STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

NORTHERN ELECTRIC POWER COMPANY, L.P.;
and SOUTH GLENS FALLS L.P.;

Plaintiffs,

-against-

HUDSON RIVER - BLACK RIVER
REGULATING DISTRICT,

Defendant.

DECISION and ORDER
INDEX NO. 3510-12
RJI NO. 01-12-107959

Supreme Court Albany County All Purpose Term, January 4, 2013
Assigned to Justice Joseph C. Teresi

APPEARANCES:
K & L Gates, LLP
Brian D. Koosed, Esq.
Attorneys for the Plaintiffs
599 Lexington Avenue
New York, New York 10022

Goldberg Segalla, LLP
William J. Greagan, Esq.
Attorneys for the Plaintiffs
8 Southwoods Blvd., Suite 300
Albany, New York 12211

Eric T. Schneiderman, Esq.
Attorney General for the State of New York
Attorneys for Defendant
C. Harris Dague, Esq. (AAG)
The Capitol
Albany, New York 12224

TERESI, J.:

Plaintiffs, Northern Electric Power Company, LP[1] and South Glens Falls LP[2], operate hydroelectric power plants on the Hudson River. The Conklingville Dam is located upstream from Plaintiffs, on the Sacandaga River approximately six miles above the Sacandaga and Hudson Rivers confluence. Defendant, Hudson River-Black River Regulating District[3], regulates the water flow of the Hudson River, in relevant part, by operating the Conklingville Dam.

Plaintiffs commenced this action to recover the "headwater benefits"[4] the District collected from them between 2002[5] and 2008. The District answered, and all now move for summary judgment.[6] Because Plaintiffs demonstrated their entitlement to judgment as a matter of law and the District raised no triable issue of material fact, Plaintiffs' motion is granted and the District's is denied.

This action is closely analogous to an action previously before this Court entitled Albany

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[1] Hereinafter referred to as "NEPC."

[2] Hereinafter referred to as "SGF."

[3] Hereinafter referred to as "the District."

[4] "An upstream dam typically will render the downstream flow more even and predictable, enabling downstream hydropower plants to operate at a higher capacity." (Albany Eng'g Corp. v F.E.R.C., 548 F3d 1071, 1072 [DC Cir 2008]). Such increased capacity is referred to as headwater benefits.

[5] Plaintiffs seek to recoup only a portion (1/4) of the 2002 headwater benefits they paid. Because the District has not specifically controverted such proportion, it is deemed uncontested and will not be further addressed herein.

[6] This Court, by Letter Order dated December 5, 2012, permitted the parties to supplement their submissions with briefs addressing the collateral estoppel issue discussed at length below.

Engineering Corporation v Hudson River-Black River Regulating District (Index No. 5289-11)[7]. This Court, by Decision and Order dated April 2, 2012[8] in the AEC Action, fully explored the District's obtaining a federal license to operate the Conklingville Dam in 2002, its collection of headwater benefits from AEC between 2002 and 2008 and AEC's exhaustive challenge thereto. Such background is incorporated, and need not be fully explained again.

Turning to the merits, Plaintiffs demonstrated their entitlement to judgment, by operation of the collateral estoppel effect of the AEC Decision, on the issue of the District's wrongful collection of headwater benefits between 2002 and 2008.

A movant for summary judgment "seeking to invoke the doctrine of collateral estoppel bears the [initial] burden of establishing that the identical issue was necessarily decided in the prior action." (Nachum v Ezagui, 83 AD3d 1017, 1018 [2d Dept 2011], quoting Leung v Suffolk Plate Glass Co., Inc., 78 AD3d 663 [2d Dept 2010]; Weber v Kessler, 177 AD2d 843 [3d Dept 1991]). Only if the burden is shifted will "the opponent [be required] to establish the absence of a full and fair opportunity to litigate the issue in [the] prior action or proceeding." (Ryan v New York Tel. Co., 62 NY2d 494, 501 [1984]).

Like the AEC Action, here too Plaintiffs are challenging the District's collection of headwater benefits. Both AEC and the instant Plaintiffs are downstream users of the headwater benefits created by the District's regulation of the Hudson River's flow. Although each paid the District's headwater benefit assessments from 2002 through 2008, as noted in the AEC Decision,

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[7] Hereinafter referred to as "the AEC Action," and Albany Engineering Corporation will be referred to as "AEC."

[8] Hereinafter referred to as "the AEC Decision."

the United States Court of Appeals for the District of Columbia Circuit held that Federal Law "preempts all state headwater benefits assessments." (Albany Eng'g Corp. v F.E.R.C., supra at 1079). Just as "the District never had [state law] authority to exact any compensation from [AEC] for headwater benefits," it similarly had no authority to collect headwater benefits from NEPC or SGF. (Id.) Because this material issue was clearly raised and essential to this Court' AEC Decision, collateral estoppel precludes its re-litigation in this action. (Gadani v DeBrino Caulking Assoc., Inc., 86 AD3d 689, 691-92 [3d Dept 2011]). Such showing of "identicality and decisiveness of the issue" sufficiently establishes Plaintiffs' prima facie burden. (Kibler v New York State Dept. of Correctional Services, 91 AD3d 1218, 1221 [3d Dept 2012] lv to appeal denied, 19 NY3d 803 [2012], quoting Ryan v New York Tel. Co., 62 NY2d 494 [1984]).

With the burden shifted, the District failed to show that it did not have "a full and fair opportunity to litigate" such issue. (Martin v Rosenzweig, 70 AD3d 1112 [3d Dept 2010]). The record is conspicuously silent. The District made no allegation that it did not vigorously defend the prior action (which resulted in a judgement in excess of five hundred thousand dollars) or have a full and fair opportunity to litigate its authority to collect headwater benefits. Moreover, the District conceded that it fully litigated their ripeness, exhaustion and primary jurisdiction defenses in the AEC Action. It is now collaterally estopped from raising such defenses. While the District now claims that: the AEC Action's judgment is relatively small, that new evidence[9] exists and that it previously made different tactical determinations, the District did not state that

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[9] On July 31, 2012 a headwater benefits investigation was completed (hereinafter "Order Determining Headwater Benefits"), whereas at the time of the AEC Action only a draft report had been prepared. Such investigation, however, does not address the District's authority to collect headwater benefits.

any such factor deprived it of a full and fair opportunity to litigate in the AEC Action.

Instead, the District now allegedly relies on two new affirmative defenses, the statute of limitations and the Paramount doctrine[10], not raised in the AEC Action. Because affirmative defenses not previously litigated are not given collateral estoppel effect, neither would be barred by the AEC Decision. (Restatement [Second] of Judgments § 27 [stating: "[a]n issue is not actually litigated if the defendant might have interposed it as an affirmative defense but failed to do so"; compare Jeanson v Middlegrove Estates Inc., 222 AD2d 782 [3d Dept 1995]). Although the District is not necessarily collaterally estopped from asserting such defenses, neither raises a triable issue of fact in opposition to Plaintiffs' motion.

Considering first the District's statute of limitations defense, it is wholly unavailing. As the District's supplemental brief acknowledges, the AEC Decision was based upon that Plaintiff's "unjust enrichment cause of action." The collateral estoppel effect of the AEC Decision, noted above, here too entitles Plaintiffs to judgments on their unjust enrichment causes of action. The unjust enrichment claims set forth by the Plaintiffs, as conceded by the District, is limited by a "six-year statute of limitations (see CPLR 213[1])." (Sirico v F.G.G. Productions, Inc., 71 AD3d 429, 434 [1st Dept 2010]; Davis v Cornerstone Tel. Co., LLC, 61 AD3d 1315, 1316 [3d Dept 2009]). Contrary to the District's claim, however, Plaintiffs' unjust enrichment causes of action did not accrue at the time each invoice was paid. Rather, it is well established that "unjust enrichment accrues upon the occurrence of the wrongful act giving rise to a duty of restitution." (Elliott v Qwest Communications Corp., 25 AD3d 897, 898 [3d Dept 2006],

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[10] While the District alleges a defense under the "Paramount doctrine," derived from Paramount Film Distrib. Corp. v State (30 NY2d 415 [1972]), no cases in New York have either classified such decision as creating a doctrine or referred to it and its progeny.

quoting Congregation Yetev Lev D'Satmar v 26 Adar N.B. Corp., 192 AD2d 501 [3d Dept 1993][internal quotation marks omitted]; Am. Home Assur. Co. v Nausch, Hogan & Murray, Inc., 71 AD3d 550 [1st Dept 2010]). It is uncontested that the District's "duty of restitution" did not arise until November 28, 2008, when the Albany Eng'g Corp. v F.E.R.C. Court held that Federal Law "preempts all state headwater benefits assessments." (Id. at 1079). It was not until such holding that the District's retention of Plaintiffs' payments became wrongful and their duty of restitution arose. Only then could the Plaintiffs truthfully assert their unjust enrichment causes of action. Thus, Plaintiffs' unjust enrichment cause of action accrued on November 28, 2008.

Because Plaintiffs commenced this action well within six years of the accrual of their unjust enrichment causes of action, the District raised no triable issue of fact with their statute of limitations defense.

The District's reliance on the Paramount doctrine is likewise unavailing.

Preliminarily, because the Paramount doctrine is not an affirmative defense, the District is collaterally estopped from now raising it. The District disregards Paramount's voluntary/ involuntary inquiry, focusing instead on its more general unjust enrichment analysis. Such argument, however, focuses on the elements of an unjust enrichment claim and re-litigates the AEC Decision's unjust enrichment holding. As such, the District's Paramount doctrine argument does not state an affirmative defense. Nor did the District explain why they failed to raise the Paramount doctrine previously or even suggest that they "were in any way inhibited from addressing the [Paramount doctrine], which involved the essence of the[] claim" against it. (Aldrich v State, 110 AD2d 331 [3d Dept 1985]). The District's previous failure to proffer this new proof and argument concerning unjust enrichment "cannot now be made the basis for

avoiding the application of collateral estoppel." (Lippman v State, 83 AD2d 700 [3d Dept 1981]; Wheeler v Vil. of Saugerties, 216 AD2d 733, 735 [3d Dept 1995]; Schultz Const., Inc. v Franbilt, Inc., 14 AD3d 895 [3d Dept 2005]).

Moreover, even if not collaterally estopped, the District raised no triable issue of material fact with its Paramount doctrine argument. For that portion of the Paramount decision the District relied upon, Paramount's "essential inquiry [was]... whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered." (30 NY2d at 421). Such policy statement was, however, pure dicta. Its related analysis was either ignored or contradicted by the Paramount Court's own holding, in which "recovery [was] allowed" despite its numerous findings against unjust enrichment. (Id. at 422). Moreover, contrary to the District's contention, Plaintiffs are not seeking to recover the monies it paid the District for maintenance. Plaintiffs deducted such amount, as set forth below, from the recovery they seek. Nor has the District proffered any admissible proof to affirmatively establish that its 2002 through 2008 charges were innocently made; its reliance on a lack of protest or proof raises no triable issue of fact. In sum, the District failed to proffer sufficient proof that equity and good conscience prohibit Plaintiffs from recouping the monies the District wrongfully collected between 2002 and 2008.

Accordingly, Plaintiffs established that the District had no authority to collect headwater benefits from them for the period between 2002 through 2008 along with their related entitlement to recoup the monies wrongfully collected; and the District raised no triable issue of fact.

Plaintiffs also sufficiently demonstrated, as a matter of law, the amount of headwater benefits wrongfully collected. NEPC and SGF both submitted the invoices they received from

the District for the years 2002 through 2008. They supported their motion with the affidavit of Daniel McCarty, their "Manager, Hydro Operations," who alleged that each invoice was paid. Such submissions established that for the period 2002 though 2008 NEPC paid the District a total amount of $2,753,816.51, and SGF paid $761,812.53. While Plaintiffs duly established the total amount of headwater benefits paid, they do not seek to recover the entire amount. Rather, in accord with the FERC's Order Determining Headwater Benefits, they seek to recover only that portion of their 2002 through 2008 payments that were not properly collected under Federal Power Act §10(f). As the Albany Eng'g Corp. v F.E.R.C. Court found, Federal Power Act §10(f) permits the District to collect "interest, maintenance and depreciation" only. In accord with Federal Power Act §10(f), the Order Determining Headwater Benefits found that for the 2002 through 2008 period NEPC should have been charged $385,336, while SGF was properly charged $402,483. On such proof, Plaintiffs demonstrated their entitlement to the difference between what they actually paid and what they should have been charged. Thus, NEPC and SGF demonstrated, as a matter of law, that they are entitled to judgements in the amount of $2,368,480.51 and $359,329.53 respectively.

With the burden shifted, the District raised no triable issue of material fact relative to the amount due either Plaintiff. The District explicitly admitted that Plaintiffs paid the amounts each alleged,[11] and proffered no proof that the Order Determining Headwater Benefits incorrectly calculated NEPC and SGF's overpayments. Nor, as is uncontested, has the District appealed the Order Determining Headwater Benefits's calculation. To the extent that the District is not

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[11] Although the District alleged that SGF paid more in 2004 than its papers alleged, such difference is immaterial and disregarded because SGF apparently concedes that it is not entitled to such additional amount.

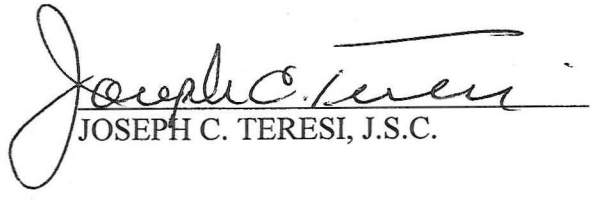
collaterally estopped from claiming that such Order is not final, it raised no issue of fact by claiming that an appeal from it is pending. Such appeal, according to the District's own submissions, challenges the Order's future assessment not its 2002 through 2008 determination.

Accordingly, Plaintiffs' motion is granted and the District's is denied. To the extent not specifically addressed above, the parties' remaining contentions have been examined and found to be either lacking in merit or moot.

This Decision and Order is being returned to Goldberg Segalla, LLP, one of the attorneys for Plaintiffs. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: January 17, 2013
Albany, New York



JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated August 31, 2012; Affidavit of Andrew Young, dated August 30, 2012, with attached Exhibits A-M; Affidavit of Daniel McCarty, dated August 28, 2012, with attached Exhibits A-N.
2. Notice of Cross-Motion, dated September 24, 2012; Declaration, dated September 24, 2012, with attached Exhibits 1-2; Affidavit of Richard J. Ferrara, dated September 24, 2012, with attached Exhibits 1-5.