SHORT FORM ORDER

INDEX NO. 14273-2011

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

Present:

HON. EMILY PINES
J. S. C.

Motion Date: 03-19-2013
Submit Date: 03-19-2013
Motion No.: 005 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-Petitioner,

- against -

GREENS AT HALF HOLLOW, LLC,

Defendant,

-and-

SUFFOLK COUNTY SEWER AGENCY,
COUNTY OF SUFFOLK,
TOWN BOARD of the TOWN OF HUNTINGTON,
and TOWN OF HUNTINGTON,

Defendants-Respondents.

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ORDERED that the motion (Mot. Seq. 005) by plaintiff for an order, inter alia, pursuant to CPLR 6315 fixing the damages allegedly sustained by the plaintiff as a result of the preliminary injunction issued by order this Court on October 19, 2011,

is denied.

Factual and Procedural Background

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 within a development of condominiums known as The Greens at Half Hollow ("The Greens"), against Greens at Half Hollow, LLC ("GHH"), 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 owned and operated by GHH. The HOA seeks a declaration of the parties' rights and obligations under a Sewage Treatment Plant Agreement ("STP Agreement") between GHH and The County and various statutes governing the operation of the sewage treatment plant, including the Transportation Corporations Law ("TCL"). Specifically, the HOA seeks a declaration that GHH may not impose or collect sewer charges from owners of units within The Greens 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 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 moved for a preliminary mandatory injunction. By decision and order

on October 19, 2011, placed on the record following oral argument, the Court granted GHH's motion for a preliminary mandatory injunction "pending what happens with the [County]." The mandatory injunction directed the HOA to continue paying $55,106.55 per month to GHH for operation of the sewage treatment plant to which the units within The Greens are connected. As a condition of the injunction, the Court required GHH, pursuant to CPLR 6312(b), to post a bond in the amount of $250,000. The bond was posted and the HOA made monthly payments to GHH in the amount of $55,106.55 from November 2011 through September 2012.

By letter dated October 12, 2012, Gilbert Anderson, P.E. Commissioner of the County's DPW and Chairman of the Suffolk County Sewer Agency, advised counsel for the HOA and GHH, in relevant part, as follows:

> 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.
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> 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.

By order dated December 5, 2012, this Court denied GHH's subsequent motion for summary judgment. In that same order, the Court also denied, as moot, the HOA's cross-motion to modify the preliminary injunction. The Court determined that the preliminary injunction automatically expired when the County issued its determination on October 12, 2012.

Plaintiff now moves for an order pursuant to CPLR 6315 fixing the damages it allegedly sustained as a result of the preliminary injunction. Plaintiff claims that its damages for the 11 month period during which the preliminary injunction was in place (November 2011-September 2012) amount to $323,032.05, representing the difference between what it paid ($606,172.05) and what it claims it should have paid in accordance with the County's rate determination ($283,140.00). Thus, Plaintiff seeks to recover the full amount of the bond, i.e. $250,000. GHH opposes the motion.

Discussion

CPLR 6312(b) provides, in relevant part:

> "[P]rior to the granting of a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court, that the plaintiff, if it is finally determined that he or she was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction . . .

The vacating of a preliminary injunction while the action is still pending is not a final determination within the meaning of CPLR 6312(b) (*Straisa Realty Corp. v Woodbury Assocs.*, 185 AD2d 96 [2d Dept 1993]; *Blueberries Gourmet, Inc. v Aris Realty Corp.*, 255 AD2d 348 [2d Dept 1998]).

Here, the expiration of the preliminary injunction on October 12, 2012, is not a final determination within the meaning of CPLR 6312(b), as the Plaintiff's underlying claims have not yet been determined on their merits. If the Defendant ultimately prevails, then the preliminary injunction, in hindsight, would not be improper and the Plaintiff would not be entitled to recover damages sustained by reason of the preliminary injunction. If the Plaintiff wins, then it will be entitled to recover its actual damages sustained by reason of the preliminary injunction.

Defendant's liability under CPLR 6312(b) turns on whether it is finally determined that defendant was not entitled to an injunction (*see J.A. Preston Corp. v Fabrication Enterprises, Inc.*, 68 NY2d 397, 406 [1986]). Such a determination, either by way of a motion for summary judgment or trial, has not yet occurred. Therefore, Plaintiff's motion is denied.

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

Dated: June 11, 2013
Riverhead, New York

Emily Pines
EMILY PINES
J. S. C.

[ ] Final
[x] Non Final

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