

Frasier v Niagara Mohawk Power Corp.
2023 NY Slip Op 35036(U)
October 30, 2023
Supreme Court, Fulton County
Docket Number: Index No. EF2019-07711
Judge: Martin D. Auffredou
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STATE OF NEW YORK SUPREME COURT
COUNTY OF FULTON

RICK FRASIER and ELMVUE FARMS,
LLC,

Plaintiffs,

-against-

NIAGARA MOHAWK POWER CORP., Doing
Business as NATIONAL GRID,

Defendant.

DECISION AND ORDER

Index No.: EF2019-07711

RJI No.: 17-1-2020-0066

Appearances:

Harris Beach PLLC, Pittsford (*Kyle D. Gooch* and *Dale A. Worrall* of counsel), and *Bird, Stevens & Borgen, P.C.*, Rochester, Minnesota (*Jeremy R. Stevens*, admitted pro hac vice, of counsel), for plaintiffs.

Barclay Damon LLP, Syracuse (*Alan R. Peterman* of counsel), and *Wheeler Trigg O'Donnell LLP*, Denver, Colorado (*James E. Hooper* and *Kate Mercer-Lawson*, admitted pro hac vice, of counsel), for defendant.

AUFFREDOU, J.

Motion by plaintiffs, brought by order to show cause, for a preliminary injunction.

Plaintiff Elmvue Farms, LLC is a dairy and cattle farm in Johnstown, New York that specializes in raising high-quality show cattle. It breeds such cattle and sells their offspring and embryos, and has made a name for itself in state, national and international expositions. It also maintains a herd of cattle that are milked as dairy cows. Plaintiff Rick Frasier is an owner of Elmvue Farms, LLC and owns the real property on which the farm is located. Defendant Niagara Mohawk Power Corporation, doing business as National Grid, is a utility that provides electrical service in the Capitol District area of New York State and, in particular, to plaintiffs' farm. It owns, operates and maintains the power lines and related equipment that supply electricity to the farm.

Frasier's family have operated the farm for generations. In 2005, plaintiffs, with defendant's assistance, updated their facility to accommodate electrical milking equipment. In

2012, plaintiffs claimed to defendant that they were experiencing stray voltage on the farm, prompting defendant to send a representative to the farm to investigate.¹ Some of the representative's measurements of neutral-to-earth voltage (NEV) exceeded defendant's ½-volt threshold for remediation, which the representative therefore undertook in accord with defendant's policy, by isolating the primary and secondary neutral conductors.^{2,3,4} However, defendant's representative found no stray voltages in locations that cows might contact (hereinafter "cow contact voltages") that were problematic or hazardous either before or after the isolation.

The farm operated on the isolated system until 2019, when plaintiffs' stray voltage concerns resurfaced, resulting in their commencement of this litigation. Their complaint sounds in negligence, private nuisance, trespass to land and trespass to chattel; and generally alleges that defendant failed to exercise reasonable care in the design, operation and maintenance of its electrical distribution system that services the farm, causing excessive and harmful amounts of stray voltage to flow through the farm and its cattle, resulting in injury in the form of decreased milk production, decreased fertility rates, diminution in value of show cattle and out-of-pocket costs for veterinary and other expenses to diagnose and mitigate these effects. They seek

¹ "Stray voltage" refers to electrical potentials that exist between conductive surfaces that are not part of a facility's electrical system and cause electrical current to pass through people or animals who come into contact with two such surfaces simultaneously. Stray voltage is ubiquitous in our electrified world, but is normally encountered in undetectable, nonproblematic quantities. However, it is well-documented that excessive stray voltage can affect dairy cattle, impacting their feeding and watering behaviors, general quality of life, and, in turn, their milk production and ability to reproduce.

² "NEV" refers to current that returns to the power source via the earth, rather than via the neutral line of an electrical circuit, and which can contribute to stray voltage. It is measured between a grounded rod in the earth and a circuit's neutral line, not at locations that cows may contact.

³ One-half of a volt is well below the threshold that would present a current that could be harmful to, or even perceived by, a cow through which it passes. Defendant's threshold for remediation is twice as demanding as the New York State Public Service Commission's remediation threshold of one volt.

⁴ A primary neutral conductor is the neutral service line in a utility's distribution system. A secondary neutral conductor is the grounded neutral line in a serviced facility's electrical system. Normally, the two are bonded but a device known as an isolator separates them, its purpose being to eliminate on-facility NEV that may be emanating from the primary (i.e., the utility) distribution system.

monetary damages and injunctive relief compelling defendant to "take all necessary steps to abate the stray voltage affecting" the farm. Defendant joined issue in January 2020 by the filing of an answer, in which it asserted various affirmative defenses.

Litigation proceeded thereafter in more or less the ordinary course until October 2022, when defendant offered to reconfigure and rewire the service to the farm at its expense. This work, related testing, and an inspection of the farm's operations took place between October 24 and 27, 2022. Plaintiffs now claim that this reconfiguration exacerbated the stray voltage situation. They base this claim on their expert's post-remediation NEV measurements at the primary system, which they claim are now so high that stray voltage on the farm presents a hazard to both human and bovine life and safety. They thus move as stated above, seeking an order compelling defendant to take all necessary steps to reduce stray voltages at cow contacts to under $\frac{1}{2}$ of a volt, balance the three phases of their electrical distribution lines to within 10% of each other, and ensure adequate isolation of the primary electrical system such that the ratio of primary to secondary voltage as measured at plaintiffs' milking barn is 20:1.⁵

Defendant opposes the motion, observing that there is no proof of excessive stray voltage at any contact point. Rather, its testing before and after the reconfiguration revealed no cow contact voltages above $\frac{1}{2}$ of a volt.⁶ Indeed, they argue, plaintiffs have failed even to identify what voltage is necessary to constitute a threat to human or bovine life, much less to demonstrate that such voltages are present on the farm. The further provide a litany of on-farm conditions

⁵ A three-phase electrical distribution system is comprised of three hot wires carrying electrical current from a power source, a neutral distribution line and a ground. Electricity is drawn by a given property that is serviced by the distribution system from only one of the phases, making the draw on each phase variable according to the moment-to-moment usages of the properties serviced by the phase. All electricity from each phase returns to the source via the single neutral and ground.

⁶ One exception to this finding was a measurement of 2 volts at a cow contact point in October 2022, but defendant explains that such was done with the isolator bypassed and was thus measured under conditions that do not normally exist on the farm.

unrelated to their electricity distribution that explain plaintiffs' inadequate milk production and reproductive failures.

Upon consideration of the affidavit of Randy Frasier, sworn to March 17, 2023, with exhibits; the affidavit of Lawrence C. Neubauer, sworn to March 6, 2023, with exhibits; the affirmation of Dale A. Worrall, Esq., dated March 17, 2023, with exhibits; plaintiffs' memorandum of law in support of the motion, dated March 17, 2023; the affirmation of Kate Mercer-Lawson, Esq., dated April 21, 2023, with exhibits; the affidavit of Joseph Culbert, sworn to April 20, 2023; the affidavit of Mark A. Cook, sworn to April 20, 2023, with exhibit; the affidavit of John Loud, MSEE, PE, sworn to April 20, 2023, with exhibit; the affidavit of Joseph G. Henningfield, sworn to April 20, 2023, with exhibits; the affidavit of David A. Reid, DVM, sworn to April 18, 2023, with exhibits; defendant's memorandum of law in opposition to the motion, dated April 21, 2023; the reply affidavit of Lawrence C. Neubauer, sworn to May 17, 2023, with exhibits; the reply affirmation of Dale A. Worrall, Esq., dated May 18, 2023, with exhibit; and plaintiffs' reply memorandum of law, dated May 18, 2023; and oral argument having been conducted on May 31, 2023; and due deliberation upon all the foregoing having been had, decision is hereby rendered as follows.

"The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor" (*Camp Bearberry, LLC v Khanna*, 212 AD3d 897, 898 [3d Dept 2023]; quoting *Sardino v Scholet Family Trust*, 192 AD3d 1433, 1434 [3d Dept 2021] [internal quotation marks and citations omitted]; see CPLR 6301). Whether to issue a preliminary injunction is a matter of judicial discretion, but such constitutes "drastic relief" and therefore "should be issued cautiously" (*Rural Community Coalition, Inc. v Village of Bloomingburg*, 118 AD3d 1092, 1095

[3d Dept 2014], quoting *Troy Sand & Gravel Co. v Town of Nassau*, 101 AD3d 1505, 1509 [3d Dept 2012]).

The field of electrical engineering is complex and nuanced, and the parties' respective experts have painted starkly different pictures of the electrical conditions on this farm, each taking serious issue with the others' testing methodologies and the conclusions to be drawn from the results thereof. It may be argued with equal force that this factual dispute is not such as should defeat the motion, or that these "sharp factual disputes obscure[e] the likelihood of success" on the merits such that a preliminary injunction should not issue (*Eklund v Pinkey*, 31 AD3d 908, 909 [3d Dept 2006]; see Siegel, *New York Practice* § 328 at 524 [4th ed 2005] [likelihood of success determination "a matter of the court's balancing all the proof, including consideration—but not undue consideration—of issues of fact raised by the defendant"]). The court finds, however, that it needs not determine whether plaintiffs have established a likelihood of success on the merits because they have failed to demonstrate a danger that they would suffer irreparable harm in the absence of the requested injunction.

The harm at issue here, as identified by plaintiffs, is the potential for serious injury or the loss of human or bovine life from exposure to excessive stray voltage at contact points; the loss of unique genetics from cattle death and the inability to breed them that, they allege, is caused by stray voltage; and the loss of milk production that they also allege is due to stray voltage. The court is unable to conclude that cow contact voltages or other stray voltages on the farm are so severe as to present a hazard of serious injury or death to humans or cows. Plaintiffs' expert's conclusions that such must be present is the product of inference from his post-remediation NEV measurements, not of measurements of actual cow contact voltages. Those were measured directly by defendant's experts, who attest that they are insufficient even to be perceived.

Defendants demonstrated that the farm's cattle death rate is below the industry average and there have been no reported injuries to or untimely deaths of humans or animals in the year since the remediation took place.⁷

Defendant has also presented compelling evidence of on-farm conditions that explain the plaintiffs' farm's low milk production and inability to breed their cows—unsanitary milking practices, overmilking, unmaintained milking equipment, cows' inadequate access to clean water, poor feeding practices, excessive mycotoxins in feed, poor breeding practices, inadequate record keeping, safety hazards present in farm-controlled facilities, and other conditions that affect cow comfort and quality of life. Thus, notwithstanding that plaintiffs may ultimately be able to show at trial that there are cow contact voltages of ½ of a volt or higher on the farm, the court is unable to conclude at this juncture that such are causing the harms of which plaintiffs complain (*see Rural Community Coalition, Inc.*, 118 AD3d at 1095 ["The ruling on a motion for a preliminary injunction . . . does not establish the law of the case nor is it an adjudication on the ultimate merit of the underlying action"]). Put another way, the court is not convinced that the requested injunction would cause plaintiffs' low milk production and inability to breed their herd to abate. Accordingly, the "drastic remedy" that plaintiff's request is denied (*id.*, quoting *Troy Sand & Gravel Co.*, 101 AD3d at 1509).

Arguments not specifically addressed have been examined and determined to be without merit or academic of light of the holdings herein. Based upon the foregoing it is hereby

ORDERED that the motion is denied; and it is further

⁷ To the extent that plaintiffs point to defendant's expert's 2-volt measurement in October 2022, characterizing the isolator that prevents this condition as a non-permanent solution, the fact remains that it is in place and addresses the condition (*see* fn 6, *supra*).

ORDERED that a conference shall be held for the purpose of scheduling a jury trial herein. Chambers' secretary will contact counsel for this purpose concomitantly with the issuance of this decision and order.

The within constitutes the decision and order of this court.

Signed this 30th day of October 2023, at Lake George, New York.

ENTER:



HON. MARTIN D. AUFFREDOU
JUSTICE OF THE SUPREME COURT

The court is uploading the decision and order to the New York State Courts Electronic Filing System (NYSCEF). Such uploading does not constitute service with notice of entry (*see* 22 NYCRR 202.5-b [h] [2]).

Distribution:

- Kyle D. Gooch, Esq.
- Dale A. Worrall, Esq.
- Jeremy R. Stevens, Esq.
- Alan R. Peterman, Esq.
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- Kate Mercer-Lawson, Esq.

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