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5-6-10

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

PRESENT: HON. CAROL EDMEAD PART 31

Index Number : 105548/2009
ARIZA, LLC
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 003
VACATE

INDEX NO.
MOTION DATE 4/20/10
MOTION SEQ. NO. 003
MOTION CAL. NO.

his motion to/for

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

NYS SUPREME COURT
RECEIVED
MAY 06 2010
MOTION SUPPORT OFFICE

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendant, the City of New York, acting by and through its Department of Buildings pursuant to CPLR 2221, for an order vacating and granting leave to reargue this Court's decision and order entered on February 22, 2010 to the extent that the Court granted plaintiffs summary judgment on their First Cause Action is denied; and it is further

ORDERED that plaintiffs' application for costs is denied; and it is further

ORDERED that defendant, the City of New York shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

FILED
MAY 06 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5/4/10

HON. CAROL EDMEAD J.S.C.

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

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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ARIZA, LLC, d/b/a EARLY DAYS CHILDCARE CENTER and N&J ASSOCIATES, LLC,

Index No.105548/09

Plaintiffs,

-against-

THE CITY OF NEW YORK, acting by and through its DEPARTMENT OF BUILDINGS and THE BOARD OF MANAGERS OF THE 105 W. 72 CONDOMINIUM,

Defendants.

---------- X

HON. CAROL EDMEAD, J.S.C.

MEMORANDUM DECISION

Defendant, the City of New York, acting by and through its Department of Buildings (the "DOB" or the "City") moves, pursuant to CPLR 2221, for an order vacating and granting leave to reargue this Court's decision and order entered on February 22, 2010 to the extent that the Court granted plaintiffs summary judgment on their First Cause Action.[1]

Factual Background

Plaintiff N&J Associates, LLC ("N&J"), an owner of a commercial unit at 105 West 72nd Street Condominium, leased its unit to Ariza, LLC, d/b/a Early Days Childcare Center ("Ariza"), which proposed to use the unit as a childcare facility. The DOB later issued certain permits in connection with renovations necessary for this use (the "Permits"). However, in March 2009, DOB revoked the Permits, due to N&J's failure to respond to DOB's December 18, 2008 notice of intention to revoke the Permits on the ground that the required Owner's Authorization for the building had not been submitted.

[1] On March 5, 2010, the City moved to appeal this Court's February 22, 2010 Decision.

On April 21, 2009, plaintiffs commenced an Article 78 Proceeding before Justice Marcy Friedman ("Judge Friedman") challenging the revocation of the Permits, the decision to audit and the issue a Stop Work Order, and the alleged involvement of the Board of Managers of the 105 W. 72nd Street Condominium (the "Board") with the revocation of the Permits (the "Petition"). Plaintiffs also sought damages of no less than 1,000,000.00.

The following day, plaintiffs commenced the instant declaratory judgment action before Justice Eileen Rakower ("Judge Rakower"), and subsequently amended the Complaint on June 4, 2009 (the "Complaint"). The First Cause of Action in the Complaint sought declarations that the Board's consent to the renovations proposed in the Permit was unnecessary, that DOB reinstate the Permits and lift the Stop Work Order, and that plaintiffs are entitled to damages from DOB and the Board of no less than $1,000,000.00. The Complaint's two other causes of action assert claims against the Board for breach of contract (Second Cause of Action) and tortuous interference with prospective economic relations (Third Cause of Action).

On June 9, 2009, Judge Friedman granted the City's cross-motion and dismissed the Article 78 proceeding, based on plaintiffs' failure to appeal the DOB decisions at issue to the Board of Standards and Appeals ("BSA"). Justice Friedman stated that the interpretation of the Building Code falls squarely within the agency's expertise and authority. Justice Friedman also stated that delays occasioned by the requirement to exhaust administrative remedies did not constitute irreparable harm and that petitioners failed to show that exhaustion should be excused.

Thereafter, the City moved to dismiss this action on the grounds that the nature of the relief sought is not properly the subject of a declaratory judgment action, and that the instant action as against the City is precluded by the doctrines of *res judicata* and collateral estoppel.

Justice Rakower held that the First Cause of Action, while denominated a declaratory judgment, was properly brought and to be treated as a claim under Article 78 as it challenges DOB's decision to impose a Stop Work Order and revoke the Permits as violative of lawful procedure. Judge Rakower then held that this proceeding "is clearly precluded by principles of *res judicata*, as Plaintiffs have previously brought an Article 78 proceeding challenging the DOB actions complained of herein and had that action dismissed by Justice Friedman based upon their failure to exhaust their administrative remedies."

Following the dismissal of the Complaint against the City, this action was transferred to this Court.

Plaintiffs then moved for summary judgment against *the Board* on its First Cause of Action, arguing that the Plan clearly states that the owner of the Unit may use it for any lawful purpose without the prior consent of the Board, and that the Building Code does not alter this conclusion in any way. Plaintiffs argued that the Board unlawfully interfered with Plaintiffs' respective rights and interest, and was therefore liable for damages. The Board cross moved to dismiss arguing that the Complaint was barred by *res judicata*.

This Court granted plaintiffs' motion, holding that plaintiffs' claims against the Board were not barred by *res judicata* as "[t]he merits of Ariza and N&J's claims against the Board were not, and could not have been considered in either the prior Article 78 proceeding or the DOB's motion to dismiss in this action." Next, the Court found that, "pursuant to the Plan, the Board's consent to the renovations in the Unit is unnecessary. The Board's position that its consent to the renovations was required by law is belied by Section 28-104.8.2 of the Administrative Code of the City of New York when it is read in conjunction with the plan." In

reaching that conclusion, the Court relied on the rule of statutory construction that the "use of the "conjunction 'or' in a statute usually indicates that the language is to be construed in the alternative sense." The Court continued:

> In this case, the statute permits either the owner or the condominium association to sign the application, In order to determine which signature is required on an individual application, one must read the condominium plan and by-laws in conjunction with the regulation. Pursuant to the Plan, the Board must approve the renovations in the individual residential units, and in those cases, the Board's signature on the permit application for residential units is required. . . . However, since the Plan specifically states the Board's approval for renovations to a commercial unit is not required, it follows that a commercial unit owner signature on the permit application, as authorized by the Plan and the Administrative Code, is sufficient. . . .

In support of reargument of this Court's February 18, 2010 decision, the City argues that the Court incorrectly interpreted the effect of the prior decisions in that summary judgment is barred by both Judge Rakower's decision, which is law of the case, and by collateral estoppel due to the Article 78 proceeding. The "law of the case" doctrine precludes one justice from reviewing, disturbing or overruling an order of another justice of coordinate jurisdiction in the same action or proceeding. While Judge Rakower's conclusions as to the characterization of the First Cause of Action and its dismissal were subject to appeal by plaintiffs, having been reached following full briefing of the City's motion by the parties, in the absence of an appeal, they are binding on all subsequent decisions herein. Thus, the City argues, summary judgment on the First Cause of Action and the analysis of NYC Administrative Code §28-104.82 on which it was based should be vacated, and the First Cause of Action dismissed based on the law of the case.

Additionally, summary judgment on the First Cause of Action is also barred by Justice Friedman's decision under the doctrine of collateral estoppel. The First Cause of Action essentially repeats the allegations in the Petition regarding the City and the Board. The central

issue in both matters and with respect to both the City and the Board is also one and the same - whether the Board's authorization is required on DOB permit applications under NYC Administrative Code §28-104.82. Additionally, plaintiffs had a full and fair opportunity to oppose the City's motion to dismiss the Petition for failure to exhaust administrative remedies and could have appealed the Article 78 Decision. Moreover, the findings in the Article 78 Decision, that the interpretation of the Building Code falls squarely within the agency's expertise and authority and that judicial review is precluded based on the failure to exhaust administrative remedies, were material to the dismissal of the Petition. Accordingly, plaintiffs are bound by those findings and may not obtain herein judicial review of the requirements under NYC Administrative Code § 28-104.8.2 rejected in the Article 78 Proceeding. The City also contends that to the extent that the declarations sought by plaintiffs are not dependent on NYC Administrative Code § 28-104.8.2, *i.e.*, that plaintiffs are the owner and lessee of the Unit and Ariza intends to make lawful use of the Unit as a childcare facility, such declarations are of no consequence in this action except in conjunction with the requirements under NYC Administrative Code §28-104.82.

The City further contends that the Court's reliance on the principles of *res judicata* and the absence of a final determination on the merits is misplaced as a final judgment is not required under the "law of the case" doctrine. Collateral estoppel also applies to unappealed determinations of law, such as the Article 78 Proceeding's determination. And, the decisions cited by the Court[2] also do not support the Court's conclusions. Furthermore, the Court

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[2] *Town of Caropa v Joseph Herms*, 62 AD3d 1121 [3d Dept 2009] and *Fahev v Axelrodi*, 171 AD2d 213 [3d Dept 1991].

misconstrued Section 28-104.8.2 of the Administrative Code. As provided under NYC Administrative Code §28-104.82, a permit application submitted to DOB "shall contain a signed statement by the owner, cooperative owners' corporation, or condominium owners' association stating that the applicant is authorized to make the application." Under Section 28-101.5.8.2 (as defined under the Building Code), "owner" is any "person, agent, firm, partnership, corporation or other legal entity having a legal or equitable interest in, or control of the premises. Thus, as is in the instant case, where the applications were submitted by a condominium unit owner, the condominium association, given its legal interest in the unit, must authorize the applications. The Court's interpretation is faulty for various reasons. The Court's interpretation improperly creates a distinction without basis between condominiums and all other types of ownership by allowing an application pertaining to a condominium unit to be submitted without the authorization of all entities with a legal interest in the premises at issue in the application despite the requirement for such authorization in applications pertaining to all other types of premises. Additionally, under the Court's interpretation, the requirement of owner authorization under Section 28-104.8.2 would be redundant as the application itself is submitted by the owner, as, for example, the applications submitted by N&J for the Permits in question. Finally, there would be no need to include "condominium owner's association" in the list of entities whose authorization is required if the authorization of the condominium unit owner was sufficient under Section 28-104.8.2. Finally, as Justice Friedman expressly held in dismissing the Article 78 decision, the interpretation of the Building Code requirements at issue falls squarely within the agency's expertise and interpretation.

The Board supports the City's motion to reargue. The Board contends that it had

previously argued to this Court that plaintiffs' claims were barred by the principle of *res judicata* and the City did not participate in the prior motion practice because Judge Rakower's decision had removed the City from the case. The Board agrees with the City's argument that plaintiffs' claims were barred by the doctrines of law of the case and collateral estoppel. The Board also supports DOB's argument that the Court's declaration that plaintiffs, as individual unit owners, are entitled to submit a DOB permit application, is a misinterpretation of NYC Administrative Code §28-104.82. The party required to authorize a DOB application depends upon the ownership status of the building as an entirety: *e.g.*, single owner, cooperative, or condominium. In turn, the governance structure determines which entity - single owner, cooperative, or condominium - is entitled to authorize a DOB permit application. The evolution of this section of the Building Code in recent times reflects major changes in home ownership patterns in NYC, from mostly individual owners/landlords, to groups of individual owners (*i.e.*, within cooperatives and condominiums), whose individual rights are subject to an internal governing board elected from among the individual owners. The Building Code did not evolve in order to give more and more entities the right to submit a DOB permit application. Rather, argues the Board, the law evolved in order to limit the number and kinds of entities with the power to authorize the submission of a DOB permit application. The decision of this Court, which extends the right of an individual building owner to submit a DOB permit application, to each and every individual unit owner within a jointly-owned and governed condominium building, is a misreading of the law and its evolution. Moreover, it is undisputed that the Board has a legal responsibility and fundamental duty to oversee the subject condominium building, and to insure that it operates in accordance with law, which duty cannot be abdicated. The declaration by this

Court that the owner of one unit within the entire condominium may submit a permit application to DOB, without the authorization of the governing Board removes any and all oversight authority from the governing entity of the building. The Board's duty to oversee the building is incompatible with a system where every unit owner can submit its own DOB permit application. Thus, the Board argues, this Court should rule that under Section 28-104.8.2, only the Board is authorized to authorize a DOB permit application.

In opposition, plaintiffs argue that the motion should be denied, with costs. Plaintiffs first argue that the City has no standing to bring this motion. The Article 78 proceeding that Ariza had brought was, upon the City's motion, dismissed for failure to exhaust administrative remedies. Then, when Ariza sought to prosecute its declaratory judgment action against the City and the Board, the City successfully obtained a dismissal of the case against it. This time the City claimed that the essential nature of Ariza's claim against it was relief under Article 78 but that such relief was barred under the doctrine of *res judicata*. Judge Rakower agreed and "[o]rdered that the City's motion to dismiss is granted and the first cause of action of the complaint as against the City is severed and dismissed." Therefore, the City obtained the exact relief it wanted: dismissal from the case without ever having to defend its position on the merits. Notwithstanding that it is a non-party to this action, the City moves to vacate and reargue the Court's order which granted Ariza certain declaratory judgment relief against the Board. Such a motion is impermissible since a non-party "lacks standing to proceed in a matter." Reargument cannot be granted because the motion has not been brought by the unsuccessful party, here, the Board. Since the City lacks the requisite standing to challenge this Court's order, its motion must be denied in this basis alone.

Even assuming that the City has standing to reargue, the Court's order, with respect to the first cause of action seeking summary judgment on its declaratory judgment claims against the Board, was properly made. First, the Board, in its papers below, did not make any argument with respect to the law of the case. Hence, this new argument cannot be raised by a non-party at this late date. Second, as regards the *res judicata* claim, this Court properly held that the merits of Ariza and N&J's claims against the Board were not, and could not have been considered in either the prior Article 78 proceeding or the DOB's motion to dismiss in this action, and that *res judicata* does not serve to bar consideration of these claims. The finding was properly predicated on the basis that the failure to exhaust administrative remedies is not a decision on the merits.

The City's contention that this Court misconstrued NYC Administrative Code § 28-104.8.2 is erroneous. The papers demonstrate that Ariza begged the City to review the Condominium documents to determine who was the "owner" of the unit so that Ariza could sign the permit application take any necessary steps to clear DOB objections and move along with the project The City refused to take such action arguing that any legal determination of "ownership" would have to be made by a court. (Notwithstanding that the City had already determined *sub silentio* that the Board was the owner. Otherwise, why ignore the condominium documents which clearly provided in several places that N&J, as the owner of the Commercial Unit, did not need Board approval to lawfully utilize the unit.) Now that the Court determined that N&J was the owner for purposes of §28-1048.2 and that the Board's signature on the prior application for the Unit was not required, the City seeks to avoid the very Court determination it obstinately required Ariza to obtain.

The City, not the Court, has misrepresented Administrative Code § 28-104.8.2. First,

deference need not be given to an administrative agency charged with enforcing the statute when the issue is one of pure statutory analysis, and in this case, deference certainly not be given when, under the City's self-serving analysis, the term "owner" of a unit would have no meaning whatsoever. This Court properly understood that a statute should not be interpreted to achieve an absurd result. Thus, in this case, the statute permits either the owner or the condominium association to sign the application. In order to determine which signature is required on an individual application, one must read the condominium plan and by-laws in conjunction with the regulation. Pursuant to the Plan, the Board must approve the renovations in the individual residential units, and in those cases, the Board's signature on the permit application for residential units is required. However, since the Plan specifically states the Board's approval for renovations to a commercial unit is not required, it follows that a commercial unit owners signature on the permit application, as authorized by the Plan and the Administrative Code, is sufficient. Thus, this Court committed no error in ruling that "the Board's signature on the permit application for the Unit was not required."

In reply, the City argues that plaintiffs' opposition to the City's motion leave unchallenged the grounds for reargument. The "law of the case" doctrine bars consideration of the First Cause Action, which was dismissed by the prior decision herein issued by Judge Rakower. Additionally, plaintiffs are barred by collateral estopped from seeking judicial review of the Building Code provisions at issue based on the holding in the similarly based Article 78 Proceeding that the interpretation of the Building Code falls squarely within DOB's discretion and the dismissal of that proceeding for failure to appeal the revocation of the DOB permits in question to the BSA. To claim that the City does not have standing to challenge the February 22,

2010 Decision, ignores the posture of this case and the related Article 78 proceeding. As the prevailing party in two decisions by two different judges, the City has a cognizable interest in rearguing the failure to recognize the preclusive effect of those decisions in granting plaintiffs summary judgment on the First Cause of Action.

The law of the case doctrine is not affected by the Board's failure to raise the argument below. The argument was also not asserted at a "late date," but in timely response to the erroneous February 22, 2010 Decision. Furthermore, the "law of the case" doctrine precludes exactly what happened here: one justice reviewing, disturbing or overruling an order of another justice of coordinate jurisdiction in the same action or proceeding. And, the City did not argue *res judicata*. Plaintiffs also ignore the collateral estoppel effect of the Article 78 Decision. Given the determination that review by BSA is required prior to judicial review of DOB's revocation of the Permits, the Court was precluded from addressing the issue and the Building Code provision in the absence of prior review by BSA. Plaintiffs cannot now raise arguments in opposition to the requirement of prior BSA review having failed to appeal the Article 78 Decision.

Also, as shown by the December 18, 2008 and March 24, 2009 letters from DOB, the City's interpretation of NYC Administrative Code § 28-104.8.2 has always been that permit applications submitted by a condominium unit owner must be authorized by the condominium association. Equally clearly, the City sought only the issue first be addressed by BSA.

Finally, NYC Administrative Code § 28-104.8.2 requires permit applications to be authorized by a person or legal entity with an interest in the premises, *i.e.* the owner, if a lessee is the applicant; the cooperative owners' corporation, if a shareholder of a cooperative is the

applicant; and the condominium owners association, if a condominium unit owner is the applicant. There would be no need to include "condominium owner's association" in the list of entities whose authorization is required if the authorization of the condominium unit owner were sufficient. Lastly, as Judge Friedman held in dismissing the Article 78 proceeding, the interpretation of the Building Code falls squarely within the agency's expertise and interpretation.

Discussion

CPLR 2221 (a) provides that "A motion for leave to renew or to reargue a prior motion, for leave to appeal from, or to stay, vacate or modify, an order shall be made, on notice, to the judge who signed the order, unless he or she is for any reason unable to hear it . . . ." A motion for leave to reargue under CPLR 2221, "is addressed to the sound discretion of the court and may be granted only upon a showing 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision'" (*William P. Pahl Equipment Corp. v Kassis*,182 AD2d 22 [1st Dept] *lv. denied and dismissed* 80 NY2d 1005, 592 NYS2d 665 [1992], *rearg. denied* 81 NY2d 782, 594 NYS2d 714 [1993]). On reargument the court's attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked (*see Macklowe v Browning School*, 80 AD2d 790, 437 NYS2d 11 [1st Dept 1981]).

As to whether the City has standing to seek leave to reargue this Court's February 2010 decision, although CPLR 2221 addresses the Judge or Court to whom or which a motion to reargue must be made, this section does not address *by whom* such a motion must be made. Yet, the purpose of reargument is widely known and accepted: reargument "is designed to afford a *party* an opportunity to establish that the court overlooked or misapprehended the relevant facts,

or misapplied any controlling principle of law. Its purpose is not to serve as a vehicle to permit the unsuccessful *party* to argue once again the very questions previously decided. . . ." (*Foley v Roche*, 68 AD2d 558, 567, 418 NYS2d 588 [1st Dept 1979]; *Pro Brokerage v Home Ins. Co.*, 99 AD2d 971, 472 NYS2d 661 [reargument is not designed to afford the unsuccessful *party* successive opportunities to reargue issues previously decided]). However, "Sometimes a nonparty is given the right to make a motion in an action. Some examples are the motion to intervene under CPLR 1012-1014 and the motion to substitute under CPLR 1021." (David Siegal, McKinneys Practice Commentaries, CPLR 2211:2) ("A general rule can be formulated along these lines: Anything that the court has the power to order, an interested party has the right to move for. Whether the motion is granted is of course another matter. That depends entirely on the merits of the motion . . .")). Reargument presumes that the decision being challenged resulted from arguments raised by parties to a litigation (*see Dugas v Bernstein,* 5 Misc 3d 818, 826, 786 NYS2d 708 [Sup Ct New York County 2004] ("a motion for leave to reargue to be made within the time that *the aggrieved party* has to appeal from the prior order)).

Plaintiffs' claims against the City in this action were dismissed and at the time the underlying papers were submitted to the Court, the City was no longer a party to this action by virtue of Judge Rakower's decision. Even the claims against the City pertaining the Permits as alleged in the related Article 78 proceeding were dismissed. Therefore, the City, which was no longer a party to this action, which did not participate in the underlying motion practice giving rise to the order which is the subject of this reargument motion, and which did not seek leave to intervene or for substitution, lacks standing to seek to reargue this Court's February 22, 2010 decision and order.

Even assuming the City has standing to reargue the February 2010 decision, reargument is not designed to afford a party opportunities to present arguments different from those originally asserted (*Foley*, at 567; *William P. Pahl Equipment Corp.*, 182 AD2d at 27; *Bush v City of New York*, 195 Misc 2d 882, 762 NYS2d 775 [1993]). The plaintiffs' underlying motion for summary judgment and the Board's cross-motion did not address whether the plaintiffs' First Cause of Action was barred under the law of the case doctrine. The law of the case doctrine was raised as a basis for dismissal of the action for the first time in the instant motion to reargue, and is markedly different from the doctrine of *res judicata* originally asserted by the moving parties. Thus, the law of the case doctrine is not a proper basis for reargument (*Simpson v Loehmann*, 21 NY2d 990 [1968] ("A motion for reargument is not an appropriate vehicle for raising new questions")). This is not an instance where questions of law were raised for the first time by the court's decision (*see Manocherian v Lenox Hill Hosp.*, 229 AD2d 197, 654 NYS2d 339 [1st Dept 1997]). Likewise, the Board did not seek dismissal of the action as asserted against it based on the doctrine of collateral estoppel, and this argument, not raised in the underlying papers or by the Court, cannot serve as a basis for reargument. The City's instant contention that "[i]n granting summary judgment on the First Cause of Action for declaratory judgment, the Court ignored the doctrines of "law of the case" and collateral estoppel" lack merit.

The Court notes that while the City previously moved in the instant action to dismiss the declaratory judgment cause of action as against it on the grounds of *res judicata* and "collateral estoppel," and the Board supported the City's motion, the resulting decision by Judge Rakower dismissed the action as against the City only on the ground of *res judicata*; Judge Rakower's decision did not determine whether plaintiffs' action against *the Board* was barred under the

doctrine of *collateral estoppel*; nor did Judge Rakower's decision address the merits of the plaintiffs' case against the City or the Board. The same can be said concerning Judge Friedman's decision, on which Judge Rakower's decision was based, which dismissed the Article 78 proceeding *against the City* for failure to exhaust administrative remedies. Therefore, plaintiffs' reliance upon the premise that the Court overlooked the collateral estoppel effect of both of these decisions, in that " . . . collateral estoppel provides that a legal issue can be determined in a subsequent action by reference to a previous judgment, even if in a different cause of action, if the same issue was necessarily raised and decided and the party against whom collateral estoppel is sought had a full and fair opportunity to contest" and bars plaintiffs' First Cause of Action against the Board, is misplaced.

Even if leave to reargue were granted to the City on the ground that the Court overlooked the collateral estoppel effect of Judge Rakower and Judge Friedman's decisions, the Court adhere to its earlier determination.

Justice Rakower held that the First Cause of Action for a declaratory judgment was a challenge of the *City's* decision to impose a Stop Work Order and revoke the Permits and should be treated as an action under Article 78. Justice Rakower then dismissed the First Cause of Action as against *the City* based on the dismissal of the prior Article 78 Proceeding challenging the City's actions. The Article 78 proceeding was dismissed by Judge Friedman for failure to exhaust administrative remedies. Both the decision by Judge Rakower in this action, and the decision by Judge Friedman addressed the procedural infirmity of plaintiffs' claims as against the City only, and not the merits of plaintiffs' claims against the City or as against the Board. Collateral estoppel, or issue preclusion, is invoked when the cause of action in the second

proceeding is different from that in the first and applies to a prior determination of an issue which was actually and necessarily decided in the earlier case (*DaimlerChrysler Corp. v Spitzer,* 6 Misc 3d 228, 782 NYS2d 610 [Sup Ct Albany County 2004]). It is confined to the point actually determined and applies only to issues which were actually litigated, not to those which could have been litigated (*id.*). In order for the doctrine of collateral estoppel to apply, two requirements must be satisfied: the party seeking the benefit of the doctrine must prove that the identical issue was decided in the prior action and is decisive in the current action, and that the party to be precluded from relitigating the issue had a full and fair opportunity to contest the prior determination (*DaimlerChrysler Corp. v Spitzer*). The issue decided by Judge Rakower and Judge Friedman were not identical to the issue addressed by this Court in its February 2010 decision, and thus, such prior decisions had no collateral effect on the issues before the Court at the time of its February 2010 decision. And, for the reasons stated in the February 2010 decision, the Board's signature on the permit application for the Unit was not required.

Therefore, leave to reargue this Court's February 22, 2010 decision is denied.

As to plaintiffs' request for costs, such application is denied. The Rules of the Chief Administrator of the Courts grant the court discretion to impose financial sanctions and/or costs on a party or the party's attorney for engaging in frivolous conduct (*Grozea v Lagoutova*, 67 AD3d 611, 888 NYS2d 507 [1st Dept 2009] citing 22 NYCRR 130.1.1[a], [c][2]). Frivolous conduct occurs when, as defined in subdivision (c) of 22 NYCRR 130-1.1:

> "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false" (see e.g. Intercontinental Bank Ltd., 300 A.D.2d at 208, 753 N.Y.S.2d 449 [the making of "false

assertions of material facts" was frivolous]; Nachbaur v. American Tr. Ins. Co., 300 A.D.2d 74, 75, 752 N.Y.S.2d 605 [2002], lv. dismissed, 99 N.Y.2d 576, 755 N.Y.S.2d 709, 785 N.E.2d 730 [2003], cert. denied 538 U.S. 987, 123 S.Ct. 1801, 155 L.Ed.2d 682 [2003] [the bringing of "repetitive and meritless motions" constituted frivolous conduct]; Premier Capital v. Damon Realty Corp., 299 A.D.2d 158, 753 N.Y.S.2d 43 [2002]).

155 West 21st Street, LLC v McMullan, 61 AD3d 497, 877 NYS2d 56 [1st Dept 2009]).

Plaintiffs made no showing, and the record fails to indicate, that the City engaged in frivolous conduct.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendant, the City of New York, acting by and through its Department of Buildings pursuant to CPLR 2221, for an order vacating and granting leave to reargue this Court's decision and order entered on February 22, 2010 to the extent that the Court granted plaintiffs summary judgment on their First Cause Action is denied; and it is further

ORDERED that plaintiffs' application for costs is denied; and it is further

ORDERED that defendant, the City of New York shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: May 4, 2010

Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD