

485 Madison Ave., L.L.C.. v New York City Water Bd.
2021 NY Slip Op 31153(U)
April 8, 2021
Supreme Court, New York County
Docket Number: 158325/2018
Judge: Debra A. James
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA A. JAMES **PART** **IAS MOTION 59EFM**

Justice

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485 MADISON AVENUE, L.L.C., and JACK RESNICK &
SONS, INC.

Petitioners,

For a Judgment pursuant to Article 78 of the Civil Practice
Law & Rules,

- v -

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

Respondents.

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**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 4, 5, 27
were read on this motion to/for _____

ARTICLE 78 JUDGMENT

ORDER

Upon the foregoing documents, it is

ADJUDGED that the petition is denied and the proceeding is
dismissed, with costs and disbursements to respondents; and it is
further

ADJUDGED that respondent New York City Water Board, having an
address at _____, do recover from petitioners 485
Madison Avenue LLC and Jack Resnick & Sons, Inc., having an address
at _____, costs and disbursements in the amount of
\$ _____, as taxed by the Clerk, and that respondent have
execution therefor.

DECISION

In Chelsea Piers Management v Chapin, 7 AD3d 389 (1st Dept 2004), the Appellate Division, First Department, modified the determination of the trial court remanding the application for the sewer rent credit to the respondent Water Board and, annulled the Water Board's reversal of the sewer rent credit and reinstated such credit. In that case, for the period in which the sewer rent charges were assessed, due to an error of respondent Water Board, petitioner Chelsea Piers' wastewaters were not being emptied into the City's sanitary sewer system but were only connected to storm drains. The appellate panel found that petitioner never used respondent's wastewater system and therefore did not receive the wastewater services for which it was charged. On that basis, as General Municipal Law § 451 and New York City Administrative Code § 24-514(b)(1) provide that sewer rents be based on actual use, the appeals court held that petitioner was entitled to a credit for the wrongfully assessed sewer rents that petitioner paid.

The facts of the proceeding at bar are distinguishable from Chelsea Piers Management, supra. Here, there is no dispute that the petitioner received waste water services. Instead, the issue before this court is the amount of water that the subject cooling towers evaporated into the atmosphere, in lieu of such water being discharged into respondent Water Board's sewer

system for treatment. It cannot be gainsaid that the purpose of the cooling tower meters was to measure that amount. See MHG Family Ltd Partnership v New York City Water Board, 46 AD3d 472 (1st Dept 2007). The facts are, as follows:

The water meters to the cooling towers were petitioners' responsibility to maintain.

Petitioners disconnected water **meter R3604179** (meter 1749) in 2014, without a permit from respondent New York City Department of Environmental Protection (DEP), and did not replace it until September 2015.

Petitioners replaced meter 1749 with meter **G13033792** (replacement meter 3792) in September 2015. However, DEP inspected replacement meter 3792 on September 8, 2015 and found that it was not set properly and it could not be sealed. Though DEP requested follow up inspections from petitioners, petitioners did not provide such access until December 16, 2015, when DEP found the replacement meter properly set and sealed it.

Under respondent Water Board's Rate Schedule, a wastewater allowance expires two years after it is granted, and the customer must apply for a renewal of such allowance before expiration of the two-year period. Respondent Water Board approved petitioners water allowance for meter 3792, effective December 16, 2015, which expired on December 16, 2017. Petitioners did not apply for a renewal until February 22, 2017.

As meter 3792 was not accessible for inspection and sealing by respondent NYC Department of Environmental Protection until December 16, 2015, the amount of evaporation could not be accurately determined during the period of such removal and inaccessible replacement meter. In addition, although respondent credited petitioners for an allowance through January 17, 2017, no allowance was provided for the remainder of the expiration period and before the renewal on February 22, 2017.

Based upon such facts, this court finds a rational basis for respondents' determination disallowing petitioners the cooling tower allowances for the periods May 30, 2014 to December 16, 2015, and from January 17, 2017 to February 22, 2017, the period when the meters were offline or the allowance not yet renewed, respectively.

Arguing that respondent Board was arbitrary and capricious in selectively disallowing retroactive credits to them but granting retroactive relief to other similarly situated building owners, petitioners seek to submit evidence of cooling tower allowances granted to other building owners, for periods before the Board received completed written applications from such owners or made the determination that such owners were eligible for the credit. As to such submissions, this court agrees with respondents that this "'court may not consider . . . evidence not contained in the administrative record'." Rizzo v New York

State Div of Housing & Community Renewal, 16 AD3d 72, 75 (1st Dept 2005). Moreover, petitioners' arguments as to same are speculative. Finally, as in Stapleton Studios v City of New York, 7 AD3d 273, 275 (1st Dept 2004), petitioners have failed to establish that the discovery sought with respect to such building owners would be material and necessary to the prosecution of this proceeding.

Debra A. James

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4/8/2021

DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER
 INCLUDES TRANSFER/REASSIGN

SUBMIT ORDER
 FIDUCIARY APPOINTMENT REFERENCE

CHECK IF APPROPRIATE: