STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

EMPIRE GEN HOLDINGS, INC. and
EMPIRE GENERATING CO, LLC,

Plaintiffs,

-against-

THE GOVERNOR OF THE STATE OF
NEW YORK, in his official capacity, and
THE STATE OF NEW YORK,

Defendants.

DECISION and ORDER
INDEX NO. 4450-12
RJI NO. 01-12-108748

Supreme Court Albany County All Purpose Term, May 20, 2013
Assigned to Justice Joseph C. Teresi

APPEARANCES:
Hiscock & Barclay, LLP
David Burch, Jr., Esq.
Attorneys forPlaintiffs
One Park Place
300 South State Street
Syracuse, New York 13202

Eric T. Schneiderman, Esq.
Attorney General of the State of New York
Attorneys for the Defendants
Aaron Baldwin, Esq. AAG
The Capitol
Albany, New York 12224

TERESI, J.:

Plaintiffs[1] commenced this declaratory judgement / injunction action seeking a

[1] Empire Gen Holdings, Inc. owns all of the membership interests in Empire Generating Co, LLC, which was formerly known as Besicorp-Empire Power Company, LLC. Each of these entities will be referred to herein, without distinction, as Plaintiffs.

declaration that Tax Law §§33 and 34[2] are unconstitutional, an injunction prohibiting their enforcement and attorney's fees. Prior to answering, Defendants claim that the complaint fails to state a cause of action and move to dismiss pursuant to CPLR 3211(a)(7). Plaintiffs opposed the motion. Because Defendants demonstrated their entitlement to dismissal, their motion is granted and the complaint is dismissed.

It is well established that this Court, when considering a motion to dismiss pursuant to CPLR 3211(a)(7), "must afford the complaint a liberal construction, accept the facts as alleged in the pleading as true, confer on the plaintiff[s] the benefit of every possible inference and determine whether the facts as alleged fit within any cognizable legal theory." (Torok v Moore's Flatwork & Foundations, LLC, 106 AD3d 1421 [3d Dept 2013], quoting Scheffield v Vestal Parkway Plaza, LLC, 102 AD3d 992 [3d Dept 2013]; Simkin v Blank, 19 NY3d 46 [2012]). "[T]he dispositive inquiry is whether [Plaintiffs have] a cause of action and not whether one has been stated." (Alaimo v Town of Ft. Ann, 63 AD3d 1481, 1482 [3d Dept 2009], quoting IMS Engineers-Architects, P.C. v State, 51 AD3d 1355 [3d Dept 2008]).

Here, accepting Plaintiffs' allegations outlined below as true, they have no cause of action that fits within a cognizable legal theory.

Prior to June 2004, BASF Corporation (herinafter "BASF") owned a parcel of real property located in the City of Rensselaer, New York (hereinafter "South 40"). The South 40,

---

[2] The Tax Law §33 challenged in this action was added by L 2010, ch 57, pt Y, §1 and is entitled "Temporary deferral of certain tax credits;" while Tax Law §34 was added by L 2010, ch 57, pt Y, §2 and entitled "Temporary deferral payout credits." There are, however, two other Tax Law §§33 and 34, added by L 2010, ch 57, pt G, §2 and L 2010, ch 57, pt G, §3 respectively, which are not at issue in this proceeding. To avoid confusion, this Decision and Order will refer to the challenged Tax Law §§33 and 34 as the "Tax Credit Deferral Provisions."

however, was polluted. Plaintiffs entered an agreement with BASF, whereby the South 40 would be remediated and redeveloped.

In June 2004, Plaintiffs, BASF and the New York State Department of Environmental Conservation (hereinafter "DEC") entered into a Brownfield Site Cleanup Agreement (hereinafter "BSCA"). Such agreement obligated Plaintiffs and BASF to remediate the South 40, subject to DEC oversight and approval. In March 2008, DEC approved Plaintiffs' final engineering report of remediation. Upon such completion and approval, DEC issued a "Certificate of Completion" and Plaintiffs claimed a "site preparation [tax] credit." Such tax credit was received by Plaintiffs in tax year 2008, and is not at issue herein.

Plaintiffs then turned to redevelopment and its related tax credit. They built a 65 megawatt natural gas fired electric generating plant (hereinafter "the facility") on the South 40. The facility was placed into service in September 2010, at which time it began generating electricity. For such redevelopment project Plaintiffs claim they were due, for tax year 2010, a tax credit of $86,951,916 (hereinafter "full redevelopment tax credit"[3]). Defendants do not dispute the projects' completion, the amount of the full redevelopment tax credit or Plaintiffs' eventual entitlement to it.

The Tax Credit Deferral Provisions, however, prohibited Plaintiffs from claiming the entire $86,951,916 in tax year 2010. Instead, the Tax Credit Deferral Provisions significantly reduced Plaintiffs' 2010 tax credit to $1,663,633 and deferred Plaintiffs' receipt of the balance of

---

[3] Although Plaintiffs' complaint alleges that Tax Law §23 (titled "Environmental remediation insurance credit") entitles it to the full redevelopment tax credit, Defendants demonstrated that Tax Law §21(3) (titled "Brownfield redevelopment tax credit - Tangible property credit component") actually governs the tax credit at issue in this action.

the full redevelopment tax credit to future years. Due to such delay, Plaintiffs' complaint seeks redress under multiple constitutional theories, each of which will be addressed separately.

Plaintiffs first and sixth causes of action set forth "Takings Clause" challenges, both of which fail to state a claim. "The Takings Clause prevents government actors from depriving private persons of vested property rights except for a public use and upon payment of just compensation." (James Square Associates LP v Mullen, __NY3d__ [2013], quoting Landgraf v USI Film Products, 511 US 244 [1994][internal quotation marks omitted, emphasis added]). "The determination of whether a property interest exists to support a taking claim is typically the threshold inquiry." (Gazza v New York State Dept. of Envtl. Conservation, 89 NY2d 603, 614 [1997]; Preble Aggregate Inc. v Town of Preble, 263 AD2d 849 [3d Dept 1999]).

Here, because Plaintiffs had no "vested property right" to the tax credit they seek they have no Takings Clause cause of action. As set forth above, Plaintiffs challenge their delayed receipt of the full redevelopment tax credit. Tax Law §21(3) establishes such credit and provides, in pertinent part, that it is "allowed for the taxable year in which such qualified tangible property is placed in service on a qualified site with respect to which a certificate of completion has been issued to the taxpayer." (Tax Law §21[3]). The parties agree that the facility constitutes "qualified tangible property" and that the South 40 is a "qualified site," which received a "certificate of completion." (Id.). Nor do the parties dispute, as alleged in the complaint, that the facility was placed "in service" in September 2010. (Id.). Such undisputed facts establish that all of Tax Law §21(3)'s elements were satisfied in September 2010; it was not until then that Plaintiffs right to their full redevelopment tax credit "vested."

By September 2010, however, Plaintiffs' full redevelopment tax credit had already been

deferred. On August 11, 2010, the Tax Credit Deferral Provisions became effective "immediately." (L 2010, ch 57, pt Y, §1) Because Plaintiffs' Tax Law §21(3)'s tangible property tax credit was deferred in August 2010, prior to its vesting, the credit was "nothing more than an expectancy interest... an insufficient basis upon which to find a takings clause violation." (Novara ex rel. Jones v Cantor Fitzgerald, LP, 20 AD3d 103, 108 [3d Dept 2005]).

Similarly, because Plaintiffs' lacked a vested property right when the Tax Credit Deferral Provisions were enacted, they failed to state a substantive due process / anti-retroactivity causes of action.[4]

"To establish a claim for violation of substantive due process, a party must establish a cognizable... vested property interest." (Raynor v Landmark Chrysler, 18 NY3d 48, 59 [2011], quoting Forti v New York State Ethics Com'n, 75 NY2d 596, 609 [1990], quoting McKinney's Cons Laws of NY, Book 1, Statutes §51).

Here, even affording Plaintiffs the benefit of every possible favorable inference, they have no substantive due process / anti-retroactivity cause of action. As set forth above, the Tax Credit Deferral Provisions were passed and became effective in August 2010. Plaintiffs, however, were not entitled to claim the full redevelopment tax credit until September 2010, when the facility was "placed in service." (Tax Law §21[3]). Because the uncontested facts establish that Plaintiffs were not entitled to claim the full redevelopment tax credit prior to the Tax Credit Deferral Provisions' effective date, they failed to state a cognizable vested property interest entitled to due process protection against retroactive taxation. As such, Plaintiffs set forth no

---

[4] As clarified in Plaintiffs' Memorandum of Law, Plaintiffs' second, fourth and seventh due process causes of action are all premised upon a claim of unconstitutional retroactivity. As such, these causes of action will be addressed collectively.

substantive due process cause of action.

Nor have Plaintiffs stated a Contracts Clause violation with their fifth cause of action.

"It is black letter law that absent some clear indication that the Legislature intends to bind the State contractually, a statute is presumed not to create private contractual or vested rights, but merely to declare a policy to be pursued until the Legislature shall ordain otherwise." (Med. Soc. of State v Sobol, 192 AD2d 78, 80 [3d Dept 1993]). Similarly well settled, a "statute cannot be said to impair a contract that did not exist at the time of its enactment." (Held v State, Workers' Compensation Bd., 85 AD3d 35, 45 [3d Dept 2011], quoting Texaco, Inc. v Short, 454 US 516 [1982]; Consumers Union of U.S., Inc. v State, 5 NY3d 327, 359 [2005]).

Here, because Plaintiffs have no contract entitling them to the full redevelopment tax credit, they have no Contracts Clause cause of action based on its deferral. Plaintiffs assert that they contracted with Defendants for the full redevelopment tax credit by entering the BSCA, remediating the South 40, receiving their Certificate of Completion and by nearly placing the facility into service. While such events are uncontested, they do not clearly indicate the Legislature's intention to bind the State to paying the full redevelopment tax credit without deferral. Nor do the Brownfield Cleanup Program (Environmental Conservation Law Title 14) and its related tax credits (Tax Law §§21, 22 and 23) include such a clear indication. Moreover, "the New York Constitution provides that tax exemptions are freely repealable (N.Y. Const, art XVI, § 1)." (James Square Associates LP v Mullen, supra). As such, Plaintiffs have no Contracts Clause cause of action.

Plaintiffs' third and eighth equal protection causes of action are likewise deficient.

Equal protection review "of differential taxation consequences is subject to the lowest

level of judicial review, whether any rational basis supports the legislative choices." (Daimlerchrysler Co., LLC v Billet, 51 AD3d 1284, 1287 [3d Dept 2008], quoting Port Jefferson Health Care Facility v Wing, 94 NY2d 284 [1999]). "Unless a suspect class or fundamental right is involved, which is not the case here, classifications that create distinctions between similarly-situated individuals will be upheld if they are rationally related to a legitimate government interest." (Walton v New York State Dept. of Correctional Services, 13 NY3d 475, 492 [2009]; Trump v Chu, 65 NY2d 20 [1985]).

Here, Plaintiffs' claim that the Tax Credit Deferral Provisions' application to brownfield redevelopment investors but not to film production credit (Tax Law §24) investors does not set forth a viable equal protection challenge. First, because the brownfield redevelopment and film production credit investors are not similarly-situated groups, Plaintiffs "fail to state a cognizable equal protection claim." (Walton v New York State Dept. of Correctional Services, supra 493). Moreover, the Tax Credit Deferral Provisions did not apply solely to brownfield redevelopment investors, but rather applied to more than thirty separate tax credits. In addition, as outlined by Respondents, such distinction could have been rationally based upon differences between the structure of each credit, the commercial desirability of each credit or the fiscal impact on the state of each credit. Even viewing the Tax Credit Deferral Provisions' in a light most favorable to Plaintiffs, there is no reasonable view of such statute that negates the rational basis of this legislation. (Trump v Chu, 65 NY2d 20, 28 [1985]; Novara ex rel. Jones v Cantor Fitzgerald, LP, 20 AD3d 103 [3d Dept 2005]). As such, Plaintiffs have no equal protection cause of action.

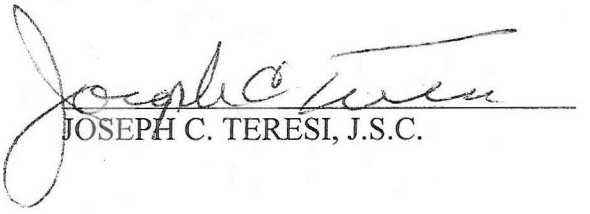
Because Plaintiffs have no viable constitutional cause of action, as per the above, their injunction cause of action and 42 USC §1983 damages demand are entirely unsupported.

Accordingly, Defendants' motion is granted and the complaint is dismissed in its entirety.

This Decision and Order is being returned to the attorneys for the Defendants. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: June 25, 2011
Albany, New York



JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated December 13, 2012; Affirmation of Aaron Baldwin, dated December 13, 2012, with attached Exhibits 1-8.
2. Affirmation of David Burch, dated April 12, 2013.