

Matter of Martinez v Scheyer

2009 NY Slip Op 32152(U)

September 15, 2009

Supreme Court, Suffolk County

Docket Number: 7980/2008

Judge: Joseph Farneti

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SHORT FORM ORDER

INDEX NO. 7980/2008

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
 Acting Justice Supreme Court

 In the Matter of the Application of

JOSE MARTINEZ and MARJORIE MUNIVE,

Petitioners,

-against-

RICHARD J. SCHEYER, CHAIRMAN,
 ALBERT R. MORRISON, VICE CHAIRMAN,
 KIRK PAHLITZSCH, JAMES H. BOWERS,
 and BARBARA O'CONNOR,
 CONSTITUTING THE MEMBERS OF THE
 ZONING BOARD OF APPEALS OF THE
 TOWN OF ISLIP,

Respondent.

ORIG. RETURN DATE: APRIL 11, 2008
 FINAL SUBMISSION DATE: AUGUST 28, 2008
 MTN. SEQ. #: 002
 MOTION: MD

PLTF'S/PET'S ATTORNEYS:

RIVKIN RADLER LLP
 926 REX CORP PLAZA
 UNIONDALE, NEW YORK 11556-0926
 516-357-3000

DEFT'S/RESP ATTORNEY:

ROBERT F. QUINLAN
 ISLIP TOWN ATTORNEY
 BY: ALICIA S. O'CONNOR, ESQ.
 655 MAIN STREET
 ISLIP, NEW YORK 11751
 631-224-5550

Upon the following papers numbered 1 to 8 read on this motion _____
 FOR A JUDGMENT PURSUANT TO ARTICLE 78 _____.

Notice of Petition and supporting papers 1-3; Verified Answer 4; Affirmation in Opposition
 and supporting papers 5, 6; Respondents' Return 7; Memorandum of Law in Opposition
8; it is,

ORDERED that this verified petition for a judgment, pursuant to Article 78 of the CPLR, annulling and reversing the decision of respondent ZONING BOARD OF APPEALS OF THE TOWN OF ISLIP ("Zoning Board"), which denied petitioners' request for a rehearing and directing the Zoning Board to hold a public hearing on the matter, is hereby **DENIED** for the reasons set forth hereinafter. The Zoning Board has filed a verified answer, a return, an affirmation in opposition, and a memorandum of law in opposition to the verified petition.

Petitioners are the owners in fee of an improved parcel of real property located at 84 East Halley Lane, Central Islip, New York ("property"). Petitioners inform the Court that the property is irregular in shape, and that the structure thereupon is situated in a "caddy corner" fashion which results in a small rear yard. As a result, one corner of the structure is only 4.05 feet from the property line where a rear yard setback of 25 feet is required. Petitioners allege that they purchased the property on May 6, 2005, and that the existing dwelling was under construction at the time. Petitioners allege that the construction was for the purpose of adding a second story to the dwelling. Upon purchasing the property, petitioners completed the construction, but contend that they were unaware that the prior owner neglected to obtain a building permit from the Town of Islip for the addition. On or about November 7, 2005, petitioners applied to the Town for a building permit, which was denied because variances were required. As such, petitioners applied to the Zoning Board for variance relief. The Zoning Board denied petitioners' application. Thereafter, petitioner JOSE MARTINEZ filed a petition, pursuant to Article 78 of the CPLR, seeking a review of that denial. By Order dated September 29, 2006 (Blydenburgh, J.), the Court denied the petition. The Court held therein that "nothing in the record reflects that the decision of the [Zoning Board] was arbitrary and capricious. It appears that the permit would have been denied, had it been sought, prior to the construction of the addition to the premises."

By letter dated October 29, 2007, petitioners filed a revised variance application with the Zoning Board, which petitioners allege proposed substantial structural changes to the dwelling that significantly reduced the magnitude of the variance relief initially requested, and sought a rehearing on the application. Specifically, petitioners proposed to completely remove a 7.4 by 39.7 foot portion of the rear of the dwelling to increase the rear yard set back. In addition, petitioners removed two existing decks, one in the front yard and one in the rear, thereby eliminating the need for setback variances in connection therewith. In the instant petition, petitioners argue that this second application was "entirely new" and therefore warrants a public hearing, as opposed to a rehearing as originally requested. By letter decision dated January 29, 2008, the Zoning Board denied petitioners' application for a rehearing, indicating that after a review of petitioners' request, "the Board finds that no significant difference has been presented regarding the subject parcel and the request previously heard by the Board, decided on March 14, 2006." Petitioners allege that the Zoning Board's denial was arbitrary and capricious and failed to articulate its reasons as to why a hearing should not occur. Hence, petitioners filed the instant petition to reverse

that denial and to compel the Zoning Board to conduct a public hearing on petitioners' second application.

In opposition, the Zoning Board alleges that along with petitioners' letter application for a rehearing dated October 29, 2007, petitioners submitted an undated and uncertified site plan, which is a copy, with new handwritten notations, of the site plan submitted on the original application. No survey was submitted in connection therewith. The Zoning Board argues that it properly exercised its discretion in determining that petitioners' request for a rehearing did not present a "substantial change" in circumstances which would warrant a rehearing as: (1) a variance to maintain the illegal second-story addition, requiring a front-yard setback of 22.7 feet instead of the required 25 feet, was still necessary; (2) a variance to leave a cellar entrance having a rear yard setback of 4 feet instead of the required 25 feet, was still necessary; and (3) neither a new rear-yard setback calculation, nor an accurate floor area ratio (FAR) calculation was presented for the Zoning Board's consideration. The Zoning Board contends that where a landowner, such as in the instant matter, fails to present any new facts that materially change aspects of the variance relief requested, a zoning board may refuse to rehear the application pursuant to Town Law § 267-a (12).

In a proceeding under Article 78 of the CPLR when reviewing a determination of an administrative tribunal, courts have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is substantial evidence (*Pell v Board of Education*, 34 NY2d 222 [1974]; *Matter of Isaksson-Wilder v New York State Div. of Human Rights*, 43 AD3d 921 [2007]; *Allen v Bane*, 208 AD2d 721 [1994]). This approach is the same when the issue concerns the exercise of discretion by the administrative tribunal (*Pell v Board of Education*, 34 NY2d 222, *supra*). The courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is arbitrary and capricious (*Gilman v N.Y. State Div. of Hous. & Cmty. Renewal*, 99 NY2d 144 [2002]; *Matter of Lakeside Manor Home for Adults, Inc. v Novello*, 43 AD3d 1057 [2007]; *Matter of Stanton v Town of Islip Dept. of Planning & Dev.*, 37 AD3d 473 [2007]). The arbitrary or capricious test chiefly relates to whether a particular action should have been taken or is justified and whether the administrative action is without foundation in fact (*Pell v Board of Education*, 34 NY2d 222, *supra*).

It is well-settled that a Court may not substitute its own judgment for that of a reviewing board (see *Janiak v Planning Board of the Town of Greenville*,

159 AD2d 574 [1990], *appeal denied* 76 NY2d 707 [1990]; *Mascony Transport and Ferry Service v. Richmond*, 71 AD2d 896 [1979], *aff'd* 49 NY2d 969 [1980]). Therefore, if the decision rendered by the reviewing board is within the scope of the authority delegated to it, the Court may not interfere and annul it, unless said decision is arbitrary, capricious or unlawful (see *Castle Properties Co. v Ackerson*, 163 AD2d 785 [1990]).

Moreover, local zoning boards have broad discretion in considering applications for area variances and the judicial function in reviewing such decisions is a limited one (*Pecoraro v Bd. of Appeals*, 2 NY3d 608 [2004]). Courts may set aside a zoning board determination only where the record reveals that the board acted illegally or arbitrarily, or abused its discretion, or that it merely succumbed to generalized community pressure (*Pecoraro v Bd. of Appeals*, 2 NY3d 608, *supra*). A determination of a zoning board should be sustained on judicial review if it has a rational basis and is supported by substantial evidence (*Pecoraro v Bd. of Appeals*, 2 NY3d 608, *supra*; *Matter of Hannett v Scheyer*, 37 AD3d 603 [2007]; *Matter of B.Z.V. Enter. Corp. v Srinivasan*, 35 AD3d 732 [2006]).

Town Law § 267-a (12) provides in pertinent part that “[a] motion for the zoning board of appeals to hold a rehearing to review any order, decision or determination of the board not previously reheard may be made by any member of the board. A unanimous vote of all members of the board then present is required for such rehearing to occur . . . Upon such rehearing the board may reverse, modify or annul its original order, decision or determination upon the unanimous vote of all members then present, provided the board finds that the rights vested in persons acting in good faith in reliance upon the reheard order, decision or determination will not be prejudiced thereby” (Town Law § 267-a [12]).

Further, a Town of Islip Zoning Board rule adopted in 1981 provides that “[i]f application is denied, new application cannot be accepted unless there is a substantial change in such application, or if granted permission by the Board after submission of a letter setting forth any new evidence which might indicate such substantial change or unless directed by a court of competent jurisdiction.”

Here, petitioners specifically requested a *rehearing* of their application in the October 29, 2007 letter. Although petitioners now contend that they seek a hearing, not a rehearing, on their second application, the Court must analyze the denial of the Zoning Board in the context of the application and the

record before the Zoning Board at the time. As such, it appears to the Court that the only significant, material difference between the original application and the rehearing request is that no setbacks would be required for the front and rear decks of the property, as petitioners allege that they have been removed. Although petitioners proposed to remove a 7.4 by 39.7 foot portion of the rear of the dwelling, petitioners failed to specify how this removal would impact the setback variances required. Moreover, petitioners failed to submit a certified survey or an accurate FAR with their request for a rehearing. Thus, the Court finds that the main relief sought, to wit: permission to leave the illegal second-story addition, remained unchanged.

Based upon the foregoing, the Court finds that the decision by the Zoning Board to deny petitioners' application for a rehearing was neither arbitrary nor capricious, and with a rational basis in fact and law (*see e.g. Hughes v. Doherty*, 5 NY3d 100 [2005]; *Pell v Board of Education*, 34 NY2d 222 [1974]; *Matter of Lakeside Manor Home for Adults, Inc. v Novello*, 43 AD3d 1057 [2007]; *Matter of Stanton v Town of Islip Dept. of Planning & Dev.*, 37 AD3d 473 [2007]). The Zoning Board acted properly in denying petitioners' application for a rehearing as petitioners failed to demonstrate that there was a substantial change in such application since the first hearing conducted two years prior (*see Matter of Sammartino v Scheyer*, 24 AD3d 681 [2005]; *Matter of Matherson v Scheyer*, 20 AD3d 425 [2005]; *Matter of Lee v Zoning Bd. of Appeals of Town of Putnam Val.*, 1 AD3d 600 [2003]).

Accordingly, the instant petition is **DENIED** and this special proceeding is dismissed.

The foregoing constitutes the decision and Order of the Court.

Dated: September 15, 2009



HON. JOSEPH FARNETI
Acting Justice Supreme Court