

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

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 9-22-12  
SUBMITTED: 4-12-12  
MOTION NO.: 001-MOT D

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BOARD OF EDUCATION OF THE NORTHPORT-EAST  
NORTHPORT UNION FREE SCHOOL DISTRICT and  
STEPHEN V. WALDENBURG, JR., individually, and as  
President of the Board of Education of the Northport-East  
Northport Union Free School District,

INGERMAN SMITH, L.L.P.  
Attorneys for Plaintiffs  
150 Motor Parkway, Suite 400  
Hauppauge, New York 11788

Plaintiffs,

-against-

RIVKIN RADLER LLP  
Attorneys for Defendants Long Island Power  
Authority and Long Island Lighting Company  
d/b/a LIPA  
926 RXR Plaza  
Uniondale, New York 11556

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,

LAURICE ARROYO, ESQ.  
Attorney for Defendants National Grid US8 Inc.,  
National Grid Generation LLC formerly known as  
Keyspan Generation LLC, National Grid PLC,  
Keyspan Corporation, National Grid Electric  
Services LLC, National Grid Energy Trading  
Services LLC, and The Brooklyn Union Gas  
Company  
One Metro Tech Center, 14<sup>th</sup> Floor  
Brooklyn, New York 11201

Defendants.

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Upon the following papers numbered 1-24 read on this motion to dismiss; Notice of Motion and supporting papers 1-7; Notice of Cross Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers 8-23; Replying Affidavits and supporting papers 24; and after hearing oral argument in support of and in opposition to the motion it is,

**ORDERED** that the motion by the defendants for an order dismissing the complaint is granted as to the fifth through eighth causes of action and the eleventh through sixteenth causes of action; and it is further

**ORDERED** that the motion is otherwise denied.

In 1986, the New York State Legislature enacted the Long Island Power Authority Act (Public Authorities Law, art 5, tit 1-A), which created LIPA, a not-for-profit public corporation with broad powers to effectuate the legislation's purposes. Those purposes were primarily to close the Shoreham nuclear power plant, to replace the Long Island Lighting Company ("LILCO") as the provider of electric power on Long Island, and to reduce electric power costs for Long Island ratepayers (Public Authorities Law §§ 1020-a, 1020-c, 1020-f, 1020-g, 1020-h; **Matter of Citizens for an Orderly Energy Policy v Cuomo**, 78 NY2d 398, 407). Thus, LIPA was authorized, among other things, to acquire all or any part of the stock or assets of LILCO (Public Authorities Law § 1020-h [2]; **Matter of Town of Islip v Long Island Power Authority**, 301 AD2d 1, 4).

In March 1997, LIPA and LILCO entered into an Agreement in Principle in which LIPA agreed to acquire LILCO's electric transmission and distribution facilities as well as its retail operations (**Matter of Suffolk County v Long Island Power Auth.**, 248 AD2d 226, 228). LILCO's remaining assets, including its gas and distribution assets and its non-nuclear generation facilities were sold to a newly formed company from whom LIPA would purchase energy. Additional agreements between LIPA and LILCO resolved various ancillary issues, and the final acquisition of LILCO by LIPA was consummated in 1998 (**Id.**).

On June 26, 1997, LIPA and LILCO executed two agreements: the Power Supply Agreement ("PSA") and the Agreement and Plan of Merger (the "Merger Agreement"). Pursuant to the PSA, LILCO agreed to sell and deliver to LIPA all of the capacity and energy that it produced from its generating facilities in Nassau and Suffolk counties. The initial term of the PSA was 15 years, commencing on the closing date. The PSA was binding and effective upon and inured to the benefit of LIPA, LILCO, and their successors or assignees. Article 21.16 of the PSA provided, in pertinent part, that after June 26, 1997, LILCO would not challenge any property tax assessment on its 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." Substantially the same language was included in the Merger Agreement, which also provided as follows:

This Agreement shall be binding upon and inure solely to the benefit of each party hereto, and nothing in this Agreement, express or implied, is intended to or shall confer upon any other person or persons any rights, benefits or remedies of any nature whatsoever.

The foregoing language was not included in the PSA.

On May 2, 1997, the Chairman of LIPA, Richard Kessel, sent a letter to the Nassau-Suffolk School Boards Association, of which the School District was a member. In the letter, Kessel made the following statements:

Let me also guarantee you that LIPA will immediately drop all tax certiorari cases against all municipalities and school districts on all of its properties immediately following the takeover. Furthermore, LILCO will drop all of its remaining tax suits at the

same time and neither LIPA nor LILCO will initiate any further tax certiorari cases on any of their respective properties at any time in the future unless a municipality abusively increases its assessment rate. Traditional increases in local taxes and assessments along with any capital improvements will not represent a change in this promise. By the way, this language is specifically spelled out in the definitive agreements between LIPA/LILCO and Brooklyn Union.

Huntington: On August 6, 1997, Kessel sent the following letter to the Supervisor of the Town of

Thank you for your July 21<sup>st</sup> letter regarding certain provisions of the LIPA/LILCO agreement.

Your understanding of the LIPA/LILCO agreement and our commitments resulting from the agreement is accurate. Once the transaction closes, all pending certiorari proceedings against the Town of Huntington will be withdrawn. In the future, there will be no appeal or litigation of any assessment on the Northport facility unless Huntington Town singles out LIPA, LILCO, or Brooklyn Union Gas property for reassessment, thus increasing the assessment separate and apart from other properties located within the town.

Furthermore, the agreement provides that routine increases in assessment for all properties and increases in assessment on various utility facilities, including Northport, as a result of capital improvements would not warrant certiorari challenges. Finally, it is important to note that this policy will apply to all facilities owned and/or operated by LIPA, LILCO or Brooklyn Union Gas within the Town of Huntington. I hope that this letter answers the various concerns you've had regarding the LIPA/LILCO transaction.

On March 22, 2007, LIPA and LILCO entered into an agreement with KeySpan Corporation and National Grid USA, among others, in connection with the merger of KeySpan and National Grid (the "Agreement and Waiver").<sup>1</sup> The Agreement and Waiver provided, in pertinent part, as follows:

Notwithstanding any provisions to the contrary in the PSA or the June 26, 1997 Agreement and Plan of Merger, between the KeySpan parties and LIPA, for the term of the PSA National Grid and Genco<sup>2</sup>

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<sup>1</sup> In the interest of brevity, the court will refer to the various KeySpan and National Grid entities as "KeySpan" and "National Grid," respectively.

<sup>2</sup> Genco is Keyspan Generation LLC.

hereby agree that unless directed to do so by LIPA, they shall not initiate any tax certiorari proceedings with respect to any Genco “Generating Facilities”, as such term is defined in the PSA.

At a press conference following the merger of KeySpan and National Grid, the defendants announced that they would not challenge any tax assessments unless the conditions found in the parties’ earlier agreements had been met.

On October 15, 2010, LIPA and National Grid commenced tax certiorari proceedings in the Supreme Court, Suffolk County, against the Assessor of the Town of Huntington, among others, challenging the property tax assessments on the Northport power-generating facilities, which are located in the Town of Huntington. It is undisputed that the assessments for the properties in question had not been increased disproportionately to the assessments for any other properties in the Town of Huntington.

The Board of Education of the Northport-East Northport Union Free School District (the “School District”) and Stephen V. Waldenburg, Jr., individually and as the president thereof, commenced this action against LILCO, LIPA, Brooklyn Union Gas, KeySpan and National Grid. The plaintiffs contend that they are intended third-party beneficiaries of the 1997 Power Supply Agreement between LIPA and LILCO. The complaint contains 16 causes of action for money damages and for declaratory and injunctive relief. The first, third, fifth, and seventh causes of action seek a judgment declaring that the defendants violated the PSA by commencing the aforementioned tax certiorari proceedings. The second, fourth, sixth, and eighth causes of action seek an injunction enjoining the defendants from prosecuting the tax certiorari proceedings. The ninth through twelfth causes of action seek money damages for breach of the PSA. The thirteenth through sixteenth causes of action seek money damages for negligent misrepresentation. The defendants move to dismiss the complaint pursuant to CPLR 3211 (a) (1), (3), (7), and/or (8). In support of their motion, the defendants contend, inter alia, that the plaintiffs have no standing to maintain this action and that they are not intended third-party beneficiaries of the PSA.

On a motion to dismiss pursuant to CPLR 3211, the sole criterion is whether the pleading states a cause of action and if, from its four corners, the factual allegations, taken together, manifest any cause of action cognizable at law (**Guggenheimer v Ginzburg**, 43 NY2d 268, 275). The court is to liberally construe the complaint, accept the alleged facts as true, and give the plaintiff the benefit of every possible favorable inference (**Leon v Martinez**, 84 NY2d 83, 87). The court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (**Id.** at 88, citing **Rovello v Orofino Realty**, 40 NY2d 633, 635). When evidentiary material is considered, the inquiry turns from whether the complaint states a cause of action to whether the plaintiff actually has one. Unless it can be shown that a material fact as claimed by the plaintiff is not a fact at all and that no significant dispute exists regarding it, the complaint should not be dismissed (**Guggenheimer v Ginzburg**, *supra*).

One may not maintain a cause of action for breach of contract in the absence of privity (**LaBarte v Seneca Resources Corp.**, 285 AD2d 974, 975), but a third-party may sue to enforce a contract made for its benefit (*see*, **Port Chester Elec. Constr. Corp. v Atlas**, 40 NY2d

652, 655). In order to maintain an action to recover as the third-party beneficiary of a contract, the third-party must establish that it was the intent of the contracting parties to benefit the third-party (*Id.* at 655; *see also*, **Amin Realty v K & R Constr. Corp.**, 306 AD2d 230). A third-party who is only an incidental beneficiary to a contract may not sue to enforce it (*see*, **Port Chester Elec. Constr. Corp. v Atlas**, *supra* at 655; **Amin Realty v K & R Constr. Corp.**, *supra* at 232). In determining third-party beneficiary status, the court must examine the intent of the parties as revealed in their agreement and in the surrounding circumstances (**Septembertide Publ. B.V. v Stein & Day**, 884 F2d 675, 679 [2<sup>nd</sup> Cir]; *see also*, **Aievoli v Farley**, 223 AD2d 613, 614; **Trans-Orient Mar. Corp. v Star Trading & Mar.**, 925 F2d 566, 573 [2<sup>nd</sup> Cir]). Moreover, it is well settled that the obligation to perform to the third-party beneficiary need not be expressly stated in the contract (*see*, **Aievoli**, *supra*; **Trans-Orient**, *supra*).

Applying these principles to the facts of this case, the court finds that the plaintiffs' opposition to the defendants' motion is sufficient to raise an issue as to whether the School District is an intended third-party beneficiary of Article 21.16 of the Power Supply Agreement (*see*, **Aievoli**, *supra*). As the defendants' correctly contend, the overall purpose of the PSA is the purchase and delivery of power, which benefits the parties to the contract and LIPA's ratepayers. Article 21.16, however, benefits neither the parties to the contract nor the ratepayers. Moreover, the School District has produced evidence to support its contention that Article 21.16 was included in the PSA to benefit the School District. The court, therefore, cannot conclude as a matter of law that the School District is merely an incidental beneficiary and not an intended third-party beneficiary of the Power Supply Agreement.

The defendants contend that the School District lacks standing to maintain this action. The defendants contend that the Suffolk County Tax Act prevents any tax refunds from being charged back to the School District. Thus, the Town of Huntington, and not the School District, is responsible for any tax refunds that may be owed to LIPA and National Grid due to an overassessment of the Northport power-generating facilities.

Standing is a threshold issue (**New York Mortgage Trust, Inc. v Dasedmir**, 37 Misc 3d 1226[A] at \*3). It is the law's policy to allow only an aggrieved person to bring a lawsuit (*Id.*). Standing to sue requires an interest in the claim at issue that the law will recognize as a sufficient predicate for determining the issue at the litigant's request (**Caprer v Nussbaum**, 36 AD3d 176, 181). When the issue of standing is raised by the defendant, the plaintiff must prove its standing in order to be entitled to relief (**Bank of New York v Silverberg**, 86 AD3d 274, 279). In order to have standing to challenge or enforce a contract, the plaintiff must be a party thereto or a third-party beneficiary thereof (**New York Mortgage Trust, Inc. v Dasedmir**, *supra* [and cases cited therein]). A nonparty to a contract has standing to sue for breach only when that nonparty is an intended third-party beneficiary of the contract (**Carver Federal Savings Bank v Word Aflame Community Church Inc.**, 34 Misc 3d 1239[A]). Thus, until the court determines whether or not the School District is an intended third-party beneficiary of the PSA, it cannot determine the standing issue.

In **Vantage Petroleum v Board of Assessment Review of Town of Babylon** (91 AD2d 1037, *aff'd* 61 NY2d 695), upon which the defendants rely, the Second Department upheld

the Supreme Court's denial of a motion by the Lindenhurst School District for leave to intervene in a tax certiorari proceeding on the ground that the School District had no direct financial interest in the outcome of that proceeding. Pursuant to the Suffolk County Tax Act, school districts in Suffolk County are not liable for refunds of the school portion of the property tax that is owed to petitioners who prevail in tax certiorari proceedings. Rather, it is the town who must pay the refund. Thus, the Second Department rejected the School District's attempt to intervene, which the court found was based solely on the speculative theory that a reduction in the assessment of the petitioner's property may result in an undervaluation of the property and a decrease in the school district's tax base.

This court finds that the defendants' reliance in **Vanguard Petroleum** is misplaced. While the School District does not have the right to intervene in the pending tax certiorari proceedings, it is not seeking leave to intervene in those proceedings. Rather, it has commenced a separate action to enforce Article 21.16 of the Power Supply Agreement. The School District may have contractual rights that the Lindenhurst School District did not have in **Vanguard Petroleum** if the court finds that it is an intended third-party beneficiary of the PSA. Although the School District will not have to refund any money to LIPA and National Grid if they prevail in the tax certiorari proceedings, the School District may still be entitled to damages and/or equitable relief for breach of the PSA. Accordingly, the court declines to dismiss the first and third causes of action asserted by the School District for declaratory relief, the second and fourth causes of action asserted by the School District for injunctive relief, and the ninth and tenth causes of action asserted by the School District for breach of contract.

The defendants contend that Stephen V. Waldenburg, Jr., lacks standing to maintain this action. The plaintiffs contend that Waldenburg has standing as a third-party beneficiary of the PSA and as a taxpayer. The court finds that there is no evidence in the record that Waldenburg, individually, was an intended third-party beneficiary of the PSA. Moreover, the plaintiffs have failed to allege that Waldenburg will suffer an injury distinct from other taxpayers or members of the general public (*see*, **Matter of Diederich v St. Lawrence**, 78 AD3d 1290, 1291-1292). The fact that Waldenburg will have to share with other taxpayers any loss of tax revenues to the School District is insufficient to establish standing (*see*, **Matter of Quigley v Town of Ulster**, 66 AD3d 1295, 1296). Accordingly, the fifth, sixth, seventh, eighth, eleventh, and twelfth causes of action are dismissed.

The thirteenth through sixteenth causes of action are for negligent misrepresentation. A claim for negligent misrepresentation requires, inter alia, the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff (**Mandarin Trading Ltd. v Wildenstein**, 16 NY3d 173, 180). A special relationship may be established by persons who possess unique or specialized expertise or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified (**Id.**). The special relationship requires a closer degree of trust than an ordinary business relationship (*see*, **Wright v Selle**, 27 AD3d 1065, 1066). The record reflects that nothing more than an ordinary business relationship existed between the plaintiffs and the defendants (**Id.**; *see also*, **H & R Project Assocs., Inc. v City of Syracuse**, 289 AD2d 967, 969). Moreover, these causes of action are not based on circumstances extraneous to the Power Supply Agreement (**Auble**

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**v Doyle**, 38 AD3d 1264, 1266), and the alleged misrepresentation is merely an expression of future expectation, which is not actionable (*see*, **Dunlevy v New Hartford Cent. School Dist.**, 266 AD2d 931, 933). Accordingly, the thirteenth through sixteenth causes of action are dismissed.

DATED: May 21, 2013

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**J. S.C.**