2021 WL 4537635
Unreported Disposition
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This opinion is uncorrected and will not be published in the printed Official Reports.
Supreme Court, Albany County, New York.

City of Albany, New York, Plaintiff,
v.
NEO Albany, LCC and ALBANY ENERGY, LLC, Defendants.

901315-20
|
Decided on September 29, 2021

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Opinion

Richard M. Platkin, J.

***1** Plaintiff City of Albany ("City") moves for partial summary judgment on the second and fourth causes of action of its complaint (*see* NYSCEF Doc No. 1 ["Complaint"]). Defendants NEO Albany, LLC ("NEO") and Albany Energy, LLC oppose the motion and cross-move for dismissal of the causes of action insofar as they are directed at recovering funds granted to Albany Energy under section 1603 of the American Recovery and Reinvestment Act of 2009.

BACKGROUND [1]

The City is the owner of a solid waste management facility on Rapp Road ("Landfill") (*see* Complaint, ¶ 7). The Landfill consists of an original landfill that was closed and capped several years ago ("Original Landfill") and an expansion area that remains in use ("Expansion Area") (*see id.*, ¶¶ 8-9).

On September 18, 1995, NEO entered into a Gas Lease and Easement Agreement for the Original Landfill (*see* JS, ¶ 1). Under the agreement, the City "leased to NEO the right to extract and use gas from the original Landfill as well as enter the original Landfill and construct and operate gas production and electric generation equipment" (*id.*, ¶ 2). "These rights were conferred in exchange for the making of . . . monthly royalty payment to the City for the gas which is used for the generation of electricity" (*id.*, ¶¶ 3-4).

On September 30, 2008, the City entered into a Landfill Gas Lease Agreement ("Gas Lease") with Albany Energy relating to the Expansion Area (*see id.*, ¶ 5; *see also* NYSCEF Doc No. 25). The Gas Lease governs the relationship of the contracting parties relative to the purchase and sale of landfill gas, including allocation of the financial benefits derived from government programs intended to promote **renewable energy**, such as carbon credits, **renewable energy** certificates, **renewable energy** tax credits and voluntary emission reduction credits (*see* Gas Lease, art VI, §§ 2-5).

At issue herein are "**Renewable Energy** Tax Credits," which are defined in the Gas Lease as "the tax credit[s] derived from producing electric power using a non-conventional fuel source within the meaning of Section 45 of the Internal Revenue Code of 1986, as amended" (*id.*, art I, § 38). Under the Gas Lease,

[Albany Energy] shall retain all rights to **Renewable Energy** Tax Credits associated with the generation of electrical energy from Landfill Gas; provided, however, in the event [Albany Energy] is able to create and monetize any such **Renewable Energy** Tax Credit, [Albany Energy] shall pay to the City fifty percent (50%) of the Net Monetized Value of any

such **Renewable Energy** Tax Credit derived from Landfill Gas collected [at the Expansion Area]. Both parties agree to cooperate and use commercially reasonable efforts to maximize the Net Monetized Value of any such **Renewable Energy** Tax Credits related to the operation of the Generating Station; such cooperation shall include, but shall not be limited to, submission by [Albany Energy] to the City for the City's review and comment, at least three (3) months prior to the date on which the Generating Station is expected to be placed into service, of its proposed approach to maximization of the Net Monetized Value of the **Renewable Energy** Tax Credits (*id.*, art VI, § 4).

***2** In 2009, following execution of the Gas Lease, "Congress created an energy subsidy program as part of the American Recovery and Reinvestment Act (Pub. L. 111-5) ('ARRA'), referred to as the 'Section 1603 Grant program' " (JS, ¶ 9).

"Albany Energy applied [in July 2013] for a Section 1603 Grant for the new electric generating facility which it constructed under the . . . Gas Lease" (*id.*, ¶ 10). "On or about July 10, 2014, Albany Energy received a Section 1603 Grant of $2,073,038.00 related to the new electric generating facility" (*id.*, ¶ 11). "By receiving payment under the Section 1603 Grant, Albany Energy had to forego tax credits under Sections 48 and 45 of the [Internal Revenue Code ("IRC")] with respect to such property" (*id.*, ¶ 12).

The City claims that it is entitled to one-half of the Section 1603 Grant funds under article VI, § 4 of the Gas Lease (*see id.*, ¶ 14). Albany Energy disagrees (*see id.*, ¶ 15).

The City commenced this action on February 4, 2020 through the electronic filing of a summons and complaint (*see* NYSCEF Doc No. 1). Defendants joined issue on July 28, 2020 through the service of an answer with counterclaims (*see* NYSCEF Doc No. 2).[2] Following the limited exchange of paper discovery, the instant motion practice ensued.

ANALYSIS

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the initial showing has been made, the burden shifts to the opponent of the motion to establish, by admissible proof, the existence of triable issues of fact or a legal defense to the action (*see id.*; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). On such a motion, all evidence must be viewed in the light most favorable to the opponent of summary judgment (*see Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]).

A. Breach of Gas Lease

For its fourth cause of action, the City alleges that Albany Energy breached the Gas Lease (*see* Complaint, ¶¶ 91-95). According to the Complaint, the Gas Lease is a valid contract (*see id.*, ¶ 91) and the City has performed its obligations thereunder (*see id.*, ¶ 92), but Albany Energy "has failed and refused to fulfill its obligations" (*id.*, ¶ 93).

In its moving papers, the City argues that Albany Energy breached the Gas Lease by failing to turn over one-half of the Section 1603 Grant funds received from the federal government. The City claims that these funds represent a monetization of **Renewable Energy** Tax Credits to which Albany Energy would otherwise have been entitled, and article VI, § 4 of the Gas Lease obliged Albany Energy to pay the City 50% of the net proceeds of the monetization.

"To recover for a breach of contract, a party must establish the existence of a contract, the party's own performance under the contract, the other party's breach of its contractual obligations, and damages resulting from the breach" (*LaPenna Contr., Ltd. v Mullen*, 187 AD3d 1451, 1453 [3d Dept 2020] [internal quotation marks and citation omitted]).

***3** In construing the Gas Lease, the Court must be "guided by basic principles of contract interpretation which instruct that a contract should be construed to give effect to the parties' intent as gleaned from the four corners of the document itself, provided that its terms are clear and unambiguous" (*Elmira Teachers' Assn. v Elmira City School Dist.*, 53 AD3d 757, 759 [3d Dept 2008], *lv denied* 11 NY3d 709 [2008]). "A written agreement that is clear, complete and subject to only one reasonable interpretation must be enforced according to the plain meaning of the language chosen by the contracting parties" (*Brad H. v City of New York*, 17 NY3d 180, 185 [2011] [citations omitted]; *see Thompson v McQueeney*, 56 AD3d 1254, 1257 [4th Dept 2008]).

Under the Gas Lease, Albany Energy retained all rights to **Renewable Energy** Tax Credits associated with the generation of electricity from landfill gas at the Expansion Area. However, to the extent that Albany Energy "is able to create and monetize any such **Renewable Energy** Tax Credit," it must pay the City one-half of the "Net Monetized Value" (Gas Lease, art VI, § 4). "Net Monetized Value" means the "actual cash value of any applicable [tax credit]" received by Albany Energy after deduction of all transaction costs incurred in the "sale" (*id.*, art I, § 35). As such, Albany Energy's obligation to share the financial benefit of **Renewable Energy** Tax Credits arises only when such credits are "create[d] and monetize[d]" (*id.*, art VI, § 4).

Thus, the issue presented by the instant motions is whether the Section 1603 Grant funds received by Albany Energy in lieu of tax credits under Sections 45 and 48 constitute the "Net Monetized Value" of "**Renewable Energy** Tax Credits" within the meaning of the Gas Lease.

The Gas Lease defines **Renewable Energy** Tax Credits ("RETCs") as "the tax credit[s] derived from producing electric power using a non-conventional fuel source within the meaning of Section 45 of the Internal Revenue Code of 1986, as amended" (*id.*, art I, § 38). Section 45 of the IRC, which forms the basis of this definition, entitles taxpayers to a production tax credit based on the amount of electricity generated at a qualified **renewable energy** facility (*see* IRC § 45 [a]). In contrast, Section 48, which is not referred to in the Gas Lease, provides a tax credit for capital investments in **renewable energy** infrastructure (*see id.* § 48 [a]).

The Section 1603 program established by Congress in 2009, entitled "Grants for Specified Energy Property In Lieu of Tax Credits," was a temporary program enacted during the Great Recession that offered grants for capital investments in **renewable energy** projects in lieu of the tax credits available under Sections 45 and 48 (*see* ARRA, § 1603 [a-b]; JS, ¶ 12).

The City argues that Albany Energy "monetized" the RETCs that it otherwise would have been entitled to under Sections 45 and 48 of the IRC by accepting the Section 1603 Grant funds. In other words, the City claims that Albany Energy "sold" RETCs by "exchang[ing them] with the Federal government for a cash payment" (NYSCEF Doc No. 10 ["City MOL"], p. 6). The City further asserts that the Great Recession and the enactment of ARRA were subsequent events that could not have been foreseen by the contracting parties, and that Congress created Section 1603 as a "new way to monetize RETCs" as part of efforts to stimulate the economy (*id.*, p. 5).

For the reasons that follow, the Court concludes that the Section 1603 Grant funds received by Albany Energy are neither "**Renewable Energy** Tax Credits" nor the "Net Monetized Value" of "**Renewable Energy** Tax Credits," as such terms are defined by the clear and unambiguous language of the Gas Lease.

***4** "**Renewable Energy** Tax Credits" mean "the tax credit[s] derived from producing electric power using a non-conventional fuel source within the meaning of Section 45 of the Internal Revenue Code of 1986, as amended" (Gas Lease, art I, § 38). But the Section 1603 Grant is not a "tax credit"; it is cash grant made directly to taxpayers.

And unlike Section 45 of the IRC, which establishes a tax credit for the *production* of **renewable energy** (*see* 26 USC § 45 [a] ["renewable electricity production credit . . . in an amount equal to the product of 1.5 cents, multiplied by the kilowatt hours of electricity . . . produced . . . from qualified energy resources, and at a qualified facility . . . ."]), Section 1603 provided direct cash grants to owners of "specified energy property" based on *capital investments* in **renewable energy** infrastructure (*see* ARRA, § 1603 [b], [d]; *WestRock Virginia Corp. v United States*, 941 F3d 1315, 1318 [Fed Cir 2019] ["reimbursement of (a specified) percent of the cost of any qualified property . . . that is part of a qualified facility"]). Thus, Section 1603 Grant funds are not "derived from *producing* electric power" (Gas Lease, art I, § 38 [emphasis added]).[3]

Notably, Section 48 does provide a tax credit for capital investments in **renewable energy** infrastructure, and Congress intended the cash grants provided under Section 1603 to " 'mimic the operation of the credit under [S]ection 48' " (*WestRock*, 941 F3d at 1318, quoting H.R. Rep. No. 111-16 at 621).[4] But the definition of "**Renewable Energy** Tax Credit" used in the Gas Lease encompasses only the *production* tax credits of Section 45 (*see* Gas Lease, art I, § 38). In fact, there is nothing in the Gas Lease that obliges Albany Energy to share the benefit of any investment tax credits under Section 48.

The Court therefore concludes that the Section 1603 Grant received by Albany Energy is not a "**Renewable Energy** Tax Credit" because it is not a "tax credit" and it is not "derived from producing electric power . . . within the meaning of Section 45" (*id.*).[5]

***5** Nor can the Section 1603 Grant funds received by Albany Energy be characterized as the "Net Monetized Value" of "**Renewable Energy** Tax Credits." The term "Net Monetized Value" contemplates a "sale" of RETCs to a "third party" (*id.*, art I, § 35), but Albany Energy did not sell tax credits to the federal government (or anyone else). Rather, Albany Energy received the Section 1603 Grant in lieu of claiming (and potentially monetizing) RETCs (*see* JS, ¶¶ 11-12). Albany Energy's election to receive a cash grant under Section 1603, a program intended as "an *alternative* to the type of benefits provided under IRC § 48 for similar types of clean energy investments" (*WestRock*, 941 F3d at 1319 [emphasis added]), is not the "creat[ion] and monetiz[ation]" of tax credits within the ordinary meaning of these terms.

Moreover, even if Albany Energy's acceptance of Section 1603 Grant funds could be understood as a "sale" of RETCs (Gas Lease, art I, § 35) and the resulting "creat[ion] and monetize[ation]" of such tax credits (*id.*, art VI, § 4) — rather than a "cash grant *in lieu* of a tax credit under IRC § 48" (*WestRock*, 941 F3d at 1319) — the funds do not represent the monetization of a benefit "derived from producing electric power using a non-conventional fuel source within the meaning of Section 45" (Gas Lease, art I, § 38).[6] As explained previously, grants under Section 1603 are based solely on capital investments in **renewable energy** projects, not the production of electric power.

And contrary to the City's contention, the legislative history of Section 1603 does not show that it was intended as a "new way to monetize RETCs" (City MOL, p. 5). Rather, Congress enacted a direct grant program because "some investors in **renewable energy** projects have suffered economic losses that prevent them from benefitting from" tax credits, and "this situation, combined with [the impact of the Great Recession], has the potential to jeopardize investment in **renewable energy** facilities" (Joint Committee on Taxation, General Explanation of Tax Legislation in the 111th Congress, 2011 WL 940372, *11). Congress therefore "create[d] an *alternate program* that provides cash grants in lieu of a tax credit to investors for certain qualifying investments" (*WestRock*, 941 F3d at 1316 [emphasis added]). Thus, Section 1603 was enacted as a temporary, alternate method of encouraging investments in **renewable energy** facilities during difficult economic times, not as a method of monetizing tax credits authorized under existing programs.

Finally, it bears emphasis that the Gas Lease is an agreement "negotiated between sophisticated, counseled business people negotiating at arm's length" (*Global Reins. Corp. of Am. v Century Indem. Co.*, 30 NY3d 508, 518-519 [2017] [internal quotation marks and citation omitted]). As such, the Court is "extremely reluctant to interpret [the Gas Lease] as impliedly stating something which the parties have neglected to specifically include' " (*id.* [internal quotation marks and citation omitted]).

Accordingly, the Court concludes that the Section 1603 Grant funds received by Albany Energy were neither "tax credit[s] derived from producing electric power using a non-conventional fuel source within the meaning of Section 45" (*id.*, art I, § 38) nor the proceeds of the monetization of such tax credits (*see id.*, art I, § 35). The City's motion for summary judgment on its fourth cause of action therefore must be denied insofar as it is directed at recovering the Section 1603 Grant funds received by Albany Energy.

Albany Energy's cross motion seeks the dismissal of the City's fourth cause of action to the extent that it is directed at recovering Section 1603 Grant funds (*see* NYSCEF Doc No. 14). While the City has no direct entitlement to the grant funds as "**Renewable Energy** Tax Credits" or the "Net Monetized Value" of such tax credits, that is not the end of the inquiry.

***6** Under the Gas Lease, Albany Energy promised to "use commercially reasonable efforts to maximize the Net Monetized Value of any such **Renewable Energy** Tax Credits related to the operation of the Generating Station" (Gas Lease, art VI, § 4). By accepting Section 1603 Grant funds, however, Albany Energy irrevocably waived its right to receive tax credits under Section 45 (*see* JS, ¶ 12), thereby disabling itself from performing its contractual duty. Having voluntarily relinquished its right "to create and monetize" RETCs (Gas Lease, art VI, § 4), Albany Energy has not demonstrated the full performance of its contractual duties under the "reasonable efforts" language of article VI, § 4.

Further, while Jonathan Maurer, the managing director of Albany Energy, submits an affidavit describing the difficulties associated with the monetization of RETCs (*see* NYSCEF Doc No. 16, ¶¶ 7-12), the Court concludes that this proof falls well short of establishing as a matter of law that the City sustained no damages by reason of Albany Energy's decision to forego production tax credits under Section 45 by accepting Section 1603 Grant funds. [7]

Accordingly, the branch of Albany Energy's cross motion directed at obtaining the partial dismissal of the fourth cause of action should also be denied.

B. Unjust Enrichment

The City's second cause of action, alleging unjust enrichment, claims that "Albany Energy's receipt of the [Section 1603] award precluded Albany Energy from receiving **Renewable Energy** Tax Credits, thereby depriving the City of Albany from receiving half of the proceeds" (Complaint, ¶ 81). "Through these actions, Albany Energy has been unjustly enriched to the detriment of the City" (*id.*, ¶ 82).

"Unjust enrichment occurs when in equity and good conscience, a party obtains or possesses value that rightfully belongs to another party" (*Henning v Henning*, 103 AD3d 778, 780-781 [2d Dept 2013] [internal quotation marks, brackets and citations omitted]). It is a quasi-contractual " 'obligation which the law creates, in the absence of any agreement' " (*State of New York v Barclays Bank of NY*, 76 NY2d 533, 540 [1990], quoting *Miller v Schloss*, 218 NY 400, 407 [1916]). As such, "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]).

The Gas Lease is a valid and enforceable agreement intended to comprehensively govern the relationship of the City and Albany Energy relative to the purchase and sale of landfill gas, including allocation of the financial benefits derived from governmental programs designed to encourage the production of clean energy from renewable sources (*see* Gas Lease, art VI, §§ 2-5). The City's claim for unjust enrichment concerns the same subject matter and, therefore, is precluded (*see* *Concavage Mar. Constr., Inc. v Lou-Al-John Corp.*, 191 AD3d 843, 845 [2d Dept 2021]; *Conklin v City of Saratoga Springs*, 267 AD2d 841, 842 [3d Dept 1999]). [8]

Accordingly, the second cause of action must be dismissed.

CONCLUSION

*7 Based on the foregoing, [9] it is

ORDERED that plaintiff's motion is denied in accordance with the foregoing; and it is further

ORDERED that the second cause of action is dismissed; and it is further

ORDERED that defendants' cross motion is granted to the limited extent indicated in the preceding decretal paragraph and otherwise is denied in accordance with the foregoing; and it is further

ORDERED that the parties shall appear for a remote status conference on **October 26, 2021** at **10:00 a.m.**; and finally it is

ORDERED that, in advance of such conference, counsel for the parties shall confer with their clients and each other regarding: (1) the parties' willingness to return to mediation/ ADR; and (2) a proposed schedule for the expeditious completion of any remaining fact discovery, expert discovery and the filing of a note of issue.

This constitutes the Decision & Order of the Court, the original of which is being uploaded to NYSCEF for filing and entry by the Albany County Clerk. Upon such entry, counsel for plaintiff shall promptly serve notice of entry on all other parties entitled thereto.

Dated: Albany, New York

September 29, 2021

RICHARD M. PLATKIN

A.J.S.C.

Papers Considered:

NYSCEF Doc Nos. 9-11, 14-17, 20, 23 and 24-25.

All Citations

Slip Copy, 2021 WL 4537635 (Table), 2021 N.Y. Slip Op. 50926(U)

Footnotes

1 The following facts are drawn largely from the parties' Joint Statement of Undisputed Facts (*see* NYSCEF Doc No. 11 ["JS"]).

2 As this motion practice is directed solely at the City's claimed entitlement to Section 1603 Grant funds, there is no need to discuss the City's other causes of action or defendants' counterclaims.

3 To be sure, investments in **renewable energy** infrastructure are intended to promote the generation of clean energy, and courts have relied on that objective in limiting Section 1603 grants to the portion of the capital investment actually used to produce electricity (*see WestRock*, 941 F3d at 1320). But the Section 1603 Grant itself is based solely on capital investments, not the production of electricity.

4 For this reason, Section 1603 draws on the definitions of clean energy infrastructure established in Sections 45 and 48 (*see* ARRA, § 1603 [d]; *WestRock*, 941 F3d at 1318 ["Section 1603 (b) (2) (A) provides for reimbursement of 30 percent of the cost of any qualified property — as defined in section 48 (a) (5) (D) of the Code — that is part of a qualified facility — as defined in Section 45 (d) (3) of the Code."]).

5 While the parties' definition of "**Renewable Energy** Tax Credits" is limited to the tax credits derived from a particular program — production tax credits under Section 45 — it bears emphasis that other provisions of the Gas Lease allocating financial benefits between the parties were drafted in a more open-ended manner, without reference to a particular statutory enactment (*see id.*, art I, § 8 ["carbon credits"]).

6 Absent such a monetization, Albany Energy "shall retain all rights to **Renewable Energy** Tax Credits associated with the generation of electrical energy from Landfill Gas" (Gas Lease, art I, § 4).

7 In any event, nominal damages always are available in an action for breach of contract (*see Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402 [1993]).

8 Additionally, the City's unjust enrichment claim is expressly predicated upon allegations that Albany Energy breached the Gas Lease (*see* Complaint, ¶¶ 78-80). Thus, the claim is nothing more than an impermissible restatement of the City's contractual claim (*see Corsello v Verizon NY, Inc.*, 18 NY3d 777, 790 [2012]).

9 To the extent not specifically referenced herein, the parties' remaining contentions have been considered and found to be without merit.

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