

**Matter of 1098 Madison Villa LLC v New York City
Water Bd.**

2024 NY Slip Op 32703(U)

July 29, 2024

Supreme Court, Kings County

Docket Number: Index No. 519974/2023

Judge: Ingrid Joseph

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This opinion is uncorrected and not selected for official publication.

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 29th day of July, 2024.

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

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In the Matter of an Article 78 proceeding

1098 MADISON VILLA LLC,

Index No: 519974/2023

Petitioner,

-against-

ORDER

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

Respondent(s).

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The following e-filed papers read herein:

NYSCEF Doc. Nos.:

Notice of Petition/Petition/Exhibits Annexed.....	1 – 11
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In this matter, 1098 Madison Villa LLC (“Petitioner”) moves (Mot. Seq. 1) for a judgment pursuant to Article 78 of the Civil Practice Law and Rules (“CPLR”) against New York City Water Board (“Water Board”), New York City Department of Environmental Protection (“DEP”), and City of New York (the “City”) (collectively “Respondents”). Petitioner seeks (1) to annul the Water Board’s determination that Petitioner owes \$48,412.06 in outstanding water and sewer charges for the period of July 13, 2017, through January 31, 2020, (2) an Order directing Respondents to modify its determination, and (2) to assess attorneys’ fees and costs under Article 86 of the CPLR. In opposition, the Respondents request that the court deny Petitioner relief and dismiss the Petition in its entirety.

Petitioner owns the property located at 1098 Madison Street, Brooklyn, New York (the “Property”) which is serviced by account number XXXXXXXX20001. DEP is an administrative agency of the City 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 and the Water Board, 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 of the City’s water system pursuant to New York Public Administration Law 1045-j.

The Water Board 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]). 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 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 for disputed water charges. Part VIII of the Rate Schedule establishes a four-year time limit for challenging a Water Board charge. Part VIII, Section 2 of the Rate Schedule establishes a three-tiered complaint resolution and appeal process. Customers disputing a bill must: (1) file a written complaint or Customer Dispute Form within four years of the Bill Date to DEP/Bureau of Customer Service (“BCS”) of DEP, (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.

In the instant case, on or about July 11, 2017, Petitioner tapped into a water main by installing a meter without a permit or inspection from DEP. By letter dated December 11, 2019, titled “Determination of Theft of Services Cease and Desist Notice,” DEP notified Petitioner that on November 20, 2019, DEP “observed the unlawful plumbing condition(s) ... and determined that Theft of Services exist at [the Property].” The Cease and Desist Notice further noted that DEP imposed a \$650 Theft of Services (“TOS”) Account Administration Fee on each account associated with the Property and Attributed Consumption Charges (“ACC”) (collectively “Charges”) on each applicable service line.

By letter dated March 25, 2020, Petitioner inquired about the Charges. DEP responded by letter dated June 25, 2020, noting that the Charges are “in accordance with the New York City Water Board regulations and rules governing Theft of Services, and require no adjustment.” On September 21 and 24, 2020, Petitioner emailed DEP, requesting further review of the Charges. On June 2, 2021, DEP responded to Petitioner’s emails by resending a copy of DEP’s June 25, 2020, letter to Petitioner.

On November 18, 2021, Petitioner filed a written complaint disputing the Charges via Customer Dispute Form (“Initial Dispute”). The Initial Dispute argued that the TOS charges should be reduced because Petitioner had been erroneously overcharged as a fully occupied residential building when, during the relevant period, the building was under construction and therefore not fully occupied. DEP denied the Initial Dispute by letter dated May 10, 2022, stating that the Charges were valid and “based on an annual consumption rate, which is not impacted by the vacant status of a property” (“Initial Denial”). The Initial

Denial concluded by advising Petitioner that, pursuant to the Rate Schedule appeals process, it may appeal the Initial Denial within 120 days.

In a letter dated October 18, 2022, Petitioner requested that the DEP reconsider its rejection of the Owner's dispute of the Charges, arguing that the DEP did not have a legitimate basis for calculating the ACC at a rate for a fully or predominantly non-residential building and reiterating that the Property was not fully occupied during the relevant period for a full occupancy residential rate to apply to the ACC ("Second Letter"). By letter dated December 28, 2022, DEP interpreted Petitioner's Second Letter as an appeal of DEP's Initial Denial. DEP rendered the Initial Denial on May 10, 2022, thus Petitioner had a 120 day window to file an appeal before September 7, 2022. DEP asserts that since it did not receive an appeal until October 20, 2022, thus the appeal was time barred ("Second Denial").¹ DEP disclosed that Petitioner may appeal the Second Denial within 60 days pursuant to the Rate Schedule appeals process. In response, Petitioner sent a letter dated January 31, 2023, to the Water Board, appealing DEP's Second Denial. Petitioner claimed the Second Letter was not time barred because it never received the Initial Denial, thus the Second Letter was timely and the Water Board should consider the substantive basis of Petitioner's claims ("Third Letter"). By letter dated March 22, 2023, the Water Board affirmed the DEP's Initial Denial, providing Petitioner with a copy of the Initial Denial and reiterating that the Second Letter was time barred ("Third Denial").

Petitioner then commenced this Petition, arguing that the Water Board's denial of its request was arbitrary and capricious because Petitioner never received the DEP's Initial Denial and thus Petitioner's Second Letter was not time barred. Petitioner further contends that DEP has failed to provide any proof of service. Additionally, Petitioner stated that DEP's refusal to recalculate and explain the Charges, specifically the ACCs, is arbitrary and capricious.

In opposition, Respondents argue that since Petitioner failed to timely file its appeal to the Initial Denial, the Water Board properly denied Petitioner's Second Letter. Respondents further contend that DEP followed agency practices when it sent the Initial Denial to Petitioner and that Petitioner has offered no evidence that it did not receive the Initial Denial. In support of its Answer, Respondents filed an affidavit dated November 30, 2023, from Vincenzo Mattarella ("Mattarella"), the Chief of Operations for the Bureau of Customer Services. Mattarella's duties include overseeing the Correspondence Unit for the DEP. Mattarella stated that the Correspondence Unit's responsibilities include responding to correspondence received from customers regarding inquiries and administrative appeals. Mattarella attested that the DEP standard operating procedures used to respond to customer complaints in May 2022 was to manually review customer correspondence and assign a DEP Correspondence Representative for resolution. Mattarella

¹ Petitioner's Second Letter was dated October 18, 2022, but Respondents claims they did not receive the letter until October 20, 2022.

asserted that the DEP's centralized business system for tracking water and sewer charges and payments on customer accounts digitally creates the letters following review and assignment. Mattarella purported that once prepared, DEP electronically sends these letters for processing to Vanguard, a marketing communication agency that DEP contracts with to handle departmental mailings. Mattarella claimed that DEP's liaison with Vanguard informed Mattarella that once Vanguard receives letters from the DEP, Vanguard, using an automated process, prints, folds, and mails the letters using first-class, pre-sorted postage on the envelopes to the address DEP has on file for the recipient, to which then a Vanguard employee transports the envelopes containing the letters to a United States Post Office.

In its reply, Petitioner argues Respondents failed to submit an affidavit of an individual with personal knowledge that the Denial Letter was mailed or received by Petitioner. Petitioner further contends that Respondents' initial bill charging the ACC is calculated based upon both residential and commercial units at the Property while no commercial unit ever existed thereon. Petitioner underscored that Respondents have billed Petitioner at "punitive and extortionist rates," providing breakdowns of the alleged ACC overcharges if calculated by frontage per the Rate Schedule or if calculated by a single house hose bibb while the Property was demolished.

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 "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]). 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]). 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]).

It is the agency's burden to establish that it gave requisite notice of an action (*Bludson v Popolizio*, 166 AD2d 346, 347 [1st Dept 1990]). "[E]vidence of actual mailing (e.g., an affidavit of mailing or service) ... or ... proof of a sender's routine business practices with respect to the creation, addressing, and mailing

of the documents of that nature” can establish that notice was sent (*Cit Bank N.A. v Schiffman*, 36 NY3d 550, 556 [2021]). “An affidavit of an employee with personal knowledge of the practices utilized by the company at the time of the alleged mailing” may establish the presumption that such notification was mailed. (*Id.*). Recitation of general office procedures absent personal knowledge that notice was sent, is insufficient to demonstrate notice (*Almeida v Hernandez*, 9 Misc 3d 986, 989 [Sup Ct, Kings County 2005]).

Here, the court finds that the submitted documents in the record do not establish that Respondents gave notice of the Initial Denial to Petitioner. Although Respondents submitted an affidavit from Mattarella who had firsthand knowledge of the DEP’s standard operating procedures for reviewing customer complaints, Mattarella lacks firsthand or personal knowledge that the Initial Denial was mailed. In his affidavit, Mattarella states that letters are digitally created and sent electronically to Vanguard. However, Respondents have not proffered any evidence to establish when that process occurred in relation to Petitioner. Moreover, Respondents have failed to provide an affidavit or an affidavit of service from a representative of Vanguard who would have personal knowledge that the Initial Denial was mailed. Since Respondents have not demonstrated that they gave proper notice of the Initial Denial to Petitioner, Petitioner’s time to seek review of the Initial Decision has not run. In addition, Petitioner’s Second Letter cannot be time barred and simultaneously subject to an appeal through the Water Board’s three-tiered complaint resolution and appeal process. Time barred decisions would fall outside of the Rate Schedule appeals process.

With respect to attorney’s fees, the court declines to award Petitioner attorney’s fees and costs. Petitioner sought attorney’s fees under Article 86. In opposition, Respondents argued Petitioner is not entitled to attorney’s fees because there is no statutory provision authorizing the recovery of attorney’s fees in an Article 78 proceeding. Respondents contend that CPLR §§ 8600-8605 only allows recovery of attorney’s fees for proceedings against the state and not municipalities or public authorities. Petitioner has failed to address or rebut Respondents’ contentions in its Reply. It is well settled that attorney’s fees “are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule” (*Pickett v 992 Gates Ave. Corp.*, 114 AD3d 740, 741 [2d Dept 2014] (quoting *Hooper Assoc., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491 [1989])). “City agencies generally are not otherwise liable for an award of attorneys’ fees in CPLR article 78 proceedings, as they are not State agencies within the meaning of the Equal Access to Justice Act (CPLR art 86)” *Moscatelli v. New York City Police Dep’t*, 2022 NYLJ LEXIS 2688, *20 (citing *Matter of Herman v NYC Dept. of Hous. Preserv. & Dev.*, 147 AD3d 756, 757 [2d Dept 2017])).

Accordingly, it is hereby,

ORDERED, that this matter be remanded to be heard on the merits following proper notice of the Initial Denial.

All other issues not addressed are either without merit or moot.

This constitutes the decision and order of the court.



Hon. Ingrid Joseph J.S.C.

**Hon. Ingrid Joseph
Supreme Court Justice**