345 Ovington, LLC v New York City Water Bd.
2020 NY Slip Op 31323(U)
April 17, 2020
Supreme Court, Kings County
Docket Number: 508503/2019
Judge: Carl J. Landicino

At an IAS Term, Part 7 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 17th day of April, 2020.

P R E S E N T:
HON. CARL J. LANDICINO,
Justice.

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345 OVINGTON, LLC,
Petitioner,

Index No: 508503/2019

For a Judgment under Article 78 of the Civil Practice Law and Rules,

DECISION AND ORDER

- against -

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

Motion Sequence #1

Respondents.

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

	Papers Numbered
Notice of Petition/Petition and Affidavits (Affirmations) Annexed.....	1/2,
Verified Answer (Affirmations).....	3,
Memorandum of Law	4, 5
Reply Affirmation	6,

This is an action brought by Notice of Petition and Verified Petition by Petitioner 345 Ovington, LLC (hereinafter "the Petitioner"). The Petitioner is purportedly the owner of the property known as 345 Ovington Avenue, Brooklyn, N.Y. (hereinafter "the Premises" or "Property"). The Petitioner contends that the Respondents, the New York City Water Board and the New York City Department of Environmental Protection (hereinafter collectively referred to as "the Respondents") should be compelled, pursuant to CPLR Article 78, to reverse or set aside the Respondents' previous denial of the Petitioner's application to cancel water charges against the Property, relating to the period of April 1, 2014 through January 16, 2016. The Petitioner argues that the Respondents should issue a revised bill for what the Petitioner claims was the actual water usage for that time period. The Petitioner contends that it did not receive the notices from the Respondents as required, and as a result

was not aware that it was being charged a rate in excess of the Property's actual water use. The Petitioner also seeks an order directing the Respondents to cancel any charges, penalties and interest in relation to these water charges and attorneys fees and costs, pursuant to Article 86 of the CPLR.

In opposition, the Respondents contend that the decision to deny the Petitioner's request to cancel the Attributed Consumption Charges was rational and reasonable. The Respondents allege that they followed their procedure for charging the Petitioner Attributed Consumption Charges. The Respondent DEP contends, and Respondent Water Board determined, that the appropriate notices were mailed to the Petitioner several times during the relevant period and that the Petitioner failed to provide the Respondents with access to the Premises. On December 13, 2013 Respondent DEP purportedly mailed an "Inspection Request Notice" to the subject premises. On February 14, 2014 Respondent DEP purportedly mailed a Demand for Access Notice. On March 10, 2014 Respondent DEP purportedly mailed a Notice of Denial of Access Account Administration Fee Imposed. On April 7, 2014 Respondent DEP purportedly mailed a Notice of Denial of Access Attributed Consumption Charges Imposed. The Respondents also contend that the Petitioner also received notice of charges and fees in the form of monthly account statements regarding charges for water usage and that it was the Petitioner's responsibility to schedule and facilitate access to the meter for inspection. The Respondents argue that the Petitioner failed to do this and as a result the Attributed Consumption Charges that were levied against the Petitioner were assessed correctly and appropriately.

In the seminal holding of *Pell v. Board of Elections*, Judge Stevens, writing for the Court, directs that a determination is an abuse of discretion, arbitrary and capricious when it is manifestly unjust.

> **At this time, it may be ventured that a result is shocking to one's senses of fairness if the sanction imposed is so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct, incompetence, failure or turpitude of the individual, or to the harm or risk of harm to the agency or institution, or to the public generally visited or threatened by the derelictions of the individuals...There is no doubt that the reason for the enactment of the statute (CPLR 7803) was to make it possible, where warranted, to ameliorate harsh impositions of sanctions by administrative agencies. That purpose should be fulfilled by the courts not only as a matter of legislative**

intention, but also in order to accomplish what a sense of justice would dictate.

Pell v. Board of Education, 34 N.Y.2d 222 [1974].

Moreover, "as long as the Board's determination is supported by a rational basis, and is neither arbitrary nor capricious, it will not be disturbed," *Nehorayoff v. Mills*, 95 N.Y.2d 671, 723 N.Y.S. 2d 114 [2nd Dept 2001], referring to *Pell*. "The challenged administrative determination must be upheld unless it was arbitrary and capricious or lacked a rational basis." *Clinton Mews Owners Corp. v. New York City Water Bd.*, 62 A.D.3d 872, 873, 879 N.Y.S.2d 556, 557 [2nd Dept 2009]; see CPLR 7803; *Westmoreland Apt. Corp. v. New York City Water Bd.,* 294 A.D.2d 587, 588, 742 N.Y.S.2d 892, 893 [2nd Dept 2002]. "A petitioner's task in demonstrating that the rate-setting agency's determination is unreasonable is appropriately described as a 'heavy burden.'" *Prometheus Realty Corp. v. New York City Water Bd.*, 30 N.Y.3d 639, 646, 92 N.E.3d 778, 782 [2017]; *see also Nazareth Home of Franciscan Sisters v. Novello*, 7 N.Y.3d 538, 544, 858 N.E.2d 1131, 1134 [2006].

A review of the Petition and the documents attached herein results in the conclusion that the underlying decision made by the Respondents was not arbitrary, capricious or an abuse of discretion and the Petition should therefore be denied. *See Citylights at Queens Landing, Inc. v. New York City of Environmental Protection*, 62 A.D.3d 871, 871, 878 N.Y.S2d 896, 897 [2nd Dept 2009]. The Petitioner contends, in conclusory fashion, that it did not receive the required notices for access to or inspection of the Premises. Moreover, the affidavits from Mark Schwartz and Lauren Mogul, both associates of New York Water Management, Inc.,[1] are insufficient to establish that the Respondents did not correctly assess the Attributed Consumption Charges, since both affidavits rely primarily on hearsay and the papers contain limited material documentation, mostly unexplained, in relation to Petitioner's

[1] Petitioner, in its Verified Petition (paragraph 37) states that "[o]n or about November 4, 2016, Petitioner retained New York Water Management Inc. to perform an audit of water charges that accrued on the Property."

contentions (i.e. purported Certificate of Occupancy dated March 12, 2015 and purported meter reading).

What is more, the Court notes that the Petitioner does not address whether it received the monthly account statements, and the Petitioner provides no indication that it sought to have the Respondents inspect the water meter during the period of April 1, 2014 through January 16, 2016, and only retained the the services of New York Water Management, Inc. on or around November 4, 2016. See *Greenwhich Holding Corp. v. New York City Water Bd.*, 57 A.D.3d 285, 868 N.Y.S. 2d 527, 528 [1st Dept 2008], *Haav 575 Realty Corp. v. New York City Water Bd.*, 38 A.D.3d 481, 833 N.Y.S.2d 430 [1st Dept 2007], *Matter of Pistilli Assoc. III LLC v. New York City Water Bd.*, 46 A.D.3d 905, 850 N.Y.S.2d 136 [2nd Dept 2007] and *Matter of Lijo v.New York City Water Bd.*, 54 A.D.3d 412, 863 N.Y.S.2d [2nd Dept 2007]. Although the respective Departments disagree as to whether surcharges may be assessed in the event that the regulatory language does not explicitly provide for same, the Departments are in agreement that billing calculations for public policy reasons, as well as those based on actual use, are permissible and rational. As such, the determination by the Respondents shall stand and the Petition is accordingly dismissed.

Based upon the foregoing, it is hereby Ordered that:

The Petition (Motion Seq. No. 1) is denied and dismissed.

The foregoing constitutes the Decision and Order of the Court.

Enter:

Carl J. Landicino, J.S.C.