Vernon Twp. & Vernon Twp. Mun. Utils. Auth. v. Sussex County Mun. Utils. Auth.

Superior Court of New Jersey, Appellate Division

December 12, 2022, Argued; February 16, 2023, Decided

DOCKET NO. A-0897-21, A-0911-21

Reporter
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VERNON TOWNSHIP and VERNON TOWNSHIP MUNICIPAL UTILITIES AUTHORITY, Plaintiffs-Appellants, v. SUSSEX COUNTY MUNICIPAL UTILITIES AUTHORITY, Defendant-Respondent.

Prior History: **[*1]** On appeal from the Superior Court of New Jersey, Law Division, Sussex County, Docket No. L-0267-21.

Core Terms

bonds, service contract, finance, contractual, obligations, charges, sewer, bond issuance, contracts, municipalities, parties, municipal utility, issuance, rates

Counsel: Joshua A. Zielinski and Brian R. Tipton argued the cause for appellants (O'Toole Scrivo, LLC, and Florio, Perrucci, Steinhardt, Cappelli, Tipton & Taylor LLC, attorneys; Joshua A. Zielinski and Brian R. Tipton, of counsel; Alex R. Daniel, on the joint briefs).

Thomas H. Prol and Michael S. Carucci argued the cause for respondent (Sills Cummis & Gross PC, attorneys; Thomas H. Prol and Michael S. Carucci, on the brief).

Judges: Before Judges Whipple, Mawla and Marczyk.

Opinion

PER CURIAM

On November 2, 2005, plaintiffs Vernon Township (Vernon) and Vernon Township Municipal Utilities Authority (collectively, plaintiffs) entered into a contract for sewer treatment services with defendant Sussex County Municipal Utilities Authority (SCMUA).

SCMUA is a county utility authority, created pursuant to the *Municipal and County Utilities Authorities Law (MCUAL), N.J.S.A. 40:14B-1 to -78*. It operates the Upper Wallkill Valley Water Pollution Control System, a wastewater treatment system that services other nearby towns and municipalities.

As a precondition of Vernon joining the sewer system, significant upgrades and infrastructure projects were undertaken by SCMUA so the additional wastewater could be treated and disposed **[*2]** of. Though it did not explicitly reference a precise bond resolution, a service contract was entered into with the understanding SCMUA would issue bonds to finance this expansion, secured in part by the revenue generated from the contract.

Bonds were issued in 2008 for over $27 million. The stated purpose of this issuance was to provide funds to finance planned expansion, including expanded sewer service to Vernon. As security for the bonds, SCMUA listed its provision of wastewater treatment disposal services to participants on a contractual basis. The resolution specifically noted: "After completion of the project, Vernon Township will also be paying user charges on a contractual basis." Plaintiffs did not challenge this bond resolution.

The service contract obligates SCMUA to accept sewage from Vernon as well as from Mountain Creek ski resort and a nearby development. Vernon must pay charges based on the cost of operating the system and covering the interest on the bonds issued to pay for the expansion. Like the other municipalities which use SCMUA, Vernon pays a specified rate to the utility per gallon. According to the service contract, this rate is

computed to be uniform as to all **[*3]** towns serviced by SCMUA. This arrangement mirrors the requirement in the MCUAL that rates be "as nearly as the municipal authority shall deem practicable and equitable[,] . . . uniform through the district . . . ." *N.J.S.A. 40:14B-22*.

The pricing structure has other features. Even though the rate per gallon remains uniform across all municipalities, each town SCMUA services has an Assigned Minimum Flow (AMF) that represents a floor for their usage charges. These minimums vary from town to town and are based either on monthly or annual average use. Even if a town delivers less sewage than this estimate contemplates into the SCMUA system, it is still obliged to pay the AMF amount.

In 2013, the parties amended the 2005 contract to add capacity. As a result, Vernon's AMF increased from 265,000 gallons per day to a volume of 461,000 gallons per day, a seventy-four percent increase. The motivation for this adjustment—as represented during oral argument—was Vernon's expectation of a new housing development, which would have required increased sewer capacity but ultimately did not materialize. Both parties assented and continue to perform under the 2013 deal.

The dispute here stems from this 2013 increase in AMF. **[*4]** Vernon asserts it has never used more than 223,000 gallons per day, approximately forty-eight percent of its renegotiated AMF, but it still must pay for the full amount. Some of Vernon's neighboring townships—also serviced by SCMUA—have more accurate AMF estimates, and as a result their actual usage more closely matches what they must pay. When broken down by the gallon, the rate SCMUA charges Vernon is arguably an outlier from the rate it charges the other towns. Vernon pays roughly four dollars or less per gallon of sewage delivered to SCMUA, whereas some of its neighboring towns pay in the two-to-three-dollar range.

In 2021—fifteen years after the parties entered into the service contract, thirteen years after the bond issuance, and eight years after the parties amended the 2005 contract to add capacity—Vernon sued, seeking rescission, alleging this pricing discrepancy violated the uniform pricing requirements of *N.J.S.A. 40:14B-22* and the contract itself.[1] In response, SCMUA asserted Vernon's claims were time-barred. In their view, the entanglement of the service contract with the 2008 bond resolution means *N.J.S.A. 40:14B-28* applies. That statute places a hard limit of twenty days during which a party may challenge **[*5]** the obligations provided for by bond resolutions. SCMUA accordingly moved to dismiss Vernon's complaint for failure to state a claim under *Rule 4:6-2(e)*.

The motion court heard oral arguments and rendered a decision on October 14, 2021, ruling in favor of SCMUA, stating:

> [I]n 2008, over $27 million in bond debt, backed up by the credit of the County of Sussex, was incurred by SCMUA based on the [s]ervice [c]ontract and revenue projections. Vernon never challenged the bond resolution. While Vernon claims that it does not challenge the bond resolution or its debt obligations, if this [c]ourt were to grant the relief sought in the [c]omplaint, it could very well jeopardize SCMUA's ability to pay its bond indebtedness and cause the other members of the Upper Wallkill system to pay more, or go into default with SCMUA, damaging SCMUA's credit, and possibly wreaking havoc on the financing structure which allows SCMUA to function.
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> So, while [p]laintiffs' lawsuit contends otherwise, it presents a[t] least an indirect attack on the validity, or at least the vitality, of the 2008 Bond Ordinance.

The court also analyzed the merits of plaintiffs' statutory and contractual arguments:

> The language contained within **[*6]** *N.J.S.A. 40:14B-22* allocates to the municipal utility authority the authority and discretion to assess service charges and collect service charge fees.
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> . . . .
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> [B]efore the [c]ourt now, Vernon views the [s]ervice [c]ontract with SCMUA to have been, in retrospect, "a bad deal," and now asks this court to cancel the contract, through the guise of rescission, and make a better deal, and write a better contract for Vernon than that which Vernon previously reviewed, approved, and executed.
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> . . . .
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> [T]here is no evidence presented at all to support the contention of unequal rates; and to the contrary, the record is clear that the rates are charged uniformly to all participants — except that each participant is contractually bound to its AMF.
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> Plaintiffs' counsel has not brought to this [c]ourt's attention any statutory provision, or other authority, that prohibits or bars SCMUA and a participating

[1] Plaintiffs seek to void the contract ab initio and compel damages for "overcharged" fees already paid to SCMUA.

> member from agreeing to a certain AMF in the [s]ervice [c]ontract. No case law has been cited to this court which is directly on point. Plaintiffs fail to articulate why, or on what basis, an AMF is not permissible.
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> In fact, it would appear that such [s]ervice [c]ontracts as were entered into between Vernon and SCMUA are **[*7]** specifically contemplated, and broadly authorized under N.J.S.A. 40:14B-49 and 40:14B-50.
> . . . .
>
> AMF provisions are properly allowed under the statutory authority of N.J.S.A. 40:14B-22, which vests in the [Municipal Utility Authority] the ability and authority to impose rates, rents, charges, and fees ". . . as nearly as the municipal authority shall deem practicable and equitable [to] be uniform throughout the district. . . ." If AMF provisions were not included in the [s]ervice [c]ontract — and here, there are AMF provisions that bind each of the participants in the Upper Wallkill system — the SCMUA would be at serious risk to meet its debt obligation, and to be able to bond for improvements necessitated when a new participant joins the system — as Vernon did here — at competitive interest rates.
>
> [(thirteenth and fourteenth alterations in original).]

The trial court dismissed the case with prejudice. These appeals followed.

We review Rule 4:6-2(e) motions—to dismiss for failure to state a claim upon which relief can be granted—on a de novo basis. Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157,171, 249 A.3d 461 (2021). In considering such a motion, we "examine 'the legal sufficiency of the facts alleged on the face of the complaint,' giving the plaintiff the benefit of" all reasonable inferences of fact. *Ibid.* **[*8]** (quoting Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 107, 203 A.3d 133 (2019)). The test for determining the adequacy of a pleading is "whether a cause of action is 'suggested' by the facts." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746, 563 A.2d 31 (1989) (quoting Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192, 536 A.2d 237 (1988)). Dismissals should be made with prejudice only where the factual allegations are "palpably insufficient to support a claim on which relief can be granted," or if discovery will not give rise to such a claim. Rieder v. State, 221 N.J. Super. 547, 552, 535 A.2d 512 (App. Div. 1987); Dimitrakopoulos, 237 N.J. at 107.

Plaintiffs first assert the motion court incorrectly determined that N.J.S.A. 40:14B-28 bars the claim as a challenge to a bond resolution outside of the first twenty days of issuance. That statute reads, in relevant part:

> [A]ny action or proceeding of any kind or nature in any court questioning the validity or proper authorization of bonds provided for by the bond resolution, or *the validity of any covenants, agreements or contracts provided for by the bond resolution* shall be commenced within [twenty] days after the first publication of such notice. [If no objection is made in that timeframe], then all . . . persons whatsoever shall be forever barred . . . from . . . commencing any action or proceeding in any court, questioning . . . the validity of any such covenants, agreements or contracts, and [the municipal utility] shall be conclusively deemed to have been validly created and established . . . and said bonds, covenants, agreements and contracts shall be conclusively deemed to be valid and binding obligations in accordance with their terms and tenor.
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> [N.J.S.A. 40:14B-28 (emphasis added).]

Plaintiffs argue they have not challenged a bond ordinance or resolution, but rather advanced statutory and contractual **[*9]** claims based on Vernon's contracts with SCMUA. They assert, the statutory prohibition only applies to contracts "provided for by the bond resolution." Therefore, because the 2005 service contract predates the 2008 bond issuance by a few years, the two lack a sufficient connection to bar plaintiffs' claims under the statute. While plaintiffs concede the Legislature granted utilities the power to issue bonds in order to pay for infrastructure projects via N.J.S.A. 40:14B-2(4), they argue the statute must be narrowly read and contend the Legislature did not intend to apply the twenty-day limitation period to contracts that predate the issuance of a bond resolution.

We discussed this precise issue once before, but only in dicta. In *Graziano v. Mayor of Montville*, reaching a decision on other grounds, we observed that

> [a]ppellants contend that the phrase "contract provided for by the bond resolution" excludes the [contract which predated the bond resolution] because it preceded the bond resolution and was not "provided for" by them. Respondents argue, with persuasion, that a reasonable interpretation *of this section of the act would bar an attack on the*

> *validity of a contract incorporated in a bond resolution* ***[*10]*** *by reference*, especially when payment of the bonds authorized by the resolution depends upon obligations established by such contract.
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> [*162 N.J. Super. 552, 555-56, 394 A.2d 103 (App. Div. 1978)* (emphasis added).]

In different contexts, our Supreme Court has emphasized that statutes of limitation in bond issuances are designed to "assure bondholders and financial markets that bonds, once issued, will not be subject to attack," and that "[p]ermitting late-filed challenges to bond ordinances would erode public confidence in the legitimacy of bonds that are issued . . . ." *In re Ordinance 2354-12 of Twp. of W. Orange, Essex Cty. v. Twp. of W. Orange, 223 N.J. 589, 592, 127 A.3d 1277 (2015)* (considering *N.J.S.A. 40A:2-49*, a similar statute).

The 2005 service contract predates the 2008 bond resolution. Therefore, Vernon asserts the resolution cannot "provide for" the contract, which must be treated as a wholly separate instrument. They argue it is unfair for a contract to be shielded from scrutiny simply because it was later financed using bonds. We disagree.

Our analysis begins with an examination of whether the bond resolution "provides for" the 2005 service contract by reference. If it does, then there is no dispute, the statute clearly applies, and the present action is time-barred. *N.J.S.A. 40:14B-28*.

The most plausible interpretation of "provides for" is "incorporates by reference," as was suggested **[*11]** by *Graziano*. *162 N.J. Super. at 555*. There are two requirements for a proper and enforceable incorporation by reference of a separate document into a contract: (1) the separate document must be described in such terms that its identity may be ascertained beyond doubt, and (2) the party to be bound by the terms must have knowledge of and assent to the incorporated terms. *Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn, 410 N.J. Super. 510, 534, 983 A.2d 604 (App. Div. 2009)*.

Here, the two documents are tightly interwoven to the degree that they satisfy the standard for incorporation by reference. First, the service contract explicitly contemplates SCMUA's issuance of bonds to finance the necessary infrastructure upgrades required to service Vernon. SCMUA-issued bonds are referenced over thirty times in the contract, including statements such as:

> The [g]eneral [c]harge to all [p]articipants shall at all times be sufficient to pay the principal of and interest on any and all bonds, loans or other obligations of [SCMUA] issued to finance in whole or in part the Upper Wallkill System . . . .
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> . . . .
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> Since the total capital costs of the . . . project will exceed the capital contribution provided by [Vernon] . . . "Additional Bonds" will be required to be issued to finance the . . . [p]roject.

Clearly, plaintiffs assented **[*12]** to the financing of the sewer expansion via bond issuance. The intertwined nature of the service contract and the bond resolution is further confirmed by the bond resolution itself, which clearly delineates the bonds are issued for the purpose of financing Vernon's sewer expansion, the fees owed under service contracts with municipalities are to serve as security for the bonds, and that SCMUA is unaware of any litigation which impacts the issuance of the bonds.

In 2005, the parties contracted with the understanding that bonds would be issued to finance the project; then in 2008, bonds were issued to finance that project. The bond issuance clearly contemplates the 2005 contract. It specifically references the contractual obligations of other members of the sewer system as security for the bonds, and states "[a]fter completion of the project, Vernon . . . will also be paying user charges on a contractual basis." Furthermore, the project of expanding the sewer service to Vernon is specifically recognized as the purpose of the bond issuance. At the time the bonds were issued, the parties had no other contractual obligations. Therefore, the 2005 service contract is the only plausible document **[*13]** implicated by these statements. The standard for incorporation by reference is satisfied. *Alpert, 410 N.J. Super. at 534*.

We reject plaintiffs' assertion the present suit for contract rescission is wholly unrelated to and separate from the bond issuance. The trial court correctly determined that granting the relief sought would "jeopardize SCMUA's ability to pay its bond indebtedness" and could "wreak[] havoc on the financing structure which allows SCMUA to function." These are the precise outcomes *N.J.S.A. 40:14B-28* seeks to avoid. We conclude the 2005 service contract and 2008 bond resolution are legally incorporated by reference, and the present suit is time-barred under

N.J.S.A. 40:14B-28. We need not reach any remaining arguments.

Affirmed.

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