

Snyder v New York City Dept. of Bldgs.

2009 NY Slip Op 32864(U)

December 4, 2009

Supreme Court, New York County

Docket Number: 114636-2009

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE
Justice

PART 10

Richard Snyder
NYC Dept. of Buildings
Et Al.

INDEX NO. 114636/09
MOTION DATE _____
MOTION SEQ. NO. 1
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

and petition
**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: December 4, 2009

J. Gische
HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10**

-----x
Richard Snyder,

Petitioner (s),

-against-

The New York City Department of Buildings,
The New York City Landmarks Preservation
Commission, Crown Wisteria, Inc.,
Jared B. Stamell and Susan Frank Stamell,

Respondent (s)
-----x

DECISION/ORDER
Index No.: 114636-2009
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representatives must appear in person at the Judgment Clerk's Desk (Room 141B).

Recitation, as required by CPLR 2219 [a], of the papers considered in the Clerk's Desk (Room (these) motion(s):

Papers	Numbered
Pet's OSC (CPLR §6301) w/RS affid, ROM affirm, exhs	1
DOB, Landmarks' x/m (CPLR §§3211, 7804) w/JMG affirm, exhs	2
Crown/Stamell x/m (CPLR §3211) w/JBS affirm	3
Pet's affirm (BWK) in further support w/exhs	4
Steno Minutes 10/20/09 and 11/5/09 (sep backs)	5, 6

Upon the foregoing papers, the decision and order of the court is as follows:

This is an Article 78 summary proceeding brought on by order to show cause with a temporary restraining order ("TRO"). The court denied the TRO after hearing arguments, as required under the Uniform Rules - Trial Courts § 202.7[f] (see, stenographic minutes 10/20/09).

Richard S. Snyder ("Snyder") is the record owner of real property and improvements located at 120 East 78th Street, New York, New York (Block 1412 Lot 63) ("Snyder's house"). The respondents are Crown Wisteria, Inc. ("Crown Wisteria"), the record owner of the real property and improvements located at 118 East 78th Street, New York, New York (Block 1412 Lot 64), Jared B. Stamell, Crown Wisteria's president, and

Susan Frank Stamell, Stamell's wife. Jared B. Stamell, is an attorney at law admitted to practice in this state; he is representing himself, the corporation and his wife. Unless otherwise provided, Crown Wisteria, Inc. and the Stamells shall be referred to collectively as the "Stamells" and the house at 118 East 78th Street as the "Stamells' house."

Petitioner's motion for a preliminary injunction and the underlying petition seeks the same relief which is as follows: [a] an order directing DOB to conduct a further review of job number 120110361 ["job"] and the permit issued for that job (No. 120110361-01-EW-OT) ["job"]; [b] a report by DOB as to the findings and conclusions that resulted in the permit being approved; [c] alternatively, an immediate hearing to determine the validity of DOB's approval of the job and permit; [c] an order directing DOB to revoke the permit it issued because the work violates various rules, ordinances, etc.; [d] an order directing the Stamells to remove the wood fence; and [e] the cost, expenses, etc., attendant to the petitioner having to bring this motion.

Respondents DOB and the New York City Landmarks Preservation Commission (at times "city respondents") have cross moved for the pre-answer dismissal of the petition based upon CPLR § 7804 [f] (objections in point of law) and CPLR §§ 3211 [a][2] and [7]. The Stamells have separately cross moved for the dismissal of the petition for that reason as well. Petitioner opposes both cross motions, arguing that even if he is denied a preliminary injunction, a testimonial hearing is necessary before the court can decide the parties' underlying dispute.

Applicable Law

On a motion for a preliminary injunction the movant must prove the likelihood of ultimate success on the merits, that it will suffer irreparable harm unless the relief is

granted, and a balance of the equities in its favor. Paine v. Chriscott v. Blair House Associates, 70 AD2d 571 (1st dept. 1979); Aetna Insur. Co. v. Capasso, 75 NY2d 860 (1990). The purpose of a preliminary injunction is to maintain the *status quo* and prevent the dissipation of property that could render a judgment ineffectual (Moy v. Umeki, 10 AD3d 604 [2nd Dept 2004]). "Likelihood of success" need only be shown from the evidence presented; conclusive proof is not required. Thus even where there are facts in dispute, the court may, in its discretion, order such relief pendente lite to maintain the status quo. Moy v. Umeki, supra at 605.

Where a motion to dismiss is premised upon CPLR §7804 [f], only the petition and the exhibits attached thereto may be considered and all the allegations contained therein are deemed to be true. (Green Harbour Homeowners' Ass'n. Inc. v. Town of Lake George Planning Board, 1 AD3d 744 [3rd Dept 2003]). Similarly, on a motion to dismiss brought pursuant to CPLR § 3211, the court is required to presume the truth of all allegations contained in the challenged pleadings and resolve all inferences which may reasonably flow therefrom in favor of the non-movant (Cron v. Hargro Fabrics, Inc., 91 NY2d 362 [1998]; Sanders v. Winship, 57 NY2d 391 [1982]). Thus, the court's inquiry is whether the plaintiff *has* a cause of action, not whether s/he has stated one (Guggenheimer v. Ginzberg, 43 NY2d 268 [1977]; DePaoli v. Board of Educ., Somers Cent. School Dist., 92 AD2d 894 [2nd Dept 1983]).

The petition contains the following facts which also form the basis for Snyder's motion for a preliminary injunction:

Allegations and Arguments

There is other litigation pending between Snyder and the Stamells (Snyder v. Crown, et al., Supreme Court, N.Y. Co., Index No. 110543-09) involving claims that the Stamells erected a wood fence in their back yard which is a private nuisance. In that action, this court denied Snyder's motion for a preliminary injunction because he did not show a likelihood of success on the merits, and for other reasons set forth in the court's decision and order dated September 21, 2009.

In this Article 78 proceeding Snyder approaches his disputes with the Stamells from a different perspective. Here, Snyder seeks a preliminary injunction requiring the DOB to immediately review the permit it issued to the Stamells and upon doing so, revoke it. Alternatively, Snyder argues that this court should review DOB's actions thus far (including the issuance of the permit) because those actions are arbitrary and capricious, in violation of lawful procedure, or an abuse of DOB's discretion. The city respondents and the Stamells argue that petitioner has not exhausted his administrative remedies, which require him to file an appeal with the Board of Standards and Appeals ("BSA"). Alternatively, the city respondents argue that they acted within their discretion by issuing the Certificate of No Effect (sometimes "CNE") and the work permit allowing the fence to be built.

The Stamells support the city respondents' cross motion and separately argue that there is no basis to force them to remove their fence at this time because they obtained a permit to build it, but even if the permit is ultimately revoked, it is simple enough (and they are willing) to take down the fence, if they are ordered to.

The Stamells and Snyder have been neighbors since 1996 when Snyder bought

his house. The Stamells have owned their house since 1975. Both homes are in a land marked area known as the Upper East Side Historic District. The Stamells started to erect a wooden fence in their back yard on June 13, 2009. Someone complained to the authorities that the work was being done without a permit. In response to that complaint, the Environmental Control Board fined the Stamells and DOB issued a partial stop work order on June 17, 2008. The next day, the New York City Landmarks Preservation Commission ("LPC") issued its own warning letter and stop work order, based upon its own inspection. LPC determined that work being done without a permit and urged the owner to bring an application for a permit to legitimize the process.

On June 26, 2009, the Stamells filed an application for a certificate of no effect. On the application, the work described was "replace [ment] of window(s) or doors(s)" and "fence at rear yard." Although Susan Stamell is identified as the owner on the application, it is signed by Jared Stamell as owner. LPC approved the proposed work and issued a CNE on July 16, 2009 which allowed "install [ation] [of] a new wood fence . . ." and other work. The CNE, which was issued to Susan Stamell, refers to LPC's prior stop work order and the fact that the fence was already completed when the Stamells applied for a permit with the LCP. The CNE authorizes the "replace [ment] [of] existing rear fence at rear yard with [a] new [fence] as per plans . . ." and notes that the other work being done was also in the Stamell's rear yard, which was out of view.

Following the CNE, the Stamells filed for a work permit. The application, dated July 27, 2009 was approved by DOB on July 29, 2009 and permit 120110361-01-EW-OT was issued by the department. Later, again in response to outside complaints, the DOB sent

the Stamells a notice of "Intent to Revoke Approval(s) and Permit(s)" dated August 31, 2009. The notice included an "objection sheet" dated August 12, 2009, requiring that the Stamells "provide dimensioned elevations and details to demonstrate compliance" with the zoning requirement that the fence be erected "a maximum of 6 feet above the [ground]."

The Stamells responded by filing a "determination form" containing the information requested by DOB along with a statement that the total height of the fence was 3' 11" above curb level and therefore, within the height limitations set by the department. DOB approved the determination in the Stamells' favor on September 4, 2009 and rescinded its notice. It is that decision, dated September 11, 2009¹, rescinding the notice of intention to revoke that Snyder is specifically challenging in this petition.

Snyder contends that this dispute (and the agencies' determinations) is (are) ripe for judicial review, and he is entitled to injunctive relief, because the fence is blocking two of his windows. He contends that DOB's decision to rescind the "revocation of the permit" was without any rational basis, or alternatively, that it is an abuse of its discretion. Snyder contends that DOB should never have permitted the Stamells to "replace [the] existing fence at [their] rear yard with [a new fence]" as the job and work permit DOB issued provides, because there was no "existing fence" until the Stamells engaged in self-help by building a fence in June 2009 without obtaining the proper approvals and permits.

Snyder argues further that the DOB file is missing, and he cannot independently examine everything that was filed to get the permit. He states that the file may have been deliberately removed by someone trying to impede his investigation. Snyder contends

¹ The petition misidentifies the date as September 10, 2009.

that the LCP CNE and DOB's permit are inconsistent because LCP issued the CNE to Susan Stamell as "owner" although Crown Wisteria, Inc. is the name on the deed, and LCP acknowledged the fence was the Stamells built in June 2009 was new but DOB refers to an "existing" fence. Thus, Snyder maintains his facts show he has a likelihood of success on the merits, the balance of equities lie in his favor because his windows are now blocked, and he has been irreparably harmed because his peaceful enjoyment of his home has been disturbed.

Discussion

We begin by deciding whether respondents' cross motions to dismiss the petition should be granted. If they are, then petitioner's motion for a preliminary injunction is rendered moot. In the absence of a petition, there is no activity to prematurely restrain (or compel) and the issue of petitioner's "likelihood of success on the merits" would be resolved in favor of the respondents.

The standard for evaluating the city respondents' determination is whether it was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious. CPLR § 7803[3]. In order for the court to find that an agency determination is arbitrary and capricious, it would have to find that the action taken was without sound basis in reason and taken without regard to the facts. Thus, the question for the court is generally whether the agency determination has a rational basis (Matter of Gilman v. New York State Div of Housing and Community Renewal, 99 NY2d 144, 149 [2002]; Pell v. Board of Education of Union Free School District No. 1 of Towns of Scarsdale and Mamaroneck, 34 NY2d 222 [1974]). Where the determination is rationally based upon the administrative record, it should not be disturbed (Matter of Salvati v. Eimicke, 77 NY2d

784 [1988]; Elgart v. DHCR, 2 AD3d 218 [1st Dept 2003]). While pure issues of law should be determined by the court, issues concerning the interpretation of a statute or regulation by the agency responsible for its administration should be upheld, if it is not irrational or unreasonable (Madison-Oneida Board of Comparative Educational Services v. Mills, 4 NY3d 51 [2004]; Allstate Ins. Co. v. Libow, 106 AD2d 110 [2nd Dept 1984] *aff'd* 65 NY2d 807 [1985]).

The Board of Standards and Appeals ("BSA") is vested with the authority to review decisions made by the Department of Buildings (Steam Heat, Inc. v. Silva, 230 AD2d 800 [2nd Dept. 1996]; Perrotta v. City of New York, Dept. of Bldg., 107 AD2d 320 [1st Dept. 1985] *aff'd* 66 NY2d 859 [1985]; Fraydun Enterprises v. Deutsch, 124 Misc2d 470 [Sup Ct N.Y. Co. 1984]). Before seeking judicial review of an agency's decision, the petitioner must first exhaust the available administrative remedies (Perrotta v. City of New York, Dept. of Bldg., *supra*). This exhaustion requirement applies whether the petitioner is seeking to compel, or opposes the revocation of, a building permit (*Id.*).

Petitioner is asking this court to review DOB's decision granting the Stamells' application for a permit. He did not however, exhaust his administrative remedies before bringing this Article 78 petition for judicial review. Snyder's statement, that he cannot obtain adequate relief from DOB or BSA, hence the need for judicial intervention at this time, is offered without any supporting facts. Assuming that Snyder is entitled to the ultimate relief he seeks (revocation of the permit and removal of the fence), that relief is available from the BSA in its discretion (*see*, Fray-Dun v. Deutsch, 124 Misc2d 470 [Sup Ct. N.Y. Co. 1984]). Therefore, Snyder has not proved he exhausted his administrative remedies or that to do so would be futile. For those reasons alone, this petition must be

dismissed against the DOB.

Although LPC is named as a respondent, Snyder has failed to set forth any facts that state a cause of action against the LPC. While he contends that the LPC was misled and that it issued the July 16, 2009 CNE based upon fabrications by the Stamells, this statement is complete speculation and not borne by any facts offered by him. His other claim, that the certificate of no effect is invalid because it was issued to Susan Stamell and she is not the owner, places undue emphasis on something which is of no moment in connection with the ultimate relief sought. Not only did LPC issue the warning and stop work order to Susan Stamell as owner, she was warned that "any person working on a land marked site" must obtain approval for all the work being done, and she was urged to "obtain a permit and [promptly] cure the violation . . ." which is exactly what she did. Although Susan Stamell, prepared the application, it was signed by Jared B. Stamell, the president of Crown Wisteria, Inc. The Stamells are the beneficial owners of the property and Susan Stamell is not a stranger to the property. Thus, petitioner has not set forth any facts tending to show that LPC's decision to issue the CNE in the name of the Stamells was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious (CPLR § 7803[3]; Society for Ethical Culture in City of New York v. Spatt, 68 AD2d 112 [1st Dept 1979]). Therefore, the petition against LPC must be dismissed as well.

The city respondents and Stamells have proved that Snyder brought this petition against the DOB prematurely. They have further shown that the LPC decision to issue a CNE had a rational basis. Therefore, the cross motions by respondents are hereby granted and the petition is hereby dismissed in its entirety. Since dismissal of the petition

also renders petitioner's motion for a preliminary injunction moot, it is hereby denied for that reason.

Conclusion

It is hereby

ORDERED that the cross motion by respondents The New York City Department of Buildings and The New York City Landmarks Preservation Commission, dismissing the petition pursuant to CPLR § 7804[f], 3211 [a] is hereby granted; and it is further

ORDERED that the cross motion by respondents Crown Wisteria, Inc., Jared B. Stamell and Susan Frank Stamell, dismissing the petition pursuant to CPLR § 7804[f], 3211 [a] is hereby also granted; and it is further

ORDERED that petitioner's motion for a preliminary injunction is denied for the reasons stated; and it is further

ORDERED that any relief requested that has not been addressed is hereby denied; and it is further

ORDERED AND ADJUDGED that the petition is hereby dismissed against each respondent and the Clerk shall enter judgment in favor of the respondents against petitioner Richard Snyder, dismissing the petition in its entirety.

This constitutes the decision and order of the court.

Dated: New York, New York
December 4, 2009

So Ordered:

UNFILED JUDGMENT

Hon. Judith J. Gische, J.S.C.

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).