State of New York Court of Appeals

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

No. 11
Barbara Connolly, et al.,
Respondents,
v.
Long Island Power Authority, et al.,
Appellants,
et al.,
Defendant.

No. 12
William Baumann, et al.,
Respondents,
v.
Long Island Power Authority, et al.,
Appellants,
et al.,
Defendant.

No. 13
William Heeran, &c., et al.,
Respondents,
v.
Long Island Power Authority (LIPA), et al.,
Appellants,
et al.,
Defendants.

Case No. 11:
David Lazer, for appellants.
Brian J. Shoot, for respondents.

Case No. 12:
David Lazer, for appellants.
Brian J. Shoot, for respondents.

Case No. 13:
David Lazer, for appellants.
Brian J. Isaac, for respondents.

STEIN, J.:

The narrow issue before us on these appeals is whether defendants Long Island Power Authority (LIPA), Long Island Lighting Company (LILCO), and National Grid Electric Services, LLC (National Grid, and collectively with LIPA and LILCO, defendants)

are entitled to dismissal of plaintiffs' amended complaints on the rationale that the actions challenged were governmental and discretionary as a matter of law, and, even assuming the actions were not discretionary, that plaintiffs' failure to allege a special duty is a fatal defect. Because defendants have not met their threshold burden of demonstrating that the action was governmental in the context of these pre-answer, pre-discovery CPLR 3211 (a) (7) motions, we cannot say that the complaints fail to state causes of action as a matter of law. We therefore affirm.

- I -

LIPA is a public authority that was created by the legislature in 1986 to provide a "safer, more efficient, reliable and economical supply of electric energy" in the service area of LILCO, which includes the Rockaway Peninsula in Queens County (see Public Authorities Law § 1020-a). Due to rising costs of electricity and a lack of confidence in the ability of LILCO – an "investor owned utility" at the time – the legislature determined that "[s]uch matters of state concern best can be dealt with by replacing [LILCO] with a publicly owned power authority" (id.). To effectuate these purposes, the legislature created LIPA as a "corporate municipal instrumentality of the state . . . which shall be a body corporate and politic and a political subdivision of the state, exercising essential governmental and public powers," and authorized it to operate in LILCO's service area (Public Authorities Law § 1020-c [1], [2]).

At the direction of the legislature, LIPA acquired LILCO including, among other things, its electric transmission and distribution facilities (T&D System) (see Public Authorities Law § 1020-h [1] [b]; Matter of Suffolk County v Long Is. Power Auth., 258

AD2d 226, 228 [2d Dept 1999], lv denied 94 NY2d 759 [2000]). The T&D System consists of the equipment necessary to bring power onto Long Island from high-load power lines, towers, and substations, and to deliver power to individual customers. As a result of the acquisition, LILCO became a wholly-owned subsidiary of LIPA, entitled by statute to "all the privileges [and] immunities . . . of [LIPA]" (Public Authorities Law § 1020-i [2]). Meanwhile, in preparation for the acquisition, LIPA entered into a Management Services Agreement (MSA) with LILCO, which was eventually assigned to the entity now known as National Grid. The MSA governed all aspects of the relationship between LIPA and National Grid at the relevant time, including National Grid's main function of operating and maintaining the T&D System.

In each of the actions presently before us, plaintiffs allege that their real and personal property was destroyed by fire as a result of defendants' negligent failure to preemptively de-energize the Rockaway Peninsula prior to or after Hurricane Sandy made landfall in October 2012.[1] As alleged in plaintiffs' complaints, the Governor declared a state of emergency in all counties across New York State in preparation for the potential impact of the storm, and the National Hurricane Center warned of a "life-threatening storm surge" that could cause "repeated and extended periods of coastal and bayside flooding." Further, the Mayor of the City of New York issued Executive Law No. 163 ordering the evacuation of Zone A, which included the Rockaway Peninsula. Nevertheless, LIPA did not shut down power to the area, even though Consolidated Edison – the utility supplying most of

[1] LILCO was not named as a defendant in one of the actions (see Heeran v Long Is. Power Auth. (LIPA), 141 AD3d 561 [2d Dept 2016]).

the electricity to the five boroughs of New York City – preemptively did so in its service area in order to avoid salt water from the surge coming into contact with its electrical systems. According to plaintiffs, when the Rockaway Peninsula flooded due to storm surges from Hurricane Sandy, flood water came into contact with components of the T&D System, causing short circuits, fires and, ultimately, the destruction of plaintiffs' property. Plaintiffs also alleged in their amended complaints that LIPA persisted in failing to shut down power despite having received actual notice of downed, live power lines.

Defendants moved to dismiss the amended complaints pursuant to CPLR 3211 (a) (7) insofar as asserted against them on the ground that LIPA was immune from liability based on the doctrine of governmental function immunity, and that LILCO and National Grid were entitled to the same defense. Specifically, LIPA argued, among other things, that the actions challenged were taken in the exercise of its governmental capacity and were discretionary, and, even if they were not discretionary, plaintiffs' failure to allege a special duty in the complaints amounted to a failure to state viable claims. Plaintiffs opposed the motions on the ground that defendants' actions were proprietary, not governmental, and that special duty rules did not apply. Supreme Court denied the motions to dismiss in three substantially similar orders.

On defendants' appeals, the Appellate Division, Second Department, with one Justice dissenting, affirmed each order denying defendants' motions to dismiss (141 AD3d 555 [2d Dept 2016]; 141 AD3d 554 [2d Dept 2016]; 141 AD3d 561 [2d Dept 2016]). The Court held that LIPA was not entitled to governmental immunity because the provision of electricity is properly categorized as a proprietary function and, in the Court's view, the

functions of both providing electricity in the ordinary course and in responding to a hurricane are part of the proprietary core functions of electric utilities. The Court also rejected National Grid's claim of immunity on the basis that it presupposed that LIPA was entitled to governmental immunity. The dissenting Justice agreed that defendants were engaged in a generally proprietary activity as providers of electricity, but would have held that the specific acts or omissions alleged in the complaints were related, not to defendants' general operations but, instead, to the governmental function of preparing for, and responding to, a natural disaster (141 AD3d at 571-573 [Miller, J., dissenting]).

The Appellate Division granted defendants leave to appeal to this Court, in each case, certifying the question of whether its order was properly made.

- II -

It is well settled that, "[d]espite the sovereign's own statutory surrender of common-law tort immunity for the misfeasance of its employees, governmental entities somewhat incongruously claim – and unquestionably continue to enjoy – a significant measure of immunity fashioned for their protection by the courts" (Haddock v City of New York, 75 NY2d 478, 484 [1990]). The doctrine of governmental function immunity "reflects separation of powers principles and is intended to ensure that public servants are free to exercise their decision-making authority without interference from the courts" (Valdez v City of New York, 18 NY3d 69, 76 [2011]). Additionally,

> "this immunity reflects a value judgment that – despite injury to a member of the public – the broader interest in having government officers and employees free to exercise judgment and discretion in their official functions, unhampered by fear

> of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury"

(Haddock, 75 NY2d at 484).

Because the issue in this CPLR 3211 (a) (7) motion is whether plaintiffs' complaints have stated a viable claim, the first issue that we must consider "is whether the . . . entity was engaged in a proprietary function or acted in a governmental capacity at the time the claim arose" (Applewhite v Accuhealth, Inc., 21 NY3d 420, 425 [2013]). This is so because, if the action challenged in the litigation is governmental, the existence of a special duty is an element of the plaintiff's negligence cause of action (see Lauer v City of New York, 95 NY2d 95 [2000]). As this Court recently explained:

> "A government entity performs a purely proprietary role when its activities essentially substitute for or supplement traditionally private enterprises. In contrast, a [government entity] will be deemed to have been engaged in a governmental function when its acts are undertaken for the protection and safety of the public pursuant to the general police powers"

(Turturro v City of New York, 28 NY3d 469, 477-478 [2016] [internal quotation marks and citations omitted]; see Sebastian v State of New York, 93 NY2d 790, 793 [1999]). This Court has observed that "[a] governmental entity's conduct may fall along a continuum of responsibility to individuals and society deriving from its governmental and proprietary functions" (Miller v State of New York, 62 NY2d 506, 511-512 [1984]), and that "the determination . . . may present a close question for the courts to decide" (Applewhite, 21 NY3d at 425). Consequently, "[w]hen the liability of a governmental entity is at issue, it is the specific act or omission out of which the injury is claimed to have arisen and the capacity in which that act or failure to act occurred which governs liability"

(Miller, 62 NY2d at 513 [internal quotation marks and citation omitted]). Put differently, "the determination of the primary capacity under which a governmental agency was acting turns solely on the acts or omissions claimed to have caused the injury" (Matter of World Trade Ctr. Bombing Litig., 17 NY3d 428, 447 [2011], cert denied sub nom Ruiz v Port Auth. of N.Y. & N.J., 558 US 817 [2012]).

Assuming the government entity was acting in a governmental capacity, the plaintiff may nevertheless state a viable claim by alleging the existence of a special duty to the plaintiff (see Turturro, 28 NY3d at 478). If the plaintiff establishes the elements of the cause of action, including special duty, the government entity can avoid liability under the governmental function immunity defense by proving the challenged actions were discretionary in nature and that discretion was, in fact, exercised (see id.; Valdez, 18 NY3d at 75-76). However, because the governmental immunity defense protects government entities from liability only for discretionary actions taken during the performance of governmental functions, "[t]he . . . defense has no applicability where the [entity] has acted in a proprietary capacity, even if the acts of the [entity] may be characterized as discretionary" (Turturro, 28 NY3d at 479; see Matter of World Trade Ctr., 17 NY3d at 432).

- III -

In assessing defendants' motions to dismiss under CPLR 3211 (a) (7), we must accept plaintiffs' allegations as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether plaintiffs have a cause of action (see Leon v Martinez, 84 NY2d 83, 87-88 [1994]). At the same time, defendants bear the burden of

establishing that the complaint fails to state a viable cause of action. Thus, the threshold inquiry distills to whether defendants have established that the challenged action, or failure to act, was governmental, as a matter of law, based solely on plaintiffs' amplified pleadings (see id. at 88).

As noted above, plaintiffs averred that defendants were negligent in failing to preemptively de-energize or otherwise suspend the provision of electricity to the Rockaway Peninsula. Specifically, plaintiffs alleged that defendants failed to take action despite repeated warnings that Hurricane Sandy would create a massive surge, inundating the locality with salt water that was likely to come into contact with components of defendants' T&D System, which defendants knew created a risk of fire and which, in fact, caused such fires. Plaintiffs further alleged that, notwithstanding defendants' actual knowledge of downed live electrical lines, they persisted in their failure to de-energize the area.

Viewing these allegations in the light most favorable to plaintiffs, as we must given the procedural posture, plaintiffs' allegations concern the provision of electrical power by defendants, a service that traditionally has been provided by private entities in the State of New York. In fact, LIPA itself was created to replace LILCO which, at the time, was an "investor owned utility" (Public Authorities Law § 1020-a). This takeover was anomalous and, when the legislation creating LIPA was enacted, the New York State Public Service Commission – the agency charged with ensuring safe and reliable utility service throughout the State – observed that, "[i]n New York State we have generally adopted a system of private ownership subject to close regulation" (New York State Department of Public Service Mem, Bill Jacket, L 1986, ch 517, at 1). In that vein, during a debate concerning

the bill, the Senate acknowledged that passage of the bill marked an "extraordinary event in the history of New York State" (NY Senate Debate on L 1986, ch 517, at 7060-7061). Moreover, the record demonstrates that LILCO itself observed that "[t]he draft bill breaks new . . . ground on several scores[;] . . . there is no precedent whatsoever for a utility takeover of this magnitude by any means anywhere in this country" (LILCO Mem [July 2, 1986]).

Indeed, LIPA does not dispute that the provision of electricity traditionally has been a private enterprise which, in the normal course of operations, would be a proprietary function. However, LIPA argues that its alleged decision to refrain from shutting down electrical power to, or failure to de-energize, the Rockaway Peninsula – the specific act or omission alleged in the amended complaints – was a governmental function under the circumstances here because it related more broadly to the protection of the public from a natural disaster.

Given the procedural posture, we cannot say, as a matter of law based only on the allegations in the amended complaints, as amplified, that LIPA was acting in a governmental, rather than a proprietary, capacity when engaged in the conduct claimed to have caused plaintiffs' injuries. We reject defendants' claim that the magnitude of the disaster, without any reference to the circumstances and nature of the specific act or omission alleged – i.e., the failure to de-energize – renders LIPA's conduct governmental

as a matter of law.[2] Inasmuch as defendants have failed to meet their burden to establish that plaintiffs' amended complaints failed to state viable claims, we hold that the courts below properly denied LIPA's motions to dismiss.[3]

Accordingly, in each appeal, the order of the Appellate Division should be affirmed, with costs, and the certified question answered in the affirmative.

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[2] Indeed, in cases in which it is difficult to determine whether the municipal entity has acted in a proprietary or governmental capacity, that inquiry has not been resolved at the threshold stage of the litigation based on the plaintiffs' allegations alone. Rather, such determinations have been made after discovery on summary judgment or after trial (see e.g. Matter of World Trade Ctr., 17 NY3d at 448 [reasoning that the acts or omissions for which plaintiffs sought to hold the defendant liable involved the "strategic allocation of police resources" and reflected a "considered legislative-executive decision as to how those resources may be deployed"]). Nevertheless, while we conclude that, in this particular case, the procedural posture in which it is presented to us does not enable us to determine the nature of LIPA's acts, we note that we have recognized circumstances in which that determination could be made in the context of a CPLR 3211 (a) (7) motion (see e.g. Lauer v City of New York, 95 NY2d 95, 102-103 [2000]). We do not foreclose the possibility that this threshold issue concerning the governmental function immunity defense may be capable of resolution at the pre-answer, motion to dismiss stage in other appropriate cases.

[3] LILCO, as LIPA's subsidiary, likewise was not entitled to dismissal of the amended complaints. Further, inasmuch as defendants' assertion that National Grid should be afforded governmental immunity by virtue of its contractual obligation to operate LIPA's T&D System presupposes that LIPA, itself, is entitled to immunity, defendants have not shown that plaintiffs' amended complaints should be dismissed insofar as asserted against National Grid.

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RIVERA, J. (concurring):

Defendants are electrical power suppliers for customers in Suffolk and Nassau Counties and parts of Queens County, New York. Defendant Long Island Power Authority (LIPA) is a publicly-owned power authority created in 1986 to replace the existing investor-owned utility, defendant Long Island Lighting Company (LILCO), for the purpose of "assuring the provision of an adequate supply of electricity in a reliable, efficient and economic manner" to LILCO's customers (see Public Authorities Law § 1020-a). As the majority acknowledges "[t]his takeover was anomalous," both in scope and concept, as historically, New York's electrical needs have been met by the private sector through a

market-driven proprietary model of services (majority op at 8-9; see Braun v Buffalo Gen. Elec. Co., 200 NY 484 [1911]; Miner v Long Island Lighting Co., 40 NY2d 372 [1976]). Plaintiffs sued defendants for property damage allegedly caused by defendants' failure to de-energize part of its customer service area during Superstorm Sandy. Defendants moved to dismiss on the ground that LIPA, and as a consequence the co-defendants, are immune from suit for acting in LIPA's governmental, as opposed to proprietary, capacity.

I agree with the majority that defendants failed to carry their burden on the motion because the amended complaints state cognizable claims for relief based on defendants' alleged negligence (majority op at 8-10). However, I disagree with the majority's suggestion that defendants may be able to establish an affirmative defense of immunity at some later stage in this litigation (majority op at 10 n 2). The majority essentially invites the parties to engage in further motion practice on defendants' purported entitlement to immunity. In doing so, it encourages the parties to incur unwarranted litigation costs and needlessly expend judicial resources on an argument that has no possibility of success. A governmental entity that replaced a private entity to supply a service that historically has been provided by private entities, in a manner indistinguishable from those private entities, simply cannot be said to be acting in a governmental capacity. LIPA's decision not to de-energize is decidedly proprietary because its "activities essentially substitute for or supplement 'traditionally private enterprises'" (Sebastian v State, 93 NY2d 790, 793 [1999], citing Riss v City of New York, 22 NY2d 579, 581 [1968, Breitel, J.]). Regardless of how LIPA characterizes its actions, they were not undertaken "pursuant to the general

police powers" and did not involve a governmental function (Balsam v Delma Eng'g Corp., 90 NY2d 966, 968 [1997]). Therefore, as a matter of law, defendants are not entitled to an affirmative defense of immunity from suit under the theory that they acted in a governmental capacity.

New York's doctrine of governmental immunity furthers important societal interests.

> "This limitation on liability reflects separation of powers principles and is intended to ensure that public servants are free to exercise their decision-making authority without interference from the courts. It further reflects a value judgment that – despite injury to a member of the public – the broader interest in having government officers and employees free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury" (Valdez v City of New York, 18 NY3d 69, 76 [2011]).

Our law is well-settled that a governmental entity may be subject to liability under ordinary principles of tort law for "activities which have displaced or supplemented traditionally private enterprises [and] activities of government which provide services and facilities for the use of the public" because these actions are performed in the entity's proprietary capacity (Riss, 22 NY2d at 581). In contrast, absent a special duty to the injured party, a governmental entity may assert a defense of immunity to a negligence suit for actions taken in performance of its governmental function (Sebastian v State, 93 NY2d 790, 793 [1999]).

The application of the doctrine requires careful review to determine whether the entity's actions have proprietary characteristics.

> "This Court has recognized that a 'governmental entity's conduct may fall along a continuum of responsibility to individuals and society deriving from its governmental and proprietary functions.' At one end of the continuum lie purely governmental functions 'undertaken for the protection and safety of the public pursuant to the general police powers.' . . . On the opposite periphery lie proprietary functions in which governmental activities essentially substitute for or supplement 'traditionally private enterprises'" (id. at 793 [internal citations omitted]).

To determine whether a function is proprietary or governmental, the courts must examine "the specific act or omission out of which the injury is claimed to have arisen and the capacity in which that act or failure to act occurred . . . , not whether the agency involved is engaged generally in proprietary activity or is in control of the location in which the injury occurred" (Miller v State of New York, 62 NY2d 506, 513 [1984]). The critical factor in determining whether the governmental entity is acting pursuant to a governmental function is determining if it exercised its police powers for the protection and safety of the public in carrying out the action challenged by a plaintiff (Applewhite v Accuhealth, Inc., 21 NY3d 420, 425 [2013]). If not, the entity is understood to be acting as its private sector counterpart, without the need for immunity to ensure the proper deployment of limited governmental resources. Examples of governmental functions attributed to the general police powers include police and fire protections, oversight of juvenile delinquents, issuance of building permits or certificates of occupancy, certifying compliance with fire safety codes, teacher supervision of a public school playground, boat inspections, garbage

collection, and traffic regulations (see id. at 425–426). Each of these examples manifest policy choices based on social norms and political considerations that at their core require balancing society's interests in protecting the public welfare, health, and safety against the interests of the individual.

LIPA's challenged action here does not involve the exercise of the police power. Its decision not to de-energize is no different than those historically made by private actors. In fact, its private sector counterpart, Con Edison, faced this very same decision in the days and hours before the storm. We need only compare this decision with a true exercise of the police power under the circumstances of a storm emergency to understand why LIPA's actions were proprietary. As the storm approached, the deployment of law enforcement personnel, fire fighters, emergency medical providers, and other first responders, was a clear governmental act (id. at 425, 428 ["Police and fire protection are examples of long-recognized, quintessential governmental functions," and EMT and other first responders fulfill a government function]). Similarly, the decision to evacuate parts of New York City could only be accomplished by means of the government exercising its police powers in the course of an emergency. In contrast, LIPA's actions did not involve decisions about these limited governmental resources, which are at the core of those governmental actions.

I agree with the majority that the fact that LIPA was responding to a severe storm does not itself mean that its behavior constituted governmental action (majority op at 10). Nor would the fact that LIPA took into consideration the choices of other governmental actors, such as various entities' decisions about evacuating particular areas and deploying

first responders, make its decision "governmental." Con Edison did the same. Additionally, to the extent that LIPA's actions were taken at the behest of some governmental command, this may bear upon LIPA's eventual liability under traditional negligence principles, not whether LIPA acted in a governmental capacity. Again, a private utility would respond to governmental directives in the same way.

It is not disputed that the provision of electricity has traditionally been a proprietary enterprise undertaken by private entities (see Prosser & Keeton, Torts § 131 at 1053 [5th ed 1984] ["(I)f the city operates a local electric or water company for which fees are charged, this looks very much like private enterprise and is usually considered proprietary."]).[1] LIPA replaced a private entity – LILCO – and as such its "activities essentially substitute for or supplement traditionally private enterprises" (Sebastian, 93 NY2d at 793). Our courts have frequently held private utility companies subject to liability under ordinary rules of negligence, including LILCO (see e.g. Miner, 40 NY2d at 375). Indeed, defendants concede that LIPA's "core function – the routine operation and maintenance of its electric utility equipment on a 'blue sky day' – is proprietary."

This case is distinguishable from In re World Trade Ctr. Bombing Litig., in which the Court found that the Port Authority had security concerns of a drastically different

[1] LIPA stresses that the legislature specified that LIPA would be performing an "essential government function" (Public Authorities Law § 1020-p [1]), but as the Appellate Division majority points out, similar language is in the laws creating other public authorities that definitely carry out proprietary activities, such as the White Plains Parking Authority or the Upper Mohawk Valley Memorial Auditorium Authority (see Heeran, 141 AD3d at 566, citing Public Authorities Law §§ 1427 [2], 1942 [5]).

quantitative and qualitative register than most landowners and that the administration and deployment of security at the World Trade Center (WTC) involved discretionary decision-making about allocating security and police resources (17 NY3d 428, 449 [2011]). First, nothing suggests that LIPA faces different public safety concerns than the private companies in the region, including those providing power to customers directly across Jamaica Bay, as well as different parts of New York City (see Heeran, 141 AD3d at 565-566). While, as the Moreland Commission on Utility Storm Preparation and Response observed, the purpose of the de-energization process, broadly speaking, "is to protect the public from fire and electrical hazards posed by wiring and circuits that may have come into contact with flood water," LIPA was required to protect its customers from the commodity it supplies, in the same way, and with the same considerations, as a private utility company.[2]

Second, there is nothing to suggest that the decision not to de-energize implicated the general police powers of the state. In In re World Trade Ctr., the Port Authority was tasked with administering security measures to counter criminal and terrorist activity for its tenants and everyone who used the WTC facility, which required determining how best to allocate its finite resources (17 NY3d at 449). As the Court noted there, "[p]olice protection . . . is a quintessential example of a governmental function as it involves 'the

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[2] The Moreland Commission was established by Governor Andrew M. Cuomo in November 2012 to investigate the response, preparation, and management of the State's power utility companies with respect to major storms afflicting the State (The Moreland Commission on Utility Storm Preparation and Response, https://utilitystormmanagement.moreland.ny.gov/ [last accessed Jan. 20, 2018]).

provision of a governmental service to protect the public generally from external hazards and particularly to control the activities of criminal wrongdoers'" (id. at 448, quoting Riss, 22 NY2d at 581). What distinguishes police protection from other decisions made by governmental entities is that it is "limited by the resources of the community and by a considered legislative-executive decision as to how those resources may be deployed" (In re World Trade Ctr., 17 NY3d at 448, quoting Riss, 22 NY2d at 581-582). Indeed, crime prevention is "a classic example of a governmental function" and that this function "has traditionally been assumed by police rather than by private actors is a tell-tale sign that the conduct is not proprietary in nature" (Balsam, 90 NY2d at 968). While we have acknowledged that government entities conduct may fall on a continuum between purely proprietary and purely governmental functions, and that a governmental entity may have a "dual role" in performing both (see Miller, 62 NY2d at 511), unlike WTC, nothing moves LIPA's actions off the proprietary end of the continuum. Its sole role is proprietary in nature: the efficient delivery of electrical services to its customers.

LIPA and co-defendant National Grid were aware that a major storm capable of flooding the Rockaway Peninsula was about to hit the region, and that this could create a fire hazard if certain areas vulnerable to flooding were not de-energized. They were also aware that de-energizing could potentially bring its own risks, as it could affect those unable to evacuate and those responding to the storm. Had LIPA never taken over from LILCO, however, a private utility company would have been faced with this precise dilemma, as were other private utility providers in the region on that day. The magnitude

of the storm did not in any way generate a situation in which defendants' activities did more than substitute for or supplement a traditional private enterprise. Utility companies provide power not only when the sky is blue, but also during intense blizzards, thunderstorms, hurricanes, and other treacherous weather events. Superstorm Sandy may have been one of the more severe storms to hit New York, but preparing for it and reacting to it was a proprietary function.

The fact that electrical services have traditionally been delivered through private enterprises and that the legislature supplanted privately-owned LILCO with publicly-owned LIPA for the sole purpose of ensuring the efficient delivery of electricity to LILCO's customer base leads to the conclusion that LIPA's decision not to withhold delivery of that commodity was unquestionably a proprietary act. The majority's suggestion that some as-yet-unknown fact may come to light at some future point in this litigation that might illuminate defendants' conduct, and transform LIPA's decision not to de-energize into a governmental action, has no grounding in law or the reality of public utility services. LIPA's decision to keep the lights on was not an exercise of the police power.

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For Each Case: Order affirmed, with costs, and certified question answered in the affirmative. Opinion by Judge Stein. Chief Judge DiFiore and Judges Wilson and Feinman concur. Judge Rivera concurs in result in an opinion, in which Judge Fahey concurs. Judge Garcia took no part.

Decided February 20, 2018