

**Matter of Babinsky v Lancaster**

2008 NY Slip Op 32649(U)

September 26, 2008

Supreme Court, New York County

Docket Number: 105957/08

Judge: Kibbie F. Payne

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

PRESENT: KIBBIE F. PAYNE  
*Justice*

PART 4

JOSEPH BABINSKY

INDEX NO. 105957/08

MOTION DATE 07-23-08

- v -

MOTION SEQ. NO. 001

PATRICIA LANCASTER

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 3 were read on this motion for Article 78

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits _____	<u>2</u>
Replying Affidavits _____	<u>3</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, the petition is decided in accordance with the annexed Judgement/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: September 26, 2008

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check If appropriate:  DO NOT POST  REFERENCE

[\* 2 ]  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 4

-----X  
In the Matter of the Application of  
JOSEPH BABINSKY and  
462 WEST 25TH STREET, LLC,

Petitioners,

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

Index No. 105957/08

-against-

Judgment/Decision

PATRICIA LANCASTER, as COMMISSIONER,  
CHRISTOPHER SANTULLI, as BOROUGH  
COMMISSIONER, and DILEEP KHEDEKAR,  
ROBERT LIMANDRI, as DEPUTY BOROUGH  
COMMISSIONERS of THE NEW YORK  
DEPARTMENT OF BUILDINGS, and THE NEW  
YORK CITY DEPARTMENT OF BUILDINGS,

Respondents,

-----X  
KIBBIE F. PAYNE, J.:

In this Article 78 proceeding, petitioners Joseph Babinsky and 462 West 25th Street, LLC, seek nullification of the January 30, 2008 stop-work order issued by respondent the New York City Department of Buildings ("DOB"), as well as the reinstatement of permits pertaining to DOB Alteration Application Number 104126571 (the "Alteration Application"). Respondents have answered, cross-moving to dismiss on the grounds that, among other things, petitioners have failed to exhaust their administrative remedies and that the subject stop-work order is moot.

The subject of this proceeding is a six-story residential building, located at 462 West 25th Street, New York, New York

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(the "Premises"). On June 1, 2005, petitioners filed the Alteration Application, to add additional vertical space to the Premises. After a post-approval audit, the DOB issued an October 2, 2007 Objection to the work being done at the Premises, specifying four objections. According to petitioners, the DOB then lifted that hold on November 14, 2007.

Thereafter, the DOB again inspected the Premises and issued a December 11, 2007 Violation, numbered 121107C4TM01, as well as a stop-work order, stating that the current work violated zoning regulation Section 23-145. In particular, the violation noted that an extra two feet had been added "to the North side of the of the 6th floor & increasing the floor area ratio contrary to Zoning Section 23-145" (Pet., Ex. C). After petitioners challenged the December 11 stop-work order, the DOB revoked it on January 15, 2008, finding that "plans were amended and work conforms to plans" (*id.*, Ex. E).

However, the DOB then issued another objection, on January 23, 2008, and another stop-work order on January 30, 2008 (the "challenged stop-work order" or "second stop-work order"). The second stop-work order arose from objections ten and eleven, which found that:

10. The proposed front setback is contrary to Section 23-633 (b) Setback regulations of the Zoning Resolution. Not permitted.
11. Provide more information to substantiate the mechanical deduction taken on drawing Z-1, Revision #3. Review with this auditor.  
(Pet., Ex. H).

Petitioners challenged the second stop-work order on February 4, 2008 and submitted an "Additional Information" form at that time. According to petitioners, DOB reinspected the Premises, but neither lifted the second stop-work order nor responded to the February 4, 2008 rebuttal. In the absence of a response, petitioners' attorneys wrote to the DOB on March 7 and 20, 2008, again requesting the revocation of the second stop-work order. When the DOB failed to respond, petitioners commenced this proceeding.

In a letter dated May 15, 2008, the DOB informed petitioners that it intended to revoke its approval and permits for work at the Premises (the "intent to revoke letter"). The objections and issues cited as cause for the DOB's intention to revoke were as follows: (1) the "proposed lot coverage exceeds 65%" in violation of zoning regulation Section 23-145; (2) HVAC units at the rear of the Premises do not conform with zoning regulation Section 23-44 (b); (3) a noise inspection of the Premises' mechanical equipment and HVAC units is required pursuant to building code Section 27-770 (a) (4); (4) and clarification of "all mechanical deductions indicated on the plans, Revision #2 dated 12/31/07" is necessary (Cross Motion, Ex. G). Petitioners responded to the intent to revoke letter on May 27, 2008, claiming that: (1) the DOB improperly included certain portions of the Premises when calculating "lot coverage"; (2) the "HVAC units at issue are

being removed"; (3) that there is no exterior mechanical equipment on the Premises' roof; and (4) the mechanical deductions were already approved by the DOB on January 16, 2008. Petitioners also requested to submit amended plans relocating an "exterior glass enclosure," which they claimed would reduce the lot coverage to under 65% of the lot area (*id.*, Ex. I). That request was denied on June 19, 2008, as the DOB found that the "covered roof terrace . . . does not comply [with] 23-132 and shall be considered floor area and lot coverage" (*id.*, Ex. I).

On June 24, 2008, the DOB revoked all permits with regard to the Premises pursuant to Section 27-197 of the Administrative Code of the City of New York. The DOB further stated that it "has received insufficient response to its notice of intent to revoke the approval and permit" and issued an immediate stop-work order (*id.*, Ex. J).

Initially, the court must address the issue of whether the challenged stop-work order has been rendered moot. "Where, during the pendency of a proceeding to review an agency determination, there has been subsequent action taken which has resolved the issue in dispute, the proceeding should be dismissed as moot" (*Mehta v. New York City Dep't of Consumer Affairs*, 162 AD2d 236, 237 [1st Dept 1990]). In general, the mootness doctrine will be applied "where a change in circumstances prevents a court from rendering a decision that would effectively

determine an actual controversy" (*Citineighbors Coalition of Historic Carnegie Hill v. N.Y. City Landmarks Pres. Comm'n*, 2 NY3d 727, 728-729 [2004]).

Here, the DOB contends that the plans that gave rise to the challenged January 30th stop-work order, which found that a front setback was "not permitted" and requested "more information to substantiate [a] mechanical deduction" noted in a drawing, have since been amended. However, the evidence demonstrates while certain aspects of the plans for the Premises have been amended, the portions of the plans challenged by the second stop-work—specifically relating to the front setback and the mechanical deductions—have not been altered since the issuance of that stop-work order. Consequently, the stop-work order that is the subject of this proceeding is not moot.

On the other hand, the court agrees with petitioners that the DOB has failed to issue a determination with regard to petitioners' February 4th re-submission. Respondent does not claim to have provided any such response to that February 4th rebuttal. The Section 27-144 of the Administrative Code provides that:

Whenever an application and accompanying plans have been rejected and are thereafter revised and resubmitted to meet stated grounds of rejection, the revised application and plans shall be approved if they meet the stated grounds of rejection, or shall be rejected if they fail to meet the stated grounds of rejection; and written notice of

approval or written notice of rejection, stating the grounds of rejection, shall be given the applicant promptly and not later than twenty calendar days after the resubmission thereof.

(emphasis supplied)

Since it is undisputed that the DOB never provided written notice of approval or rejection of petitioners' revised application, submitted in response to the January 30th stop-work order, the DOB has failed to comply with Administrative Code § 27-144 and must be compelled to do so. Article 78 proceedings replace and supersede the common law writs of certiorari, prohibition and mandamus (CPLR 7804). Here, when DOB did not respond to petitioners' February 4, 2008 challenges it failed to perform its designated ministerial duties. Prior to commencing an article 78 proceeding in the nature of a writ of mandamus petitioner must make a demand and await a refusal (*Austin v Board of Higher Educ.*, 5 NY2d 430, 442 [1959]). Whether the DOB approves or rejects the February 4th application is within its purview as the agency making the determination; however, the Administrative Code requires a written response and the court directs the DOB to provide the same to petitioners. Accordingly, it is


ORDERED and ADJUDGED that the matter is remanded to the respondent the New York City Department of Buildings for a determination as to petitioners' February 4, 2008 response and that such determination should be served on petitioners within twenty (20) days after service on respondents of a copy of this

order with notice of entry.

The foregoing constitutes the judgment and order of this court.

Dated: September 26, 2008

ENTER:

  
KIBBIE F. PAYNE  
J.S.C.

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