

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER
Justice

PART 45

EAST RIVER REALTY COMPANY, LLC

INDEX NO. 110981/09

-v-

MOTION DATE

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

MOTION SEQ. NO. 002

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).

Answering Affidavits — Exhibits No(s).

Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is by defendant for summary judgement dismissing the complaint is GRANTED per the attached Decision and Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: March 13, 2013

Melvin L. Schweitzer, S.D.
MELVIN L. SCHWEITZER

- 1. CHECK ONE: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: [X] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER
3. CHECK IF APPROPRIATE: [ ] SETTLE ORDER [ ] SUBMIT ORDER
[ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 45

-----X  
EAST RIVER REALTY COMPANY, LLC,

Plaintiff,

- against -

CONSOLIDATED EDISON COMPANY OF  
NEW YORK, INC.,

Defendant.  
-----X

Index No. 110981/09

DECISION AND ORDER

Motion Sequence No. 003

**MELVIN L. SCHWEITZER, J.:**

In this breach of contract action, defendant Consolidated Edison Company of New York, Inc. (Con Edison) moves for summary judgment to dismiss the complaint.

**Factual and Procedural Background**

This proceeding involves the rights of Con Edison and plaintiff East River Realty Company, LLC (East River) under an agreement for the sale of real property. Con Edison is a public utility that provides electric service in New York City and portions of Westchester County. East River is the successor-in-interest to FSM East River Associates LLC (FSM), the entity that entered into the contract of sale with Con Edison for the purchase of real property in Manhattan.

Four properties were bundled for the subject sale: 616 First Avenue, formerly a Con Edison fuel storage facility, 685 First Avenue, which was formerly a Con Edison parking lot, 700 First Avenue, the former "Waterside" power generating plant (Waterside), and 708 First Avenue, a former Con Edison office building (collectively First Avenue Properties). Waterside is the subject of this litigation.

In a December 2, 1999 order, the New York State Public Service Commission (PSC) approved the plan by Con Edison to auction off these four properties as a single asset bundle for real estate development (PSC Order). As part of the sale, Con Edison was to substitute the steam and electrical outputs of Waterside, which was 100 years old at the time, by replacing it with a state of the art facility, the "East River Repowering Project" (ERRP) at 14<sup>th</sup> Street. The PSC Order also authorized Con Ed to continue its auction of the three nearby properties. Once the repowering was completed, the Waterside station would be retired, and the sale of Waterside would be finalized, subject to the terms and conditions agreed upon by the parties.

On November 15, 2000, after East River's predecessor was selected as the winning bidder, Con Edison and FSM entered into a contract (the Agreement) in which Con Edison agreed to sell the properties to FSM for development purposes.

Pursuant to article 13.1 of the Agreement, the parties agreed that East River would assume responsibility for all post-closing real property taxes:

"All real property taxes, general or special (and whether foreseen or unforeseen, ordinary or extraordinary), ... shall be adjusted and apportioned between Con Edison and Developer [East River] as of midnight the day before the Closing Date and will be assumed and paid thereafter by Developer."

(Aff of James A. Schmidt, Ex. D at 37).

Additionally, the Agreement, in article 13.3, provides that Con Edison was obligated to make all "necessary filings to protest or reduce Real Property Taxes" for the First Avenue properties, including Waterside, until the time of the closing of the sale:

"After the date of this Agreement and before the Closing, Con Edison shall make necessary filings to protest or reduce Real Property Taxes as to each Property for the fiscal year starting July 1, 2002 and each subsequent fiscal year of New York City until the Closing of such Property. Con Edison shall have full authority (in

its sole discretion) to settle or otherwise compromise any proceeding to protest or reduce Real Property Taxes which is now or subsequently pending, but Con Edison shall not without the prior written consent of Developer (not to be unreasonably withheld), after the giving of any notice scheduling a Closing pursuant to this Agreement, withdraw, terminate, or settle any such proceeding affecting the year in which such Closing will occur unless a Developer Event of Default has occurred. . . . “

(Aff of Schmidt, Ex. D at 37):

The Agreement also required Con Edison to obtain approval from the PSC to sell the First Avenue Properties. In March 2001, Con Edison and East River jointly petitioned the PSC for approval of the sale under Public Service Law Section 70. By order dated May 20, 2004, the PSC conditionally approved the sale of the properties (2004 PSC Order). The PSC wrote:

“Therefore, approval of the sale is also conditioned on Waterside remaining operational during the initial stages of ERRP’s operation. The determination of the length of this period is left to Con Edison to make, in its business judgment and based on its PSL §§ 65 and 79 requirements to provide safe, adequate and reliable service to its customers. Additionally, Con Edison is not permitted to divest the Waterside property or to commence decommissioning of the plant until it is satisfied that ERRP is fully functional, all start-up issues are resolved and Waterside is no longer needed to satisfy its statutory obligations”

(Aff of Eli R. Mattioli, Ex. 13 at 72).

On the same date the parties entered into the Agreement, November 15, 2000, Con Edison simultaneously entered into an exit strategy contract (the TRC Contract) with TRC Companies, Inc., TRC Engineers, Inc. and TRC Environmental Corp. (collectively, TRC), as required by article 9.2 of the Agreement. Under the TRC Contract, Con Edison agreed to pay \$103.5 million to TRC for the “complete demolition and decommissioning of all on-Site structures,” which included Waterside, and “remediation of the pre-existing contamination [at]

the site” (Aff of Schmidt, Ex. E at 421 and 430). The site is defined as the four parcels: 616 First Avenue, 685 First Avenue, 708 First Avenue and 700 First Avenue.

A TRC progress report for the reporting period of January 1, 2005 through January 28, 2005 indicates, for Waterside, that it was continuing: (1) to do abatement work; (2) to conduct ongoing inspections throughout Waterside to support abatement; (3) to plan decommission and demolition; and (4) to revise draft work plans for decommissioning and demolition (Aff of Eli R. Mattioli, Ex. 32 at 362). According to a chart annexed to the TRC progress report, the original projected budget for Waterside is \$49,903,203 and the expenditures to date for that location are \$7,240,609 (Aff of Eli R. Mattioli, Ex. 32 at 368).

As a matter of its annual procedure, the New York City Department of Finance announces tentative assessed values for taxable properties in mid-January and then the property owner has until March 1<sup>st</sup>, to file an application for correction of tentative assessment. The relevant tax year commences on July 1<sup>st</sup>. On or about January 15, 2005, the Department of Finance announced a tentative assessed value for Waterside for 2005/2006 of \$105,298,101 as of the January 5, 2005 taxable status date. In both the tentative and final assessment rolls for 2005/2006, the Department of Finance assessed Waterside at \$105,840,000 subject to an exemption of \$541,899, for a net assessed value of \$105,298,101.

To initiate a protest of real property taxes, the applicant must file an application with the Tax Commission of the City of New York to reduce or correct the Department of Finance’s tentative assessed value of the property. On March 1, 2005, Con Edison timely initiated a protest of the real property taxes for Waterside for the 2005/2006 tax year by filing an Application for Correction of Assessed Value with the Tax Commission. The application included a protest of

the real property taxes for the land and plant equipment located at that address. For the land, Con Edison sought a \$2,297,061 reduction on the assessed value, from \$14,521,005 to \$12,223,944, and, for the plant equipment, Con Edison sought a \$3,254,944 reduction in the assessed value, from \$13,019,776 to \$9,764,832.

For Waterside, Con Edison sought a reduction of the 2005-2006 tentative assessed value by approximately \$33.8 million, 34 percent, from \$105,298,101 to \$71,516,504, which under the tax rate of 12.5 percent, would result in a reduction in real property taxes of \$4,224,879.

In this application, Con Edison did not include the fact that Waterside would be shutting down within the next six months. Charles D. Hutcheson, an employee from Con Edison, who helped prepare the protest application, testified: "I filed the application as of January 5th and that's the date that you have to value the plant. The fact that it's going off-line six months later doesn't matter to me" (Aff of Eli R. Mattioli, Ex. 21, dep. of Hutcheson at 145).

Hutcheson also testified about how he factored depreciation into his assessment of Waterside.

"Q: Now, in determining the claimed value for lot 63 for the '05/'06 tax application, did Con Edison consider the fact that the Waterside plant would be going offline in the upcoming months?

A: As I've stated before, for other similar questions, the answer is no. The plant was a working power plant as of the date that we had to value it as of, January 5<sup>th</sup>.

Q: Did it consider the fact that it would be demolished?

A: No"

(Aff of Mattioli, Ex. 21 at 259).

"Q: And just to be clear, I mean future decommissioning was not considered, future demolition was not considered, and future remediation was not considered.  
[colloquy]

A: We certainly didn't consider [sic] fact that the plant wasn't going to be there at some point in the future. But we did consider, as we've been talking for a large part of today and my previous deposition, future net salvage on the plant. So, the depreciation allowance, as I stated earlier, is higher because of negative net salvage, and the RCNLD is lower because of negative net value advantage. And that was considered in all of our complaint"

(Aff. of Mattioli, Ex. 21 at 260-261).

"Q: And they didn't consider future demolition; is that correct?

A: All depreciation allowances include a net salvage factor, and to the extent that there's a net salvage factor in the RCNLD calculation, then we considered the recovery of net salvage. I think I've testified to that all day long.

Your question on whether we considered the amount of dollars that were going to be spent to tear down the plant specifically, I would say no, we didn't consider that, because that hadn't occurred yet"

(Aff of Mattioli, Ex. 21 at 263).

On March 25, 2005, the parties closed on the sale of the First Avenue Properties other than 700 First Avenue. This closing included the sale of 616, 685 and 708 First Avenue. The price of the sale was \$300 million.

On or about April 5, 2005, Waterside's replacement, ERRP, began its operations. After Con Edison was able to satisfy PSC that it had complied with the conditions under the 2004 PSC Order, that Waterside's replacement was "fully functional," Waterside ceased operations. Thus, on or about April 29, 2005, Waterside ceased operating and Con Edison began decommissioning Waterside. Brian Horton, a Con Edison employee, testified that the last unit of Waterside that was in service was shut down on April 29, 2005. Likewise, Kevin Grant, who was involved with the closing of Waterside in 2005, testified that Waterside ceased operating at the "end of April,

beginning of May of 2005" (Aff of Eli R. Mattioli, Ex. 6 at 94). The sale of Waterside closed on May 31, 2005. At the closing, 700 First Realty Company LLC received title to Waterside.

On May 25, 2005, a week before that closing, the Tax Commission set the final assessment of Waterside for the 2005/2006 tax year at \$105,298,101.

On or about September 23, 2005, East River filed a petition in the Supreme Court of New York seeking review of Waterside's final 2005/2006 tax assessment under article 7 of the Real Property Tax Law. By an October 13, 2006 stipulation of the parties, the action was discontinued.

In or about March 2006, East River filed protest applications with the Tax Commission for Waterside for the 2005/2006 and 2006/2007 tax years. On June 30, 2006, a hearing was held before Reed Schneider of the Tax Commission. East River's tax certiorari counsel, Marcus & Pollack, and the Department of Finance appeared to present their arguments to the Tax Commission.

After the hearing, East River's counsel submitted a July 10, 2006 memorandum in which it argued that Waterside should have been assessed at "zero value" for 2005/2006, based on, among other things, the fact that Waterside was slated for imminent shutdown (Manus Memorandum). In that memo, East River's counsel set forth its position: (1) prior to January 1, 2005, Waterside's replacement "was fully operational and fulfilled all Con Edison requirements and the need of its customers;" (2) in 2005, Waterside did not "operate normally or supply steam or electricity as it was originally designed;" and (3) prior to 2005, the north portion of Waterside was fully demolished and the demolition of the remainder of Waterside was scheduled for demolition prior to 2005 (Aff of Mattioli, Ex. 41 at 1305-1307).

The REUC Unit at the Finance Department responded to the Marcus Memorandum in a July 18, 2006 memorandum that was transmitted to the Tax Commission. It was prepared by Douglas McClure, the assessor who had determined the amount of Waterside's tentative assessment for 2005/2006. It states, in part:

“The aforementioned information contradicts the statement by Marcus & Pollack (July 10, 2006 Memorandum) that “The plant was of no value to any other purchasers for use as an operating generator facility. In fact, its replacement, the 14th Street Con Ed Plant, was fully operational and fulfilled all Con Edison requirements and the needs of its customers, prior to January 1, 2005.” (Emphasis added). Indeed, in late December 2005, REUC conducted an inspection of the 14th Street Facility with construction personnel and Con Edison which concluded that the plant was substantially complete, but not operational. Con Edison personnel estimated a date [sic] spring of 2005. Accordingly, the valuation of the East 14th Street plant reflected the fact that the plant would not be operational on January 5, 2005. The assertion that “the remaining Waterside Plant was in the process of demolition prior to 2005” was not reflected in the Con Edison Inside Plant report for 2005/06. Based on the information and reports that REUC received, the proper market value was reflected for 2005/06. A zero value as suggested by the attorney is not appropriate”

(Aff of Mattioli, Ex. 44 at 2).

During his deposition, Jeffrey Ray, an administrative assessor at the New York City Department of Finance, testified that the crucial date for property assessment is January 5<sup>th</sup>, the taxable status date, and that information regarding events scheduled to take place after that date are not factored into the Finance Department's assessment. He stated:

“Q: Can future events ever affect depreciation?

A: What do you mean by future events?

Q: For example, if you knew on January 5 of 2005 that this property was going to be demolished in let's say a week, is that something that would affect the assessed value?

A: If we knew it was going to be demolished in a week?

Q: Yes.

A: We would value the property as of January 5<sup>th</sup>”

(Aff of Mattioli, Ex. 24, Dep. of Ray at 53-54).

Ray testified that the Finance Department had no knowledge that Waterside was going to be shut down within months and that “if the plant was not operational [on January 5, 2005],” he and Reed Schneider “would have reduced it to 20 percent salvage value” (Aff of Mattioli, Ex. 24, dep of Ray at 35). He testified:

“Q: Okay. So was it Department of Finance’s position that so long as the plant was operating on January 5, 2005, there should be no reduction in the assessment to account for a known future decommissioning or shutdown of the plant?

A: Correct. Again, that was the thinking when the valuation was done. We did not know. We had no information about future demolitions or anything. When a hypothetical situation was presented to me by Reed Schneider, to say if the plant was not operational, what would you do, we decided on a 20 percent salvage if that information [in the Pollack memo] had been correct. We never felt that the information in the Pollack memo was correct”

(Aff of Mattioli, Ex. 24, dep of Ray at 112-113).

“Q: Could the Department of Finance have reduced its assessment after reading Mr. Pollack’s memo if it wanted to?

A: No, it was well past the deadline”

(Aff of Schmidt, Ex. Q at 123).

An August 15, 2006 NYC Tax Commission worksheet for the tax years 2005/2006 and 2006/2007 contains Reed Schneider’s, chief counsel at the Department of Finance, handwritten notes: “all structures in process of demolition – anticipated retirement and closing of Waterside Power Plant – repowering project nearly complete 1/5/05 – complete 4/5/05. Con Ed 2005 claimed value controls max. relief ... Finance concedes it would have used 20% floor had it been aware of situation in 2005” (Aff of James A. Schmidt, Ex. KK at 128).

During his deposition, Reed Schneider testified that it is the policy of the Department of Finance that the Tax Commission may not “reduce an assessment below the amount requested [by the applicant] in the [protest] application” (Aff. of James A. Schmidt, Ex. JJ, Dep of Reed Schneider at 104). When asked about whether he believed that East River was nonetheless entitled to a lower assessment than that requested by Con Edison in its protest application for the 2005/2006 tax year, he testified:

“Q: And when you say even if [East River] thought they were entitled to it in seeking a lower number, a lower assessment, there’s nothing here to suggest in Ex. 21 that you thought they were entitled to a lower assessment; isn’t that correct?

A: That’s correct”

(*id.*, at 123).

On this issue, he further testified:

“Q: Is it possible that he may or may not have been entitled to a lower assessment but for the Tax Commission’s rule–

A: The rule–

Q: that the Tax Commission cannot go below–

A: The rule mooted out other values.

Q: Below the claimed value sought in Con Ed–

A: So you didn’t have to reach that question.

Q: What question?

A: Of whether or not the fair market value was below the claimed value”

(*id.*, at 127).

On October 13, 2006, East River agreed to the Tax Commission’s reduction of Waterside’s assessment to \$71,516,504.00 for the 2005/2006 tax year, which was Con Edison’s claimed value, and to \$100,000 for 2006/2007. East River states that Con Edison’s grossly inflated claimed value for 2005/2006 kept East River from obtaining a proper assessed value and

that it accepted the Tax Commission's offer to resolve the matter so as to mitigate its damages. East River paid the 2005/2006 taxes for Waterside as per the Agreement.

In the complaint, East River alleges that Con Edison: (1) breached section 13.3 of the Agreement in "fail[ing] to make the necessary filings to protest or reduce the Real Property Taxes for the First Avenue Properties for the 2005/2006 tax year;" (2) "breached the covenant of good faith and fair dealing" with respect to its obligations under the contract; (3) "frustrated the purpose [of the Agreement] by failing to make the necessary tax filings to protest the real property taxes for the First Avenue Properties for the 2005/2006 tax year;" and (4) "withdrew, settled and/or terminated [the] tax proceeding for the tax year 2005/2006 to the extent that it barred Plaintiff from seeking to protest or reduce the assessed valuation to an amount below" those values set forth by Con Edison and thus, did not seek East River's consent. According to the fourth cause of action, Con Edison breached an obligation under the Agreement by making the 2005/2006 tax filings "without [East River's] prior written consent."

On September 11, 2009, Con Edison answered the complaint. Subsequent to its motion for leave to amend the answer, Con Edison served an amended answer, including its counterclaim for attorney's fees and costs, as provided in section 27.14 of the Agreement.

Con Edison now moves for summary judgment to dismiss the complaint. In its motion, it argues that East River cannot establish that Con Edison breached the Agreement because Con Edison made the necessary filings with the Department of Finance, pursuant to the Agreement, and because East River's claimed damages are speculative. Further, Con Edison argues that East River's causes of action that allege that Con Edison breached the implied covenant of good faith

fail as they are duplicative of its breach of contract claims, and because there is no evidence that Con Edison acted in bad faith.

In opposition, East River argues that Con Edison breached the Agreement by improperly using the “replacement cost new less depreciation” method, rather than the “reproduction cost new less depreciation” method. East River further argues that Con Edison did not make the necessary filings in good faith because it failed to include the fact that Waterside was going to be shut down and demolished imminently and, as a result, East River suffered damages.

In support of its opposition, East River includes the affidavit and report of its expert, Kevin S. Reilly, an appraiser, whose expertise is in valuing specialty properties, like electric power generating plants. In his affidavit, Reilly avers that his conclusion is that Waterside had a market value of zero as of January 5, 2005. Reilly calculated the value of Waterside by using the “reproduction cost new less depreciation” method, among others. He states that, in valuing Waterside, the most important factor in determining depreciation was the fact that, as of January 5, 2005, it was expected that Waterside would be permanently shut down and demolished in April 2005.

According to Reilly, when one considers that Waterside had only four months of remaining useful life left, a textbook form of economic obsolescence, the result is that Waterside should have been depreciated by 99.3% as of January 5, 2005. As a consequence, according to his calculations, the value drops from \$1,157,417,529 to \$989,240. He avers that the market value is then reduced to zero after considering the millions of dollars that it will cost to demolish and remediate Waterside.

## Discussion

It is well understood that summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established the absence of any material issues of fact, requiring judgment as a matter of law (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012], citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Despite the sufficiency of the opposing papers, the “[f]ailure to make such showing requires denial of the motion” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

### Breach of Contract

East River alleges breach of contract and breach of the implied covenant of good faith and fair dealing. A breach of contract claim is articulated when a plaintiff establishes: (1) the existence of a contract; (2) the plaintiff’s performance under that contract; (3) the defendant’s breach of that contract; and (4) resulting damages (*JP Morgan Chase v J.H. Elec. Of N.Y., Inc.*, 69 AD3d 802, 803 [2d Dept 2010]). Further, if the contract provides for discretion, it necessarily “includes a promise not to act arbitrarily or irrationally in exercising that discretion” (*Dalton v Educational Testing Serv.*, 87 NY2d 384, 389[1995]).

## Assessing Waterside's Value as of the Taxable Status Date

### (i) *The Method Used*

According to Real Property Tax Law § 305 (2), to establish real property assessments the property must be assessed at a uniform percentage of value. While property is assessed for tax purposes at market value, "there is no fixed method for determining that value" (*Matter of Allied Corp. v Town of Camillus*, 80 NY2d 351, 356 [1992]).

Here, the parties agree that Waterside is a specialty property and that the appropriate method of valuation is reproduction cost new less depreciation (RCNLD). East River argues that there is a question as to whether Con Edison used the RCNLD method to value the property and bases this contention exclusively on a portion of the deposition testimony of Charles D. Hutcheson, who assisted in preparing Con Edison's tax protest for Waterside for the 2005/2006 tax year. East River contends that Hutcheson's testimony creates a question as to whether Con Edison used the "*reproduction* cost new less depreciation method" as opposed to the "*replacement* cost new less depreciation method."

During his deposition, Hutcheson testified that Con Edison used the reproduction cost new less depreciation method to protest the assessed taxes for Waterside for the 2005/2006 tax year. He then discusses the columns on a chart entitled "Inside Property Tax Valuation Detail Report," but does not testify that reproduction cost new is not the one used by Con Edison for assessing this utility.

Further, although East River points to this portion of Hutcheson's deposition where he discusses the chart and the columns labeled replacement cost new, East River does not attack Con Edison's method to calculate the value of Waterside in any other way. Nor does East River

explain what miscalculation came of Con Edison's use of this allegedly improper formula. Further, East River's expert does not attack Con Edison's methodology in this way; he does not suggest that Con Edison used replacement cost new. Moreover, he does not take the position that Con Edison's use of any particular formula led to an over-valuation of Waterside. Instead, he focuses on the fact that Con Edison did not use the imminent closing of Waterside to reduce its value to approximately zero. This appears to be East River's main attack of Con Edison's contractual responsibilities and, therefore, its limited attack on Con Edison's method of calculating the value of Waterside, whether it was reproduction cost new or replacement cost new, does not seem to lead anywhere. The court does not find that this issue creates a question of material fact warranting a trial.

(ii) *The Taxable Status Date*

According to New York law, the value of the property must be assessed for tax purposes on the "taxable status date." Pursuant to the New York City Charter § 1507, the taxable status of all real property assessable for taxation in the city "shall be fixed for the succeeding fiscal year on the fifth day of January in each year."

The relevant consideration in assessment cases is the property's value on the taxable status date and "not its future use or value or the intentions of the owner" (*Matter of Allied Corp.*, 80 NY2d at 360). In *Matter of Estate of Goldman v Commissioner of Fin.* (203 AD2d 20, 21 [1<sup>st</sup> Dept 1994]), where the petitioners purchased the lots in question as speculation for future development, which had not yet taken place, the court found that the assessment of taxes, calculated by using a method based upon the present use and income of the properties, was

consistent with the statutory edict that assessments be made according to the condition and ownership of the property as it presently exists (*id.* at 21).

Likewise, the appellate court in *Matter of Addis Co. v Srogi* (79 AD2d 856, 857 [4th Dept 1980]), found that the trial court correctly concluded that the fair market value of the subject building should be determined in reference to its existing use. The court stated: "Property is assessed for tax purposes according to its condition on the taxable status date, without regard to future potentialities or possibilities and may not be assessed on the basis of some use contemplated in the future" (*id.* at 857).

In *Spiegel v Board of Assessors* (161 AD2d 627, 629 [2d Dept 1990]), the court noted that events occurring after the taxable status date do not affect the assessed value of the property for that tax year and explained the purpose of this:

"The purpose of this rule is 'to achieve a degree of stability and certainty in the tax structure, inasmuch as the budgetary requirements of local municipalities are predicated on the assessment roll. The taxable status date serves as cutoff date to fix the value of all assessable real property as of one certain date and cannot be construed to embrace a shifting period'"

(*id.* at 629 [citation omitted]).

In *Matter of Allied Corp.*, the Court of Appeals found that the plaintiff's wastebeds, the primary purpose of which was to retain waste after receiving it, and to hold it until the solidification process has run its course, were still operating even after they ceased receiving waste. The Court found that "[w]e need not determine the point at which the settling process will have ceased and the site's use ended. It is enough to find that on the taxable status dates relevant here, ... the wastebeds continued to be 'specially used'" (80 NY2d at 358).

Likewise, in *Matter of Miriam Osborn Mem. Home Assn. v Assessor of City of Rye* (275 AD2d 716, 717 [2d Dept 2000]), the court held that the condition and use of the property on the taxable status date is critical to its assessment. The petitioner home association was tax exempt for years, but, in 1996, the city revoked the tax exempt status on the grounds that the home modernized and expanded its facilities to include an independent living residence called Sterling Park. The certificates of occupancy, however, were not issued until after May 1, 1996, the taxable status date, and, therefore, the residents did not move into the facility until later that year. This made the property “unusable” on the taxable status date, according to the court, allowing the condition of the property to remain unchanged, and entitling the home to the continued exemption for the 1996 tax year (*id.* at 716-717).

This is not unlike the court’s holding in *Matter of Long Is. Lighting Co. v Assessor for Town of Brookhaven* (246 AD2d 156 [2d Dept 1998]), which valued a nuclear power plant based upon its use and condition on the taxable status date, despite the fact that the court included the probability that the status would not change going into the future. The power station at issue remained under construction, or was substantially constructed and being tested, on each of the successive taxable status dates, and was, therefore, not operating. There was substantial public opposition to the opening of the plant, and there were questions as to whether it would ever achieve commercial operation, as there “were the regulatory hurdles that LILCO faced in obtaining an operating license” (*id.* at 160).

The Supreme Court found that the plant under construction had no value because, on the taxable status date, it was not operating, there was significant public resistance to it, it could not get an operating license and there was a strong likelihood that it would never operate

commercially. The Second Department affirmed, finding that “[a]ny appraisal of a power plant *under construction* must necessarily include the quantification of risks of delay and cancellation in order to determine the plant’s true [fair market value]” (*id.* at 161[citation omitted][emphasis added]). Although taking into account the future of the plant that was under construction, the court valued the plant based upon its condition and use on the taxable status date.

Distinct from the power plant in *Long Island Lighting Co.*, Waterside was fully operational on the taxable status date. The central question on this motion is whether Con Edison breached the Agreement by failing to value Waterside at zero in its protest application based upon the fact of the imminent closing and demolition of Waterside.

According to the parties submissions, Waterside was operating as of January 5, 2005. The PSC Order mandated that Waterside remain functioning up until the time that its replacement, ERRP, was operating. ERRP became operational on April 5, 2005. According to the deposition testimony of Con Edison employees, Brian Horton and Kevin Grant, Waterside ceased operating in late April of 2005. Additionally, according to the TRC invoice and progress report, demolition of Waterside had not yet begun in, or prior to, January of 2005.

In its statement of undisputed facts, East River clarifies its earlier statements about the demolition of Waterside in early 2005. East River explains that its earlier statement that “[i]n 2005, Waterside did not operate normally,” meant that Waterside was shut down on April 29, 2005. East River also clarified its statement that “large portions of the facilities [that were part of the same sale as Waterside] in fact were dismantled before 2005,” to mean that 708 First Avenue was demolished in 2003 and TRC performed approximately \$7 million of work at Waterside as of January 5, 2005 (plaintiff’s response to defendant’s rule 19-A statement at 9-10).

Thus, there is no evidence presented on this motion that Waterside itself, or any portion thereof, had been demolished as of January 5, 2005.

East River's position, that the use and condition of Waterside on January 5, 2005 was that it was imminently closing and thus had no value, is not supported by case law. Regardless of its proposed status three months hence, on the taxable status date, it was functioning, producing electricity for income; pursuant to the PSC mandate, it was providing safe and adequate services to its customers.

East River further argues that, as set forth in the August 15, 2005, handwritten notes of Reed Schneider, the Department of Finance's policy not to lower an assessment below that requested by the applicant, prevented the Department of Finance from granting East River the relief it requested.

East River seeks in this lawsuit, and sought in the administrative tribunal, to lower the assessment of Waterside to a value of zero for the tax year 2005/2006. But these notes do not support such an assessment. Instead, the testimony of Jeffrey Ray and the handwritten notes of Reed Schneider suggest that in the event of a hypothetical set of facts about Waterside's condition on the taxable status date, the Department of Finance would have used a factor in addition to those included in the RCNLD method to calculate the value of Waterside, which would have to include a 20% salvage rate or valuation floor.

Moreover, according to the deposition testimony of Con Edison employee Charles Hutcheson, the cost of remediation was included in the protest application. Hutcheson testified that he filed that application as if the plant were an operating power plant as of the January 5,

2005 and included a formulation for depreciation. He did not include the cost of demolition as this had not yet taken place on the taxable status date.

There is nothing in the papers establishing that Con Edison acted irrationally or arbitrarily when it filed its protest application, as there is ample support in the law for its disclosure concerning the use and condition of Waterside on January 5, 2005. The court, therefore, dismisses the cause of action sounding in breach of contract.

Under New York law, “every contract contains an implied covenant of good faith and fair dealing” (*Apfel v Prudential-Bache Sec.*, 183 AD2d 439, 439 [1<sup>st</sup> Dept 1992], *affd on other grds* 81 NY2d 470 [1993]). “Encompassed within the implied obligation of each promisor to exercise good faith are ‘any promises which a reasonable person in the position of the promisee would be justified in understanding were included’” (*Dalton*, 87 NY2d at 389 [1995] quoting *Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 69 [1978]). A claim for breach of the implied covenant of good faith is duplicative of a breach of contract claim, if it arises from the same facts and seeks identical damages (*Havell Capital Enhanced Mun. Income Fund, L.P. v Citibank, N.A.*, 84 AD3d 588, 588 [1<sup>st</sup> Dept 2011]). Moreover, the “exercise of an apparently unfettered discretionary contract right breaches the implied obligation of good faith and fair dealing if it frustrates the basic purpose of the agreement ...” (*Hirsch v Food Resources, Inc.*, 24 AD3d 293, 296 [1<sup>st</sup> Dept 2005]).

Here, East River’s causes of action alleging a breach of the implied covenant of good faith are duplicative of its cause of action alleging breach of contract. East River alleges that Con Edison breached the contract because it did not make the necessary filing to protest the real property taxes when it failed to include the imminent demolition of Waterside in its application.

It is from this same set of facts that its cause of action alleging breach of the implied covenant arises and East River seeks identical damages for each. The court, therefore, dismisses the second and third causes of action alleging breach of the implied covenant of good faith.

The court additionally dismisses the fourth cause of action, as the language of article 13.3 of the Agreement does not require that Con Edison obtain East River's consent in order to "settle or otherwise compromise any proceeding to protest or reduce Real Property Taxes which is now or subsequently pending ..." (Aff of Schmidt, Ex. D at 37). It appears from the unambiguous language of the contract that Con Edison, prior to the closing, had "sole discretion" to carry out this responsibility.

Accordingly, it is

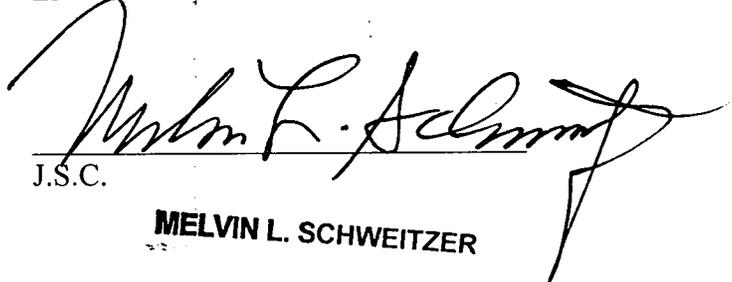
ORDERED that the motion for summary judgment dismissing the complaint brought by defendant Consolidated Edison Company of New York, Inc. is granted in its entirety, with costs and disbursements to said defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs, and it is further

ORDERED that the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: March 13, 2013

ENTER:

  
J.S.C.  
**MELVIN L. SCHWEITZER**