

Matter of Sau Ping Lin v Srinivasan

2012 NY Slip Op 33012(U)

December 18, 2012

Supreme Court, Richmond County

Docket Number: 103608/11

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.: 103608/11
Motion No.: 001**

In the Matter of the Petition of:

**SAU PING LIN,
JIAN GUO,
LI ARCHITECT ASSOCIATES, PLLC and
LING LI,**

Petitioners

DECISION & ORDER

against

HON. JOSEPH J. MALTESE

**MEENAKSHI SRINIVASAN, Chairperson,
CHRISTOPHER COLLINS, Vice-Chairperson,
DARA OTTLEY-BROWN,
SUSAN HINKSON, R.A.,
EILEEN MONTANEZ, P.E. Commissioners constituting the
BOARD OF STANDARDS AND APPEALS OF THE CITY OF
NEW YORK,
MARSHALL A. KAMINER, P.E., and
THE DEPARTMENT OF BUILDINGS OF THE CITY OF NEW YORK,**

Respondents,

The following items were considered in the review of the following petition to reverse a finding of the Board of Standards and Appeals

<u>Papers</u>	<u>Numbered</u>
Notice of Petition and Affidavits Annexed	1
Memorandum of Law in Support	2
Verified Answer	3
Memorandum of Law in Opposition	4
Reply Memorandum of Law	5
Supplemental Affirmation	6
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Petition is as follows:

The petitioners commenced this action pursuant to CPLR Article 78 for this court to review a final determination of the Board of Standards and Appeals of the City of New York (“BSA”). The petitioners seek an order annulling and vacating two resolutions of the BSA dated December 6, 2011; a declaration that the BSA’s determinations were arbitrary and capricious and

an abuse of its discretion and contrary to law; and the entry of an order granting an a zoning variance. The petition is denied and the determination of the BSA is affirmed.

Facts

On or about March 18, 2004 the petitioner Sau Ping Lin (“Lin”) purchased land located at 23 Windom Avenue, Staten Island, New York. Lin describes this lot as an “oversized” 60 foot by 100 foot parcel with a single family home located on it at the time of purchase. It was Lin’s intention to demolish the existing structure on the property and erect two semi-detached two family dwellings on a subdivided lot. The record shows that on or about August 3, 2004 Lin engaged the services of an architect, petitioner Ling Li and the firm Li Architect Associates, PLLC to sub-divide the lot into two 30 foot by 100 foot plots. The two sub-divided lots would be designated 23 Windom Avenue and 25 Windom Avenue.

According to Lin, building plans were submitted to the Department of Buildings in early January 2005 through the Professional Certification Program. Building permits were then issued in February 2005 for 25 Windom Avenue; and in June 2005 for 23 Windom Avenue. Work commenced at the site. In April 2006 the Department of Buildings (“DOB”) conducted an audit of the application and raised several questions regarding the level of the rear yard and whether it met the natural grading. A stop work order was issued in May which caused Lin to meet with DOB professionals to review the original survey concerning this issue. At the end of May the DOB issued a Recision of the Notice of Intent to Revoke and consequently allowed the project to resume. On June 5, 2006 DOB conducted another site inspection which resulted in another stop work order which prompted another meeting between Lin and DOB professionals. The issue was resolved and the project once again resumed on June 9. However this was not the last time construction was stopped at the project. On June 13 and again on June 29 after receiving complaints the DOB stopped work at the site. By August 2006 the structures were completed and arrangements were made for final inspections to obtain a Certificate of Occupancy.

On September 28, 2006 the DOB issued an objection citing a one story stucco building encroaching on the property which it deemed contrary to the survey. The architect provided additional information which resulted in a finding from the Deputy Commissioner which stated that the encroachment would not effect the Certificate of Occupancy for 25 Windom Avenue. Notwithstanding this position a second audit was commenced citing a violation of §BC 27-139, lot boundaries provided on plans as being contrary to survey. Subsequently, the approval and permit for 25 Windom Avenue were revoked.

On March 26, 2007 a Certificate of Occupancy was issued for 23 Windom Avenue and on April 12, 2007 it was sold to petitioner Jian Guo. In or about September 25, 2007 petitioner Lin as the owner of 25 Windom Avenue commenced an action in Supreme Court, Richmond County against the owner of 72 Ocean Terrace seeking the removal of the of the encroachment onto his lot. By Judgment dated August 12, 2008 the owner of 72 Ocean Terrace was awarded adverse possession of the encroaching structure causing the depth of the lot located at 25 Windom Avenue to shrink below 100 feet. The property located at 25 Windom Avenue was now 30 feet wide by approximately 84 feet and 100 feet with a total area of 2,728 square feet.

On November 18, 2008 the DOB advised Li that the permit for 25 Windom Avenue would be restored if the following conditions were met: 1) a restrictive declaration must be registered with the county clerk stating that she is aware that the rear yard arrangement is contrary to the Zoning Resolution, in that the as-built condition is contrary to section 23-47 if considered an interior lot; and 2) notarized letters of acceptance from all current neighbors about this non-compliant condition.

By letter dated March 23, 2009 the DOB advised Li that a Certificate of Occupancy could not be issued for 25 Windom Avenue and that November 18, 2008 letter stating the method to restore the permit for the property was issued incorrectly because the Judgement redrew the tax lot but not the zoning lot.

On June 23, 2011 the petitioners submitted an application for a variance to allow the legalization of the existing semi-detached two family home on 23 Windom Avenue. Absent the granting of the variance the structure violates the lot area and lot width requirements under the Zoning Resolution. On the same date the petitioners sought a variance for the existing two family detached home at 25 Windom Avenue. The request for the variances were denied and the denials were subsequently affirmed by the Board of Standards and Appeals. This petition pursuant to CPLR Article 78 follows that affirmation of the determination of the Board of Standards and Appeals.

Discussion

The scope of judicial review of administrative actions pursuant to Article 78 in the Civil Practice Rules and Law is limited. “The only questions that may be raised in a proceeding under [CPLR Article 78] are . . . whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion.”¹ An action or determination is arbitrary only if it was made without sound basis in reason or without regard to the facts.²

Here, the petitioners advance an argument that the BSA acted arbitrarily, capriciously and abused its discretion by not granting a zoning variance which would allow for the issuance of a Certificate of Occupancy for both 23 and 25 Windom Avenue. Essentially the main thrust of the petitioners’ argument is that setting aside the fact that the architect, Li, submitted the initial plans through the Professional Certification Program, the onus was on the Department of Buildings to find any and all violations with the submitted plans during the early audits and site inspections.

¹ CPLR § 7803.

² *Heintz v. Brown*, 80 NY2d 998, 1001 [1992].

The Rules and Regulations of the of the City of New York state clearly that:

. . .That, should Department audit indicate a non-compliance with the Zoning Resolution, the Building Code and/or other applicable laws and regulations, the architect or engineer of record shall take the necessary remedial measures to obtain compliance.

. . .That the owner is aware of the application and the conditions under which it is being submitted and agrees to comply with any requirement for remedial measures, if necessary.³

Here, the architect, Ling Li, acknowledges that the zoning law changed in 2004 prior to the submission of the plans to the Department of Buildings 2005. But Li asserts that the newly enacted zoning requirements were not in printed form at the time the plans were produced and subsequently submitted. However, the City of New York points out that the updated zoning requirements were available through the Department of City Planning's internet website since 1999, as well as in print form from the office itself. The City of New York also states that the zoning changes were circulated prior to adoption to community boards, borough boards, and borough presidents well in advance of its adoption.

The requirements for the issuance of a zoning variance are found under ZR § 72-21 which set forth five specific findings which include that unique physical conditions create practical difficulties or unnecessary hardships in carrying out the strict letter of the provision and that the claimed practical difficulties or unnecessary hardship was not created by the owner or prior predecessor in title. Each and every requirement must be met in order for the Board of Standards and Appeals ("BSA") to issue a zoning variance.⁴ Here, the plans submitted by the architect, Ling Li, through the Professional Certification Program created the subsequent issues which led to the buildings not being in conformance with zoning resolution thereby preventing the issuance of a certificate of occupancy.

³ 1 RCNY § 21-01(b)(7) and (8)

⁴ See, *35 Broadway v. Bennet*, 161 AD2d 767 [2d Dep't. 1990].

This court does not find that the findings of the BSA which denied the petitioners' application for a zoning variance to be arbitrary, capricious, or an abuse of discretion. The DOB was not under any obligation to conduct an exhaustive review of the plans Li submitted through the Professional Certification Program. In fact, any audit conducted prior to the final inspections to obtain a certificate of occupancy by the DOB would be discretionary in nature.⁵ Consequently, the petitioners' application is denied.

Accordingly, it is hereby:

ORDERED, that the amended notice of petition brought by Sau Ping Lin, Jian Guo, Li Architect Associates, PLLC and Ling Li is denied.

ENTER,

DATED: December 18, 2012

Joseph J. Maltese
Justice of the Supreme Court

⁵ 1 RCNY § 21-06(b)(7).