

<b>Wenat Realty Assoc. LP v New York City Water Bd.</b>
2022 NY Slip Op 31921(U)
June 16, 2022
Supreme Court, New York County
Docket Number: Index No. 159014/2021
Judge: Frank P. Nervo
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. FRANK NERVO PART 04**

*Justice*

-----X

WENAT REALTY ASSOCIATES LP,  
  
Plaintiff,

INDEX NO. 159014/2021

MOTION DATE 10/01/2021

MOTION SEQ. NO. 001

- v -

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

**DECISION + ORDER  
ON MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43

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

Petitioner seeks an order, pursuant to Article 78, reversing and annulling the final determination of respondent New York City Water Board (hereinafter "Water Board") which upheld, inter alia, a water charge of \$320,827.79. Petitioner contends the final determination is arbitrary and capricious and not otherwise supported by the record. Respondent opposes, contending the charge was proper and supported by the evidence.

The standard of review of an agency determination via an Article 78 proceeding is well established. The Court must determine whether there is a rational basis for the agency determination or whether the determination is arbitrary and capricious (*Matter of Gilman v. New York State Div. of Housing*

*and Community Renewal*, 99 NY2d 144 [2002]). “An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts” (*Peckham v. Calogero*, 12 NY3d 424 [2009]; *see also Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 [1974]). When an agency determination is supported by a rational basis, this Court must sustain the determination, notwithstanding that the Court would reach a different result than that of the agency (*Peckham v. Calogero*, 12 NY2d at 431).

As relevant here, it is undisputed that petitioner installed a new water connection to the Water Board’s infrastructure on January 23, 2018. It is further undisputed that at the time the new connection was established, petitioner installed an approved water meter, but failed to file the requisite permit for the new connection and, thus, petitioner’s connection was illegal until it filed the permit on June 4, 2020. Thereafter, respondent Water Board determined that petitioner had installed an unmetered water service and had committed theft of services for the period of January 23, 2018 through June 4, 2020, and charged petitioner attributed consumption charges totaling \$320,827.79, plus various fees.

The record here does not support respondent's finding of theft of services nor does it support imposing consumption charges of \$320,827.79. As discussed supra, it is undisputed that petitioner installed a water meter at the time the new connection was made. Respondent Water Board was therefore able to read the water meter, which met respondents' requirements and was an approved type meter, to determine the actual amount of water used by petitioner. It is undisputed that respondent did in fact read the meter on June 4, 2020, after petitioner filed the requisite connection permit, and the water meter reflected that petitioner used 1,297 HCF of water for the period of January 23, 2018 through June 4, 2020, amounting to no more than \$13,398.01<sup>1</sup> in water use. Consequently, on this record, charging petitioner \$320,827.79, nearly twenty-five times the amount of water actually used, is arbitrary and capricious. There can be no rational basis to impose such excessive estimated or attributed consumption charges where it is undisputed that the water meter accurately recorded the actual use during the operative period.

[continued on following page]

---

<sup>1</sup> As the water rate changed during the operative period, petitioner has arrived at this figure using the highest water rate charged during the operative period, \$10.33 per HCF of water. However, as the water meter was not read until June 4, 2020, a more accurate amount due cannot be determined.

Turning to petitioner's request for attorney's fees, respondents cite *Apollon v. Giuliani* for the proposition that attorney's fees cannot be imposed here under CPLR § 8601 (246 AD2d 130 [1st Dept 1998]). Respondents reliance on *Apollon* is misplaced, as that matter found the petitioner was not a "prevailing party" for the purposes of CPLR § 8601. CPLR § 8601(a) provides, in relevant part that "a court shall award to a *prevailing party* ... in any civil action brought *against the State*, unless the court finds the position of the state was substantially justified" (emphasis supplied). Here there can be no argument that petitioner is the prevailing party; however, conspicuously absent from the parties' filings is any authority elucidating whether respondents are members of "the State" for the purposes of CPLR § 8601. Consequently, the Court directs further briefing on the issue of attorney's fees.

Accordingly, it is

ORDERED that the petition is granted and respondent New York City Water Board's final determination of June 2, 2021 on account 1001057165001 is reversed and annulled; and it is further

ORDERED that the attributed consumption charges for the period January 23, 2018 through June 4, 2020 are cancelled; and it is further

ORDERED that the theft of services charge, \$650.00, is canceled; and it is further

ORDERED that New York City Water Board shall bill petitioner for the actual amount of water used, 1,297 HCF for the period January 23, 2018 through June 4, 2020, in an amount not to exceed \$13,398.01 and respondents shall not impose any late fees associated with charges for this period; and it is further

ORDERED that petitioner shall remit payment within 45 days of receipt of the above bill by respondents; and it is further

ORDERED that to the extent petitioner seeks attorney's fees, decision is reserved pending further briefing, to wit, no later than July 15, 2022 the parties shall file, via NYSCEF with courtesy copy to the Part Clerk ([SFC-Part4-Clerk@nycourts.gov](mailto:SFC-Part4-Clerk@nycourts.gov) or 80 Centre Street, Part IV Courtroom 327 New York, NY 10013), briefs on the limited issue of whether respondents are properly deemed State actors for the purposes of attorney's fees under Article 86 of the CPLR; and it is further

ORDERED that should petitioner fail to timely submit the above brief, such failure shall constitute withdrawal of that portion of the petition seeking attorney's fees; and it is further

ORDERED that should respondents fail to timely submit the above brief, such failure shall constitute admission that attorney's fees are properly entered against respondents and consent to entry of same; and it is further

ORDERED that the above briefing schedule shall not be adjourned or modified by the parties; and it is further

ORDERED that briefs shall be limited to 2,500 words, as counted under the Uniform Rules, and oversized briefs will not be considered; and it is

ORDERED that there shall be no replies or further briefing; and it is further

[continued on following page]

ORDERED that should the parties stipulate to the issue of attorney's fees, they shall file said stipulation to NYSCEF, with courtesy copy to the Part Clerk as above, no later than July 11, 2022.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

6/16/2022  
DATE



HON. FRANK P. NERVO

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

J.S.C.

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE