IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Norristown Municipal Waste Authority,	:	
Appellant	:	No. 1977 C.D. 2010 Argued: October 17, 2011
v.	:	
200 E. Airy, LLC and Commerce Bank NA	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE KEITH B. QUIGLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE QUIGLEY FILED: November 30, 2011

The Norristown Municipal Waste Authority (Authority) appeals from the August 23, 2010 order of the Court of Common Pleas of Montgomery County (trial court) granting judgment in favor of 200 E. Airy, LLC and Commerce Bank, NA (collectively, Landowner) and striking off the Authority's municipal lien. The Authority filed a municipal lien against Landowner's property for its failure to pay tapping fees. For the reasons that follow, we affirm.

In 2002, Landowner purchased property located at 200 East Airy Street, Norristown, Pennsylvania (Property). Landowner submitted a zoning application with the Borough of Norristown (Borough) to convert the Property's use from a

vacant gas station to a Laundromat. The Borough issued Landowner a certificate of occupancy in 2005.

Three years later, the Authority contacted Landowner in July 2008 and asked it to pay a tapping fee for the Laundromat's connection to the sewer system. After the parties could not reach an agreement, the Authority passed Resolution 2008-08-12-01 (December 2008 Resolution)[1] to reduce the volume basis for the tapping fee of a Laundromat from 500 gallons of water per day/per washer to 350 gallons of water per day/per washer. Reproduced Record (R.R.) 415a-416a.[2]

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[1] The December 2008 Resolution, titled "Resolution of [Authority] amending tapping fees for self-service laundry," set forth the volume basis of the tapping fee (§1), the method of payment of the tapping fee (§2), the method of recording the payment provisions in section 2 (§3), and future adjustments of tapping fee based on volume increases or decreases during the installment payment period (§4). The December 2008 Resolution did not include a separate resolution that identified the tapping fee and the supporting calculations. Reproduced Record (R.R.) at 415a-416a.

[2] The December 2008 Resolution amended the Authority's earlier Resolution 2008-08-03-01 (March 2008 Resolution), which imposed a tapping fee. As to the calculation of the tapping fee, the March 2008 Resolution merely provided that the fee amount was based on the calculations done by a consulting firm. The March 2008 Resolution provided in relevant part:

> 1. The Authority hereby adopts a tapping fee of $4,100 per equivalent dwelling unit or EDU, as such term is defined in the Sewer System Tapping Fee Report, prepared by Keystone Alliance Consulting and dated February 2008.
>
> 2. The tapping fee amount is based on the calculations, prepared by Keystone Alliance Consulting and presented in the aforementioned Report, and is allocated between the collection and capacity components.
>
> 3. The tapping fee is applicable to all connections made to the sanitary sewer system after the date of this Resolution with the provision that the Authority shall, prior to December 31, 2008, revert to the previous tapping fee for a connection that was approved conditionally or otherwise, by the Authority or its professionals before the date of this Resolution.

(Continued…)

On February 4, 2009, the Authority filed a municipal lien (original lien) in the amount of $167,200.00 against the Property based on 44 equivalent domestic units (EDUs) attributable to the Laundromat. R.R. 4a-5a. The Authority averred that Landowner failed to remit tapping fees pursuant to the December 2008 Resolution and the Municipality Authorities Act (MAA).[3] *Id.*

Within weeks, Landowner filed a petition to strike the municipal lien. Landowner first alleged that the municipal lien was defective because it failed to comply with the Act of May 16, 1923, P.L. 207, *as amended*, 53 P.S. §§7101-7505, commonly known as the Municipal Claims and Tax Lien Law (Tax Lien Law). Specifically, Landowner alleged that the municipal claim failed to comply with Section 10 of the Tax Lien Law, 53 P.S. §7144, in that it failed to identify the time period for which the lien was levied and that the lien incorrectly identified the year in which the fees would become due. Landowner further alleged the lien was untimely. Authority filed an answer to the petition to strike municipal lien.

Thereafter, Landowner issued a notice to issue a writ of *scire facias* and the Authority timely complied.[4] After limited discovery, Landowner filed an affidavit of

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R.R. at 64a. The March 2008 Resolution, however, did not attach a copy of the Keystone Alliance Report. As noted by the trial court, the original lien cited the December 2008 Resolution as authority for imposition of the lien. The trial court did not consider whether the March 2008 Resolution satisfied the requirements 53 Pa. C.S. §5607(d)(24) so as to uphold the original lien.

[3] Act of June 19, 2001, P.L. 287, No. 22 (Act 22 of 2001), *as amended* by the Act of December 17, 2001, P.L. 926, No. 110 (Act 110 of 2001) and the Act of December 30, 2003, P.L. 404, No. 57 (Act 57), codified at 53 Pa. C.S. §§5601-5623.

[4] A *scire facias* procedure is a mechanism where the parties may establish a complete factual record from which the fact finder can ascertain the amount due on a lien. 18 *Standard Pennsylvania*

(Continued…)

defense, denying that the Act 110 of 2001 granted the Authority power to lien property for unpaid tapping fees because Act 22 of 2001, as amended by Act 110, permits liens for unpaid amounts for the costs of construction of a sewer or water main. Here, however, there was no sewer connection constructed to service the property. Landowner further asserted that the December 2008 Resolution did not apply to Landowner because it specifically stated that the tapping fees applied to all connections made to the sewer system after the Resolution's effective date.

In July 2009, the Authority filed an amended municipal lien. Notably, the Authority did not seek an agreement from Landowner or permission from the trial court to file the amended lien. The amended lien cited the Act of December 19, 1990, P.L. 1227, No. 203 (Act 203 of 1990) and a February 7, 1996 Resolution as support for the Authority's power to impose a tapping fee. R.R. at 69a-70a. The amended lien increased the number of EDUs to 63 but decreased the amount of the lien to $121,527.00. *Id.*

In its answer to Landowner's affidavit of defense, the Authority alleged that its 1996 Resolution complied with Act 203 of 1990. When Landowner received its occupancy permit in 2005, therefore, the 1996 ordinance (with tapping rates amended in 2004), applied to the Property.[5] R.R. 171a-177a.

Practice, §102:1. Pursuant to Section 16 of the Act of May 16, 1923, P.L. 207, known as the Municipal Claims and Tax Lien Law (Tax Lien Law), *as amended*, 53 P.S. §7184, any party named as a defendant in a claim may serve notice upon the claimant to issue a *scire facias* within 15 days of the notice.

[5] In relevant part, the 1996 Resolution, which amended Section 4 C of the Authority's February 16, 1994 Resolution, provided:

(Continued…)

Landowner moved for judgment pursuant to Section 19 of the Tax Lien Law, 53 P.S. §7271. Granting judgment in favor of Landowner, the trial court noted that the current statute governing tapping fees is found at 53 Pa. C.S. §5607. Pursuant to Section 5607(d)(24), a municipal authority is permitted to charge enumerated fees to property owners who desire or are required to connect to the authority's sewer or water connection; however, the fees must be based upon a duly adopted fee schedule in effect at the time of payment. 53 Pa. C.S. §5607(d)(24). Payments are due at the time of application for connection or at a time agreed upon by the authority and the property owner. Subsection (d)(24)(i) requires the fees to be separately set forth in a resolution adopted by the authority. 53 Pa. C.S. §5607(d)(24)(i). Further, any authority charging a tapping fee may do so only pursuant to a resolution adopted at a public meeting. *Id.* Pursuant to Section 5607(d)(24)(iii), an authority is only permitted to impose fee, customer facilities fee, tapping fee or similar fee except as provided under section 5607. 53 Pa. C.S. §5607(d)(24)(iii).

Reviewing the statutory language, the trial court concluded Landowner was entitled to judgment and struck the amended lien with prejudice. As of the effective date of Section 5607, that is, June 30, 2005, the Authority had not passed the December 2008 Resolution. Rather, the Authority adopted the December 2008

> Effective upon the date of this Resolution, the tapping fee shall be $1,929.00 per EDU. Attached to this Resolution, as Exhibit A, is a true and correct copy of the analysis of the costs of existing facilities and facilities to be constructed pursuant to the provisions of Act 203 of 1990, upon which this tapping fee resolution is based.

R.R. at 195a-196a. Notably, the 1996 Resolution attached a copy of the calculation of the tapping fee. R.R. at 197a.

Resolution five months after it sought payment from Landowner. Thus, the trial court determined that the December 2008 Resolution could not provide authority for imposition of the original lien in the amount of $167,200.00.

The trial court then considered the Authority's amended lien and concluded it was not valid because the Authority failed to either seek leave of court to amend the lien or to have agreement of the other party. *See* Section 34 of the Tax Lien Law, 53 P.S. §7188. Overlooking this procedural defect, the trial court further determined the amended lien had to be stricken because it was imposed pursuant to the 1996 resolution which also did not comply with 53 Pa. C.S. §5607.

The Authority appeals. This court's scope of review of a trial court's order disposing of a petition to strike off a municipal claim is limited to a determination of whether the court abused its discretion, committed an error of law, or whether constitutional rights were violated. *Penn Twp. v. Hanover Foods Corp.*, 847 A.2d 219 (Pa. Cmwlth. 2004); *W. Clinton Cnty. Mun. Auth. v. Estate of Rosamilla*, 826 A.2d 52 (Pa. Cmwlth. 2003).

Before we begin, it is helpful to briefly review the progression of the Municipal Authorities Act of 1945 (MAA), Act of May 2, 1945, P.L. 382, *as amended*, formerly 53 P.S. §§301-322. In 1990, the General Assembly amended former Section 4(B)(t) of the MAA,[6] which permitted municipal authorities to impose fees for construction of or connection to water or sewer lines. *See* Act of 203 of 1990, *as amended*. For the first time, the December 1990 amendments to the MAA set forth the requirement

[6] Act of December 19, 1990, P.L. 1227, *as amended*, formerly 53 P.S. §306(B)(t).

that municipalities adopt separate resolutions establishing connection, customer facility and tapping fees. As to tapping fees in particular, there are several components which provide the basis for the tapping fees that must be separately set forth in a resolution. Former 53 P.S. §306(B)(t). The component parts of a tapping fee are the capacity part, the distribution or collection part, the special purpose part, and the reimbursement part. *Id.*

In June 2001, the General Assembly repealed the MAA of 1945 and consolidated its provisions as Chapter 56 of Title 53 of the consolidated statutes, 53 Pa. C.S. §§5601-5623, or Act 22 of 2001. Section 4 of Act 22 of 2001 provided that "any difference in language between 53 Pa. C.S. Ch. 56 and the Municipal Authorities Act of 1945 is intended only to conform to the style of the Pennsylvania Consolidated Statutes and is not intended to change or affect the legislative intent, judicial construction or administration and implementation of the Municipal Authorities Act of 1945." A line-by-line comparison of former Section 4(B)(t) and the 2001 consolidated version of Section 5607(d)(24)(i)(C), which both relate to tapping fees, indicates that there are few material distinctions between the two.[7] Thus, the basis for the requirement that municipalities adopt tapping fees by separate resolution can be traced back to the December 19, 1990 version of the MAA. *See generally West v. Hampton Twp. Sanitary Auth.*, 661 A.2d 459 (Pa. Cmwlth. 1995).

[7] The December 2001 amendments to Chapter 56 (Act 110 of 2001), did not relate to tapping fees. However, the 2003 amendments, Act of December 30, 2003, P.L. 404, amended Section 5706(d)(i)(C)(I), to provide that municipalities may rely upon an engineer's written estimate of current replacement costs where historical data is not available to calculate the capacity part, the distribution and collection part, and special purpose part. The amendments further addressed reduction of outstanding debt where the municipality revised historical costs to reflect current cost and revision to tapping fees on an annual basis.

With that as background, the law in effect at the time the Authority filed the original lien in 2009 provided that "No authority shall have the power to impose a connection fee, customer facilities fee, tapping fee or similar fee except as provided specifically under this section." 53 Pa. C.S. §5607(d)(24)(iii).

Section 5607(d)(24)(i) permits imposition of a connection fee, a customer facilities fee, and a tapping fee, if the authority adopts the fees pursuant to separate resolutions. 53 Pa. C.S. §5607(d)(24)(i). Relevantly, *the fees are payable at the time determined by the authority for connections made to an existing development*. 53 Pa. C.S. §5607(d)(24). Here, as established by Authority's own timeline as set forth at page 11 of its appellate brief, the Authority did not approach Landowner for payment of the tapping fees until July 22, 2008. Thus, the Authority determined the fees were payable in July 2008.[8]

Consequently, we must agree with the trial court that the Authority could not rely upon the December 2008 Resolution to impose a tapping fee upon Landowner's property as it was adopted *after* the Authority sought payment from Landowner. Furthermore, a review of the December 2008 Resolution reveals that the Authority lowered the water volume used to determine tapping fees but did not separately set

[8] We reject the Authority's position that Landowner "baldly commenced operation of its Laundromat and feigned ignorance of the requirement to pay the same" and therefore is at fault for not paying the tapping fees in 2005 when the Borough issued an occupancy permit. Authority's Br. at 6. As the Authority points out, it is a separate body independent of the municipality which created it. *Vernon Twp. v. Water Auth. v. Vernon Twp.*, 734 A.2d 935 (Pa. Cmwlth. 1999). At some point prior to beginning operations as a Laundromat, Landowner had to establish an account with the Authority for billing purposes. However, Landowner could not have known what the tapping fees were until the Authority advised Landowner the amount due.

forth by resolution the tapping fees. This Resolution does not explain the various components of the tapping fee or how it was calculated and, therefore, does not comply with 53 Pa. C.S. §5607(d)(24)(i)(C).[9]

We are further compelled to disagree with the Authority's primary argument that its 1994 Resolution, as amended, applied to Landowner's 2005 connection to the sewer system and that therefore, the trial court erred in striking the amended lien. This argument is premised on the Authority's position it could amend the lien as of right. Section 34 of the Tax Lien Law, 53 P.S. §7188, provides in part:

> Any claim, petition, answer, replication, scire facias, affidavit of defense, or other paper filed of record, *may be amended, from time to time, by agreement of the parties, or by leave of court upon petition for that purpose,* under oath or affirmation, setting forth the amendment desired that the averments therein contained are true in fact, and that by mistake they were omitted from or wrongfully stated in the particulars as to which amendment is desired. *Such amendments shall be of right*, saving intervening rights, except that no amendment of the claim shall be allowed, after the time for its filing has expired, which undertakes to substitute an entirely different property from that originally described in the claim, but that description of the property may be amended so as to be made more accurate, as in the other cases of amendment. (Emphasis added.).

[9] The result would be the same had the Authority asserted the lien under the March 2008 Resolution, titled 'Resolution of [the Authority] updating tapping fee." The March 2008 Resolution purports to set tapping fees "as such term is defined in the Sewer System Tapping Fee Report, and prepared by Keystone Alliance Consulting and dated February 2008." R.R. 64a. The March 2008 Resolution further provides that "[t]he tapping fee amount is based on the calculations, prepared by Keystone Alliance Consulting and presented in the aforementioned Report, and is allocated between the collection and capacity components." *Id.* However, the Resolution does not attach the report or have a separate resolution setting forth the fees as required by the 53 Pa. C.S. §5607(d)(24)(i). *Id.*

The Authority's argument on this issue is merely that it is permitted to amend its lien "as of right." However, Section 34 permits amendments as of right by agreement of the parties or leave of court. In other words, had the Authority sought leave to amend the original lien, the trial court would have been required to permit the amendment so long as the Authority did not seek to substitute a different property. The Authority cites no case law to support its proposition that it could file an amended lien absent court permission or Landowner's agreement, and our research has only uncovered case law addressing the grant or denial of a motion to amend a lien. *See generally Spramelli v. Borough of Punxsutawny*, 157 A. 522 (Pa. Super. 1931) (concluding that common pleas court should have granted municipality's prayer for relief to amend municipal lien to correct name of property owner); *cf. City of Phila. v. Kehoe*, 22 Pa. Super. 320 (1902) (concluding that common pleas court properly permitted amendment to lien to add the property owner's name); *City of Phila. v. Second Reformed Presbyterian Church*, 16 Pa. Super. 65 (1900) (concluding that common pleas court erred in striking lien where municipality filed motion to amend).[10]

It is undisputed that the Authority here did not seek leave of court to amend its lien. Although an appellate court may grant any relief available in the trial court, we are not permitted to decide this case on the basis of something the Authority never asked the trial court to do. *See generally Dep't of Transp., Bureau of Driver*

[10] Although the decisions in *City of Philadelphia. v. Kehoe*, 22 Pa. Super. 320 (1902) and *City of Philadelphia v. Second Reformed Presbyterian Church*, 16 Pa. Super. 65 (1900), pre-date the Tax Lien Law, the Superior Court determined that the prior law regarding municipal liens should be liberally interpreted to allow amendments where sought due to its remedial nature.

Licensing v. Boros, 533 Pa. 214, 620 A.2d 1139 (1993) (an appellate court does not sit to review questions that were neither raised, tried, nor considered in the trial court); *Martindale Lumber Co. v. Trusch*, 681 A.2d 803 (Pa. Super. 1996) (trial court could not *sua sponte* raise issue of whether appellee could amend complaint where the appellee never asked the court to do so). Here, the Authority never sought permission to file an amended lien. [11]

Accordingly, we affirm.

Keith B. Quigley, Senior Judge

[11] Had it moved to amend its lien, we would agree with the Authority that the proper inquiry is whether the Authority's 1996 resolution complied with the December 19, 1990 version of the MAA, which as noted above, first required municipalities to establish tapping fees by separate resolution. *See* Section 2 of the Act 22 of 2001, providing that "The provisions of 53 Pa. C.S. Ch. 56, so far as they are the same as those of existing laws, are intended as a continuation of such laws and not as new enactments. The repeal by this act of any act or part of any act, shall not affect the existence of any authority previously incorporated. The provisions of this Act shall not affect any act done, liability incurred or right accrued or vested, or affect any suit pending or to be instituted, to enforce any right or penalty under the authority of such repealed laws. All rules and regulations made pursuant to any act or part of any act repealed by 53 Pa. C.S. Ch. 56 shall continue with the same force and effect as if such act had not been repealed."

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Appellant	:	No. 1977 C.D. 2010
v.	:	
200 E. Airy, LLC and Commerce Bank NA	:	

O R D E R

NOW, this 30th day of November, 2011, the order of the Court of Common Pleas of Montgomery County is affirmed.

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Keith B. Quigley, Senior Judge