ORIGINAL

Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19
Justice

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William Heeran, individually and on behalf of Harbor Light Enterprises Corp., and Harbor Light Pub Café, Inc., Hannah J. Sweeney, Christopher Bambury, James Barnes, Shamus Barnes, Clifford F. & Maureen Baumann, William & Mary Bayer, Deborah Blair, Regina Shannon Bodnar, Alvina C. Boughal, Eileen Braithwaite, Catherine R. Brennan, Sinead McStravog Brogan, James Bunyan, Kieran Burke, Mary Castellano, Ilene Cavagnuolo, George Clark, individually and on behalf of 114-04 Rockaway Beach Blvd., LLC, Dennis Cook, Eileen P. Deering, Allegra Dengler, Maureen A. Dennelly, James J. Doyle, Lucille Dwyer, Sheila Duranti, Richard Early, Sr., Frank E. Farrell, Kathleen Fitzsimmons, Fortunato Peter & Valerie Foti, Katherine Gallagher, Judith Ganun, Timothy Ganun, Helen Graham, Jeannette Donnelly Griffenkranz, Aldis Hagen, Helen Hammill, Thomas Hammill, Bruce Hannaway, Suzanne Hasselman, Anne Heslin & Mary Heslin Reed, Elaine Ferrara Hetzel, Kathleen Hinchcliff, Gerard Jordan, James & Patricia Kane, Jean Marie Keane, Arthur Kear, William Keating, William J. Keating, Individually and on behalf of East Meets West Superb Chinese Food, Inc., Ronald Krische, Eileen Lagan, Kathleen Lahey, Brian & Tracy Lang, Patricia Lang, Victor & Patricia LaPlace, Philip & Debra Livoti, Marie Lopresti, Marie A. Lopresti, Joseph Ludovico, Bernice Luhurs, Kathleen Lux, Richard Mahon, Raymond Marten, John Mathis, Stephen McDade, Mary McDermott, Jean McDonald, James E. McGovern, Martin J. McGowan, Charles McLoughlin, Martha Militano, George F. Miller, Daniel J. Moran, Megan & Joseph Moran, Elizabeth Morgan, John C. Morris, Patrick Mullaney, Joseph Napoli, Mark Negrelli, John Nelson, Rita Nussbaum, Elizabeth O'Grady, Donald Olsen, Patricia A. Pinto, Jeanine Poggioli, Marie Potter, Michael

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Motion Date: 1/8/14
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QUEENS COUNTY

& Noreen Quinn, Dorothy Raffo, Dean Rasinya, Maureen Regan, Robert R. Reilly, Richard & Tricia Rojas, Thomas Rom, Michael Rudolph, Rosemary Russo, Michael Sacco, Louis Scheriff & Margaret McHugh, John Schretzmayer, Edward Scott, Robert Somerville, Robert Stever, Mary Sutera, Elena Tasso, Patricia A. Tietjen, George Tkach, John Tran, on behalf of The John Joseph Tran and Jacqueline Michelle Tran Joint Living Trust, Raymond A. Vance, Samuel Vivino, Mary Welsame, Roland W. Wertz, Lorraine Wipper, Ronald Wohl, Thomas Woodsm and Breezy Point Cooperative Inc.,

Plaintiffs,

-against-

Long Island Power Authority (LIPA) and National Grid PLC a/k/a National Grid US8, Inc., National Grid USA, Inc., Keyspan Electric Services, LLC, and Keyspan Energy Trading Services, LLC, d/b/a National Grid,

Defendants.

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The following papers numbered 1 to 16 read on this motion for an order pursuant to CPLR 3211(a)(7) granting Defendants LIPA and National Grid Electric Services, LLC, dismissing the complaint as to them with prejudice, on the grounds of governmental immunity.

	PAPERS NUMBERED
Notice of Motion - Affidavits-Exhibits- Memo of Law.....	1 - 5
Affirmation In Opposition- Memo of Law.....	6 - 11
Reply Affirmation-Defendants' Reply Memorandum of Law.....	12 - 16

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

I. Facts

Plaintiffs commenced the within action for damages allegedly sustained as a result of fires started during Hurricane Sandy ("Sandy") in Breezy Point, New York, which fires, they contend, were caused by LIPA's decision not to de-energize the Rockaway Peninsula in advance of the Storm. Plaintiffs allege in the complaint that "at all of the premises owned and/or occupied by the plaintiffs herein, fires originated at their respective premises as a result of heat from electrical arcing caused by flooding contacting electrical transmission lines that had been left in service and electrified by defendants LIPA and National Grid on the night of October 29, 2012." (Complaint ¶58.) It is undisputed that on October 28, 2012, the National Weather Service issued an advisory that Hurricane Sandy was going to be a major storm with surges and flooding on the coast of New York. On the same day, Mayor Michael Bloomberg issued an emergency evacuation order for "Zone A," which included the Rockaway Peninsula. It is undisputed that other utilities shut down power to flood zones to avoid fires which could arise from salt water touching power lines.

LIPA is a public authority established in 1986 pursuant to the Long Island Power Authority Act (New York Public Authorities Law §1020 *et seq.*) LILCO was a private entity that provided power to Long Island and part of Queens. In 1998, LIPA finished its acquisition of LILCO. (*Matter of Suffolk County v. Long Is. Power Auth.*, 258 A.D.2d 226, 228 [2d Dep't 1999]; *Matter of Town of Islip v. Long Is. Power Auth.*, 301 A.D.2d 1, 4 [2d Dep't 2002].) Defendant National Grid operated LIPA's electrical grid when Hurricane Sandy struck.

II. Discussion

LIPA moves to dismiss the complaint, alleging that it is a governmental entity which was

(and is) engaged in a governmental function and, based on such governmental immunity, LIPA cannot be held liable absent the existence of a special duty between it and plaintiffs. National Grid moves to dismiss on the assertion that, as a government contractor, it too has governmental immunity. Neither argument has any merit.

On a motion to dismiss, "the court must liberally construe the complaint, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Nerey v. Greenpoint Mtge. Funding, Inc.*, 116 A.D.3d 1015, 1016 [2d Dep't 2014]; *see also Paino v. Kaieyes Realty, LLC*, 115 A.D.3d 656, 656 [2d Dep't 2014].) A motion to dismiss "will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law." (*Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 A.D.3d 34, 38 [2d Dep't 2006].) In deciding a motion to dismiss, the Court will not consider whether plaintiffs' case will survive a motion for summary judgment. (*Soodoo v. LC, LLC*, 116 A.D.3d 1033, 1033-1034 [2d Dep't 2014].) '"Whether a plaintiff can ultimately establish its allegations is not part of the calculus'" on a motion to dismiss. (*Sokol v. Leader*, 74 A.D.3d 1180, 1181 [2d Dep't 2010] (quoting *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 [2005]).)

A. Defendants Cannot Use Governmental Immunity as a Defense

Defendant LIPA asserts that "as a municipal instrumentality and subdivision of New York State" it is entitled to governmental immunity because the transmission of electricity falls under the umbrella of governmental acts. National Grid asserts that it provided an essential governmental function on behalf of LIPA and is entitled to the same relief. Defendants,

collectively, were responsible for providing electricity to the geographic area concerned herein. Since the Reconstruction era, the Court of Appeals has held that when a governmental entity acts for "private purposes," instead of "public purposes....a municipality is like a private corporation, and is liable for a failure to use its power well, or for an injury caused by using it badly." (*Maxmilian v. City of New York*, 62 N.Y. 160, 164-165 [1875].) More recently, the Court of Appeals has held that"[a] governmental entity's conduct may fall along a continuum of responsibility to individuals and society deriving from its governmental and proprietary functions." (*Miller v. State of New York*, 62 N.Y.2d 506, 511-512 [1984].) On one end of the spectrum are activities that are "'undertaken for the protection and safety of the public pursuant to the general police powers,"' which are governmental functions. (*Sebastian v. State of New York*, 93 N.Y.2d 790, 793 [1999] (quoting *Balsam v. Delma Eng'g Corp.*, 90 N.Y.2d 966, 968 [1997]).) "On the opposite periphery lie proprietary functions in which governmental activities essentially substitute for or supplement 'traditionally private enterprises.'" (*Sebastian*, 93 N.Y.2d at 793 (quoting *Riss v. City of New York*, 22 N.Y.2d 579, 581 [1968]); *see also Kochanski v. City of New York*, 76 A.D.3d 1050, 1051 [2d Dep't 2010].) An act is proprietary if the governmental entity provides "'services that traditionally have been supplied by the private sector."' (*Applewhite v. Accuhealth, Inc.*, 21 N.Y.3d 420, 426 [2013] (quoting *Sebastian*, 93 N.Y.2d at 795).) "It is the specific act or omission of which the injury is claimed to have arisen and the capacity in which that act or failure to act occurred" that determines whether an act is governmental or proprietary. (*Weiner v. Metropolitan Transp. Auth.*, 55 N.Y.2d 175, 182 [1982].) A governmental entity engaging in a proprietary act "is subject to suit under the ordinary rules of negligence applicable to nongovernmental parties." (*Applewhite*, 21 N.Y.3d at

425; *see also Crosland v. New York City Tr. Auth.*, 110 A.D.2d 148, 154 [2d Dep't 1985]; *Kochanski v. City of New York*, 76 A.D.3d 1050, 1051 [2d Dep't 2010].)

The Court finds that providing electricity to consumers is a proprietary act because electricity has traditionally been supplied by the private sector. Defendants offer absolutely no evidence to support the proposition that electricity in New York has traditionally been provided by public entities, and the burden on a motion to dismiss pursuant to CPLR § 3211(a)(7) never shifts to the plaintiff to disprove a defense. (*Weill v. East Sunset Park Realty, LLC*, 101 A.D.3d 859, 860 [2d Dep't 2012].) Instead, the evidence before this Court shows that, traditionally, electricity in New York has been provided by private entities, with public entities like LIPA being the exception rather than the rule. Notably, LIPA did not operate its own electrical grid when Hurricane Sandy struck; that responsibility went to defendant National Grid, a private entity. Moreover, as even defendants admit, LILCO was an "investor owned utility [*sic*]" before it was acquired by LIPA, further buttressing the proposition that private entities, and not governmental entities, have traditionally provided electricity on Long Island. (Defendants' Memorandum of Law, p. 16.) Significantly, a village was held to have acted in a proprietary capacity when, while providing electricity to its residents, it negligently maintained or repaired its own power lines. (*Bliss v. Village of Arcade*, 306 A.D.2d 902, 903 [4th Dep't 2003].) Clearly, the transmission of electricity by LIPA and National Grid is a proprietary act, not governmental, depriving defendants the protection of the cloak of governmental immunity.

Defendants' reliance on *Koch v. Dyson* for the assertion that providing electricity is a proprietary act is misplaced. The gravamen of *Koch* was not tort liability, but rather a challenge to the authority of the Power Authority of the State of New York to authorize the building of a

power plant on Staten Island. (*Koch v. Dyson*, 85 A.D.2d 346, 347 [2d Dep't 1982].) The *Koch* court did not rule on governmental immunity, let alone discuss the legal paradigm, and, accordingly, fails to buttress defendants' contentions.

Defendants' assertion that the discretionary nature of the decision not to de-energize Breezy Point provides governmental immunity also fails. As noted above, the court finds that the defendants were engaging in proprietary acts. Immunity for discretionary actions only applies when the public entity was engaging in a governmental act, not a proprietary one. When a public entity "acts in a proprietary capacity, it is subject to the same principles of tort law as a private entity. By contrast, discretionary acts, such as the failure to issue a license, can never be a basis for damages." (internal citations omitted) (*Applewhite v. Accuhealth, Inc.*, 90 A.D.3d 501, 502 [1st Dep't 2011], *aff'd*, 21 N.Y.3d 420 [2013].) "[T]he common-law doctrine of governmental immunity continues to shield public entities from liability for discretionary actions taken during the performance of **governmental** functions." (emphasis added) (*Valdez v. City of New York*, 18 N.Y.3d 69, 75-76 [2011].) "[D]iscretionary **governmental** acts may not be a basis of liability." (emphasis added) (*Matter of World Trade Ctr. Bombing Litig.*, 17 N.Y.3d 428, 453 [2011].) Indeed, a governmental entity engaging in a proprietary act "is subject to suit under the ordinary rules of negligence applicable to nongovernmental parties." (*Applewhite*, 21 N.Y.3d at 425; *see also Crosland*, 110 A.D.2d at 154; *Kochanski*, 76 A.D.3d at 1051.) Here, defendants would not have any immunity based on the discretionary nature of their actions because, as noted above, their acts were proprietary in nature, not governmental. Thus, defendants' motion to dismiss is denied.

In any event, LILCO would not be able to use governmental immunity as a defense

because it is a private entity, not a governmental entity. Even the Court of Appeals has recognized that distinction in stating that LILCO is a "privately owned utility," while LIPA is a "State governmental entity." (*Long Is. Power Auth. v. Shoreham-Wading Riv. Cent. School Dist.*, 88 N.Y.2d 503, 517 [1996].) Thus, LILCO would never be able to use governmental immunity as a defense.

B. New York Does Not Recognize a Government Contractor Defense to Negligence

National Grid moves to dismiss upon the premise that because LIPA is clothed with governmental immunity, as a government contractor, National Grid is likewise protected. Essentially, National Grid maintains that it can piggyback on LIPA's alleged governmental immunity. As an initial matter, this argument fails because, as discussed above, LIPA cannot use governmental immunity as a defense. But even if LIPA could, National Grid would still not be able to rely on governmental immunity as a defense because a government contractor defense to negligence does not exist in this State.

For over 100 years, the well-settled law in this State has been that private contractors that perform work for government entities are liable for their own negligence. (*Bates v. Holbrook*, 171 N.Y. 460, 468 [1902]; *Turner v. Degnon McLean Contracting Co.*, 99 A.D. 135, 137 [1st Dep't 1904]; *Ramme v. Long Island R. Co.*, 226 N.Y. 327, 334 [1919].) As the Court of Appeals stated over 130 years ago, "[a] municipal corporation cannot delegate power to private individuals to be exercised for their own private benefit to do injury to the property of their neighbors, and relieve them from responsibility from the damages, or reduce their liability to such as may result from want of proper care." (*Mairs v. Manhattan Real Estate Assn.*, 89 N.Y. 498, 498 [1882].) Private entities that perform work for public entities may not use

governmental immunity as a defense to a negligence claim. This court finds no reason to countermand the weight of authority. Thus, defendant National Grid's motion to dismiss is denied.

III. Conclusion

Defendants' motion to dismiss is denied in its entirety.

Dated: 7/3, 2014

Bernice D. Siegal, J. S. C.