GMMM Westover LLC v New York State Elec. & Gas Corp.
2015 NY Slip Op 32824(U)
September 15, 2015
Supreme Court, Broome County
Docket Number: 2015-0227-M
Judge: Jeffrey A. Tait

At a Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Broome County Courthouse, in the City of Binghamton, New York on the 24nd day of March 2015.

PRESENT: HONORABLE JEFFREY A. TAIT
JUSTICE PRESIDING

STATE OF NEW YORK
SUPREME COURT : COUNTY OF BROOME

GMMM WESTOVER LLC,

Petitioner,

vs.

NEW YORK STATE ELECTRIC AND GAS CORPORATION,

Respondent.

DECISION AND ORDER
Index No.: 2015-0449
RJI No.: 2015-0227-M

APPEARANCES:

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HON. JEFFREY A. TAIT, J.S.C.

This matter is before the Court on the Order to Show Cause of the Petitioner GMMM Westover LLC (GMMM) seeking an order directing the Respondent New York State Electric and Gas Corporation (NYSEG) to vacate what is known and referred to as the Westover Power Station (Westover Station)[1] at 720 Riverside Drive, Johnson City, NY, declaring NYSEG a trespasser on the property, and awarding GMMM money damages. NYSEG opposes the Petition and the Order to Show Cause and moves to dismiss the Petition on the grounds that: the Petition is procedurally defective, does not comply with the New York State Real Property Action and Proceedings Law (RPAPL), and contains requests for relief that are not permitted by the RPAPL; NYSEG is lawfully on the premises; and NYSEG is working to vacate the property as quickly and safely as possible, though it has no legal obligation to do so.

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Which was a coal fired electric power generating station that was also locally known and referred to for many years as the Goudey Station. It was shut down several years ago and is no longer used to generate electric power.

Procedural background

GMMM commenced this proceeding by filing the Petition on February 24, 2015. The Order to Show Cause was signed on that date and scheduled to be heard on March 10, 2015. A conference was held with the attorneys for the parties on March 2, 2015. As a result of the conference, the Order to Show Cause was rescheduled to be heard March 24, 2015, with responsive papers due on March 17, 2015 and any reply papers due on March 23, 2015. On March 17, 2015, NYSEG moved to dismiss the Petition. The Order to Show Cause and the motion to dismiss were heard on March 24, 2015. At this Court's request, a second oral argument was held on May 18, 2015 focusing on the easements and the respective rights or obligations of the parties under them.[2]

A telephone conference was held on August 6, 2015 at the request of GMMM's counsel, who sent a letter expressing concern that NYSEG was not diligently or expeditiously pursuing the separation of its transmission facilities from the building. NYSEG responded with a letter detailing the steps being taken to move the project along.

In the telephone conference, GMMM's counsel stated that he was at the site that morning, one or two individuals were at the site for NYSEG, and no activity was taking place in the GMMM building. Both NYSEG's counsel and its in-house general counsel recounted

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2 Although the discussion was not limited to those issues. Numerous issues were discussed by the parties and the Court.

the steps being taken and asserted that the project was complicated, high stakes, and being diligently pursued.

The GMMM Order to Show Cause

The Order to Show Cause seeks summary relief under the RPAPL. The Petition asserts causes of action for ejectment, trespass, declaration of the parties' property rights, unjust enrichment, and damages for withholding real property.

GMMM asserts that NYSEG was obligated under the applicable agreements to complete its so-called "Separation Project" by October 2014 so that GMMM could demolish the Westover Station building. It asserts that this was a clear mandate in the agreements between them resulting from legal proceedings in U.S. Bankruptcy Court.

The NYSEG motion to dismiss

NYSEG moves to dismiss the Petition on the grounds that: it is procedurally defective and does not comply with the provisions of the RPAPL; it contains causes of action and requests for relief not permitted by the RPAPL; NYSEG is lawfully on the premises based on various easements; and NYSEG is working diligently to vacate the premises.

NYSEG asserts that the Petition is procedurally defective due to GMMM's failure to adhere to several requirements of RPAPL Article 7 and that these defects render the Petition jurisdictionally defective. Specifically, NYSEG asserts that "GMMM failed to adhere to the strict requirements of RPAPL § 735" by failing to describe the method of service in the

affidavit of service, sending the Petition by Federal Express rather than first class and certified mail,[3] failing to file a later affidavit of service within three days of mailing, and failing to explain the efforts to obtain admittance to the location where it was affixed to a door. NYSEG also asserts that the Petition fails to apprise NYSEG of the specific grounds upon which it is brought, was filed prior to the expiration of the ten day statutory notice period, and includes other causes of action not permitted under Article 7 of the RPAPL. NYSEG also asserts that RPAPL Article 7 is not applicable to the dispute here.

Fact background

This matter arises out of a series of transactions dating back several years involving the sale of the Westover Station originally owned by NYSEG. NYSEG sold it to an entity generally known as AES as part of a regulatory reorganization of the New York utility industry which separated transmission and power generation facilities. NYSEG continued to own the transmission facilities and AES took over operation of the power generating Westover Station. For a period of time thereafter, AES operated the Westover Station. Later, AES filed a petition for relief under the United States bankruptcy laws. GMMM acquired the Westover Station through that bankruptcy. NYSEG, which still had facilities intertwined with the Westover Station, had certain agreements which set forth the terms under which it continued to control the facilities and assets on the site and in the building on that site. NYSEG also

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Which its attorney, Christopher D. Thomas, Esq., refers to in his affirmation as "reckless . . . . 'service.'"

entered into certain agreements as part of the bankruptcy proceeding which governed its continued presence and operation of its facilities at that site.

It is the nature of NYSEG's continued presence and operation of its facilities there that is at the heart of the current dispute. GMMM asserts that NYSEG no longer has the right to occupy the property, as its time to take action necessary to terminate its operations there has expired. NYSEG asserts that it has no obligation whatsoever to vacate the property and in fact has the right to continue to use it for as long as it wants. NYSEG does state that, despite that right, it does want to cease any operations and remove any equipment from the property and is doing so as expeditiously as possible.[4]

In order to decide the rights and obligations of the parties and the basis for GMMM to gain full possession of the Westover Station building or, alternatively, for NYSEG to remain there, this Court must first determine the nature of their relationship. To do that, a review of the applicable agreements and easements is necessary.

The agreements

GMMM is a party to an Assignment and Assumption Agreement (Assignment

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NYSEG asserts that it has economic incentives to do this, as it is paying the expenses of and carrying costs for the Westover Station.

Agreement)[5] whereby it assumed all right, title, and interest in and all of the duties, liabilities, and obligations of Sections 2.4, 2.5, and 2.7 of what is referred to as the "Settlement Agreement." These sections are referred to as the "Assigned Sections." NYSEG is specifically designated as an express third party beneficiary of the Assignment Agreement. The Assignment Agreement also provides that GMMM "fulfill the obligations set forth in Sections 2.8(b) and (c) of the Settlement Agreement." These are referred to as the "Additional Obligations."

Therefore, to determine the extent of GMMM's obligations under the Settlement Agreement, one needs to look to sections 2.4, 2.5, 2.7, and 2.8 (b) and (c).

Section 2.4 covers obligations before the Deemed Rejection Date. That date has by all accounts passed. This section does not impose any obligations on any of the parties at this point.

Section 2.5 covers the parties' obligations after the Deemed Rejection Date. The parties disagree as to the extent this section applies to the current situation. Consequently, it is necessary to parse its language in order to ascertain what it provides.

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5 Which is "dated as of December __, 2012."

It is first necessary to establish what constitutes both the "Separation Project" and the "Project Completion Date." Both are defined in the first phrase of Section 2.5, which reads as follows:

> Following the Deemed Rejection Date and continuing thereafter until the earlier of (a) such time as NYSEG has completed separation of its Transmission System from the IA Debtors' generation systems at the Non-Operating Facilities (the "Separation Project"), and (b) twenty two (22) months from the Deemed Rejection Date (the "Project Completion Date") . . .

Thus, the Separation Project refers to separation of NYSEG's transmission system from, in the present case, the Westover Station generation system. The Project Completion Date is the date NYSEG completes separation of its transmission system from the IA Debtors'[6] generation systems **or** twenty-two months from the Deemed Rejection Date – **whichever is earlier.**[7] Under any analysis, it is clear the Project Completion Date – i.e., the earlier of the completion of the separation of NYSEG's transmission system and twenty-two months from the Deemed Rejection Date – has passed.

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6 For the Westover Station, GMMM is the IA Debtor.

7 The choice of the words "Project Completion Date" is interesting, as one would presumably (and reasonably) think it refers to the date of a project's completion. The very subject matter at issue is the separation of NYSEG's transmission system … which sounds like a "project." The other language – not uncommon in agreements – places an outside date on the time for the completion of that project.

The next phrase of Section 2.5 requires GMMM, at NYSEG's expense, to maintain the Westover Station facility "in a manner consistent with the manner in which [it was] maintained immediately prior to the Deemed Rejection Date. . ." A proviso then states that nothing shall prevent GMMM from "conducting demolition and redevelopment activities in a manner reasonably protective of NYSEG's Transmission System prior to the Project Completion Date."[8] The next sentence of Section 2.5 provides that GMMM shall have "no obligation to maintain" the Westover Station facility if NYSEG does not advance payment as provided therein.

Section 2.7 provides that GMMM "shall coordinate with NYSEG before any demolition is performed . . . in order to protect NYSEG's transmission facilities. . ."

Under sections 2.8 (b) and (c), GMMM must "(b) pay all real estate taxes and municipal assessments with respect to [the Westover Station property] through the Project Completion Date; and (c) maintain, at its own cost and expense, through the Project Completion Date, insurance as is customary for demolition companies and demolition projects of similar type and size, naming NYSEG as an additional insured." As all parties acknowledge, as the Project

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Can one presume from this that after the Project Completion Date GMMM can conduct demolition and redevelopment activities in a manner that **is not** reasonably protective of NYSEG's transmission system? If so, was this intentional? Or did someone fail to provide terms which would control if the "separation of its Transmission System from the IA Debtors' [GMMM] generation systems at the Non-Operating Facilities [the Westover Station facility]" was not completed by "twenty–two months from the Deemed Rejection Date"?

Completion Date (as defined in the Assignment Agreement) has passed, GMMM now has no obligation to pay real estate taxes and municipal assessments or to maintain an insurance policy "customary for demolition companies and demolition projects of similar type and size, naming NYSEG as an additional insured."[9]

Based on the foregoing, it would seem that NYSEG at a minimum anticipated – and quite possibly assumed – that it would complete the Separation Project sometime before, but certainly within, the twenty-two month outside date referred to as the "Project Completion Date."

Clearly, GMMM owns the Westover Station property and NYSEG has no right to continue occupying it or maintaining facilities on it other than as expressly set forth in a binding document or agreement. In other words, as the owner of the property, GMMM does not need to show an agreement or document stating that NYSEG must vacate the property. Rather, NYSEG must show some agreement or document which grants it the right to remain on the property and restricts GMMM's right to do what it wants with the property it owns.

In that regard, there may be easements in favor of NYSEG which remain in effect and provide it with the right to have and maintain its transmission equipment at the Westover Station facility. NYSEG points out that Section 4.4 of the Settlement Agreement provides that nothing in it "shall affect NYSEG's rights under easements relating to the Non-Operating

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9 It is doubtful NYSEG intended this result.

Facilities, including the Amended and Restated Reciprocal Easement Agreements." The Assignment Agreement does not reference Section 4.4 or provide that GMMM is bound by the complete Settlement Agreement.[10] If the drafters of the Assignment Agreement had intended for GMMM to be bound by Section 4.4, they no doubt would have explicitly done so.[11]

Section 9 of the Assignment Agreement is clear that it is subject to the Purchase Agreement. That section reads as follows:

> This Agreement is delivered pursuant to and is subject to the Purchase Agreement. Nothing contained herein is intended to or shall be construed to modify, alter, amend, expand, interpret, supersede or otherwise change any of the terms, conditions, covenants, warranties, representations, remedies or any other provisions of the Purchase Agreement. In the event of any conflict between the terms of the Purchase Agreement and the terms of this Agreement, the terms of the Purchase Agreement shall prevail.

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The attorney representing NYSEG with respect to the Settlement Agreement states that "to read into the Settlement Agreement an implied obligation by NYSEG to vacate the Westover Facility or complete the Separation Project by a date certain . . . ignores the plain terms of the integration clause appearing in Section 7.9 of the Settlement Agreement" (*see* affidavit of Keith J. Cunningham dated April 2, 2015 at ¶ 15). What that statement ignores is that the Assignment Agreement does not bind GMMM to section 7.9 of the Settlement Agreement.

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This could have been accomplished by either listing that as one of the sections binding on the IA Debtors or having the IA Debtors assume all of the obligations under the Settlement Agreement. The agreements do provide that the term "IA Debtors" includes GMMM.

However, the Assignment Agreement does not expressly state that GMMM or the Property Buyers (which include GMMM) are assigned any of the rights or assume any of the obligations under the Purchase Agreement.

The easements

NYSEG asserts that under the Reciprocal Easement Agreements (REA) and/or the Interconnection Agreement (ICA) and easements recorded in the Broome County Clerk's Office, it has easements which exist and will continue to exist into the future that give it the right to continue locating its equipment and operations on the Westover Station property.

GMMM disputes this, stating that any such easements do not prohibit or restrict it from demolishing the former power generating facility on the property.[12] GMMM asserts that the ICA was rejected by the Bankruptcy Court and is no longer in force, so that certain easements no longer exist.

Paragraph thirteen of the Bankruptcy Court Order dated October 11, 2012 provides that nothing in that Order shall affect the rights of NYSEG under any easements relating to the Non-Operating Facilities "including the Reciprocal Easement Agreements . . ."[13]

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The parties apparently do not dispute there are easements for transmission of electric or gas on the property.

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At Paragraph 25 of his undated affirmation (filed March 17, 2015), Christopher Thomas, Esq. states that the Bankruptcy Court "advised the parties of the superiority of

Section 2.1 of the Settlement Agreement between AES entities and NYSEG dated as of May 29, 2012 provides that the ICA is "deemed to be rejected with respect to the Non-Operating Facilities (of which Westover is one) effective as of the Deemed Rejection Date." There is no dispute that the Deemed Rejection Date has passed. This seems to provide that the ICA is no longer in force as it is "deemed" rejected as of October 2014.

Paragraph 4.4 of the Settlement Agreement provides that nothing in that "Agreement shall affect NYSEG's rights under easements relating to the Non-Operating Facilities, including the Amended and Restated Reciprocal Easement Agreements." As noted previously, GMMM only assumed the rights and obligations of the AES entities under paragraphs 2.4, 2.5, 2.7 and 2.8 (b) and (c). There is no mention of or reference to assumption of any AES obligations under paragraph 4.4.

The REA does contain language denoting the easements as "perpetual" except as otherwise provided in Section 3.3(b) of the REA, which provides:

> Any easement, license, right, or right of way granted for purposes of enabling a Party to exercise any right or fulfill any obligation set forth in the ICA will last for the term of the ICA or longer if the right or obligation either (i) survives the ICA, or (ii) is necessary for the conduct of business by a Party hereto or by a future owner of the Facilities, Property, and/or Improvements of a Party hereto.

NYSEG's REAs" through its October 11, 2012 Order. What the Order actually states is that nothing in the Order affects NYSEG's rights under the Settlement Agreement or under any easements relating to the Non-Operating Facilities, including the REA. What this really means is that the Order does not affect those easements – meaning it neither subordinates them nor establishes their superiority. It simply leaves them unaffected.

The easements then expired with the rejection of the ICA unless they expressly survive the ICA or are "necessary for the conduct of business by a party."

Thus, the REA may not bind GMMM as the Assignment Agreement does not bind GMMM to Paragraph 4.4 of the Settlement Agreement[14] and there appears to be no other document binding it to the REA.

This leaves the possibility that GMMM is bound by easements that run with the land, also referred to as easements appurtenant.[15] There are a number of easements on the Westover Station facility,[16] although it remains unclear which precise easement NYSEG claims allows it to remain in the building.

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As the AES entities were.

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To the extent easements are conveyed in writing, are subscribed by the creator, and burden the servient estate for the benefit of the dominant estate, they are easements appurtenant (*Djoganopoulos v. Polkes*, 95 AD3d 933, 935 [2d Dept 2012]). Once created, the easement runs with the land and can only be extinguished by abandonment, conveyance, condemnation, or adverse possession (*id.*). Owners of servient estates are bound by constructive or inquiry notice of easements which appear in deeds or other instruments of conveyance in their property's direct chain of title (*see Witter v. Taggart*, 78 NY2d 234, 239 [1991]).

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The deed that conveys the property to GMMM does include a provision which provides that the conveyance is made subject to easements and restrictions set forth in the attached Appendix C, which refers to the Amended and Restated Reciprocal Easement between New York State Electric & Gas Corporation and AES Energy, L.P. dated May 1, 1999.

Analysis

One thing that is apparent and can be seen from the review of the agreements and easements discussed above is that the relationship between the parties is certainly not a typical landlord-tenant relationship.[17] NYSEG's presence on the property began as an owner and then, after the sale to AES, was pursuant to agreements to continue its operations on that site. It is clear from the agreements that they were meant to sever NYSEG's transmission facilities from the building. It is with this in mind that the Court will consider the parties' requests for relief and the basis for GMMM to gain full possession of the Westover Station building or, alternatively, for NYSEG to remain there.

Motion to Dismiss

NYSEG contends that this proceeding must be dismissed as the relief sought is not recoverable in the type of proceeding GMMM has commenced. GMMM's Petition alleges entitlement to relief under RPAPL Articles 6 and 7, both of which provide for summary relief to recover possession of real property, and alleges causes of action for ejectment, trespass, unjust enrichment, and damages for withholding real property, all of which are valid and recognized causes of action in New York State.

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NYSEG is apparently not sure how to characterize its status on the property. When asked at oral argument what NYSEG's status on the property is, its counsel was unwilling or unable to say whether NYSEG is a tenant, licensee, or has some other status there.

RPAPL § 711 provides the grounds for such a proceeding where a landlord-tenant relationship exists and § 713 provides the grounds for such a proceeding where there is no landlord-tenant relationship.

It is true that NYSEG is now paying certain carrying costs and expenses for the property under the Settlement Agreement. While this does give some indicia of a landlord-tenant relationship, it is not sufficient to render RPAPL § 711 applicable. The Settlement Agreement is not simply a lease and the current effort by GMMM to remove NYSEG from the Westover Station property is not simply an effort to end a tenancy there. Rather, it is to compel NYSEG to more promptly relocate operations out of the building at the site, which will then allow GMMM to demolish the building there and NYSEG to continue transmission of power from its easements on or near the site.

None of the grounds for an action under RPAPL § 713 (where no landlord-tenant relationship exists) applies here. As such, RPAPL Article 7 does not apply and NYSEG's motion to dismiss is granted with respect to any and all claims based on RPAPL Article 7.

This leaves the issue of whether RPAPL Article 6 applies. A cause of action for ejectment is recognized at common law and has been codified in New York State in RPAPL Article 6 (*see Calvi v. Knutson*, 195 AD2d 828, 831 [3d Dept 1993]; *see also Alleyne v. Townsley*, 110 AD2d 674, 675 [2d Dept 1985]).

RPAPL Article 6 does not set forth the elements of a cause of action for ejectment. "In order to maintain a cause of action to recover possession of real property, the plaintiff must

(1) be the owner of an estate in fee, for life, or for a term of years, in tangible real property, (2) with a present or immediate right to possession thereof, (3) from which, or of which, he has been unlawfully ousted or disseised by the defendant or his predecessors, and of which the defendant is in present possession" (*Jannace v. Nelson, L.P.*, 256 AD2d 385, 385-386 [2d Dept 1998]; *see Merkos L'Inyonei Chinuch, Inc., v. Sharf*, 59 AD3d 408, 410 [2d Dept 2009]).[18] The defendant must be in actual possession of or claiming title to the property or an interest therein (*Coletti v. Matthews*, 224 AD2d 858, 859 [3d Dept 1996], *citing Raffaeli v. Pomeroy*, 193 AD 958 [2d Dept 1920], *affd* 233 NY 513 [1922]).

As GMMM is the owner of the Westover Station property and this action is to enforce agreements that were meant to sever NYSEG's transmission facilities from the building at that site, this action is properly characterized as one for ejectment.

RPAPL § 641 refers to a complaint. The pleading before this Court is labeled a Petition. A court may convert a pleading to the correct form where appropriate (*see* CPLR § 103(c); *Seymour v. County of Saratoga*, 190 AD2d 276, 278 [3d Dept 1993]). As the action here is one for ejectment and is clearly labeled as such in the Petition, the Petition is converted to a complaint.

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Stated differently, "[T]here are but two essential allegations to a complaint in ejectment: first that the plaintiff is seized in fee, for life or for a term of years, or is otherwise entitled to immediate possession of the described property in the litigation; second, that the defendant is in possession thereof and withholds the same from the plaintiff" (14 Carmody-Wait, NY Practice at p 178).

NYSEG asserts that it did not receive proper notice or demand from GMMM prior to commencement of this proceeding. Nothing in RPAPL Article 6 requires notice or written demand for surrender of the property before commencing an action in a situation such as this. It does require that a complaint "state the plaintiff's interest in the property and describe it with reasonable certainty in such a manner that, from the description, possession of the property claimed may be delivered" (RPAPL § 641). In any event, GMMM did provide clear notice to NYSEG of its claim prior to commencement of this action.

To the extent that NYSEG seeks dismissal of GMMM's claim for ejectment, that aspect of the motion is denied.

GMMM substantive claim

GMMM asserts that under the applicable agreements it is now entitled to full possession of the Westover Station property (i.e. ejectment of NYSEG) at least insofar as it can now force NYSEG to vacate it so that GMMM can demolish the structures it owns.

GMMM's Order to Show Cause clearly seeks summary relief to recover possession of the building at the Westover Station property. As noted above, such summary relief, if granted, will be under ejectment and RPAPL Article 6. That Article requires a complaint as the initial pleading. Unlike RPAPL Article 7, there is no express statutory provision providing for that summary relief.

Thus, such summary relief, if any, will come in the form of summary judgment. Much of what is before the Court in the form of affidavits, affirmations, and exhibits is what would

be submitted on a motion for summary judgment. However, CPLR 3211(c) provides that notice must be given to the parties prior to treating a motion to dismiss as one for summary judgment. In that regard, "It is well settled that '[a] court may not, on its own initiative, convert a motion . . . into one for summary judgment without giving adequate notice to the parties and affording the parties an opportunity to lay bare their proof'" (*Town of Lloyd v. Moreno*, 297 AD2d 403, 405 [3d Dept 2002][lower court erred in converting plaintiff's motion for contempt to one for summary judgment without affording adequate notice], *quoting Ratner v. Steinberg*, 259 AD2d 744 [2d Dept 1999]; *Farrell v. Kiernan*, 213 AD2d 373 [2d Dept 1995][lower court erred in converting plaintiff's motion for a preliminary injunction to one for summary judgment without first giving defendants adequate notice of its intention to do so and an opportunity to lay bare their proof]; *Clark v. New York State Off. of Parks, Recreation & Historic Preserv.*, 288 AD2d 934, 935 [4th Dept 2001]; *Livas v. Mitzner*, 303 AD2d 381 [2d Dept 2003]).

An exception to the notice requirement applies where the parties have clearly charted a summary judgment course (*see Moreno*, 297 AD2d at 405). While GMMM's application by Order to Show Cause clearly seeks summary relief "directing NYSEG to vacate the Westover Power Station" and other relief, NYSEG has challenged the authority for and several procedural aspects of this proceeding and thus has not treated this as a summary proceeding. Accordingly, the parties are entitled to notice that this Court will be treating the Order to Show Cause filed by GMMM as a motion for summary judgment.

Conclusion

NYSEG's motion to dismiss is granted with respect to any and all claims based on RPAPL Article 7 and is otherwise denied.

The Petition is converted to a complaint. NYSEG shall have until October 5, 2015 to submit an answer to the complaint. The Order to Show Cause shall be deemed a motion for summary judgment. GMMM shall have until October 15, 2015 to supplement what will now be treated as a motion for summary judgment. NYSEG shall have until October 23, 2015 to supplement its submissions in this matter. **The motion will be heard on Friday, October 30, 2015 at 1:00 PM at the Broome County Courthouse, 92 Court Street, Binghamton, NY 13902.**

This Decision shall also constitute the Order of the Court pursuant to rule 202.8(g) of the Uniform Rules for the New York State Trial Courts and it is deemed entered as of the date below. To commence the statutory time period for appeals as of right (CPLR 5513[a]), a copy of this Decision and Order, together with notice of entry, must be served upon all parties.

Dated: September 15, 2015
Binghamton, New York

HON. JEFFREY A. TAIT
Supreme Court Justice

FILED
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BROOME COUNTY CLERK