Milford Mgt., LLC v New York City Water Bd.
2020 NY Slip Op 33771(U)
November 12, 2020
Supreme Court, New York County
Docket Number: 161783/2018
Judge: W. Franc Perry

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. W. FRANC PERRY** **PART** **IAS MOTION 23EFM**

Justice

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MILFORD MANAGEMENT, LLC,

Petitioner,

- v -

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

Respondent.

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INDEX NO. 161783/2018

MOTION DATE 08/15/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Petitioner Milford Management LLC, the owner of the building located at 53 W. 14th Street in Manhattan, brings this Article 78 proceeding for a judgment: (a) vacating respondent New York City Water Board's August 17, 2018 decision (Decision) denying petitioner's appeal of the June 21, 2018 determination of respondent New York City Department of Environmental Protection (DEP); (b) declaring that, from February 15, 2013 through August 3, 2015, respondents failed to fulfill its duty to bill, as far as practicable, on the basis of petitioner's use of the sewer system, and that respondents' final determination was made in violation of lawful procedure, was affected by an error of law, was arbitrary and capricious, or an abuse of discretion; and (c) directing respondents to reimburse petitioner for services not rendered for meter V83045963 (the Meter); or, in the alternative, setting these matters down for trial.

The June 21, 2018 billing determination noted that, from February 15, 2013 on, the Meter covered a cooling tower that petitioner had caused to be erected on its building, but that petitioner first applied for a cooling tower allowance on June 19, 2015, which application was

granted as of August 3, 2015, the date on which DEP gained access to the Meter and installed a meter transmitting unit (MTU). Prior to that time, the determination stated, DEP was unable to obtain readings from the meter, and was, therefore, unable to determine what proportion of the water that the building used was evaporated through the cooling tower, rather than being discharged into the sewer system. The Decision denied the appeal, which sought a wastewater allowance retroactive to February 15, 2013, noting that "a cooling tower must be sealed and have a properly functioning MTU to receive a wastewater allowance [, and that] . . . there is no basis for application of cooling tower credits prior to August 3, 2015, when the cooling tower was metered to the satisfaction of DEP." NYSCEF Doc. No. 8 at 2.

Since the Decision was issued, respondents have agreed to make petitioner's wastewater allowance retroactive to June 19, 2015, the date of petitioner's application for such an allowance.

It is undisputed that June 19, 2015, was also the date on which petitioner first advised respondents that it had not received wastewater credits from the time that the Meter was installed. *See* Amended Petition, ¶ 13. Petitioner argues that it was entitled, at that time, to complain that it had not received a wastewater allowance in the preceding three years, because Public Authorities Law (PAL) § 1045-g provides, in relevant part, that:

> the Water Board shall not establish a limit of less than four years commencing from the date of the bill for services to challenge any fee, rate or other service charge for the use of or services furnished by the water and/or sewage systems.

That argument misses the mark, because petitioner was denied a retroactive allowance, not because its application was time barred, but because petitioner had not previously qualified for such an allowance. The Decision states that, in response to petitioner's June 19, 2015 application for a cooling tower wastewater allowance, a DEP inspector "sealed the [M]eter and installed a Meter Transmission Unit (MTU), which is required for the allowance." NYSCEF

Doc. No. 28 at 1. Part III, section 7 (A) of the Water Board's tariff, effective July 1, 2014, provides, in relevant part:

> [w]ater consumption that is exclusively used for a commercial or industrial purpose and separately metered, where the process is such that water supplied is not discharged entirely into the Wastewater System, may be eligible for a Wastewater Allowance . . . if the water supply to the process is fully metered to the satisfaction of DEP. DEP may require the installation of sampling or gauging instruments or approved wastewater discharge meters, if, in the opinion of the Commissioner, the equipment is necessary to verify or monitor flows or discharges for the purpose of determining actual charges or allowances.

NYSCEF Doc. No. 5 at 14. Section 7 (B)(1) provides, in relevant part:

> A Wastewater Allowance will be granted upon satisfaction of all of the following conditions:
>
> a. The customer files a Complete Application, which includes proof satisfactory to the Commissioner that the system is metered and the meter is functioning properly.

Id. at 14.

Of course, an administratively adopted tariff may not transgress a statute. *Matter of Niagara Mohawk Power Co. v Public Serv. Commn. of State of N.Y.*, 69 NY2d 365, 372 (1983). Here, petitioner notes, correctly, that Public Authorities Law § 1045-g (4) requires the Water Board to adopt a tariff of charges "for the use of or services furnished by the sewerage system." It hardly follows from this that the Water Board may not require metering, to its professional satisfaction, to determine what proportion of a building's water supply is sent into the sewerage system.

Petitioner's heavy reliance upon *Chelsea Piers Mgt. v Chapin* (7 AD3d 389 [1st Dept 2004]) is misplaced. In that case, no wastewater at all was being discharged into the sewers. Here, by contrast, it is undisputed that a certain percentage of the water that is supplied to petitioner's building is discharged into the sewerage system. As the Appellate Division, First Department, has recently held in an action between the same parties as appear here, "[n]othing in

the state or city legislative provisions . . . precludes respondents from requiring customers to apply for the credits or from providing credits only prospectively." *Matter of Milford Mgt. v New York City Water Bd.*, 179 AD3d 432, 433 (1st Dept 2020).

Accordingly, it is hereby

DECLARED that: (a) for the period between February 15, 2013 through June 18, 2015, respondents did not fail to perform their duty to bill petitioner, as far as possible, on the basis of petitioner's use of the sewer system; and (b) respondents' final determination was neither made in violation of lawful procedure, nor affected by an error of law, nor arbitrary or capricious, nor an abuse of discretion; and it is

ADJUDGED that the petition is denied, and this proceeding is dismissed.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of this Court.

11/12/2020
DATE

W. FRANC PERRY, J.S.C.

CHECK ONE:	[X]	**CASE DISPOSED**		[ ]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[X] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**