

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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EAST END ERUV ASSOCIATION, INC., MARVIN
TENZER, MORRIS TUCHMAN, CLINTON
GREENBAUM, ALAN H. SCHECHTER, CAROL
SCHECHTER, JEFFREY LEAN, ALEXA LEAN,
DEBORAH POLLACK and SIMCHA POLLACK,

Plaintiffs,

-against-

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

Defendants.
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CV-11-0213 (LDW)(AKT)

**56.1 STATEMENT OF
UNDISPUTED MATERIAL
FACTS IN SUPPORT OF
CROSS-MOTION FOR
SUMMARY JUDGMENT**

Defendant VILLAGE OF WESTHAMPTON BEACH, by its attorneys, Sokoloff Stern LLP, submits the following statement of material facts for which there are no genuine issues to be tried in support of its Cross-Motion for Summary Judgment.

VERIZON AND LIPA INTEND TO HELP PLAINTIFFS CONSTRUCT AN ERUV IN WESTHAMPTON BEACH BY TURNING PUBLIC UTILITY POLES INTO RELIGIOUS SYMBOLS

1. In March of 2010, a number of observant Orthodox Jews formed the East End Eruv Association (“EEEE”) for the purpose of working to establish an *eruv* in the Westhampton Beach, Quogue, and the Town of Southampton. See Ex. H, ¶ 7 (Tuchman Dec.); Ex. I, ¶ 7 (Tenzer Dec.); Ex. J, ¶ 8 (Schechter Decl.).

2. An *eruv* is a continuous physical boundary and a visible demarcation of a geographical area – defined by a rabbi – within which certain observant religious Jews who believe in *eruv* (plural of *eruv*) may perform certain activities which are otherwise prohibited on the Jewish Sabbath and Yom Kippur. See Ex. A., ¶ 2 (Amended Compl.); Ex. H, ¶ 4 (Tuchman Decl.); Ex. E, ¶ 6 (Verizon Answer); Ex. F, ¶ 6 (LIPA Answer).

3. The EEEA seeks to establish an *eruv*, part or all of which would be located in the Village of Westhampton Beach. See Ex. E, ¶ 1 (Verizon Answer); Ex. F, ¶ 1 (LIPA Answer).

4. EEEA approached Verizon New York, Inc. (“Verizon”) and Long Island Lighting Co., d/b/a/ Long Island Power Authority (“LIPA”) (collectively “the Public Utilities”) and asked the Public Utilities to allow the EEEA to use the Utilities’ telephone and utility poles to create an *eruv* by attaching *lechis* to the poles. See Ex. A., ¶ 52 (Amended Compl.); Ex. E, ¶ 3 (Verizon Answer); Ex. F, ¶ 3 (LIPA Answer).

5. LIPA is a corporate municipal instrumentality and political subdivision of the State of New York. See Ex. F, ¶ 58 (LIPA Answer).

6. Verizon is a public utility operating under the laws of the State of New York. See New York SMSA L.P. v. Town of Oyster Bay Zoning Bd. of Appeals, 08-CV-4833 (JS) (AKT), 2010 WL 3937277 (E.D.N.Y. Sept. 30, 2010) citing Cellular Tel. Co. v. Rosenberg, 82 N.Y.2d 364, 371–72 (1993).

7. Verizon and LIPA have entered into written agreements with EEEA for the issuance of licenses to permit the attachment of *lechis* to certain poles. See Ex. E, ¶ 3 (Verizon Answer); Ex. F, ¶ 3 (LIPA Answer).

8. In or about May 2010, EEEA and Verizon entered into an *Eruv-Lechi Stave Agreement*. See Ex. L, (Aug. 16, 2010 *Eruv-Lechi Stave Agreement* between EEEA and Verizon)

9. The agreement, executed on August 16, 2010, allowed EEEA to affix *lechis* to certain Verizon poles in Westhampton Beach to complete an *eruv*. See Ex. L, (Aug. 16, 2010 *Eruv-Lechi Stave Agreement*)

10. On or about July 27, 2010, EEEA and LIPA, entered into a License Agreement, whereby LIPA agreed to allow EEEA to affix *lechis* to LIPA poles in Westhampton Beach to complete an *eruv*. See Ex. M, (July 27, 2011 License Agreement between EEEA and LIPA).

11. On or about June 13, 2011, EEEA and Verizon entered into an updated Pole Attachment Agreement For Miscellaneous Attachments in order to provide for the attachment of 15-foot-long 5/8” wide half-round PVC-*lechis* to certain Verizon utility poles in the Municipalities, including Westhampton Beach. See Ex. N, (June 13, 2011 Pole Attachment Agreement For Miscellaneous Attachments between EEEA and Verizon)

12. The boundaries of the *eruv* that Verizon and LIPA are working with the EEEA to establish are set by a Rabbi Unsdorfer, an Orthodox Jewish rabbi. See Ex. K, p. 38 (Hearing Tr. [Tuchman]).

13. Verizon worked with the EEEA to determine the appropriate length and material of the *lechis*. See Ex. K, p. 38 (Hearing Tr. [Tuchman]).

14. Pursuant to their agreements with the East End Eruv Association, Verizon and LIPA do not charge a fee for the licensing of their poles or the attachment of *lechis* to the poles. See Ex. L, (August 16, 2010 *Eruv-Lechi* Stave Agreement); Ex. M, (July 27, 2011 License Agreement); Ex. N, (July 13, 2011 Pole Attachment Agreement); See also Ex. K, p. 200 (Hearing Tr. [Balcerski]).

15. Some of the telephone and utility poles are located in the Village of Westhampton Beach. See Ex. E, ¶ 3 (Verizon Answer); Ex. F, ¶ 3 (LIPA Answer).

16. EEEA has requested licenses from Verizon to attach *lechis* to three of Verizon’s utility poles located on Dune Road in the Village of Westhampton Beach. See Ex. E, ¶ 11 (Verizon Answer).

17. The *lechis* would be visible. See Ex. E, ¶ 4 (Verizon Answer); Ex. F, ¶ 4 (LIPA Answer).

18. Usually, a valid *eruv* also requires “a proclamation delineating and renting the area for use as an *eruv* from a public official whose jurisdiction includes the area in which the *eruv* is to be constructed.” See Ex. K, p. 298 (Hearing Tr. [Tucker]); Ex. S, [Sugarman October 19, 2008 letter].

19. In fact, in or about March 7, 2008, Rabbi Marc Schneier submitted a petition on behalf of the Hampton Synagogue to the Board of Trustees of Westhampton Beach (“Westhampton Beach Trustees”) requesting a proclamation from the Village for the establishment of an *eruv* in Westhampton Beach. See Ex. H, ¶ 12 (Tuchman Decl.); Ex. K, pp. 165, 274 (Hearing Tr. [Tuchman]), (Hearing Tr. [Teller]).

20. The Synagogue withdrew its request for *eruv* proclamation before it could be brought up for a vote by the Village Board. See Ex. K, p. 165, 274 (Hearing Tr. [Tuchman]), (Hearing Tr. [Teller]).

21. A rabbi advised the EEEA, however, that there was no need for a proclamation from a government authority to establish the *eruv* they now seek. See Ex. K, p. 23 (Hearing Tr. [Tuchman]).

22. Thus, the EEEA now claims that it does not need a proclamation to establish the *eruv* they seek. See Ex. K, p. 23 (Hearing Tr. [Tuchman]).

23. On January 13, 2011, EEEA filed a lawsuit against Westhampton Beach, Quogue, and Southampton (“The EEEA Action”). See Ex. A, (East End Eruv Complaint).

24. On February 3, 2012, the EEEA filed an amended complaint (i) asserting claims under the Free Exercise Clause, RLUIPA, and 42 U.S.C. § 1983; (ii) claiming tortious

interference with contract; and (iii) requesting a declaratory judgment that there is no local, county, or state law or ordinance that prohibits the construction of an *eruv* in Westhampton Beach and parts of Quogue and Southampton. See Ex. B, ¶¶ 19 - 157 (EEEE Am. Complaint).

25. According to the EEEA, if the Court grants this injunction, the *eruv* will be a valid *eruv*, it will be put up, and it will be totally in line with *Halakhah*, which is Jewish religious law. See Ex. K, p. 161 (Hearing Tr. [Tuchman]).

26. Five days after the EEEA filed its original complaint, on January 18, 2011, plaintiff utilities filed the instant action. See Ex. C, (Verizon/LIPA Complaint).

27. In this action, Verizon and LIPA ask the Court to decide the issues plaintiffs raise in the EEEA Action and to declare that the utilities may permit installation of the *lechis* on their utility poles. See Ex. C, ¶ 4 (Verizon/LIPA Complaint).

28. On July 9, 2012, the Village filed a Answer with Counterclaims in this action, denying that Verizon and LIPA are entitled to the relief they seek and asserting (1) that Verizon and LIPA lack authority to issue licenses for *lechi* attachments to the EEEA, and (2) that the attachment of *lechis* to poles in the Village would violate the Establishment Clause of the First Amendment to the United States Constitution. See Ex. D (Village of Westhampton Beach Answer in Verizon/LIPA Action).

29. Verizon has indicated that it believes it has the authority to issue licenses to the EEEA in accordance with agreement and further that it intends to do so imminently. See Ex. CC (May 25, 2012 Letter from Michael Wiles to Brian Sokoloff).

30. However, Verizon has agreed to refrain from issuing such licenses until the Court decides this motion. See July 6, 2012 Stipulation between Verizon and the Village, Docket Entry No. 56, So-Ordered on July 17, 2012.

31. On July 30, 2012, the Jewish People for the Betterment of Westhampton Beach (a/k/a “JPOE”), Arnold Sheiffer, and Estelle Lubliner filed a complaint (the “JPOE Action”) against the Village of Westhampton Beach, the East End *Eruv* Association, Verizon New York, Inc., and Long Island Lighting Company d/b/a LIPA. See Ex. G (JPOE Complaint).

32. JPOE and the individual plaintiffs are opposed to the proposed *eruv* and bring the action claiming that the establishment of an *eruv* within the Village of Westhampton Beach will constitute a violation of the Establishment Clause. See Ex. G, ¶ 1 (JPOE Complaint).

VERIZON AND LIPA POLES IN THE VILLAGE ARE GOVERNED BY FRANCHISE AGREEMENTS DATING BACK TO THE TURN OF THE CENTURY

33. Pursuant to the Transportation Corporation Law, in 1910 the Town Board of the Town of Southampton granted a franchise agreement to Riverhead Electric Light Company for the area west of Quantuck Creek. See Ex. V (1910 franchise agreement)

34. In 1911, the Town Board of the Town of Southampton granted to Patchogue Electric Light Company a franchise for the area west of the Speonk River. See Ex. W (1911 franchise agreement).

35. Based upon these franchises, Riverhead Electric Light Company’s franchise covers the area of Westhampton Beach as well as that part of the Town of Southampton that is proposed to be part of the *eruv*. See Exs. V, W.

36. Both franchise agreements provided that the franchise is not transferable without the consent of the Town Board. See Exs. V, W.

37. In 1912, the Town Board consented to the transfer of the franchise from Riverhead Electric Light Company to either the Patchogue Electric Light Company or Suffolk Light Heat and Power Co. See Ex. X (1912 assignment).

38. In 1917, the Town Board approved the assignment of the franchise to Long Island Lighting Company. See Ex. Y, (1917 approval).

39. In 1964, the Town Board approved the transfer of the franchise from Patchogue Electric Light Company to Long Island Lighting Company. See Ex. Z, (1964 approval).

40. The franchise agreement granted to Riverhead Electric Light Company, which was subsequently assigned to Long Island Lighting Company and which was subsequently assigned to LIPA, sets forth the authorization for the franchise. It states specifically that the franchise is for the “ ... the privilege and right to erect and maintain poles for the support of cross-arms, fixtures and wires and construct and maintain necessary pole lines for supplying electricity for heat, light and power to the inhabitants of said Town” See Exs. V-Y.

41. In November 1938, two months after the 1938 hurricane destroyed most of the homes and other structures on Dune Road in Westhampton Beach,^[1] the United States Coast Guard requested and received from Westhampton Beach a franchise to construct poles on Dune Road in order to maintain the circuits for the Coast Guard. In so doing, the Coast Guard recognized Westhampton Beach’s jurisdiction over the Dune Road. See Ex. AA, (1938 resolution).

42. In 1952, at the request of the New York Telephone Company, the Board of Trustees granted New York Telephone Company a franchise to take over and operate the poles on Dune Road, subject to the mayor’s to execution of a franchise agreement on behalf of Westhampton Beach. See Ex. BB (1952 resolution).

43. It appears that New York Telephone Company never submitted to Westhampton Beach the franchise agreement that is required by the resolution.

^[1] The hurricane was the sixth most costly hurricane in 1998 dollars. See, www2.sunysuffolk.edu/mandias/38hurricane

44. The franchise agreement granted by Westhampton Beach to the Coast Guard allows the Coast Guard to restore communications by restoring or replacing such poles as may be needed to maintain Coast Guard circuits along the Dune Road ... Subject to the conditions, among them being "... (2) Joint use of such poles by the New York Telephone Company and the Long Island Lighting Company shall be permitted by the Coast Guard." See Ex. AA.

45. The 1952 resolution of the Board of Trustees approving the transfer of the franchise from the Coast Guard to New York Telephone Company was subject to the Mayor's execution of a franchise agreement. See Ex. BB, (1952 resolution). It does not appear that New York Telephone Company ever prepared such an agreement. No franchise agreement was ever executed by the Mayor.

46. On several occasions, New York Telephone Company (Verizon's predecessor) requested permission from Westhampton Beach to install utility poles in the Village. See Ex. DD (1985 Permit to New York Telephone Company), Ex. EE (1989 Permit to New York Telephone Company).

THE ERUV IS A PURELY RELIGIOUS CONSTRUCT WITH NO PURPOSE BUT TO ADVANCE THE PARTICULAR RELIGIOUS BELIEFS AND PRACTICES OF ONE SUBSET OF OBSERVANT RELIGIOUS JEWS; MANY RELIGIOUS JEWS CONSIDER IT ANTITHETICAL TO THEIR OWN SINCERELY HELD RELIGIOUS BELIEFS

47. The observance of the Sabbath, or *Shabbat*, is one of the central tenets for certain observing Jews. See Ex. H, ¶ 4 (Tuchman Decl.); Ex. K, p. 8 (Hearing Tr. [Tuchman]).

48. *Shabbat* is the Jewish day of rest, which spans from Friday evening until Saturday night. See Ex. H, ¶ 4 (Tuchman Decl.); Ex. K, p. 8 (Hearing Tr. [Tuchman]).

49. The observance of *Shabbat* is one of Ten Commandments, and, according to some observant Jews, one of the very critical aspects in the observance of the Jewish faith. See Ex. H, ¶ 4 (Tuchman Decl.); Ex. K, p. 8 (Hearing Tr. [Tuchman]).

50. One of the principal tenets of observance of *Shabbat* is the prohibition on carrying items from the home to the public domain. See Ex. A., ¶ 3, 27 (Amended Compl.); Ex. H, ¶ 4 (Tuchman Decl.); Ex. K, p. 8 (Hearing Tr. [Tuchman]).

51. On *Shabbat*, many observant Jews recite prayers that can be said only with a *minyan* (a quorum of Jewish adults), including the reading of the weekly Torah portion. See Ex. H, ¶ 5 (Tuchman Decl.).

52. On special occasions, many observant Jews celebrate life cycle events in the synagogue on *Shabbat* with readings from the Torah. See Ex. H, ¶ 5 (Tuchman Decl.).

53. On the memorial anniversary of loved ones, many observant Jews recite the Mourner's *Kaddish*, which also may only be recited in the presence of a *minyan*. See Ex. H, (Tuchman Decl.).

54. Because of the restriction on carrying, many observant Jews who use wheelchairs or who have children who must ride in strollers are confined to their homes and are unable to participate in these traditions or fulfill other ritual obligations. See Ex. A., ¶ 3 (Amended Compl.); Ex. H, ¶ 5 (Tuchman Decl.).

55. Many of the same restrictions apply on *Yom Kippur* (the Jewish Day of Atonement) as on *Shabbat*. See Ex. H, ¶ 6 (Tuchman Decl.); Ex. A., ¶ 3, 27 (Amended Compl.).

56. Specifically, many observant Jews who rely on strollers and wheelchairs will not leave their homes on *Yom Kippur*. See Ex. H, ¶ 6 (Tuchman Decl.).

57. Accordingly, because of the religious restriction on carrying, some observant Jews are home-bound on what many consider to be one of the holiest days of the Jewish year, a day on which the vast majority of the special prayers may only be recited in the presence of a *minyan*. See Ex. H, ¶ 6 (Tuchman Decl.); Ex. A., ¶ 27 (Amended Compl.).

58. Jewish law has developed a concept called an “*eruv*.” See Ex. H, ¶ 4 (Tuchman Decl.).

59. An *eruv* is a symbolic religious boundary. See Ex. K, p. 178 (Hearing Tr. [Tuchman]).

60. Through the erection of visible symbolic markers, an *eruv* creates a literal and symbolic boundary around a community within which some observant Jews believe they may carry things without violating the laws of Shabbat. See Ex. H, ¶ 4 (Tuchman Decl.); Ex. E, ¶ 6 (Verizon Answer); Ex. F, ¶ 6 (LIPA Answer); Ex. A., ¶¶ 24, 27 (Amended Compl.).

61. The *eruv* is an area demarcated pursuant to Jewish religious law. See Ex. A., ¶ 24 (Amended Compl.); Ex. C, ¶ 13 (Verizon/LIPA Complaint).

62. The appropriate boundaries for an *eruv* are set by a rabbi. See Ex. A., ¶ 55 (Amended Compl.); Ex. K, p. 36-37 (Hearing Tr. [Tuchman]).

63. The demarcation is created, in part, by using telephone poles and wires and utility poles and wires and by attaching wooden or plastic strips (“*lechis*”) to the sides of the poles. See Ex. A., ¶ 24 (Amended Compl.); Ex. C, ¶ 13 (Verizon/LIPA Complaint).

64. These *lechis* are attached for a religious purpose. See Ex. K, p. 178 (Hearing Tr. [Tuchman]).

65. The *eruv* is constructed by imbuing physical objects with religious symbolic meaning. See Ex. K, p. 168 (Hearing Tr. [Tuchman]).

66. The concept of the *eruv* has existed for more than two thousand years. See Ex. H, ¶ 4 (Tuchman Decl.).

67. The concept of an *eruv* is based on principles derived from the Bible, which are developed in the Talmud and codified in the Codes of Jewish Law. In fact, there is an entire

tractate (book) of the Talmud that deals with the subject of an *eruv*. See Ex. T, ¶ 3 (Shacter Affirmation).

68. Some observant Jews believe that it is religiously incumbent on them to establish an *eruv*. As Rabbi Joseph Karo (1488-1575) wrote in his *Shulhan Arukh*, the classical code of Jewish law that has gained universal acceptance by observant Jews the world over, “It is a mitzvah [religious obligation] to strive to make *eyruvin* [plural of *eruv*] for courtyards.” See Ex. H, ¶ 4 (Tuchman Decl. citing R. Joseph Karo, SHULHAN ARUKH, *Orah Hayyim* 366:13, in 4A MISHNAH BERURAH 352, 353 (A. Orenstein ed., Pisgah Foundation trans. 2001)); Ex. A., ¶ 28 (Amended Compl.).

69. Other observant Jews, some of them residents of Westhampton Beach, do not believe in *eruv* and believe that they are antithetical to their own religious beliefs. See Ex. G, ¶ 3, (JPOE Complaint).

70. In the JPOE Action, plaintiffs contend that “Many Jews reject the very concept of an *eruv*, and sincerely believe that the particular form of Jewish belief and observance that elevates legalist constructs over the true spiritual values of Judaism and the Sabbath is abhorrent to their own religious views and interpretation of Jewish law.” See Ex. G, ¶ 3, (JPOE Complaint).

71. Indeed, they claim “it is the official position of the Central Conference of American Rabbis (“CCAR”), the umbrella rabbinical organization of Reform Judaism in the United States, that an *eruv* is a sort of ‘legal fiction’ which is inconsistent with the true ‘spirit’ of Jewish law.” See Ex. G, ¶ 3, (JPBWB Complaint) citing CCAR Responsa – 178, *Eruv* dated July 1983.

72. For those Jews who do believe in the *eruv*, the primary benefit and purpose of the *eruv* is to enable couples with younger children (who cannot walk on their own) and disabled and elderly persons confined to wheelchairs to attend synagogue services on the Sabbath and *Yom Kippur*, and thereby participate in communal prayer services and the Torah reading. See Ex. A., ¶ 28 (Amended Compl.); Ex. T, ¶ 3 (Shacter Affirmation); Ex. H, ¶ 7 (Tuchman Decl.); Ex. J, ¶ 4 (Schechter Decl.).

73. These religious Jews believe that the ability to participate in communal prayer in the synagogue on the Sabbath and *Yom Kippur* is a meaningful and significant enhancement of their Jewish religious observance. See Ex. T, ¶ 3 (Shacter Affirmation).

74. The *eruv* also allows certain observant Jews to carry a prayer shawl and prayer book to the synagogue or carry books for Jewish study. See Ex. J, ¶ 5 (Schechter Decl.); Ex. H, ¶ 10 (Tuchman Decl.).

75. Thus, an *eruv* allows some observant religious Jews to fully observe Shabbat and *Yom Kippur*, according to their beliefs. See Ex. H, ¶ 10 (Tuchman Decl.).

76. The establishment of an *eruv* has no effect on non-Jews and nonobservant Jews. It does not change what they can or cannot do. See Ex. H, ¶ 4 (Tuchman Decl.); Ex. K, p. 24 (Hearing Tr. [Tuchman]).

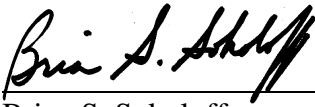
77. Observant Jews who believe in the *eruv* will be the only ones to benefit from the *eruv*. See Ex. K, p. 24 (Hearing Tr. [Tuchman]).

78. The establishment of an *eruv* serves no secular purpose and has no secular meaning or significance. See Ex. K, p. 24 (Hearing Tr. [Tuchman]).

79. The only purpose of the demarcation of an *eruv* is, thus, to facilitate the exercise of religious beliefs. See Ex. K, p. 24 (Hearing Tr. [Tuchman]).

Dated: Westbury, New York
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