

Matter of Lechar Realty Corp. v Lewitts

2008 NY Slip Op 31936(U)

June 26, 2008

Supreme Court, New York County

Docket Number: 0115861/2007

Judge: Shirley Werner Kornreich

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

PRESENT: **HON. SHIRLEY WERNER KORNREICH**

PART 54

Justice

Index Number : 115861/2007

LECHAR REALTY CORP.

vs.

LAWITTS, STEVEN W.

SEQUENCE NUMBER : # 001

ARTICLE 78

INDEX NO. 115861-07

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

read on this motion to/for

PAPERS NUMBERED

1

23

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

UNFILED JUDGMENT

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

6/26/08

HON. SHIRLEY WERNER KORNREICH

[Signature]
J.S.C.

Dated: _____

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----- X

In the Matter of the Application of
LECHAR REALTY CORP., and LECHAR REALTY, LLC,

Index No.:115861/07

Petitioners,

- against-

**DECISION and
ORDER**

STEVEN W. LAWITTS, as Executive Director of the New
York City Water Board and EMILY LLOYD, as
Commissioner of the New York City Department of
Environmental Protection,

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

KORNREICH, SHIRLEY WERNER, J.:

In this Article 78 proceeding, Petitioners challenge a determination of the New York City Water Board (Board), dated October 23, 2007, which, after an administrative appeal, affirmed a decision of the Board's Executive Director, Steven Lawitts, dated April 18, 2007. The Executive Director's decision affirmed prior determinations by Deputy Commissioner, Joseph F. Singleton, dated August 21, 2006, and an Initial Review by DEP Customer Service Representative Robert Ko, issued on May 1, 2006. At issue is the accuracy of bills for Petitioners' two accounts numbered 22201 and 23001, in the amounts, respectively, of \$45,785.22 and \$168,543.56, plus late charges.¹ The first cause of action in the petition is granted and the second cause of action is denied for the reasons that follow.

¹ The Board threatened petitioners with termination of water service for their office building in December of 2007. On February 22, 2008, the parties entered into a stipulation staying any action for non-payment until a decision is rendered in this proceeding.

I. *Factual Background*

Petitioners own an office building located at 1441 Broadway, New York, NY ("the building"). The Department of Environmental Protection (DEP), which operates the Water Board's water and sewer services, provides water and sewer services to the building. The building is serviced by three interconnected mains that provide "domestic" (potable) water.

Each main has a meter which measures the amount of water which flows through the pipe. According to the DEP's official pamphlet entitled "How to Read a Water Meter:" "[a]ll water meters approved for use by the New York City Department of Environmental Protection read much like a car odometer." In a similar fashion to an odometer, positive water consumption (water flowing into the building) causes the reading to increase; negative consumption (water flowing out of the building) causes the reading to decrease.

The building was billed under two separate account numbers, 22201 and 23001. Account 22201 bills one main, serviced by meter 0859 until August 17, 2004, and subsequently by meter 8796. Account 23001 bills two mains. The first is serviced by meter 2049. The second was serviced by meter 5096 until October 21, 2003, and subsequently by meter 0273.

Water usage is billed according to meter readings by DEP employees. The Water Board Rate Schedule, which contains the agency's rules and regulations, provides:

If a water meter registers incorrectly, stops registering or is removed or bypassed for any cause or reason, a charge for water will be imposed for water consumed during that period of time based upon the consumption measured by an accurately functioning meter for a representative period of time either prior or subsequent to the period of meter failure as reasonably determined by DEP, at the appropriate rates in effect for that period.

The bills issued to DEP customers indicate whether the billing is based on "Actual" or "Estimated" readings.

Petitioners' first cause of action challenges estimated bills for meter 0859 on the ground that the Board's use of estimated billing, when actual readings were available and showed no usage, was arbitrary, capricious, contrary to law, and an abuse of discretion. During the time period at issue (May 2002 through August 2004), water started flowing backwards out of the building through the main serviced by meter 0859. This was caused by a broken backflow prevention "check-valve." The backflow was registered correctly by the meter, as evidenced by negative actual readings recorded by DEP. The first negative reading appeared on the reading taken February 17, 2003, and the backflow continued until the check-valve was replaced on August 17, 2004.

Despite DEP's knowledge that the backflow was causing the negative readings, it did not notify petitioners. Nor did it issue bills based on the available actual readings. Instead, DEP proceeded as if the meter was malfunctioning and used estimated readings based on a prior period. During the contested period, the estimated bills for meter 0859 totaled \$45,785.22.

In their second cause of action, petitioners challenge the bills for account 23001 for the other two water mains, although petitioners admit that they were based on actual readings. Petitioners' complaint is that the readings were "not reflective of actual usage" because the building's meters are interconnected and, in order to keep the building supplied with water, the other two mains were forced to "over-pump" to compensate for the water being lost through backflow of the main serviced by 0859. This assertion is supported by the evidence. DEP's meter-reading records show a decrease in positive

consumption by the two other meters after Petitioner discovered the broken check valve and fixed it on August 17, 2004. Hence, Petitioners urge that they should not be held responsible for the charges incurred by the extra usage.

Respondents counter that they had no legal responsibility to notify Petitioner of the backflow, as the applicable New York City regulation, 15 RCNY §20-04(e)(3), places statutory responsibility on Petitioners to check and maintain check-valves for backflow prevention.

Petitioners exhausted all administrative appeals prior to commencing this proceeding. The DEP and Water Board provide for a three step appeal process. The steps are laid out in Part IX, Section 2, of the Water Board Rate Schedule. The customer can first request an Initial Review, and a response from DEP must be issued within 90 days. If the customer is dissatisfied with the initial review, they can appeal the charges through a written request to the Deputy Commissioner. If the customer disagrees with the decision rendered by the Deputy Commissioner, they have 30 days to submit a written request for a Final Appeal to the Executive Director of the Water Board on the following grounds: (1) new or additional information is presented; (2) the customer demonstrates that factual information stated in the decision of the Deputy Commissioner is incorrect; (3) the Deputy Commissioner has not correctly interpreted or applied a Water Board rule or rules; (4) the material facts are not as described in the decision."

II. Administrative Procedural History

Petitioner filed a request for Initial Review on January 31, 2006, complaining that actual negative use readings on account 22201 (meter 0859) were billed as positive use based upon estimated usage. Petitioner also complained that the backflow on one main

caused a "200-300%" increase in consumption for the other two mains. DEP Customer Service Representative Robert Ko issued a response to petitioner's Initial Review request on May 1, 2006. Mr. Ko did not address the reverse-flowing water. As petitioners note in their petition, the letter "completely ignored the issue of the back flow in Meter 0859 and incorrectly described it as 'not registering.'"

Petitioners appealed Mr. Ko's Initial Review decision to Deputy Commissioner Robert Singleton. Regarding the back flowing meter, petitioners' appeal was based on DEP's own records, which demonstrated that the meter was functioning and properly measured the actual backflow of the main. Petitioners' appeal stated that "[f]or the period 5/17/02-1/13/06 DEP billed the old meter #0859 for consumption of 11168 hcf. Again as verified by reads taken by DEP the meter actually showed negative registration of 31,385 HCF through 8/17/04 and no further usage through the date of its removal." With respect to account 23001 (meters 2049 & 0273), petitioners' appeal stated that the bill was inconsistent with prior readings, relying on the fact that the amount of usage through these two mains before and after the valve was fixed were drastically different, as they had to compensate for the water flowing back to the City. Petitioners asserted that after the check valve was replaced, the usage of meter 2049 decreased by 338%, and 0273 by 199%.

Deputy Commissioner Joseph F. Singleton's determination, dated August 21, 2006, admitted that meter 0859 was working correctly. He stated that "the test indicated that meter N13690859 registered consumption at an overall 100.3%, which is within the acceptable percentage of 98.5% through 101.5% accepted by the American Waterworks Association." He then noted the "backward registered consumption" through the main serviced by 0859. However, Deputy Commissioner concluded that petitioners benefitted

from the estimated bills for that account. "This equates to an ADC [Average Daily Consumption]² of 38.13 hcf and it appears that your client received the benefit of under-billing for the former meter 0859 from May 17, 2002 to February 11, 2006." In conclusion, he stated that he would not correct the "under billing" for the negative usage: "I have instructed staff to make no further adjustments to the January 17, 2006 bill in order not to subject your client to a large bill."

On August 30, 2006, petitioners requested the Deputy Commissioner to reconsider his determination. In a September 2, 2006 letter, Mr. Singleton affirmed "that the backflow condition existed for an extended period of time and the consumption billed due to a defective check valve or lost through the same," but denied the request to reconsider.

Petitioners filed an appeal from the Deputy Commissioner's decision to Executive Director Steven Lawitts. The decision by Mr. Lawitts, dated April 18, 2007, quoted the Water Board Rate Schedule rule regarding malfunctioning meters and ignored petitioners' argument that it was error to substitute estimated readings when accurate actual readings were available: "Meter N13690859 had not been accurately recording consumption from May 17, 2002 until the date it was replaced with meter K16038796, February 11, 2006. Due to the unrecorded consumption, the account was billed on the basis of estimated consumption." Petitioners requested reconsideration on June 12, 2007, which was denied on October 23, 2007. This proceeding ensued.

III. Conclusions of Law

In an Article 78 proceeding, the courts must uphold the administrative

² The correct term is "ADF," an acronym for Average Daily Flow.

determination "unless there is no rational basis for the exercise of discretion or the action complained of is 'arbitrary and capricious.'" *Pell v. Bd. of Ed.*, 34 N.Y.2d. 222, 231 (1974). An administrative determination made "without sound basis in reason and without regard to the facts," is arbitrary and capricious. *Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 N.Y.2d. 753, 758 (1991). A decision made in violation of an agency's own procedural rules should be annulled. *Lozada v. Scully*, 108 A.D.2d 859 (2nd Dept. 1985). An Article 78 proceeding is in the nature of a motion for summary judgment, *Reisman v. Codd*, 54 A.D.2d 878 (1st Dept 1976), in which uncontradicted facts are deemed admitted, *Costello Associates, Inc. v. Standard Metals Corp.*, 99 A.D.2d 227, 229 (1st Dept. 1984).

The first cause of action in the petition challenging the bill for meter 0859 must be granted because the Board irrationally billed petitioner for negative consumption recorded by a functioning meter based upon estimates of past usage, in violation of the Board's own rules. The pivotal fact that water was flowing *out* of the water main measured by meter 0859, from May 17, 2002 to August 17, 2004, was ignored in the challenged determinations at all stages of administrative review. It was not denied by the Board during the appeal process or in this proceeding. Hence, negative consumption is admitted by the Board. Under the Board's own rules, petitioners' appeal regarding meter 0859 should have been granted on the grounds that "factual information stated in the decision of the Deputy Commissioner is incorrect," the Deputy Commissioner incorrectly "interpreted or applied a Water Board rule or rules," and material facts were not as described in the Deputy Commissioner's decision. Petitioner demonstrates conclusively using the DEP's uncontradicted meter reading records, that there was negative water use for water meter

0859 during the relevant period. Deputy Commissioner Singleton's decision stated that there was an ADF [Average Daily Flow] of 38.13 when the DEP meter reading records clearly reflected that the ADF was -38.13. The accuracy of meter 0859 is undisputed on this record and yet the negative water use was ignored by the challenged determination. Consequently, the Board erred in substituting estimated for actual use in billing for meter 0859. The Water Board Rate Schedule permits estimated bills only where a meter malfunctions. As there is no proof in the record that meter 0859 was registering incorrectly, stopped registering, was removed or was bypassed, estimated readings were not authorized by the Board's own rules. Thus, the Board's determination with regard to the first cause of action was irrational, arbitrary and capricious and must be annulled.

The second cause of action in the petition must be denied because petitioners offer no evidence that the bills for account 23001 were based on meters that failed to accurately record consumption throughout the period. The bills were based on the actual readings. Petitioners' argument that over-pumping resulted from the faulty check valve on meter 0859 does not negate that the water entered their building. Furthermore, 15 RCNY § 20-04 (e)(3) states that: "failure of a building owner or customer to provide an annual test report certifying that an existing backflow prevention device... is properly operating shall be a violation of these rules." The rule assigns statutory responsibility for the check valve to petitioners. Hence, the Board is not responsible for the excess water pumped in compensation for the failed check valve. The Board states that the policy behind the rule is to give customers an incentive to perform repairs in timely fashion so as to protect water quality and public health. The Board's decision was rationally based upon the actual readings for petitioners' water meter for account 23001 and in accordance with policy

judgments of the Board, as reflected in its regulations concerning the responsibility for maintaining the check valve. This court cannot substitute its judgment for the rational determination of the Board. Accordingly, it is

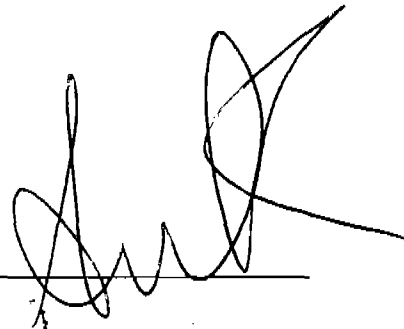
ORDERED, ADJUDGED and DECREED that the petition of Lechar Realty Corp. and Lechar Realty, LLC, against STEVEN W. LAWITTS, as Executive Director of the New York City Water Board and EMILY LLOYD, as Commissioner of the New York City Department of Environmental Protection, is granted as to the first cause of action, and the determination of respondent New York City Water Board, dated October 23, 2007, imposing charges upon Petitioners in the amount of \$45,785.22, plus late charges in connection with Account Number 22201, is hereby vacated and annulled; and it is further

ORDERED, ADJUDGED and DECREED that said petition is denied as to the second cause of action regarding the determination of the New York City Water Board, dated October 23, 2007 in connection with charges for Account Number 23001, and the petitioners time to pay said charges is extended until 60 days after service upon them of a copy of this order with notice of entry; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 10/26/08

ENTER:



UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1419).