

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 24-01528

PRESENT: WHALEN, P.J., LINDLEY, MONTOUR, AND KEANE, JJ.

IN THE MATTER OF PARK AVENUE ESTATES, LLC
AND DARRYL CARR, PETITIONERS-APPELLANTS,

V

MEMORANDUM AND ORDER

CITY OF BUFFALO AND CITY OF BUFFALO
PERMIT & INSPECTION SERVICES,
RESPONDENTS-RESPONDENTS.

SALCEDO APPEALS PLLC, BUFFALO (STEVEN B. SALCEDO OF COUNSEL), FOR
PETITIONERS-APPELLANTS.

CAVETTE A. CHAMBERS, CORPORATION COUNSEL, BUFFALO (ROBERT E. QUINN OF
COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered August 28, 2024, in a proceeding pursuant to CPLR article 78. The judgment, insofar as appealed from, granted the motion of respondents to dismiss the petition and dismissed the petition.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed on the law without costs, the motion is denied, the petition is reinstated, and respondents are granted 20 days from service of the order of this Court with notice of entry to serve and file an answer.

Memorandum: In this proceeding pursuant to CPLR article 78, petitioners, Park Avenue Estates, LLC and Darryl Carr, appeal from a judgment that, inter alia, granted the pre-answer motion of respondents, City of Buffalo (City) and City of Buffalo Permit & Inspection Services, to dismiss the petition. Supreme Court granted the motion on the ground that petitioners failed to exhaust administrative remedies. As limited by their brief, petitioners appeal from the judgment to the extent that it granted the motion, and we reverse the judgment insofar as appealed from.

Preliminarily, we note that the properties at issue in this proceeding are the same properties involved in our prior decision confirming the City's determination to condemn the properties (*Matter of Carr v City of Buffalo*, 225 AD3d 1236, 1237 [4th Dept 2024], *lv denied* 42 NY3d 912 [2025]). They are also the same properties involved in our prior decision affirming an order denying Carr's request for *permission* to demolish buildings on the properties in the

context of code violation proceedings (*Matter of City of Buffalo v Carr*, – AD3d –, 2025 NY Slip Op 05586, *1-2 [4th Dept 2025]). Because the City has not yet commenced a proceeding to acquire the properties (see EDPL 401 [a] [3]), Carr still holds title to the two properties.

Petitioners commenced this proceeding after a two-alarm fire erupted at one of the subject properties, causing more damage to the already deteriorating buildings contained therein. Based on the fire damage, the Commissioner of the City of Buffalo Permit & Inspection Services (Commissioner) determined that various buildings on the property affected by the fire must be stabilized at petitioners' expense in order to protect the public. Petitioners opposed stabilization and contended that the Commissioner was required to order an emergency demolition of the buildings on both properties pursuant to section 113-15 of the City of Buffalo Code, which provides that "[e]very wooden or frame building with a brick or other front [that is] damaged by fire or otherwise to an amount not greater than ½ of its value may be repaired or rebuilt; but if such damage shall amount to more than ½ of such value thereof, exclusive of the foundation, then such building shall not be repaired or rebuilt but must be taken down."

The Commissioner denied petitioners' request for an emergency demolition order, determining that the relevant structure affected by the fire is a "heavy timber structure (Type IV Construction as defined in Chapter 6 of the Building Code of NYS), as such section 113-15 is not applicable." Petitioners asked the Commissioner to reconsider her determination, but that request was ignored, prompting them to commence this proceeding.

In the petition, petitioners alleged that the Commissioner's determination was arbitrary and capricious and that the Commissioner's failure to enforce the City Code "is a failure to execute a duty imposed on the Commissioner." In their pre-answer motion to dismiss, respondents asserted that petitioners failed to exhaust their administrative remedies by not seeking permission from the City's Preservation Board to demolish the properties (see generally *Matter of Cameron Transp. Corp. v New York State Dept. of Health*, 197 AD3d 884, 887 [4th Dept 2021]). The court agreed with respondents on that point, but we do not.

Petitioners sought from the Commissioner an emergency demolition order under City Code § 113-15, which compels demolition of fire-damaged properties under certain conditions. Demolition under section 113-15 is not contingent upon approval of the Preservation Board, and respondents have identified no other administrative remedies petitioners were required to pursue before commencing this proceeding.

We note that the petition seeks, inter alia, relief in the nature of mandamus under CPLR 7803 (1), which lies "where a petitioner seeks to compel the performance of a ministerial act [imposed] by law" (*Cameron Transp. Corp.*, 197 AD3d at 885 [internal quotation marks omitted]). Inasmuch as petitioners are seeking to compel the performance of an alleged ministerial act imposed upon the

Commissioner by the City Code and because there are no further administrative remedies that petitioners were required to pursue, there was no legal basis for the court to grant the motion on the ground that petitioners failed to seek permission from the Preservation Board to demolish the relevant buildings.