Greens at Half Hollow LLC v Suffolk County Dept. of Public Works
2013 NY Slip Op 32924(U)
November 8, 2013
Sup CT, Suffolk County
Docket Number: 003381-2013
Judge: Emily Pines
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SHORT FORM ORDER INDEX NUMBER 003381-2013

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION- PART 46, SUFFOLK COUNTY

Present: ***HON. EMILY PINES***
J. S. C.

Original Motion Dates: 04-02-13;06-11-13
Motion Submission Date: 09-24-2013
Motion Sequence Numbers: 002 MOTD
003 MOTD
004 MOTD
005 MOTD

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GREENS AT HALF HOLLOW LLC,

Petitioner-Plaintiff,

-against-

SUFFOLK COUNTY DEPARTMENT OF PUBLIC WORKS, SUFFOLK COUNTY SEWER AGENCY, SUFFOLK COUNTY DEPARTMENT OF HEALTH SERVICES, THE COUNTY OF SUFFOLK, and THE TOWN OF HUNTINGTON,

Respondents-Defendants,

and

THE GREENS AT HALF HOLLOW HOME OWNERS ASSOCIATION, INC., AND THE BOARD OF MANAGERS OF GREENS AT HALF HOLLOW CONDOMINIUMS I-V ON THEIR OWN BEHALF AND AS REPRESENTATIVES OF AND ON BEHALF OF THE RESIDENTS OF THE GREENS AT HALF HOLLOW,

Defendants.

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In this hybrid proceeding/action, the Petitioner-Plaintiff, Greens at Half Hollow LLC ("GHH") seeks, among other things, (1) a judgment annulling a "Sewer Rate Determination" dated October 12, 2012, by the Suffolk County Department of Public Works, disapproving the

charges by GHH to Respondent Greens at Half Hollow Homeowner's Association ("HOA") for its use of a sewage treatment plant owned by GHH, (2) various declaratory judgments declaring the rights and obligations between the parties, and (3) compensatory damages and declaratory and injunctive relief pursuant to 42 USC § 1983 for violations of GHH's property rights.

ORDERED that the motions to dismiss by the Respondents-Defendants (Mot. Seq. 002 and 003), and Defendants (Mot. Seq. 004) and the cross-motion by Plaintiff-Petitioner (Mot. Seq. 005) are decided as set forth herein.

Factual and Procedural Background

In 2002, in connection with the development of condominiums known as the Greens at Half Hollow ("The Greens"), GHH's predecessor in interest, S.B.J. Associates, LLC ("SBJ") and the Suffolk County Department of Public Works ("SCDPW"), Suffolk County Sewer Agency ("SCSA"), Suffolk County Department of Health Services ("SCDHS"), and the County of Suffolk ("County")(collectively "County Defendants") entered into an agreement entitled "Agreement for the Construction, Operation and Maintenance of a Sewer System" ("STP Agreement"). The STP Agreement recites, among other things, that SBJ is the owner of the premises on which the Greens was to be developed and that it had previously made an application to the County to construct a sewage collection, treatment and disposal facility for the Greens, which application was approved by the County. Article 19 of the STP Agreement, provides, in relevant part:

> C. In addition to any consideration paid to the OWNER for the connection of off-site additional facilities in accordance with paragraph (B) above, the OWNER shall be entitled to receive from any connecting entity a fair and reasonable charge for the entity's proportionate share of the operation and maintenance costs of the SYSTEM. This charge shall be subject to the approval of the COUNTY. The OWNER covenants, warrants and represents that

> any fees, excluding that part reasonably attributable to the value of sewer line easements, collected by the OWNER pursuant to this paragraph shall be applied for the benefit of all users of the SYSTEM.
>
> * * *
>
> E. In the event that the OWNER, at any time, desires an increase in the rate charged to any connecting entity for the operation and maintenance costs of the PLANT, the OWNER shall make application to the COUNTY for same. The OWNER shall, at the OWNER'S sole cost, expense and effort, provide written notice of its application to all of the entities connected to the PLANT. This notice . . . may be included with the invoices sent by the OWNER to the connected entities for operation and maintenance expenses. This notice shall advise the connected entities that the OWNER is seeking an increase in the rate charged to them for the operation and maintenance costs of the PLANT and that the OWNER has applied to the AGENCY for such an increase, and shall state the date of the AGENCY meeting at which the OWNER'S application will be considered. Such notice shall be mailed to each connected entity no less than three weeks prior to the date of the AGENCY meeting at which the OWNER'S application will be heard.

In 2011, the HOA asked SCDPW to review the sewer rates charged to it by GHH. On October 12, 2012, following a review of documentation provided by GHH relating to the operation and maintenance of the sewage treatment plant from 2004 through 2011, SCDPW issued its written determination ("Rate Determination") that the charges to the HOA were not fair and reasonable and, therefore, SCDPW did not approve the charges imposed at that time. SCDPW also determined that a rate of $270 per "Single Family Equivalent" annually for entities connected to the sewage treatment plant was fair and reasonable.

GHH commenced this proceeding/action on January 31, 2013, by filing a Summons and Combined Verified Petition and Complaint. The Combined Verified Petition and Complaint names SCDPW, SCSA, SCDHS, the County and the Town of Huntington as Respondents-

Defendants and the HOA and the Board of Managers of Greens At Half Hollow Condominiums I-V ("Boards") as Defendants.

The Combined Verified Petition and Complaint contains thirteen causes of action. The first through fifth causes of action seek relief pursuant to CPLR Article 78 from the Defendants-Respondents, i.e. the County Defendants and the Town, vacating and annulling the October 12, 2012 rate determination. The sixth and seventh causes of action seek declaratory relief regarding the STP Agreement between GHH and the County Defendants. The eighth cause of action seeks a judgment declaring that any change in rates charged by GHH will be implemented prospectively only, and not retroactively. The ninth cause of action seeks a judgment declaring that the sewer rates disclosed in the Offering Plans for the condominiums were approved by the Town and the County. The tenth cause of action seeks a judgment declaring that the County Defendants wrongfully deprived and are depriving GHH of its right to substantive and procedural due process in violation of the Fifth and Fourteenth Amendments to the United States and New York State Constitutions, as well as damages of no less than $5,000,000. The eleventh cause of action seeks, in the alternative to the declaratory relief sought in the sixth and seventh causes of action, a judgment declaring that Sections 18 and 29 of the STP Agreement are unconstitutional. The twelfth cause of action seeks a judgment declaring that Section 740-46 of the Suffolk County Code is void as preempted by State-wide general law. The thirteenth cause of action seeks a permanent injunction enjoining the HOA and the Boards, on their own behalf and on behalf of the residents of the Greens at Half Hollow, from refusing to pay for sewer services.

On January 31, 2013, the same day this hybrid proceeding/action was commenced, GHH presented a proposed Order to Show Cause ("OTSC") to this Court seeking a temporary restraining order and preliminary injunction. The OTSC, as signed by this Court, states, in

relevant part:

> "Upon the annexed affirmation of Ronald J. Rosenberg . . ., the annexed affidavit of Steven Kaplan . . ., the Combined Verified Petition and Complaint . . ., the exhibits annexed thereto, and all the papers and proceedings heretofore had herein, it is hereby
>
> ***ORDERED***, that Respondents-Defendants, and Defendants, or their attorneys show cause . . . on the 19th day of February 2013 . . . why an order should not be made and entered as follows: (i) pursuant to CPLR § 6301 et seq., granting a preliminary injunction and compelling the defendant Greens at Half Hollow Home Owners Association, Inc. (the "HOA") and/or the Board of Managers for the Greens at Half Hollow Condominiums I-V, to pay the minimum sum of $25,740.00 per month for the essential sewage treatment services being provided by plaintiff Greens at Half Hollow LLC ("GHH")(the "Minimum Sewer Charges"); (ii) together with such other, further and different relief as to the Court may seem just and proper in the premises . . ."

The OTSC also directed that the order and the papers upon which it was granted be served upon the Respondents-Defendants and Defendants on or before February 4, 2013. The Court struck a proposed paragraph in the OTSC thereby denying GHH's request for interim relief. The Request for Judicial Intervention dated January 30, 2013, filed by GHH indicates only that the nature of the action is "Contract." It does not indicate in any way that GHH seeks any relief pursuant to CPLR Article 78.

The County Defendants and the Town have admitted that they were served with the OTSC on January 31, 2013. GHH served the Boards with the OTSC on February 4, 2013.

On February 5, 2013, at the request of GHH, the Court entertained oral argument on GHH's application for the mandatory temporary restraining order that was denied on January 31, 2013. After oral argument, this Court granted GHH's application to the extent of directing the HOA/Boards to make monthly payments for sewer services to GHH in the amount of $25,740.00

commencing April 2013.

In late February 2013, both the County Defendants and the Town sought extensions of time to answer or otherwise move with respect to the Combined Verified Petition and Complaint from GHH. GHH conditioned its consent to an extension of time on Defendants-Respondents and Defendants waiver of any objections or defenses with respect to the service of the OTSC, the Summons, and the Combined Verified Petition and Complaint, and personal jurisdiction.

In a letter to counsel for the County Defendants dated February 27, 2013, counsel for GHH took the position that the County Defendants were in default by having failed to serve its answer and supporting papers by February 14, 2013, five days before February 19, 2013, the day GHH's contends was set by the Court in the OTSC for the petition to be heard.

In Motion Sequence # 002, the County Defendants move to dismiss the Combined Verified Petition and Complaint as asserted against them pursuant to CPLR 3211 on the grounds that (1) the Court lacks personal jurisdiction over the County Defendants, (2) that the Combined Verified Petition and Complaint fails to state a cause of action, (3) that the causes of action asserted in the Combined Verified Petition and Complaint are barred by the statute of limitations, and (4) that the Court should not proceed in the absence of necessary parties. The County Defendants contend, among other things, that because the OTSC signed by this Court on January 31, 2013, does not set a return date for the petition, it is jurisdictionally defective as it fails to provide notice to the County Defendants of the time and place for answering the Combined Verified Petition and Complaint. The County Defendants also claim, among other things, that GHH failed to name other entities connected to the sewer treatment plant as parties and, therefore, failed to join necessary parties.

Similarly, in Motion Sequence # 003, the Town moves to dismiss all claims as asserted

against it pursuant to CPLR 3211 on the grounds that GHH failed to secure personal jurisdiction over it, (2) the action was not commenced within the applicable statute of limitations, (3) GHH lacks standing, and (4) GHH failed to join necessary parties. The Town contends, among other things, that GHH knowingly failed to join several other entities connected to the sewer treatment plant as parties to this action/proceeding, and are now barred from joining them because the four-month statute of limitations has expired.

Similarly, in Motion Sequence # 004, the HOA and the Boards move, pursuant to CPLR 3211, (1) to dismiss the first through fifth causes of action for lack of personal jurisdiction, failure to join necessary parties, and expiration of the applicable statute of limitations; (2) dismissing the sixth, seventh, eighth and twelfth causes of action for failure to join necessary parties and due to the expiration of the applicable statute of limitations; and (3) dismissing the ninth cause of action for failure to state a cause of action. The HOA and Boards allege, among other things, that other entities connected to the sewage treatment plant have not been made parties to this proceeding/action. The HOA and Boards point to a letter from GHH to SCSA dated July 28, 2011, identifying five entities as connected the sewer treatment plant: the HOA, Country Pointe Dix Hills HOA, Long Island Developmental Disabilities Service Office, HSC No. 6 Housing Development Fund Company, Inc., and HSC No. 5 Housing Development Fund Company, Inc. According to the HOA and Boards, all entities connected to the STP have rights and entitlements with respect thereto, as recognized in the STP Agreement, and are affected by the Rate Determination now being challenged by GHH. The HOA and Boards also point out that they are only named as "Defendants" with respect to the thirteenth cause of action in this hybrid proceeding/action, and not as "Respondents" with respect to the first through fifth causes of action seeking relief pursuant to CPLR Article 78. Therefore, the HOA and Boards contend that

GHH's deliberate failure to name all entities connected to the STP as parties mandates dismissal of this proceeding/action.

GHH opposes the motions to dismiss and cross-moves (1) for default judgments and an inquest on damages against the Defendants-Respondents and Defendants based upon their purported default in answering the Combined Verified Petition and Complaint. GHH contends, among other things, that the OTSC set February 19, 2013, as both the date for the hearing on the petition and the return date of GHH's motion for a preliminary injunction. GHH states that in addition to serving the OTSC, all Defendants-Respondents and Defendants were separately served with the Summons and Combined Verified Petition and Complaint. According to GHH, pursuant to CPLR 7804(d) the time to answer the petition expired on February 14, 2013, and, the time for the County, Town and HOA to appear in the plenary action expired on February 25, 2013, while the time for the Boards to appear in the plenary action expired on March 11, 2013. Alternatively, if the Court determines that the OTSC was defective in that it did not set a date for the hearing of the petition, GHH asks the Court, pursuant to CPLR 2001, to correct the omission by setting a new date for the hearing of the petition. Additionally, GHH contends, among other things, that it did not fail to join parties who should be joined because the other entities connected to the STP are not necessary parties to this hybrid proceeding/action within the meaning of CPLR 1001(a).

Discussion

Return Date of Petition

First, on January 31, 2013, the Court, in effect, signed the OTSC to be served in lieu of a notice of petition, although the OTSC did not specifically set forth the time and place of the hearing on the petition and supporting affidavits. The OTSC refers only to GHH's motion for

provisional injunctive relief. Because a return date for the proceeding was not set forth in the OTSC, there cannot have been a default by failing to answer the petition by February 14, 2013. Accordingly, that branch of GHH's cross-motion which seeks a default judgment is denied.

However, that branch of GHH's cross-motion which seeks to correct the omission in the OTSC is granted to the extent that the return date for the petition is hereby set for January 21, 2014. CPLR 2001 provides that any unprejudicial "mistake, omission, defect or irregularity" may be corrected by the court. CPLR 304, as amended in 2001, provides that in a special proceeding the filing of the petition alone constitutes commencement of the proceeding. As stated by Professor David D. Siegel:

> "Since the filing of the notice of petition is no longer an indispensable part of the commencement process, omissions in the notice of petition should no longer be deemed incurable. Hence even the omission of a return date should be remediable if the respondent has suffered no prejudice and a proper return date can be asserted now, with whatever incidental CPLR 2004 time extension is needed."

(138 Siegel's Prac. Rev. 4 [2003]).

Thus, a defect such as the omission of a return date for the petition from the OTSC signed on January 31, 2013, can be corrected. Here, the filing of a notice of petition, or an order to show cause in lieu of a notice of petition, was not required for proper commencement of this proceeding. Pursuant to CPLR 304, this hybrid proceeding/action was properly commenced by the filing of the Combined Verified Petition and Complaint on January 31, 2013. Even if proper commencement required the filing of a notice of petition or an order to show cause in lieu of a notice of petition, the 2007 amendment to CPLR 2001 enables non-prejudicial errors at the commencement of actions to be corrected. Here, the lack of a return date for the petition in the OTSC did not cause any prejudice, and a return date can now be set with answers to be served in

accordance with CPLR 7804(c). Accordingly, those branches of the motions by Respondents-Defendants and Defendants to dismiss the first through fifth causes of action pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction are denied.

Necessary Joinder of Parties

CPLR 1001 provides:

> **(a) Parties who should be joined.** Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so he may be made a defendant.
>
> **(b) When joinder excused.** When a person who should be joined under subdivision (a) has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned. If jurisdiction over him can be obtained only by his consent or appearance, the court, when justice requires, may allow the action to proceed without his being made a party. In determining whether to allow the action to proceed, the court shall consider:
>
> 1. whether the plaintiff has another effective remedy in case the action is dismissed on account of the non-joinder;
>
> 2. the prejudice which may accrue from the nonjoinder to the defendant or to the person not joined;
>
> 3. whether and by whom prejudice might have been avoided or may in the future be avoided;
>
> 4. the feasibility of a protective provision by order of the court or in the judgment; and
>
> 5. whether an effective judgment may be rendered in the absence of the person who is not joined.

"[T]he joinder provisions of CPLR 1001(a) apply to Article 78 proceedings" (*27th Block Ass'n. v Dormitory Auth. of the State of N.Y.*, 302 AD2d 155, 160 [1st Dept 2002]).

Thus, this Court must first determine if there are non-parties that are necessary within the meaning of CPLR 1001(a). If so, the first sentence of subdivision (b) requires the Court to order that the person or entity be joined where they are subject to the court's jurisdiction.

"Necessary parties are persons 'who might be inequitably affected by a judgment in the action' and must be made plaintiffs or defendants" (*Censi v Cove Landings, Inc.*, 65 AD3d 1066, 1067 [2d Dept 2009]; *see, e.g. Martin v Ronan*, 47 NY2d 486 [1979][civil service employees whose employment status would be adversely affected by successful challenge to validity of policy or examination pursuant to which they appointed]; *Dudley v Kerwick*, 52 NY2d 542 [1981][in proceeding by landowners challenging property tax exemption granted by town assessor, exempt landowners were necessary parties]; *Jim Ludtka Sporting Goods, Inc. v City of Buffalo School Dist.*, 48 AD3d 1103 [4th Dept 2008][successful bidder a necessary party to unsuccessful bidder's challenge to bidding determination that could result in nullification of successful bidder's contract]; *Spence v Cahill*, 300 AD2d 992 [4th Dept 2002][landowners within well spacing unit necessary parties to proceeding challenging determination because successful challenge will adversely affect landowners' royalties]; *Romeo v New York State Dept. of Educ.*, 41 AD3d 1102 [3d Dept 2007][school district necessary party to proceeding to annul determination of Commissioner of Education denying enrollment of children in school district]). As stated by the Appellate Division, First Department:

> With respect to the second prong of CPLR 1001(a)'s test, it is well settled that "'[t]he possibility that a judgment rendered without [the omitted party] could have an adverse practical effect [on that party] is enough to indicate joinder.'" (*Hitchcock v Boyack*, 256 AD2d 842, 844, quoting Siegel, N.Y. Prac. § 132, at 199 [2d ed].).

(*Id.*).

Here, it is clear that all entities connected to the STP are necessary parties as they all might be inequitably affected by a judgment herein. First, Article 19(C) of the STP Agreement between GHH and the County Defendants expressly provides GHH with a right "to receive ***from any connecting entity*** a fair and reasonable charge for ***the entity's*** proportionate share of the operation and maintenance costs of the SYSTEM" and mandates that the charge is "subject to the approval of the COUNTY" (emphasis added). Article 19(C) further requires GHH to apply any fees collected by it pursuant to Article 19(C) "for the benefit ***of all users of the system***" (emphasis added). Article 19(E) mandates that any application by GHH to increase the rate charged "to any connecting entity" be made to the County on written notice "***to all of the entities connected to the PLANT***" at least 21 days before the hearing on such an application. Thus, it is clear that the STP Agreement gave both GHH and all connected entities certain rights and obligations with respect to the rates charged by GHH to connected entities for use of the STP. Moreover, contrary to GHH's contention, the Rate Determination dated October 12, 2012, is not limited solely to the rates charged by GHH to the HOA. Rather, in addition to determining that the charges at that time to the HOA were not fair and reasonable, the County also explicitly determined that a "rate of $270 (per SFE) annually "***for entities connected to the sewage treatment plant***" is fair and reasonable. In issuing this part of the Rate Determination, it is clear that the County was specifically addressing the rates charged to all connected entities, and not just the rate charged to the HOA and, in effect, the County set what it found to be a fair and reasonable rate for all entities connected to the STP. Thus, all entities connected to the STP are necessary parties as the relief sought by GHH in the first through fifth cases of action (vacatur and nullification of the Rate Determination dated October 12, 2012) would inequitably affect their rights. Similarly, the relief sought by GHH in the sixth, seventh, and eighth causes of action

(judgment declaring, among other things, the STP Agreement is void, terminable at will, and that rate changes under the STP Agreement apply only prospectively), as well as the twelfth cause of action (judgment declaring section 740-46 of the Suffolk County Code void as preempted by the Transportation Corporations Law) could have an adverse effect on all entities connected to the STP. Therefore, all connected entities are necessary parties with regard to those causes of action as well. While several or all of these causes of action may very well be barred by the expiration of applicable statutes of limitations, or GHH may be estopped from asserting them based upon the provisions of the Offering Plans for Condominiums I-V, such a determination must await joinder of all necessary parties.

Since it appears that all entities connected to the STP are subject to the jurisdiction of the court as they are located within Suffolk County, the Court hereby orders them summoned, without prejudice to their rights to assert any defenses or affirmative defenses. In accordance with process set forth by the Appellate Division, Second Department in *Lazzari v Town of Eastchester* (62 AD3d 1002 [2d Dept 2009]), GHH must serve the OTSC and Summons and Combined Verified Petition and Complaint upon all entities connected to the STP. The Court hereby directs that such service be completed within 30 days after the date of this decision and order. In light of the fact that the HOA and Boards were not named as Respondents in the Combined Verified Petition and Complaint, the foregoing directive applies to those entities as well as it is undisputed that they are connected to the STP.

Contrary to the contention of the Defendants-Respondents and Defendants, a necessary party is not beyond the jurisdiction of the court by virtue of a lapsed statute of limitations (*Windy Ridge Farm v Assessor of Town of Shandaken*, 11 NY3d 725, 727 [2008]). As recently held by the Appellate Division, Second Department:

> "[T]he statute of limitations is a defense which must be asserted by the party opposing the challenge, and the failure to interpose a cause of action within the applicable limitations period is not a jurisdictional defect (*see Windy Ridge Farm v Assessor of Town of Shandaken*, 11 NY3d 725, 727). If the necessary party, once joined, correctly alleges that the statute of limitations bars the proceeding, the proceeding may be then dismissed as time-barred (*see id.* at 727)."

(*Jenkins v Astorino*, — AD3d —, 2013 NY Slip Op 06684 [2d Dept 2013]).

Therefore, those branches of the motions by the Respondents-Defendants and Defendants pursuant to CPLR 3211(a)(10) are denied, and those branches of the motions by Respondents-Defendants and Defendants pursuant to CPLR 3211(a)(5) to dismiss the Combined Verified Petition and Complaint as barred by the statute of limitations are denied with leave to renew after the joinder of all necessary parties as set forth above (*see id.*).

GHH's reliance on *Mid-Island Therapy Assocs., LLC v New York State Dept. of Educ.* (99 AD3d 1082 [3d Dept 2012]), is misplaced, as that case involved the different factual scenario of a failure to join certain governmental entities as parties to a challenge to another governmental entity's certification of a reconciliation rate. The Appellate Division held that only the governmental entity that was primarily responsible for the challenged determination was a necessary party, and specifically limited its holding to the circumstances of that case. Thus, the case is inapplicable here.

Ninth Cause of Action

The ninth cause of action fails to state a cause of action.

> CPLR 3211(a)(7) permits the court to dismiss a complaint that fails to state a cause of action. The complaint must be liberally construed and the plaintiff given the benefit of every favorable inference (citations omitted). The court must also accept as true all of the facts alleged in the complaint and any factual submissions made in opposition to the motion (citations omitted). If the court

> can determine that the plaintiff is entitled to relief on any view of the facts stated, its inquiry is complete and the complaint must be declared legally sufficient (citations omitted). While factual allegations contained in the complaint are deemed true, bare legal conclusions and facts flatly contradicted on the record are not entitled to a presumption of truth (citations omitted).

(*Symbol Tech., Inc. v. Deloitte & Touche, LLP*, 69 AD3d 191, 193-195 [2d Dept 2009]).

Here, in the ninth cause of action, GHH alleges that in 2003 it filed copies of the Offering Plan containing the sewer rates with the "Town of Huntington" and the "County of Suffolk". GHH fails to allege that it filed a petition with the local governing body or bodies as required by TCL § 121. Clearly, filings of copies of the Offering Plan with the Suffolk County Clerk and the Clerk of the Town of Huntington were not petitions to the local governing body or bodies for review of rates charged for the collection, treatment and disposal of sewage. Any such allegation is not entitled to a presumption of truth as it is a bare legal conclusion. Accordingly, the ninth cause of action is dismissed as it fails to state a cause of action.

Tenth and Eleventh Causes of Action

The tenth cause of action is asserted only against the County Defendants and alleges, among other things, that the Rate determination is unjust, unreasonable and deprives GHH of its property interest in the sewer rates in violation of the Fourteenth Amendment of the United States Constitution and the New York Constitution. GHH seeks a declaratory judgment that the County Defendants wrongfully deprived and are depriving GHH of its right to substantive and procedural due process, as well as compensatory damages. While the County Defendants argue that this claim constitutes an impermissible attempt by GHH to subvert the statute of limitations provided by CPLR 217 because the essence of GHH's challenge is to the specific action of the County Defendants (*see Roebling Liquors Inc. v Urbach*, 245 AD2d 829, 830 [2d Dept 1997]),

as discussed above, the determination of whether the claims asserted herein pursuant to CPLR Article 78 are barred by the expiration of the statute of limitations must await joinder of all necessary parties. Therefore, that branch of the motion by the County Defendants to dismiss the tenth cause of action as barred by the statute of limitations is denied with leave to renew after the joinder of all necessary parties as set forth above.

Contrary to the contention of the County Defendants, the eleventh cause of action does not in any way challenge the Rate Determination. Rather, GHH seeks a declaration that certain provisions of the STP Agreement are unconstitutional and violate the TCL. In its papers, the County Defendants have not articulated a specific basis for dismissal of the eleventh cause of action. Therefore, that branch of the motion is denied.

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: November 8, 2013
Riverhead, New York

Emily Pines

HON. EMILY PINES