

Matter of Tip Top Management, Inc. v New York City Water Board
2006 NY Slip Op 30065(U)
November 20, 2006
Supreme Court, New York County
Docket Number: 0102767/2006
Judge: Judith J. Gische
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY

HON. JUDITH J. GISCHE

PART 10

PI Index Number : 102767/2006

- TIP TOP MANAGEMENT

vs
WATER BOARD

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were _____ motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...

Answering Affidavits - Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.

FILED
NOV 24 2006
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/20/06

HON. JUDITH J. GISCHE
J.C.C. J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
In the Matter of the Application of
TIP TOP MANAGEMENT, INC., MOLLANEY
LLC, F.T.C. REALTY CO., INC. and MACAU
MANAGEMENT & CONSULTING, LLC,

Decision/Order

Index No.: 102767/06
Seq. No. : 001

Petitioners,

For a Judgment under Article 78 of the Civil
Practice Law and Rules and for a Declaratory
Judgment

- against-

Present:

Hon. Judith J. Gische
J.S.C.

NEW YORK CITY WATER BOARD, CITY OF
NEW YORK and NEW YORK CITY
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondents.

----- X

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this
(these) motion(s):

Papers	Numbered
Pets' petition [article 78] w/SG verified petition, exhs	1
Resps' verified answer (CLH) w/exhs	2
Resps' affid (WK) w/exhs	3
Pets' affirm in response (SG) w/exhs	4

Gische, J.:

Upon the foregoing papers, the decision and order of the court is as follows:

This Article 78 proceeding is brought by three otherwise unrelated owners of
multi-family residential real property with six (6) or more units and their common
management company, to challenge surcharge penalties imposed by the New York City
Water Board ("Water Board") based upon their respective failures to either install water

meters by July 1, 2000 or to request, prior to July 1, 2000, that co-respondent New York City Department of Environmental Protection ("DEP") install them. When petitioners are not referred to collectively, they are identified individually as "Tip Top"; "Mollaney", "FTC" and "Macau".

The petitioners challenge three separate final determinations by the Water Board, all made on or about October 31, 2005, which denied their separate appeals seeking cancellation of the surcharge and affirmed the DEP's billing determinations.¹

On August 6, 1990, pursuant to a consent decree with the New York State Department of Environmental Conservation, DEP was required to install, or cause to be installed, water meters in more than 600,000 buildings in New York City. The DEP is the agency in charge of providing New York City with a pure, wholesome and adequate supply of water and disposal of sewage. New York City Charter §1403. The Water Board is responsible for the financial aspects of the DEP's mandate to provide water, including to fix and collect water and sewer charges. Public Authorities Law §§1046, 1045-g.

In furtherance of the consent decree, the DEP adopted a program that required installation of water meters in any building connected to the City's water supply. In accordance with applicable practice and procedures, the Water Board promulgated regulations that owners of residential buildings, with six or more apartments, had to either install water meters by July 1, 2000 (subject to reimbursement by the City) or

¹ As a matter of procedure, these challenges should have been brought as three separate article 78 proceedings. Respondent, however, does not really raise this as a basis for denial, so that the court will consider the merits of each application.

notify the DEP that it was requesting DEP to make such installation. In the event the owner did neither, the Water Board would impose a surcharge equal to 100% of the last unmetered water charge for any period after July 1, 2000 until compliance occurred. New York City Water Board Rules and Regulations, Part II, section 3 ("surcharge regulation"). These regulations and the potential surcharges for non-compliance were subject to widespread notification and publication efforts.

Based upon the application of the surcharge regulation, Tip Top was surcharged \$15,450.03 for the period July 1, 2000 through June 30, 2006.

Based upon the application of the surcharge regulation, Mollaney was surcharged \$4,599.68 for the period July 1, 2000 through September 16, 2002.

Based upon the application of the surcharge regulation, FTC was surcharged \$8,371.21 for the period July 1, 2000 through June 30, 2002.

Petitioners are challenging these surcharge determinations, which have all been upheld after final administrative appeal.

The standard for evaluating the Water Board's determinations is whether they were made in violation of lawful procedure, affected by an error of law or were arbitrary and capricious. CPLR § 7803[3]. In order for the court to find that an agency determination is arbitrary and capricious, it would have to find that the action taken was without sound basis in reason and taken without regard to the facts. The question for the court is whether the agency determinations have a rational basis. Pell v. Board of Education of Union Free School District No. 1 of Towns of Scarsdale and Mamaroneck, 34 NY2d 222 (1974). Where the issues concern the interpretation of a statute or regulation, the interpretations afforded by the agency responsible for its administration

should be upheld, if they are not irrational or unreasonable. Matter of Gains v. New York State Division of Housing and Community Renewal, 90 NY2d 545 (1997); Allstate Ins. Co. v. Libow, 106 AD2d 110 (2nd dept. 1984) *affd.* 65 NY2d 807 (1985).

The court finds that most of the arguments petitioners raise challenging the surcharge regulation have been expressly rejected by the Appellate Division, first department in Matter of 77 Realty LLC v. New York City Water Board, 16 AD3d 247 (1st dept 2005) *lv to app den* 5 NY3d 715 (2005). That decision is controlling authority on the issues presented. The Appellate Division expressly rejected arguments that the regulation did not further the purpose of water conservation, that it was arbitrary or capricious, and/or that the fine was excessive or constitutionally infirm. This court holds in accord, and rejects those arguments as well.

In Matter of 77 Realty, *supra*, the Appellate Division expressly stated, however, that it was not reaching the issue about whether the respondents determinations are legally infirm because they violate the Water Board rate schedule insofar as the surcharges are calculated on both the water and waste water portions of petitioner's prior bill. While there is no binding Appellate authority on this issue, there are several lower court decisions, all in agreement that there is no legal infirmity even if the calculation of the penalty was in part based upon the waste water portion of petitioner's last unmetered annual bill. Forty Ruti Realty LLC v. New York City Water Board, index #10758/04 Queens County Sup. Ct, Polizzi, J.12/06/04; Haav v. New York City Water Board, index # 113342/2005, Feinman, J, NY Co Sup Ct. 4/19/06; 1985-1995 Creston Avenue Housing Development Fund Corp. v. New York City Water Board, index # 15334/05 (Bx Co NY Sup. Ct. 9/19/06). In particular, in the Haav decision, Justice

Feinman provides an excellent analysis of this issue. This court holds in accord based upon the same reasoning. The interpretation of the regulation by the agency to include the surcharge on both water and waste water charges was consistent with the rational goals of conservation and it will not be disturbed by this court. Allstate Ins. Co. V. Libow, 106 AD2d 110 (2nd dept. 1984) *aff'd* 65 NY2d 807 (1985).

That leaves for consideration only the arguments raised by each petitioner that their account histories showed work orders which proved compliance with the regulation. Mollaney and FTC rely on work orders showing that meter installation was scheduled for October 15, 1999. Both accounts show that the work was refused, a claim both Mollaney and FTC deny. Tip Top's account history shows work orders for October 15, 1999 (with the work refused) and another one processed May 9, 2001.

Clearly if petitioners have complied with the surcharge regulation, that would constitute a complete defense to the imposition of the actual surcharge. 770 Owners Corp. V. City of New York Department of Environmental Protection, 20 AD3d 572 (2nd dept. 2005).

Conspicuously absent from this record is any affirmative proof by any of the petitioners that requests for DEP installation of meters was made by any of them at any time. The DEP had a process of automatically processing work orders, regardless of whether they were requested or not. Not only were petitioners unable to affirmatively represent that they made such requests, but they apparently did not even know about the work orders until they made FOIL requests to the DEP. This supports DEP's position that the notations were simply the result of batch work orders set by the DEPT itself. The DEP's internal procedures do not absolve petitioners of their responsibilities

and do not constitute a defense to the surcharges imposed.

Conclusion

In accordance herewith,

It is hereby:


ORDERED that the relief requested in the petition is denied in its entirety and the Clerk shall enter a judgment in favor of respondents and against the petitioners dismissing the petition, and it is further

ORDERED that any relief requested that is not expressly granted herein is denied, and it is further

ORDERED that this shall constitute the decision and order of the Court.

Dated: New York, New York
November 20, 2006

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

FILED
NOV 24 2006
NEW YORK
COUNTY CLERK'S OFFICE