

**Matter of Arnav Indus. Inc. v New York City
Water Bd.**

2007 NY Slip Op 30691(U)

March 27, 2007

Supreme Court, New York County

Docket Number: 0109898/2006

Judge: Charles J. Tejada

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**SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. Charles J. Tejada, Justice PART 50N**

In The Matter of the Application of
ARNAV INDUSTRIES INC., ZODIAC
PROPERTIES, INC., and
ARNAV RETIREMENT TRUST,
Petitioners,

INDEX NO. 109898/06
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

FOR A JUDGMENT UNDER ARTICLE 78 OF THE
CIVIL PRACTICE LAW AND RULES AND FOR A
DECLARATORY JUDGMENT,

-AGAINST-

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

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

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

Answering Affidavits - Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Papers Numbered
FILED
APR 13 2007
NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this Petition is denied as per the
attached Opinion, Decision and Order.

Dated: March 27, 2007

ENTER: 
J.S.C.

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: PART 50

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TEJADA, C.J., J.S.C.

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Pursuant to Article 78 of the Civil Practice Laws and Rules, the scope of this Court's review of an administrative agency's determination is limited. In reviewing an agency's decision, the only determination to be made is "whether a determination was made in violation of lawful procedures, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion." CPLR 7803[3]; *Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 356 N.Y.S.2d 833 (1974). Thus, the function of the Court upon an application of relief under CPLR Article 78 is to determine, upon the proof before the administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious. *Fanille v. NYC Conciliation and Appeals Board*, 90 A.D.2d 756, (1st Dep't 1982) aff'd 58 N.Y.2d 952 (1983).

In the case at bar, the petitioners seek reversal of respondent's, New York City Water Board (Water Board), decisions dated May 12, 2006, May 12, 2006, April 24, 2006, and March 3, 2006, that imposed surcharge penalties on the four residential real properties (the "properties") receiving water and sewer services for failure to timely install water meters, as per the time line set by the respondent Department of Environmental Protection (DEP). Petitioners argue that, in light of the fact that a work order was present for the DEP to install a water meter for 441 West

End Avenue, that the decision to impose a surcharge on this property was a clear violation of the surcharge regulations and DEP's billing policies, arbitrary and capricious conduct, an error of law and an abuse of discretion. Petitioners also argue that since petitioners had no opportunity to comply with the surcharge provision because they did not receive notice of the impending surcharge, that the decisions by the Water Board to impose surcharges on the other properties (307-309 Mott Street, 120 Riverside Drive and 540 East 6th Street) was a clear violation of the surcharge regulations and constituted arbitrary and capricious conduct, an error of law and an abuse of discretion. Petitioners also seek a declaratory judgment that the surcharge penalty and its enforcement, on sewer charges for fiscal year 2001 and 2002 is illegal and unenforceable and in direct contravention of the clear and unambiguous language of the rate schedules.

Respondent Water Board argues that their surcharge determinations were not arbitrary or capricious, an abuse of discretion or the result of an error of law. Respondents urge this court to dismiss the instant petition since they argue that none of the petitioners requested that DEP install the water meters or have water meters installed by a private plumber by the June 30, 2000 deadline. All New York City property owners were given notices of this requirement beginning in 1995 with their annual frontage bills and thereafter on several other occasions including the final warning notices sent to petitioners in 1999 and 2000.

A review of the record before this Court shows that each of respondents' decisions is supported by a rational basis in the record and is neither arbitrary or capricious, an abuse of discretion or contrary to law. The record shows that petitioners were well advised with more than adequate notice and time to make accommodations to have water meters installed in their premises (at no charge) as part of a city wide effort to promote water conservation and pursuant to a consent decree whereby the DEP was required to install or cause to be installed water meters in more than 600,000 buildings in New York City. In accordance with the consent decree, in 1995 DEP began efforts to notify its customers about the requirement to have water meters installed. By 1999, the over 100,000 properties that failed to have water meters installed were notified that failure to do so would result in surcharges if the water meters were not installed by April 14, 2000. In addition to these notices, there were several newspaper articles that discussed the requirement to install water meters and a surcharge for failure to do so. In October 1999 and thereafter in March 2000, surcharge notices were sent to these buildings which included the

buildings owned by petitioners. Moreover, the April 14, 2000 deadline to install the water meters *or request that the meters be installed* was extended until June 30, 2000. There is nothing in the record to show that petitioner's complied with the mandate to either install the water meters by June 30, 2000 or make a request with the DEP by June 30, 2000 to have the water meters installed. Furthermore, petitioner's claim that there was a work order in effect for the installation of the water meter for the property located at 441 West End Avenue was found to be without merit. Consequently, petitioners' claims that they were not notified of the impending surcharge for failure to comply with the citywide water meter installation program and the alternatives presented to them in an effort to avoid the surcharge has no support in the record.

Further, that portion of the petition seeking a declaratory judgment must also be denied. See *Matter of 77 Realty, LLC v. New York City Water Board*, 16 AD3d 247 (1st Dept, 2005).

Finally, this Court finds that respondents' determination that upheld the surcharge is rational, proper, not arbitrary or capricious, or an abuse of discretion or the result of an error of law. See, *Rudin Management Company v. New York State Division of Housing and Community Renewal*, 215 AD2d 243.

Consequently, the petitioners' Article 78 application is dismissed.

This constitutes the opinion, decision and order of this Court.

New York, New York
March 27, 2007



J.S.C.

FILED
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