

**Matter of Long Is. Power Auth. Hurricane Sandy Litig.**

2016 NY Slip Op 32695(U)

June 8, 2016

Supreme Court, Nassau County

Docket Number: 601434/13

Judge: Antonio I. Brandveen

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This opinion is uncorrected and not selected for official publication.

**ORIGINAL**

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

Present: **ANTONIO I. BRANDVEEN**  
J. S. C.

IN RE LONG ISLAND POWER AUTHORITY  
HURRICANE SANDY LITIGATION

TRIAL / IAS PART 35  
NASSAU COUNTY

Index No. 601434/13

Motion Sequence No. 006, 007

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits .....	<u>1, 2</u>
Answering Affidavits .....	<u>          </u>
Replying Affidavits .....	<u>3</u>
Briefs: Plaintiff's / Petitioner's .....	<u>4</u>
Defendant's / Respondent's .....	<u>5, 6, 7</u>

National Grid Electric Services, LLC, the defendant moves (Sequence 006) pursuant to CPLR 3212 for an order awarding National Grid Electric Services, LLC summary judgment dismissing the verified complaint against it or, alternatively pursuant to CPLR 7503 compelling arbitration and staying the litigation. National Grid Electric Services, LLC asserts John Coyle, Evangelos Bardis, Gayle Hoeffner, Daniel Weber, Sandra Weiss, Kimberly Levy and Justin Oland, the plaintiffs are not third party beneficiaries of the management services agreement between National Grid Electric Services, LLC and Long Island Power Authority or the plaintiffs are third-party beneficiaries who therefore are required to arbitrate their claims.

National Grid Electric Services, LLC avers there is no genuine issue of material

fact as to whether the management services agreement governs the plaintiff's breach of contract claim against the defendant. National Grid Electric Services, LLC contends the plaintiffs' cause of action against it for breach of contract within the scope of the arbitration agreement set forth in the management services agreement. National Grid Electric Services, LLC maintains, if the plaintiffs are third party beneficiaries are beneficiaries of the management services agreement between National Grid Electric Services, LLC and Long Island Power Authority, then the plaintiffs are bound by the arbitration clause in the management services agreement.

The plaintiffs oppose this motion (Sequence 006) by National Grid Electric Services, LLC. The plaintiffs claim summary judgment is premature. The plaintiffs assert National Grid Electric Services, LLC waived its right to compel arbitration. The plaintiffs aver National Grid Electric Services, LLC cannot compel the plaintiffs to arbitrate their breach of contract claim. The plaintiffs maintain National Grid Electric Services, LLC has not affirmatively established a valid agreement to arbitrate. The plaintiffs contend their breach of contract claim does not fall within the scope of the narrow arbitration exception in the management services agreement. The plaintiffs point out National Grid Electric Services, LLC failed to follow the prerequisites of the management services agreement. The plaintiffs assert arbitration pursuant to management services agreement would be inequitable and unconscionable.

National Grid Electric Services, LLC replies the CPLR and the Federal Arbitration Act govern the management services agreement providing for the judicial appointment of

an arbitrator for the third party beneficiaries. The attorney for National Grid Electric Services, LLC states, in an affirmation dated March 31, 2016, that National Grid Electric Services, LLC consents to the plaintiffs' selection of an arbitrator to the panel of arbitrators for any arbitration of the plaintiffs' claim against National Grid Electric Services, LLC under the management services agreement, the plaintiffs will not need to apply to the Court for the appointment of an arbitrator.

Long Island Power Authority, the defendant moves (Sequence 007) pursuant to CPLR 7503 for an order compelling the plaintiffs to arbitrate, or alternatively staying the action as asserted against Long Island Power Authority pending the outcome of arbitration of the plaintiffs' claims against National Grid Electric Services, LLC. Long Island Power Authority asserts the plaintiffs' claims against National Grid Electric Services, LLC for breach of the management services agreement are subject to arbitration. Long Island Power Authority avers the plaintiffs' tariff claim against Long Island Power Authority implicates the performance of National Grid Electric Services, LLC under the management services agreement. Long Island Power Authority contends its liability under the tariff may depend in part on the performance of National Grid Electric Services, LLC under the management services agreement. Long Island Power Authority maintains it and/or National Grid Electric Services, LLC may be responsible for indemnifying the other entity's conduct under the management services agreement.

The plaintiffs oppose the motion (Sequence 007) by Long Island Power Authority. The plaintiffs assert Long Island Power Authority waived any possible right to compel

arbitration. The plaintiffs aver neither they nor Long Island Power Authority agreed to arbitrate any disputes between them. The plaintiffs maintain Long Island Power Authority lacks any other basis to force the plaintiffs to arbitrate their claims against Long Island Power Authority. The plaintiffs argue their claims against Long Island Power Authority should not be stayed.

Long Island Power Authority replies it has not waived its right to compel arbitration. Long Island Power Authority asserts the plaintiffs should be compelled to arbitrate their claims against it. Long Island Power Authority avers, in the alternative, it is entitled to a stay of this action pending the arbitration of the plaintiffs' claims against National Grid Electric Services, LLC.

The plaintiffs sur-reply (Sequences 006 and 007) to the National Grid Electric Services, LLC and Long Island Power Authority. The plaintiffs assert National Grid Electric Services, LLC does not address governing law, cited irrelevant cases, largely stock and investment matters governed by regulatory arbitration and misconstrued the construction of the management services agreement to try to create an arbitrator agreement to cover this dispute. The plaintiffs point out the defense motions have been filed to avoid class certification by seeking arbitration to readdress the class certification issues. The plaintiffs argue participation in litigation by National Grid Electric Services, LLC and Long Island Power Authority, the defendants' inconsistency with the assertions of rights to arbitrate, the defendants' delays in seeking arbitration and prejudice to the plaintiffs are facts which weigh heavily against the defendants. The plaintiffs maintain National Grid

Electric Services, LLC and Long Island Power Authority produced more than 80,000 pages of documents, waited some three and a half years to pursue arbitration, offer no explanation for the manifest delay by National Grid Electric Services, LLC and Long Island Power Authority and the defendants vigorously opposed the plaintiffs' class action allegations.

The plaintiffs note National Grid Electric Services, LLC and Long Island Power Authority only pursued arbitration after the prospect of avoiding the class allegations in court had been foreclosed. The plaintiffs contend National Grid Electric Services, LLC fails to meet its heavy burden of affirmatively establishing that the parties agreed to arbitrate their disputes, and point out the plaintiffs are not signatories to the management services agreement. The plaintiffs argue National Grid Electric Services, LLC can only justify arbitration by waiving its challenge to the plaintiffs' third party beneficiary status, but National Grid Electric Services, LLC refused to do it. The plaintiffs maintain neither CPLR 7503(c) nor the management services agreement section 7.8(E) provide a notice of intention to arbitrate, and the defendants failed to comply with any of the specific prerequisites, including a prior written notice to the plaintiffs as required by management services agreement section 7.8(E) for this dispute to be resolved by negotiation or by mediation.

The plaintiffs indicate they do not concede the management services agreement is governed by the Federal Arbitration Act rather the management services agreement is governed and construed under New York law, and state National Grid Electric Services,

LLC observes that, too. The plaintiffs maintain the management services agreement only apply to disputes between National Grid Electric Services, LLC and Long Island Power Authority.

The Second Department held: “the service agreement contains a boilerplate provision generally denying the parties’ intent to benefit any third parties “[u]nless specifically set forth herein.” However, other sections of the service agreement raise issues of fact as to whether the public was an intended third-party beneficiary of Grid’s contract with LIPA” [citations omitted] (*In re Long Is. Power Auth. Hurricane Sandy Litig.*, 134 AD3d 1119, 1121-22 [2d Dept 2015], *lv to appeal denied* 2016 WL 1291308, 2016 N.Y. Slip Op. 69066[U] [2d Dept 2016]). Here, discovery is incomplete, and it is possible discovery may lead to evidence of whether the public was an intended third-party beneficiary of the contract between National Grid Electric Services, LLC and Long Island Power Authority. This Court determines, under the circumstances, the branch of the motion by National Grid Electric Services, LLC seeking summary judgment dismissing the verified complaint against it is premature. Contrary to the assertions by National Grid Electric Services, LLC regarding the branch of its motion seeking summary judgment, the Second Department observed the management services agreement raises issues of fact as to whether the public was an intended third-party beneficiary of Grid’s contract with LIPA.

“[L]ike contract rights generally, a right to arbitration may be modified, waived or abandoned.” . . . a litigant may not compel arbitration when its use of the courts is “clearly

inconsistent with [its] later claim that the parties were obligated to settle their differences by arbitration.” [citations omitted]” (*Cusimano v Schnurr*, 26 NY3d 391, 400 [2015]). Contrary to the assertions by National Grid Electric Services, LLC and Long Island Power Authority, the issue of whether the companies waived their right to arbitrate by their litigation-related conduct is for the Court to resolve (*Skyline Steel, LLC v PilePro LLC*, --- N.Y.S.3d ----, 2016 NY Slip Op 04158 [1st Dept May 31, 2016]). Neither National Grid Electric Services, LLC nor Long Island Power Authority proves that the parties expressly agreed to arbitrate this dispute, and the defendants just now made moved to assert their perspective that this difference should go to arbitration. This Court considered the amount of litigation that has occurred in this litigation, including but not limited to several pretrial motions and an appeal, the more than three years between the commencement of the lawsuit and the arbitration requests by National Grid Electric Services, LLC and Long Island Power Authority, and the showing of substantial prejudice by the plaintiffs. The Court determines, after consideration of the totality of the conduct by National Grid Electric Services, LLC and Long Island Power Authority, that they waived their rights to arbitrate this dispute. The alternative branch of the motion by National Grid Electric Services, LLC seeking to compel arbitration and staying the litigation, and the motion by Long Island Power Authority seeking to compel arbitration or alternatively staying the action pending the outcome of arbitration is denied.

ORDERED that the motion by National Grid Electric Services, LLC (Sequence 006) is DENIED seeking summary judgment dismissing the verified complaint against it

or, alternatively compelling arbitration and staying the litigation, and it is also,

ORDERED that the motion by Long Island Power Authority, the defendant (Sequence 007) is DENIED seeking to compel the plaintiffs to arbitrate, or alternatively staying the action as asserted against Long Island Power Authority pending the outcome of arbitration of the plaintiffs' claims against National Grid Electric Services, LLC.

This will constitute the decision and order of the Court.

So ordered.

Dated: **June 8, 2016**

ENTER:



J. S. C.

NON FINAL DISPOSITION

**ENTERED**

JUN 16 2016

NASSAU COUNTY  
COUNTY CLERK'S OFFICE