

Matter of Carroll v Srinivasan
2008 NY Slip Op 30339(U)
January 30, 2008
Supreme Court, New York County
Docket Number: 0110199/2007
Judge: Herman Cahn
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Justice Cahn
Justice

PART 49

Carroll, T

INDEX NO. 110199/07

- v -

MOTION DATE _____

MOTION SEQ. NO. 02

Meenakshi Srinivasan

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 _____

FILED

Cross-Motion: Yes No

FEB 07 2008

Upon the foregoing papers, it is ordered that this motion

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION IN MOTION SEQUENCE**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 1-30-08

Justice Cahn
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

-----X
 :
 In the Matter of the Application of
 THOMAS CARROLL, :
 :
 Petitioner, :
 :
 For an Order and Judgment pursuant to Article 78 of the
 CPLR and/or § 1046 (c) of the New York City Charter :
 :
 -against- :
 :
 MEENASKSI SRINIVASAN, Chairperson, :
 CHRISTOPHER COLLINS, DARA OTTLEY-BROWN, :
 and SUSAN HINKSON, Commissioners constituting THE :
 BOARD OF STANDARDS AND APPEALS OF THE :
 CITY OF NEW YORK and the DEPARTMENT OF :
 BUILDINGS OF THE CITY OF NEW YORK, :
 :
 Respondents. :
 :
 -----X

Index No. 110199/07

FILED
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Herman CAHN, J.

Petitioner Thomas Carroll commenced this Article 78 proceeding seeking an order vacating or modifying the determination of Respondent, Board of Standards and Appeals of the City of New York ("BSA") which denied his request for the issuance of subpoenas to compel the attendance of witnesses and the production of documents, City Charter § 1046(c)(1). In the alternative, he seeks to have the Court judicially authorize the subpoenas, pursuant to CPLR § 2307 and City Charter § 1046(c)(1).

Respondents cross-move for dismissal, arguing that the Petition is premature. Respondents are the Chair and members of the BSA, as well the Department of Buildings of the City of New York (the "DOB").

Background:

The Petition stems from the revocation of a permit for the construction of a single family home (number 402293430) on May 17, 2006 (the "Permit"). Petitioner originally sought and received the Permit, for the construction of a new home for himself in the Breezy Point section of Queens County, from the DOB. Murray Aff ¶ 5. Petitioner's plans had been approved by DOB on August 1, 2005.¹

On April 27, 2007, almost 21 months later, the DOB revoked the permit. Murray Aff, Exh E.

Petitioner alleges that the revocation stems from the opposition to the Permit raised by neighbors. However, the Petition, which identifies the Hon. James Golia² and his wife, Rosemary Golia, lacks specificity as to what each is alleged to have done.³

Beginning in August 2005, Ms. Golia apparently wrote letters of complaint to the DOB regarding the issuance of the Permit, and the DOB thereupon undertook an investigation. Pet at ¶ 8. On September 6, 2006, she formally filed an administrative appeal with the BSA, challenging the DOB approval and the Permit that was issued. Murray Aff at ¶ 7.

¹ The approval was thereafter reaffirmed by letters: dated February 27, 2006, wherein Derek Lee, the DOB Commissioner for Queens County, stated that the DOB found Petitioner's application to be acceptable and had no objection to the Permit; dated July 17, 2006, wherein Andrew Wallace, Esq., counsel to the DOB Queens Enforcement Unit, stated that the project complies with the zoning requirement and that there were no grounds for a Work Stop Order; and dated August 24, 2006, wherein the DOB Commissioner for Queens County, reaffirmed that the Permit had been properly issued. Pet at ¶¶ 9-11.

² The Hon. James Golia is a Justice of The Supreme Court sitting in Queens County, and a former employee of DOB.

³ The opponents are often referred to in the Petition as "the Golias," without greater specificity. It appears the institution of an Article 78 proceeding was done by Ms. Golia and her counsel.

The DOB issued a notice of intent to revoke its approval and the Permit in a letter dated February 27, 2007. Murray Aff at ¶ 8; Murray Aff, Exh C. By letter dated April 11, 2007, the DOB informed Petitioner's architect that to avoid revocation of the Permit, the building plans needed to be revised to reflect a plan for the front yard of the property that would be in compliance with local zoning requirements. Murray Aff, Exh D. This was despite the fact that in his August 24, 2006 letter, the DOB Commissioner for Queens County, Derek Lee, stated that the plan at issue "satisfies the minimum ten foot front-yard setback." Pet at ¶ 10; Pet, Exh A. The DOB revoked the permit on April 27, 2007.⁴

On May 24, 2007, Petitioner filed an administrative appeal, challenging the revocation. Murray Aff at ¶ 15. Shortly thereafter, and in relation to his appeal, Petitioner requested that BSA compel production of certain DOB documents. He further sought the attendance of three specific DOB employees at the hearing on the appeal. He seeks to question them about both the basis for the initial approval of the Permit, as well as the rationale for reversing the DOB position. Murray Aff, Exh H.⁵

By letter dated July 6, 2007, the BSA denied the request for the issuance of subpoenas, contending that it does not have authority to compel the production of documents. The BSA also declined to compel the testimony of the witnesses, although it stated that compelling their attendance is within its discretion. Murray Aff, Exh I.

⁴ After the Permit was revoked, the BSA informed Ms. Golia that her administrative appeal would be dismissed as moot. Murray Aff at ¶ 11. Ms. Golia requested that the BSA not dismiss the appeal. When the BSA nevertheless did so, she commenced an Article 78 proceeding, challenging the dismissal. Murray Aff, Exh F, G; Murray Aff at ¶ 14. This proceeding remains pending. (Index number 15285/07 Sup. Ct. Kings Co.).

⁵ The subpoenas sought are for the testimony of: Derek Lee, DOB's Queens County Commissioner; Andrew Wallace, Esq., the attorney for the DOB Queens Enforcement Unit; and Frank Marchiano, the Planning Examiner.

Petitioner argues that the refusal to issue the subpoenas is arbitrary and capricious. He contends that all documents and testimony relevant to the rationale for DOB's reversal of its position should be obtained and reviewed, prior to the BSA determining the propriety of the DOB's determinations. Pet at ¶ 19. He further argues that if the Court determines that the BSA acted within its discretionary authority in refusing to issue the subpoenas, the Court should order and authorize their issuance and retain jurisdiction over this matter.

Finally, Petitioner argues that, given the fact that a complaining neighbor is a former Queens DOB employee who is now a sitting Justice of the Supreme Court, full disclosure and transparency is required to avoid the appearance of impropriety. Pet at ¶ 14. The Court notes that there is nothing in either the allegations in the Petition or the record that indicates that Justice Golia or Ms. Golia acted in any improper manner. Petitioner's claims are against individuals at the BSA and the DOB itself; the claims are not against the Golias. Indeed, although Petitioner certainly objects to the actions that he alleges Respondents took in response to the opposition to the Permit, he never alleges that they did anything wrongful in raising the objections. Indeed, the mere fact that the Hon. James Golia is a Justice of the Supreme Court who happens to be a former employee of DOB and Ms. Golia is married to him should not deprive them of the civil rights enjoyed by every resident of this city, to voice opposition to actions of the Municipal government.

Discussion:

Pursuant to § 666 of the New York City Charter, the BSA has the authority to review any DOB determination. In accordance with § 1046(c)(1) of the City Charter, at an adjudicatory hearing:

[a]ll parties shall be afforded an opportunity for a hearing within a reasonable time. At the hearing, the parties shall be afforded due process of law, including the opportunity to be represented by counsel, *to issue subpoenas or to request that a subpoena be issued, to call witnesses, to cross-examine opposing witnesses* and to present oral and written arguments on the law and facts.

(Emphasis added). Thus, the BSA has express authority to issue subpoenas. However, a party's opportunity to call witnesses is separately delineated from the ability to have subpoenas issued, and whether the subpoenas referenced therein include those for documents, in addition to those for witness testimony, is a question of construction.

Respondents cross-move for dismissal of the Petition as premature. They argue that the BSA's decision not to issue subpoenas was not a "final determination" but, rather, an "interim evidentiary ruling in an ongoing hearing whose outcome has yet to be determined" and which is, therefore, not yet subject to judicial review. Murray Aff at ¶ 25.

It is clear from the plain language of § 1046(c)(1) of the City Charter that Petitioner does not need the Court's permission to issue subpoenas or request that a subpoena be issued. The City Charter gives him the right to have subpoenas issued on his behalf. Thus the petition is granted to the extent of directing respondents to permit (and if necessary cooperate) in the issuance of subpoenas sought by Petitioner. At this juncture, the Court does not feel that Respondents should be called upon to authorize the issuance of subpoenas duces tecum - and the refusal to issue such subpoenas was not arbitrary or capricious. As to the subpoenas to witnesses to compel their testimony - in view of the specific statutory direction - the failure to authorize them was arbitrary and capricious.

If a subpoenaed witness seeks to quash the subpoena issued to him or her, or if the witness or any party objects to any question asked, a ruling thereon shall of course, be made by the Administrative Law Judge or Commissioner, presiding over the hearing.

Petitioner's alternative request, that the Court order and authorize the subpoenas, and retain jurisdiction over further disclosure disputes, is denied.

After the BSA makes its final determination, Petitioner may seek further relief from the Court, if he be so advised.

The Court has considered the remaining arguments of the parties and finds them unavailing.

Accordingly, it is

ORDERED that the Petition is granted to the extent set forth herein; and it is further, ORDERED that Respondents' cross motion to dismiss the Petition is denied; and it is further

ORDERED that the clerk shall enter judgment accordingly.


FILED

FEB 07 2008

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COUNTY CLERK'S OFFICE

Dated: January 30, 2008

ENTER:



J.S.C.