PHILIP NEIL CHARLES, ARIADIS RIVERA CHARLES, KERWYN PIERRE, JOHN DOE(S), Plaintiffs, v. PLAINFIELD MUNICIPAL UTILITIES AUTHORITY, Defendant	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: UNION COUNTY DOCKET NO. UNN-L-1068-09 Civil Action
PLAINFIELD MUNICIPAL UTILITIES AUTHORITY, Defendant/Third Party Plaintiff v. CITY OF PLAINFIELD, Third Party Defendant	

BRIEF OF THE CITY OF PLAINFIELD IN OPPOSITION TO THE THIRD PARTY COMPLAINT OF THE PLAINFIELD MUNICIPAL UTILITIES AUTHORITY (AS TO COUNT THREE OF THE COMPLAINT – SHARED SYSTEM SERVICES FEES)

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STATEMENT OF FACTS

Pursuant to the Municipal and County Utilities Authorities Law, N.J.S.A. 40:14B-1 et seq., ("MCUA"), the City of Plainfield ("the City") created the Plainfield Municipal Utilities Authority (the "Authority") by Ordinance MC-1995-19 adopted September 18, 1995, entitled, "An Ordinance Creating the Plainfield Municipal Utilities Authority" (the "Creation Ordinance"). (Certification of Daniel A. Williamson, Exhibit A) ("Williamson Certification"). The Authority is charged in Section III of the Creation Ordinance with the responsibility, inter alia, of providing sewage collection and disposal services and the provision of solid waste services and facilities within the City "in accordance with the terms of an agreement to be executed by and between the City and the Authority". Id.

In Ordinance MC-1997-6, adopted April 7, 1997, the City authorized the Execution, Delivery and Performance of an Interlocal Services Agreement between the City of Plainfield and the Plainfield Municipal Utilities Authority and a Related Deficiency Agreement. (Williamson Certification, Exhibit B).

A. Interlocal Services Agreement

In accordance with the above Ordinances, the City and the Authority entered into an agreement dated October 17, 1997, entitled "Interlocal Agreement by and between the City of Plainfield and the Plainfield Municipal Utilities Authority." (hereinafter referred to as the "ISA") (Attached to Williamson Certification as Exhibit C).

The ISA sets forth the terms and conditions of the Authority's provision of Sewerage and Solid Waste Services in the City of Plainfield.

1. Lease terms.

In §202 of the ISA, the City agreed to lease to the Authority the System Assets for a period of (i) thirty (30) years, or (ii) one year following the final maturity of any bonds, notes or other obligations issued by the Authority, but in any event not greater than 40 years.

2. Consideration

In consideration for the lease of the Sewerage System Assets, the Authority agreed to a lease payment of $812,000, increasing to $1,062,000.00 on June 1, 1999, - to be adjusted thereafter in accordance with an Escalation Factor. (ISA, §203(a)).

In consideration for the lease of the Solid Waste System Assets, the City agreed to appropriate as part of its annual budget an amount necessary to pay the cost of disposal of Solid Waste originating within the geographical boundaries of the City. (ISA, §203(b)(i)). In return, the Authority is to pay as a lease payment for the Solid Waste System Assets, an amount equal to the difference between (i) the City appropriation provided above, and (ii) $1,200,000 of said City appropriation. (ISA, §203(b)(ii)).

3. Rules and Regulations

The ISA provides that the Authority issue and enforce rules and regulations regulating the maintenance and operation of the Sewerage System, and the Solid Waste System. (ISA, §701).

Similar powers have been provided to the Authority pursuant to the MCUA. Pursuant to N.J.S.A. 40:14B-20(14), the Authority is empowered "To enter into any and all contracts, execute any and all instruments, and do and perform any and all acts or things necessary, convenient or desirable for the purposes of the municipal Authority or to carry out any power expressly given in this act, ..."

Pursuant to N.J.S.A 40:14B-20(12), the Authority has the power:

"To make and enforce bylaws or rules and regulations for the management and regulation of its business and affairs and for the use, maintenance and operation of the utility system and any other of its properties, and to amend the same."

4. Authority Rates and Charges

The Authority is required to charge and collect Service Charges in accordance with the terms of the MCUA, and that such Service Charges be established at the rates which are estimated by the PMUA to be sufficient to provide sufficient sums in each Fiscal Year as necessary to the amount needed to pay for its various financial obligations. (Williamson Certification, Exhibit C, ISA §202).

In §405 of the ISA, the Authority is to establish a billing and accounting system for its users. The ISA further provides that service charges are determined solely by the Authority.

> Notwithstanding the provisions of any ordinance, rule or regulation to the contrary, the Service Charges charged and collected by the Authority shall be determined solely by the Authority . . . . Id.

On or about May 12, 1998 – after the execution and delivery of the ISA in October 1997, the Authority's Commissioners adopted a Rate Setting Resolution in which it established a Charge which the Authority refers to as a "Shared System Services Fee" to be imposed upon its customers. (See Authority Answer to Third Amended Complaint ¶23; Williamson Certification, Exhibit E). The Authority maintains that this Shared System Fee is currently imposed on all property owners for the collection and disposal of solid waste from "public areas", which collection and disposal provides a benefit to the general public and property owners in the City (Authority Answer to Third Amended Complaint, ¶ 28.)[1]

5. Deficiency Agreement

Pursuant to the ISA, the parties executed a related Deficiency Agreement which provides, inter alia, a procedure wherein the City would, if necessary, provide financial assistance to the Authority through the payment of such sums necessary to cover deficits in revenues from the

[1] The Authority defines "public areas" as including the streets and public right of ways throughout the City, the downtown area of the City, and City Parks. (Authority Answer to Third Amended Complaint, ¶ 27).

operation of the Sewerage and Solid Waste Systems. (Williamson Certification, Exhibit C, ISA §501).

B. City Budgetary Considerations

As a municipal entity, the City derives its revenues from the collection of property taxes from Plainfield property owners. The Mayor submitted her Executive Budget in November, 2009, which resulted in 15 layoffs effective February 17, 2010. Subsequently, the City Council, after further review and analysis of the Executive Budget, recommended additional reductions totaling in excess of $1 Million. The City finalized/adopted its budget for Fiscal Year 2010 on February 16, 2010. Should the City be unable to identify alternatives, those reductions will require approximately 7 additional City employees to be laid off and will also require the outsourcing of some of its important City services. Notwithstanding these budget reductions and other steps to achieve savings, property taxes for Plainfield homeowners will increase by approximately $300.00 per average assessment. (Certification of Bibi Taylor, ¶ 3-8) ("Taylor Certification").

The Authority charges a "Shared System Services Fee" for community services for downtown street sweeping and public can service, and collection of trash from municipal buildings, public areas, parks and community sites and events. If the costs of shared systems services are placed on the City, there would be an immediate and substantial impact on the City budget and impose an even greater tax burden on Plainfield property owners. There is also the potential that this additional cost could bring the City budget over the City's cap limit. (Taylor Certification, ¶ 10-13).

PROCEDURAL HISTORY

Plaintiffs Philip Neil Charles, Ariadis Rivera Charles and Kerwyn Pierre (collectively referred to as "Plaintiffs") filed an action in lieu of prerogative writ under Docket No. UNN-L-1068-9 against the Plainfield Municipal Utilities Authority. In its Third Amended Complaint filed April 30, 2009, plaintiffs challenge the validity of the Authority's actions and practices with regard to:

1. Public notice of a meeting to be held on January 22, 2009 (Count One);
2. Retroactivity of rates increases (Count Two);
3. Shared System Services fees (Count Three);
4. Opting Out Procedures (Count Four);
5. Charges to Vacant Land (Count Five);
6. Charges for Excess Solid Waste (Count Six);
7. Charges for Cart Return (Count Seven);
8. Charges to Unoccupied Dwellings (Count Eight);
9. Calculation of Sewerage Service Charges (Count Nine); and
10. Compensation to Authority members (Count 10).

On or about July 24, 2009, the Authority filed an Amended Answer to the Third Amended Complaint. The Authority also filed a Third Party Complaint joining the City of Plainfield as a necessary and indispensable party solely as to the Count Three of the Complaint (Shared Systems Services Fees). The Authority maintains that should the plaintiffs ultimately prevail as to Count Three, the City would then be responsible for the costs of Shared Services Fees through property taxes.

The Authority seeks relief with respect to the payment of the costs of Shared Services provided to the City and public lands, including if necessary, a declaration that the City is required to pay the costs for Shared Services, and that the ISA and/or the Deficiency Agreement be reformed to reflect any such declaration by the Court.

On September 11, 2009, the City filed its Answer to the Third Party Complaint as to Count Three.

On January 25, 2010, the Court entered an Order dismissing Counts One, Two, Five, Six, Eight and Nine of the Third Amended Complaint pursuant to a Stipulation of Partial Settlement between the plaintiffs and defendant Authority. The Court has scheduled oral argument on March 18, 2010 with regard to Count Three of Plaintiff's Complaint and the Authority's Third Party Complaint, (and if necessary, as to Count Ten), with initial briefs to be filed by February 19, 2010.

LEGAL ARGUMENT

POINT ONE

THE AUTHORITY'S SHARED SYSTEMS SERVICES FEE IS A VALID CHARGE TO AUTHORITY RATEPAYERS

The City of Plainfield concurs with and joins in the Authority's Brief to the extent that the Authority maintains that the Shared Services Fee is a proper and legitimate charge to Plainfield property owners and occupants under State law.

The City also agrees with the Authority that Count Three of Plaintiffs' Complaint should be dismissed.

The Authority pursuant to the ISA provides solid waste services for City owned or controlled properties and municipal facilities; collection and disposal of solid waste from public street cans and parks, solid waste generated at public and community events, the downtown business containers; and disposes of City collected street sweepings, leaves and other waste from City streets. (Williamson Certification, Exhibit D). These services provided to the City's public areas and streets are necessary and vital services that enhance the health and welfare of all Plainfield residents – including owners and occupants of real property in the City.

Alternatively, if the Court determines that the Shared Services Fee cannot be validly charged to Authority ratepayers, then the City of Plainfield maintains that under the ISA, these fees or costs cannot be charged to the City of Plainfield.

POINT II

THE AUTHORITY IS NOT ENTITLED TO REWRITE OR REFORM THE CONTRACT TO REQUIRE THE CITY TO PAY FOR SHARED SYSTEMS SERVICES COSTS

Under §204(c) of the ISA and §202 of the Deficiency Agreement, the City and the Authority specifically agreed that as part of the valuable consideration for the lease and control the City's sewerage and solid waste systems, **the City would not be charged solid waste or sewer service charges for "all properties owned or controlled by the City"**. (Williamson Certification, Exhibit C) (emphasis added).

"Service Charges" are defined in the ISA, Article I, Definitions, as:

> Rents, rates, fees or other charges for direct or indirect connection with, or the use of the services of the systems, including charges relating to the recycling of recyclable materials.

The Deficiency Agreement §202 similarly reflects that the City shall not be charged:

> "Notwithstanding anything herein to the contrary, **the Authority shall not charge and collect service charges from the City with respect to the provision of the sewerage system or solid waste systems**. (emphasis added).

The only exception is for solid waste charges for collection and disposal of solid waste that is illegally disposed of on City owned property for which it arranges disposal at the direction of the City. (§202, Deficiency Agreement).

The City's exemption from payment of services charges is a material part of the consideration for approving the agreement – it is not an incidental or inconsequential provision of the ISA.

Thus, as executed, the ISA is a ". . . legal, valid and binding obligation of the Authority, enforceable against it in accordance with its terms." ISA, §203(c), Representations and Warranties.

A. The Authority cannot rewrite the contract.

In its Third Party Complaint, the Authority asks the Court to rewrite the ISA and Deficiency Agreement to remove a core and essential provision – namely, that the Authority shall not charge or

collect service charges from the City with respect to the provision of the sewerage and solid waste services – including those which the Authority describes as Shared System Services.

The Authority's attempt to so modify the original contract terms should be firmly rejected. A court has no power to rewrite the contract of the parties by substituting a new or different provision from what is clearly expressed in the instrument, nor may a court make a better contract for either party, or supply terms that have not been agreed upon. Rahway Hosp. v. Horizon Blue Cross Blue Shield of New Jersey, 374 N.J. Super. 101, 111 (App. Div. 2005). Where the terms of an agreement are clear, courts ordinarily will not make a better contract for parties than they have voluntarily made for themselves, nor alter their contract for the benefit or detriment of either. Id. See also Grow Company, Inc. v. Chokshi, 403 N.J. Super. 443 (App. Div. 2008).

B. Reformation is not an available remedy.

Reformation of a contract is an equitable remedy, traditionally available when there exists either (1) mutual mistake or (2) unilateral mistake by one party and fraud or unconscionable conduct by the other. See Dugan Constr. Co. v. N.J. Tpk. Auth., 398 N.J. Super. 229, 242-43 (App. Div.), certif. denied, 196 N.J. 346 (2008), citing St. Pius X House of Retreats, Salvatorian Fathers v. Diocese of Camden, 88 N.J. 571, 577 (1982)).

Moreover, New Jersey Courts firmly adhere to the rule that reformation is an "extraordinary remedy," requiring a "higher order of proof." Such proof must be "[c]lear, convincing proof of facts pertinent to the remedy." Martinez v. John Hancock Mutual Life Ins. Co., 145 N.J. Super. 301, 312 (App. Div. 1976), certif. denied, 74 N.J. 253 (1977) (citing Heake v. Atlantic Cas. Ins. Co., 15 N.J. 475, 481 (1954).

In this matter, there is no allegation of unilateral mistake or proof of fraud on the part of the City. Therefore, in order to prevail on its reformation claim, the Authority must provide clear and

convincing proof that there was a mutual mistake by the City and the Authority at the time of contract inception.

Reformation predicated upon mutual mistake requires that both parties are in agreement at the time they attempt to reduce their understanding to writing, and that the writing fails to express that understanding correctly. St. Pius, supra, 88 N.J. at 580 (emphasis added). Mutual mistake exists only when "both parties were laboring under the same misapprehension as to [a] particular, essential fact." Bonnco Petrol, Inc. v. Epstein, 115 N.J. 599, 608 (1989).

As stated in St. Pius, supra 88 N.J. at 580-81:

> For a court to grant reformation there must be 'clear and convincing proof' that the contract in its reformed, and not original, form is the one that the contracting parties understood and meant it to be ") . . . ("Only upon the production of proof clear, convincing and free from doubt that the contract in its reformed and not original form is the one that the contracting parties understood and meant it to be -- and as in fact it was but for the alleged mistake in its drafting -- will this court grant an applicant [reformation]"). [citations omitted] [emphasis added]

See also Central State Bank v. Hudik-Ross Co. Inc., 164 N.J. Super. 317, 323 (App.Div.1978)

In this case, there is **no** evidence, let alone clear and convincing evidence, that the ISA's unambiguous provision that the City not be charged for disposal on public properties was conditioned on the Authority's successful imposition of a Shared Systems Service Fee. The clear and unambiguous intent of the parties was that the City would not be subject to such charges (with the exception of costs of illegal dumping performed at the City's request).

The ISA provides that the Authority is to establish rates and fees to cover the costs of its operations. There is no reference anywhere in the ISA to "Shared Services Fees", and the Authority's attempts to read such a provision into the contract should be rejected. The ISA was executed October 17, 1997, and the Authority enacted its "Shared Service Fee" as part of its rate structure on May 12, 1998 - well after the ISA was finalized.

It would be unjust and inequitable for the Court to now impose on the City an obligation to pay for the costs of disposal on public properties and lands when under the ISA the contractual intent of the parties was that the City would not be liable for any such costs. There would be a tremendous impact on the City's finances, imposing an additional and unwarranted tax burden on Plainfield residents over and above this year's tax increases, with the potential of causing the City to exceed its cap limit. The City of Plainfield would unjustly be deprived of the benefit of its bargain when the Interlocal Services Agreement was executed.

If the Court rules in favor of Plaintiffs as to the Shared System Services Fee, and after the financial impact of such a ruling can be fully assessed, the City remains willing to further discuss the matter with the Authority. The City is not unmindful of its relationship with the Authority and is not heedless to the significant fiscal impact of an adverse ruling by the Court. To reform the ISA to add terms and conditions not within the original intent of the City is not, however, the proper remedy.

CONCLUSION

For the foregoing reasons, it is respectfully maintained that the Authority's Third Party Complaint should as a matter of law and as a matter of fairness and equity be dismissed.

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City of Plainfield

Dated: 2/18/10