

**Smith v Advance Auto Parts, Inc.**

Supreme Court of New York, New York County

July 20, 2023, Decided

INDEX NO. 190261/2016

**Reporter**

2023 N.Y. Misc. LEXIS 3741 \*; 2023 NY Slip Op 32527(U) \*\*

**[\*\*1]** CAROLINE SMITH, CAROLINE SMITH, Plaintiff,  
- v - ADVANCE AUTO PARTS, INC., AIR & LIQUID  
SYSTEMS CORPORATION, ALCOA, INC., ALCO  
PRODUCTS, INC., ALPHA WIRE CORP., AMERICAN  
BILTRITE INC., AMERICAN INSULATED WIRE  
CORP., A.O SMITH WATER PRODUCTS COMPANY,  
AMERICAN STANDARD, INC., ARMSTRONG  
INTERNATIONAL, INC., ARMSTRONG PUMPS, INC.,  
ASBEKA INDUSTRIES, INC., AURORA PUMP  
COMPANY, A.W. CHESTERTON CO., INC., AWC 1997  
CORP., BELDEN WIRE & CABLE CO., BORG  
WARNER CORPORATION, BURNHAM HOLDINGS,  
INC., BW/IP, INC., CARBORUNDUM INC., CARRIER  
CORPORATION, CBS CORPORATION, CCX, INC.,  
CERTAINTEED CORPORATION, CIRCUIT BREAKER  
SALES, INC., CLEAVER-BROOKS INC., COOPER  
INDUSTRIES INC., COURTER'S COMPANY, CRANE  
CO., CRANE PUMPS & SYSTEMS, INC., CYTEC  
INDUSTRIES INC., DANA CORPORATION, DEMING  
PUMPS. DUREZ CORPORATION, EATON  
ELECTRICAL, INC., ELECTRIC SWITCHBOARD CO.,  
INC., ERICSSON, INC., FEDERAL PACIFIC ELECTRIC  
COMPANY, FEDERAL PACIFIC EQUIPMENT INC.,  
FEDERAL PUMP COMPANY, FEDERAL PUMP  
CORPORATION, FISCHBACH & MOORE, INC., FMC  
CORPORATION, FLUOR CORPORATION,  
FLOWSERVE CORPORATION, FORD MOTOR  
COMPANY, FORT KENT HOLDINGS, INC., FOSTER  
WHEELER, LLC, GARDNER DENVER, INC.,  
GENERAL CABLE CORPORATION, GENERAL  
ELECTRIC COMPANY, GENERAL REFRACTORIES  
CO., GENERAL WIRE & CABLE, GENERAL WIRE  
PRODUCTS, INC., GENUINE PARTS COMPANY,  
GEORGIA-PACIFIC LLC, GOULDS PUMPS  
INCORPORATED, GRAYBAR ELECTRIC COMPANY  
INC., GRUNDFOS PUMPS CORPORATION, HATZEL  
& BUEHLER INC., HENRY VOGT MACHINE CO.,  
HONEYWELL INTERNATIONAL, INC., HOWDEN  
BUFFALO, INC., HUBBELL POWER SYSTEMS INC.,  
IMO INDUSTRIES, INC., INGERSOLL RAND

COMPANY, J.H. FRANCE REFRACTORIES CO.,  
JOHNSON CONTROLS, INC., KAISER GYPSUM INC.,  
KEYSPAN ENERGY CORPORATION, KING  
INSULATION INC., LEVITON MANUFACTURING CO.,  
LIGHTOLIER INC., METROPOLITAN INSURANCE  
COMPANY, MINE **[\*\*2]** SAFETY APPLIANCES  
COMPANY, NATIONAL GRID, NATIONAL GRID  
GENERATOR, LLC, NATIONAL LIGHTING COMPANY,  
O'CONNOR CONSTRUCTORS, INC., PEERLESS  
ELECTRIC COMPANY, PEERLESS INDUSTRIES,  
INC., PENT AIR PUMP GROUP, INC., PFIZER INC.,  
PLASTICS ENGINEERING COMPANY, PRESCOLITE,  
INC., PROGRESS LIGHTING, INC., RILEY POWER  
INC., ROCKBESTOS SUPRENANT CABLE I CORP.,  
ROCKWELL AUTOMATION INC., RSCC WIRE &  
CABLE, LLC, SCHNEIDER ELECTRIC CORP., SHELL  
OIL, SIEMENS ENERGY & AUTOMATION, INC.,  
SPIRAX SARCO, INC., SQUARE D COMPANY, SPX  
COOLING TECHNOLOGIES. INC. JACO. INC., THE  
FULTON COMPANIES, THE OKONITE COMPANY,  
THE TRANE COMPANY, THE WM POWELL  
COMPANY, THERMO ELECTRIC CO., INC.,  
TREADWELL CORPORATION, TYCO FLOW  
CONTROL, INC., TYCO VALVES & CONTROLS, INC.,  
UNION CARBIDE CORP., UNITED STATES STEEL  
CORPORATION, VELAN VALVE CORPORATION,  
VICTOR WIRE & CABLE CORP., VIKING PUMP CO.,  
INC., WARREN PUMPS, WEIL MCLAIN, YARWAY  
CORPORATION, YORK INDUSTRIES INC., YORK  
INTERNATIONAL, YUBA HEAT TRANSFER, LLC, AC  
LIGHTING & ELECTRICAL SUPPLIES, LLC, COOPER  
CROUSE-HINDS, LLC; FOR ITS CHICO X BRAND  
PRODUCTS, GEICO CORPORATION, MACY'S, INC.,  
SEARS ROEBUCK & COMPANY, GOULD  
ELECTRONICS, INC. INDIVIDUALLY AND AS  
SUCCESSOR IN INTEREST TO GOULD., INC., AS  
SUCCESSOR IN INTEREST TO I-T-E IMPERIAL  
CORP AND BULLDOG ELECTRIC PRODUCTS CO,  
EX-FM, INC. FORMERLY KNOWN AS FISCHBACH  
AND MOORE, INCORPORATED, LONG ISLAND  
POWER AUTHORITY, LONG ISLAND LIGHTING  
COMPANY, Defendant.

**Notice:** THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

## Core Terms

notice of claim, public authority, electrical, subsidiary, summary judgment motion, statute of limitations, summary judgment, Reply

**Judges:** [\*1] PRESENT: HON. ADAM SILVERA, Justice.

**Opinion by:** ADAM SILVERA

## Opinion

### DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 020) 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 969, 970, 973, 974, 975 were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is ordered that the instant motion for summary judgment, pursuant to [CPLR §3212](#), is denied for the reasons set forth below.

Here, defendants Long Island Power Authority ("LIPA") and Long Island Lighting Company ("LILCO") move to dismiss this action on the grounds that plaintiff has both failed to bring their claims within the statute of limitations and failed to serve timely Notices of Claim [\*3] upon defendants pursuant to New York Public Authority & General Municipal Law. See *N.Y. Pub. Auth. Law § 1020(y)*; *N.Y. Gen. Mun. § 50(e)*. LILCO is a subsidiary of LIPA, and defendants contend that this affords LILCO the same "privileges and immunities" as LIPA, a public authority, including a notice of claim. See Memorandum of Law in Support of Motion for Summary Judgment, p. 6.

In opposition, plaintiffs contest the dismissal of claims against LILCO, on the basis that LILCO was a private entity during the period of **asbestos** exposure at issue herein, and [\*2] is therefore not subject to the notice requirements for a public authority. See Plaintiffs' Opposition to Long Island Power Authority, s/h/a Long Island Lighting Company's Motion for Summary Judgment [*sic*], p. 13. Plaintiffs further note that there

is no authority for applying the notice of claim requirement retroactively. *Id.* at p. 12. Defendants reply, reiterating LILCO's status as a subsidiary of LIPA and noting that LILCO has been a public subsidiary since 1998, prior to the commencement of this lawsuit. See Reply Brief in Further Support of Motion for Summary Judgment, p. 10-11.

The Court notes that summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law. See [Alvarez v Prospect Hosp., 68 NY2d 320, 324 \(1986\)](#). "The 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 eliminate any material issues of fact from the case". [Winegrad v New York University Medical Center, 64 NY2d 851, 853 \(1985\)](#). Despite the sufficiency of the opposing papers, the failure to make such a showing requires denial of the motion. See *id.* at [853](#). Additionally, summary judgment motions should be denied if the opposing party presents admissible [\*3] evidence establishing that there is a genuine issue of fact remaining. See [Zuckerman v \[\\*\\*4\] City of New York, 49 NY2d 557, 560 \(1980\)](#). "In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility." [Garcia v J.C. Duggan, Inc., 180 AD2d 579, 580 \(1st Dep't 1992\)](#), citing [Dauman Displays, Inc. v Masturzo, 168 AD2d 204 \(1st Dep't 1990\)](#).

Here, it is important to note that LIPA was created specifically to remedy LILCO's conduct as a private electric provider. LIPA's primary purposes included closing LILCO'S Shoreham Nuclear Power Station, the very site of plaintiff-decedent's **asbestos** exposure, and otherwise broadly reducing power costs to LILCO's customer base, including by replacing LILCO as an electric provider. See [Citizens for an Orderly Energy Policy, Inc. v Cuomo, 78 NY2d 398, 407-408 \(1991\)](#); see also [Suffolk County v Long Island Power Authority, 258 AD2d 226, 232 \(1999\)](#) ("the Court of Appeals has observed that the '*sine qua non* objective of the [LIPA] Act was to give LIPA the authority to save ratepayers money by controlling and reducing utility costs").

Defendants cite a myriad of caselaw in their moving papers to explain what a statute of limitations is and why it must be upheld, along with cases upholding a notice of claim requirement against various public authorities. See Memorandum of Law in Support, *supra*, at p. 5-10. However, at issue herein is not whether statutes of

limitations [\*4] or notice of claim requirements are reasonable, valid, or generally upheld against municipalities/public authorities. Rather, the issue is whether a private entity should be afforded the benefits of these requirements for potentially tortious conduct due to later acquisition by a public authority. On this topic, defendants assert their primary argument solely in an unsupported footnote. See *id.* at p. 11, n.2. Defendants, in reply, simply attack the caselaw cited by plaintiff as being irrelevant due to not mentioning notice of claim requirements or LILCO. See Reply Brief, *supra*, at p.9 (discussing [**\*\*5**] [Merrimack Mutual Fire Ins. Co. v Long Island Power Authority, 143 AD3d 953 \[2d Dep't 2016\]](#) and [Heeran v Long Island Power Authority, 141 AD3d 561 \[2d Dep't 2016\]](#)).

In doing so, defendants erroneously attempt to place their burden at summary judgment on plaintiff, the non-moving party. It is defendants' burden to prove, as a matter of law, what is stated in their footnote—that "any action against LILCO...is subject to the same notice of claim requirement [as LIPA]." *Supra*. And indeed, it is defendants that provide next to no case law mentioning LILCO, or any analogous situations to the relationship between LILCO and LIPA. Their multiple examples of notice requirements against public authorities, acting in a public capacity, are wholly irrelevant [**\*\*5**] to the instant case. See *e.g.*, [Bridgeview at Babylon Cove Homeowners Ass'n, Inc. v Inc. Vil. of Babylon, 41 A.D.3d 404 \(2d Dep't. 2007\)](#) (holding that notice of claim requirement was upheld against a village/municipality); [Loughlin v NYCTA, 983 NYS2d 204 \(Sup. Ct. N.Y. Co. 2013\)](#) (upholding a notice of claim requirement against New York City Transit Authority).

Regarding LILCO specifically, Defendants attempt to highlight one unreported federal case which found that LILCO had proper standing to bring a claim under the New York State False Claims Act, reserved for public entities. See Reply Brief, *supra*, at p. 6-7 (citing [SPE Utility Contractors, LLC v. Long Island Lighting Company, 2016 WL 11448126 \[E.D.N.Y. Nov. 28, 2016\]](#)). In *SPE*, the plaintiff was explicitly contracted with LILCO, working in its capacity' as a LIPA subsidiary, (named in the contract as "LILCO d/b/a LIPA") for work on electrical installation and underground electrical transmission feeder lines from Great Neck to Port Washington, New York. *Id.* at p. 2. The *SPE* court framed the issue as "whether a payment made to LILCO, **when acting as a wholly owned subsidiary of LIPA**, constitutes payment to a public [**\*\*6**] benefit corporation for the purpose of supporting a claim under the FCA." *Id.* at p. 3 (emphasis added).

LILCO in the instant action is being sued in their capacity as the *private* former operators of Shoreham Nuclear Power Station—a facility so concerning to public welfare that it indeed informed LIPA's inception and [**\*\*6**] later acquisition of LILCO. Here, LILCO is not being sued "when acting as" a subsidiary of LIPA. The relevant inquiry here is whether LILCO was functioning as a subsidiary of LIPA *at the time of the contested conduct*.

Plaintiffs' cases in opposition, in fact, address the issue at hand more directly. In [Merrimack Mut. Fire Ins., 143 AD3d 953, supra](#), the court finds a "potentially meritorious" argument that National Grid is not entitled to a notice of claim requirement as LIPA is. *Id.* at p. 955. National Grid is a private entity that has worked with LIPA to perform LIPA's functions. See [Heeran v Long Island Power Auth., 141 AD3d 561 at p. 562](#) ("[National Grid Electric Services, LLC] operated LIPA's electrical transmission and distribution system under a management services agreement).

The Court of Appeals has clearly held that governmental immunity does not apply to LIPA when it is functioning in a primarily proprietary manner, including when making electrical power decisions. [Connolly v Long Island Power Authority, 30 NY3d 719, 728 \(2018\)](#). The quicker statute of limitations and notice of claim requirements for public authorities are privileges like the governmental immunity afforded to public authorities. Having been established that even LIPA itself can lose its governmental privilege if it is functioning essentially as its private sector counterparts, it is [**\*\*7**] not convincing as a matter of law that LILCO is afforded the privilege of being associated with LIPA for conduct that was entirely private and [**\*\*7**] occurred prior to any relationship with a public authority. There is no indication that the government intended to immunize private conduct indefinitely by later acquiring LILCO.

The Court finds that a triable issue of fact exists as to LILCO's liability in the underlying case and as to whether it is entitled to the shortened statute of limitations and notice of claim requirements that are afforded to LIPA. As such, defendants' motion for summary judgment is denied and plaintiffs may proceed under a standard statute of limitations and without a notice of claim to LILCO.

Accordingly, it is

ORDERED that defendant LILCO's motion for summary judgment is denied in its entirety; and it is further

ORDERED that within 30 days of entry plaintiffs shall serve defendants with a copy of this Decision/Order with notice of entry.

This constitutes the Decision/Order of the Court.

**07/20/2023**

**DATE**

/s/ Adam Silvera

**ADAM SILVERA, J.S.C.**

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