

**Moskowitz v New York City Dept. of
Bldgs. & Lower Manhattan Constr.
Command Ctr.**

2009 NY Slip Op 30168(U)

January 26, 2009

Supreme Court, New York County

Docket Number: 106800/08

Judge: Shirley Werner Kornreich

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

PRESENT: SHIRLEY WERNER KORNREICH
Justice

PART 54

HERBERT MOSKOWITZ, d/b/a, MANHATTAN
REALTY CO,

Petitioner,

-against-

INDEX NO. 106800/08

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

THE NEW YORK CITY DEPARTMENT OF
BUILDINGS & LOWER MANHATTAN
CONSTRUCTION COMMAND CENTER,

Respondents.

The following papers, numbered 1 to _____ were read on this motion to/for Article 78 Petition

	<u>PAPERS NUMBERED</u>
Petition — Affidavits — Exhibits ... _____	1
Answering Affidavits — Exhibits _____	2, 3
Replying Affidavits _____	4

FILED
JAN 29 2009
COUNTY CLERKS OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER,**

Dated: 1/26/09

HON. SHIRLEY WERNER KORNREICH
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

[* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
In the Matter of the Application of

HERBERT MOSKOWITZ, d/b/a, MANHATTAN
REALTY CO,

Petitioner,

for Judgment Pursuant to Article 78 of the
Civil Practice Law & Rules

Index No. 106800/08

DECISION
and ORDER

-against-

THE NEW YORK CITY DEPARTMENT OF
BUILDINGS & LOWER MANHATTAN
CONSTRUCTION COMMAND CENTER,

Respondents.

-----X
KORNREICH, SHIRLEY WERNER, J.:

Petitioner, the owner and landlord of a building located at 177 Hudson Street in Manhattan, brings this Article 78 proceeding requesting that the court order respondent New York City Department of Buildings (DOB) to locate and release a file regarding the third floor renovation of petitioner's building, and direct DOB to make a determination on the amended plans petitioner seeks to file in regard to that renovation. By Interim Decision and Order signed August 21, 2008, the Court denied DOB's cross-motion to dismiss, severed the Petition, and ordered DOB to file an answer on or before October 6, 2008. By Interim Order signed August 7, 2008, the Court granted the motion to dismiss filed by respondent Lower Manhattan Construction Command Center (LMCCC). Judgment was filed September 17, 2008, dismissing the Petition as against LMCCC. Based on the pleadings and papers filed in this proceeding, and on argument before the

[*3]
Court on July 14, 2008, the Court now decides the Petition in favor of petitioner and against the remaining respondent, DOB.

DISCUSSION AND LEGAL RULINGS

The Court assumes the parties' familiarity with the facts, and incorporates herein by this reference the Interim Decision and Order dated August 21, 2008. DOB, in its Answer to the Petition, has submitted the exact same evidence that it filed to support its cross-motion to dismiss. The Court reviews that evidence under the following principles.

A court reviewing an Article 78 proceeding must judge the propriety of an administrative action solely on the reasons cited by the administration. *Scherbyn v. Wayne-Finger Lakes Bd. Of Coop. Educ. Servs.*, 77 N.Y.2d 753, 758 (1991). Such an action must be upheld unless it "shocks the judicial conscience and, therefore, constitutes an abuse of discretion as a matter of law." *Featherstone v. Franco*, 95 N.Y.2d 550, 554 (2000). CPLR section 7803 states that the following questions may be raised in an Article 78 proceeding: "Whether a determination was made in violation of lawful procedure, was effected by error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed."

In deciding whether an agency's determination was arbitrary, capricious, or an abuse of discretion, courts are limited to an assessment of whether a rational basis exists for the administrative determination, "without disturbing underlying factual determinations." *Heinz v. Brown*, 80 N.Y.2d 998, 1001 (1992); *see Matter of Pell v. Board of Educ.*, 34 N.Y.2d 222, 231 (1974) ("Arbitrary action is without sound basis in reason and is generally taken without regard to the facts."). A rational or reasonable basis

for the agency's determination exists if there is evidence in the record to support its conclusion. *See Sewell v. New York*, 182 A.D.2d 469, 473 (1st Dept. 1992).

Petitioner argues that pursuant to a stop work order issued January 11, 2008, it attempted to file amended plans with DOB on January 18, 2008, but was told by DOB that the plans could not be reviewed because the job folder would be unavailable until an investigation was completed. The amended plans petitioner tried to file were signed and sealed by petitioner's architect. When DOB refused to review the amended plans, petitioner did not file them and did not leave a copy. DOB argues that it did review the amended plans, which it claims had been submitted on-line, and that it disapproved of them on June 3, 2008. There is no rational basis in the record for DOB's failure to provide the job folder, refusal to review the amended plans when petitioner attempted to file them, and subsequent disapproval of what it disingenuously refers to as the "amended plans." DOB's behavior violated lawful procedure, was arbitrary and capricious, and constitutes an abuse of discretion.

The record shows that petitioner did not leave the amended plans with DOB on January 18, 2008, because DOB said the job folder was unavailable due to an investigation. DOB does not dispute this claim, but instead makes a vague assertion that it received a copy of the amended plans on that date. DOB does not provide any details regarding this submission. Nor does it identify the source of the "amended plans" DOB attaches to its Answer. They could be a copy of the plans attached to the Petition, as petitioner suggests, but it is enough to find that they are not a copy of the amended plans petitioner tried to file on January 18, 2008, which were signed and sealed by the

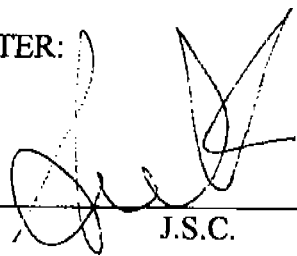
architect, as required by the applicable code provision.¹ The Court finds that DOB has not, to date, reviewed the amended plans that petitioner attempted to file on January 18, 2008, which were sealed and contained the requisite signature of the architect. DOB's issuance of an objection sheet on June 3, 2008, citing the lack of the architect's signature and sealing, is therefore of no consequence, and it would not have been supported by a rational basis if DOB had been reviewing the right set of amended plans.

Even if DOB had produced the project folder and accepted petitioner's amended plans for filing, DOB would be in violation of its own regulations by failing to review them until five months later. New York City Building Code §§ 27-143 and 144 provided that DOB "shall" review submitted plans "promptly," then provide notice of approval or rejection "promptly," and "no later than forty calendar days after the submission thereof." *Id.* DOB, by its own admission, did not even review the plans it claims were submitted January 18th, until June 3rd, nearly five months later. This admitted delay, as well as DOB's extraordinary behavior in this matter, remain unexplained. At this point, DOB must promptly produce and release the appropriate job folder, and afford petitioner an opportunity to file its amended plans, which the Court anticipates will comply with the applicable Construction Code provisions. DOB must then promptly review the amended plans and issue its approval or fully supported rejection within the controlling time limits. Delay by DOB in complying with this Court's order set forth below could subject it to sanctions for civil contempt under Judiciary Law § 753(A). *See McCain v. Dinkins*, 84 N.Y.2d 216 (1994) (city officials held in contempt). Accordingly, it is

¹Building Code § 27-157, which required the professional preparing the plans to sign and seal them, controlled in January, 2008. It was repealed effective July 1, 2008, with the adoption of the New York City Construction Codes.

ORDERED that the application by petitioner for an order directing respondent DOB to locate and release a file regarding the third floor renovation of petitioner's building, and directing DOB to make a determination on the amended plans petitioner seeks to file in regard to that renovation, is granted.

ENTER:



J.S.C.

Date: January 26, 2009
New York, N. Y.

FILED
JAN 29 2009
COUNTY CLERK'S OFFICE
NEW YORK