

Respondent filed a motion for summary decision on September 6, 2016. By the motion, Respondent sought to dismiss the petition, contending the meter properly registered usage during the billing period and no records reflect the discontinuance of gas service or shut off at the residence, therefore, Petitioner is responsible for the balance of \$1,768.51. In support of its motion, Respondent attached documents showing the meter reading history and the billing history. Respondent also attached the monthly invoices and the meter test record. Respondent further argues that Petitioner's monetary claim should be dismissed for lack of jurisdiction. Accordingly, Respondent sought dismissal of the petition with prejudice and an order indicating that Petitioner was properly billed and directing Petitioner to pay the outstanding balance.

Petitioner submitted no response to the motion for summary decision.

The ALJ issued an Initial Decision granting summary decision in Respondent's favor on December 6, 2016. The ALJ reviewed N.J.A.C. 1:1-12.5(b), stating that "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged then the moving party is entitled to prevail as a matter of law" and a summary decision may be rendered.

The record reflects Respondent provided gas service to property on a residential account to Petitioner and the billing period in dispute is October 2012 to May 2014. The ALJ found exhibits portrayed the careful tracking of actual gas usage on the account, but for one billing period, from October 2012 to November 2012, which was estimated. The gas meter, meter no. 614650, was disconnected on May 30, 2014 and testing results reflect that the meter tested within accuracy range for reporting. The record further reflects no record of gas discontinuance or shut off at the property during the relevant time period. The ALJ stated that Petitioner, although obligated to rebut Respondent's claims, did not counter Respondent's motion. Further, Petitioner provided no reason for failing to answer or address the motion. Therefore, the ALJ concluded that the motion record demands that the relief sought by Respondent's summary decision motion be granted. Additionally, the ALJ ordered that the petition be dismissed with prejudice.

Pursuant to N.J.S.A. 52:14B-10(c), the Board issued an order on December 12, 2016, extending its time to issue a final agency decision.

Both parties were noticed of the Initial Decision, and exceptions were not filed.

DISCUSSION

For the reasons that follow, the Board **ADOPTS** the Initial Decision and **DISMISSES** the petition.

A motion for summary decision may be made upon all or any of the substantive issues in a contested case. N.J.A.C. 1:1-12.5(a). Summary decision may be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). The procedure is aimed at the swift uncovering of the merits and their effective disposition or advancement towards a prompt resolution, Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1954), as an evidentiary hearing is mandated only when the proposed administrative action is based on disputed adjudicatory facts, Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106, 120 (App. Div. 1995), certif. denied, 145 N.J. 372 (1996). Determining whether a genuine issue with respect to a material fact exists requires consideration of whether the competent evidential materials presented,

when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. Brill v. Guardian Life Insurance Company of America, 142 N.J. 520, 540 (1995). Where a motion for summary decision not decided by an agency head fully disposes of the case, it is treated as an initial decision under N.J.A.C. 1:1-18 et seq. N.J.A.C. 1:1-12.5(c).

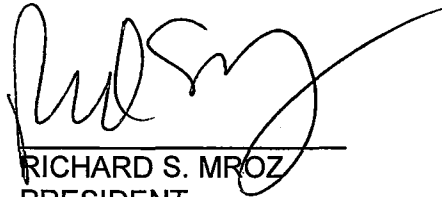
The record reflects there is no genuine issue of material fact on the accuracy of the registering meter, the billing amounts due and owing, and the uninterrupted provision of gas to the property. N.J.A.C. 1:1-12.5(b) provides that for the non-moving party to prevail, it must submit a responding affidavit setting forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. N.J.A.C. 1:1-12.5(b) further provides that if the non-moving party does not oppose the motion, a summary decision, if appropriate, shall be entered. Petitioner did not oppose Respondent's motion which was amply supported by Respondent's business records.

Upon careful review and consideration of the record, the Board **FINDS** the ALJ grant of summary decision to be reasonable and supported by sufficient, competent, and credible evidence. Accordingly, the Board **ADOPTS** the Initial Decision, dismissing the petition.

This Order shall be effective on March 4, 2017.

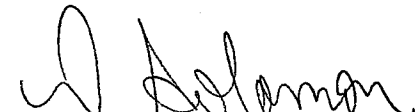
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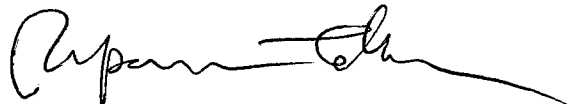
BOARD OF PUBLIC UTILITIES
BY:

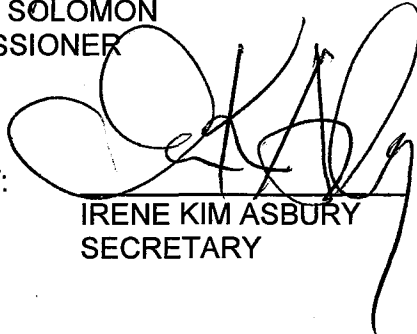

RICHARD S. MROZ
PRESIDENT


JOSEPH L. FIORDALISO
COMMISSIONER

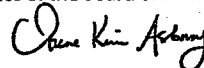

MARY-ANNA HOLDEN
COMMISSIONER


DIANNE SOLOMON
COMMISSIONER


UPENDRA J. CHIVUKULA
COMMISSIONER

ATTEST: 
IRENE KIM ASBURY
SECRETARY

I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utilities



TIMOTHY SHERRY

V.

NEW JERSEY NATURAL GAS

**BPU DOCKET NO. GC15101194U
OAL DOCKET NO. PUC 2089-16**

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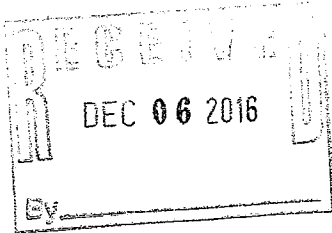
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BOARD OF PUBLIC UTILITIES
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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW



INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. PUC 2089-16

AGENCY DKT. NO. GC15101194U

TIMOTHY SHERRY,

Petitioner,

v.

NEW JERSEY NATURAL GAS

COMPANY,

Respondent.

Timothy Sherry, petitioner, pro se

Eileen F. Quinn, Esq., for respondent

Record Closed: November 15, 2016

Decided: December 6, 2016

BEFORE JOSEPH LAVERY, ALJ t/a:

CMS
V. Haynes
D. Lee Thom
E. Hartsfield
J. Ford
C. Jordan
R. Lambert
J. Gertsman
B. Agee
C. Vachier

STATEMENT OF THE CASE

This is an appeal brought by **Timothy Sherry, petitioner**, asking for relief from certain billing by respondent for natural gas which he denies consuming at his property.

Respondent, New Jersey Natural Gas Company (NJNG; the Company) insists that petitioner did consume the gas in issue. It contests the appeal, and asks for summary decision pursuant to N.J.A.C. 1:1-12.5.

Today's initial decision grants summary decision, dismissing the appeal, with prejudice.

Procedural History:

This matter was filed in the Office of Administrative Law by the agency head as a contested case on February 5, 2016. It was assigned by the Acting Director and Chief Administrative Law Judge to Robert Bingham II, Administrative Law Judge, for hearing. Judge Bingham conferred with counsel by phone on April 28, 2016, and then issued a prehearing order dated May 2, 2016, setting the date for plenary hearing at November 15, 2016. Respondent Company then filed the present motion seeking dismissal of the appeal in the Office of Administrative Law (OAL) on September 6, 2016.

Subsequently, Judge Bingham was appointed to the Superior Court bench, and the case was transferred by letter of November 9, 2016, to the undersigned pursuant to N.J.A.C. 1:1-14.13. The hearing date of November 15, 2016, was adjourned to dispose of respondent's motion, and on the latter date the record is marked as closed.

Background:

The facts material to this motion may be succinctly stated:

In his letter petitioning the New Jersey Board of Public Utilities for plenary hearing, filed there on October 5, 2015, **petitioner, Timothy Sherry**, appears to argue simultaneously that his bills were inordinately high, but also that, because of Hurricane Sandy, the property was left vacant due to the storm, and that he had been without gas for an unclear period of time. In particular, petitioner contends:

The gas company simple [sic] will not admit that it turned my gas off never turned it back on and has been giving me estimated reading and claiming they were physical ones. [Appeal letter to New Jersey Board of Public Utilities, dated October 5, 2015, at p. 2]

Petitioner for this reason denies any obligation to render to NJNG the accumulated bill payments it seeks. He further suggests that NJNG might at some point be liable to repay him for water damages proximately attributable to lack of gas.

Respondent NJNG maintains that petitioner was appropriately billed for consumption of natural gas at the property located at 105 Asbury Avenue, Ocean Grove, New Jersey. The period in issue for which petitioner denies responsibility for payment, according to NJNG, extends from October 2012 through May 30, 2014, when the meter was removed. The meter was shortly thereafter determined by respondent to have been operating properly at all times. During the periods in question, according to NJNG, respondent consumed its gas product and accrued a payment debt of \$1,768.51.¹ It denies any connection with, or liability for, any ostensible water damages yet to be identified by petitioner. Based on these asserted facts², respondent NJNG moves for summary dismissal of petitioner's case.

Petitioner did not at all respond to the NJNG's motion, and here the matter stands.

FINDINGS OF FACT

I FIND that the above narrative of procedural events is correct, and supports respondent's motion for dismissal for reasons of law discussed below.

¹ Exhibit A, respondent New Jersey Natural Gas Company's answer to petition, at p. 4, itemized par. 4. At variance with this amount is the final bill of record covering the period March 16 through April 14, 2016. (Exhibit C, NJNG00122).

² Exhibits A through D accompanying respondent's motion and brief.

ANALYSIS AND CONCLUSIONS OF LAW

Legal analysis:

Summary decision is the administrative counterpart to summary judgment in the judicial arena. R 4:46., et seq. The correlating administrative rule, N.J.A.C. 1:1-12.5, provides that summary decision should be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. In order to defeat a summary decision motion, the adverse party must respond by affidavits setting forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary hearing. Use of the summary procedure is aimed at the swift uncovering of the merits and either their effective disposition or their advancement toward a prompt resolution by trial. Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1954).

The New Jersey Supreme Court encouraged trial-level courts not to refrain from granting summary judgment when the proper circumstances present themselves. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 541 (1995). While cautioning that a judge should not weigh the truth of the evidence or resolve factual disputes at this early stage of the proceedings, the Court clarified that when the evidence is so one-sided that one party must prevail as a matter of law, the trial court should not hesitate to grant summary judgment. Id. at 540. Appellate courts recognize that “[a]n evidentiary hearing is mandated only when the proposed administrative action is based on disputed adjudicatory facts.” Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106, 120 (App. Div. 1995), certif. denied, 145 N.J. 372 (1996).

While there may be disputed adjudicatory facts left unaddressed through plenary hearing as petitioner has requested, this is not the fault of respondent NJNG. Respondent submitted exhibits which it maintains portrays the careful tracking of actual

gas usage, but for one billing period, which was estimated. It submits documents³ purporting to confirm its affirmative claim.

Petitioner, who thereafter is obliged under the rule to rebut or be subject to an adverse conclusion, for his part has offered nothing to counter the motion. Further, he has provided no exculpatory reason for failing to comply with the rule. In the face of this lack, he cannot hope to succeed in his petition.

Conclusion of law:

Given the foregoing legal analysis, it must be concluded that the record on motion demands that the relief sought by respondent NJNG through its motion for summary decision be granted, and that petitioner's appeal be dismissed, with prejudice.

ORDER

It is hereby **ORDERED** that respondent's motion for summary decision be **GRANTED**, and,

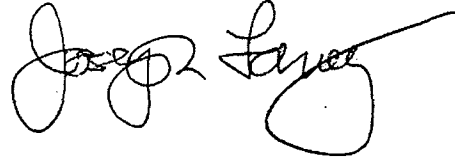
It is hereby further **ORDERED** that the petition brought by Timothy Sherry be **DISMISSED WITH PREJUDICE**.

I hereby **FILE** my initial decision with the **BOARD OF PUBLIC UTILITIES** for consideration.

This recommended decision may be adopted, modified or rejected by the **BOARD OF PUBLIC UTILITIES**, which by law is authorized to make a final decision in this matter. If the Board of Public Utilities does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

³ Exhibits A through D included in respondent's letter brief on motion

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **SECRETARY OF THE BOARD OF PUBLIC UTILITIES, 44 South Clinton Avenue, P.O. Box 350, Trenton, NJ 08625-0350**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.



December 6, 2016
DATE

JOSEPH LAVERY, ALJ t/a

Date Received at Agency: _____

Date Mailed to Parties: _____

mph