

**Board of Educ. of the Northport-E. Northport Union
Free Sch. Dist. v Long Island Power Auth.**

2018 NY Slip Op 30304(U)

January 31, 2018

Supreme Court, Suffolk County

Docket Number: 15194-11

Judge: Elizabeth H. Emerson

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NO.: 15194-11

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

x
BOARD OF EDUCATION OF THE NORTHPORT-EAST
NORTHPORT UNION FREE SCHOOL DISTRICT AND
BOARD OD EDUCATION OF THE PORT JEFFERSON
UNION FREE SCHOOL DISTRICT,

Plaintiffs,

-against-

LONG ISLAND POWER AUTHORITY, LONG ISLAND
LIGHTING COMPANY d//b/a LIPA, NATIONAL GRID
US8, Inc. a/k/a NATIONAL GRID USA, INC.,
NATIONAL GRID GENERATION, L.L.C., NATIONAL
GRID, P.L.C., KEYSpan CORPORATION, KEYSpan
GENERATION, L.L.C., KEYSpan ELECTRIC
SERVICES, L.L.C., KEYSpan ENERGY TRADING
SERVICES, L.L.C. and BROOKLYN UNION GAS,

Defendants.

x

MOTION DATE: 12-14-17
SUBMITTED: 12-14-17
MOTION NO.: 004-MG
005-XMD
006-MD

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Upon the following papers numbered 1-24 read on this motion for a joint trial, cross motion for a bifurcated trial, and motion for change of venue ; Notice of Motion and supporting papers 1-10; 16-20 ; Notice of Cross Motion and supporting papers 12-15 ; Answering Affidavits and supporting papers 23-24 ; Replying Affidavits and supporting papers ; Other 11; 21-22 ; it is,

ORDERED that the motion (seq. 004) by defendants Long Island Power Authority, Long Island Lighting Company and National Grid Generation, LLC, the cross motion (seq. 005) by plaintiffs, and the motion (seq. 006) by the Board of Education of the Island Park Union Free School District are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendants Long Island Power Authority, Long Island Lighting Company and National Grid Generation, LLC, for an order transferring venue of the actions pending in the Supreme Court, Nassau County, entitled *Board of Education of the North Shore Central School District, plaintiff, against Long Island Power Authority, Long Island Lighting Company d/b/a LIPA, National Grid Generation, L.L.C., Keyspan Generation, L.L.C., and Marketspan Generation, L.L.C., defendants*, assigned index number 12607/2013, and *Board of Education of the Island Park Union Free School District, plaintiff, against Long Island Power Authority, Long Island Lighting Company d/b/a LIPA, National Grid Generation, L.L.C., Keyspan Generation, L.L.C., and Marketspan Generation, L.L.C., defendants*, assigned index number 607447/2015, to Suffolk County, and joining such actions for trial with this action and the actions entitled *Town of Huntington, plaintiff, against Long Island Power Authority, Long Island Lighting Company, as predecessor of interest of Long Island Power Authority d/b/a LIPA, National Grid U.S.8, a/k/a National Grid U.S.A., Inc., National Grid Generation, L.L.C., Keyspan Generation, L.L.C., Brooklyn Union Gas, Keyspan Corporation, National Grid, P.L.C., Keyspan Electric Service, L.L.C., and Keyspan Energy Trading, L.L.C., defendants*, assigned index number 15186/2011, and *The Incorporated Village of Port Jefferson, plaintiff, against Long Island Power Authority, Long Island Lighting Company d/b/a LIPA, and National Grid Generation, L.L.C., defendants*, assigned index number 609579/2015, both of which are pending in this court, is granted; and it is

ORDERED that the cross motion by plaintiff for an order bifurcating the liability and damages issues of the joint trial is denied without prejudice; and it is

ORDERED that the motion, improperly denominated as a cross motion, by the Board of Education of the Island Park Union Free School District for an order placing venue of the joint trial in Nassau County is denied; and it is

ORDERED plaintiffs shall serve a copy of this order with notice of its entry upon the Calendar Clerk of this Court and upon the Clerk of the Supreme Court, Nassau County, within 30 days of the date of this order. Upon such service, the Clerk of the Supreme Court, Nassau County, shall deliver to the Clerk of this Court all papers and records filed in the action assigned index number 12607/2013 and in the action assigned index number 607447/2015; and it is further

ORDERED that a separate note of issue and bill of costs shall be filed and separate court fees shall be paid for each action.

In May 2011, the Board of Education of the Northport-East Northport Union Free School District and its president, Stephen V. Waldenburg, Jr., commenced this action (Action No. 1) against defendants Long Island Power Authority (LIPA), Long Island Lighting Company (LILCO), National Grid US8, Inc., National Grid Generation, LLC, Keyspan Generation, LLC, Brooklyn Union Gas Company and other related entities seeking declaratory and injunctive relief, as well as damages for breach of contract and negligent representation. Also in May 2011, the Town of Huntington brought a separate action in this court (Action No. 2), assigned index number 15186/2011, against LIPA, LILCO, National Grid US8 and others seeking similar relief. Both Action No. 1 and Action No. 2 were commenced after LIPA filed tax certiorari proceedings in this court challenging the Town of

Huntington's assessment of the power-generating facilities located in Northport, New York (the Northport Power Station).

By order dated May 21, 2013, the undersigned granted defendants' motion in Action No. 1 for an order pursuant to CPLR 3211 dismissing the complaint to the extent that the causes of action for negligent misrepresentation were dismissed, as was the individual claim asserted by Waldenburg. That same day, the undersigned issued an order in Action No. 2 denying dismissal of the Town of Huntington's claims for injunctive relief, declaratory relief, and damages for breach of contract, and granting dismissal of its claims for fraud and negligent misrepresentation. The relevant facts, the parties' arguments, and the bases for the Court's determinations are set forth in the May 2013 orders and will not be repeated herein, as the parties' familiarity with such orders is assumed. Thereafter, the Appellate Division, Second Department, in separate decisions dated July 29, 2015, affirmed the May 2013 orders (*see Board of Educ. of Northport-E. Northport Union Free Sch. Dist. v Long Is. Power Auth.*, 130 AD3d 953, 14 NYS3d 450 [2d Dept 2015]; *Town of Huntington v Long Is. Power Auth.*, 130 AD3d 1013, 12 NYS3d 912 [2d Dept 2015]).

In September 2015, another action (Action No. 3), assigned index number 609579/2015, was brought in this court by the Incorporated Village of Port Jefferson against LIPA, LILCO and National Grid Generation. As with Action No. 1 and Action No. 2, Action No. 3 was brought in response to a tax certiorari proceeding brought by LIPA challenging the assessment of the power-generating facilities located in Port Jefferson, New York (the Port Jefferson Power Station). Thereafter, in 2017, amended complaints and second amended complaints were served in Action No. 1, Action No. 2 and Action No. 3. It is noted that the caption in Action No. 1 was amended by deleting Waldenburg and adding the Board of Education of the Port Jefferson Union Free School District as a plaintiff.

Briefly stated, the second amended complaint in Action No. 1 alleges that the Board of Education of the Northport-East Northport Union Free School District and the Board of Education of the Port Jefferson Union Free School District (hereinafter collectively referred to as plaintiffs) are third-party beneficiaries of a written agreement, known as the Power Supply Agreement (PSA), executed by LIPA and LILCO in June 1997 to effectuate an earlier agreement by LILCO to sell and deliver the capacity and energy it produced at its power-generating facilities located in Nassau and Suffolk Counties to LIPA. The PSA, which allegedly is binding and effective on the successors and assignees of LIPA and LILCO, including National Grid Generation, contains a provision, Article 21.16, which states in pertinent part that after June 26, 1997, LILCO will not challenge any property tax assessment on its power-generating facilities unless the assessment was increased "not in an appropriate proportion to the increase in value related to taxable capital additions affixed to the tax parcel between the last two tax dates." The second amended complaint alleges, in part, that in May 1997, Richard Kessel, who at the time was Chairman of LIPA, sent a letter to the Nassau-Suffolk School Board Association stating, in part, that "neither LIPA nor LILCO will initiate any further tax certiorari cases on any of their respective properties at any time in future unless a municipality abusively increases its assessment rate. Traditional increases in local taxes and assessments will not represent a change in this promise."

Further, according to the second amended complaint, LIPA, LILCO and National Grid

Generation entered into an Amended and Restated Power Supply Agreement in May 2013 that renewed the terms of the PSA, yet failed to include any provision limiting LIPA's and LILCO's ability to bring proceedings challenging the tax assessment of its generating facilities. The second amended complaint alleges the failure to include such a provision in the Amended and Restated Power Supply Agreement constitutes a breach of Article 21.16 of the PSA. Moreover, the second amended complaint alleges, among other things, that LIPA, LILCO and National Grid Generation breached the PSA by commencing tax certiorari proceedings, "despite having promised to refrain from challenging real property assessments on the Northport and Port Jefferson power-generating facilities unless certain conditions have occurred"; that there have been no "abusive" increases to the property tax assessments for such facilities; and that defendants' breach of the agreement not to challenge the tax assessments absent abusive rate increases by a municipality will harm plaintiffs' finances and bond ratings. In addition to seeking damages for breach of contract, the second amended complaint asserts causes of action for a permanent injunction and for a declaratory judgment that defendants are contractually prohibited from commencing and proceeding with real property tax assessment challenges on the properties situated within the Northport-East Northport and the Port Jefferson school districts. It also contains a cause of action for promissory estoppel based on the statements made by Richard Kessel in 1997.

As in Action No. 1, second amended complaints were served in Action No. 2 and Action No. 3 in 2017. The second amended complaints in such actions contain essentially the same allegations and legal claims as set forth in the second amended complaint served in Action No. 1, with the exception that Action No. 3 challenges the LIPA tax certiorari proceeding involving the Port Jefferson Power Station.

Meanwhile, in 2013, the Board of Education of the North Shore Central School District commenced an action (Action No. 4) in Supreme Court, Nassau County, assigned index number 12607/2013, against LIPA, LILCO, National Grid Generation, Keyspan Generation, LLC, and Marketspan Generation, LLC, alleging, in relevant part, that they breached their obligations under the PSA by bringing tax certiorari proceedings seeking reductions in the assessed property value of the power-generating facility in the Town of Hempstead known as the Glenwood Generating Station. In 2015, the Board of Education of the Island Park Union Free School District commenced an action (Action No. 5) in Supreme Court, Nassau County, assigned index number 607447/2015, alleging that LIPA, LILCO, National Grid Generation, Keyspan Generation, and Marketspan Generation violated their obligations under the PSA by filing tax certiorari proceedings challenging the assessment for the power-generating facility known as the E.F. Barrett Power Station, also located in the Town of Hempstead. As in the Suffolk County actions, Action No. 4 and Action No. 5 seek injunctive and declaratory relief, and damages for breach of contract. On December 4, 2015, the Supreme Court, Nassau County (Driscoll, J.), issued an order denying a defense motion seeking dismissal of the complaint. Thereafter, in 2017, second amended complaints were served by the Board of Education of the North Shore Central School District and the Board of Education of the Island Park Union Free School District in Action No. 4 and Action No. 5. The second amended complaints in those actions assert substantially the same allegations and legal claims as the Suffolk County actions discussed herein, except Action No. 4 challenges the tax certiorari proceeding involving the Glenwood Landing facility and Action No. 5 challenges the tax certiorari proceeding involving the E. F. Barrett facility.

Defendants LIPA, LILCO and National Grid Generation now move for an order directing that Action No. 4 and Action No. 5 be transferred to Suffolk County and joining all five actions for trial. They allege that the parties in all five actions have coordinated discovery and that discovery proceedings are nearly completed. They argue that a joint trial is appropriate, as all five cases arise from the institution of tax certiorari proceedings by LIPA challenging the property taxes assessed against its power plants, and involve common questions of fact and law. They further argue the joint trial should be conducted in Suffolk County, as Action No. 1 and Action No. 2 were commenced prior to the Nassau County actions.

Plaintiffs cross-move, in effect, for an order joining the five actions for trial only on the issue of liability and directing separate trials for each action on the issue of damages. In support of their motion, plaintiffs argue that, due to the “unique claims for damages” that will be asserted by the local boards of education and the municipalities, severance of the actions after completion of the liability phase of the joint trial is required “to protect against confusion of the issues and the waste of resources.” No papers were submitted in opposition to plaintiffs’ cross motion.

A motion to consolidate actions or to join separate actions for trial rests within the sound discretion of the trial court (*see Alizio v Perpignano*, 78 AD3d 1087, 912 NYS2d 132 [2d Dept 2010]; *RCN Constr. Corp. v Fleet Bank, N.A.*, 34 AD3d 776, 825 NYS2d 140 [2d Dept 2006]). Consolidation gives rise to a new action that displaces the actions affected thereby (*Pigott v Field*, 10 AD2d 99, 101, 197 AD2d 648 [1st Dept 1960]; *see Kelley v Galina-Bouquet, Inc.*, 155 AD2d 96, 552 NYS2d 305 [1st Dept 1990]). Conversely, a joint trial preserves the separate character of each action, but secures the advantage of a single trial on common issues (*see Import Alley of Mid-Is. v Mid-Island Shopping Plaza*, 103 AD2d 797, 477 NYS2d 675 [2d Dept 1984]). Absent prejudice to a substantial right of a party opposing the motion, consolidation or a joint trial of actions pending before a court should be granted when common questions of law or fact exist (*see Obuko v New York City Tr. Auth.*, 141 AD3d 708, 35 NYS3d 710 [2d Dept 2016]; *Lecorps v Bromberg*, 127 AD3d 931, 6 NYS3d 627 [2d Dept 2015]; *Cieza v 20th Ave. Realty, Inc.*, 109 AD3d 506, 970 NYS2d 311 [2d Dept 2013]). Further, when considering an application for consolidation or for a joint trial of actions involving common questions of fact and law, but brought in different venues, the general rule is that, absent proof of circumstances compelling the trial be held elsewhere, the county of the first commenced action should be designated as the place for trial (*see Brown v Cope Bestway Express, Inc.*, 99 AD3d 746, 952 NYS2d 220 [2d Dept 2012]; *Whiteman v Parsons Transp. Group of N.Y., Inc.*, 72 AD3d 677, 900 NYS2d 87 2d Dept 2010]; *Nigro v Pickett*, 39 AD3d 720, 833 NYS2d 655 [2d Dept 2007]).

Here, it is undisputed that all five lawsuits arise out of LIPA’s actions challenging the taxing jurisdictions’ property assessments of the power stations and involve common issues of fact and law (*see Perini Corp. v WDF, Inc.*, 33 AD3d 605, 822 NYS2d 295 [2d Dept 2006]; *Kay v Kritzer*, 298 AD2d 560, 748 NYS2d 679 [2d Dept 2002]; *J & A Vending v Eagle & Fein*, 268 AD2d 505, 703 NYS2d 53 [2d Dept 2000]). Moreover, no claim of prejudice has been raised by any of the parties in this action or in the Nassau County actions, other than a conclusory assertion by the Board of Education of the Island Park Union Free School District that placing venue in Suffolk County “quite likely . . . would result in substantial delay to the trial date” and deprive it of its “substantial right to a speedy trial.” It is noted that “delay of the trial is not a sufficient basis to justify the denial of a

joint trial” (*Perini Corp. v WDF, Inc.*, 33 AD3d 605, 606, 822 NYS2d 295). Thus, absent a showing of prejudice, the motion by defendants Long Island Power Authority, Long Island Lighting Company and National Grid Generation is granted, as a joint trial will avoid unnecessary expenses, save judicial resources, and prevent inconsistent verdicts based on the same facts (*see Obuko v New York City Tr. Auth.*, 141 AD3d 708, 35 NYS3d 710; *Clark v Clark*, 93 AD3d 812, 941 NYS2d 192 [2d Dept 2012]; *Alizio v Perpignano*, 78 AD3d 1087, 912 NYS2d 132). Moreover, venue is proper in Suffolk County, where the first two actions were commenced.

Plaintiffs’ cross motion to bifurcate the trial is denied without prejudice. No affidavit of service of the cross motion was included with the moving papers, and there is no indication in the papers before the Court that the cross motion was received by the other parties. Accordingly, the court grants the parties leave to make an application to bifurcate the trial at a later date in the proceedings, closer to trial. Any application to bifurcate the trial shall be made after a pre-motion conference with the court in accordance with Rule 24 of the Rules of the Commercial Division.

Finally, the motion by the Board of Education of the Island Park Union Free School District inter alia, for an order setting the venue of the joint trial in Nassau County is denied. As each action retains its separate identity in a joint trial, any request for relief by a party must be made under the appropriate index number. Since the motion by the Board of Education of the Island Park Union Free School District was made in this action, it is not properly before the court.

DATED: January 31, 2018



J.S.C.