

**Omega Mkt., LLC v New York City Dept. of Env'tl.
Protection**

2023 NY Slip Op 34372(U)

November 30, 2023

Supreme Court, Kings County

Docket Number: Index No. 511756/2021

Judge: Ingrid Joseph

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At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 30th day of November 2023.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF
NEW YORK COUNTY OF KINGS

Index No: 511756/2021

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OMEGA MARKET, LLC

Petitioner(s),

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

ORDER

-against-

THE NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent(s)

-----X
The following e-filed papers read herein:

Notice of Motion/Petition/Affidavits Annexed

Exhibits Annexed/Reply.....

Affirmation in Opposition/Affidavits Annexed/Exhibits Annexed.....

NYSCEF Nos.:

1-13; 33-34; 36-40

17-31; 35

In this matter, Omega Market LLC (“Petitioner”) moves (Motion Seq. 1) for a judgment pursuant to Article 78 of the Civil Practice Law and Rules (“CPLR”), vacating the Water Board’s, January 29, 2021, final determination that Petitioner owes \$46,064.40 in outstanding water charges for the period of May 9, 2015, through May 9, 2019, nullifying the bills in their entirety or to remand the case for proper adjudication. The New York City Department of Environment Protection (“DEP” or “Respondent”) has opposed the motion on the grounds that the final determination was rational, reasonable, and based on standard operating business calculations which satisfies their standard of review and therefore the Petitioner is not entitled to Mandamus relief.

Petitioner is the owner of a property located at 155 Huron St. Brooklyn, New York (“Subject Premises”) which is serviced by account number XXXXXXXX50001 (“Account 50001”). Respondent is an administrative agency of the City of New York charged with the billing and enforcement of water and sewer charges for properties located in the city. Pursuant to the lease agreement between the City of New York and the Water Board, Respondent DEP acts as a billing agent of the Water Board. The Water Board is an autonomous seven-member public benefit corporation in the city whose primary function includes

fixing and collecting water and wastewater charges. The Water Board charges fees for use to the city's water system pursuant to New York Public Administration Law ("PAL") 1045-j. The New York City Water Board's Water and Wastewater Rate Schedule ("Rate Schedule") provides the rates to be charged by the DEP as well as the procedures to be followed if a customer disputes a bill. Part VI of the Rate Schedule sets forth the payment and billing terms for water and wastewater and addresses the issue of back-billing. Part VIII of the Rate Schedule establishes a four-year time limit for challenging a Water Board charge that customers disagree with.

In the instant case, prior to June 30, 2012, the Subject Premises was billed annually by the DEP on flat rate frontage charges. On or about June 30, 2012, Petitioner submitted an "Election of Metered Billing" form converting the Property to metered billing. Thereafter, a meter was installed on the Property. Respondent claims that due to an error, when the account was converted, the meter was left on a "monitoring status" which resulted in the Subject Property not being billed for water and sewer usage for a period of seven years. In May of 2019, Respondent recognized the error and issued a back-bill for outstanding water usage for \$47,988.22 for the period of February 2015 through May of 2019.

On March 6, 2020, Petitioner sent a Letter of Reconsideration to Respondent disputing the charges. On June 9, 2020, Respondent responded to Petitioner's letter explaining that the Property was not being billed in error, that the NYC Board Rules and Regulations permits back billing up to a period of four years, and that the calculations were based on actual readings recorded on the Property. By letter dated September 8, 2020, Petitioner sent their Initial Appeal of the Respondent's June 9, 2020 determination. However, Respondent's letter dated August 28, 2020, which states that it received Petitioner's initial appeal on August 18, 2020, affirmed their prior decision and reiterated that the May 9, 2019, bill was based on actual readings from the property's meter. On October 19, 2020, Petitioner submitted a Final Appeal of the May 9, 2019, bill. By letter dated January 29, 2021, the Water Board sent a Final Determination to the Petitioner denying in part Petitioner's appeal and confirming that due to the meter being placed on "monitor only" status that no bills were issued to the account but that the meter was still recording usage at the property resulting in outstanding charges on the account. The letter also

stated that pursuant to the Rate Schedule, the Respondent is required to issue a back-bill for the previous four-year service period, but that because the May 9, 2019 back bill was for service from February 21, 2015 to May 8, 2019 which exceeded the permitted four-year service period, the back-bill was reissued for the correct four year period of May 9, 2015 to May 8, 2019. The letter did not detail exactly how the figures were calculated but states that they were based on actual readings from the meter on the property. This recalculation reduced the charges billed from \$48,410.46 to \$46,064.40 and waived late fees of \$139.74. The revised bill was sent on January 11, 2021.

Pursuant to the Water Board's back-billing policy, Petitioner was informed that service from June 30, 2012 to May 9, 2015 will remain unbilled and that while the issuance of zero water and sewer charges for a building in New York City over an extended period of time is usual, that a customer's delay in making an inquiry as to why charges for services are not being billed does not excuse a customer's responsibility to pay for back-billed charges. Accordingly, the Petitioner's appeal requesting reduction in charges was partially approved and the Respondent's August 29, 2020, billing determination was modified. Petitioner was informed that pursuant to the Water Board's Rate Schedule, this was the final review of its billing dispute.

In support of its Petition, Petitioner argues that the charges reflected in the May 9, 2018, letter were inflated, and that Respondent has failed to detail how the purported calculations were generated. Petitioner claims that the charges were significantly higher than the meter readings and charges that it received after May 9, 2020. Petitioner contends that it is being punished for DEP's error in not properly billing and that the Respondent's letters never addressed the issue that the bills, for the period of May 9, 2015, to May 9, 2019, were inflated. Petitioner contends that the Respondent's records reflect that the charges billed were based upon "contrived estimated charges" which is arbitrary and capricious and that Respondent's refusal to either properly adjust water and sewer charges for the period May 9, 2015, through May 9, 2019, to be consistent with known actual usage for the premises or to waive such charges altogether is an abuse of administrative responsibility. Furthermore, Petitioner states that Respondent's denial of its Final Appeal should be reversed in its entirety because it is arbitrary and capricious.

In opposition, Respondent argues that the Final Determination denying the Petitioner's request to cancel the back bill charges was rational, reasonable, and based on standard operating business calculations. Respondent states that the Water Board properly held that Petitioner is not entitled to any further reduction of water charges on the back-bill reissued on January 11, 2021. Furthermore, Respondent claims that Petitioner's assertion that the charges issued in the May 9, 2019, bill were inflated should be disregarded because it is irrelevant to the analysis of whether it acted in an arbitrary manner when it used actual meter readings to create the back bill for the time period between May 9, 2015, and May 8, 2019. Additionally, Respondent argues that Petitioner is not entitled to an order adjudicating its service bill for the period of May 9, 2015 through May 8, 2019 "to commensurate with actual readings for the following year or to vacate the bill in its entirety" because mandamus remedy is only available where there is a clear and absolute right to the relief sought and the body or officer whose duty it is to enforce such right has refused to perform such a duty. Respondent claims that an order compelling it to bill based on readings taken outside of the four-year billing period or cancelling the bill in its entirety would be in direct contravention of the authority given to the it by the Rate Schedule.

Following oral arguments on January 15, 2022, Respondent filed an Affidavit dated February 23, 2022, from Margarita Tenenbaum ("Tenenbaum"), a DEP Administrative Manager/Executive Billing Analyst on the case. As an Executive Billing Analyst, Tenenbaum is responsible for, among other things, reviewing water and sewer bills that have billing issues. Tenenbaum states that the Petitioner's water and sewer account was reviewed by her and that upon review, she confirmed that the water and sewer account readings were being read automatically via DEP's Automatic Meter Reading ("AMR") system, however, the DEP system did not generate the bills because the code to release the water bills had not been updated and that seven years of charges had not been billed. Therefore, based on DEP's standard operating procedure, DEP created a four-year back bill based on the actual meter readings-the beginning reading of May 9, 2015, and May 8, 2019. Tenenbaum claims that when this type of billing issue occurs, as part of the DEP's standard operating procedure, instead of rebilling each of the quarterly bills individually, it was

more efficient to obtain the two actual readings from DEP's AMR system (the first and last dates of the four-year period), and back bill the customer for four years based on these actual reads.

Tenenbaum attaches a chart breaking down the actual beginning and end readings per year over the four-year period from May 9, 2015, until May 8, 2019, and an explanation as to how New York City properties are assessed for water and sewer services based upon the amount of water consumed between their prior and current water meter readings in cubic feet. The chart provides the following: (1) the water and sewer rate per given year; (2) the total water and sewer rate charge; (3) the property's beginning and end readings per given year in cubic feet; (4) the property's consumption rate per given year in hundred cubic feet, or HCF (which is arrived at by subtracting the beginning reading from the end reading in that given year and then dividing by 100); (5) the number of days in the given service period; (6) the amount billed for water; (7) the amount billed for sewer; and (8) the total amount of charges billed for water/sewer consumption. Thus, based on the two actual beginning and end readings for each year, the total amount for the four-year back bill from May 9, 2015, until May 8, 2019, was \$46,064.39.

Pursuant to CPLR 7803, judicial review of an agency determination is limited to whether the determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803[3]; *Matter of Save America's Clocks, Inc.*, 33 NY3d 198 [2017]). The courts cannot interfere unless there is "no rational basis for the exercise of discretion, or the action is without sound basis in reason and . . . taken without regard to the facts." (*Id.* at 207). The reviewing court does not examine the facts de novo to reach an independent determination (*Heintz v Brown*, 80 NY2d 998 [1992]; *Matter of Marsh v Hanley*, 50 AD2d 687 [3d Dept. 1975]). The reviewing court "may not substitute its own judgment of the evidence for that of the administrative agency but should review the whole record to determine whether there exists a rational basis to support the findings upon which the agency's determination is predicated (*Matter of Purdy v Kreisberg*, 47 NY2d 354 [1979]). If the acts of the administrative agency find support in the record, its determination is conclusive even if the court would have reached a contrary result (*CHT Place, LLC v New York State Division of Housing and Community Renewal*, 219 AD3d 486 [2d Dept. 2023]; *Matter of Sullivan County*

Harness Racing Assn. v Glasser, 30 NY2d 269 [1972]). In demonstrating that administrative actions were taken arbitrarily or in bad faith, the petitioner bears a heavy burden of proof, for which conclusory allegations and speculative assertions will not suffice (*Matter of Harpur v Cassano*, 129 AD3d 964 [2d Dept. 2015]).

The Water Board is the entity which promulgates the rate schedule of sewer rents and wastewater allowances in the discharge of its duties to fix and collect water and sewer charges in order for the City to maintain the water system (see Public Authorities Law § 1045-g[4]; *Matter of A&F Scaccia Realty Corp. v New York City Dept. of Envtl. Protection*, 200 AD3d 875, 877 [2d Dept 2021]). In that regard, the Water Board shall have the power “to establish, fix, revise, charge and collect and enforce the payment of all fees, rates, rents and other service charges for the use of, or services furnished by the sewerage system, water system, or both (Public Authorities Law § 1045-g). The Water Board's rate schedule provides that ‘Unbilled Service’ means service that was provided to a property and no billing transaction(s) for that service period were posted to the records of either the Water Board or the DEP. Additionally, under Part VIII, Section 2 of the New York City Water Board Water and Wastewater Rate Schedule, the three tiered procedure for billing disputes states that customers seeking to dispute a water and wastewater bill must (1) file a written complaint ... within four years of the Bill Date to DEP/BCS Customer Service (2) within 120 days of receipt of a determination from BCS, a customer may appeal the determination to the Deputy Commissioner of BCS, and (3) upon receipt of the Commissioner’s determination, a final appeal may be sought by writing the Executive Director of the Water Board within 30 days of the date of the Commissioner’s denial.

Here, the court finds that while the Respondent adequately explained the nature and cause of the error which resulted in Petitioner’s property not being billed, and followed the requisite procedure for consumer disputes, the submitted documents in the record do not adequately address Petitioner’s allegations that service charges may have been inflated and therefore Respondent’s refusal to cancel the back-bill charges were arbitrary and capricious. The May 9, 2019, bill sent to Petitioner, which reflects the February 2015 through June 2018 period gives “estimated” readings for the subject meter with rates

and total charges, whereas the chart submitted with Respondent's affidavit is based on "actual" meter readings, with rates and total charges for the following periods: May 9, 2015 through June 30, 2015, June 30, 2015 through June 30, 2016, June 30, 2016 through June 30, 2017, June 30, 2017 through June 30, 2018 and June 30, 2018 through May 8, 2019. Petitioner has also submitted several prior bills it has received which state "actual" readings; however, these bills cover the following periods: September 2014 through December 2014, December 2014 through March 2015, March 2015 through June 2015, and June 2015 through September 2015. Because these periods are either outside the relevant time period or are calculated in shorter periods than those reflected in the chart, the court is unable to adequately compare that similar readings in the "actual" reading chart were also reflected in bills sent to Petitioner with "actual" readings, even though Petitioner was not charged. Moreover, the final determination letter sent to Petitioner attaches a Meter Reads History which only reflects daily readings from May 1, 2015, through May 31, 2015, and May 1, 2019, through May 31, 2019. Again, the discrepancies in the meter reading periods leaves the court unable to compare the relevant reading numbers and total charges for a determination.

Accordingly, it is hereby,

ORDERED, that this matter be remanded for a recalculation of the Petitioner's unbilled services for the period of May 9, 2015, through May 8, 2019.

This constitutes the decision and order of the court.



Hon. Ingrid Joseph J.S.C.

**Hon. Ingrid Joseph
Supreme Court Justice**