Save The View Now v Brooklyn Bridge Park Corp.
2015 NY Slip Op 31047(U)
June 10, 2015
Supreme Court, Kings County
Docket Number: 504785/2015
Judge: Lawrence Knipel
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 10th day of June, 2015

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

----------X

SAVE THE VIEW NOW , BY ITS PRESIDENT STEVEN GUTERMAN, STEVEN GUTERMAN, DANIELA GIOSEFFI, AND CHRISTINA PAGE,

Plaintiffs,

- against -

Index No.: 504785/15

BROOKLYN BRIDGE PARK CORPORATION, NEW YORK STATE URBAN DEVELOPMENT CORPORATION D/B/A EMPIRE STATE DEVELOPMENT CORPORATION, BROOKLYN BRIDGE PARK DEVELOPMENT CORPORATION, CITY OF NEW YORK, TOLL BROTHERS REAL ESTATE, INC., AND STARWOOD MORTGAGE CAPITAL, LLC,

Defendants.

----------X

The following papers numbered 1 to 18 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1 - 6
Opposing Affidavits (Affirmations)	7 - 13
Reply Affidavits (Affirmations)	
Affidavit (Affirmation)	
Other Papers Memorandum of Law	14 - 18

INTRODUCTION

Beyond peradventure, the vision of New York Harbor from the Brooklyn Promenade is an iconic, world class view worthy of the maximum protection that the law can afford.

While long appreciated, it was not until 1974 that legal recognition was first extended to protect this scenic treasure by means of a City Zoning Resolution establishing a Special Scenic View District (SV-1), with a protected View Plane. Even though created under State authority and therefore outside the jurisdiction of City Zoning, structures in the Brooklyn Bridge Park are, by virtue of the explicit mandate of its organic document, the General Project Plan (as modified), made subject to the View Plane established in this Scenic View District. In fact, none of the parties to this litigation now contend that either building (or any appurtenance thereto) in any manner encroaches upon the established View Plane.

Plaintiffs do contend that the height of the buildings exceeds the maximum height permitted in the Modified General Project Plan (MGPP), and seek declaratory relief to that effect. Defendants concede that the buildings are bound by the height limits contained in the MGPP, but deny that these limits have been exceeded. Defendants further contend that the time within which plaintiffs are permitted to assert their claims has long since expired.

HISTORY

The docks and related facilities along the Brooklyn Heights waterfront, which for centuries had been a vibrant center of seabone commerce, were rendered obsolete and slowly lapsed into decay and abandonment with the widespread adoption of container shipping some 50 to 60 years ago. By 1984, cargo shipping operations had completely ceased and the Port Authority explored plans to sell the property for commercial development.

The origins of the present park can be traced to the period of 1986 to1988, when concerned citizens and the Brooklyn Heights Association (BHA), in response to City and Port Authority proposals to construct densely-sited residential structures along the waterfront, banded together to first propose the concept of a "Harbor Park" on Port Authority and City land along the waterfront. An 80% recreational and 20% commercial space mix was proposed to promote economic viability with protection to be afforded then current harbor views (beyond the Scenic View Plane). The concept of a "Harbor Park" attracted widespread support from numerous community organizations and City and State elected officials. This initial vision formed the conceptual basis for every subsequent iteration of the park plan as it came to evolve.

In 1988, the Brooklyn Borough President formed the Brooklyn Waterfront Local Development Corporation (LDC). Funding was secured from the New York State Legislature at the behest of the then local Assemblywoman and State Senator, which culminated in the issuance of a

Brooklyn Bridge Park Illustrative Master Plan in 2000. Eventually, in May 2002, a Memorandum of Understanding was executed by the City and State (signed by the Mayor and Governor) whereby the Brooklyn Bridge Park Development Corporation (BBPDC) was formed for the purpose of creating a Brooklyn Bridge Park from State (formerly Port Authority) and City lands along the waterfront. The basic principles were the same as those first propounded in the Harbor Park proposal, namely: 1) No more than 20% commercial development; 2) Economically self-sustaining; and 3) Protection of views.

BUILDING HEIGHT

The overall design of the Brooklyn Bridge Park was entrusted to Michael Van Valkenburg Associates, Inc. (MVVA). A General Project Plan (GPP) with a Draft Environmental Impact Study was first adopted in July of 2005. For the first time, height limitations were placed on the buildings that are the subject of this litigation. The Plan, in pertinent part, called for demolition of the Cold Storage Warehouse facility located along the Waterfront and its replacement with two buildings which form the subject matter of the instant litigation. The proposed northerly building was limited to a height of 110 feet and the southerly building to a height of 55 feet. The net visual effect was intended to slightly increase the vertical and significantly decrease the horizontal obstruction to the view of the Brooklyn Bridge from the Promenade then presented by the Cold Storage Warehouse, which itself measured 97 feet in height, exclusive of rooftop structures. Exhibit D to the Guterman

affidavit is a photograph of the now demolished Cold Storage Warehouse which clearly shows the top floor, in addition to rooftop structures, blocking the view from the Promenade of the bridge roadbed.

A public hearing and comment period then ensued after which a Final Environmental Impact Study (FEIS) was issued in December of 2005, a SEQRA finding issued in January, 2006 and a Modified General Project Plan (MGPP) was eventually adopted in December of 2006. In the MGPP the height of the northern building was reduced to "approximately 100 feet" and the height of the southern building remained at "approximately 55 feet". The MGPP, as the GPP before it, is completely silent both as to how the height is to be measured and those building features that are included or excluded from the computation.[1]

STRUCTURES PROTRUDING THE ROOF LINES

The subject of structures which extend above the roof lines (bulkheads, mechanicals, etc.) was first addressed during the public comment period following adoption of the GPP. An e-mail dated September 14, 2005 by Otis Pearsall, a representative of the BHA, states:

> "As things now stand the arc formed by the Bridge's roadbed is visible above the flat roof of the raised portion of the Cold Storage Buildings.... Cars are clearly visible moving on this roadbed toward the Brooklyn Tower except where they pass behind what appears to be three bulkheads above the roof..."

[1]The MGPP was itself later modified in matters immaterial to the current litigation.

> "It is this view of the Bridge's arc from Tower to Tower above the Cold Storage Buildings that we have understood your Park Plan is intended to preserve."

This view is again reiterated by Mr. Pearsall in his written submission to BBPDC dated September 19, 2005 (as corrected October 20, 2005). A further e-mail sent by Mr. Pearsall on September 22, 2005 to members of the BHA stated that associates of MVVA,

> "...without making any promises, that they (MVVA) were looking seriously at the possibilities for dropping the top 12 feet associated with the bulkheads, with the mechanicals tucked out of sight."

A November 2, 2005 e-mail of Mr. Pearsall explicitly inquires of the MVVA employee with whom he had been corresponding about mechanicals "being absorbed within the building envelope". The next day a reply was received from a different MVVA employee, (the employee to whom the e-mail was address was on vacation), which stated:

> "I am replying to the e-mail that you sent Michael yesterday regarding your assumption that mechanicals were included in the building envelope - this is correct."
>
> Furthermore, sometime thereafter (but before the FEIS was issued) the response to comment 224 of the "Response to Comments on the DEIS" states, "Any required parapet and mechanical equipment should be included in the proposed building envelope".

Thereafter, the MGPP was adopted and the subject of rooftop protrusions does not appear to have again been broached, whether in the MGPP or other documents or communications, for a number of years. Commencing with the response to question 4 of the "RFP Amendment #1 Questions and Answers" dated October 7, 2011, the BBPDC has consistently and explicitly taken

a position that rooftop mechanicals and other permitted obstructions described in NYC Zoning Resolutions are excluded from building height restrictions.

Without passing at this point upon the merits of their contention, the BBPDC's position appears to have been widely disseminated. The Community Advisory Council (CAC) for Brooklyn Bridge Park is a broadly based grouping of a great many community, civic, and business organizations, including the BHA, interested in the Park's development. In a letter dated December 20, 2011, the CAC identifies "mechanicals on the roof" among a list of items which are "what we most oppose".

Jane McGroarty, a distinguished architect, was on the Board of Governors from 1999 and President of the BHA from 2010 through 2013. She was also the BHA representative on the CAC from its inception in 2010 through early 2014. In her affidavit submitted by the Plaintiffs herein, she states that she was until recently, unaware of any communications between Otis Pearsall and MVVA regarding rooftop mechanicals. She and others on the CAC appear to have accepted rooftop mechanicals, but took the position that they should, "be as inconspicious as possible". Her letter dated July 19, 2012 states, "We are also interested in the hotel roof and the height and number of structures which will be above the 100 feet height limit - elevator bulkhead, stairs..."

SUPERSTORM SANDY

Superstorm Sandy was the deadliest and most destructive hurricane to strike New York in recent memory. Its storm surge struck New York City on October 29, 2012, flooding streets, tunnels

and subways, and causing power outages. The East River flooded into and submerged Brooklyn Bridge Park. In response thereto, the area of these buildings was for the first time reclassified as a flood zone by the Federal Emergency Management Agency (FEMA).

Concomitantly, the City adopted changes in zoning for flood zones which increased the grade elevation of new construction and limited below flood level placement of critical building mechanicals (Executive Order No. 203 of 2013). Although not required to do so, the buildings were redesigned to comply with these zoning changes to qualify for Federal Flood Insurance and provide increased safety in the event of another flood. The rooftop mechanicals are combined with the bulkheads, and neither party has demonstrated how much, if at all, the movement of some mechanicals to the roof have increased the above the roof profiles of the buildings. The grade elevation appears to have increased the building height somewhat over four (4) feet (at its highest).

Final building plans were filed with the NYC Department of Buildings, and construction commenced in 2013. On September 10, 2014, the northern building reached its maximum height (topped out). Some seven (7) months thereafter, on April 22, 2015, the instant litigation was commenced.

BUILDING HEIGHT

Both plaintiffs' and defendants' architectural experts failed to make independent measurements of the site or buildings, but instead relied upon those drawings and plans already

issued in connection with this project. All agree that defendants are bound by the 100 and 55 foot building height limitations as set forth in the MGPP. The real issue here is, essentially, a determination of the point at which calculation of the building height commences and at what point it is complete. The language of the MGPP itself is of little aid in this regard. It reads in material part as follows:

> "The residential and hotel uses would be located in two buildings, one approximately 55 feet and the other approximately 100 feet in height".

Plaintiffs, through their principal architectural expert, Lorraine Bonaventura, contend that the measurement should commence at the preconstruction sidewalk level (low point), and continue to the highest elevation of any rooftop structure (bulkhead, mechanicals, parapets, etc.). She cites no authority in law or good and accepted architectural practice to support her opinion, but merely opines "This is the only logical and consistent way to measure..." Susannah Drake, a landscape architect and community resident whose affidavit plaintiffs also submit, concedes that rooftop structures are usually permitted to exceed height caps, but opines that here they should not because the height caps under consideration directly relate to the view itself, as opposed to the usual circumstance where their relevance is more indirect, such as preservation of neighborhood land use, character and light and air to the street.

Defendants' architect, Jonathan Marvel, opines that since the land is not level, the building height is measured from the base plane which means the average grade level. Use of the average

grade level appears to account for between two (2) and three (3) feet of the discrepancy of the parties' architectural experts' height calculation. Marvel further opines that the rooftop, exclusive of bulkheads, mechanicals and other appurtenances is the proper end point of measurement. He states that this method of measuring is consistent with the New York City Zoning Code and the prevailing methodology in the industry for measuring building height. None of plaintiffs' architectural experts opine otherwise. In fact, plaintiffs' counsel was unable, during oral argument, to name any municipality which included rooftop appurtenances in calculating the height of a building.

With the MGPP bereft of guidance on appropriate methodology for measuiring height caps, this court must look to good and accepted architectural practices prevailing in the industry to make that computation. *See Alger v CVS Mack Drug of New York*, 39 AD 3d 928(3d Dept. 2007). When calculated in a fashion consistent with industry standards and municipal zoning codes across this nation, it is undeniable that the height of the northern building is 100 feet and the height of that portion of the southern building without the penthouse is 42 feet, and that portion with the penthouse is 55 feet.

With regard to the approximate four feet of raise in elevation of the buildings following Superstorm Sandy, it is plain that this grade raise resulted from the redesignation of the area as a flood zone rather any attempt to evade height restrictions. As such, it is entirely appropriate to

compute the building height in the manner proposed by defendants' architect and consistent with industry standards.

AGREEMENT TO LIMIT ROOFTOP STRUCTURES

Plaintiffs further contend that defendants seek to evade a prior agreement to limit structures on the rooftops to the 100 and 55 foot height cap. This court has searched the record and has found no such agreement. As previously stated, in this regard plaintiffs only points to the e-mail from MVVA dated November 3, 2005 and the response to comment 224 of the "Response to Comments on the DEIS". Firstly, both are at best ambiguous as they refer to the "building envelope" and not the height limitation. But more importantly, neither the substance of the e-mail nor the response to comment 224 was incorporated into the all-important MGPP. As such, even if construed as a then present intent to include rooftop structures in the height cap, the statements would have no continuing relevance or binding effect because they were never included in the MGPP. In fact, for many years following adoption of the MGPP all parties appear to have accepted this and operated under the assumption that rooftop appurtenances were permitted to exceed height limitations. To now contend that these earlier representations (if they are such) form the basis of a binding agreement is without merit.

STATUTE OF LIMITATIONS

Although framed as an action seeking Declaratory Judgment, the instant proceeding in clearly a challenge to governmental conduct. As such, the four-month Statute of Limitations governing proceedings pursuant to CPLR Article 78 must apply. "In a declaratory judgment action such as this, the applicable Statute of Limitations is determined by the substantive nature of the claim. If a proceeding pursuant to CPLR Article 78 would have been appropriate to settle a dispute with a governmental entity, the period of limitations governing proceedings pursuant to CPLR Article 78 is applicable" *(McComb v Town of Greenville*, 163 AD2d 369, 370 [2d Dept. 1990]). "(T)he time for asserting the claim cannot be extended through the simple expedient of denominating the action one for declaratory relief" *(Uniformed Firefighters Association v City of New York*, 300 AD2d 651 [2d Dept. 2002]).

For purposes of Article 78, the four-month statute commences to run from the date a claimant was 'aggrieved' by the governmental action (*see Lenihan v City of New York* 58 NY2d 679 [1982]). Arguably, the time began to run as far back as December of 2006 when the MGPP was adopted. Conceivably, it began to run in 2011 or 2012 when the height measurement definitions implicit in the MGPP were explicitly published. Most likely the time commenced in 2013 when final plans were filed with the New York City Department of Buildings and construction commenced. Certainly the time commenced no later than September of 2014 when the northern building reached its

maximum height and a topping off ceremony was held. The instant litigation did not commence until fully seven (7) months thereafter.

Plaintiffs' argument that "a violation of the maximum height limits in the MGPP would constitute a 'continuing wrong' that gives rise to successive cause of action each day the violation persists" is unavailing.

"A cause of action involving the wrongful issuance of a building permit accrues when the permit is issued, and does not constitute a continuing wrong" *(Solow v Lieberman* 202 AD2d 493 [2d Dept. 1994]). Were this court to adopt plaintiffs' reasoning in this regard, all Statutes of Limitation would be removed from challenges to these sorts of governmental determinations. Indeed, construction of Brooklyn's venerable Borough Hall would still to this day remain subject to challenge even after some 167 years following its completion.

CONCLUSION

The casual passerby walking along Brooklyn's majestic Promenade is struck with an indelible impression that these buildings, now nearing completion, are simply too large. No matter that the Cold Storage Warehouse which they replaced may have been, in at least some dimension, larger. When our government had the opportunity to significantly improve the view, a conscious decision was then made not to do so, for reasons relating to economic sustainability. This decision was a result of a compromise entered into by other branches of government. The decision may have been shortsighted, but it was a compromise without which the Brooklyn Bridge Park might not have

been created. In hindsight, this court cannot now say, and it is not within the provenance of this court to say, that the compromise was erroneous as a matter of law.

In sum, the time within which to challenge the construction has expired. In any event, the record herein clearly indicates that the buildings that are the subject matter of the instant litigation are being built in conformity with the MGPP. As such, plaintiffs cannot demonstrate a likelihood of success on the merits. Accordingly, plaintiffs' motion for a preliminary injunction is denied. All interim relief and stays on construction are vacated.

The foregoing constitutes the decision, order and judgment of this court.

ENTER FORTHWITH,

Lawrence Knipel

J. S. C.

HON. LAWRENCE KNIPEL