

**Safos v City of New York**

2007 NY Slip Op 33406(U)

September 28, 2007

Supreme Court, Queens County

Docket Number: 0007769/2007

Judge: Kevin Kerrigan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10  
Justice

-----X

MATTHEW SAFOS, M.D.M.Z. CORP., and  
150 LIGHTHOUSE CORP.,  
Petitioners,

Index  
Number: 7769/07

For a Judgment pursuant to Article 78  
of the Civil Practice Law and Rules,

Motion  
Date: 09/04/07

- against -

Motion  
Cal. Number: 23

Motion Seq. No. 1

THE CITY OF NEW YORK, and THE CITY OF  
NEW YORK DEPARTMENT OF BUILDINGS,

Respondent.

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The following papers numbered 1 to 8 read on this Article 78  
petition for a judgment annulling a determination of respondent.

	<u>Papers Numbered</u>
Notice of Petition-Petition-Exhibits.....	1-3
Answer-Exhibits.....	4-6
Reply Affirmation.....	7-8

Upon the foregoing papers it is ordered that the petition is  
decided as follows:

Application, pursuant to CPLR Article 78, for an order  
annulling the notice of violation (NOV) and stop work order (SWO)  
issued by the Commissioner of the Department of Buildings (DOB) on  
November 29, 2006 relating to Lighthouse's property located at 150  
Beach 115 Street in Queens County is denied and the petition is  
dismissed.

MDMZ is the owner of 166 B 114<sup>th</sup> St and Lighthouse is the owner  
of 150 B 115<sup>th</sup> St. Safos is the president of both MDMZ and  
Lighthouse. Both properties are single room occupancy dwellings  
(SRO).

A prior owner of 150 B 115th St, one John Valez, filed an  
application for a work permit with the DOB on February 21, 2006

under job # 402292808 to perform exterior renovation/repair work. In response to a complaint alleging that work was being performed without a permit, a DOB inspector went to the premises on March 9, 2006 and issued two Environmental Control Board (ECB) notices of violation (NOV). NOV 34512887K was issued upon the ground that the work pursuant to the permit did not conform to the approved plans. NOV 34512888M was issued upon the ground that a construction fence was erected for which no permit had been obtained. A stop work order was issued pursuant to the NOVs.

Additional complaints on March 20 and March 23, 2006 resulted in the issuance of another NOV (34515063L) for safety violations.

On March 30, 2006, an application (# 402314722) was filed with DOB by a subsequent owner, Mike Pastrokos, to convert the premises from an SRO into studio apartments. Work permits were issued on May 3, 2006. Safos avers that Lighthouse purchased the 150 B 115<sup>th</sup> St property on May 9, 2006. Therefore, Lighthouse has standing to maintain the instant proceeding. On May 10, 2006, a NOV (# 34512948P) was issued for failure of the work to conform to the approved plans. A SWO was also issued in conjunction with the NOV. On May 19, 2006, a certificate of correction to cure the violation was filed and, on May 23, 2006, was approved, granting permission to cure the violation.

By letters dated June 2, 2006, a stop work order was issued with respect to the 402292808 and 402314722 permits, for the reasons stated in a list of objections annexed to each of the letters.

Further complaints on June 5, 6 and 8, 2006 resulted in the issuance on June 8, 2006 of another NOV(34507103R) for work being performed in violation of the SWO issued on May 10, 2006.

On June 14, 2006, an application was filed to restore the premises back to an SRO (#402401183). Subsequent to approval and issuance of a work permit on November 8, 2006, DOB, responding to further complaints, issued a SWO on November 21, 2006. The bases for the SWO were the audit objections set forth on November 20, 2006 apprising petitioner of its failure to "[v]erify your legal existing conditions and use," "[p]rovide a legend and clarify your proposed work. Note work under 402314722 and 402292808" and "[e]very alteration application where the building is defined as a 'single room occupancy MD' a HPD Certificate of No Harassment is required."

On November 29, 2006, an NOV was issued, which was not an ECB violation but a DOB violation, stating, "The Queens Borough Commissioner of the Dept. of Buildings, City of New York has revoked job #0402401183 and ordered all work at this site stopped as of 11/21/06. Approx. 60% of work was completed as of this date.

'Stop all work.'" A SWO was also issued on November 29, 2006 pursuant to this NOV.

Finally, by letters dated April 18, 2007, DOB revoked the permits with respect to Job Nos. 402292808, 402314722 and 402401183.

Petitioner thereafter commenced the instant Article 78 proceeding.

In its reply, petitioner states that the only cause of action it seeks to pursue is that seeking to annul the NOV and SWO issued on November 29, 2006 with respect to the 150 B 115<sup>th</sup> St property. Therefore, it is ordered that the petition is discontinued except for Lighthouse's cause of action seeking to annul the determination of the Commissioner of the DOB with respect to the NOV and SWO issued on November 29, 2006 relating to the property 150 B 115<sup>th</sup> St under job #0402401183.

With respect to the 150 B 115<sup>th</sup> St property, petitioner does not challenge respondent's second affirmative defense of statute of limitations interposed in its answer as to petitioner's causes of action concerning the NOVs and SWOs issued prior to November 29, 2006.

Pursuant to CPLR 217(1), an Article 78 proceeding must be commenced within four months after a final determination by the agency is sought to be reviewed. Petitioner does not dispute that all NOVs and SWOs, except the November 29, 2006 NOV and SWO, were issued more than four months before the instant proceeding was commenced and, therefore, petitioner's claims with respect to those determinations are time barred.

With respect to the only remaining relief petitioner seeks, namely, the vacatur of the NOV and SWO issued on November 29, 2006 against Lighthouse, respondent contends that the petition must be dismissed since petitioner has not exhausted its administrative remedies. This Court agrees.

Pursuant to CPLR 7801(1), resort to a proceeding under Article 78 may not be had to challenge an agency determination "which is not final or can be adequately reviewed by appeal to a court or to some other body or officer..."

"A petitioner must exhaust all administrative remedies before seeking judicial review unless 'an agency's action is challenged as either unconstitutional or wholly beyond its grant of power . . . or when resort to an administrative remedy would be futile . . . or when its pursuit would cause irreparable injury'" (Matter of Cliff v. Russell, 264 AD 2d 892, 893 [3<sup>rd</sup> Dept 1999], quoting Watergate II Apts. v. Buffalo Sewer Auth., 46 NY 2d 52, 57 [1978]).

Section 666(7) (a) of the New York City Charter vests the Board of Standards and Appeals with jurisdiction over appeals from determinations of the Commissioner of the New York City Department of Buildings (see also NYC Charter §648).

Petitioner does not challenge the determinations of the DOB as being unconstitutional or beyond its grant of power. Petitioner does not dispute that the DOB has the authority to issue stop work orders and revoke permits (see New York City Administrative Code §27-197). Petitioner does not argue, nor does the record on this petition establish or even suggest, that an appeal would be futile or cause irreparable injury. Rather, petitioner argues that an appeal of the determinations of the DOB to the Board of Standards and Appeals is "discretionary" and not a prerequisite to maintaining the instant proceeding, and that the issue of whether a certificate of no harassment was necessary is a question of law which can be decided without the necessity of petitioner exhausting its administrative remedies.

Administrative review by the Board of Standards and Appeals of an adverse determination by the Department of Buildings prior to judicial review via an Article 78 proceeding is not optional, as petitioners contend. Petitioner's failure to appeal the NOV and SWO precludes it from maintaining the instant Article 78 proceeding (see Perrotta v. City of New York, 107 AD 2d 320 [1<sup>st</sup> Dept 1985]).

Petitioner additionally argues that it need not pursue the administrative review process before seeking judicial intervention because the matter only involves an issue of law. Petitioner contends that it is only challenging the DOB's determination that a certificate of no harassment is required as a prerequisite to the conversion of the subject property back to an SRO, which, it argues, is purely a question of law. Petitioner contends that it is not directly challenging the Commissioner's NOV and SWO, but rather only the legal basis for said NOV and SWO, which is that petitioner must furnish a certificate of no harassment.

The cases cited by petitioner's counsel in the reply are inapposite to the facts of this case and are not supportive of petitioner's position. Moreover, the cases cited in support of petitioner's statement that a challenge to the granting or denial of a certificate of no harassment may be judicially reviewed without appeal to the Bureau of Standards and Appeals state no such rule of law.

Petitioner's argument that it is not challenging the agency's determination but merely the legal rationale underlying its determination is without merit. Petitioner seeks an order "rescinding" the NOV and SWO as being arbitrary and capricious and is, thus, challenging the NOV and SWO. Therefore, counsel's semantical argument that petitioner is not directly challenging the

NOV and SWO but is merely seeking to invalidate them via a judicial declaration that the legal basis for the agency's determination was in error is disingenuous. A component of every agency determination is an interpretation and application of the relevant law.

In any event, even if, *arguendo*, petitioner need not exhaust its administrative remedies where the issue involved is purely a question of law, the NOV of November 29, 2006 with its accompanying SWO was issued pursuant to the SWO of November 21, 2006. The determination that a certificate of no harassment was needed was rendered at the audit on November 20, 2006 and resulted in the issuance of the November 21<sup>st</sup> SWO. The Court may not review said determination since it is concededly time-barred. Moreover, since the November 21<sup>st</sup> SWO is still in effect and has not been rescinded, and petitioner is not challenging said SWO, the issue of whether a certificate of no harassment is necessary and whether, as a result, the NOV and SWO issued on November 29 should be annulled, is academic.

Even had petitioner not withdrawn that branch of the petition challenging the November 21<sup>st</sup> SWO, and even were Article 78 review of the November 21<sup>st</sup> determination not time-barred, said determination was not based solely upon petitioner's failure to furnish a certificate of no harassment, but also upon its failure to "[v]erify your legal existing conditions and use" and "[p]rovide a legend and clarify your proposed work."

Therefore, petitioner's argument that the November 29<sup>th</sup> determination of the DOB Commissioner may be reviewed directly by this Court because it was based solely upon an issue of law, to wit, whether a certificate of no harassment was required, is without merit.

Finally, Deborah Rand, Esq., the Assistant Commissioner for housing litigation of the New York City Department of Housing Preservation and Development (HPD), in her affirmation dated May 9, 2007 annexed to respondent's answer, affirms that petitioner did, in fact, file an application for a certificate of no harassment with HPD on January 8, 2007, and that such application is currently pending before HPD. Petitioner does not dispute this statement.

Therefore, since petitioner did respond to the SWO issued on November 21, 2006 to the extent of submitting an application for a certificate of no harassment and the application has not been denied but is currently pending, the instant petition does not present a justiciable controversy upon which relief could be granted that would have an immediate, practical effect on the conduct of the parties but, in effect, seeks an advisory opinion, which this Court may not properly issue (see King v. Glass, 223 AD 2d 708 [2<sup>nd</sup> Dept 1996]).

Since petitioner had an available remedy through administrative review before the Board of Standards and Appeals and did not avail itself of such remedy, it failed to exhaust its administrative remedies and, therefore, the instant proceeding is premature (see Weissman v. City of New York, 96 AD 2d 454 [1<sup>st</sup> Dept 1983]).

This Court does not consider respondent's sur-reply. Although respondent was permitted to submit a sur-reply to address new matters that defendant's counsel represented were raised in the reply, upon review of the record on this petition, this Court does not find that petitioner's reply introduced any new arguments or facts which were beyond the scope of the arguments and allegations raised in respondent's answer.

Accordingly, the petition is dismissed.

Dated: September 28, 2007

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KEVIN J. KERRIGAN, J.S.C.