

Matter of CDO Corp. v New York City Water Bd.

2007 NY Slip Op 30939(U)

April 19, 2007

Supreme Court, New York County

Docket Number: 0111532/2006

Judge: Rolando T. Acosta

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

PRESENT: HON. ROLANDO T. ACOSTA

PART 61

Index Number : 111532/2006

CDO CORP.

INDEX NO. _____

vs

NYC WATER BOARD

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

ARTICLE 78

MOTION CAL. NO. _____

_____ were read on this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

see attached

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be sent based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

SO ORDERED

Dated: 4/19/07

[Signature]

ROLANDO T. ACOSTA
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 61

In the Matter of the Application of

CDO Corp., Vida Associates, LLC, 2304-06 Natari
 Associates, Inc., 23304-2306 LLC, 2304-06 ACP
 Realty LLC, 41 Fifth Owners Corp., 46th Street Realty,
 LLC, 240-44 East 87th Street Owners Corp., 2487
 Davidson Avenue, LLC, Parkash 2487 LLC, 715-723
 Sixth Avenue Owners Corp., Connie Ramos and
 Anne Mazella,

Petitioner,

For a Judgment under Article 78 of the Civil Practice
 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 documents were considered in reviewing the instant petition for a judgment reversing the eleven decision of the Acting Executive Director of the New York City Water Board and a declaration that the sewer portion of the Board's surcharge is illegal:

Papers	Numbered
Notice of Petition, Petition & Memorandum of Law	1-2 (Exhibits A-N; A-D)
Verified Answer, Affidavit & Memorandum of Law	3-5 (Exhibits A-R, A-F, 1)
Reply Affirmation	6 (Exhibits A-B)

DECISION/JUDGMENT

Index No. 111532/06

Seq. No. 1

Present:

Rolando T. Acosta
 Supreme Court Justice

The eleven petitioners (residential property owners with at least six apartments located within the City of New York) were each issued a surcharge for not installing a water meter by July 1, 2000 or not requesting that respondents install one. Petitioners argue, inter alia, that the New York City Water Board's determinations denying their appeals were arbitrary and capricious because ten of the petitioners never received notice of the impending surcharge penalty, and one, 715-723 Sixth Avenue Owners Corp, had an open work order and request to install a meter filed with the DEP, which should have precluded the surcharge. They also argue that the Board's method of assessing the sewer portion of the surcharge is illegal.

Initially, it should be noted that out of the seven petitioners who filed their initial complaint within the four year statute of limitations, respondent's determination was rational and supported by the record. Indeed, DEP records indicate that final warning notices were sent to all eleven petitioners in October 1999 and March 2000, and (except for 715-723 Sixth Avenue) it is undisputed that petitioners neither requested that DEP install a meter or had one installed by June 30, 2000. See In the Matter of MHG Family Limited Partnership, Index No. 112187/06 (Sup. Ct., N.Y. Co.)(Acosta, J.).

Contrary to petitioner's assertions, the Board's determination that 715-723 Sixth Avenue did not request that a meter be installed is supported by the record. As explained by respondent, the work order referred to by petitioner did not result from a request by 715-723 Sixth Avenue. Rather,

it was system generated by DEP and resulted from a process related to DEP's administration of its own meter installation contractors. The property was located within the service area covered by one of DEP's meter installation contractors. That system had been in place for many years since DEP began meter installation using City awarded contracts in the late 1980's, and this process was entirely unrelated to the request by an owner for metering required to avoid the surcharge. The work order was subsequently cancelled on September 5, 2001 due to the expiration of the service contract.

Respondent's Exhibit N. Inasmuch as there were only two ways of avoiding the surcharge, either installing a meter on or prior to June 30, 2000 or making a request to DEP on or before June 30, 2000, respondent's decision was not arbitrary or capricious. See Tip Top Management v. Water Board, Index No. 1027767/06 (Sup. Ct. N.Y. Co.)(Gische, J.).

That portion of the petition which seeks to declare the Board's method of assessing the sewer portion of the surcharge illegal is denied. Haav 575 Realty Corp. v New York City Water Board, ___ A.D.3d ___, 2007 Slip Op 02673 (1st Dept. 2007)(Court rejected this

argument).

Four petitioners (2306 Seventh Avenue, 2304 Seventh Avenue, 2911 Eight Avenue, and 41 Fifth Avenue) filed their initial complaint after the four year statute of limitation. Thus, that portion of their initial complaints that seek to challenge the July 1, 2000 bill and DEP's factual determination that petitioners had received notice of the impending surcharge and that they nevertheless failed to install or request that DEP install a meter by the June 30, 2000 deadline are time barred. See Part IX, Section 2(A) Complaint Resolution for Rate Schedules, Respondent's Exhibit D. In any event, these four petitioners' claims are not supported by the record.

That respondent failed to address these four petitioners' challenges to the July 1, 2001 and subsequent bills on the legal basis of whether the surcharge should be imposed on sewer water is of no moment inasmuch as the issue is raised in the petition seeking declaratory relief to that effect, which obviates the need for a remand. Moreover, as noted above, that argument has no merit. Haav 575 Realty Corp. v New York City Water Board, ___ A.D.3d ___, 2007 Slip Op 02673 (1st Dept. 2007).

Accordingly, it is

ORDERED that the instant petition is denied in its entirety and dismissed.

This constitutes the Decision and Judgment of the Court.

SO ORDERED

Dated: April 19, 2007

Rolando T. Acosta, J.S.C.
ROLANDO T. ACOSTA
J.S.C.

UNFILED JUDGMENT
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