

Forst v Long Is. Power Auth. (LIPA)

2017 NY Slip Op 32471(U)

October 5, 2017

Supreme Court, Suffolk County

Docket Number: 10675/2014

Judge: Martha L. Luft

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - COUNTY OF SUFFOLK

P R E S E N T:

Hon. Martha L. Luft
Acting Justice Supreme Court

_____ x
HELEN FORST, JACK FORST, FRED
BUTTI, MICHAEL FORST, AMY FORST,
BARRY WAYNE, LARRY PENNY,
BEITH MORAN, DAVID GRESHAM,
SABRINA PAGANI, THOMAS A.
PIACENTINE, FOUAD CHARTOUNI,
RICHARD DOTY, JOHN MCGUIRK,
NANCY MCGUIRK, REBECCA SINGER,
STEPHEN BRADBURY, ROBERT
BARRON, EDUARD DEJOUX, ANDREA
MAMMANO and other members of the
class similarly situated with the named
Plaintiffs,

Plaintiffs,

-against-

LONG ISLAND POWER AUTHORITY
(LIPA) and PUBLIC SERVICE ELECTRIC
AND GAS COMPANY LONG ISLAND
(PSEGLI),

Defendants.

_____ x

DECISION AND ORDER

Mot. Seq. No.: 003 - **MG**
Orig. Return Date: 06/09/2017
Mot. Submit Date: 07/11/2017

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Upon the following papers read on this Motion to Reargue; Affirmation of William A. Hurst, Esq. and the exhibits thereto; Answering Affirmation and exhibits thereto; Reply brief and supporting papers, it is

ORDERED, that defendant Long Island Power Authority's ("LIPA") motion to reargue is granted insofar as it asserts that the Court's Order of April 5, 2017 overlooked or misapprehended LIPA's re-notice of the Article 78 petition when it ruled that no party had properly re-noticed the Article 78 portion of this hybrid action and proceeding (9th cause of action); and it is further

ORDERED, that upon reargument, the Article 78 portion of this hybrid action and proceeding (9th cause of action) is dismissed and the remainder of the complaint is severed therefrom; and it is further

ORDERED, that in all other respects the Court's April 5, 2017 Order remains in full force and effect.

This is a hybrid action/proceeding by the plaintiffs, residents of East Hampton and Amagansett, seeking damages and a permanent injunction to remove utility poles in the vicinity of their homes ("Project"). Three causes of action remain on the complaint: private nuisance, negligence and trespass. The Article 78 claim for relief seeks to challenge LIPA's compliance with the State Environmental Quality Review Act ("SEQRA") underlying its determination to build the Project. The facts of this matter will not be repeated here, since they have been the subject of two prior orders (July 23, 2015¹ and April 5, 2017) and are familiar to the parties.

The April 5, 2017 Order considered the Article 78 portion of LIPA's motion to be LIPA's second and prohibited "pre-answer motion to dismiss" because the Article 78 had not been re-noticed and answered in accordance with CPLR 7804(f). A re-notice was required after the denial of LIPA's earlier motion to dismiss which had been decided on July 23, 2016. Without such re-notice the motion would be pre-answer. Although not the model of clarity and somewhat procedurally unorthodox, the "combined notice of verified petition/notice of motion for summary judgment" could be construed as re-noticing the matter pursuant to CPLR 7804(f). LIPA submitted an answer containing objections in point of law on the Article 78 claims with the "re-notice." Thus, LIPA had not renewed a pre-answer motion to dismiss or made such a pre-answer motion, as the Court had ruled in the April 5, 2017 Order. Rather LIPA answered the Article 78 proceeding on the merits.

The Answer asserted that the SEQRA negative declaration had been prepared on

¹There was a subsequent Order issued on January 22, 2016 which corrected the July 23, 2015 Order by adding in two lines of text that had been inadvertently omitted.

September 25, 2013 and filed in LIPA's internal files on October 2, 2013. The affidavit of Nicholas Lizanich ("Lizanich Affidavit") and the exhibits containing these documents established these dates, among other facts. LIPA's answering papers also established that the public was not informed in any manner whatsoever that a negative declaration had been issued. Moreover, the public was not notified of the extensive Environmental Assessment Form ("EAF") nor of where it was available for viewing. LIPA argues that this process complied with the provisions of 6 NYCRR 617.12 (c)(1) which state that a negative declaration of an unlisted action, such as was the case here, is not required to be published in the Environmental Notice Bulletin and the portions of the SEQRA Handbook which provide that a negative declaration of an unlisted action need only be maintained in the lead agency's files. LIPA asserts that the four-month statute of limitations for purposes of Article 78 and CPLR 217(1) ran from the date that the negative declaration was brought to the LIPA in-house file room.

LIPA's argument does not withstand scrutiny. As noted in the July 23, 2015 Order, an administrative determination becomes "final and binding" for Article 78 purposes when the aggrieved party is "notified" thereof. *Matter of Vil. of Westbury v Dep't of Transp. of State of NY*, 75 NY2d 62, 72, 550 NYS2d 604 [1989].

LIPA cites no case where the placing of a negative declaration in a file was sufficient notification for purposes of commencing the 4-month Article 78 statute of limitations time period. In fact, in cases which involved negative declarations for unlisted actions, there was some kind of public disclosure. *See, e.g., Dreves v NY Power Authority*, 131 AD2d 182, 520 NYS2d 956 [3d Dep't 1987] (petitioner aggrieved when agency, which had issued a negative declaration, took action on project); *Barrett v Dutchess County Legislature*, 38 AD3d 651, 831 NYS2d 540 [2d Dep't 2007] (negative declaration on an unlisted action issued in resolution approving project adopted at a public meeting).

Although the July 2015 Order indicated that the statute of limitations would run from the issuing and filing of the negative declaration, the Court made clear that it did not have sufficient facts before it to determine the issue of timeliness or the circumstances surrounding the filing of the negative declaration. Moreover, the July 2015 Order cited and relied upon the well-established principle that the four-month statute of limitations runs from when the aggrieved party is "notified" of the determination, citing *Matter of Westbury*. Additional information was provided in the answer, such that the Court now

has a full recitation of the facts.²

However, LIPA's answering papers do establish, as conceded by the petitioners, that the work on the Project commenced on or about January 1, 2014. The plaintiffs were notified of LIPA's final and binding determination to place poles in the area of their homes during the first week of January 2014. In fact, the affidavits of several of the plaintiffs acknowledge that they became aware of LIPA's determination at that time.

The time period for commencing an Article 78 claim begins to run when the petitioner has "suffered a concrete injury not amenable to further administrative review and corrective action" *Eadie v. Town Bd. of Town of N. Greenbush*, 7 N.Y.3d 306, 316, 854 N.E.2d 464, 468-69 (2006), quoting, *Matter of City of New York [Grand Lafayette Props. LLC]*, 6 NY3d 540, 548, 814 NYS2d 592, 847 NE2d 1166 [2006]. It is evident that the alleged concrete injury was inflicted when LIPA began erecting the poles. Thus, the plaintiffs had until May 1, 2014 to challenge the negative declaration underlying the determination to undertake the Project. The complaint (now deemed to be a hybrid complaint/petition) was filed on or about May 27, 2014, more than four months later, rendering it untimely.

Submit judgment on notice on the Article 78 proceeding (9th cause of action).

E N T E R

Date: October 5, 2017
Riverhead, New York


MARTHA L. LUFT, A.J.S.C.

²In any event, the ruling on this issue is not controlling since a fully submitted Article 78 proceeding is the equivalent of a summary judgment motion. *Battaglia v. Schuler Eyeglasses*, 60 AD2d 759, 400 NYS2d 951 [4th Dept 1977], and the denial of a motion to dismiss is not the law of the case on a subsequent summary judgment motion. *Del Castillo v. Bayley Seton Hosp.* 232 AD2d 602, 649 NYS2d 41 [2d Dept 1996].

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FINAL DISPOSITION

NON-FINAL DISPOSITION