

Matter of York v New York City Water Bd.
2013 NY Slip Op 31333(U)
May 9, 2013
Sup Ct, Queens County
Docket Number: 19784/12
Judge: Timothy J. Dufficy
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MEMORANDUM

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS**

**PART 35
HON. TIMOTHY J. DUFFICY**

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**IN THE MATTER OF APPLICATION OF
ESTHER YORK,**

Petitioner,

Index No. 19784/12

Motion Date: 1/23/13

**For Judgment pursuant to Article 78 of the
Civil Practice Law and Rules**

Mot. Cal. No.: 131

Mot. Seq. 1

-against-

**NEW YORK CITY WATER BOARD a/k/a
NEW YORK CITY DEPARTMENT OF
ENVIRONMENTAL PROTECTION (DEP),**

Respondent.

Date: May 9, 2013

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In this Article 78 proceeding, self represented petitioner Esther York seeks a judgment vacating the determination of respondent New York City Water Board (Water Board), dated May 18, 2012, which upheld the New York City Department of Environmental Protection's (DEP) determination not to reduce the water and sewer charges in the June 20, 2011 bill for water service for 199-61 Keno Avenue, Queens, New York, for the period of June 22, 2009 through June 20, 2011; for an order directing the Water Board to produce for inspection the original water meter that was replaced by the respondents; for an order directing the Water Board to grant her an administrative hearing with respect to the June 20, 2011 water bill; and awarding her costs and attorneys' fees.

Petitioner Esther York is the owner of a one-family house, located at 199-61 Keno Avenue, Queens, New York. Respondent New York City Water Board is an autonomous public benefit corporation empowered to set water and sewer rates sufficient to support New York City's water and sewer systems (Public Authorities Law §§ 1045-f, 1045-j). Pursuant to an agreement between the City and the Water Board, respondent DEP acts as the Water Board's agent, responsible for billing and collecting water and sewer charges, and maintaining accounts.

On June 22, 2009, the DEP obtained an actual reading of the water meter N2555 at the subject premises and sent the petitioner a bill, dated June 30, 2009, in the amount of

\$503.77. On April 14, 2011, the DEP mailed to petitioner York an inspection request notice in order to gain access to the property and investigate estimated water meter readings. This notice was sent to the petitioner at the subject property and to an alternative address that was on file with the agency. In response to said letter, Ms. York contacted the DEP in order to schedule an inspection date. An inspection was scheduled for May 23, 2011.

On May 23, 2011, the DEP determined that the outside remote meter reading device was defective, and could not transmit readings from the meter resulting in estimated billing. Based upon this inspection, the DEP replaced the water meter N2555. The DEP determined that water meter N2555 was properly registering water flow, and obtained a final meter reading. The DEP installed a new water meter- E4061, at the subject premises, that started at a reading of zero. The DEP also discovered toilet leaks at the premises and issued a leak and water waste notice, advising Ms. York to repair the leak condition by June 3, 2011. On May 31, 2011, Ms. York contacted the DEP and advised it that the toilet leak conditions had been repaired.

On June 20, 2011, the DEP cancelled the estimated water and sewer charges in the sum of \$1,821.10 for water meter N2555, based upon the May 23, 2011 inspection and the meter readings obtained on that day. The DEP, based upon an actual read of the meter N2555 for the period of June 22, 2009 through May 23, 2011, determined that the total water charge was \$4,530.00, credited Ms. York for the previously paid estimated bills, and issued a bill on June 20, 2011, in the sum of \$2,709.69.

Ms. York contacted the DEP on July 1, 2011, in connection with the June 20, 2011 bill, and was informed that she could dispute the charges in writing, and that an inspection was scheduled for July 18, 2011. Ms. York also requested that the alternative address be removed from the DEP's records. On July 5, 2011, Ms. York wrote to the DEP contesting the July 20, 2011 water bill in the amount of \$2,709.69, stating that prior to having the meter changed she had no outstanding bills; that for the bill due on April 8, 2011, the water charges were \$277.18; that she was not shown the meter reading which resulted in the June 20, 2011 bill for \$2,709.69; and that she was not told that the meter was being changed and was under the impression a device was being installed which would permit the meter to be scanned. She also stated that her water usage had declined over the years and that a plumber recently came to her home and told her that her "plumbing is fine".

On July 18, 2011, the DEP conducted an inspection of the new water meter and determined that it was working properly, and installed an automatic meter reading device that allowed readings to be obtained using air frequency transmissions.

On July 19, 2011, the DEP reviewed Ms. York's account for meter N2555 and determined that the final read date was incorrect, as it was billed to June 3, 2011 rather than May 23, 2011. The DEP cancelled the \$4,530.79 charge, and rebilled the account to reflect the correct final billing date of May 23, 2011, for a new final total of \$4,526.26. The July 19, 2011 bill, in the amount of \$2,804.49, reflected this correction.

In a letter dated July 21, 2011, the DEP responded to Ms. York's letter of July 5, 2011, stating that it had reviewed her account and determined that the charges in the June 20, 2011 bills were correct. The DEP, explained, in part, that since June 2009 the account for meter N34342555 was billed on estimated consumption; that when actual readings could not be obtained, estimated bills are issued; and that once an actual reading is obtained the estimated bills may be adjusted to reflect actual water usage. The DEP stated that on May 23, 2011 a final reading was obtained on said meter showing usage of 6146; that during the inspection, leak and waste was observed in the first floor toilet tank, and a notice was issued to repair the condition; that based on the final reading, the estimated charges totaling \$1,821.10 for the period of June 22, 2009 to June 3, 2011 were cancelled, and revised charges were issued in the amount of \$4,526.26. The DEP stated that although the toilet leak may have contributed to the increase in the charges billed, such leaks do not qualify for any of the agency's billing programs; that the current account balance was \$2,804.49; and that Ms. York could appeal this decision in writing, within 120 dates from the date of said letter.

Ms. York, in a letter dated September 27, 2011, appealed the DEP's July 21, 2011 decision to the Deputy Commissioner. Ms. York disputed the water bill charges, and stated that the person who installed the new meter did not show her the usage on the old meter; that her plumber had inspected the premises and found no leaks in any of the toilets; that the DEP had failed to send a follow up representative to inspect her toilets or home to verify that there were any waster or water leaks; and that the DEP had not installed a device to allow for electronic reading outside of her home at the same time it replaced the water meter, and that she had received two notices in June 2011 requesting access to her premises.

Deputy Commissioner Joseph Singleton, in a letter dated February 1, 2012, denied

Ms. York's appeal, finding that the charges billed were valid. A billing chart was included showing the actual meter readings for the period of September 2008 to December 2011, for both the old and new water meter. The Deputy Commissioner determined that the disputed charges were valid, and were based upon the final reading of the old meter recorded on May 23, 2011; that the average daily use for the disputed charges was consistent with the average use for the subsequent billing period recorded in the current meter from May 23, 2011 to September 26, 2011; that the current bill dated December 30, 2011 indicated that usage at the property significantly declined after September 26, 2011; that the new meter was working properly and that there was no need for the DEP to inspect the meter; and that an inspection of the property was not necessary as it would only reflect the conditions present one the day of inspection, and that the DEP had no way of knowing what the conditions were at the property prior to and subsequent to the inspection. The Deputy Commissioner stated that as of February 1, 2012, the account balance was \$3,566.23. Ms. York was informed that she could appeal said determination within 30 days of the date of the letter, by submitting a written appeal and presenting new evidence, along with a copy of the February 1, 2012 letter.

Ms. York, in a letter dated February 24, 2012, appealed the Deputy Commissioner's determination. She specifically complained that the Deputy Commissioner had failed to inspect the old meter and had refused to allow her to inspect the old meter; that she was not shown the meter reading for N2555 by the installer, so that she could verify the reading; that the reading was inconsistent with her water consumption and prior billing for the past eight years and that the Deputy Commissioner did not address this claim; that her plumber had inspected her toilets on May 30, 2011 and found no leaks in any of her toilets; that she called the DEP and informed that the problem was resolved and that no further action was necessary; that her plumber made a follow up inspection on August 16, 2011, and conducted certain tests and found that there were no toilet leaks; that the DEP failed to send a follow up representative to her home to inspect the toilets or verify if there was any waste or water leakage; that the DEP failed to advise her that her meter was being removed on May 23, 2011, and that although she was informed that a device would be installed outside of her home which would permit electronic reading, this was not done, and she received two notices in June 2011 requesting access in order to change the outside box. She stated that she was unable to verify the meter readings for the old meter and that she believed that the old meter was either damaged or gave a "fast" reading. Ms. York also requested an administrative

hearing.

Steven Lawitts, the Executive Director of the Water Board, in a letter dated May 18, 2012, denied the appeal and upheld the DEP's determination of February 1, 2012. Mr. Lawitts stated that FY 2012 Water Board Rate Schedule, Part IX, Section 2.C, provides that final appeals of water and sewer billing disputes are to be conducted in writing, and therefore hearing was unavailable. He further stated as follows:

“DEP installed a new meter on your property on May 23, 2011. Your appeal questions the the final consumption-based bill on the replaced meter that was issued on July 19, 2011 and adjusted previously estimated charges for service from July 22, 2009 to May 23, 2011 based upon the actual level of consumption. The previous bills for service during this extended period were based on an estimated consumption levels of either 0.39 or 0.40 hundred cubic feet (HFC) per day. These bills were labeled as estimated bills, which would be subject to adjustment at the next verified meter reading.”

“Upon the meter's removal on May 23, 2011, a meter reading of 6146 HFC was recorded. Utilizing this final reading and the prior actual reading of 5514 HFC from July 22, 2009, the property's actual daily consumption level during the intermediate period was 0.90 HFC. Your letter expresses a belief that this previous meter was incorrectly registering consumption. In support of the accuracy of the former meter, please note that consumption recorded during the initial service period on the new meter, from May 23, 2011 to September 26, 2011 was 0.70 HFC per day, which is comparable to the last consumption level of 0.90 HFC per day recorded by the former meter.”

The Executive Director noted that a common reason for increase in consumption was the presence of a leak or waste condition, such as a toilet or faucet that does not properly close. He further noted that on May 23, 2011, the DEP inspector issued a leak and waste notice to repair a leak in the first floor toilet tank and in the two toilets on the second floor of the subject property, and that on May 31, 2011, Ms. York had called the DEP's Call Center and indicated that the leaks were repaired. He stated that these leaks could have accounted for previously higher consumption, and that as they caused by maintainable plumbing fixtures they are excluded from any forgiveness charges and are the responsibility of the property owner.

The Executive Director determined that a detailed review of the meter readings and the variations in recorded consumption, provided compelling evidence that the meter was

functioning accurately and that the property experienced an increase in consumption during the period that the estimated bills were issued; that all of the questioned charges were thoroughly reviewed and based upon actual consumption; and that there was no indication of a defective meter or a basis for reducing the water and sewer charges.

Finally, the Executive Director stated that as part of a citywide initiative to automate water readings, the DEP installed a new remote reading device on July 18, 2011, that transmits daily water readings through a wireless network. Ms. York was informed that she could now track her daily water consumption and sign up for automatic leak notifications on the DEP's website.

Self-represented petitioner Esther York commenced the within Article 78 proceeding on September 24, 2012, and alleges in her Verified Petition that the respondents' refusal to vacate the decisions and orders entered against her, to produce the old meter and allow her to inspect said meter, and to afford her an opportunity to be heard at an administrative hearing is unreasonable, arbitrary and capricious. Petitioner seeks a judgment vacating the denial of the appeals of the June 20, 2011 bill, directing respondent to produce the old meter for her inspection, and directing respondents to hold an administrative hearing with respect to the June 20, 2011 water bill. Petitioner further seeks an award of costs, disbursements and attorney's fees.

Respondents, in opposition, assert in their answer that the Water Board's determination of May 18, 2012, was neither arbitrary nor capricious, nor an abuse of discretion, nor affected by an error of law or in violation of lawful procedure. It is asserted that the Water Board's determination is rational and in accordance with the relevant law and should be affirmed. The respondents further assert that to the extent that the petitioner is seeking mandamus, her requests to inspect the old meter and for an administrative hearing is not authorized by law, and that she is not entitled to such relief. The respondent further states that the old meter has been disposed of, and is no longer in the possession of the Water Board. Finally, it is asserted that the petitioner is not entitled to recover attorney's fees, costs and disbursements, as they are not recoverable in an Article 78 proceeding.

The petitioner, in a Verified Reply, disputes the respondents' recitation of the facts, particularly with respect to the issue of water leaks at the premises. She asserts that with respect to the old water meter the respondents engaged in spoliation of the evidence, and that this is arbitrary, capricious and punitive, and therefore respondent's determination was an

improper exercise of discretion and an error of law. The petitioner further asserts that the remedy of mandamus is available here; that the respondents failed to sustain their burden of proof throughout the appeals process; and that she is entitled to recover costs and disbursements totaling \$355.00.

“The courts have the power to review the [New York City] Water Board's determinations and may overturn determinations if the action is arbitrary and capricious, i.e., lacks a rational basis” (*Matter of Westmoreland Apt. Corp. v New York City Water Bd.*, 294 AD2d 587, 588 [2d Dept 2002]; see CPLR 7803 [3]; see also *Matter of Citylights at Queens Landing, Inc. v New York City Dept. of Env'tl. Protection*, 62 AD3d 871, 871-872 [2d Dept 2009]; *Matter of Amalgamated Warbasse Houses, Inc. v Tweedy*, 33 AD3d 794, 795 [2d Dept 2006]; *Matter of Village of Scarsdale v New York City Water Bd.*, 15 AD3d 590, 591 [2d Dept 2005]). Here, the Water Board's determination confirming the decision of the DEP was neither arbitrary and capricious, and had a rational basis, as the adjusted water bill was based upon an actual reading of the old water meter.

The petitioner's claims regarding the old meter readings are rejected. Prior to receiving the revised bill, the petitioner was well aware of the fact that some of her bills were based upon estimates and others were based upon actual meter readings, and that an adjustment to the estimated bills would be made once the meter was read. The amount of water consumption recorded by the old meter was comparable to the amount of water consumption recorded by the new meter during the first three months it was installed. In the proceedings before the DEP and the Water Board, the petitioner's claim that the old meter was faulty was not substantiated and she does not claim that the new meter is faulty.

Contrary to the petitioner's assertions, neither the Water Board nor the DEP were required to establish that the higher rate of water usage at the property was actually due to leaks or waste. In the her final appeal, she did not submit an affidavit or affirmation from her plumber, and sought to rely solely on her own hearsay evidence. It is undisputed that the petitioner's plumber was not at the property on May 23, 2011. The petitioner's claim that there were no leaks or waste at the property on May 23, 2011 were not substantiated and the Water Board was entitled to rely upon the leak and waste notice issued by the DEP's inspector who was present at the property on May 23, 2011.

To the extent that the petition seeks a judgment in the nature of mandamus directing the respondents to permit her to inspect the old meter and to hold an administrative hearing,

these requests are denied. A proceeding seeking mandamus to compel (CPLR 7803 [1]) seeks an order commanding an officer or body to perform a specified ministerial act required by law to be performed (*Hamptons Hosp. & Med. Ctr., Inc. v Moore*, 52 NY2d 88 [1981]). Mandamus is not appropriate to compel an officer or tribunal to reach a particular outcome with respect to a decision that turns on the exercise of discretion or judgment (*Klostermann v Cuomo*, 61 NY2d 525, 539-540 [1984]). The petitioner must show a “clear legal right” to the relief and if there is “reasonable doubt or controversy” as to whether the right to performance exists, the petition must be denied (*Matter of Assn. of Surrogate and Supreme Court Reporters within the City of N.Y. v Bartlett*, 40 NY2d 571, 574 [1976]).

The petitioner has failed to establish a clear right to such relief. The Commissioner of the Water Board is responsible for the maintenance and repair of all water meters that are connected to the water supply and used by DEP for billing purposes, except for certain meters not at issue here (*see* New York City Water Board, Rate Schedule, Part VII, Section 2). Neither the Rate Schedule nor the regulations promulgated by the Water Board provide for a customer’s inspection of a meter after it is replaced by the Water Board or the DEP. The petitioner does not claim that the old meter was her personal property. Therefore, as there is no legal authority for the inspection of old meters, the respondents were neither required to permit such an inspection, nor could they be compelled to permit such an inspection. The disposal of the old meter, thus, does not provide a basis for vacating the Water Board’s determination.

Finally, The Water Board Rate Schedule sets forth the procedures for complaint resolution and the appeal process. In each instance, whether a complaint, appeal or final appeal, the customer may only proceed by writing. Neither the Water Board nor the DEP are required by law to hold a hearing. The Water Board, thus, properly determined that Ms. York is not entitled to an administrative hearing.

In view of the foregoing, the petition is denied in its entirety and is dismissed.

This constitutes the decision and order of this Court.

Settle Judgement.

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TIMOTHY J. DUFFICY, J.S.C.