

Perlbinder Holdings, LLC v Srinivasan

2013 NY Slip Op 30466(U)

March 7, 2013

Supreme Court, New York County

Docket Number: 103231/12

Judge: Joan B. Lobis

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

PRESENT: LOBIS Justice

PART 6

Index Number : 103231/2012
PERLBINDER HOLDINGS, LLC
vs.
SRINIVASAN, MEENAKSHI
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE 1-8-13
MOTION SEQ. NO. 001

The following papers, numbered 1 to 24, were read on this motion to/for Art. 78 Petition.

Notice of Motion/Order to Show Cause — Affidavits — Exhibits	<u>Petition</u>	No(s). <u>1-25</u>
Answering Affidavits — Exhibits	_____	No(s). <u>26-27</u>
Replying Affidavits	_____	No(s). _____

Upon the foregoing papers, it is ordered that this motion is

**THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION, ORDER
& Judgment**

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 3/7/13

JB, J.S.C.
JOAN B. LOBIS

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
In the Matter of the Application of
PERLBINDER HOLDINGS, LLC,

Petitioner,

Index No. 103231/12

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

Decision, Order and Judgment

-against-

MEENAKSHI SRINIVASAN, CHAIRPERSON,
CHRISTOPHER COLLINS, VICE-CHAIRPERSON,
DARA OTTLEY-BROWN, SUSAN M. HINKSON,
R.A., and EILEEN MONTANEZ, P.E.,
COMMISSIONERS, constituting THE BOARD OF
STANDARDS AND APPEALS OF THE CITY OF
NEW YORK, THE NEW YORK CITY
DEPARTMENT OF BUILDINGS, THE NEW
YORK CITY ENVIRONMENTAL CONTROL
BOARD and THE CITY OF NEW YORK,

Respondents.

-----X
JOAN B. LOBIS, J.S.C.:

Perlbinder Holdings, LLC, petitions this Court to annul a resolution of Respondent, Board of Standards and Appeals of the City of New York (BSA), which upheld a determination by the New York City Department of Buildings (DOB) revoking sign permits for Petitioner's property. For the following reasons, the petition is denied.

Petitioner owns property on the west side of Second Avenue between East 36th and East 37th Streets in Manhattan. In 1980, a wall sign was approved, permit #ES 42/80, on the north facing wall of a building that was part of the premises, on lot 28. After the sign was erected, the zoning map was amended to change the area from C6-4 zoning to C1-9, making the original sign's advertising use non-

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conforming.

In April 2008, the DOB issued an emergency declaration ordering Petitioner to demolish the building on lot 28 that displayed the wall sign. Pending demolition, in June 2008, Petitioner applied for and was granted a permit by the DOB to erect a structure to place a double-sided sign on the premises south of the prior sign's location, approximately 27 feet from the original location, on lots 26-27. The proposed sign would be lower in height than the wall sign and would be angled.

The building was demolished in July 2008. That same month, Petitioner applied to the DOB for an additional permit, which would authorize the installation of the double-sided sign on the structure that had been previously approved the month before. In August 2008, the DOB objected, however, to this application based on the location, height, and surface area of the proposed sign. Those objections were overruled by the Manhattan Borough Commissioner in October 2008, and the approved permit was issued on December 11, 2008. The approval states "THIS SIGN IS A DIRECT REPLACEMENT FOR SIGN FILED UNDER #ES 42/80." The plan submitted for the installation of the sign showed the double-sided sign on lot 28, while the plan submitted for erecting the sign's supporting structure showed the structure to be built on lots 26-27.

Following installation of the sign, in spring 2010, the DOB audited its earlier permit approvals. In the course of that audit, the DOB determined that Petitioner's sign permits were unlawful. On April 30, 2010, the DOB issued a notice of "Intent to Revoke Approvals and Permits" for Petitioner's application to erect a sign structure. The notice cited, in pertinent part, the authority to revoke prior approvals and permits when those have been issued in error. NYC Code § 28-104.2.10; *id.* § 28-105.10.1.

The notice attached an objection sheet to support the bases for the revocation. In July 2010, the DOB revoked the sign structure permit, determining that the prior approval had been incorrect. That order was ratified in August 2010. A subsequent order in May 2011 revoked the companion permit that had authorized the sign's installation on the previously-approved structure, which was ratified in June 2011. Petitioner has received over 100 violations for the illegal sign following revocation of the structure and sign installation permits.

Petitioner appealed the DOB's determinations revoking the permits to the BSA. Following hearings, in June 2012 the BSA issued a resolution, Resolution No. 86-11-A, affirming the DOB's determinations. The BSA found that the sign violated Zoning Resolutions 52-83 ("Non-Conforming Advertising Signs") and 52-61 ("Discontinuance/General Provisions"). Any right to continued use of the advertising sign as a non-conforming use had been lost since that use had been discontinued for more than two years when the wall sign was demolished along with the building in July 2008. The BSA noted that Petitioner's good faith reliance on the DOB's approvals does not estop the agency from enforcing the law. The BSA refused to reinstate the permits or toll the time under Resolution 52-61 for continuing non-conforming use. Petitioner now files this Article 78 petition.

It is well-established that in an Article 78 proceeding "an agency's interpretation of a statute that it is charged with administering is entitled to deference if it is not irrational or unreasonable." Smith v. Donovan, 61 A.D.3d 505 (1st Dep't 2009). Local zoning boards have broad discretion in "interpretations of local zoning codes, and the scope of judicial review is limited to whether their action was arbitrary, capricious, illegal, or an abuse of discretion." Marino v. Town of Smithtown, 61 A.D.3d 761

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(2d Dep't 2009); Soho Alliance v. N.Y. City Bd. of Standards and Appeals, 264 A.D.2d 59, 62-63 (1st Dep't 2000). A determination is considered rational "if it has some objective factual basis, as opposed to resting entirely on subjective considerations such as general community opposition." Halperin v. City of New Rochelle, 24 A.D.3d 768, 772 (2d Dep't 2005).

Based on this Court's review of the record, I find that the BSA's determination upholding the revocations is rational and therefore not arbitrary or capricious. The undisputed facts show that notwithstanding certain characterizations of the double-sided sign as a replacement for the wall sign the new sign was not in the same position or location as the old one. Therefore, it could not properly be considered a replacement for purposes of Zoning Resolution 52-83. Moreover, the wall sign was demolished more than two years prior and therefore there was no continuing non-conforming use. As BSA noted, the Court of Appeals has made plain that estoppel is not available against an agency even when correction of its prior erroneous determination leads to harsh results. Parkview Assocs. v. City of N.Y., 71 N.Y.2d 274, 282 (1988).

Lastly, Petitioner's request for relief relating to fines that it has received for the illegal sign is not properly before this Court. The record reflects that Petitioner is challenging those fines in ongoing administrative proceedings, and there has been no showing to support Petitioner's claim of futility. Young Men's Christian Ass'n v. Rochester Pure Waters Dist., 37 N.Y.2d 371, 375 (1975) (doctrine of exhaustion prevents reviewing courts from usurping agency's function to consider and rule on matters relating to its actions). Accordingly, it is

ORDERED and ADJUDGED that the petition is denied, and the proceeding is dismissed
in its entirety.

Dated: March 7, 2013



JOAN B. LOBIS, J.S.C.