

Matter of Chatham Towers, Inc. v Bloomberg

2006 NY Slip Op 30280(U)

September 11, 2006

Supreme Court, New York County

Docket Number: 0107761/2004

Judge: Walter Tolub

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

PRESENT: WALTER B. TOLUB
Justice

PART 15

CHATHAM TOWELS

INDEX NO.

107761/04

MOTION DATE

MOTION SEQ. NO.

004

MOTION CAL. NO.

MICHAEL SWONBELT

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

IS DECIDED

IN ACCORDANCE WITH 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: 9/11/06

WALTER B. TOLUB 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):

[* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----x
In the Matter of the Application of
CHATHAM TOWERS, INC., CONCERNED CHATHAM
GREEN SHAREHOLDERS, SOUTHBRIDGE TOWERS,
INC., JEANIE CHIN, DANNY CHEN, JAN F.
LEE, PAUL J.Q. LEE, NYDIA VELAZQUEZ,
Member of the United States Congress,
MARTIN CONNOR, New York State Senator,
SHELDON SILVER, Speaker of the New York
State Assembly, and ALAN J. GERSON,
New York City Councilman,

Petitioners,

Index No. 107761/04
Mtn Seq. 004

-against-

MICHAEL BLOOMBERG, Mayor of the City of
New York, NEW YORK CITY POLICE DEPARTMENT,
RAYMOND KELLY, Commissioner of the New
City Police Department, NEW YORK CITY
DEPARTMENT OF TRANSPORTATION and NEW YORK
CITY DEPARTMENT OF CITY PLANNING,

Respondents.

-----x
WALTER B. TOLUB, J.:

Five years ago this day, this City endured an unthinkable terrorist attack, the aftermath of which triggered litigation concerning the creation and implementation of security measures in and around Manhattan. This application, one of the earliest of the post-September 11 security cases, concerned the implementation of the Security Plan for One Police Plaza (the "Security Plan"), the headquarters of the New York City Police Department ("NYPD").

The Security Plan resulted in the creation of seven

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checkpoints and barriers located around the perimeter of NYPD headquarters¹ and the closure of Park Row, a major north-south thoroughfare, to unauthorized traffic.² Pedestrians have always been able to access virtually all of the "restricted vehicle" zones,³ and, since this court's initial decision, public City buses, which had originally been restricted from traveling through the zone, have been allowed to resume their regular routes.

Litigation History

The first of the challenges to the implementation of the Security Plan was presented to this court in 2003 under the caption, Chatham Green, Inc., et al v. Bloomberg, et al., 1 Misc 3d 434 [NY Sup. Ct. NY County, 2003] (the "Chatham Green" application). As a direct result of the numerous environmental issues raised, this court, (see, Chatham Green, Inc., 1 Misc 3d 434, 445), ordered the NYPD to complete an Environmental Assessment

¹ Again, this court recognizes that while the NYPD is comprised of numerous precincts located throughout the five boroughs of New York City, the central operations of the NYPD are predominately located at One Police Plaza, an area surrounded by residential, commercial, State and Federal buildings and facilities.

² Security checkpoints are located at Park Row, west of Worth Street; Park Row, near the Brooklyn Bridge; Pearl Street at Foley Square; Pearl Street at either side of Park Row; Pearl Street and St. James Place; Madison Street at St. James Place; Rose Street at Pearl Street; Rose Street at Avenue of the Finest; and Avenue of the Finest at Pearl Street.

³ The exception being the fenced perimeter area surrounding One Police Plaza.

Statement ("EAS") on the Security Plan in accordance with the New York State Environmental Quality Review Act ("SEQRA").

The NYPD, as lead agency, completed the EAS in November 2003 and supplemented the report in January, 2004. In late January, 2004, the NYPD issued a Negative Declaration on the EAS, which was later amended on February 12, 2004, and again on April 1, 2004. In response to the Negative Declaration, a second challenge to the implementation of the Security Plan was commenced in the form of the instant Article 78 application seeking to seeking to nullify the NYPD's Negative Declaration.

After reviewing the submissions of the parties, this court, by decision dated October 24, 2004, (1) ordered respondents to undertake and complete an Environmental Impact Statement ("EIS") for the Security Plan and the delta barriers located on Park Row; (2) permitted the maintenance of the existing delta barriers during the pendency of the completion of the EIS; (3) allowed petitioner Chatham Green to intervene in the application; and (4) denied the balance of petitioner's requests for relief. Petitioners appealed, and by decision dated May 31, 2005 the Appellate Division, First Department modified the deadline to complete the EIS imposed by this court and otherwise affirmed this court's October, 2004 decision.

Petitioners' present application before this court claims that while before the Appellate Division, respondents argued, for the

first time, that the implementation of the Security Plan did not require revocable consents issued by the New York City Department of Transportation ("DOT") because the consents involved in the implementation of the Security Plan were interagency in nature. In point of fact, the issue of revocable consents, although previously raised, was not part of the rationale of this court's decision and was unresolved. Based on this claim, petitioners submitted Freedom of Information Law ("FOIL") requests to the DOT and the Department of City Planning ("DCP") seeking "any records or portions thereof pertaining to revocable consents issued to any agency of New York City" (Order to Show Cause Exhibit 12). Petitioners claim that these documents, which petitioners assert were produced in an untimely manner, demonstrate that respondents were required by the New York City Charter and Department of Transportation regulations to obtain revocable consents under the Uniform Land Use Review Procedures (ULURP) in order to effectuate and maintain the street closures and barricades that were implemented by the Security Plan.

Following the Appellate Division's May, 2005 decision, petitioners moved for leave to appeal to the Court of Appeals, or alternatively, for remand to this court based on newly discovered evidence. On September 27, 2005, that application was denied "without prejudice to a motion by petitioners pursuant to CPLR 5015 in Supreme Court" (see, Order to Show Cause, Exhibit 8). The Court of Appeals similarly denied petitioner's motion for leave to appeal

on January 17, 2006.

The Instant Application

By this application, the remaining petitioners⁴ Chatham Towers, Inc. ("Chatham Towers"), Concerned Chatham Green Shareholders ("Chatham Green Shareholders"), Chatham Green, Inc. ("Chatham Green"),⁵ Southbridge Towers, Inc. ("Southbridge Towers", Jeanie Chin ("Ms. Chin"), and Danny Chen (Mr. Chen)⁶ move pursuant to CPLR 5015(a)(2) for partial relief from this court's October 24, 2004 judgment. This application is predicated upon the claim that newly discovered evidence concerning the issue of revocable consents, which was not available at the time of the original application, if introduced, would produce a different result.

While CPLR 5015(a)(2) allows a court to vacate a prior order

⁴ See, Chatham Towers Inc., et al v. Bloomberg, et al., 6 Misc.3d 814, *aff'd as modified*, 18 AD3d 395 [1st Dept. 2005]; *leave to appeal denied*, 6 NY 3d 704 [2006].

⁵ Chatham Green was permitted to intervene in this application pursuant to this Court's October, 2004 Decision (see, Chatham Towers Inc., 6 Misc.3d 814, *aff'd as modified*, 18 AD3d 395 [1st Dept. 2005]; *leave to appeal denied*, 6 NY 3d 704 [2006])

⁶ Chatham Towers is a cooperative apartment complex located on the southwest corner of Worth Street and Park Row. Chatham Green is a cooperative apartment building located on the easterly side of Park Row, within the NYPD's security zone. Chatham Green Shareholders is an unincorporated association of shareholders of Chatham Green. Ms. Chin is a resident of Chatham Towers, Mr. Chen is an officer of the Chatham Green Shareholders, and Southbridge Towers is a cooperative apartment building complex located on Pearl Street. Each one of these petitioners claim that they have been adversely impacted by the implementation of the NYPD's One Police Plaza Security Plan.

on the grounds of newly-discovered evidence, success on the motion requires the movant to establish that the evidence is new, could not have been discovered earlier with due diligence, and, if introduced at trial, would have produced a different result (see, CPLR 5015(a)(2); Bongiasca v. Bongiasca, 289 A.D.2d 121 [1st Dept. 2001]; Tarantino v. Sullivan, 206 AD2d 975 [4th Dept. 1994]). However, "[e]vidence which is a matter of public record is generally not deemed new evidence which could not have been discovered with due diligence before trial" (Federated Conservationists of Westchester County, Inc. v City of Westchester, 4 AD3d 326 [2nd Dept. 2004], *lv. to app. den.*, 1 NY3d 502 [2003]). See also Tarantino, 206 AD2d 975; Reed v. Reed, 13 AD3d 602 [2nd Dept 2004]).

In this case, petitioners' entire cache of "newly discovered evidence" is public record which, though available, was not requested by petitioner until the March 31, 2005 FOIL request. As such, this court is under no obligation to treat the proffered evidence as new (Federated Conservationists of Westchester County, Inc., 4 AD3d 326 [2nd Dept. 2004], *lv. to app. den.*, 1 NY3d 502 [2003]). More significantly, however, is that even if this court accepted petitioners' argument that they could only first seek out this information after reading respondents' briefing arguments on

appeal,⁷ the evidence petitioners seek to offer would not have altered this court's prior decision.

Petitioners presently argue that Section 362(d) of the City Charter and Rules of the City of New York requires respondents to obtain revocable consents in order to implement and maintain the Security Plan. This court disagrees. Section 362(d) defines revocable consent as:

a grant by the city of a right, revocable at will, (1) to any person to construct and use for private use pipes, conduits and tunnels under, railroad tracks upon, and connecting bridges over inalienable property, (2) to an owner of real property or, with the consent of the owner, to a tenant of real property to use adjacent inalienable property for such purposes as may be permitted by rules of the department of transportation or the department of information technology and telecommunications or (3) to a public service corporation for facilities ancillary to, but not within, a franchise granted prior to the effective date of this section.

Even affording the most liberal reading of this provision, it is clear to this court that the implementation and maintenance of the Security Plan does not fall within the scope of this section. It is therefore this court's opinion that respondents were not required to obtain revocable consents from the New York City

⁷The court notes that petitioners' argument is significantly weakened by the rejection of the motion to appeal on these grounds made before the First Department and the Court of Appeals.

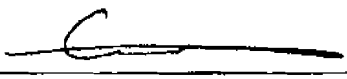
Department of Transportation prior to the implementation of the Security Plan, nor are they required to obtain revocable consents from the DOT in order to maintain the Security Plan.

Accordingly, it is

ADJUDGED that petitioner's application is denied.

This memorandum opinion constitutes the decision and judgment of the Court.

Dated: 9/11/06



HON. WALTER B. TOLUB, J.S.C.

This judgment has been filed with the Court's Clerk and notice of entry will be given as provided hereon. To obtain entry, counsel or the party's representative must appear in person at the Judgment Clerk's Desk (Room 141B).