpretation that renders clauses of the agreement meaningless).

The Court's conclusion is buttressed by the testimony of Swergold and Cameron, which the Court has credited in its entirety. Both Swergold and Cameron stated that the District had no intention of being liable for payment on the bonds. Swergold further testified that sentiment was expressed to bond counsel throughout the drafting process. Section 24 thus reflects the

undisputed testimony regarding the intent of the parties at the time that the documents at issue were drafted.

The Court rejects Frankenmuth's argument that the Third Department's decision in *Rochester Fund Municipals v. Amsterdam Muncipal Leasing Corp.*, 296 A.D.2d 785 (3d Dept. 2002) requires the District to have sought appropriations for the bonds or paid any amount due on the bonds. In that case, the City of Amsterdam contracted to construct and finance a sludge maintenance facility. Although the City was required to appropriate funds to make the necessary finance payments, it elected not to appropriate funds and terminate the lease. Plaintiff then sued the City, claiming that the City had breached its agreement with plaintiff by failing to appropriate necessary funds. The City moved for summary judgment, which the trial court denied. The Third Department affirmed the denial of summary judgment, ruling that the City had failed to demonstrate that the funds were unavailable throught the ordinary budget process. The Third Department further held that the City had failed to demonstrate that the funds "were not available 'in the course of ordinary budget procedure[s].'" [citations omitted], and further noted:

> 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.

Significantly, the contractual language in *Rochester Fund* differs markedly from that in the present case. Specifically, the City in *Rochester Fund* agreed to "use all reasonable and lawful means at its disposal to ensure the appropriation of money for such Fiscal Year sufficient to pay the Lease Payments coming due therein." By contrast, Section 24 of the LOM expressly

provides that the District had no "legal or moral obligation to request, budget, appropriate or make available moneys for the purpose of this Agreement." That alone distinguishes *Rochester Fund* from the present case. Moreover, *Rochester Fund* did not grant judgment as a matter of law *against* the City, and thus does not support Frankenmuth's claim that judgment as a matter of law is somehow appropriate against the District here.

Nor is the District liable on Frankenmuth's promissory estoppel claim. The elements of a cause of action for promissory estoppel are: (1) a clear and unambiguous promise, (2) reasonable and foreseeable reliance by the party to whom the promise is made, and (3) an injury sustained in reliance on that promise. *Agress v. Clarkstown Central School Dist.*, 69 A.D.3d 769, 771 (2d Dept. 2010). Here, there is not a "clear and unambiguous promise" by the District to pay the bonds. Indeed, Section 24 states clearly to the contrary, and is corroborated by the credible testimony of both Swergold and Cameron that the District never made any promise that it intended to be liable on the bonds..

Finally, the District is not liable to Frankenmuth under an unjust enrichment theory. To prevail on a cause of action for unjust enrichment, a party must show that "(1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what ought to be recovered." *Anesthesia Assocs. Of Mt. Kisco, LLP v. Northern Westchester Hosp. Center*, 59 A.D.3d 473, 481 (2d Dept. 2009). The essence of unjust enrichment is that "one party has received money or a benefit at the expense of another." *Wolf v. National Council of Young Israel*, 264 A.D.2d 416, 417 (2d Dept. 2009). Here, there is no evidence that the District received any benefit at Frankenmuth's expense. But even if this was the case, it is hardly "against equity and good conscience" for the District to retain any of these benefits when Frankenmuth earned a not-insignificant rate of return on the

bonds, and indeed the bondholders received in excess of the face value of the bonds. Nor is it "against equity and good conscience" for the District to have acted, without exception, in a manner consistent with its intention that the operator, and not the District, would be liable on the bonds.

Settle judgment on ten days notice.

Dated: Mineola, NY
May 15, 2012

Hon. Timothy S. Driscoll, J.S.C.

ENTERED
MAY 17 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE