

Fort Orange Club v City of Albany

2009 NY Slip Op 32732(U)

November 23, 2009

Supreme Court, Albany County

Docket Number: 94182/09

Judge: Joseph C. Teresi

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.

STATE OF NEW YORK
SUPREME COURT
FORT ORANGE CLUB,

COUNTY OF ALBANY

Petitioner,

-against-

DECISION and ORDER
INDEX NO. 9418-09
RJI NO. 01-09-98558

THE CITY OF ALBANY and NICHOLAS A.
DILELLO, in his capacity as Building
Commissioner of the City of Albany,

Respondents.

Supreme Court Albany County All Purpose Term, November 13, 2009
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Girvin & Ferlazzo, PC
Salvatore D. Ferlazzo, Esq.
Attorneys for Petitioner
20 Corporate Woods Boulevard
Albany, New York 12211

City of Albany, Corporation Counsel
Jeffery Jamison, Esq. ACC
*Attorneys for Respondents The City of
Albany and Nicholas Dilello*
City Hall
Albany, New York 12207

Boies, Schiller & Flexner, LLP
George Carpinello, Esq.
*Attorneys for Proposed Intervenors Historic Albany
Foundation, Inc. and Maryleigh Maden*
10 North Pearl Street
4th Floor
Albany, New York 12207

TERESI, J.:

On November 6, 2009, Petitioner applied to the City of Albany's Department of Buildings for a Building and Zoning Permit to authorize its demolition of two buildings located at 118-120 Washington Avenue in the City of Albany (hereinafter the "premises"). Nicholas Dilello, the Director of the City of Albany's Department of Buildings (hereinafter "Dilello"), did not immediately issue such permit. Within hours of that application and later that same day, by Order to Show Cause, Petitioner commenced this mandamus proceeding to compel Dilello to issue the permit it applied for. Issue was joined by Dilello and The City of Albany (hereinafter collectively referred to as "Respondents"). Prior to the return of the petition, Historic Albany Foundation, Inc. and Maryleigh Maden (hereinafter collectively referred to as "Intervenors") moved to intervene and served a proposed answer. Because Petitioner failed to demonstrate that Respondents have refused to perform a nondiscretionary duty, this Court is constrained to dismiss the petition and remand the matter back to the Respondents for further action on Petitioner's application. Accordingly, the Court need not reach the Intervenor's motion, which is denied as moot.

"In a CPLR article 78 proceeding in the nature of mandamus to compel, the petitioner has an initial burden of presenting factual allegations of an evidentiary nature or other competent evidence tending to establish his or her entitlement to the requested relief." (Henriquez v. New York State Dept. of Corrections, 61 AD3d 1191 [3d Dept. 2009], quoting Rodriguez v. Goord, 260 AD2d 736 [3d Dept. 1999][internal quotation marks omitted]). It is well established that mandamus to compel "is an extraordinary remedy which lies only to compel performance of acts which are mandatory, not those that are discretionary." (Barnwell v. Breslin, 46 AD3d 990, 991

[3d Dept. 2007]; Klostermann v. Cuomo, 61 NY2d 525, 539 [1984]; Gimprich v. Board of Education of City of New York, 306 N.Y. 401 [1954]). “As conditions precedent to a proceeding in the nature of mandamus to compel action, such as we have here, there must be a demand upon a public body or officer to perform a duty and a refusal by the body or officer to perform.” (Matter of Remedy for Infinite Unconcern for Mentally & Physically Handicapped (TRIUMPH) v O’Shea, 77 AD2d 363, 365 [3d Dept. 1980]; Schwartz v. Morgenthau, 23 AD3d 231, 233 [1st Dept. 2005]; Vestal Teacher’s Ass’n v. Vestal Cent. School Dist., 5 AD3d 922 [3d Dept. 2004]; Hassig v. New York State Dept. of Health, 5 AD3d 846, 848 [3d Dept. 2004] [stating that a “petitioner seeking relief in the nature of mandamus to compel is not aggrieved until an appropriate demand is made and refused.”]).

On this record, Petitioner failed to demonstrate that it made a demand which was refused. In support of its petition, Petitioner submits the affidavit of its construction manager. He asserts that he personally filed Petitioner’s Building and Zoning Permit application with Dilello. He alleges that when he presented the permit application, Dilello stated that he would “...refer the application to the Planning Board for review...” No further oral denial or statement is attributed to Dilello. Nor does Petitioner submit a written denial of its permit application. While Petitioner characterizes Dilello’s acts as “not review[ing] the application” the alleged “referral” is not a refusal or denial of the permit application. Moreover, as this action was commenced within hours of Dilello’s “referral”, Petitioner has not demonstrated that Respondents’ inaction for an unreasonable amount of time may be deemed a refusal. (Academy Street Associates, Inc. V. Spitzer, 44 AD3d 592 [1st Dept 2007]). Because Dilello’s “referral” is not a refusal it does not constitute an “actual, concrete injury” and Petitioner has failed to meet its initial burden to

demonstrate that it was aggrieved. (Schmitt v. Skovira, 53 AD3d 918, 920 [3d Dept. 2008]).

Respondents also demonstrated that the Petitioner has not suffered a final, concrete injury. Dilello's affidavit in opposition states that he has "not had the opportunity to completely review the final application" and that the permit application "require[s] further review and recommendation by the City of Albany Planning Board." Further, Respondents' Answer specifically states that Dilello "did not deny [Petitioner's] application." (emphasis in original). As such, Petitioner's application is still pending before Respondents. At this time, it is unknown what Respondents final determination will be and whether such determination will be adverse to Petitioner. Nor is it clear what action, if any, the Planning Board will take on Dilello's "referral".

While Petitioner claims that Dilello's "referral" itself was done in excess of his jurisdiction, it has not demonstrated that such referral causes an actual concrete injury entitling it to an Order compelling Respondents to issue the building permit they seek. At most, Petitioner could seek an order prohibiting such referral, which was not done here.

This action is premature. On this record, Petitioner has failed to demonstrate that it has suffered an "actual concrete injury" and that it is sufficiently aggrieved to bring this mandamus to compel action. Nor, on this record, did the Petitioner argue or demonstrate that any exception to the finality requirement applies. (Watergate II Apartments v. Buffalo Sewer Authority, 46 NY2d 52 [1978]).

Accordingly, because Petitioner did not demonstrated its entitlement to the extraordinary remedy of mandamus to compel, this court is constrained to dismiss the petition and remand the matter back to Respondents. Additionally, because Petitioner failed to demonstrate its prima facie entitlement to relief, this court need not reach the proposed Intervenors' motion or

counterclaim as there is no longer a pending proceeding in which to intervene. (McDonald v. Capital Dist. Transp. Authority, 199 AD2d 671 [3d Dept. 1993]; Town Of Crown Point v. Cummings, 300 AD2d 873 [3d Dept. 2002]).

This Decision and Order is being returned to the attorneys for the Respondents. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: November 23, 2009
Albany, New York


JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Order to Show Cause, dated November 6, 2009, Verified Petition, dated November 6, 2009, Affidavit of Salvatore Ferlazzo, dated November 6, 2009, Affidavit of Kenneth Rizzo, dated November 6, 2009.
2. Verified Answer, dated November 9, 2009, Affirmation of Jeffery Jamison, dated November 10, 2009, with attached unnumbered exhibit, Affidavit of Nicholas Dilello, dated November 9, 2008.
3. Affidavit of Salvatore Ferlazzo, dated November 10, 2009, with attached Exhibits A-B, Affidavit of Herbert Shultz, dated November 10, 2009, Affidavit of Lawrence Wilson, dated November 10, 2009.
4. Order to Show Cause, dated November 10, 2009, Affidavit of Susan Holland, dated November 10, 2009, with attached Exhibit A-B, Proposed Verified Answer and Counterclaim, dated November 10, 2009.
5. Verified Answer to Intervenor's Counterclaim, dated November 12, 2009, Affirmation of Jeffery Jamison, dated November 12, 2009, with attached Exhibits A-E.
6. Affidavit of Salvatore Ferlazzo, dated November 12, 2009, with attached Exhibit A, Affidavit of Kenneth Rizzo, dated November 12, 2009.
7. Affidavit of Salvatore Ferlazzo, dated November 13, 2009, with attached unnumbered exhibit.