INDEX NO.7216-2006

SUPREME COURT - STATE OF NEW YORK
SPECIAL TERM. PART 19 SUFFOLK COUNTY

Present:
Hon. SANDRA L. SGROI

Mot Seq: 001 Mot D
002 Mot D
Adj'd Date: 6-22-06
Return Date: 3-30-06

C.A.P.S. REALTY HOLDINGS, LLC., EASTERN WHOLESALE FENCE INC., LOGI ENTERPRISES, LLC., GLOBAL MARINE POSER, INC., KRISTEN & LINDSAY HOLDINGS, LLC., STONY BROOK MANUFACTURING CO., INC., CAL 81 705 ASSOCIATES, LLC., ISLAND INTERNATIONAL INDUSTRIES, INC., ISLAND LATHING & PLASTERING, INC., ISLAND A.D.C., INC., TEBBENS ENTERPRISES, LLC., ALFRED T. TEBBENS STEEL CORP., MIVILA FOODS, INC., LAOUDIS OF CALVERTON, LLC., AND OLDCASTLE RETAIL INC., d/b/a BONSAL AMERICAN, Plaintiffs,

-against-

M-GBC, LLC., CALVERTON/CAMELOT, LLC., and JAN BURMAN,

Defendants.

PERRY & CAMPANELLI, LLP.
Attorneys for the Plaintiffs
129 Front Street
Mineola, New York 11501

BERKMAN, HENOCH, PETERSON & PEDDY, P.C.
Attorneys for Defendants
100 Garden City Plaza
Garden City, New York 11530

Upon the following papers numbered 1 to 99 read on this Motion and Cross Motion: Notice of Motion and Supporting Papers 1-36 ; Notice of Cross Motion and Supporting Papers 37-72; Reply Affirmation and Supporting Papers 73-92; Reply Affirmation and Supporting Papers 93-99; it is,

ORDERED that the relief requested in this order to show cause of the Plaintiffs is granted to the extent that the Defendant M-GBC, LLC. is enjoined from terminating the pressurized non-potable water supply to any of the Plaintiffs who are not in default of payment of their utility bills for six months from the date of this order unless the Riverhead Water District takes title to the wells supplying the pressurized water and the Public Service Commission permits the discontinuance of service or separate fire suppression systems are installed that meet the requirements of the Town of Riverhead and all other licensing authorities; and it is further

ORDERED that the water supplied by the Defendant M-GBC, LLC. to the Plaintiffs must be heated sufficiently in order to permit the fire suppression systems to function properly; and it is further

ORDERED that the Defendant M-GBC, LLC. continue to furnish electricity to the Plaintiffs through its power plant unless the Plaintiffs are connected directly to a source of electricity from LIPA or the Public Service Commission permits the Defendant M-GBC, LLC. to disconnect service of electricity; and it is further

ORDERED that the Defendant M-GBC, LLC. is restrained from charging rates in excess of the rates charged by LIPA or the Suffolk County Water Authority for electricity or water unless the increased utility rates have been approved by the Public Service Commission; and it is further

ORDERED that the Defendant M-GBC, LLC. is restrained from demanding payment of any bills for utilities on less than thirty days notice unless such notice is permitted by the Public Service Commission; and it is further

ORDERED that the Plaintiffs are directed to file an undertaking in the amount of $50,000.00 in accordance with the ***CPLR 6312*** within ten days of service of a copy of this order; and it is further

ORDERED that the cross motion of the Defendants to dismiss the action of the Plaintiffs is granted only as to the Defendants Calverton/Camelot, LLC and Jan Burman; and it is further

ORDERED that all other requested relief is denied.

In this order to show cause, the Plaintiffs seek a preliminary injunction restraining the Defendants from terminating the electric and water services to their premises and for other relief.

The Plaintiffs are owners or lessees of owners of parcels located in the Calverton Planned Industrial Park established pursuant to the Town of Riverhead Code. According to the Plaintiffs, the Defendant Calverton/Camelot, LLC (hereinafter "Calverton") was succeeded in interest by the Defendant M-GBC, LLC. (hereinafter "M-GBC") and the Defendant Jan Burman formed and manages Defendant M-GBC. The Plaintiffs allege that the Defendants have threatened to terminate the Plaintiffs' electricity and non-potable water supply (which water is necessary to run the Plaintiffs' fire suppression systems). Additionally, the Plaintiffs allege that the non-potable water supplied by M-GBC must be heated in the winter for the fire suppression systems to function. The Plaintiffs allege that the Defendants have threatened to terminate providing both electricity and non-potable water and that if the Defendants terminate these utilities, not only would hundreds of people be put out of work and businesses destroyed, loss of life could result. The Plaintiffs further allege that the Defendants are grossly overcharging the Plaintiffs for the electricity that is being provided to their businesses.

In 2001, the Defendant Calverton purchased a 472 acre tract of land that was formerly used by Grumman Aircraft Engineering Co. from the Town of Riverhead. The property has ten individual buildings and a self standing power plant that produces steam for heat (the steam heat was the subject of a prior action that was before this Court). The Plaintiffs C.A.P.S. Realty Holdings, LLC., Logi Enterprises, LLC., Kristen & Lindsay Holdings, LLC., CAL 81 Realty, LLC., Island Lathing & Plastering, Inc., Alfred T. Tebbins Steel Corp., Laoudis of Calverton, LLC., and Old Castle Retail Inc. d/b/a Bonsal American purchased property in this developing industrial park as a result of separate sales of the ten buildings. The remaining Plaintiffs are lessees of these owners except for Tebbens Enterprises and CAL 705, which have an ownership interest as a result of subsequent transfers.

Defendant Calverton retained ownership in the self standing power plant which was eventually transferred to the Defendant M-GBC. With regard to providing electricity, M-GBC's plant acts as a substation, bringing electrical service to the businesses of the Park. The electricity is provided to M-GBC by LIPA. M-GBC also provides non-potable water to the building through a pump system that causes the water to become highly pressurized for the proper functioning of the fire suppression systems located in the buildings in the Calverton Industrial Park.

The Plaintiffs who purchased their properties from Calverton each have somewhat different written purchase agreements although those agreements were all drafted by Calverton's agents. While each agreement is slightly different, for the purposes of the issues raised in this action and the motion for injunctive relief being decided herein, the agreements are not distinguishable.[1] The general section (Section 34) concerning the responsibilities of the Parties in the contract with regard to utilities states:

> Purchaser acknowledges that the Premises is situated within the Calverton Planned Industrial Park and as such is serviced by certain utilities located within the Calverton Planned Industrial Park. Provided the charges, fees and rates imposed by such utilities are charged comparable

[1]The Court will address some of the Defendants allegations concerning the differences in the agreements subsequently in this decision.

> to the charges, fees and rates imposed by public utilities servicing the surrounding area, then and in that event Purchaser agrees to utilize the utilities generated from providers at the Calverton Planned Industrial Park site.[2]

On March 31, 2005, this Court, in a separate and disposed case entitled M-GBC v. Mivila Foods, Inc. and Laoudis of Calverton, LLC., issued a decision on a motion for a preliminary injunction concerning the steam heat required to be provided by M-GBC under these agreements.

According to the Plaintiffs herein, as a result of that decision, the Defendants in this case are bound by the findings (1) that the agreement could not be modified or terminated orally; (3) that waiver of performance is not a waiver of the contract provisions; (2) that New York law controls; (4) that the invalidity or un-enforceability of one provision does not render the contract void; and (5) that if the provisions are susceptible to two interpretations, one valid and one invalid, the provision will be interpreted as valid. Since these concepts embrace the principles of general contract law or concern specific clauses that are in the written agreements, the Court need not make a determination as to whether collateral estoppel technically applies to enable the Court to use these principles in this decision.

In that previous decision, this Court also held that the Public Service Law applied to the steam generating plant on the property, that the steam generating plant should be certified by the Public Service Commission and that the rates charged for the steam had to be approved by the Public Service Commission. As a result of those findings, this Court issued an injunction directing that M-GBC "***provide on demand, all steam for heat which is requested by the defendants on a continuing basis for defendant's building, pending the trial of this action***. Defendants shall pay for such steam service at the rate at which they previously paid until such time as such rate may be set by the Public Service Commission and thereafter shall pay at such rate as has been set by said Commission. All legal issues regarding the propriety of charges demanded by plaintiff for prior steam service and payments made by the defendants therefore are referred to the trial***." (***M-GBC, LLC. v. MIVILA Foods, Inc. and Laoudis of Calverton, LLC***, Index No. 9349-2004). After the issuance of that decision granting the motion for a preliminary injunction, the parties settled that action and application was made to the Public Service Commission.

As part of that settlement agreement, M-GBC provided the Defendants with independent heating systems for their buildings and an application was made before the Public Service Commission. The result of that application will be discussed subsequently in this decision.

As noted previously, the current litigation does not concern the steam plant or steam service but instead involves M-GBC supplying the non-potable water service on the property and the electricity supplied through the power plant. There are no provisions in the purchase agreements specifically requiring that M-GBC

---

[2]The purchase agreement of the Plaintiff Laoudis of Calverton, LLC. has the additional language "In the event that Purchaser determines that the services provided by the utilities located within the Calverton Planned Industrial Park are unsatisfactory and fail to meet the requirements of the Purchaser, then and in that event it may terminate the use of such facilities."

provide either two separate water systems (potable water and non potable water under pressure) to the Plaintiffs' properties or that M-GBC provide electricity to the Plaintiffs' properties. The agreements of the Parties do state that if M-GBC does provide these services, the rates charged must be comparable to those imposed by the local utilities that provide that service. In the prior case that was before this Court, that decision was partially based upon a provision in Section 14 (B) (1) of the written purchase agreement that stated:

> From and after the Closing Date and until the earlier of the tenth anniversary of the Closing Date or such time as steam heat shall be made available to the Premises at market rates by a public utility or other person or entity, Seller shall cause the steam plant servicing the Premises to be operated and maintained at Seller's expense and shall cause steam heat to be provided to the Premises at rates comparable to those imposed in the surrounding area generally. Seller shall also cause Seller's other purchasers of parcels in the Planned Industrial Park at Calverton to use such steam plant. Notwithstanding the foregoing, Purchaser shall not be required to utilize steam heat in the property.[3]

There is no comparable language in the agreements that mandate that M-GBC continue to supply water service or electricity service to the persons occupying the buildings on the property for any specific period of time or that those utilities be supplied indefinitely. The agreements are silent as to that issue, with the exceptions as noted in this decision. It is however undisputed that M-GBC has undertaken to provide those services for an extended period of time. Recently, M-GBC has threatened to discontinue service of those utilities, has raised the fees charged for those utilities and has changed the terms of payment of the bills for the charges for those utilities.

The Court will first address the procedural issues raised in the Defendant's cross motion to dismiss. In that cross motion the Defendants seek dismissal of the action commenced by the Plaintiffs against the Defendants Calverton and Jan Burman. According to the Defendants, Calverton transferred all of its interests in the subject agreements to M-GBC pursuant to an agreement provided to the Plaintiffs at their individual closings. It is not disputed that Calverton has properly transferred its interest to M-GBC and therefore the motion to dismiss as against Calverton is granted.

The named Defendant Jan Burman is the managing member of the Defendant M-GBC. ***Limited Liability Company Law*** § 609 expressly exempts the managing partner from personal responsibility for a company's obligations and they may only be held liable in limited circumstances, such as where the corporate veil should be pierced (see, ***Retropolis, Inc. v. 14th St. Dev. LLC***, 17 A.D.3d 209, 797 N.Y.S.2d 1) or a tort has been committed (see, ***Collins v. E-Magine, LLC***, 291 A.D.2d 350, 739 N.Y.S.2d 15 app'l dism'd 98 N.Y.2d 605, 746 N.Y.S.2d 279, 773 N.E.2d 1017; ***Rothstein v. Equity Ventures, LLC***, 299 A.D.2d 472, 750 N.Y.S.2d 625). Since it is not alleged that any of the exceptions to the general rule prohibiting the imposition of liability on the managing member are present, the motion to dismiss as against Jan Burman is granted. The request by the Defendants for sanctions against the Plaintiffs is denied (see, ***22 NYCRR 130-1.1***).

---

[3]See Plaintiffs' Exhibits B-1 through B-6

The Defendants also seek to dismiss several of the Plaintiffs as parties on the ground that they do not have standing either because of their contracts, or because they are lessees without standing or because of releases that were signed in the past.

With regard to the releases, there has been no definitive showing at this time that any of the Plaintiffs have released their claims in this action (see, ***Rotondi v. Drewes***, 2006 N.Y. App. Div. LEXIS 9596, 2006 NY Slip Op 5934 (N.Y. App. Div. 2d Dep't July 25, 2006)). The remaining issues concerning the standing of the lessees may be raised at a later time in this litigation. It is sufficient for the purposes of this motion that the Plaintiffs have shown that Defendant M-GBC has established a course of conduct of providing electricity and non-potable water to all of the Plaintiffs.

In the case of ***Brown Bros. Electrical Contractors v. Beam Construction Corp.***,(41 N.Y.2d 397, 393 N.Y.S.2d 350, 361 N.E.2d 999), where the issue before the Court was whether the "course of conduct and communications between [the parties] created a legally enforceable agreement" for electrical work, the Court (per Fuchsberg, J.) discussed the proper method to use to gauge intent:

> In accordance with long-established principles, the existence of a binding contract is not dependent on the subjective intent of either [party]. In determining whether the parties entered into a contractual agreement and what were its terms, it is necessary to look, rather, to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds. In doing so, disproportionate emphasis is not to be put on any single act, phrase or other expression, but, instead, on the totality of all of these, given the attendant circumstances, the situation of the parties, and the objectives they were trying to attain. (citations omitted)(41 N.Y.2d at 399-400, 393 N.Y.S.2d 350, 361 N.E.2d 999).

Obviously, the objective manifestations of the parties intent would be their actions or "course of conduct." Where, as here, the parties to the written agreement, guided by their self interest, enforce it for a long time by a consistent and uniform course of conduct, and that course of conduct gives the contract a practical meaning, a court will treat it as having that meaning, even though resort to the terms of the contract might have given it a different interpretation initially without taking into consideration the actions of the parties (see, ***22 N.Y. Jur. 2d Contracts § 220***; ***93 N.Y. Jur. 2d Sales § 31***).

M-GBC alleges that Section 34 of the contract was omitted from the agreement with C.A.P.S. Realty Holdings LLC. and therefore there is no contractual obligation to provide water and electricity to this Plaintiff. The Court notes that Section 34 of the written agreement with the Plaintiff C.A.P.S. Realty Holdings LLC. concerns "Post-Contract Subdivision of Property and Deed Reservation" and there is no provision in this contract that mentions electricity or water. However, the Court notes that the provisions in Section 14 of the other Plaintiffs' contracts concerning steam heat are also omitted from the contract of C.A.P.S. Realty Holdings LLC. and there is no allegation that M-GBC failed to provide this Plaintiff with steam heat in the past. In any event, the Parties' course of conduct indicates that electricity and non-potable water for the fire suppression system were provided by M-GBC to this Plaintiff (see, ***Restatement of the Law 2nd, Contracts §§ 4, 202***). While express terms are given greater weight than course of conduct, there are no express terms

in this contract that state that water and electricity would not be provided to this Plaintiff (see, ***Restatement of the Law 2nd, Contracts §§ 203, 212***).

On October 19, 2005, each of the Plaintiffs received correspondence from M-GBC that stated in part:

> As you are aware, the fire protection system for your premises is serviced from a central water supply located within the CALVERTON subdivision. We have been advised by the Suffolk County Water District and the Town of Riverhead Fire Marshal that each property must have a stand alone fire protection system and they will no longer permit reliance on the central water supply.
>
> Accordingly, please be advised that as of December 31, 2005, the current water supply for your fire protection system will no longer be available. Pursuant to local regulation, you must make arrangements to have an individual fire protection system installed at your premises, which must be connected to the Water District's water source, if necessary.[4]

On October 27, 2005, the Supervisor of the Town of Riverhead wrote a letter to the Defendant Jan Burman (the managing partner of M-GBC) that stated in part:

> you should be aware that there is no such entity as the Suffolk County Water District and that pending satisfaction of certain outstanding conditions, the property is not currently within the Riverhead Water District. Further, you should be aware that neither the Town of Riverhead nor the Riverhead Water District nor the Town of Riverhead Fire Marshal has required that a stand alone fire suppression system be utilized within the subdivision.[5]

On or about November 8, 2005, the Defendant Jan Burman on behalf of the other Defendants forwarded additional correspondence stating that:

> Please be advised that we have decided to extend the termination date fire sprinkler service to your building to 12/3/06. This will provide you with adequate time to convert to the Riverhead Water District System.
>
> In the interim we must make certain changes and additions to our system with the steam Plant to continue to operate during the upcoming year. As a result we will be raising the rates by approximately 15% to help cover the construction and maintenance costs.[6]

---

[4]Plaintiff's Exhibit E

[5]Plaintiffs' Exhibit F

[6]Plaintiffs' Exhibit G

The Plaintiffs allege that the required water service cannot be obtained through the Suffolk County Water Authority because it must be channeled through the pump maintained by the Defendants in the industrial park in order to maintain the necessary high pressure for the system to function. M-GBC disputes this, and it remains a question of fact that is not resolved by the submissions on this motion.

In opposition to the motion for a preliminary injunction, the Defendants request that the action be dismissed because they allege that the agreements between M-GBC and the Plaintiffs do not require that M-GBC provide water and electricity services to the Plaintiffs, that M-GBC charge the Plaintiffs rates for electric service comparable to the rates charged by LIPA or that M-GBC provide two separate water services to Plaintiffs' premises. Instead, M-GBC states that Plaintiffs are free to discontinue their use of the utilities under the agreement and it is not possible to read in other additional terms with regard to the water service and the electricity service.

Pursuant to the provisions in Section 14 of the agreement, M-GBC is bound by 14(B)(2) which states that "Seller represents that the Premises are connected to water and sewer systems and that Seller shall hook up water to the building prior to the termination of the present water to the Premises by the Town of Riverhead."

With regard to the water service, M-GBC alleges it was informed by the Town of Riverhead that each of the individual properties were required to install stand alone fire suppression systems because the existing system was designed to cover large scale industrial manufacturing and was not intended to cover mixed uses. Further M-GBC alleges that its obligation was only to provide water service and there was no agreement to provide non-potable water for the fire suppression system. M-GBC has not explained why it then undertook to provide pressurized non-potable water to the Plaintiffs if it had no such obligation to provide that utility.

In the Plaintiffs' amended complaint, the Plaintiffs allege that the Defendants are obligated to provide sprinkler water and electricity pursuant to the Public Service Law. The contracts attached to the motions and the course of conduct established by the actions of the Parties support that allegation. Further support that M-GBC is obligated to provide these utilities is found in statements from the Public Service Commission of New York State.[7] In the procedural ruling issued by the Public Service Commission dated July 1, 2005, it is stated:

> With respect to electric and sprinkler water service, M-GBC ***and*** the Association declared that once the necessary easements were approved, Long Island Power Authority would provide electric service and the Riverhead Water District would provide sprinkler water service. (Emphasis provided by the Court).

Although the Defendants herein allege that non-potable water is not a utility, the Plaintiffs dispute that allegation. The Court notes that this is the first time that this issue was raised by the Defendants and, that in previous submissions by the Defendants before other agencies, the non-potable water was described as a

---

[7]The Court will discuss the role of the Public Service Commission in this litigation subsequently in this decision.

utility and it is alleged that the course of conduct by the parties over the term of their agreement indicates that the non-potable water was treated as a utility by the parties. In the cross motion, the Defendants attorney alleges that M-GBC is not threatening the imminent termination of the non-potable water service but only that water service would be terminated in December 2006 after the Water District takes title to the wells providing the water. However, the acrimonious relationship between the Parties over the last several years and the correspondence sent by M-GBC to the Plaintiffs prior to this litigation, justifies the concerns of the Plaintiffs that their utilities will be terminated.

In addition to the issue with the non-potable water, the Plaintiffs seek an injunction enjoining the Defendants from discontinuing the electric supply or overcharging the Plaintiffs for the electricity service.

Section 34 of the agreements between the parties was clearly intended to survive the closing of title. This section states:

> Use of Utilities. Purchaser acknowledges that the Premises is situated within the Calverton Planned Industrial Park and as such is serviced by certain utilities located within the Calverton Planned Industrial Park. Provided the charges, fees and rates imposed by such utilities are comparable to the charges, fees and rates imposed by such utilities are comparable to the charges, fees and rates imposed by public utilities servicing the surrounding area, then and in that event Purchaser agrees to utilize the utilities generated from providers at the Calverton Planned Industrial Park site. In the event that Purchaser determines that the services provided by the utilities located with the Calverton Planned Industrial Park are unsatisfactory and fail to meet the requirements of the Purchaser, then and in that event it may terminate the use of such utilities.

The term "utilities" in Section 34 is not defined by the agreements but, as the Court has noted previously in this decision, both Plaintiffs and M-GBC have acted, at least until recently, as if both electricity and water for the fire suppression system were utilities provided for under this clause. In fact, the right to meter for the use of water appears to emanate from a paragraph that discusses "utilities" (see, Closing agreement by and between M-GBC and Laoudis of Calverton, LLC, ¶ 3). The Court further notes that the term "utility" is defined by the dictionary as "a service (as light, power, or water) provided by a public utility" (***Merriam Webster Collegiate Dictionary on-line***). Since the word utility is defined as providing power or water, M-GBC has been providing both power and water for the sprinkler systems for several years, and there are no other relevant parts of the agreements superceding Section 34 with regard to electricity and water, Section 34 is, for the purposes of pure contractual rights (as opposed to the obligations imposed upon M-GBC pursuant by the Public Service Commission), the section of the agreement that the Court must look to in determining these motions.

While it appears that all parties agree M-GBC had an obligation to provide water service to all of the properties prior to closing, M-GBC acknowledges its obligation to connect the premises to the Water District system and it states that all the Plaintiffs need do is apply to the Riverhead Water District to connect their systems. It further states that the well which supplies the properties will be deeded to the Riverhead Water

District "on or before September 2006."[8] A fair reading to the contracts requires the Court to find that M-GBC is not required to continue to provide water service if the well or wells are deeded to the Riverhead Water District. This is consistent with the statements in the rulings of the Public Service Commission.

The purchase agreements provide that the Defendant charge rates "comparable to the charges, fees and rates imposed by public utilities servicing the surrounding area" but unlike the covenant concerning the Defendant's obligation to provide steam heat, the agreements do not require that M-GBC maintain and operate the equipment necessary to provide water and electricity if that water and electricity can be provided by public utilities.

The issue that the Court is now faced with is whether water and electricity can be provided to the Plaintiffs by public utilities and if these services cannot be provided by public utilities, should M-GBC be enjoined from discontinuing those services to the Plaintiffs. The reply affirmation of David H. Eisenberg, an attorney for the Plaintiffs, states that "[a] plain reading of the contract in its entirety, and the utilities provision, in particular, calls for the defendants to provide these utilities, and sets a standard for charges. The clause states that utilities are provided, and allows only plaintiffs to cancel once the utilities are no longer a monopoly."

While it is true that with regard to steam heat the agreement specifically stated "Seller shall cause the steam plant servicing the Premises to be operated and maintained at Seller's expense," no such equivalent language is in the agreements that cover water or electricity. Therefore, the Court is constrained to find on the basis of the written agreements, that M-GBC can discontinue providing and maintaining both water and electricity when the Plaintiffs are hooked up to both public utilities and the utilities can provide the services needed by the Plaintiffs at the level provided by M-GBC.

M-GBC cannot require that the Plaintiffs use its services nor can it charge Plaintiffs rates that are in excess of those rates charged by the public utilities that provide those services in light of the provision in the agreements that state:

> Provided the charges, fees and rates imposed by such utilities are charged comparable to the charges, fees and rates imposed by public utilities servicing the surrounding area, then and in that event Purchaser agrees to utilize the utilities generated from providers at the Calverton Planned Industrial Park site. (Section 34 of Agreements).

While this provision does not require that M-GBC charge rates comparable to local public utilities, the ***Public Service Law*** of this State must be considered. According to the Plaintiffs, M-GBC is required to obtain certification for the electric, steam and water plants from the Public Service Commission. ***Public Service Law § 5(1)(b)*** states that the Public Service Commission extends its jurisdiction "to the manufacture, conveying, transportation, sale or distribution of***electricity for light, heat or power***and to electric plants and to the persons or corporations owning, leasing or operating the same" and, pursuant to ***Public Service Law § 5 (1)(f)*** jurisdiction extends "to the furnishing of water for domestic, commercial or public uses and to water systems

---

[8]The Court has no information whether this transfer has been accomplished.

and to the persons or corporations owning, leasing or operating the same."

M-GBC recognized the reach of the jurisdiction of the Public Service Commission when, on January 14, 2005, M-GBC filed a petition requesting a certificate of public convenience and necessity for an existing steam plant, an electric substation, and sprinkler water service. On November 4, 2005, the Public Service Commission issued an order the purpose of which was to establish procedures designed to confirm that M-GBC would properly cease all of its utility service "and abandons, transfers or decommissions any utility plant that might otherwise be subject to Commission jurisdiction." In this decision the Public Service Commission notes that this matter was scheduled for a hearing, and on or about September 26, 2005, M-GBC and the Plaintiffs settled their differences. The decision states in part:

> With respect to electric service and plant, the record establishes that M-GBC intends, and the Association desires, that the electric facilities and responsibility for electric service be transferred to the Long Island Power Authority. The record also demonstrates that subdivision approvals must be granted by the Town before this transfer can occur, but that such approvals are expected within the next few weeks.
>
> ***When questioned about the status of M-GBC's existing water plant and non-potable sprinkler water service, M-GBC counsel reported that individual, on-premises fire suppression facilities will be installed. M-GBC's counsel further reported that, once said service was no longer needed, M-GBC would abandon said service and any associated plant.*** (Emphasis provided by the Court).

There is no indication that the Plaintiffs ever agreed to install these additional individual fire suppression facilities referred to above and, in fact, that is a central issue in this litigation.

The decision of the Public Service Commission further directed that M-GBC make a separate compliance filings after each of three separate events occurred: when "the necessary and relevant subdivision approvals have been granted; the existing electric facilities and responsibility for electric service at Calverton Industrial Park have been transferred to the Long Island Power Authority; and all remaining users of the non-potable sprinkler water services have installed individual fire suppression facilities."

Although the Public Service Commission clearly anticipated that M-GBC would shortly complete the decommissioning of its plants and transfer utility service to the public utilities that service that geographical region of Long Island, more than nine months have passed since the Commission issued its decision and the issues referred to above have not been resolved by the Parties and individual fire suppression systems have not been installed by the Plaintiffs in this litigation.

In the prior decision of this Court, ***Public Service Law § 79(1)*** was quoted at length and the Court stated that the M-GBC was required to set the steam rates pursuant to the requirements of the Public Service Law. The language in ***Public Service Law § 79(1)*** closely parallels the wording of both ***Public Service Law § 65 (1)*** concerning entities providing electricity and the setting of rates for that service and ***Public Service Law § 89-b(1)*** concerning entities providing water and the setting of rates for that service. Since the language is

essentially the same in these sections, electricity and water rates should be set and thereafter changed pursuant to the requirements of the Public Service Law.

Although both the Plaintiffs and M-GBC have in the past deferred to the Public Service Commission and the Public Service Commission has apparently taken jurisdiction over the generation of electricity and the supply of water at the Grumman site controlled by M-GBC, the Court does note that the definitions of "electric corporation" in ***Public Service Law § 2(13)*** and "water works corporation" in ***Public Service Law § 2(27)*** would appear to exclude M-GBC if the Plaintiffs were considered to be tenants of property owned by M-GBC. However, the parties hereto have not objected to the actions of the Public Service Commission, and in fact have consented to the orders of the Commission with regard to the electric service and water service that is provided to the Plaintiffs by M-GBC. Since there is no indication that the Plaintiffs are tenants of M-GBC and instead they appear to have either an ownership interest in their properties or they have rights pursuant to an entity with an ownership interest, it is proper that the Public Service Commission regulate the supply and charges for the water and electricity provided to the Plaintiffs.

The State in the exercise of its police power has the right to regulate for the public good corporations or other entities that provide water and electricity within the borders of New York(see, ***Consolidated Edison Co. of New York, Inc. v. City of New Rochelle***, 140 A.D.2d 125, 532 N.Y.S.2d 521; ***City of New Rochelle, on Complaint of Conlon, v. Burke***, 288 N.Y. 406, 43 N.E.2d 463). Further, pursuant to this power, private contracts with any entity that fits the definition of a utility under the Public Service Law are subject to the reserved authority of the Public Service Commission and the State has the right to alter the rates charged by the provider of the service (see, ***Buffalo East Side R. Co. v. Buffalo St. R. Co.***, 66 Sickels 132, 111 N.Y. 132, 19 N.E. 63; ***Levine v. Long Island R. Co.***, 38 A.D.2d 936, 331 N.Y.S.2d 451, aff'd 30 N.Y.2d 907, 335 N.Y.S.2d 565, 287 N.E.2d 272, cert den'd 409 U.S. 1040, 93 S.Ct. 525, 34 L.Ed.2d 490).

This Court does not have a complete copy of the settlement agreement dated September 27, 2005, because the Exhibits referred to in that agreement have not been submitted on this motion. However, even if the parties had consented to a withdrawal of the application for various approvals from the Public Service Commission, they cannot, by private agreement, act contrary to the state police power that has been delegated to the Public Service Commission. Therefore, the Court finds that it would be improper for M-GBC to unilaterally raise rates without the consent of the Public Service Commission and it would be similarly improper to terminate either the service for water necessary for the operation of the centralized fire suppression system and the service for electricity without the consent of the Public Service Commission unless and until the Plaintiffs were connected to a public source to obtain an adequate supply of those specific utilities.

Since the Plaintiffs are only entitled under their contractual agreement to water and electricity being provided at the rates comparable to the public utilities, M-GBC would not be in violation of its contractual agreements if it connected the Plaintiffs to those utilities and then discontinued providing those services privately to the Plaintiffs.

The Plaintiffs allege that the water service must be provided at high pressure for them to maintain their fire suppression systems, that this water also must be heated in the winter to avoid freezing and that the necessary

water service cannot be obtained through the Suffolk County Water Authority for the centralized fire suppression systems to function properly. The Plaintiffs further allege that neither the Town of Riverhead, the Riverhead Water District nor the Town of Riverhead Fire Marshal require that a stand alone fire suppression system as opposed to a centralized fire suppression system be utilized within the Calverton sub-division (see, Exhibit F, Letter of Philip J. Cardinale, Supervisor, Town of Riverhead). A letter sent by the Supervisor of the Town of Riverhead states:

> The decision as to whether M-GBC,LLC provides a centralized fire suppression system is solely the determination of M-GBC, LLC.
>
> Should M-GBC,LLC elect to discontinue centralized fire suppression at the site, the Town will require that replacement fire suppression systems comply with all applicable laws, rules, regulations or codes. If M-GBC,LLC makes such an election, adequate time must be allowed to provide for the proper engineering, permitting, installing and testing of an alternative fire suppression system.

As noted before, there is no language in the agreements between the parties specifically covering the centralized fire suppression system or pressurized water. However, the purchase agreements state that the premises must be able to be lawfully used for light industrial and ancillary related uses and a subsequent agreement states that "[t]he parties hereto reaffirm that any terms, covenants and conditions set forth in the Contract that are intended to survive the Closing and the delivery of the deed shall continue to survive the closing and the delivery of the deed pursuant to the terms of the Contract." If the subdivision did not have a functioning centralized fire suppression system, the Plaintiffs' properties could not have been lawfully used for light industrial uses and if the water to the fire suppression system is now stopped, the premises could not be used lawfully for light industrial uses, thus potentially violating the agreements between the Parties.

Clearly, a course of conduct has arisen whereby M-GBC has maintained and provided the high pressure water supply necessary for the operation of the centralized fire suppression used by all of the Plaintiffs. The Public Service Commission has specifically referred to high pressure water service as a utility. While the agreements between the parties do not address the fire suppression system specifically, the Plaintiffs are required to have a fire suppression system on their premises to lawfully operate their facilities. No party has provided this Court with any information as to the length of time it would take for the proper fire suppression systems to be installed or the cost of such systems.

It is clear, from these submissions, that the Plaintiffs will suffer irreparable harm if M-GBC is permitted to discontinue service of the high pressure water without allowing the time to install separate fire suppression systems. Further, there is no indication that the Public Service Commission will permit M-GBC to discontinue pressurized water service if there are not individual systems in place. The Court will therefore grant an injunction and direct that M-GBC continue to provide high pressure water for the purposes of supplying the fire suppression system for six months from the dat of this order unless permitted to disconnect by order of the Public Service Commission and the Plaintiffs are directed to file an undertaking within ten days of service of this order for the total sum of $50,000.00.

The court is required to fix an undertaking whenever injunctive relief is granted (see, ***J.A. Preston Corp. v. Fabrication Enterprises, Inc.***, 68 N.Y.2d 397, 502 N.E.2d 197, 509 N.Y.S.2d 520). The Parties who have obtained the injunction are required by statute to give an undertaking for that relief (see, ***Gaentner v. Benkovich***, 18 A.D.3d 424, 795 N.Y.S.2d 246).

Since the Plaintiffs are required to pay rates comparable to that of the local utilities for the water and electricity that they receive from M-GBC to avoid disconnection of service, the amount of the undertaking herein should be sufficient to protect the remaining Defendant from any damages sustained as a result of the Court granting this injunction (see, ***Ujueta v. Euro-Quest Corp.***, 29 A.D.3d 895, 814 N.Y.S.2d 551).

Dated: 8/25/06

SANDRA L. SGROI, J. S. C.