

Shabbat, LLC v City of New York

2008 NY Slip Op 33185(U)

November 21, 2008

Supreme Court, New York County

Docket Number: 104077/08

Judge: Herman Cahn

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

PRESENT: CAM
Justice

PART 49

SHABAZZ, LLC

INDEX NO. 104077/08

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -
CITY OF NY

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

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 1419)

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

Dated: 11/21/08

[Signature]
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):

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

-----X
SHABBAT, LLC,

Petitioner,

-against-

Index No. 104077/08

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

Respondants.

Herman Cahn, J.:

UNFILED JUDGMENT
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In this CPLR Article 78 proceeding, petitioner seeks a declaration that it does not have to obtain a certificate of non-harassment (the certificate) from the Department of Housing and Preservation Development (HPD) before it may legalize an Interim Multiple Dwelling with the Department of Buildings (DOB). Petitioner also seeks an order directing the DOB to remove its objection to the petitioner's application, based on a zoning resolution requiring the certificate as a predicate to legalization of an Interim Multiple Dwelling.

Respondents the City of New York, the DOB, and the New York City Loft Board (the Loft Board) (collectively, the City) claim that petitioner has failed to exhaust its administrative remedies before the Board of Standards and Appeals, and that the applicable zoning resolution has not been preempted by the Multiple Dwelling Law.

Petitioner is the owner of the building and property known as 517-525 West 45th Street in Manhattan (the Building). The Building is located within the Preservation Area of the Clinton district. Pursuant to a zoning resolution, the Building, which was once a commercial property, is an interim multiple dwelling (IMD) registered with the Loft Board, and is being converted to

lawful residential use. There are nine IMD units within the Building. Petitioner applied to the DOB, application #100485153, for a permit to alter the Building, in order to legalize it in accordance with Multiple Dwelling Law 7-C. The application was denied due to petitioner's failure to first provide the certificate, as required.

The petition alleges that, under the 1987 amendment to the Multiple Dwelling Law, the Building is an IMD, requiring legalization. On September 30, 1992, a prior owner of the Building filed an application with DOB, seeking a permit for work required for legalization and to obtain an appropriate certificate of occupancy. Although a work permit was issued, the prior owners did not complete the legalization process over the following 13 years. In March 2005, a new owner performed work on the Building that was found to be beyond the scope of the 1992 permit, and DOB revoked the work permit. Subsequently, petitioner purchased the Building and entered into a "global" stipulation with the tenants, which was designed to resolve all of their complaints. The stipulation stated that all parties agreed that they would cooperate in obtaining a certificate of occupancy for the Building. By letter dated August 31, 2006, the Loft Board stated that it had no objection to the work proposed under the petitioner's application.

Pursuant to the Loft Law, petitioner claims that it is obligated to take all "reasonable and necessary action" to obtain an approved alteration permit, and a certificate of occupancy as a class A multiple dwelling for the residential portions of the building. The DOB cannot enforce a city regulation that prevents compliance with a state law which has already been held to be preemptive of zoning regulations.

Zoning resolution § 96-109 states, in relevant part that:

Prior to issuance of an alteration permit by the Department of Buildings for a material alteration of a multiple dwelling within the Preservation Area, the Department of Housing Preservation and Development shall certify to the Department of Buildings that: . . . (b) the Department of Housing Preservation and Development has issued a certification of no harassment or that the owner has complied with Section 96-110, paragraph (d), (Certification of Cure for Harassment).

Petitioner argues that, notwithstanding that it does not apply to the Building on its face, DOB's decision requiring the certificate will only serve to harm the tenants that the Loft Law's legalization obligations are designed to protect, as it has stopped the legalization process and allows the Building to remain in substandard condition until a permit is issued.

Petitioner also claims that "municipal ordinances are inferior in status and subordinate to the laws of the State," citing *City of New York v Lower Manhattan Loft Tenants*, NYLJ, Nov 21, 1989 at 21, col 5 (Sup Ct, NY County 1989), *aff'd* 171 AD2d 629, *appeal dismissed* 78 NY2d 951, *appeal denied* 78 NY2d 862 (1991). At nisi prius, in this same case, the court stated that "it is the obligation of the City to conform its enactments to state law and not vice-versa . . . [t]he Loft Law . . . contains a 'supremacy clause' and the Courts have upheld the constitutionality of state statutes having a much more drastic impact on local zoning laws than the one at issue." *Id.* Petitioner relies on this language to conclude that zoning resolution § 96-109 has been preempted, to the extent of requiring that this class of building could be occupied residentially, and was required to be legalized for residential use.

While various amendments to Multiple Dwelling Law § 284 have extended an owner's time in which to legalize IMD buildings, the obligation to legalize is mandatory, argues petitioner.

The petition contains allegations that in 1990, the City amended the zoning resolution and rezoned the Building into a residential, or R8, zone. Zoning resolution § 96-109 was thereafter enacted to require “multiple dwellings” in a portion of this rezoned area to provide the certificate as a predicate to obtaining building permits for material alterations. Petitioner claims that the need for the certificate was never required before the zoning resolution was enacted and ignores the Multiple Dwelling Law requirements of mandatory legalization. It asserts that the requirement that it obtain the certificate also has the potential for frustrating legalization of the Building for at least five years, in the event that there is a finding of harassment of tenants by the landlord.

Respondents maintain that there is no merit to petitioner’s claim of the Loft Law’s preemption of the requirement of obtaining the certificate. While the Building is a registered IMD, that does not place it beyond the reach of other provisions of law which are relevant to multiple dwellings, including the zoning resolution which requires the certificate prior to the issuance of a permit for a material alteration to a property. There is no basis to petitioner’s argument that zoning resolution § 96-109 is preempted by the Loft Law.

Also, respondents argue that an IMD is a type of multiple dwelling and its tenants are entitled to the same protection as their neighbors in legalized buildings. There is nothing in the Loft Law which indicates the Legislature’s intent to preempt the field with respect to the alteration of buildings being converted from commercial to residential use. Quite the contrary, the Loft Law provides for the intervention of local governments to “effectuate legalization [of IMDs], consistent with the local zoning resolution,” citing Multiple Dwelling Law § 280. The requirement of the certificate is neither contrary to, nor inconsistent with, the Loft Law.

In an Article 78 proceeding, reviewing an agency determination, the court must not weigh the facts or the merits of petitioner's claims de novo, nor may it substitute its judgment for that of the agency. The court must simply decide whether the agency's determination was supported by a reasonable basis. *Matter of Clancy-Cullen Stor. Co. v Board of Elections of City of New York*, 98 AD2d 635 (1st Dept 1983). Findings of fact must be "sufficiently specific to furnish assurance that there was 'considered action' by the administrative authority and 'to provide the necessary basis for intelligent judicial review.'" *Matter of Villaggio Italia, Inc. v New York State Liq. Auth.*, 23 AD2d 613 (3rd Dept 1965) (internal citations omitted). The construction given statutes and regulations by the agency that is responsible for their administration is entitled to great deference if the construction is neither irrational nor unreasonable. *Matter of Albano v Kirby*, 36 NY2d 526, 532 (1975).

Respondents claim that the fact that the Building is registered with the Loft Board as an IMD does not preclude it from being identified as a multiple dwelling as well. The City claims that the Building satisfies the requirements of Multiple Dwelling Law § 4(7) since the statute defines a multiple dwelling as "a dwelling which is either rented, leased, let or hired out, to be occupied, or is occupied as the residence or home of three or more families living independently of each other." The City asserts that courts have termed IMDs to be "de facto multiple dwellings" and have used the terms interchangeably, citing *Newmann v Mapama Corp.* (96 AD2d 793, 795 [1st Dept 1983]).

The City argues that it is a matter of public policy that the Loft Law is not served by excluding IMDs from the applicable zoning provisions, pointing out that certain structures are, in fact, exempted from the provisions of zoning resolution § 96-109 in subsection (b)(2), but that

IMDs are an exception to that exemption. The change to the zoning resolution that created this exception to the exemption for IMDs was part of a December 2005 text amendment to ensure that tenants of IMDs would be protected from harassment. The issuance of the certificate is a “reasonable and necessary action” to allow for IMDs, such as the Building at issue here, to obtain an alteration permit, and ultimately a certificate of occupancy for legalization under Multiple Dwelling Law § 284, the Loft Law. Rather than an impediment to legalization, obtaining the certificate is a step in the legalization process.

DOB’s requirement that petitioner obtain the certificate from HPD was neither irrational nor unreasonable. The construction given to the relevant zoning resolution by the DOB is accorded great deference. Petitioner has failed to establish that the zoning resolution has been preempted by the Loft Law. It has also failed to prove that the denial of its request for a waiver of the certificate requirement was irrational or unreasonable.

With respect to respondents’ claim that petitioner failed to exhaust its administrative remedies, the Court finds that it would be a useless act to require petitioner to appeal the DOB’s denial of a waiver request to the New York City Board of Standards and Appeals (the BSA). The DOB’s decision denying the requested waiver was rational and proper, was not an abuse of discretion, and does not violate the doctrine of preemption.

Petitioner’s request for a declaratory judgment is denied and the DOB’s determination, including the requirement that petitioner obtain the certificate, is undisturbed.

The stay of petitioner’s appeal to the BSA is lifted, as the need for an appeal to the BSA is now moot.

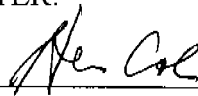
Accordingly, it is

ADJUDGED that the petition is denied and the proceeding is dismissed, with costs and disbursements to respondents.

This constitutes the decision and judgment of the Court.

Dated: November 21, 2008

ENTER:



J.S.C.

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