Town of Macedon v Village of Macedon
2014 NY Slip Op 33178(U)
December 10, 2014
Supreme Court, Wayne County
Docket Number: 75192/2012
Judge: Daniel G. Barrett

At a term of the Supreme Court held in and for the County of Wayne in the Village of Lyons, New York on the 22nd day of October, 2014.

Present: Honorable Daniel G. Barrett
Acting Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

TOWN OF MACEDON, NEW YORK
32 West main Street
Macedon, New York 14502,

Plaintiff

-vs-

VILLAGE OF MACEDON, NEW YORK
81 Main Street
Macedon, New York 14502,

Defendant

DECISION
Index No. 75192 and 76106
2012 / 2013

Since the commencement of this action in December, 2012, multiple applications have been made by the parties. In that time frame, the Court has refrained from issuing a Decision on these applications but, instead, encouraged the parties to meet in an effort to resolve the pending issues regarding the ownership and operation of the sewage treatment plant (STP). Regardless of the Decision rendered in these pending applications, the parties will still have to address issues with respect to sewage treatment for the residents of the Town and Village since the original operation Agreement expired December 31, 2012. Presently, a preliminary injunction granted January 24, 2013, by this Court is providing the framework by which the parties are operating the sewage treatment plant.

The parties have met a number of times during the course of the litigation. The Court has been encouraged that a resolution could be reached. When meeting with counsel, regarding the status of each of these meetings, the Court has been advised that the parties were close to a resolution. Since the most recent meeting of the parties was met with multiple new conditions, the Court's strategy to save the taxpayers of both municipalities substantial costs and legal fees was not successful. Therefore, the Court scheduled arguments for the outstanding applications. This constitutes the Decision with respect to the outstanding applications.

These are the outstanding applications:

1. The Village's motion to re-argue (Index No. 75192) dated May 16, 2013;

2. The Village's motion to dismiss (Index No. 76106) and for consolidation (Index Nos. 75192 and 76106) dated August 30, 2013;

3. The Town's motion for summary judgment dated January 6, 2014 (Index Nos. 75192 and 76106);

4. The Village's motion to dismiss (Index No. 76638, 76106 and 75192) dated February 4, 2014;

5. The Town's motion for judicial review of Village sewer rents, enjoining the Village from using sewer rents to finance legal fees, $5,000.00 pilot project, CFA Grant and EFC loan applications, filed February 3, 2014 and supplemented October 2, 2014.

The Village made the first application which was to re-argue a portion of the Court's Decision dated February 14, 2013, which denied the

Defendant's motion to dismiss Plaintiff's Complaint and Amended Complaint (Index No. 75192). Subsequently, the Village moved to dismiss the action commenced by the Town dated August 9, 2013, (Index No. 76106) as well as all other actions commenced by the Town. In the second application the Village moved to consolidate the actions commenced by the Town.

The position of the Village in each of these applications is very direct and succinct. The Town has no legal right to pursue any action regarding ownership of the sewage treatment plant (STP) because the statute of limitations expired after the Agreement between the Town and Village regarding the STP was signed in January, 1989. (This agreement has been referred to as the January 16, 1989 Agreement and January 17, 1989. There is only one Agreement in January of 1989 which pertains to this action and will be referred to as the January, 1989 agreement, except when quoting the Agreement.) Consequently, the Village contends that the Town is not entitled to the preliminary injunction which was granted in January, 2013. The Town opposes this application and requests additional relief. Both parties agree that the actions should be consolidated provided the Town's actions survive these motions to dismiss.

BACKGROUND INFORMATION

Prior to 1973, the Village constructed and was operating a STP located at 135 Main Street, Village of Macedon, which accepted limited sewage from the Town. In March of 1973 the STP had a flow rate of 250,000 gallons per minute. In March 1973 the STP had an actual flow of between 30,000 gallons and 50,000 per day. The Village could not operate the STP in an efficient and economical manner so it looked to the Town to jointly construct and upgrade expansion to bring it in compliance with DEC

regulations. The Village was not in compliance with DEC regulations at the time and was subject to prospective fines from that agency.

The Village looked to expand it user base and it was anticipated that the future development was in the Town outside the Village and the Village did not want Town to look to other providers for sewer service.

In furtherance of the plan for the Town to participate in the upgrade of the STP, its attorney requested and received an opinion from the Town's bond counsel which indicated that for the Town legally borrow and expend money on the Village STP, the Village must agree to convey an undivided real property interest in the STP to the Town in consideration of which the Town would agree to finance the expansion of the facilities. This letter from bond counsel was dated September 14, 1972, and was shared with the Village.

The Village directed its attorney to obtain a legal opinion from the Comptroller of the State of New York regarding the STP expansion. The Comptroller opined, in a letter dated January 26, 1973, that such expenditure of the Town's funds could be accomplished pursuant to Article 5-G of the New York General Municipal Law (§ 119-0) "Whereby the Town would expand the Village sewage treatment plant and the Village would grant to the Town an interest in the sewer treatment facilities."

On March 14, 1973, in furtherance of this plan, the Town and Village signed a letter of intent which stated that the intent of the parties that an invested property interest would be conveyed to the Town as a legal requisite of its expenditure of Town funds. The letter intended and indicates that the expansion was in the best interest of the Village.

An additional letter of intent was signed by the Town and Village in March, 1985.

The parties executed an Agreement dated January 16, 1989 which provided in part:

> "Section A(2): that recognizing the anticipated investment by the Town in the STP and to legally enable a Town to finance said expansion the Village agrees to execute to the Town documentation so as to recognize a vested interest in the plant.
>
> Section A(3): that said vested interest to the Town shall be proportional to the number of chargeable sewer units in each municipality which as of 1988 is 80% Village and 20% Town. Except as the Town may contribute more chargeable units to the Village, its vested interest will increase until such time as it reaches the 50% level at which time it will be capped so that the Village and Town each have a 50% interest in the transmission of treatment facilities.
>
> Section B(1): Village and Town jointly own [present tense] treatment facility as co-owners of the STP
>
> Section B(2): provides the Village would operate the plant during the term of the 1989 agreement.

In these pending applications the Village argues that the statute of limitation expires eighteen months after this agreement was signed. That expiration date would be July 16, 1990.

In furtherance of the 1989 agreement, by resolution dated February 14, 1991, the Town authorized the issuance of $1,666,000.00 in bond anticipation notes to finance the project. Later plans and specifications were drafted and bids let for the upgrade expansion of the existing treatment plan by the Town to increase the capacity from 250,000 gallons per day to 750,000 gallons per day and upgrade the sewer treatment plant.

On September 26, 1991, the Town awarded contracts to C.O. Falter Construction in the amount of $1,548,111.00 and Mayer Electric in the amount of $21,000.00.

The parties entered an Agreement on December 11, 1991, labeled Supplemental Sewer Treatment Project Agreement between the Town of Macedon and the Village of Macedon, which provided in part: "Whereas the respective governing Boards of the Town and Village, after due consideration, are desirous of memorializing their understandings, expectations, and representations as to the implementation of the inter municipal agreement executed January 16, 1989 by the respective chief executive officers."

At paragraph 3 of the 1991 Agreement it provides, "nothing in this supplemental agreement shall be deemed to change any of the rights and obligations set out in the January, 1991 intermunicipal agreement". [This date of 1991 appears to be incorrect as first whereas clause provides that the Town and Village did on January 16, 1989 enter into a contract styled "intermunicipal agreement for sewage treatment and transmissions lines"].

In the opposing papers to this application the Village argues that whatever interest the Town was entitled to in 1989 has been eliminated effective July, 1990 by the operation of the statute of limitations. This supplemental agreement was an affirmative act by the Village to reinstate its obligations under the 1989 Agreement.

The December 1991 Agreement provides that the project would be financed in the following manner:

$1,666,000.00 from serial bonds issued by the Town;
$ 81,000.00 from an existing Town sewer capital fund;
$ 50,000.00 from a State grant awarded to the Town;
$ 33,000.00 contributed from Village funds.

This agreement provided $356,000.00 of the principal on the bond issue would be paid based on sewer rents paid by both the Town and Village residents.

Construction on the upgrade and expansion of the STP began in December, 1991. On January 2, 1992, the Town filed an application with the New York State Department of Audit and Control seeking authorization to exclude the $1,666,000.00 sewage indebtedness from the Town's debt limit, pursuant to Section 124.10 of the Local Finance Law. By certificate dated March 16, 1992 the State Comptroller granted the Town's application for exclusion, by including in its findings and determinations, that the sewage treatment plant "will be jointly owned by the Town and Village of Macedon pursuant to the Municipal Operation Agreement as authorized by Article 5G of the General Municipal Law."

On June 21, 1993, after the upgrade and expansion had been completed, the Town issued long term general obligation bonds in the amount of $1,605,000.00.

In order to be in compliance with the law as specifically stated in the 1989 Agreement at Section A(2)- recognizing the anticipated investment by the Town and the STP and to legally enable the Town to finance said expansion, the Village agrees to execute to the Town documentation as to recognize a vested interest in the Town.

In a letter dated July 15, 1993 the Mayor of the Village referred to the STP as "Village/Town Sewer Plant" and the "Joint Sewer Treatment Plant".

From the date of the bond issue until December 15, 2012 the principal sum of $1,605,000.00 was repaid in yearly installments on December 15th.

Over the life of the bonds, the Village contributed to the Town the sum of $342,000.00 and interest of $190,000.00 for a total of $532,476.00, in 40 semi-annual payments.

Over the life of the bonds, the Town expended the sum of $830,000.00 plus interest of $236,626.00 for a total of $1,285,728.00. The Town expended an additional sum of $433,000.00 with interest of $236,626.00 for a total of $669,626.00.

The Town taxpayers paid a total of $2,036,354.00 ($669,626.00 and $1,285,728.00 in bond principal and interest, and $81,000.00 capital reserve) for the expansion of the sewer treatment plant in addition to the Town's proportional share of $532,476.00 (bond, principal and interest) for the plant upgrade.

The Village paid a total of $333,000.00 plus its proportional share of the $532,476.00.

In a letter dated August 10, 2012, the Town, through its attorney, sent a letter to the Village to produce any further documentation to complete the vested ownership interest to the Town and to negotiate a new operation agreement. The Village did not identify any further documents needed to complete or effectuate the vested interest in the Town.

In a letter dated December 4, 2012, the Village, through its counsel, to the Town indicated the Village would only negotiate a contract to continue sewer service if the Town would withdraw its claim of a vested ownership interest and give to the Village a general release for such claims.

In e-mails dated December 18, 2012 and December 19, 2012, the Village, through its counsel, stated that the absence of a post 1989 agreement for payment by the Town to the Village, the Village would discontinue providing waste treatment to Town users after January 1, 2013.

STATUTE OF LIMITATIONS

A cause of action for breach of contract accrues on a statute of limitations begins to run when the breach occurs or when the party to the agreement fails to perform an obligation. Ely Cruikshank Co., Inc., v Bank of Montreal, 81 N.Y. 2d 399, 599 N.Y.S. 2d 501.

CPLR Section 9802 provides that a breach of contract action shall be commenced within eighteen months after the cause of action accrued and provided further that the written verified claim shall be filed with the Village Clerk within one year after the cause of action accrued. The limitation begins to run when one party omits the performance of a contractual obligation.

Case law holds that at a motion to dismiss the Court is to accept the allegations of the complaint as true and all inferences which flow reasonably therefrom are resolved in favor of the pleader (see EBC I, Inc. v Goldman, Sachs and Co., 5 N.Y. 3d 11, 799 N.Y.S. 2d 170). The complaint alleges that legally the Town had to be vested with an interest in the STP before the bonds were issued. The Village reaped the benefits of the 1989 Agreement. The Village benefitted by the large expenditure of Town funds and the Village operated the STP from the formation of the 1989 Agreement until the present time. At no time did the Village object to the expenditures by the Town. The Village did not object to the issuance of the bonds knowing full well that the Town had to be vested with an interest in the STP at the time of issuance.

The Village argues that the statute of limitations expired on or about July, 1990. However, per the Agreement dated December 11, 1991, the Village, after due consideration, ratified the January, 1989 Agreement. It is noted that the actions of the Village on December 11, 1991, took place after the Town authorized the issuance of $1, 666,000.00 in bond anticipation notes on February 14, 1991.

"Our courts have long had the power, both at law and equity, to bar the assertion of the affirmative defense of the statute of limitations where it is the defendant's affirmative wrong doing... which produced a long delay" in bringing the suit. General Stencils, Inc., v Chiappa, 18 N.Y. 2d 125, 128, 272 N.Y.S. 2d 337, 334. A plaintiff seeking to apply the doctrine of equitable estoppel to preclude the defendant from using the statute of limitations as a defense must establish that subsequent and specific actions by the defendant somehow kept the plaintiff from bringing timely suit. Putter v North Shore University Hosp., 7 N.Y. 3d 548, 825 N.Y.S. 2d 435. The stimulus of use of this doctrine is conduct by one party inconsistent with a position later adopted by that party, which is prejudicial to the rights of another who relied on the prior conduct to their detriment. Vignari v Continental Tennessee Lines, Inc., 70 Misc. 2d 362, 333 N.Y.S. 2d 283. It is a situation where a defendant has deceived the plaintiff or lulled Dailey v. Mazel Stores, Inc., 309 A.D. 2d 661, 766 N.Y.S. 2d 178 the plaintiff into a false sense of security. In such cases, the doctrine of equitable estoppel may be invoked to prevent the defendant from reaping the benefits of their wrong doing. General Stencils, Inc., supra. In the case at bar the January 1989 Agreement at Section A(2) provided that the Village would execute to the Town a vested interest in the STP. At Section B:1 is an indication that both municipalities jointly owned the STP at the time of the Agreement in January, 1989. On December 11, 1991, the Village takes the affirmative step ratifying the 1989 Agreement.

The actions taken by the Village in 2012 - denying an interest in the sewer treatment plant to the Town is inconsistent with the actions the Village took in January, 1989 and December of 1991. Clearly, the Town relied on the prior conduct of the Village to their detriment in light of the fact the Town spent a significant amount of money to improve the STP. The actions of the Village present a question of fact as to whether or not equitable estoppel applies.

CONTINUING WRONG

Another theory which may have application to the case at bar is a theory of "continuing wrong".

> "However, where a contract provides where continuing performance over a period of time, each breach may begin the running of the statute anew such that accrual occurs continuously." Airco Alloys Div. v Niagara Mohawk Power Corp., 76 A.D. 2d 68, 430 N.Y.S. 2d 179. Because Defendant's obligation to assure "code compliance" with respect to the septic system was a continuing one (see Orville v Newski, Inc., 155 A.D. 2d 799, 801, 547 N.Y.S. 2d 913, lv. Dismissed 75 N.Y. 2d 946, 555 N.Y.S. 2d 693, 554 N.E. 2d 1281), the claims for breach of that obligation are "not referable exclusively to the day the original wrong was committed" (1050 Tenants Corp. v Lapidus, 289 A.D. 2d 145, 146, 735 N.Y.S. 2d 47; cf. State of New York v CSRI Ltd. Partnership, 289 A.D. 2d 394, 395, 734 N.Y.S. 2d 626; Kearney v Atlantic Cement Co., 33 A.D. 2d 848, 849, 306

N.Y.S. 2d 45). Instead, "a cause of action accrue[d] anew every day" for each continuation of the wrong (1050 Tenants Corp., 289 A.D. 2d at 146-147, 735 N.Y.S. 2d 47),and thus the statute of limitations Has not run on attempts to enforce defendant's obligation prospectively (see Orville, 155 A.D. 2d at 801, 547 N.Y.S. 2d 913; cf. 509 Sixth Ave. Corp. v New York City Tr. Auth., 15 N.Y. 2d 48, 52, 255 N.Y.S. 2d 89, 203 N.E. 2d 486; Meruk v City of New York, 223 N.Y. 271, 275-276, 119 N.E. 571; Galway v Metropolitan El. Ry. Co., 128 N.Y. 132, 143, 28 N.E. 479). To the extent that the amended complaint seeks injunctive or other prospective relief, such claims therefore are not time-barred (see generally Sova v Glasier, 192 A.D. 2d 1069, 1070, 596 N.Y.S. 2d 228; Kearney, 33 A.D. 2d at 849, 306 N.Y.S. 2d 45). Stalis v Sugar Creek Stores, Inc., 259 A.D. 2d 439, 940-941, 744 N.Y.S. 2d 586, 587- 588.

The Village had an agreement with the Town to convey an undivided interest in the STP but it also had an obligation to comply with the General Municipal Law. Bond counsel and the Comptroller opined and the Complaint alleges that in order to be a legal transaction the Village must transfer an undivided interest in the STP before the bonds are issued. The language of Section A(2) of the 1989 Agreement appears to undertake this duty by utilizing the language "to legally enable the Town to finance said expansion." The Village appears to have violated its duty in January 1989 and December 1991 and continually through the present. There is a question of fact whether the continuing wrong theory applies.

VILLAGE'S MOTIONS TO DISMISS

In the Town's action dated December 26, 2012, and modified by an Amended Complaint dated January 15, 2013, there is only one cause of action pleaded which seeks an injunction preventing the Village from terminating sewer service to residents of the Town until such time as the parties can agree on an interim or long term contract. The Motion to Dismiss this cause of action is denied.

In the Town's action dated August 9, 2013, eight causes of action are pleaded.

The first cause of action seeks a declaratory judgment holding that the Town has a present and continuing vested interest in the sewer treatment plant and transmission lines, compelling the Village to execute and deliver additional documentation as deemed required to effectuate the intent of the parties, and imposing such conditions and supervision as is necessary and proper to ensure the continued sewer treatment to all current and future users of the system. The Motion as to this cause of action is denied.

The second cause of action seeks relief under Article 15 of the RPAPL. The Motion is denied as to this cause of action.

The third cause of action seeks contract reaffirmation. The Motion to Dismiss this cause of action is denied.

The fourth cause of action is seeking unjust enrichment. The Motion to Dismiss this cause of action is denied.

The fifth cause of action is seeking a constructive trust impressed on the STP. The Motion is denied as to this cause of action.

The sixth cause of action seeks a mandatory accounting from the Village from 1991 to 2012. The Motion is denied as to this cause of action.

The seventh cause of action seeks a declaratory judgment addressing the use of sewer rents by the Village. Motion to Dismiss is denied as to this cause of action.

The eighth cause of action seeks the Village be compelled to participate in alternate dispute resolution should the Court find the matter herein subject to alternate dispute resolution under the Agreement. The issue of the statute of limitations has to be resolved prior to determining whether this matter would be referred to dispute resolution. Therefore, the Motion to Dismiss this cause of action is denied at this time.

PLAINTIFF'S APPLICATION

The Town's application dated January 6, 2014, requested that the Village's motion to be dismissed be treated as a motion for partial summary judgment and the Court grant the Town partial summary judgment on the issue of ownership of the STP. The Court denies this application. This application was expanded to include a further request for an Order determining whether the Village had used and/or is using the sewer rents to finance the Village pilot project, CFA Grant Application, and directing the Village to transfer from the Village's general fund to the sewer rent fund $5,000.00 plus the costs incurred as a result of the CFA Grant Application and EFC Loan Application. At this time the Court is denying the application.

The preliminary injunction granted by this Court on January 24, 2013 continues herein.

This constitutes the Decision of the Court.

Counsel for Town to prepare an Order based on this Decision.

Dated: December 10, 2014
Lyons, New York

Daniel G. Barrett
Acting Supreme Court Justice