Matter of Lamar Adv. of Penn, LLC v City of New York
2020 NY Slip Op 32385(U)
July 20, 2020
Supreme Court, New York County
Docket Number: 160811/2019
Judge: Arthur F. Engoron
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARTHUR F. ENGORON** **PART** **IAS MOTION 37EFM**

Justice

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IN THE MATTER OF THE APPLICATION OF LAMAR ADVERTISING OF PENN, LLC,

Petitioner,

- v -

THE CITY OF NEW YORK, TYNIA RICHARD, MELANIE ROCCO

Respondents.

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INDEX NO. 160811/2019

MOTION DATE 11/06/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39

were read on this motion for CPLR ARTICLE 78 RELIEF.

Upon the foregoing documents, it is

Upon the foregoing documents, the instant CPLR Article 78 petition is denied and dismissed for the reasons stated hereinbelow.

The Players

Petitioner, Lamar Advertising of Penn, LLC ("Lamar Advertising"), is a Delaware limited liability company with its principal place of business at 437 Fifth Avenue, New York, NY 10016. Respondent the City of New York (the "City") is a municipal corporation in the State of New York. Respondent Tynia D. Richard ("Richard") is the Acting Commissioner and Chief Judge of the New York City Office of Administrative Trials and Hearings ("OATH"), a City agency that adjudicates, inter alia, violations of the New York City Zoning Resolution (the "Zoning Resolution") and the Administrative Code. Respondent Melanie E. Rocco ("Rocco") is the Commissioner of the New York City Department of Buildings (the "DOB"), which administers and enforces the Zoning Resolution and Administrative Code.

Background

Petitioner is a lessee of the premises located at 242 Flatbush Avenue in Brooklyn, New York (the "Premises") and maintained advertising signage (the "Signage") on the Premises' roof at the time of an April 11, 2017 DOB inspection. On or about that same date, DOB issued various summonses (NYSCEF Doc. 3), with a fine of $10,000.00 each, to petitioner, alleging, essentially, that the Signage violated the Zoning Resolution (NYSCEF Doc. 1, at 2).

On October 5, 2018, petitioner appeared, by counsel, before OATH Hearing Officer Marc Weiner ("Weiner"). Petitioner requested that Weiner dismiss all of the various summonses

arising out of the April 11, 2017 DOB inspection of the Premises on the ground that the Signage was "not prohibited advertising signage, but instead was legal, non-conforming advertising signage" (NYSCEF Doc. 10).

However, Weiner found that petitioner failed to establish "sufficient credible evidence" for the assertion that the Signage constituted a legal non-conforming use (NYSCEF Doc. 16, at 15). Thus, in a December 28, 2018 Decision and Order, Weiner dismissed two and upheld four of the summonses (NYSCEF Doc. 4). Weiner stated that, in 1940, the zoning for the Premises changed from a "Business District" that did not prohibit signs to a "C2-4 District" that does prohibit signs (NYSCEF Doc. 16, at 15). Additionally, Weiner found a gap between, at least, 1954-1968, in petitioner's evidence for the Signage's presence at the Premises (NYSCEF Doc. 16, at 15). Although petitioner raised the "evidentiary principle" of the "presumption of continuance," Weiner stated that the Board "has never upheld a case on the theory of 'presumption of continuance'" (NYSCEF Doc. 16, at 15).

On April 8, 2019, petitioner appealed Weiner's Decision (the "Appeal;" NYSCEF Doc. 5) to the OATH Hearings Division Appeals Board (the "Board"). In support thereof, petitioner apparently presented leases dated December 23, 1937 and November 25, 1939 (NYSCEF Doc. 17, at 18). As asserted by the Board, the issues on appeal constituted whether petitioner established that "(1) the 1922 permit was valid for the sign structure existing on the date of violation; and (2) the signage was a nonconforming use" (NYSCEF Doc. 7).

In response, DOB asserted that petitioner had failed to meet its burden to establish that the Signage was continuous, pursuant to ZR § 52-61 (NYSCEF Doc. 16, at 17).

In a Decision and Order, dated June 27, 2019, the Board affirmed Weiner's December 28, 2018 Decision and Order, (NYSCEF Doc. 7). The Board affirmed four summonses, amounting to $40,000.00 ($10,000.00 for each summons) in penalties for petitioner. Note that, in the instant special proceeding, petitioner challenges only two of the summonses, namely 35245761H and 35245763L (collectively, the "Challenged Summonses"), which amount to $20,000.00 in civil penalties ($10,000.00 for each summons). Like Weiner, the Board found that petitioner had failed to establish that the Signage met the standard for a legal, non-conforming use. Petitioner had apparently failed to demonstrate that the subject use predated 1940 and continued (with a maximum interruption of two years) through the violation date (NYSCEF Doc. 16, at 17).

In the instant Article 78 special proceeding, petitioner seeks a judgment (1) vacating the Board's Decision and Order, mailed on July 11, 2019, that found petitioner liable for $20,000.00 in civil fines; and (2) dismissing the Challenged Summonses (NYSCEF Doc. 2). Petitioner alleges that the rationale of the DOB and the Board is arbitrary, capricious, and contrary to law (NYSCEF Doc. 1).

To fill "any purported 'gap' in the evidence," petitioner refers this Court to correspondence (the "Correspondence," NYSCEF Doc. 8) between the Premises' owner at the time and the outdoor advertising company operating the Signage (NYSCEF Doc. 1). The Correspondence apparently confirms "the display of signage pursuant to a 1961 lease, as amended and extended in 1965 through 1968" (NYSCEF Doc. 1).

On February 13, 2020, respondents jointly answered the instant petition with various admissions, denials, and two Affirmative Defenses (NYSCEF Doc. 16). Respondents assert, "it is well-settled that a reviewing court should not examine the facts de novo or substitute its own judgment for that of the administrative agency, but should review the whole record to determine whether there is a rational basis to support the agency's determination" (NYSCEF Doc. 16). Respondents request that this Court transfer the instant special proceeding to the Appellate Division, First Department for review of substantial evidence, "as there are no other claims or issues that could terminate this proceeding" (NYSCEF Doc. 17).

Citing 48 RCNY § 6-19 (f)(2), respondents also assert that the Correspondence had not previously appeared in the record, and "petitioner cannot now attempt to circumvent the Appeals Board's decision to uphold the subject summonses by arguing that additional evidence should be considered in support of its appeal" (NYSCEF Doc. 16, at 19).

In reply, petitioner opposes respondents' request that this Court transfer the instant special proceeding to the Appellate Division, First Department (NYSCEF Doc. 39). Petitioner argues that the Record of Assessments on the Tax Department Form No. 6-254 (the "Tax Form") "showing a consistent range of improvement valuation between 1954 and 1966" is "consistent with the continued, uninterrupted presence of the roof signage" (NYSCEF Doc. 39).

Discussion

Pertinent Section of the Zoning Resolution

Zoning Resolution § 12-10 defines a "non-conforming use" as "any lawful use, whether of a building or other structure or of a zooning lot, which does not conform to any one or more of the applicable use regulations of the district in which it is located, either on December 15, 1961, or as a result of any subsequent amendment thereto" (NYSCEF Doc. 16).

Continuous Use

In its Decision, the Board asserted that to demonstrate continuous use, an interruption cannot exceed two years (NYSCEF Doc. 7). See NYC v Janjan Realty Corp., Appeal No. 1400357 (June 26, 2014). The Board also asserted that it had previously rejected an application of a "presumption of continuance" in a nonconforming sign case in DOB v Lamar Advertising of Penn LLC, Appeal No. 18001445 (January 24, 2019) (NYSCEF Doc. 7).

The Standard for Article 78 Proceedings

It is well-settled that in an Article 78 proceeding, the scope of judicial review is limited to the issue of whether the administrative action is rational. Pell v Board of Educ., 34 NY2d 222, 230-231 (1974). This Court may not disturb respondents' determination unless there is no rational basis for the exercise of discretion or it was arbitrary and capricious. Id. at 231. "The arbitrary or capricious test chiefly relates to … whether the administrative action is without foundation in fact. Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." Id.

CPLR 7804(g) states, in pertinent part:

> Hearing and determination; transfer to appellate division. Where the substantial evidence issue specified in question four of section 7804 is not raised, the court in which the proceeding is commenced shall itself dispose of the issues in the proceeding. Where such an issue is raised, the court shall first dispose of such other objections as could terminate the proceeding, including but not limited to lack of jurisdiction, statute of limitations and res judicata, without reaching the substantial evidence issue. If the determination of the other objections does not terminate the proceeding, the court shall make an order directing that it be transferred for disposition to a term of the appellate division held within the judicial department embracing the county in which the proceeding was commenced. When the proceeding comes before it, whether by appeal or transfer, the appellate division shall dispose of all issues in the proceeding, or, if the papers are insufficient, it may remit the proceeding.

See generally, Al Turi Landfill v NY State Dep't of Envtl. Conserv., 98 NY2d 758, 759 (2002). (NYSCEF Doc. 17, at 13.).

Substantial Evidence

The Court of Appeals has held that "substantial evidence" requires that "a determination must be supported by sufficient facts or reasonable inferences that can be drawn from the record as a whole and must have a rational basis in the law" (NYSCEF Doc. 17, at 14). E.g. American Tel. & Tel. Co. v State Tax Commn., 61 NY2d 393, 400 (1984).

Respondents assert, "if the administrative agency's determination finds support in the record, its determination is conclusive even if the court would have reached a contrary result" (NYSCEF Doc. 16).

This Court Finds that the Board Did Not Act Arbitrarily and/or Capriciously

This Court upholds the Board's finding that petitioner "failed to establish that the 1922 permit was valid for the sign structure existing on the date of violation" (NYSCEF Doc. 7).

This Court finds that petitioner has failed to meet its burden to establish that the Signage constituted a legal, "non-conforming use," which required petitioner to demonstrate that the Signage existed prior to 1940 and that its use continued with a maximum interruption of two years.

As this Court cannot examine the facts de novo, it cannot take the Correspondence, which was not in the record at the time of the Board's review, into account in deciding the instant petition. However, even if it were to consider the Correspondence, this Court agrees with respondents that the Correspondence still fails to establish continuous use for the fourteen-year gap in petitioner's evidence, which skips from a 1954 photograph to a 1968 electrical inspection certificate (NYSCEF Doc. 39).

Furthermore, the Board was not arbitrary and/or capricious in finding the Tax Form unpersuasive in establishing continuous use.

Thus, this Court finds that the Board did not act arbitrarily and/or capriciously and that the Board relied on "sufficient facts or reasonable inferences" in rendering its Decision and Order, dated June 27, 2019. There is no doubt that the administrative record contained sufficient evidence for respondents to rule the way they did, and a CPLR 7804(g) transfer is not required.

Conclusion

Thus, for the reasons stated herein, Lamar Advertising of Penn, LLC's CPLR Article 78 petition against respondents, the City of New York; Tynia D. Richard as Acting Commissioner and Chief Judge of the New York City Office of Administrative Trials and Hearings; and Melanie E. Rocco, as Commissioner of the New York City Department of Buildings, is hereby denied and dismissed, and the Clerk is hereby directed to enter judgment accordingly.

7/20/2020
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED	X	DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE