

**Brooklyn Hgts. Assoc., Inc. v Brooklyn Bridge Park Corp.**

2016 NY Slip Op 31457(U)

June 27, 2016

Supreme Court, Kings County

Docket Number: 514720/2015

Judge: Lawrence Knipel

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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 27<sup>th</sup> day of June, 2016

P R E S E N T:

HON. LAWRENCE KNIPEL,  
Justice.

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BROOKLYN HEIGHTS ASSOCIATION, INC., SAVE  
THE VIEW NOW , BY ITS PRESIDENT STEVEN  
GUTERMAN, STEVEN GUTERMAN AND  
DANIELA GIOSEFFI,

Plaintiffs,

- against -

Index No.: 514720/15

BROOKLYN BRIDGE PARK CORPORATION, CITY  
OF NEW YORK, NEW YORK CITY DEPARTMENT  
OF BUILDINGS, NEW YORK STATE URBAN  
DEVELOPMENT CORPORATION D/B/A EMPIRE  
STATE DEVELOPMENT CORPORATION,  
BROOKLYN BRIDGE PARK DEVELOPMENT  
CORPORATION, TOLL BROTHERS REAL  
ESTATE, INC., AND STARWOOD MORTGAGE  
CAPITAL, LLC, AND BROOKLYN PIER 1  
RESIDENTIAL OWNER, L.P.

Defendants.

-----X

The following papers numbered 1 to read on this motion:

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_  
Opposing Affidavits (Affirmations) \_\_\_\_\_  
Reply Affidavits (Affirmations) \_\_\_\_\_  
\_\_\_\_\_ Affidavit (Affirmation) \_\_\_\_\_  
Other Papers \_\_\_\_\_ Memorandum of Law \_\_\_\_\_

Papers Numbered

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The establishment and development of the Brooklyn Bridge Park have been the source of exhaustive litigation for the better part of a decade. This court will not review the prior litigation except to the extent it has bearing upon the narrow issue presented herein, namely the impact of building at 130 Furman Street, Brooklyn, New York on the Brooklyn Heights Scenic View District (SV-1).

Plaintiffs move by Order to Show Cause to enjoin construction of the uppermost portion of 130 Furman Street, Brooklyn, New York which they contend, does not comply with the Brooklyn Heights Scenic View District (SV-1) regulations, (New York City Zoning Resolution, Article X). Plaintiffs submit an affidavit from Arkadiusz Jusiega, a licensed surveyor, which concludes that "... the penthouse wall encroaches 19.25' inside the Scenic View Reference Line and intrudes upon the Brooklyn Bridge Scenic View Plane for a total area of 381.4 square feet at a height of 11.9' to 12.9' (feet)."

All defendants oppose the Order to Show Cause and cross move to dismiss contending, *inter alia*, that this issue has already been litigated (*res judicata*), that it is untimely, that plaintiffs have failed to exhaust administrative remedies, and that in any event, 130 Furman Street, does not infringe upon the Scenic View District (SV-1).

In building 130 Furman Street, defendants have consistently relied upon a survey created by the Stantec Corporation in 2012. The difference between the Jusiega and Stantec surveys appear to revolve around proper placement of points A and A1 of the SV-1 View Reference Line.

RES JUDICATA

The instant Order to Show Cause is, in effect, plaintiffs' (now joined by additional plaintiff Brooklyn Heights Association) third attempt to halt construction. (The previous attempts being argument and reargument of the prior Order to Show Cause). In fact, the impact of SV-1 was clearly addressed during argument on the prior Order to Show Cause. Plaintiffs underlying complaint was replete with references to SV-1.<sup>1</sup> Furthermore, immediately prior to court proceedings thereon the NYC Department of Buildings temporarily stopped work while it examined whether SV-1 was infringed upon. Defendants were found in compliance and the Stop Work Order was lifted.

On April 22, 2015, plaintiffs' counsel accepted the following representation by NYC Corporation Counsel at oral argument without protest or objection. "I want to specifically address the views from the Promenade and make it absolutely clear that nothing pierces the scenic view plane... And so to clarify, the Stop Work Order referenced by plaintiffs was to review that the buildings had not pierced the scenic view plane and the order was lifted with resolution that they absolutely had not pierced the scenic view plane and I don't believe that plaintiffs are (now) alleging that it does, but I just want to make it clear".

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<sup>1</sup> Paragraph 135 of the complaint provided "on January 21, 2015, plaintiff Gutterman met with representatives of BBPC and pointed out to them, *inter alia*, that he believed the zoning diagrams on file at the New York City Department of Buildings (DOB) for the Southern Building demonstrated that it violated both the 55 feet height limit for that building and SV-1".

Beyond peradventure, plaintiffs had conceded that point and chosen not to pursue their contentions relating to SV-1.<sup>2</sup> To now rejuvenate prior SV-1 contentions would violate the ancient legal doctrine of res judicata, the matter was (already) judged (see *Matter of Hunter*, 4 NY3d 260 [2005]; *Ryan v New York Telephone Co.*, 62 NY2d 494 [1984]; *Matter of Reilly v Reid*, 45 NY2d 24 [1978]; *Myers v Meyers*, 121 AD3d 762 [2d Dept. 2014]; *Hae Sheng Wang v Pao-Mei Wang*, 96 AD3d 1007 [2d Dept. 2008]).

### TIMELINESS

Defendants have consistently relied upon the Stantec Survey to build 130 Furman Street. The Stantec Survey was included with the New Building Application for 130 Furman provided to the NYC Department of Buildings. It was presented on September 10, 2013 to the Community Advisory Committee (CAC), some members of which are plaintiffs or members of plaintiffs herein. It was included in the SEQRA findings which concluded that the proposed project was in compliance with SV-1. The complaint dismissed in the prior lawsuit quotes from this portion of the finding. Most relevantly, on February 13, 2015, the DOB determined that the revised plans of the developer complied with SV-1. On February 26, 2015, the DOB posted the finding and zoning diagram on its website.

Plaintiffs failed to challenge this final determination regarding SV-1 until submission of the instant Order to Show Cause on December 23, 2015, some ten (10) months thereafter. The time provided to administratively contest a zoning approval is 45 days, while the time provided within

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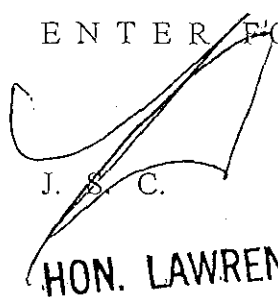
<sup>2</sup> In its decision dated June 10, 2015, this court observed, “in fact, none of the parties to this litigation now contend that either building (or appurtenance thereto) in any manner encroaches upon the established View Plane”.

which to challenge governmental determination via Article 78 is four (4) months. The instant order to show cause was brought some six months (6) months after expiration of the time provided to file an administrative appeal and some five (5) months after expiration of the strictly-applied Statute of Limitations to contest a governmental determination. (See *Walton v New York State Dept. of Correctional Servs.*, 8 NY3d186 [2004]; *Matter of Capital District Regional Off-Track Betting Corp. v New York State Racing and Wagering Bd.*, 97 AD3d 1044 [3d Dept. 2012]; *Matter of Town of Olive v City of New York*, 63 AD3d 1416 [3d Dept. 2009]).

While this court does not reach the relative merits of the now competing surveys, it is worth observing that the Stantec Survey was publicized, approved by the DOB and in SEQRA findings and remained substantively unchallenged until creation of the Jusiega Survey, by which time the legal time within which to challenge construction had expired and the building itself had long since topped out.

Accordingly, the Order to Show Cause is denied and the cross motions must be granted. The instant action is dismissed on Res Judicata, Statute of Limitations and Exhaustion of Remedies grounds. The plaintiffs are advised that their remedy lies in appeal, not renewal or reargument.

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

ENTER FORTHWITH,  
  
 J. S. C.  
**HON. LAWRENCE KNIPEL**

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 27<sup>th</sup> day of June, 2016

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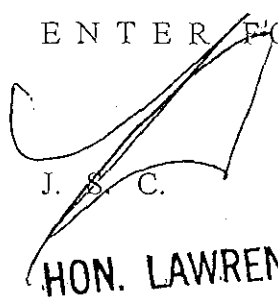
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