

<b>Sallah v Town of Brookhaven Bldg. Dept.</b>
2019 NY Slip Op 32281(U)
July 31, 2019
Supreme Court, Suffolk County
Docket Number: 6435/2017
Judge: Joseph Farneti
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SHORT FORM ORDER

INDEX NO. 6435/2017

SUPREME COURT - STATE OF NEW YORK  
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI  
Acting Justice Supreme Court

\_\_\_\_\_  
DONALD R. SALLAH AND KRISTIN M.  
SALLAH,

Plaintiffs,

-against-

TOWN OF BROOKHAVEN BUILDING DEPT.  
AND TULLIO BERTOLI, COMMISSIONER,

Defendants.  
\_\_\_\_\_

ORIG. RETURN DATE: JANUARY 5, 2018  
FINAL SUBMISSION DATE: MARCH 15, 2018  
MTN. SEQ. #: 001  
MOTION: MD

PLTF'S/PET'S ATTORNEY:  
THE SALLAH LAW FIRM  
110 WASHINGTON AVENUE  
HOLTSVILLE, NEW YORK 11742  
631-736-0500

DEFT'S/RESP ATTORNEY:  
ANNETTE EADESTO, ESQ.  
BROOKHAVEN TOWN ATTORNEY  
ONE INDEPENDENCE HILL  
FARMINGVILLE, NEW YORK 11738  
631-451-6500

Upon the following papers numbered 1 to 3 read on this motion \_\_\_\_\_  
FOR A JUDGMENT PURSUANT TO CPLR ARTICLE 78 \_\_\_\_\_.

Order to Show Cause and supporting papers 1-3; Affirmation in Opposition and supporting  
papers 4-6; Replying Affidavits and supporting papers 7; Supplemental Reply 8,9  
\_\_\_\_; it is,

**ORDERED** that this motion by plaintiffs for an order directing the  
TOWN OF BROOKHAVEN BUILDING DEPARTMENT AND TULLIO  
BERTOLI, COMMISSIONER OF THE BUILDING DEPARTMENT, to  
immediately issue a final Certificate of Occupancy for the petitioners' premises  
known as 340 Durkee Lane, Patchogue, New York 11772 is hereby dismissed  
without prejudice for failure to either exhaust administrative remedies or provide  
sworn allegations sufficient to substantiate the claims of prior approval or  
relaxation of zoning requirements by the Board of Zoning Appeals.

The Petitioner by way of Special Proceeding [although not labeled as such] seeks a Writ of Mandamus to compel the Building Department of the Town of Brookhaven to issue a Certificate of Occupancy for premises SCTM# 02009892700100017000. Petitioners are the owners of the premises known as 340 Durkee Lane, East Patchogue, New York. The petitioners made application to the Building Department of the Town of Brookhaven for a Certificate of Occupancy for said premises. Petitioners were served with a Notice requiring certain things to be done. Thereafter, petitioners allege they did completely comply with the requirements: to wit: The Environmental Certificate, the Assessment Certificate/Wetlands Certificate, Assessment Certificate, the Solder and Anti-Scald Certification, a new final survey, and Electrical Certificate, and a Debris Affidavit.

Petitioners filed all of the same with the Building Department on November 2, 2017 and were advised by the Building Department representatives that the Certificate of Occupancy would be mailed to petitioner's address, 340 Durkee Lane, East Patchogue, New York 11772 within two weeks thereafter.

As a result of the submission of a final survey as requested by the Building Department, the Chief Building Inspector purportedly discovered additional violations of the building code and refuses to Issue a Certificate of Occupancy until such deficiencies are corrected or receive variance approval of the Board of Zoning Appeals. The Town of Brookhaven submitted opposition to the motion requesting it be denied on its face.

#### FACTS

Petitioners were issued Building Permit #255040 by the Town on February 7, 1995 for the premises known as 340 Durkee Lane, East Patchogue, Town of Brookhaven, State of New York (hereinafter the "subject premises"). This permit expired on February 7, 1996 without the issuance of a Certificate of Occupancy.

Petitioners renewed the expired permit on May 29, 2015 and renewed the permit again on August 19, 2016, but no survey was submitted by petitioners at the time of either renewal.

On November 2, 2017, an updated property survey by Michael W. Minto, L.S. dated June 14, 2017, was submitted by the petitioners to the Building Department. The Minto survey revealed several previously undocumented violations of the Brookhaven Town Code, inclusive of a fence located in the Town right of way, a screened room constructed on the decking on the south side of the residential dwelling, and additional decking on both the rear and side yard. According to the Building Department representatives a review of Town records demonstrated that the aforementioned structures were not built pursuant to a building permit and without proper approvals, in violation of the Brookhaven Town Code.

By correspondence dated December 19, 2017, the petitioners were informed that the violations documented on the survey needed to be re-mediated pursuant to Code for a Certificate of Occupancy to be issued.

The petitioner commenced this CPLR Article 78 proceeding seeking review of the denial of his application for a certificate of occupancy by the Building Department of the Town of Brookhaven. That agency, together with the other respondent named in the petition, moved to dismiss the petition on the ground that the petitioner had failed to exhaust his administrative remedies.

As cited by the Second Department in Matter of LaRocca v. Dep't of Planning, Env't, & Dev. of Town of Brookhaven, 125 A.D.3d 659, [2d Dept 2015]

"As a general rule, 'one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law' " (Matter of Keener v City of Middletown, 115 AD3d 859, 860, 982 NYS2d 325 [2014], quoting Watergate II Apts. v Buffalo Sewer Auth., 46 NY2d 52, 57, 385 NE2d 560, 412 NYS2d 821 [1978]; see Matter of Henderson v Zoning Bd. of Appeals, 72 AD3d 684, 685-686, 897 NYS2d 518 [2010]; Matter of We're Assoc. Co. v. Commissioner of Dept. of Planning & Dev. of Town of Oyster Bay, 185 AD2d 820, 821, 586 NYS2d 315 [1992]; Matter of Perosi Homes v Maniscalco, 15

AD2d 563, 223 NYS2d 173 [1961]). Here, the petitioner failed to pursue an available administrative remedy—an appeal to the Board of Zoning Appeals of the Town of Brookhaven—prior to seeking judicial intervention (see Town Law § 267-a; Code of Town of Brookhaven § 85-55). The petitioner also failed to establish that an exception to the exhaustion doctrine was applicable (see Watergate II Apts. v Buffalo Sewer Auth., 46 NY2d at 57).

This is the precise argument advanced by the respondent. The Chief Building Inspector through an affidavit makes certain representations regarding the premises and conclusory statements concerning the nature of the existing structures. However, the Respondent fails to contradict the claims of the Petitioner that the structures currently existing were in fact issued a final certificate of occupancy at the time of the original construction of the premises.

The Petitioner further argued that the structures and fences were original to the property and that there existed certificates of occupancy for the offending structures and fence. The Petitioner further alleges that the respondents had approved all requirements for the issuance of a Certificate of Occupancy on November 20, 2017, and thereafter refused to issue said Certificate of Occupancy and deliver the same to the petitioners.

The newly discovered violations were determined by the Chief Building Inspector upon a review of the most recent survey submitted by the Petitioner. It is the Petitioner's contention that these so called violations were either the subject of relaxation of the necessary set back provisions by prior action of the Board of Zoning Appeals and that the other structures now alleged to have been constructed without the proper permits and inspections were in fact part of the original construction of the premises and which were covered by the original Certificate of Occupancy which predates the current actions and for which no violations have ever issued.

The argument proffered is that these ancient violations which bear no connection to the current applications and were for structures built by the original owner/general contractor can not now be raised for the first time as against this petitioner.

The prior Certificate of Occupancy has never been vacated or modified, neither has there been any violation issued against this Petitioner who has owned this property for over twenty-five years.

The difficulty encountered by this court is that the representations of the Petitioner on the one hand and the Respondent's Chief Building Inspector's affidavit on the other hand conflict with one another on a factual basis. The problem is further compounded by the fact that a municipality's error in issuing a certificate of occupancy in error, if that is what has occurred here, may be corrected and the usual defenses of laches or estoppel as against a municipality are not available.

"[W]here a local building inspector improperly issues a certificate of occupancy, and as a result the property owners acts in violation of the zoning ordinance, a zoning board of appeals may nevertheless correct the mistake by enforcing the ordinance. Indeed, estoppel is not available against a local government unit for the purpose of ratifying an administrative error and a municipality, it settled, is not estopped from enforcing its zoning laws either by the issuance of a building permit or by laches [citations omitted]". Matter of Palm Mgt. Corp. v. Goldstein, 29 A.D.3d 801, *aff'd* 8 NY3d 337. 92006).

The matter is further complicated by the fact that no certified return was submitted by the Respondent municipality. A certified return would reveal the history of the property as to its original development and any approvals or variances which were issued by the Building Department and the Board of Zoning Appeals.

Neither party has successfully carried its burden or fulfilled its obligation to the court for a proper determination of the matter. Neither party has referred to any personal examination of the file associated with this property nor has the Respondent Town of Brookhaven provided same in the form of a certified return to allow the court an opportunity for its own inspection.

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FARNETI, J.  
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Wherefore it is hereby

**ORDERED** that the Petition is dismissed without prejudice for failure to either exhaust administrative remedies or provide sworn allegations sufficient to substantiate the claims of prior approval or relaxation of zoning requirements by the Board of Zoning Appeals.

The foregoing constitutes the decision and order of this court.

**Dated: July 31, 2019**

  
\_\_\_\_\_  
**HON. JOSEPH FARNETI**  
**Acting Justice Supreme Court**

FINAL DISPOSITION

NON-FINAL DISPOSITION