

New York Water Mgt. Inc. v City of New York

2020 NY Slip Op 31358(U)

May 12, 2020

Supreme Court, Kings County

Docket Number: 520163/19

Judge: Larry D. Martin

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At an IAS Term, Commercial Part 12 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 12th day of May, 2020.

P R E S E N T:

HON. LARRY D. MARTIN,
Justice.

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NEW YORK WATER MANAGEMENT INC.,
SAMUEL SINGER, 2380 REALTY LLC,
FIA166 HOLDINGS LLC, 1514 CON LLC,
551 WEST REALTY LLC, and 3044 ALBANY LLC,

Plaintiffs,

- against -

CITY OF NEW YORK,
VINCENT SAPIENZA, COMMISSIONER NEW YORK CITY
DEPARTMENT OF ENVIRONMENTAL PROTECTION AND
CHAIRPERSON OF THE ENVIRONMENTAL CONTROL BOARD,
and JACQUES JIHA, COMMISSIONER OF THE NEW
YORK CITY DEPARTMENT OF FINANCE,

Defendants.
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DECISION AND ORDER

Index No. 520163/19

Mot. Seq. Nos. 1-2

The following e-filed papers read herein:

NYSCEF#:

Notice of Motion/Cross Motion, Affirmation (Affidavit), Memorandum of Law, and Exhibits Annexed	<u>1-9, 12-15; 22-29</u>
Amended Complaint	<u>32</u>
Affirmation in Opposition and Exhibits Annexed	<u>33-36</u>
Memorandum of Law in Reply	<u>37</u>

Plaintiff New York Water Management Inc. (NYWM), an entity which represents property owners in administrative matters relating to their water bills, has brought this action to enjoin a planned change in online access to water usage and billing information for residential and commercial properties located in the City of New York (hereafter, the planned change in access). NYWM complains that the planned change in access constitutes a “rule” within the meaning of the City Administrative Procedure Act (CAPA) and that defendants City of New York, Vincent Sapienza as the Commissioner of the New York City Department of Environmental Protection (DEP and DEP Commissioner, respectively), and Jacques Jiha as the Commissioner of the New York City Department of

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Finance (DOF; collectively, defendants) intend to implement the planned change in access without providing the CAPA-required prior notice and opportunity for public comment.

Shortly after the commencement of this action, defendants were temporarily stayed from implementing the planned change in access (*see* Order to Show Cause, dated Sept. 13, 2019 [Landicino, J.] [NYSCEF #15]). The stay has been extended pending determination of the motions sub judice (*see* Decision/Order, dated Feb. 5, 2020 [Martin, J.] [NYSCEF #38]).

On Nov. 13, 2019, defendants opposed NYWM's motion for a preliminary injunction and cross-moved, pre-answer, to dismiss the complaint for lack of standing and failure to state a cause of action, pursuant to CPLR 3211 (a) (2) and (7), respectively. On Jan. 31, 2020, NYWM, joined by six owners of residential and commercial real properties located in the city – Samuel Singer, 2380 Realty LLC, Fia166 Holdings LLC, 1514 Con LLC, 551 West Realty LLC, and 3044 Albany LLC (collectively, the named property owners, and together with NYWM, plaintiffs) – opposed defendants' cross motion and filed an amended complaint (NYSCEF #32) (Amended Complaint or AC).¹ Thereafter, defendants requested that their cross motion to dismiss, initially addressed to the original complaint, apply to the amended complaint (*see* Defendants' Memorandum of Law in Reply, dated Feb. 4, 2020, at 3 [NYSCEF #37]).

Background

Since the mid-90s, DOF provided online access to DEP's customer information system. Using DOF's online portal, third parties (*i.e.*, non-property owners) have been able to review water meter data, non-metered and metered water billing data, water

¹ Defendants' preanswer motion to dismiss extended NYWM's time to amend its complaint (*see Johnson v Spence*, 286 AD2d 481, 483 [2d Dept 2001]; CPLR 3025 [a]).

consumption usage, and other technical account data. DOF, through its online portal, enabled anyone to access the property owners' data without the property owners' knowledge or permission.

Since 2009, DEP, separately from DOF, has provided an online portal, known as "MyDEP," which allows property owners and their authorized agents to create an online account by providing a valid e-mail address, the account number, and property address. The authorized users of MyDEP can monitor water consumption at their properties, track billing and payment information, track the status of any open disputes, and make online payments. Those users who are billed monthly can access the last four years of bills, whereas those users who are billed either quarterly or annually can access the last five years of bills.

Defendants are planning to implement the change in access by (1) terminating the existing online portal maintained by DOF for water usage and billing, and (2) making such information available through MyDEP *exclusively* (AC, ¶ 7). If the planned change in access is implemented, third parties (*i.e.*, non-property owners) will no longer have an unfettered availability of a wide variety of the property owners' water consumption/billing information through DOF's portal. Rather, upon implementation of the planned change in access, only the property owners and their authorized agents, rather than anyone as was the case with DOF's portal, will have access through MyDEP to the water consumption/billing information. Moreover, MyDEP will maintain some, but not all, of the water consumption/billing information formerly available on DOF's portal.²

² The MyDEP portal, in contrast to DOF's portal, limits historical information regarding water usage and omits notifications of lien sales for past due water usage charges which are in arrears and which have been transformed into liens against the underlying property (AC, ¶ 11).

Before the inception of this action, two members of the City Council had expressed their concern to the DEP Commissioner that should the planned change in access be implemented, “there is a substantial likelihood that a number of property owners will end up owing the city not due to an actual increase in water usage, but due to a decrease in the flow of information” (Joint Letter, dated Sept. 5, 2019, to the DEP Commissioner from Honorable Costa Constantinides, Chair, Committee on Environmental Protection; and Honorable Daniel Dromm, Chair, Committee on Finance [NYSCEF #35]). As the City Council members noted in their letter, the planned change in access will limit the extent and scope of the available information, as well as prevent prospective property purchasers from performing timely due diligence regarding the target properties’ water consumption and billing. In particular, the City Council members explained that:

“[If the planned change in access is implemented, DEP’s] customers would have their billing history access limited to the 12 last billing periods, . . . whereas under the current system [*i.e.*, through the DOF], many building owners can get water billing information back as far as 1986. Limiting customers to 12 billing cycles, or about *three years* of data, is especially problematic when DEP has a *four-year* look[-]back period if a property owner wishes to dispute a charge. Additionally, MyDEP lacks pertinent information such as when water meters were installed. Finally, DEP has stated that anyone who does not have authorization from the current water customer must submit a Freedom of Information Law request to obtain the now publicly accessible data. If a prospective owner wishes to determine what the water bill for a property they are considering would be, they would potentially have to wait nine months to a year to get an answer” (emphasis added).

The DEP Commissioner, in his response to the City Council members’ letter, specifically addressed their concern about the limited extent of the look-back period available through MyDEP, by noting that it has been upgraded to “allow DEP’s customers

to search their property's billing history for a minimum of *five years*" (NYSCEF #26 [emphasis added]).³

In addition, the DEP Commissioner offered his general commitment to "working with REBNY and BOMA^[4] to ensure that their members understand how to access essential billing information and the process for authorizing representatives to review their accounts for accuracy" (*id.*). The DEP Commissioner concluded that "DEP is amenable to any additional adjustments [the City Council members may] suggest to augment data retrieval and customer privacy [through MyDEP]" (*id.*).

According to plaintiffs, the implementation of the planned change in access would violate CAPA because "[d]efendants failed to publish a notice of the proposed Policy/Rule thirty days prior in the City record; failed to announce the purpose of the proposed rule; failed to solicit written comments; failed to hold a public hearing; failed to provide notice to the City Council, the news media, and the Community Boards; and failed to again publish notice in the City Record thirty days prior to the rule becoming effective" (AC, ¶ 93).

³. "The Customer must file a written complaint of a disputed water and wastewater bill . . . within *four years* of the Bill Date. . ." (*see* New York City Water Board Water and Wastewater Rate Schedule [eff., Jan. 6, 2020], Part VIII, Section 2.A [available at https://www1.nyc.gov/assets/nycwaterboard/downloads/pdf/rates/fy2020_rates.pdf] [last accessed May 4, 2020] [emphasis added]). Contrary to defendants' representation, they did not electronically file the immediately preceding version of the Rate Schedule (eff. July 1, 2019) under NYSCEF #24 (or under any other number electronically filed in this action). Further, the Internet address to the July 1, 2019 Rate Schedule as referenced in defendants' memorandum of law filed under NYSCEF #27 (at page 5, footnote 2) is no longer valid.

⁴. "REBNY is a trade association whose members include involved New York City real estate" (AC, ¶ 66). "BOMA is a trade association whose members include property owners, developers, and property and leasing managers" (AC, ¶ 67) (footnote by the Court).

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As noted, defendants cross-moved for dismissal of the amended complaint for, among other things, lack of standing. Plaintiffs oppose. The Court heard oral argument on Feb. 5, 2020 and reserved decision.

Discussion

“Standing is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria” (*Society of Plastics Indus., Inc. v County of Suffolk*, 77 NY2d 761, 769 [1991]). Where the issue of standing is raised, a challenger to the disputed administrative action must satisfy the following two-part test:

“First, a plaintiff must show ‘injury in fact,’ meaning that plaintiff will actually be harmed by the challenged administrative action. As the term itself implies, the injury must be more than conjectural. Second, the injury a plaintiff asserts must fall within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted.”

(*New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211[2004]).

The foregoing “requirements ensure that the courts are adjudicating actual controversies for parties that have a genuine stake in the litigation” (*Matter of Assn. for Better Long Is. v New York State Dept. of Env'tl. Conservation*, 23 NY3d 1, 6 [2014]).

Plaintiff NYWM's Standing

The Court finds that NYWM lacks standing to maintain this action in its own right because it has failed to allege that it will suffer any “injury in fact” if the planned change in access is implemented. NYWM’s claims that the planned change in access, when implemented, will (1) impair its or its clients’ “ability to cull information that will allow

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a successful challenge to water bills issued by [DEP]" (AC, ¶¶ 80-81), and (2) "preclude parties from timely obtaining tax lien information resulting from water charge arrears" (AC, ¶ 83), are too speculative to give rise to a cognizable interest (*see Matter of MFY Legal Servs., Inc. v Dudley*, 67 NY2d 706, 708 [1986]).

NYWM's representation of the named property owners in administrative proceedings before DEP does not confer it with standing in this action (*see Matter of MFY Legal Servs.*, 67 NY2d at 708). In reality, what NYWM is trying to do here is to sue on its own behalf for a declaration of its clients' rights – something which it may not do (*id.* at 708-709; *Frank H. Hiscock Legal Aid Socy. v Hennessy*, 101 Misc 2d 1046, 1048-1049 [Sup Ct, Onondaga County 1979], *affd for reasons stated below* 78 AD2d 775 [4th Dept 1980], *lv denied* 52 NY2d 703 [1981]).

Further, NYWM falls outside "the zone of interests or concerns sought to be promoted or protected" by CAPA (*see Sysco Metro NY, LLC v City of New York*, 59 Misc 3d 727, 730 [Sup Ct, NY County 2017], *affd* 168 AD3d 459 [1st Dept 2019]). As a property owner representative, NYWM is a distinct entity from the recipient of a water bill. It is the property owner, not its representative, who is aggrieved when a water charge is upheld or cannot be disputed. Although NYWM, as a property owner representative, may challenge water bills before DEP, its presence is not essential to the process: property owners may challenge their water bills before DEP without the assistance of a representative.⁵

⁵ The principal of NYWM – Mark Schwartz – has an ownership interest in several limited liability companies and corporations which, in turn, own real property and are billed by the city

The Named Property Owners' Standing

The Court further finds that the named property owners have failed to allege that the “claimed harm [is] . . . direct and immediate[,] such that it cannot be prevented or significantly ameliorated by . . . administrative action or by steps available to the complaining party” (*Matter of Acevedo v New York State Dept. of Motor Vehicles*, 29 NY3d 202, 217 [2017] [internal quotation marks omitted]). Any harm that the named property owners allege they will suffer as a result of the planned change in access is speculative (*see Roulan v County of Onondaga*, 21 NY3d 902, 905 [2013]). Equally important, the named property owners have failed to allege that they will suffer “special damage, different in kind and degree from the community generally” (*Matter of Colella v Board of Assessors of County of Nassau*, 95 NY2d 401, 410 [2000]).⁶ It is important to note in this regard that neither REBNY nor BOMA has joined this action. Nothing precludes the named property owners (or its agent NYWM) from communicating their

for water usage. Nevertheless, Mr. Schwartz’s ownership interests cannot confer standing on NYWM because, among other things, he is not a named plaintiff in this action.

⁶ According to the amended complaint: (1) two named property owners – Samuel Singer and 2830 Realty LLC, among others – are challenging the water charges based on the information obtained on the current web portal maintained by DOF (AC, ¶ 43); and (2) “[t]he information needed by . . . [these property owners] [is] not available on the proposed MyDEP Portal (AC, ¶ 44). Significantly, however, the amended complaint fails to allege that the planned change in access would limit these property owners to obtaining the DEP-related information *solely and exclusively* through a Freedom of Information of Law (FOIL) request. Note the careful wording of the allegations in AC, ¶ 45 (“While it may be possible for [these named property owners] to obtain the information needed to challenge water charges or apply for programs that would reduce their water charges, the information would have to be obtained, if available, by *other means such as* FOIL requests. . . .”) (emphasis added). The italicized phrase “*other means, such as*” encompasses, *but is not limited to*, a FOIL request.

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concerns about the planned change in access to the DEP Commissioner either through REBNY or BOMA, or through the aforementioned City Council members, or directly.

Inasmuch as plaintiffs lack standing, the Court need not address defendants' additional contention that the amended complaint fails to state a cause of action.

Conclusion

Based on the foregoing and after oral argument, it is

ORDERED that the branch of defendants' cross motion to dismiss this action for lack of standing is *granted*, and the amended complaint is *dismissed without prejudice*; and it is further

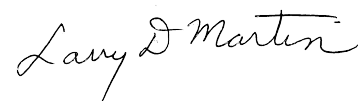
ORDERED that the remaining branch of defendants' cross motion to dismiss this action for failure to state a cause of action is denied as academic; and it is further

ORDERED that *all stays in this action*, as imposed by the Order to Show Cause, dated Sept. 13, 2019 (NYSCEF #15), and as continued by the Decision/Order, dated Feb. 5, 2020 (NYSCEF #38), are *dissolved and vacated*; and it is further

ORDERED that defendants' counsel is directed to electronically serve a copy of this Decision, Order, and Judgment with notice of entry on plaintiffs' counsel and to electronically file a copy thereof with the Kings County Clerk.

The foregoing constitutes the Decision, Order, and Judgment of the Court.

E N T E R,



J. S. C.