Matter of Pantelidis v New York City Board of Standards and Appeals
2003 NY Slip Op 30205(U)
September 19, 2003
Supreme Court, New York County
Docket Number: 102563/03
Judge: Alice Schlesinger

[* 1]

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

PRESENT: ALICE SCHLESINGER PART LA Part 16 / 16

Justice

George Pantelidis

INDEX NO. 102583/03

MOTION DATE

- v -

MOTION SEQ. NO. 003

NYC Board of Standards

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: SEP 19 2003

ALICE SCHLESINGER J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 16
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In the Matter of the Application of

GEORGE PANTELIDIS,

Petitioner,

For a Judgment pursuant to Article 78 of the CPLR,

- against -

NEW YORK CITY BOARD OF STANDARDS AND APPEALS AND NEW YORK CITY DEPARTMENT OF BUILDINGS,

Respondents,

JOSEPH E. SHEEHAN and ROSA SHEEHAN,

Intervenor-Respondents,
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Index No. 102563/03

Mot. Seq. 003

SCHLESINGER, J.:

The petitioner landowner George Pantelidis (Pantelidis) commenced this Article 78 proceeding against the New York City Board of Standards and Appeals (BSA) and Department of Buildings (DOB) challenging the January 14,2003 BSA Resolution which denied the application by Pantelidis for a variance. The underlying facts are set forth in this Court's July 21 ,2003 decision and order and will not be repeated herein. In that decision, this Court granted the petition to the extent of ordering a hearing pursuant to CPLR § 7804(h) as to whether Pantelidis acted in good faith by, among other things, relying on a then valid DOB permit when completing the construction at issue herein.

The neighboring landowners, intervenors-respondents Joseph and Rosa Sheehan (Sheehans), have moved to renew and reargue this Court's **July** 21,2003 decision and, upon reconsideration, to

dismiss the petition. In the alternative, they ask this Court to transfer the proceeding to the Appellate Division pursuant to CPLR § 7804 (g) based on a substantial evidence issue. BSA joins in the motion. Pantelidis vigorously opposes the motion and urges the Court to adhere to its original decision.

The motion is in all respects denied, as the movants have failed to make the showing required by statute. **A** motion to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination. . ." CPLR § 2221, subd. (e) 2. Where the facts previously existed and were known to the party, the motion "shall contain reasonable justification for the failure to present such facts on the prior motion.'' CPLR § 2221, subd. (e) 3.

The Sheehans have failed to satisfy these criteria for renewal. The "new" evidence consists of an affidavit from Pantelidis offered in an action which the Sheehans commenced against him some three years ago based on the precise construction at issue herein. ***Sheehan v. Pantelidis,*** Index No. 112555/00. In addition, the Sheehans offer documents submitted to Justice Shulman in the Article 78 proceeding which Pantelidis commenced to challenge the 2001 BSA revocation of the permit which had been issued by the DOB. ***Pantelidis v. BSA,*** Index No. 110531/01. These documents are offered to bolster the Sheehans' argument that Justice Shulman made a determination on good faith which has collateral estoppel effect here.

The Sheehans were undeniably aware of these documents as they were active participants in the litigation in all the proceedings. They nevertheless contend that the evidence was not offered originally as they "did not reasonably anticipate" that this Court would examine the issue of good faith because that issue had previously been determined by Justice Shulman and the BSA. (Sheehan Memorandum of Law at p. 22).

This Court rejects the proffered excuse as unreasonable. The good faith issue was raised in the petition and addressed by the parties before this Court. The Sheehans and the BSA had ample opportunity to address the points, and they offered voluminous documents and legal arguments in support of their claims. Moreover, the Pantelidis affidavit, when read in full, does not constitute an admission of a lack of good faith, and neither the BSA nor Justice Shulman has determined the "good faith" issue in a manner which has collateral estoppel effect.

This Court also rejects the various proffered grounds for reargument, as none demonstrate that this Court "overlooked or misapprehended" any issue of fact or law when deciding the prior motion. CPLR § 2221, subd. (d) 2. A discussion of each proffered ground follows.

As previously indicated, this Court disagrees with the Sheehans' contention that Justice Shulman made a finding on good faith which has collateral estoppel effect here. The proceeding before Justice Shulman involved the April 27, 2001 BSA Resolution which revoked the DOB permit. This proceeding involves the January 14, 2003 BSA Resolution which denied the Pantelidis application for a variance, an application separate from the permit application and subject to different criteria. Further, this Court stands by its prior determination that Justice Shulman's statements were *dicta* and therefore have no collateral estoppel effect. Similarly, as noted above, the statements by Pantelidis in the action commenced by the Sheehans against him do not constitute admissions and have no conclusive effect on the good faith issue.

Nor did the BSA in the underlying proceeding herein entertain full and fair litigation on the good faith issue. While the record does include discussion on that point between BSA members and party representatives, no sworn testimony was given, witnesses were not cross-examined, and no "hearing" was held that could reasonably be characterized as judicial in nature. As the Court of

Appeals stated in *Sasso v. Osgood*, 86 NY2d 374,385, n. 2 (1995) and as recently reiterated by our Appellate Division in *Kent Avenue Block Association. v. BSA*, 280 AD2d 423 (1st Dept. 2001), *lv. den.* 96 NY2d 715:

> [A] determination of a Zoning Board is administrative or quasi-legislative in character and rationality is the appropriate standard of review. The Board's actions are to be distinguished from quasi-judicial determinations reached upon a hearing involving sworn testimony *(compare:* 300 *Gramatan Ave. Assoc. v. State Div. Of Human Rights*, 45 *NY2d* 176: *CPLR* 7803 [4]).[1]

It cannot be said that the BSA in the case at bar fully considered the matter and determined the good faith issue against Pantelidis, as the Sheehansnow contend. On the contrary, efforts by the Pantelidis representatives to press the good faith issue and the application of *Jayne Estates* were repeatedly stymied by the BSA. For example, in response to one such effort, Commissioner Korbey stated (at R. 441):

> [A]ssuming for the moment there was reliance on a genuine permit and that it was used for that purpose that it was applied for, maybe we have got some uniqueness but that's making an assumption I'm not sure we can make given the cloud.

This Court is empowered by CPLR § 7804 (h) to conduct a full evidentiary hearing to determine whether petitioner Pantelidis proceeded in good faith. Contrary to the claims **by** the Sheehans and the BSA, a remand to the BSA for a determination of the issue is not the proper remedy.

Particularly instructive on this point is the Appellate Division's decision in *Church of Scientology* ***v. Tax*** *Commission*, 120 AD2d 376 (1st Dept. 1986), *app. dismissed* 68 NY2d 807

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[1] These decisions also defeat the altemative claim by the Sheehans herein that this proceeding should be transferred to the Appellate Division on a substantial **evidence issue.**

(1986). There the Church of Scientology had applied to the Tax Commission for an exemption based on its alleged status as a bona fide religious organization. The Tax Commission denied the exemption, and Scientology commenced an Article 78 proceeding. Special Term found the record inadequate to determine whether the Commission had acted in an arbitrary and capricious manner so remanded the matter to the Commission for a further hearing. 120 AD2d at **378-79.**

Of particular significance here is the Appellate Division's modification of Special Term's order of remand. While agreeing that the administrative record was inadequate for the court to determine whether the Commission's determination was arbitrary and capricious, the Appellate Division disagreed that the agency was the proper body to further consider the issues and held that the court was the proper forum, stating (at **379):**

> A full evidentiary is necessary and should have been ordered by Special Term. This is the central purpose underlying CPLR **7804** (h).

In reaching its conclusion, the Appellate Division relied on its earlier decision in ***Matter*** of *Holy* ***Spirit Association. v. Tax Commission,*** **62** AD2d **188 (1st** Dept. **1978).** In that case, as in ***Scientology,*** the court reviewing the administrative determination pursuant to CPLR Article **78** concluded that the record was "not sufficient to permit an informed judgment as to whether the administrative body had acted arbitrarily and capriciously." **62** AD2d at **194.**

In terms of the nature of the hearing to be held, the Court directed: "The hearing will be plenary and, unlike the one conducted by the Tax Commission, adversarial as well [with] a full examination of the facts and a broad inquiry" into the issue to be determined. **62** AD2d at 198. The Court contrasted the administrative "hearing" before the Commission, which had been more in the nature of "gathering information", with a hearing judicial in nature, which would include the

presentation of testimony through witnesses by means of interrogation and cross-examination. 62 AD2d at 192-193. Such "further factual exploration could supply defects in the proof' and assist the court in determining whether the administrative determination was arbitrary and capricious. 62 AD2d at 194. On the appeal after remand, the Court of Appeals did not question the 7804 (h) hearing procedure or the Appellate Division's reasoning on the subject. 55 NY2d 512.

Similarly, and quite recently, the First Department in 1999 decided that a hearing was necessary to determine whether a tenant, who was protesting the deregulation of her apartment, had ever received a 1995 request from DHCR for verification of her income. ***Futterman v DHCR***, 264 AD2d 593 (First Dep't 1999), ***lv. dismissed*** 94 NY2d 846. What is particularly interesting for our purposes is that the trial court was modified because it had remanded the matter to the agency for that hearing. The appellate court agreed that a hearing was in order but modified to the extent of choosing the trial court as the preferred venue for it, even though DHCR routinely conducts hearings.

What this Court seeks to do herein is precisely what the Appellate Division directed be done in the ***Scientology, Tax Commission,*** and ***Futterman*** cases. Contrary to claims by BSA and the Sheehans, such a hearing pursuant to CPLR § 7804 (h) "is not a trial ***de novo." See, New York Civil Practice,*** Weinstein, Korn & Miller § 7803.14 and cases cited therein. As emphasized by the Appellate Division in *Holy* ***Spirit,*** 62 AD2d at 193:

> Even though we are retaining jurisdiction [under 7804(h)], it should be noted that the intrinsic nature of the proceeding is unchanged and that the standard for review remains the same – whether the determination was arbitrary and capricious.

Thus, this Court intends to make a finding, after the 7804 (h) hearing in this case, whether Pantelidis acted in good faith in connection with his application to the DOB for a permit. That

finding will be used to assist the Court in determining whether or not the **BSA** decision was arbitrary and capricious when analyzed pursuant to ***Jayne Estates.***

When viewed in this manner, this Court's decision in no way conflicts with the cases cited by the Sheehans and **BSA,** where remand to the agency was directed. For example, in ***Montauk Improvement, Inc. v. Proccacino***, 41 NY2d 913 (1977), the administrative agency had acted in a "quasi-judicial capacity." The **BSA** here did not. ***See, Sasso, supra.*** Further, the agency in *Montauk* had failed to make "any findings," thereby precluding any meaningful review without a remand for findings. In contrast here, this Court is intending to hear and determine the good faith question so as to decide whether the findings made by the **BSA** were arbitrary and capricious.[2]

Also misplaced is the movants' reliance on ***Del Vecchio v. Tuomey,*** 283 AD2d 955 (2nd Dept. 1954). There the court-appointed referee actually stepped into the shoes of the agency and determined the variance application *ab* ***initio*** pursuant to the various zoning criteria as if he were the agency itself. This Court has no intention of doing that.

To the extent the movants argue that this Court's prior decision suggests otherwise, they have misconstrued the decision. This Court's statement, that "the **BSA** did not make any specific finding" on good faith, does not put this case within the parameters of *Montauk* **and** require a remand so the BSA can state its findings. Rather, the statement was merely some evidence supporting this Court's conclusion that, contrary to movants' claims, the **BSA** did ***not*** fully hear and determine the good faith issue.

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[2] ***Perella v. Suffolk County,*** 117 AD2d 603 (2nd Dept. 1986) cited by the movants is distinguishable from the case at bar on the same grounds as ***Montauk.***

Finally, little would be served in remanding this issue to the BSA as the Court is far better equipped to hear and determine issues of fact and credibility traditionally within its purview.

Accordingly, it is hereby

ORDERED that the motion to renew and reargue is denied, and the parties are directed to appear in Room 222 on October 2, 2003 at 9:30 a.m. for a hearing in accordance with this decision and the July 21, 2003 decision.

This constitutes the decision and order of the Court.

Dated: September 19, 2003

SEP 19 2003

J.S.C.

ALICE SCHLESINGER