

Ferrando v City of New York

2007 NY Slip Op 30452(U)

March 29, 2007

Supreme Court, Richmond County

Docket Number: 0101021/2006

Judge: Joseph J. Maltese

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND
4, 5, 6

Index No.: 101021/2006
Motion No.: 1, 2, 3,

CHARLES FERRANDO,

DECISION & ORDER
HON. JOSEPH J. MALTESE
Plaintiff

against

THE CITY OF NEW YORK, NYC DEPARTMENT OF BUILDINGS, NYC BOARD OF STANDARDS AND APPEALS, NYC OFFICE OF THE CORPORATION-COUNSEL, NYC DEPARTMENT OF CITY PLANNING, THE STATE OF NEW YORK, NYS DEPARTMENT OF EDUCATION, NYS OFFICE OF PROFESSIONAL DISCIPLINE, THE RICHMOND COUNTY DISTRICT ATTORNEY, WOHL & O'MARA, SURVEYORS, LOBUE & VALENZIANO, ARCHITECT, PAUL CULOTTA, PATRICIA LANCASTER, R.A., RONALD LIVIAN, P.E., TERRENCE LIN, P.E., SATISH BABBAR, R.A., JOHN MIELE, P.E., JAMES CHIN, P.E., MICHAEL CARDOZO, ESQ., SHERYL KAMHOLZ, ESQ., AMANDA BURDEN, RICHARD MILLS, COMMISSIONER OF THE NYS EDUCATION DEPARTMENT, DANIEL KELLEHER OF THE OFFICE OF PROFESSIONAL DISCIPLINE, JOSEPH TEPEDINO OF THE OFFICE OF PROFESSIONAL DISCIPLINE, ARIANA MILLER OF THE OFFICE OF PROFESSIONAL DISCIPLINE, JOHN DOE #1 & #2 OF THE OFFICE OF PROFESSIONAL DISCIPLINE, DANIEL DONOVAN, ESQ., KAREN VARIALE, ESQ., MICHAEL DEODATI, ESQ., "DETECTIVE GENTILE", ROCCO DE FILIPPIS, P.E., WILLIAM TRANG, P.R., OTIS VOILS, P.L.S., JOHN DOE #3, EMANUEL LO BUE, R.A., ANTONIO VALENZIANO, R.A., JOHN REISINGER, ESQ., WILLIAM THOMPSON, COMPTROLLER OF THE CITY OF NEW YORK, SUCURI PALEVIC, JOHN DOE #4 (REPRESENTING THE CLERK OF THE APPELLATE DIVISION, FIRST DEPARTMENT) SHIRLEY KORNREICH, JUSTICE OF THE SUPREME COURT, JUSTICES OF THE APPELLATE DIVISION FIRST DEPARTMENT, JUDITH KAYE, CHIEF JUSTICE OF THE NYS COURT OF APPEALS, JOHN DOES #5-#15

Defendants

The following items were considered in the review of these motions to dismiss

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1, 4, 6
Answering Affidavits	2, 5
Replying Papers	3
Exhibits	Attached to Papers
Memorandum of Law	

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

This action arises as a challenge to the construction of a home at 33 White Plains Avenue, Staten Island, New York.¹ The subject premises is located in an R3-2 zoning district between Shaughnessy Lane and Chestnut Avenue in Staten Island, and is currently “improved” with a house which consists of a cellar and two stories which was built as a result of the professionally-certified job application the New York City Department of Buildings received on February 13, 2001.

According to the City of New York, there are two methods for filing a new building application with the Department of Buildings [hereinafter “DOB”]. In the first method, an applicant submits an application to DOB, which then reviews the application to determine if it complies with the relevant Building Code, Zoning Resolution, and other statutory requirements. If DOB deems the application satisfactory, it is approved; however, if it is deficient, DOB issues a list of objections. The applicant then has an opportunity to correct those deficiencies, at which time the application will be re-reviewed and either approved or denied.

In the second method, the applicant submits a “professionally certified application,” from a registered architect (R.A.) or a professionally licensed engineer (P.E.) who certifies that the application meets Building Code, Zoning and other requirements. Normally, work permits are issued almost immediately upon the filing of a professionally-certified application. The DOB then audits a percentage of all of the professionally certified applications to determine whether the particular application does, in fact comply with all codes and requirements. If a professionally certified application passes the audit, DOB takes no further action; if it fails, DOB issues a list of objections for the applicant to correct to avoid revocation of the permit.

Facts

The application for the construction of the subject house was granted on February 27, 2001 and building permit # 500442675-01NB was issued. In March, 2001, the application was randomly selected for audit which was completed on April 20, 2001, at which time the application passed. At the same time, the plaintiff filed complaints with DOB regarding the construction of the house. The complaints consisted of, *inter alia*, that the house’s basement walls and foundation were being improperly constructed; the size of the side yard was too small; the house was not properly set back from the mapped street widening line; and the house was not being constructed in compliance with the DOB approved plans. The DOB investigated the complaints and determined that they were without merit. In letters dated April 3, 2001, May 23, 2001 and June 4, 2001, DOB informed the plaintiff that the DOB had completed an audit of the new building application filed and determined that the house conformed to the applicable Building Code and Zoning Resolutions, and that DOB had, as a result of the complaints, inspected the subject premises on May 24, 2001 and determined that it was being completed in

accordance with the DOB approved plans.

On June 20, 2001, the plaintiff brought an Article 78 proceeding in the Supreme Court, Richmond County.² That special proceeding challenged DOB's determination not to revoke the work permits issued to construct the house, and sought an order stating the construction due to alleged code violations. Between August 30, 2001 and October 18, 2001, the parties filed responsive and supplemental reply papers and by decision and order dated October 22, 2001, this court denied the plaintiff's application for injunctive relief finding that: 1) DOB, to the satisfaction of the Court, had addressed plaintiff's complaints regarding the construction of the house; 2) the DOB had submitted an affidavit from a licensed architect setting forth that the house's setback was in compliance with all Building Codes and Zoning Resolutions; and 3) that the plaintiff "had not met his burden in coming forth with evidence from opposing architects, or engineers to present the Court with opinions that would demonstrate that the DOB and the respondent architect were in error." In finding so, this court dismissed the plaintiff's action finding that the proper forum was the Bureau of Standards and Appeals.

On November 21, 2001 the DOB issued a Certificate of Occupancy [hereinafter "C of O"] No: 500442675 for the premise to be used as a two-family residence and cellar. Thereafter, on December 19, 2001, the plaintiff wrote to DOB challenging the validity of the C of O, alleging that the C of O was invalid because the house contained numerous Building Code and Zoning violations, including an improper set back and that the house deviated from the DOB approved plans. On April 18, 2002, the DOB responded and refused to revoke the C of O as the construction of the house did not violate either the Building Code or the Zoning Resolution.

On May 16, 2002, the plaintiff filed an application with New York City's Board of Standards and Appeals [hereinafter "BSA"] challenging the DOB's issuance of the C of O. The plaintiff alleged that: 1) the house was not set back to the required distance from a mapped street widening as required by § 23-45 and § 23-631(h) of the Zoning Resolution applicable to that area; 2) zoning violations; 3) building code violations; and, 4) deviations from the approved plans in the as-built condition of the house. At the public hearings on September 24, 2002, the Board raised several concerns which then prompted this case to be forwarded to DOB's Investigations and Discipline Unit, as well as the DOB's Technical Compliance Unit. A second audit of the construction was conducted which revealed that while the as-built conditions differed from the approved plans in a few minor ways, none of the deviations were grounds for revocations of the C of O. The BSA then met on January 14, 2003 and unanimously voted to deny the plaintiff's appeal filing a resolution on January 15, 2003. In the resolution, the BSA rejected the plaintiff's claims regarding the construction permits issued for the house located at the subject premises, the house's setback, the size of the house's side yard, the house's floor elevation measurement, the discrepancies of the house's as-built condition and, ultimately, found that the C of O was properly issued.

The plaintiff then, on February 14, 2003, commenced another Article 78 proceeding in the New York County Supreme Court,³ seeking an order revoking the C of O issued and ordering the "removal of any part of the structure which is located or built in violation of the zoning ordinance. The plaintiff also sought a determination as to the validity of the mapped street widening line running through the premises. The plaintiff alleged that the BSA determination was arbitrary and capricious because 1) the house was not built in accordance to the plans submitted to the DOB; and 2) the house was not erected with the proper setback from a

mapped street widening line. On October 7, 2002, Justice Shirley Werner Kornreich of the Supreme Court, New York County denied the petition in its entirety finding that: 1) BSA properly found the house's set back to be in compliance with the Zoning Resolution and Building Code; 2) that DOB did not abuse its discretion in allowing the discrepancies between the house as planned and as built; and 3) that the plaintiff failed to name a necessary party. Moreover, she found that the plaintiff was barred by the statute of limitations.

Plaintiff appealed Justice Kornreich's decision to the Appellate Division, First Department on July 18, 2003. The plaintiff's appeal alleged, *inter alia*, 1) DOB incorrectly allowed the construction of the house at the subject premises in violation of the Zoning Resolution and Building Code; 2) DOB and BSA failed to make required inspections of the subject premises; 3) DOB abused its discretion and exceeded its authority in issuing permits and a C of O for the subject premises; 4) DOB's audits were incorrect; 5) DOB accepted falsified documents relating to the construction at the subject premises; 6) DOB provided the BSA and the Courts with incorrect documentation and failed to correct such; 7) defendants Lin and Livian issued erroneous findings as to the construction at the subject premises; 8) defendant Culotta was engaged in criminal bribery; 9) the BSA via Corporation Counsel provided the Court with defective records; 10) the BSA failed to address various alleged violations of the Zoning Resolution and the Building Code; and 11) the BSA determination not to revoke the subject premises' C of O was in error, as well as arbitrary and capricious. On November 23, 2004, the Appellate Division, First Department affirmed Justice Kornreich's decision and denied the plaintiff's appeal.

The plaintiff then commenced the present action by summons and complaint dated March 24, 2006 and March 17, 2006. Again, the plaintiff is seeking to challenge the construction of the house built at 33 White Plains Avenue, Staten Island, New York. The plaintiff herein alleges that the construction of the house is not in compliance with the Building Code and Zoning Resolution for the area. Additionally, the plaintiff seeks to recover money damages against the various defendants who in their official capacity reviewed the facts and law and ruled against the plaintiff.

Discussion

The Court of Appeals has held that under New York's transactional analysis approach to *res judicata*, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories, or if seeking a different remedy. (*In re Hunter* 4 N.Y.3d 260 [2005]; *O'Brien v. City of Syracuse* 54 NY2d 353 [1981]; *Fitzgerald v. Hudson Nat. Golf Club* 35 A.D.3d 533 [2d Dept 2006]; *Sosa v. JP Morgan Chase Bank* 33 A.D.3d 609 [2d Dept 2006]; *Vigliotti v. North Shore University Hosp.* 24 A.D.3d 752 [2d Dept 2005].) The doctrine bars not only claims that were actually litigated, but also claims that could have been litigated. (*Marinelli Assocs. v. Helmsley-Noyes Co.* 265 AD2d 1 [1st Dept 2005].) The primary purposes of *res judicata* are grounded in public policy concerns and are intended to ensure finality, prevent vexatious litigation, and promote judicial economy (*Chen v. Fischer* 6 NY3d 94 [2006]). Under the doctrine of *res judicata*, a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action involving the parties to a litigation and those in privity with them. (*Gramatan Home Investors Corp. v. Lopez* 46 N.Y.2d 481 [1979]; *Luscher ex rel. Luscher v. Arrua* 21 A.D.3d 1005 [2d Dept 2005].)

In the instant matter, the plaintiff is raising identical issues to every one of the prior

actions decided against him. In *Ferrando v. Babbar*, this very court denied the plaintiff injunctive relief as it found that the plaintiff had not met his burden of proof in demonstrating that DOB erred in finding that the construction of the subject premises complied with the Zoning Resolution and Building Code. In *Ferrando v. BSA*, Justice Kornreich of the Supreme Court, New York County, denied the plaintiff's petition finding the BSA did not abuse its discretion in finding that the house at the subject premises was properly set back from the mapped street widening line, and that DOB did not abuse its discretion in allowing the discrepancies between the house as planned and the house as built. The plaintiff then appealed Justice Kornreich's decision to the Appellate Division, First Department, which affirmed her decision. All of the prior courts of competent jurisdiction have found against the plaintiff and this court now finds the same. All of the plaintiff's claims, which arose out of the same occurrence and transaction, have been litigated, and re-litigated in the courts, all resulting in valid final judgments. Therefore, under the theory of *res judicata*, the plaintiff's complaint is dismissed in its entirety and this action is dismissed with prejudice.

Accordingly, it is hereby:

ORDERED, that upon the foregoing motions to dismiss, this action is dismissed in its entirety with prejudice, and costs are awarded to the defendants.

ENTER,

DATED: March 29, 2007

Joseph J. Maltese
Justice of the Supreme Court

¹Tax Block 2967, Lot 73

²See, *Ferrando v. Babbar* Supreme Court, Richmond County, Index No.: 8296/2001

³Supreme Court, New York County Index No.:102674/2003.