UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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VERIZON NEW YORK INC. and
LONG ISLAND LIGHTING COMPANY
d/b/a LIPA,

Plaintiffs,

- against -

THE VILLAGE OF WESTHAMPTON BEACH,
THE VILLAGE OF QUOGUE and
THE TOWN OF SOUTHAMPTON,

Defendants.

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ORDER

CV 11-252 (AKT)

By letter dated March 28, 2014, defendant Town of Southampton ("Southampton") asks this Court to abstain from exercising supplemental jurisdiction over the parties' dispute about whether Plaintiffs Verizon New York Inc. ("Verizon") and Long Island Lighting Company d/b/a LIPA ("LIPA") (collectively, "Plaintiffs") have authority to attach lechis to their utility poles. For the reasons that follow, the Court declines to do so.

I. BACKGROUND

A. Procedural Setting

On February 4, 2013, District Judge Wexler stayed this action as to defendant Southampton and scheduled a bench trial regarding the sole issue of Verizon and LIPA's authority to attach lechis to their utility poles. Electronic Orders, Feb. 4, 2013; DE 83. Pursuant to Judge Wexler's directives at the February 4, 2013 conference, on March 20, 2013, the parties submitted a Joint Stipulation of Facts regarding Verizon and LIPA's authority to license attachments to their utility poles, along with memoranda and proposed conclusions of law. *See* Joint Stip. [DE 88]; Quogue's Conclusions of Law [DE 89]; Westhampton Beach's Proposed

Conclusions of Law [DE 90]; LIPA's Proposed Conclusions of Law [DE 91]; Verizon's Proposed Conclusions of Law [DE 92]. Because the action was stayed as to Southampton, Southampton did not make any submissions regarding this issue.

On March 21, 2013, Plaintiffs in *East End Eruv, et al. v. Vill. of Westhampton Beach, et al.*, CV 11-213 (the "EEEA Action"), filed an amicus "Statement in Support" of the proposed conclusions of law submitted by Verizon and LIPA. *See* Statement in Support of the Proposed Conclusions of Law Submitted by Verizon New York, Inc. and Long Island Lighting Co., d/b/a LIPA. DE 94. On March 26, 2013, Westhampton Beach moved to strike the "Statement in Support" as an improper submission by a non-party. DE 95.

After the parties filed their submissions, all counsel in this action and the EEEA Action interposed a consent to the jurisdiction of a United States Magistrate Judge for all purposes, pursuant to 28 U.S.C. § 636(c). *See* DE 98; EEEA Action DE 200. On April 9, 2013, the pending matters were transferred to this Court. *See* DE 100; EEEA Action DE 202. At a status conference on November 8, 2013, the stay against Southampton was lifted, and counsel for all parties represented on the record that they wished to have this issue decided without a bench trial or oral argument. DE 112.

By Order dated March 21, 2014, this Court denied the motion by Westhampton Beach to strike EEEA's Statement in Support but allowed Westhampton Beach to submit opposition. DE 121. Westhampton Beach's opposition was filed on April 22, 2014.[1]

[1] Westhampton Beach apparently filed its opposition inadvertently in the EEEA Action, CV 11-213, DE 250.

B. Southampton's Request for Abstention

By letter dated April 17, 2014 -- more than one year after the parties submitted a Joint Stipulation of Facts regarding Plaintiffs' authority to license attachments to their utility poles, along with memoranda and proposed conclusions of law, and more than five months since the stay against Southampton in this case was lifted -- Southampton urges the Court "to abstain from exercising supplemental jurisdiction over the State law question of whether Verizon and LIPA have authority to sublicense their poles to EEEA." DE 127, at 1. Relying solely on *Carver v. Nassau County Interim Fin. Auth.*, 730 F.3d 150 (2d Cir. 2013), a Second Circuit decision decided in September 2013, Southampton argues that this issue "implicate[s] policy concerns seriously impacting the State's administration of its affairs" and, thus, pursuant to *Carver*, "should be determined by New York State courts." DE 127, at 2.

In response, Plaintiffs oppose Southampton's application, arguing that the *Carver* case represents no change in the law of abstention or supplemental jurisdiction and that Southampton makes no new argument which was unavailable to it much earlier in the litigation. DE 128, at 1. Plaintiffs also point out that Southampton's abstention argument was not asserted by either of the defendants who were party to the Stipulation and conclusions of law which were filed more than a year ago, nor has abstention been previously advanced in this litigation by any party regarding the issue of Verizon and LIPA's authority. *Id.* at 2. In fact, although none of the Defendants previously advanced an abstention argument, Plaintiffs note that it was Defendants, including Southampton, who first raised the issue of Plaintiffs' authority under state law to issue licenses for attachments to their utility poles. *Id.* (citing, *inter alia*, Southampton's February 28, 2012 Memorandum of Law in Support of Motion to Dismiss, DE 42-4, at 12-14). Consequently, Plaintiffs argue, Southampton cannot use the utilities' authority issue as both a sword and a

shield: "the parties have spent years litigating the issue of Verizon and LIPA's authority in federal court; now, after more than two years of litigating this issue, [Southampton] may not further delay the case by seeking to use that very issue to prevent federal court adjudication of the issues in this litigation." *Id.* Finally, Plaintiffs contend that even if the Court were to consider Southampton's abstention argument, that argument fails on the merits since the state law issues to be resolved by this Court are neither novel nor complex; in fact, they are well-settled. *Id.* at 3.

II. ANALYSIS

A district court's exercise of supplemental jurisdiction is governed by 28 U.S.C. § 1367. Subsection (c) of § 1367 provides:

> The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—
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> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c). "It is a truism of federal civil procedure that '[i]n providing that a district court "may" decline to exercise such jurisdiction, [§ 1367(c)] is permissive rather than mandatory.'" *Pension Benefit Guar. Corp. v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 726 (2d Cir. 2013) (quoting *Valencia ex rel. Franco v. Lee*, 316 F.3d 299, 305 (2d Cir. 2003)). Thus, the decision whether to exercise supplemental jurisdiction is "left to the exercise of the district court's discretion." *Briarpatch Ltd., L.P v. Phoenix Pictures, Inc.*, 373 F.3d 296, 308 (2d Cir. 2004).

Having reviewed the parties' submissions, the Court, in the exercise of its discretion, declines to abstain from exercising supplemental jurisdiction over the state law issue of whether Verizon and LIPA have authority to attach lechis to their utility poles. In this regard, the Court finds that this case is distinguishable from *Carver*, the only case relied upon by Southampton. In *Carver*, the plaintiffs were representatives of various Nassau County police unions who sought to contest a wage freeze imposed in 2011 on Nassau County employees, including police officers, by the Nassau Interim Finance Authority ("NIFA"), a public benefit corporation formed by the New York State Legislature in 2000 in response to the growing financial crisis facing Nassau County. 730 F.3d at 152. The police unions argued that the wage freeze was unconstitutional and that the authority conferred on NIFA to impose such a freeze had expired under the terms of the applicable statute, N.Y. Pub. Auth. Law § 3669(3). *Id.* The district court granted summary judgment to the police unions on their state law claim without reaching the constitutional question. *Id.* On appeal, defendants argued that the applicable statute was wrongly construed and that the district judge abused his discretion in exercising jurisdiction over the pendent state law claim. *Id.*

On appeal, the Second Circuit held that the district court had abused its discretion in exercising supplemental jurisdiction over the state law claim, which required it to interpret, as a matter of first impression, a statute whose interpretation "implicate[d] significant state interests." *Id.* at 154 ("This case concededly presents an unresolved question of state law and is also one in which there are exceptional circumstances which provide compelling reasons for declining jurisdiction. Unlike a case involving a dispute between private parties, this case involves the construction of a significant provision of an extraordinarily consequential legislative scheme to rescue Nassau County from the brink of bankruptcy, to monitor its financial condition, and to

take steps necessary to prevent a relapse."). The case then proceeded to the New York State Supreme Court, which reached a decision directly contrary to that of the federal district court. *Carver v. Nassau County Interim Fin. Auth.*, No. 12934-13 (N.Y. Sup. Ct. Nassau County Mar. 11, 2014).

Southampton does not assert that the *Carver* decision, decided by the Second Circuit in September 2013, represents any change in the law of abstention or supplemental jurisdiction. Instead, with a cautionary entreaty, Southampton proffers that on remand, the New York State Supreme Court reached a result directly contrary to that of the federal district court. The flaw in this reasoning, however, is that the Second Circuit's decision in *Carver* is not controlling here. In that regard, the Court initially notes that Southampton addressed this issue in a cursory fashion -- in a two-page letter with two case citations to the federal and state *Carver* decisions -- and did not request further briefing. In response, Plaintiffs submitted a three-page letter arguing against *Carver*'s application. Notwithstanding the cursory briefing, the Court does not agree that *Carver* controls here in the limited context in which it is discussed in these two letters. The Court does not see this as a matter of first impression nor as a statutory interpretation claim as presented in *Carver*. Likewise, the issue here is a far cry from what Judge Korman described as "the construction of a significant provision of an extraordinarily consequential legislative scheme to rescue Nassau County from the brink of bankruptcy." *Carver*, 730 F.3d at 154. In fact, as discussed in the Court's Findings of Fact and Conclusions of Law being issued via separate Order today, the scope of Verizon and LIPA's authority has been squarely addressed by the New York courts. Accordingly, Southampton's eleventh hour request that the Court refrain from exercising supplemental jurisdiction over the question of whether lechis may be attached to

utility poles to create an eruv is denied.

SO ORDERED.

Dated: Central Islip, New York
June 16, 2014

/s/ A. Kathleen Tomlinson
A. KATHLEEN TOMLINSON
U.S. Magistrate Judge