Greens at Half Hollow Home Owners Assoc., Inc. v Greens at Half Hollow LLC
2012 NY Slip Op 32911(U)
December 5, 2012
Supreme Court, Suffolk County
Docket Number: 14273-2011
Judge: Emily Pines

SHORT FORM ORDER

INDEX NUMBER: 14273-2011

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: HON. EMILY PINES
J. S. C.

Original Motion Dates: 05-08-12; 07-17-12
Motion Submit Date: 09-25-2012
Motion Sequence No.: 003 MD
004 MD

[ ] FINAL
[x] NON FINAL

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GREENS AT HALF HOLLOW HOME OWNERS ASSOCIATION, INC., for itself and on behalf of the Residents of The Greens at Half Hollow,

Plaintiff,

-against-

GREENS AT HALF HOLLOW LLC., SUFFOLK COUNTY SEWER AGENCY, COUNTY OF SUFFOLK, TOWN BOARD OF THE TOWN OF HUNTINGTON and THE TOWN OF HUNTINGTON,

Defendants.

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ORDERED that the motion for summary judgment by defendant Greens at Half Hollow LLC (Mot. Seq. # 003) is denied; and it is further

ORDERED that the cross-motion to modify the preliminary injunction granted by this Court on October 19, 2011, is denied as moot.

Factual and Procedural Background

On May 15, 2002, in connection with the development of condominiums known as the Greens at Half Hollow ("The Greens"), S.B.J. Associates, LLC ("SBJ") and the Suffolk County Department of Public Works, Suffolk County Sewer Agency, Suffolk County Department of Health Services, and the

County of Suffolk entered into a Sewage Treatment Plant Agreement ("STP Agreement"). The STP Agreement recites, among other things, that SBJ is the owner of the premises on which the Greens was to be developed and that it had previously made an application to the County to construct a sewage collection, treatment and disposal facility for the Greens, which application was approved by the County. The STP Agreement further provides, in relevant part:

> WHEREAS, the OWNER is desirous of constructing a SYSTEM . . . upon the PREMISES . . . to serve the sewage collection, treatment and disposal needs of the COMMUNITY (as defined in Article 1 of this Agreement); and
>
> * * *
>
> WHEREAS, this Agreement . . . is for the benefit of the COUNTY, the COMMUNITY and the OWNER;

"COMMUNITY" is defined in the STP Agreement as "[t]he development consisting of 1,250 townhouse condominium units, a golf course with a club house to be constructed." The STP Agreement also states that the "Whereas" clauses are an integral part of the STP Agreement "and shall have meaning and effect as though they were set forth at length in numbered paragraphs herein."

Article 19 of the STP Agreement, provides, in relevant part:

> 19. Connection.
>
> A. No properties, parties, persons, corporations or other entities shall be permitted to connect to any sewerage facilities of the OWNER . . . nor to the SYSTEM . . . without the prior written consent of the COUNTY . . . The provisions of this paragraph do not pertain to the individual units which comprise the PREMISES.
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> * * *
>
> C. In addition to any consideration paid to the OWNER for the connection of off-site additional facilities in accordance with paragraph (B) above, the OWNER shall be entitled to receive from any connecting

entity a fair and reasonable charge for the entity's proportionate share of the operation and maintenance costs of the SYSTEM. This charge shall be subject to the approval of the COUNTY. The OWNER covenants, warrants and represents that any fees, excluding that part reasonably attributable to the value of sewer line easements, collected by the OWNER pursuant to this paragraph shall be applied for the benefit of all users of the SYSTEM.

D. The OWNER shall have the right to charge all users of the SYSTEM reasonable expenses for the operation and maintenance of same. The OWNER covenants, warrants and represents that such charges shall be for the benefit of all users of the SYSTEM and shall be subject to prior written approval by the COUNTY. The OWNER's right to collect such charges shall terminate at such time, if ever, as the COUNTY accepts dedication of the SYSTEM.

Thereafter, SBJ sold that portion of the premises covering The Greens, including the sewage treatment plant, to Defendant Greens at Half Hollow, LLC ("GHH").

The Plaintiff/Petitioner, Greens at Half Hollow Home Owners Association, Inc. ("HOA") commenced this hybrid action/proceeding in 2011, in its own capacity and in a representative capacity on behalf of all the residents and unit owners in The Greens, against GHH and Defendants/Respondents Suffolk County Sewer Agency, County of Suffolk (collectively "The County") and Town Board of the Town of Huntington and Town of Huntington (collectively "The Town"). The members of the HOA are homeowners whose homes are connected to the sewage treatment plant. The HOA seeks a declaration of the parties' rights and obligations under the STP Agreement and various statutes governing the operation of a sewage treatment plant, including the Transportation Corporations Law ("TCL"). Specifically, the HOA seeks a declaration that GHH may not impose or collect sewer charges until it complies with the requirements of regulatory authorities, including the requirement to secure rate approval, as well as injunctive relief directing GHH to apply for rate approval. The HOA also seeks damages from GHH for alleged past unlawful charges and overcharges. The Article 78 proceeding against the County and the Town seeks to compel the County and Town to approve a rate for sewer charges.

The Verified Amended Complaint dated July 7, 2011, alleges, among other things, that the

ownership and operation of the sewage treatment plant by GHH violates TCL §§ 2-5, 116, and 121 and that pursuant to article 10 of the TCL, the County and the Town are obligated to set a rate for the provision of sewage treatment and disposal services by GHH which is "fair, reasonable and adequate." It is further alleged that from the time that the HOA commenced operations in 2002, GHH tendered periodic bills, without any itemization, back-up information or calculation, to the HOA for sewage services provided to the condominium units and residents of The Greens. The HOA alleges that it paid in full, on behalf of its members, all sewer charges invoiced to it by GHH for the sole purpose of covering GHH's maintenance and operating costs of the sewage treatment plant. Additionally, it is alleged that GHH, through the appointment of a majority of the HOA board members, was in control of the HOA from 2002 until December 2009. As of July 2011, the sewer charges from GHH to the HOA were $55,106.55 per month. The HOA alleges, among other things, that GHH breached: (1) paragraphs 19(C) and 19(D) of the STP Agreement, and violated TCL § 212, by billing and collecting for sewage services without obtaining approval of its rate from the County or the Town, (2) paragraph 19(C) of the STP Agreement by charging a rate in excess of a "fair and reasonable charge for the [HOA]'s proportionate share of the operation and maintenance costs of the system," (3) paragraph 19(D) of the STP Agreement by charging the users of the system more than its "reasonable expenses for the operation and maintenance of the SYSTEM," and (4) that GHH violated TCL § 121 by providing sewage-works facilities at a rate in excess of that which is fair, reasonable and adequate."

The Verified Amended Complaint contains five causes of action and one "cause for proceeding." The first cause of action is asserted against GHH, the County and the Town, and seeks a declaration that GHH violated various provisions of the TCL, Limited Liability Corporations Law § 201, and various paragraphs of the STP Agreement, as well as "a declaration that GHH . . . may neither discontinue the operation of the sewage treatment plant, nor reduce or otherwise diminish its level of service for so long as GHH . . . owns the sewage treatment plant" and "that [the HOA] has no obligation to pay sewer charges to GHH until: (a) GHH obtains approvals from the Town . . . and [the County] to own and operate the private sewer treatment plant and serve the premises; (b) GHH has reorganized as a sewage-works corporation under Article X of the [TCL]; (c) GHH's sewer rates are duly approved by the Town . . . and the [the County]; and (d) GHH places its stock in escrow with [the County])." The second cause of action is asserted against GHH for monies had and received and seeks restitution from GHH in an amount equal to the total of all sewer rates previously paid by the HOA to GHH, alleged to be in excess of $3,000,000. The third cause of action is asserted against GHH for breach of contract (STP Agreement), and alleges that "the HOA has been damaged, as a third-party beneficiary, in an amount equal to the difference between the total sum that the HOA has paid to GHH in sewer rates, and the HOA's proportionate share of the actual verified and approved operational and maintenance costs for the sewage treatment plant for that same period," alleged to be in excess of $1,500,000. The HOA also

seeks an injunction restraining GHH from transferring the sewage treatment plant prior to the issuance of approvals by the County and DEC, as per the STP Agreement. The fourth cause of action, pled in the alternative to the third cause of action for breach of contract, is asserted against GHH for unjust enrichment based upon GHH's collection of sewer charges from the HOA without lawful authority. The fifth cause of action is asserted against GHH for unjust enrichment "by the HOA's payments to the South Huntington Water District for charges and services relating to accounts which exclusively serve the sewage treatment plant. The "cause for proceeding" is asserted against the County and the Town as mandamus to compel the County and the Town to perform duties enjoined upon them by law under the TCL and STP by setting a rate for the sewage treatment and removal services provided by GHH to the HOA.

GHH served an Answer and Counterclaim seeking injunctive relief. The HOA served a Verified Reply to the counterclaim.

GHH moved for a preliminary injunction and separately made a pre-answer motion pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint as asserted against it. In support of its motion to dismiss, GHH argued, among other things, that there is no private right of action under the TCL and that the third cause of action "must fail since HOA is not a third-party beneficiary of the STP Agreement as a matter of law and cannot state a claim for breach of that agreement, but is merely an incidental beneficiary of the Agreement." GHH contended that the paragraphs 19(C) and (D) of the STP Agreement do not confer any benefit on the HOA or its residents. The foregoing issues were raised extensively at oral argument on the motions before the Court on October 19, 2011, at which time the HOA voluntarily discontinued the fifth cause of action without prejudice. At oral argument, the County took the position that the unit owners are third-party beneficiaries of the STP Agreement.

In its decision and order, placed on the record following oral argument, the Court granted GHH's motion for a preliminary injunction and denied GHH's motion to dismiss stating, in relevant part:

> So I am granting the preliminary injunction pending what happens with the [County]. I am also denying the motion to dismiss. I do believe based upon everything that I have read and heard that the [HOA] has standing to bring this action based upon its demonstration that it is a third-party beneficiary of the agreement. And I have to say that I also am very influenced in this decision by the statement of Suffolk County and the Town, who are not interested parties in this dispute. They are neutral with regard to this issue, and that is very significant to the Court.

* * *

> I wish to say here that the Wild Oaks case that was cited in [GHH's] brief, I agree with [HOA's counsel], is inapplicable because there was in that case a gap in the legislation and, again, a statement that summary judgment was denied, and I don't – I think it's a distinction without a difference with regard to the connection in that case and the long-standing rates in this case.
>
> Obviously, there was implied in the denial of summary judgment a determination by that Court that the plaintiff in that case did have standing because – and state that there was a private right of action with regard to, in that case, the connection rate absent a municipal rate. And, in this case, it sounds like the County, which is in charge of these rates, agrees with the Court.

This Court issued a short form order dated October 24, 2011, reflecting its decision granting the preliminary injunction and denying the motion to dismiss. GHH served and filed a notice of appeal from this Court's order dated October 24, 2011, but subsequently withdrew the appeal in May 2012.

GHH now moves for (1) summary judgment dismissing the complaint as asserted against it, (2) staying this action pending a determination by the County of its approval or disapproval of the sewer rate charged by GHH, and (3) alternatively, for a protective order limiting the scope of discovery. In support of the motion GHH submits, among other things, an affidavit from Steven Kaplan, a member of GHH. In his affidavit, Kaplan recites the factual background of the Greens development project. Additionally he states, among other things, that each of the offering plans for the condominiums disclosed the anticipated sewer rates to be charged for each type of unit, which were based on the assessed value of the units and calculations provided by SBJ's engineers, who allegedly used a formula provided by someone from the Suffolk County Department of Public Works Revenue Office. Kaplan states that each of the unit owners entered into a Purchase Agreement agreeing to be bound by the terms of the Offering Plan, including the sewer rates disclosed therein. Kaplan points out that Paragraph 7 of each Purchase Agreements provides, in relevant part:

> "Purchaser Bound by Offering Plan. The Seller has exhibited and delivered to the Purchaser and the Purchaser acknowledges receipt of the Offering Plan at least 72 hours prior to the execution of this Purchase

> Agreement and has read and agrees to be bound by the proposed Declaration, By-Laws and Offering Plan of the said Condominium and the Declaration of Covenants, Restrictions, Easements, Charges and Liens and Association By-Laws (and the Schedules, Plans and Exhibits attached thereto) all of which are incorporated by reference and made a part of this agreement with the same force and effect as if set forth in full herein . . . The Purchaser acknowledges . . . that, except as stated in this agreement (and as set forth in the Declaration, By-Laws, Exhibits and Offering Plan), it has not relied on any representations or other statements of any kind or nature made by the Seller, and representatives of Seller, or otherwise, including but not limited to any relating to . . . the estimated common charges or other expense in connection herewith.

Kaplan also cites to paragraph 39 of the Purchase Agreement which states, in relevant part:

> 39. Entire Agreement. This agreement states the entire understanding of the parties and the Seller shall not be bound by any oral representations and/or agreements made by Seller, its agents or representatives.

Based on the foregoing provisions of the Purchase Agreements, Kaplan contends that every unit owner agreed to pay the sewer rates disclosed in the Offering Plan and to be bound thereby. He states further that the sewer rates disclosed in the Offering Plans and charged to the HOA since the units were first completed are virtually the same as are still being charged today. As of June 23, 2008, the estimated annual sewage disposal cost for 1,144 units was $646,100.00, amounting to a monthly cost of $53,841.67. As of March 2012, GHH charged the HOA $55,000 per month.

According to Kaplan, although the STP Agreement states that the sewer rates are subject to the approval of the County, at no time did the County ever seek to review or approve the rates or object to the rates being charged or ask GHH about the cost of operating the sewage treatment plant. However, Kaplan acknowledges that after the HOA served its Verified Amended Complaint dated July 7, 2011, the County began the process of reviewing GHH's records and other information to enable it to either approve or disapprove the rate charged by GHH.

GHH argues, among other things, that the entire action should be dismissed because the terms

of the individual Purchase Agreements between the unit owners and GHH govern the amount of sewer rates. GHH claims that each unit owner agreed to the rates disclosed in the Offering Plans, the terms of which were incorporated into the Purchase Agreements. Thus, GHH contends that the claims asserted by the HOA in this action are barred. GHH also argues that the HOA's claim for breach of the STP Agreement should be dismissed because the HOA is not a third-party beneficiary to the STP Agreement and, even if it is a third-party beneficiary, language in paragraph 19 of the STP Agreement indicates that it does not apply to the unit owners. In any event, GHH contends that it did not have any obligation under the STP Agreement to apply to the County for approval of the sewer rates.

Additionally, GHH argues that New York's Transportation Corporations Law is inapplicable because GHH is not a transportation corporation and, even if the TCL is applicable, it does not permit a private right of action. Accordingly, GHH contends that the HOA's claims alleging violation of the TCL should be dismissed as a matter of law. Alternatively, GHH argues that this action should be stayed pending the County's review of the sewer rates. Alternatively, GHH asserts that the Court should issue a protective order limiting the scope of discovery to those documents and information provided to the County in connection with its review of the sewer rates.

In opposition to GHH's motion, the County submits, among other things, an affidavit from John Donovan, P.E., Chief Engineer in the Sanitation Division of the County's Department of Public Works. In his affidavit Donovan states, among other things, that the County was in the process of reviewing the sewer rates charged by GHH. He further states, in contradiction to Kaplan's assertion, that DPW does not give developers a formula to calculate sewer rates and that DPW records do not show that any formula was given to GHH. Donovan adds that a final determination of the reasonableness of the rates charged by GHH cannot be made until the County's review is complete. The Town joined in the opposition to GHH's motion for summary judgment submitted by the County.

The HOA opposes GHH's motion for summary judgment and cross-moves for an order modifying the preliminary injunction by reducing the amount of the HOA's monthly payment to GHH for sewer charges and increasing the amount of the undertaking posted by GHH. The HOA argues, among other things, that the Offering Plans specifically state that the sewer rates disclosed therein were estimates subject to review and approval by the County in accordance with the STP Agreement, of which the unit owners are third-party beneficiaries. Additionally, the HOA contends that GHH is now making many of the same legal arguments that it made in support of its prior motion to dismiss, which were ruled on by this Court and are now law of the case since GHH withdrew its appeal. Specifically, the HOA argues that in denying GHH's motion to dismiss, this Court held that the HOA has standing to maintain this action as a third-party beneficiary of the STP Agreement and that the HOA can maintain a private right of action under the TCL. In any event, the HOA argues that its members are

expressly identified in the STP Agreement as third-party beneficiaries and that a private action can be maintained under the TCL. Additionally, the HOA asserts that, on its face, paragraph 19(C) of the STP Agreement applies to the unit owners of the Greens and that the provision in paragraph 19(A) stating that "[t]he provisions of this paragraph do not pertain to the individual units which comprise the PREMISES" only applies to paragraph 19(A) and in no way affects the application of paragraph 19.

With regard to GHH's argument that the HOA's claims are barred by the terms of the Offering Plans, the HOA points out that its claims are based on GHH's breach of the STP Agreement, not the Offering Plans, and that the rates disclosed in the Offering Plans were only estimates. With regard to the fourth cause of action for unjust enrichment, the HOA recognizes that it cannot recover on both the breach of contract and unjust enrichment claims but it states that the unjust enrichment cause of action is explicitly pled in the alternative to the breach of contract claim and, therefore, should not be dismissed. Additionally, the HOA argues that there is no basis for a stay pending a determination by the County and that the branch of GHH's motion seeking a protective order should be referred to a conference before the Court.

The HOA makes numerous arguments in support of its cross-motion to modify the preliminary inunction and increase the undertaking posted by GHH and GHH makes numerous arguments in opposition thereto. Nevertheless, by letter dated October 17, 2012, approximately three weeks after the instant motion and cross-motion were marked submitted on this Court's calendar, counsel for the HOA advised the Court that (1) the County had issued a sewer rate determination on October 12, 2012, (2) that the HOA believed that the preliminary injunction automatically dissolved upon the issuance of the County's determination, and (3) the County's rate determination moots the HOA cross-motion and that it therefore has no objection to the denial of its cross-motion as moot. Attached to the October 17th letter is a copy of a letter dated October 12, 2012, from Gilbert Anderson, P.E. Commissioner of the County's DPW and Chairman of the Suffolk County Sewer Agency, to counsel for the HOA and GHH stating, in relevant part:

> After an examination of documentation provided by the STP operator, relating to operation and maintenance of the Greens at Half Hollow Sewage Treatment Plant from the years 2004 through 2011, the Suffolk County Department of Public Works determines that the charges presently attributed to the Greens at Half Hollow Homeowner's Association are not fair and reasonable. Therefore, this Department does not approve the current charges.
>
> Based on this Department's analysis, a rate of $270 (per SFE

> [Single Family Equivalent, (225 GPD per unit)] annually for entities connected to the sewage treatment plant has been determined to be fair and reasonable.

In response to the letter from the HOA's counsel, counsel for GHH submitted a letter to the Court dated November 5, 2012, stating, among other things, that it is GHH's position that the preliminary injunction did not dissolve automatically when the County rendered its determination.

In reply to the HOA's arguments in opposition to its motion for summary judgment, GHH contends, among other things, that this Court's prior order denying GHH's motion to dismiss is not law of the case because GHH's prior motion was addressed only to the sufficiency of the pleadings and not to the merits. Thus, GHH argues that this Court's prior order did not determine that the HOA has standing as a third-party beneficiary but rather on that the HOA had "sufficiently alleged it was a third-party beneficiary" of the STP Agreement.

Discussion

A party moving for summary judgment has the burden of making a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence demonstrating the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 85 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). Once a prima facie showing has been made by the movant, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial (*see, Zayas v. Half Hollow Hills Cent. School Dist.*, 226 AD2d 713 [2nd Dept. 1996]). However, the movant's failure to establish prima facie entitlement to judgment as a matter of law requires the denial of the motion, regardless of the sufficiency of the opposition papers (*see Thompson v. Horwitz*, — AD3d —, 2012 NY Slip Op 07983 [2d Dept 2012]).

"Once a point is decided within a case, the doctrine of the law of the case makes it binding not only on the parties, but on the court as well: no other judge of coordinate jurisdiction may undo the decision" (Siegel, NY Prac § 448 [5th ed 2012]). "The doctrine of law of the case 'applies only to legal determinations that were necessarily resolved on the merits in the prior decision' (*Gilligan v Reers*, 255 AD2d 486, 487 [2d Dept 1998] quoting *Baldasano v Bank of N.Y.*, 199 AD2d 184, 185 [1st Dept 1993]).

Here, in deciding GHH's prior motion to dismiss, this Court specifically determined, among other things, that the HOA has standing to maintain this action/proceeding as a third-party to the STP

Agreement and under the Transportation Corporations Law. Therefore, GHH is precluded by the doctrine of law of the case from re-litigating these issues in the context of the instant motion for summary judgment (*see Moran Enter., Inc. v Hurst*, 96 AD3d 914 [2d Dept 2012]; *Springwell Nav. Corp. v Sanluis Corporacion, S.A.*, 99 AD3d 482 [1st Dept 2012]; *Grana v. Security Ins. Grp.*, 72 Misc2d 265, 266 [Sup Ct, Monroe County 1972]). GHH's contention that the doctrine of law of the case is not applicable because its prior motion was only addressed to the sufficiency of the pleadings is without merit. Although the law of the case doctrine is inapplicable to the denial of a motion to dismiss under CPLR 3211(a)(7) for failure to state a cause of action (*see Tenzer, Greenblatt, Fallon & Kaplan v Capri Jewelry, Inc.*, 128 AD2d 467 [1st dept 1987]), GHH's prior motion was not made only under CPLR 3211(a)(7). Rather, GHH also moved under CPLR 3211(a)(1) and made many of the same arguments that it now makes in support of its motion for summary judgment, including that the HOA is not a third-party beneficiary to the STP Agreement and that the HOA cannot maintain a private right of action under the TCL. Both of these arguments were specifically rejected by this Court in its decision and order on the record on October 19, 2011. Therefore, the doctrine of the law of the case prevents GHH from making the same arguments in support of its subsequent motion for summary judgment.

In any event, GHH has failed to make a prima facie showing of entitlement to judgment as a matter of law dismissing the complaint as asserted against it. In support of its argument that the HOA is not a third-party beneficiary of the STP Agreement, GHH relies on, among other things, the language of the STP Agreement. However, the STP Agreement specifically states that it was entered into "for the benefit of the . . . Community," which is defined in the STP Agreement as "[t]he development consisting of 1,250 townhouse condominium units, a golf course with a club house to be constructed." Thus, GHH's moving papers do not establish, as a matter of law, that the HOA is not a third-party beneficiary of the STP Agreement.

Moreover, contrary to GHH's contention, the language of the Purchase Agreements does not establish, as a matter of law, that the HOA's third cause of action for breach of the STP Agreement lacks merit. The elements of a cause of action for breach of contract are (1) the existence of a contract between plaintiff and defendant, (2) performance by the plaintiff, (3) defendant's failure to perform, and (4) damages resulting from such failure to perform (*see Furia v. Furia*, 116 AD2d 694 [2d Dept. 1986]). The STP Agreement clearly imposes additional obligations on GHH with regard to the operation of the sewage treat plant. GHH has not made a prima facie showing that it complied with its obligations under the STP Agreement. Moreover, as repeatedly pointed out by the HOA, the Purchase Agreements and Offering Plans specifically state that the sewer rates disclosed therein are estimates. Contrary to GHH's contention, the fact that each unit owner agreed to the estimated sewer rates disclosed in the Offering Plans does not negate GHH's obligations under the STP Agreement.

Additionally, GHH has not established, as a matter of law, that paragraph 19 of the STP Agreement, in its entirety, does not apply to the HOA. Rather, on its face, the exclusion contained in paragraph 19(A) of the STP Agreement appears to be limited in its applicability to the provisions of paragraph 19(A), and not the remainder of paragraph 19. Therefore, GHH has not established entitlement to summary judgment.

Similarly, GHH has not made a prima facie showing of entitlement to summary judgment dismissing the second cause of action for money had and received or the fourth cause of action for unjust enrichment. The essential elements of a claim for money had and received are: (1) defendant received money that belongs to plaintiff; (2) from which defendant received a benefit; (3) which in equity and good conscience defendant should not be permitted to keep (*Aaron Ferer & Sons Ltd. v Chase Manhattan Bank Nat. Assn.*, 731 F2d 112, 125 [2d Cir 1984]). "The action depends upon equitable principles in the sense that broad considerations of right, justice and morality apply to it, but it has long been considered an action at law" (*Board of Educ. of the Cold Spring Harbor Cent. School Dist. v Rettaliata*, 78 NY2d 128, 138 [1991]). "'To prevail on a claim of 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 is sought to be recovered"'" (*Anesthesia Assocs. of Mount Kisco, LLP v Northern Westchester Hosp. Ctr.*, 59 AD3d 473, 481 [2d Dept 2009], quoting *Citibank, N.A. v Walker*, 12 AD3d 480, 481 [2d Dept 2004], quoting *Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421 [1972], *cert denied* 414 US 829 [1973]). Where there is a bona fide dispute as to the existence of a contract governing the dispute in question, a party is not precluded from proceeding on both breach of contract and quasi-contractual theories (*see Plumitallo v Hudson Atlantic Land Co., LLC*, 74 AD3d 1038, 1039 [2d Dept 2010]; *AHA Sales, Inc. v Creative Bath Products, Inc.*, 58 AD3d 6, 20 [2d Dept 2008]).

Here, there is a bona fide dispute between the parties as to whether the sewer rates charged by GHH to the HOA are governed by the terms of the Purchase Agreements alone or whether the STP Agreement obligated GHH to apply to the County for approval of the sewer rates. Accordingly, the HOA is not precluded from proceeding with its causes of action based on the quasi-contract theories of money had and received and unjust enrichment. Ultimately, the HOA cannot recover on both its breach of contract claim and its quasi-contractual claims but, at this point, it has not been demonstrated by GHH, as a matter of law, that there is a valid enforceable contract between the parties that governs the dispute over the sewer rates. Thus, summary judgment dismissing the second and fourth causes of action is not appropriate.

That branch of GHH's motion seeking a stay of this action pending a determination by the County of its approval or disapproval of the sewer rate charged by GHH is denied as moot, since the

County made such a determination on October 12, 2012.

Pursuant to Rule 11(c) of the Rules of the Commercial Division of the Supreme Court (22 NYCRR § 202.70), that branch of GHH's motion seeking a protective order limiting the scope of discovery is referred to a preliminary conference before the Court to be held on December 10, 2012.

Finally, the HOA's cross-motion for an order modifying the preliminary injunction is denied as moot since the preliminary injunction, which was granted "pending what happens with the [County]," automatically expired, by its terms, when the County issued its determination on October 12, 2012.

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: December 5, 2012
Riverhead, New York

Emily Pines

EMILY PINES
J. S. C.

[ ] FINAL
[x] NON FINAL