

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D26948
W/kmg

_____AD3d_____

Argued - March 5, 2010

STEVEN W. FISHER, J.P.
JOHN M. LEVENTHAL
ARIEL E. BELEN
SANDRA L. SGROI, JJ.

2009-06406

DECISION & ORDER

In the Matter of Anthony Scarcella, appellant, v
Village of Scarsdale Board of Trustees, respondent.

(Index No. 21149/08)

Silverberg Zalantis LLP, White Plains, N.Y. (Steven M. Silverberg and Katherine Zalantis of counsel), for appellant.

Wayne D. Esannason, Village Attorney, Scarsdale, N.Y. (Richard M. Gardella of counsel), for respondent.

In a proceeding pursuant to CPLR article 78 to review a determination of the Village of Scarsdale Board of Trustees dated September 9, 2008, which affirmed two determinations of the Village of Scarsdale Board of Architectural Review dated December 17, 2007, and March 10, 2008, denying the petitioner's applications for a certificate of appropriateness authorizing demolition of a historic building and for a hardship variance from the requirement that the petitioner obtain of a certificate of appropriateness, respectively, the petitioner appeals from so much of an order of the Supreme Court, Westchester County (R. Bellantoni, J.), dated June 8, 2009, as granted the petition only to the extent of remitting the matter to the respondent for a de novo hearing as to whether a hardship variance should be granted.

ORDERED that the appeal is dismissed, with costs.

The order appealed from is not appealable as a matter of right, as no appeal lies as of right from a nonfinal order in a proceeding pursuant to CPLR article 78 (*see* CPLR 5701[b], [c]; *Matter of Russo v Black*, 297 AD2d 381, *affd* 100 NY2d 395; *Matter of Blisset v New York State Div. of Parole*, 254 AD2d 354; *Matter of Persico v Board of Educ., City School Dist., City of N.Y.*, 250 AD2d 854; *Matter of DGM Partners-Rye v Board of Architectural Review of City of Rye*, 148

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AD2d 608), and we decline to grant leave to appeal (*see* CPLR 5701[c]; *Matter of DiMeglio v Village of Briarcliff Manor, N.Y.*, 58 AD3d 840; *Matter of Pace v Pleus*, 306 AD2d 350; *Matter of Young Israel of Merrick v Board of Appeals of Town of Hempstead*, 304 AD2d 834).

FISHER, J.P., LEVENTHAL, BELEN and SGROI, JJ., concur.

2009-06406

DECISION & ORDER ON MOTION

In the Matter of Anthony Scarcella, appellant, v
Village of Scarsdale Board of Trustees, respondent.

(Index No. 21149/08)

Cross motion by the respondent, inter alia, to dismiss an appeal from an order of the Supreme Court, Westchester County, dated June 8, 2009, on the ground that no appeal lies as of right from a nonfinal order in a proceeding pursuant to CPLR article 78. Application by the appellant for leave to appeal to this Court from the order dated June 8, 2009, in the event that leave to appeal is necessary. By decision and order on motion of this Court dated October 22, 2009, that branch of the cross motion which was to dismiss the appeal, and the application, were held in abeyance and referred to the panel of Justices hearing the appeal for determination upon the argument or submission thereof.

Upon the papers filed in support of the cross motion and the application, and the papers filed in opposition thereto, and upon the argument of the appeal, it is

ORDERED that the application is dismissed, as a request for leave to appeal to this Court pursuant to CPLR 5701(c) must be made by motion on notice (*see* 22 NYCRR 670.6[b][1]); and it is further,

ORDERED that the branch of the cross motion which was to dismiss the appeal is denied as academic in light of our determination of the appeal (*see Matter of Scarcella v Village of Scarsdale Bd. of Trustees*, _____AD3d_____ [decided herewith]).

FISHER, J.P., LEVENTHAL, BELEN and SGROI, JJ., concur.

ENTER:


James Edward Pelzer
Clerk of the Court