

**Albany Eng'g Corp. v Hudson River - Black River
Regulating Dist.**

2012 NY Slip Op 30814(U)

April 3, 2012

Supreme Court, Albany County

Docket Number: 5289-11

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

ALBANY ENGINEERING CORPORATION,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 5289-11
RJI NO. 01-12-105799

HUDSON RIVER - BLACK RIVER
REGULATING DISTRICT,

Defendant.

Supreme Court of Albany County All Purpose Term, March 15, 2012
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

Plaintiff moves for summary judgment pursuant to CPLR 3212 and seeks an assessment of damages against the defendant in the amount of \$516,655.62 with interest from January 1, 2003 with costs, disbursements and attorney fees. The defendant opposes the motion and cross-moves for summary judgment and maintains the plaintiff has not exhausted its administrative remedies and the motion is premature based upon the doctrine of ripeness. The plaintiff opposes the cross-motion.

The plaintiff is an engineering firm that owns and operates hydroelectric power plants. The plaintiff possesses a Federal Energy Regulatory Commission ("FERC") license for the Mechanicville Hydroelectric Project which is located downstream from the Conklingville Dam, the Sacandaga River, Sacandaga Lake and Indian Lake which are located in the Adirondack State Park. The defendant has been regulating the flow of the upper Hudson River since 1922 and has jurisdiction over the Hudson Regulating District ("District") which includes twelve municipal counties in Eastern New York State. The Great Sacandaga Lake is a man made lake and was created in 1930 with the construction of the Conklingville Dam on the Sacandaga River. The purpose of the project was to reduce floods and stabilize the water flow of the Sacandaga and Hudson rivers for hydroelectric power generation. The District is charged with providing flood protection for the welfare and benefit of the public.

The defendant manages the flow of the rivers and lakes and it produces what is called "headwater benefits" which provides downstream hydroelectric power generation plants with water flow from upstream owners. Federal and state statutes allow upstream users to charge downstream users for the benefits created by the "headwater benefits". For many decades the defendant charged downstream users an assessment which included all of their capital expenses, operating expenses and maintenance costs. In 1992, the FERC demanded that the defendant obtain a FERC license. The defendant obtained a FERC license in 2002 and was then subject to the control and regulation of the FERC. As a FERC licensee, the defendant was not allowed to levy an assessment for headwater benefits without the approval of FERC. In addition, the defendant's assessment could only be used to recoup interest, maintenance and depreciation. The plaintiff claims the defendant did not seek the approval of the FERC for its assessments. The plaintiff maintains that for the years 2003 to 2007, the defendant assessed it \$516,655.62 for headwater benefits and it had no choice but to pay the assessments. The plaintiff maintains for the years 2003 to 2007 the defendants obtained more than \$15 million dollars from all of the downstream owners.

On July 25, 2006, the plaintiff filed a complaint with the FERC and alleged the defendant's assessments for headwater benefits since 2003 was improper and excessive. The plaintiff alleged the defendant lacked the authority to collect assessments and the assessment scheme violated the Federal Power Act. The defendant joined the litigation as an intervening party.

In an Order issued December 22, 2006, the Federal Energy Regulatory Commission held, *inter alia*, that the defendant had been imposing assessments to downstream users without the pre-approval of the FERC. The Order found the defendant could not charge the downstream owners for interest, maintenance and depreciation as they were preempted by federal law. The Order stated the defendant was not prohibited from levying assessments for operating and capital expenditures and the FERC had no authority to order the defendant to issue refunds for assessments improperly collected from the plaintiff. Plaintiff sought a rehearing with the Federal Energy Regulation Commission which reviewed the prior proceeding but denied the request on May 17, 2007. Thereafter, the plaintiff appealed the decision of the FERC to the United States Court of Appeals for the District of Columbia. The defendant joined the case as an intervening party.

On November 28, 2008, the United States Court of Appeals reversed the decision of the FERC and found Federal Power Law § 10(f) precluded the defendant from charging the plaintiff any assessments. (Albany Engineering Corporation v. Federal Energy Regulatory Commission, 548 F. 3d 1071 [D.C. Circ. 2008]). The Court determined the defendant never had the authority to "exact any compensation from the [plaintiff] for headwater benefits." The plaintiff claims as a result of this decision, the defendant had improperly collected \$516,655.62 from it in the form of assessments. The Court of Appeals remanded the matter to the FERC to attain an appropriate remedy.

On May 21, 2001 the FERC issued an Order of Remand which instituted proceedings before a settlement judge to "assist the parties and other owners of projects in the affected river basin in reaching a headwater benefits settlement." (see, Exhibit L at ¶ 3). If a settlement could not be attained,

the FERC would conduct an investigation to ascertain the appropriate headwater benefit assessments for all future projects. Settlement negotiations failed and an investigation was commenced. The FERC offered to credit any future amounts due by the plaintiff as an offset against all funds previously paid. The plaintiff maintains the headwater benefits investigation is ongoing. The plaintiff maintains the FERC refused to exercise its authority and enforce its regulations by ordering the defendant to refund plaintiff assessments previously paid. The FERC concluded that if the plaintiff was dissatisfied with their proposal to offset future payments from the amounts previously paid, it should seek refunds in state court. The plaintiff sought a re-hearing on the refusal of FERC to order refunds which was denied in an Order of Rehearing on November 19, 2009. (see, Exhibit M).

The plaintiff claims the alleged ongoing investigation of the FERC has nothing to do with the issue of refunds as directed by the United States Court of Appeals. The plaintiff alleges the purpose of the ongoing investigation is to address how the defendant will financially survive and how it may lawfully charge downstream owners future assessments for future benefits.

The defendant maintains the plaintiff has not its burden of proof entitling it to summary judgment. The defendant alleges its cross-motion for summary judgment should be granted as plaintiff's claims for refunds are premature, unripe and plaintiff has not exhausted the available administrative remedies under FERC. The defendant maintains the FERC has jurisdiction over the issues remanded by the Court of Appeals and the authority to conduct an administrative process to determine the amount of headwater benefits received by sixteen downstream hydro power corporations. Defendant claims the investigation would determine the amount of refunds due and improperly assessed by the District. The Order of Rehearing authorized the retention of the Oakridge National Laboratory to conduct a Headwater Benefits study ("HWB study"). On January 19, 2012, after an 18 month investigation, the FERC issued an initial draft of the HWB study. The defendant claims the preliminary assessment is on going as federal regulations contemplates an appeal and rehearing procedure. Neither the defendant or the FERC have indicated that any appeals have been filed.

On a motion for summary judgment, the movant must establish by admissible proof the right to judgment as a matter of law. (Alvarez v Prospect Hospital, 68 NY2d 320 [1986]). The burden shifts to the opponent of the motion to establish by admissible proof, the existence of genuine issues of fact. (Zuckerman v City of New York, 49 NY2d 557 [1980]). It is well established that on a motion for summary judgment, the court's function is issue finding, not issue determination. (Barr v. County of Albany, 49 NY2d 557 [1980], and all evidence must be viewed in the light most favorable to the opponent to the motion. (Davis v. Klein, 88 NY2d 1008 [1996]).

In opposing a motion for summary judgment, one must produce evidentiary proof in admissible form . . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient. (Zuckerman v City of New York, 49 NY2d at 562). It is incumbent upon the non-moving party to lay bare her proof in order to defeat summary judgment. (O'Hara v Tonner, 288 AD2d 513 [3rd Dept. 2001]). Mere conclusionary assertions, devoid of evidentiary fact, are insufficient to raise a genuine triable issue of fact on a motion for summary judgment as is reliance upon surmise, conjecture or speculation. (Banco Popular North America v. Victory Taxi Management, Inc., 1 NY3d 381 [2004]).

The United States Court of Appeals held in Albany Engineering Corporation v. Federal Energy Regulatory Commission, 548 F. 3d at 1079:

Our holding that [Federal Power Law] § 10(f) preempts *all* state headwater benefits assessments materially changes the context for FERC's consideration of both of these issues. Whereas FERC and the District formerly believed that the District was free to assess charges of certain costs under the authority of state law, our holding makes clear that the District *never* had such authority to exact *any* compensation from [plaintiff] for headwater benefits.

... In light of these changed circumstance, we find it appropriate to remand to FERC to consider the scope of its authority to craft appropriate remedies.

As a result of this decision, the District did not have the authority to collect assessment fees from the plaintiff for the years 2003-2007. In addition, the Court of Appeals found the FERC had the power to

order refunds as the District is a licensee of the FERC subject to FERC's jurisdiction. *Id.* at 1080. The Court also stated the FERC is not compelled to order refunds of rates collected under the authority of *state law* that is pre-empted by a federal statute. *Id.* At 1081. The defendant levied assessments against the downstream users pursuant to federal statutes after it became a licensee of the FERC in 2002.

In order to comply with the directives of the Court of Appeals, the FERC has attempted to fashion an appropriate remedy since 2008. A judicial settlement program was unsuccessful. A Headwater Benefits study was recently completed after an 18 month process. The FERC has declined to address the issue of refunds. The record reveals the FERC claims "we do not have authority to order refunds of charges collected by the District without authority" and if the plaintiff seeks an immediate refund, it must be "pursued in state court." (see, Exhibit L at ¶ 19; Exhibit M at ¶ 7, 11 and 32). The FERC clearly stated that the plaintiff retains the right to seek refunds in the state courts if it chooses "regardless of whether a headwater benefits investigation later determines that it was liable for past headwater benefits, since the District's collection of all previous payments was unauthorized." (see, Exhibit L at ¶ 24). The FERC stated in its May 19, 2009 Order on Remand:

if [plaintiff] insists on obtaining a refund of the payments, rather than a remedy that we can provide, it should do so through a court action. Our determination that we cannot order refunds does not leave [plaintiff] without a remedy. In seeking a refund through the court system, [plaintiff] can rely on the court or appeals' determination that the assessments were unauthorized because they were made under preempted authority. (see, Exhibit L at ¶ 41).

It appears the focus of the FERC remedial investigation concentrates on the future of assessment levies by the District and to identify legitimate sources of income for the District. The purpose of the HWB study is not to consider refunds pursuant to the findings of the Court of Appeals, but rather, to ascertain financial resources for the District. In addition, the HWB study would identify sources that "the District would be unable to collect future payments from hydropower projects as a source of funding." (see, Exhibit L at ¶ 23).

The FERC clearly states it does not have the authority to order refunds for unauthorized assessment levies pursuant to the decision of the Court of Appeals. Since the FERC cannot and will not consider that refunds would or would not be an appropriate remedy of those issues remanded by the Court of Appeals, the plaintiff has no recourse other than to turn to the state court. Since the FERC maintains it has no authority to grant a refund, the ripeness doctrine and the exhaustion doctrine are not applicable in this instance. (Ward v. Bennett, 79 NY2d 394 [1992]).

Plaintiff's motion for summary judgment is granted. The plaintiff has demonstrated its entitlement to summary judgment as a matter of law. The Court of Appeals clearly stated that the assessment levied by the District for the years 2003-2007 was in violation of federal law. Since the levies were unlawful, the plaintiff was entitled to refunds for those assessments previously paid. The plaintiff is entitled to a judgment in the amount of \$516,655.62 together with interest from January 1, 2003.

Accordingly, the plaintiffs motion for summary judgment pursuant to CPLR 3212 is granted. The cross-motion of the defendant is denied.

This Decision and Order is returned to the attorney for the plaintiff. 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 relating to filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York
April 2, 2012


Joseph C. Teresi, J.S.C.

Papers Considered:

1. Notice of Motion dated January 4, 2012;
2. Affidavit of Matthew C. Hug, Esq. dated January 4, 2012 with Exhibits A-N;
3. Plaintiff's Memorandum of Law dated January 4, 2012;
4. Notice of Cross-motion dated February 23, 2012;
5. Affidavit of Richard J. Ferrara dated February 23, 2012 with Exhibits 1-7;
6. Defendant's Memorandum of Law dated February 23, 2012;
7. Affirmation of Matthew C. Hug, Esq. dated March 7, 2012;
8. Affidavit of Richard J. Ferrara dated March 15, 2012.