

Matter of Bethco Corp. v Tweedy

2007 NY Slip Op 32142(U)

July 11, 2007

Supreme Court, Queens County

Docket Number: 0018050/2005

Judge: Peter Joseph Kelly

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M E M O R A N D U M

SUPREME COURT - STATE OF NEW YORK
 COUNTY OF QUEENS - IAS PART 16

In the Matter of the Application of
 BETHCO CORPORATION, ET AL,

Plaintiffs,

- against -

DAVID B. TWEEDY, ETC., ET AL,

Defendants.

BY: KELLY, J

DATED: JULY 11, 2007

INDEX

NUMBER: 18050/05

MOTION

DATE: MARCH 27, 2007

In this Article 78 proceeding petitioners Bethco Corporation, Staten Island University Hospital, and UtiliSave, LLC seek a judgment reversing the decisions issued by respondents David B. Tweedy, as executive director of the New York City Water Board and Christopher O. Ward as Commissioner of the Department of Environmental Protection of the City of New York (DEP) dated April 18, 2005, which denied petitioners' appeals on the grounds that their claims were untimely.

Petitioners Bethco Corporation (Bethco), and Staten Island University Hospital (Hospital), each retained petitioner UtiliSave, LLC, (Utilisave) to audit their respective billing from the New York City Water Board (Water Board) and to seek refunds from the Water Board for overcharges on the water bills. By letter to the DEP dated August 25, 2003, UtiliSave requested an adjustment to the water bill issued to Bethco on April 27, 1998. UtiliSave requested an adjustment from the DEP by a letter dated July 31, 2003 to the bill issued to Hospital on December 5, 1997. Each of these requests were denied by the DEP on the grounds that the Water Board's "Water and Wastewater Rate Schedule" (Rate Schedule)

provided that a disputed bill would not be adjusted unless the written complaint was filed within four years of the bill date.

UtiliSave appealed each of these decisions to the Water Board, which upheld the denials on the grounds that the original complaints had not been timely filed within four years of the issuance date of the bill in question. The petitioners thereafter commenced an Article 78 proceeding in this court on May 12, 2004 in which they sought a judgment vacating respondents' determinations denying their appeals. The Hon. Joseph Dorsa, in a decision dated December 15, 2004, determined that the applicable four year statute of limitations, effective July 1, 2002, was to be applied retroactively, but that due process required that respondents acknowledge the right of customers to bring complaints within a reasonable time after the effective date of the amended Rate Schedule when considering the retroactive application of the amended time limitation. Respondents' determinations were, therefore, vacated and the matter was remanded for further proceedings (See Matter of Bethco Corporation v Tweedy, 7 Misc2d 1011A [2004]).

On March 4, 2005, the Water Board issued a resolution providing for a grace period which extended the time in which to file a claim outside the four year limitations period established on July 1, 2002 for three months until September 30, 2002. Thereafter, the Water Board again denied each of the petitioners' claims on the grounds that they were untimely, as they had been filed after September 30, 2002 and were beyond the four year

statute of limitations. Petitioners commenced the within proceeding on August 17, 2005, and assert that the three-month grace period is arbitrary, capricious, unreasonable and violates the claimants' due process rights. The matter was thereafter adjourned pending the Appellate Division determination of the same issues raised in Matter of Amalgamated Warbasse Houses, Inc. v Tweedy, (33 AD3d 807 [October 17, 2006]) and Matter of 38 Park Ave. Assn., LLC v Tweedy, 33 AD3d 794 [October 17, 2006]). In both matters the Appellate Division reversed the Supreme Court's decision and reinstated the petition ruling that the Supreme Court should determine if the Water Board's resolution of March 4, 2000, establishing a grace period to September 30, 2002, was reasonable and complied with due process requirements, or was, as alleged by the petitioners, arbitrary and capricious or an abuse of discretion.

Petitioners are asserting that the three-month grace period is arbitrary and capricious, an abuse of discretion and violates petitioners' procedural due process rights in that it ran from the date of the Rate Schedule amendment and not from the date of the remand of this proceeding to the Water Board, and expired prior to the commencement of this Article 78 proceeding. Petitioners assert that the DEP should be required to adopt a two year limitations period to resolve and rectify overbilling claims, as any other time period will result in their claims being time barred. It is asserted that the three-month grace period is unacceptable to petitioners as the process of locating and conducting appropriate investigations of their claims, and preparing the necessary

documentation far exceeds three-months, despite having hired UtiliSave. It is also asserted that UtiliSave represents hundreds of clients and tens of thousands of accounts, and as the DEP now requires such firms to submit a notarized letter of authorization, it takes UtiliSave some four to eight months to obtain the necessary authorizations from the CEO's of their institutional clients, and a year to formulate these claims.

Respondents, in opposition, contend that the denial of petitioners' overbilling claims as untimely was neither arbitrary nor capricious nor an abuse of discretion and therefore the petition should be dismissed. Respondents further assert that the three-month grace period was reasonable and comported with due process, based upon the history of the complaint filing period, the Water Board's notification efforts as regards the shortened statute of limitations, the subject matter, and the lack of a valid expectation on the part of customers that they could file a claim under the previous six year filing period.

It is well settled that the court's power to review an administrative action is limited to whether the determination was warranted in the record, has a reasonable basis in law, and is neither arbitrary nor capricious. (See, Matter of Colton v Berman, 21 NY2d 322 [1967]).

The retroactivity of the four-year period of limitations has been upheld by the Appellate Division in Amalgamated Warbasse Houses, Inc. v Tweedy, 33 AD3d 807 [October 17, 2006]), and will not be revisited here. The claims of petitioners Bethco and

Hospital were immediately barred by the application of both the application of the shortened four year limitations period and the three-month grace period.

In examining the three-month grace period adopted by the Water Board, the court is guided by the legal principle that where the legislature "expressly sets a reasonable grace period for suit after the effective date of a reduced or new limitations period, its determination of what constitutes a reasonable time is entitled to deference in the absence of some 'palpable error'", (Brothers v Florence, 95 NY2d 290, at 301; quoting Terry v. Anderson, 95 US 628, 633). Petitioners have not made a prima facie showing of palpable error (cf. Arciri v. Town of Islip Zoning Board of Appeals, et al, 16 AD3d 411).

In any event, further examination of whether the adoption of a three month grace period was in conformity with due process requirements, establishes that petitioners claims to the contrary would be unavailing (Brothers v Florence, supra; Partition Street Corporation v Zoning Board of Appeals of City of Rensselaer, 302 AD2d 65; Sessa, et al v State of New York, 63 AD2d 334).

In determining whether the three-month period is consistent with due process, the court must consider the importance of the "subject matter" of the claims being curtailed by the new Statute of Limitations (see, Brothers v Florence, supra). Here, the subject matter of the claims is the right to challenge water bills that were issued and received by the customers years before they sought to file a protest. Petitioners do not claim that they were

unaware of their right to protest the water bills. The court finds that the subject matter of these claims is not so grave as to require an extensive grace period (Compare Brothers v Florence, supra; Partition Street Corporation v Zoning Board of Appeals of City of Rensselaer, supra; Arceri v Town of Islip Zoning Board of Appeals, supra).

The court must also balance the respondents' interest here in substantially accelerating the date of repose from challenges to water bills against the legitimate interests of potential claimants in being afforded a fair opportunity to bring their claims after the effective date of July 1, 2002. This requires an examination of potential claimants' legitimate expectations or anticipation of the permissible time to challenge their water bills after the effective date of a new period of limitations (see Brothers v Florence, supra). Petitioners urge that the court reject the three-month grace period and adopt a two-year grace period, based upon the time UtiliSave requires to investigate and prepare claims on behalf of their clients.

Initially the court is unpersuaded that petitioners or those similarly situated need - as was done here - in excess of five years to challenge a water bill. Nor does UtiliSave adequately explain how a challenge to these bills could not have been made prior to September 30, 2002. A two-year grace period from the effective date of the amendment does not reflect the appropriate balance between the legislative objective and fairness to all claimants, despite the hardship alleged by UtiliSave to its

"clients". The clear goal of the Legislature and the Water Board in adopting a four-year statute of limitations was to immediately curtail the application of the six-year period of limitations to water bill challenges. Giving accrued claims a grace period of two years fails to accomplish the intended result. Moreover, adopting a two-year grace period would give petitioners and all such parties the benefit of the prior six-year period of limitations. Such a result would substantially undermine the legislative intent in enacting this amendment.

Fairness to claimants whose claims would otherwise be time-barred upon the effective date does not require extending the new Statute of Limitations to two years from the amendment's effective date. Considering the Water Board's elimination of the distinction between the application of the limitations period to bills issued prior to the implementation of the relevant rate schedule and those issued thereafter, as well as the legislative history, and the intent that the four-year limitations period be applied retroactively, a rule continuing to give many claimants an additional two years in which to file their protest would have far exceeded their reasonable expectations. Petitioners' claim that the grace period should run from the date of the remand of this matter, rather than from the effective date of the amendment is also rejected as it again would expand effectively the grace period well beyond even the previous six years statute of limitations.

Upon consideration of the foregoing factors, the court finds that the three-month grace period for claims immediately

time-barred upon the effective date of the amendment to the statute of limitations strikes the appropriate balance between government's and petitioners' personal interests for procedural due process purposes. This grace period comports with the legislative goal and the reasonable expectations of potential claimants. It also gives due consideration to the importance of the "subject matter" of the claims affected by the new period of limitations.

In view of the foregoing, the court finds that the Water Board's resolution of March 4, 2005 which established a three-month grace period for challenges to water bills that were immediately barred as of July 1, 2002, comports with procedural due process and is neither arbitrary nor capricious nor an abuse of discretion. Respondents' denial of the petitioners' claims as untimely, therefore, was proper. Petitioners' request to vacate respondents' determinations of April 18, 2005 is denied, and the petition is dismissed.

Settle judgment.

Peter J. Kelly, J.S.C.