

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IA Part 19
Justice

THE BROOKLYN UNION GAS COMPANY, x

Plaintiff,

-against-

DORMITORY AUTHORITY STATE OF
YORK,

Defendant.

Index
Number 9737 2002

Motion
Date October 27, 2004

Motion
Cal. Numbers 29 & 30

x

The following papers numbered 1 to 17 read on these separate motions by defendant, pursuant to CPLR 3211(a)(5)and (7) and 3212, to dismiss plaintiff's complaint and/or for summary judgment on the grounds that: (1) the complaint fails to state a cause of action; (2) the action is barred by the doctrine of collateral estoppel; and (3) there are no genuine issues of material fact, and by plaintiff for partial summary judgment in its favor and against defendant.

Papers
Numbered

Notices of Motion - Affidavits - Exhibits.....	1-9
Answering Affidavits - Exhibits.....	10-13
Reply Affidavits - Exhibits.....	14-17

Upon the foregoing papers it is ordered that the motions are consolidated and determined as follows:

In this action, plaintiff, a gas utility company, seeks reimbursement from defendant for costs incurred in relocating its gas facilities located underneath New York City streets at the intersection of Jamaica Avenue and 153rd Street in Queens, New York.

On or about December 29, 1993, as part of an Urban Redevelopment Plan, defendant, a public benefit corporation, entered into a lease and agreement with the City of New York (City) to acquire, design, construct, reconstruct, rehabilitate or improve certain court facilities located within the City. In conjunction with the Lease Agreement, on or about October 16, 1992, defendant entered into an Operating Agreement with the City. The Operating Agreement between defendant and the City, which was revised on or about February 7, 1996, provides for construction of courthouses and related public facilities throughout the five boroughs, including the Queens Family Court and Family Agency Facility (Family Court) located at 151-20 Jamaica Avenue, Queens, New York, which is the subject of this action. Defendant hired Lehrer McGovern Bovis, Inc. (Lehrer) as the construction manager for the Family Court project.

During the design stage of the project, defendant determined that a sewer line ran directly under the property where the Family Court was to be constructed. The sewer line had to be relocated before construction of the Family Court could begin. In order to perform the sewer relocation, the City obtained a new sewer easement in which to relocate the existing sewer line. The location of the new sewer easement goes around the property as opposed to through the property. It begins at the southwest corner formed by the intersection of Jamaica Avenue and 153rd Street and runs south along 153rd Street to the corner formed by the intersection of Archer Avenue and 153rd Street.

On or about July 10, 1998, defendant entered into a contract with Cobar Construction Company (Cobar) wherein Cobar agreed to relocate the existing sewer line in accordance with the new sewer easement. Under the terms of Cobar's contract and in order to facilitate the new sewer location, Cobar was required to build a sewer chamber underneath the southwest corner of Jamaica Avenue and 153rd Street. The location of the sewer chamber interfered with existing gas mains located underneath the southwest corner of Jamaica Avenue and 153rd Street, which were owned and maintained by plaintiff. Plaintiff is a "sole source" which means plaintiff is the only contractor that can perform work on its facilities. The Family Court construction could not proceed until plaintiff's facilities were relocated. Plaintiff's senior supervisor Larry Torres refused to relocate plaintiff's interfering gas facilities unless plaintiff was reimbursed 100 percent. On June 8, 1999, a meeting was held with Larry Torres, Anthony Coletti of Cobar, a representative of Lehrer, and John Wilson, the Chief of New York City Courts. At this meeting, John Wilson agreed that defendant would reimburse plaintiff for all costs incurred in the relocation of its gas facilities. John Wilson confirmed this agreement in a

letter, dated June 9, 1999. On or about July 9, 1999, plaintiff relocated its interfering gas facilities and subsequently demanded reimbursement therefor from defendant.

It is well established that utility companies which have been granted the privilege of laying their pipes and mains in the public streets have an absolute duty pursuant to statute and common law to remove, protect, replace, shift, relocate, and alter their facilities at their own expense whenever the public health, safety or convenience requires the change to be made. (See Matter of Consolidated Edison Co. of New York, Inc. v Lindsay, 24 NY2d 309 [1969]; see also Matter of Consolidated Edison Co. of New York, Inc. v City of New York, 171 AD2d 865 [1991]; New York Telephone Co. v City of New York, 95 AD2d 282 [1983]; Brooklyn Union Gas Co. v City of New York, 37 AD2D 603 [1971].) Departure from this established principle is recognized only when the change is required in behalf of public service corporations or municipalities exercising a proprietary instead of a governmental function. (See Matter of Consolidated Edison Co. of New York, Inc. v Lindsay, *supra*.)

In this case, defendant presented competent evidence demonstrating its entitlement to summary judgment as a matter of law. This evidence established that the public sewer relocation in conjunction with the Family Court project was properly undertaken for the public health, safety and convenience and, thus, that plaintiff had an absolute duty to relocate its facilities at its own expense, pursuant to common law principles and Administrative Code of the City of New York § 24-521.

Plaintiff, in opposition, failed to present competent evidence raising a triable issue of fact. Plaintiff's contention that defendant was acting in a proprietary as opposed to a governmental capacity is unsupported and without merit. Plaintiff also contends that defendant agreed to reimburse plaintiff for the costs associated with relocating its facilities. In support of this contention, plaintiff relies on its agreement with John Wilson, Chief of New York City Courts. John Wilson, however, was not authorized to enter into contracts on behalf of defendant. Defendant's By-Laws promulgated pursuant to Section 1678 of the Public Authorities Law designate specific officers who have the authority to enter into contracts on behalf of defendant. The By-Laws do not designate the Chief of New York City Courts as having such authority. Although Article III, Section 2, of the By-Laws provides that defendant may designate "any other person from time to time, to perform any specific act or to execute any specific document, defendant's Board of Directors did not specifically authorize John Wilson to execute a contract between defendant and

plaintiff. Thus, the alleged agreement is not enforceable. (See Matter of Garrison Protective Services, Inc. v Office of the Comptroller of the City of New York, 92 NY2d 732 [1999]; see also Seif v City of Long Beach, 286 NY 382 [1941]; Goldberg v Penny, 163 AD2d 352 [1990].)

Accordingly, defendant's motion for summary judgment is granted and plaintiff's complaint is dismissed. In light of this determination, plaintiff's motion for partial summary judgment is denied as moot.

Dated: February 18, 2005

J.S.C.