

Negrin v New York City Dept. of Bldgs.
2020 NY Slip Op 32561(U)
August 6, 2020
Supreme Court, New York County
Docket Number: 153921/2019
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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RENATO NEGRIN and SCOTT WILSON,
Petitioners,

INDEX NO. 153921/2019

MOTION DATE 03/04/2020

MOTION SEQ. NO. 003

- v -

NEW YORK CITY DEPARTMENT OF BUILDINGS,
Respondent.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84

were read on this motion for PRELIMINARY INJUNCTION.

Upon the foregoing documents, it is hereby ordered that the instant petition is granted in part and denied in part, as set forth more fully hereinbelow.

Preliminary Matter

The last sentence of this Court’s Decision and Order dated 12/20/2019 (NYSCEF Docs 43 + 44) in this Special Proceeding stated as follows: “The Clerk is hereby directed to enter judgment denying and dismissing the instant petition, without prejudice.” Nevertheless, the parties have continued to litigate it; in particular, petitioner has now moved for a preliminary injunction, and respondent and a non-party have opposed the motion. Hoping to get to the heart of the matter, and save everyone involved needless time and expense, the Court will direct the Clerk to restore this matter to active status and to enter the instant Decision and Order.

Background

The instant CPLR Article 78 proceeding is yet another battle in the never-ending war between, on one side, Manhattan developers, who want to increase the height of their buildings, and thus increase the premium prices paid for luxury apartments-in-the-sky, with their wonderful views of our great metropolis, and on the other side, Manhattan preservationists, who want to limit the height of buildings, to prevent loss of light, air and views (and property values), ... in some instances, views from their own luxury apartments-in-the-sky.

Petitioners Renato Negrin and Scott C. Wilson live on East 89th and East 88th Streets, New York, NY respectively. They value light, air, and views. Non-party 1228 Madison Avenue Development Lessee, LLC (“the Developer”) is currently building a 17-story, 250-foot high building at 1230 Madison Avenue, New York, NY (Block 1500, Lot 55). Respondent New York City Department of Buildings (“DOB”), as its name implies, is, roughly stated, the

administrative agency that regulates the construction, maintenance, alteration, and demolition of buildings, and insures compliance with the NYC Building Code, Zoning Resolution (“ZR”) and various other rules and regulations. Crucially, it issues, or refuses to issue, building permits; no permit, no building.

The subject site lies within the Special Madison Avenue Preservation District (“SMAPD”), which the City established in 1973 to, as petitioners state, “preserve and reinforce the unique character of Madison Avenue and the surrounding area from 61st Street to 96th Street.” In 1996, the City enacted § 99-054(a) of the ZR, amending the SMAPD to provide, as here relevant, as follows:

The height of all buildings or other structures shall not exceed 170 feet above curb level. However, such buildings or other structures may exceed 170 feet to a height of 19 stories or 210 feet, whichever is less, provided that the gross area of each story located above 170 feet does not exceed 80 percent of the gross area of the story directly below it.

On or about August 8, 2018, the Developer first filed plans with DOB for the subject building (NYSCEF Doc 24). On or about February 14, 2019, as DOB requires, the Developer filed a “Zoning Diagram” (NYSCEF Doc 25). Suffice it to say that there followed a dizzying array of numerous other filings, objections, denials, and permissions, culminating in DOB’s finally approving the current plans on or about February 14, 2020 (by which time the building allegedly was 50% complete). Nonetheless, petitioners continued to object. On or about April 29, 2020, DOB found that there were no illegal “mechanical voids” (see *infra*); and on or about May 7, 2010, DOB audited the Developer’s “floor area calculations” and found nothing amiss, giving the building yet another “green light.”

The Instant Motion

Petitioners now move, pursuant to CPLR Article 78 and 3025(b), to compel DOB finally to determine petitioners’ 9/10/2019, 12/10/2019, and 2/4/2020 “zoning challenges,” so as to allow petitioners to appeal to the NYC Board of Standards and Appeals (“BSA”) (see NYC Charter § 666(6)(a), directing appeals from DOB to BSA); to enjoin any further development (*i.e.*, construction) of the building “in contravention of zoning rules”; and to amend the instant petition to add the Developer as a respondent.

Standard of Review

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 respondent’s 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.* This Court may not simply second-guess respondent.

Requirements for a Preliminary Injunction

“The party seeking a [CPLR 6301] preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor.” Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 NY3d 839, 840 (2005).

Discussion

Mandamus

As best this Court can determine, DOB has approved the Developer’s building plans. As such, petitioners’ request, in the nature of mandamus, to compel DOB to do so is moot. In any event, respondent and other City entities are estopped from claiming that petitioners have not exhausted their administrative remedies with the DOB, or that any appeal to the BSA would be premature.

Preliminary Injunction

The parties devote many pages to arguing whether petitioners followed the arcane, arguably Kafka-esque, hoops through which one must jump to challenge DOB actions (see RCNY § 101-15, setting forth specifically to whom and to which office challenges must be addressed; not to mention DOB’s “Zoning Challenge and Appeal” form). Despite the legal maxim that “people must turn square corners when dealing with the government,” this Court is sympathetic to petitioners’ plight; whether or not they strictly complied with all procedural rules, they certainly made their objections known, and any failure to act according to Hoyle did not prejudice respondents. Respondent’s oxymoronic statement that petitioners’ challenges are “forever premature” is particularly problematic. Adding to the confusion, the parties disagree as to many aspects of petitioners’ course of conduct, even as to whether or not petitioners appealed DOB’s approval(s) to the BSA, which one should be able, objectively, to verify or debunk. In any event, this Court need not and does not attempt to disentangle this Gordian Knot, as even assuming petitioners did what they needed to do, and did it how and when they needed to do it, this Court finds that they are not entitled to the requested preliminary relief.

Petitioners claim that the building will be or is illegal in three particular respects. A rooftop mechanical bulkhead (or “obstruction”) is two feet too high; the bulkhead fails to taper; and the building contains a “mechanical void,” an illegal means to increase the height of a building by falsely claiming that one or more floors contain mechanical equipment, the floor area of which, if true, would not increase the statutorily limited ratio of floor area to lot size (“FAR”). Compare the affidavit of petitioners’ architect, George M. Janes, NYSCEF Doc 84, with the affidavit of the Developer’s architect, Igor Bienstock, NYSCEF Doc 78.

Likelihood of Success on the Merits

ZR § 23-62(g)(3)(ii) provides that: “where the maximum permitted height of a building is 120 feet or greater, [rooftop] obstructions [such as mechanical bulkheads] are limited to a maximum height of 40 feet.” Petitioners argue that the rooftop mechanical bulkhead is too high because it rises 42 feet. The Developer argues, in essence, that it could have had a forty-foot bulkhead atop a 210-foot-high roof, so it should be allowed to have a 42-foot bulkhead atop a 208-foot-high roof; in either event, the combined height comes out to 250 feet. Rooftop bulkheads are considered “obstructions,” and the Developer argues that the two feet of the bulkhead situated between 208 and 210 feet from curbside should not be considered an “obstruction,” because until

the 210-foot level the building had not reached its maximum height. The DOB has agreed with the Developer's position, and so does this Court.

Apparently, petitioners do not claim that the residential floors of the building violate the tapering rule; indeed, they do not dispute the Developer's claim that the building is "properly tapered to comply with the 80% area requirement for stories located above 170 feet." Rather, petitioners claim that the rooftop bulkhead violates the 80% tapering rule (*see* NYSCEF Doc 84). This Court is not aware of any authority that a rooftop bulkhead, an "obstruction," has to taper according to its "stories." In common parlance, experience, and sense, rooftop bulkheads simply do not consist of "stories."

ZR § 12-10 prohibits "mechanical voids." Petitioner claims that there is "a vast amount of mechanical space in the building." Respondent's architect, Igor Bienstock, explains, in considerable detail, that "there are no empty mechanical spaces in the building, and all of the mechanical equipment is contained on floors [four through seven] that also house residential space." At best, petitioners have established a disputed issue of fact, which is not (at least here; the law is complex) a sufficient ground to grant a preliminary injunction.

Irreparable Harm

New Yorkers are understandably jealous owners, and zealous guardians, of their light, air, and views. Even if petitioners are, *arguendo*, correct that the building improperly limits theirs, we are talking about a building that apparently already is, or soon will be, 250-feet, as opposed to 248- feet, and a mechanical bulkhead that is rectangular rather than slightly tapered. A five-foot discrepancy would be problematic; but a two-foot discrepancy, and a squared-off bulkhead, 250 feet in the air, are, to this Court, *de minimis*. Also, if petitioners pursue this case and succeed on the merits after a trial, the developer could, perhaps, lop off two feet, or the parties could reach some other, perhaps monetary, accommodation. According to petitioners' own architect, George M. Janes, the building is already "topped out." Thus, the request preliminarily to enjoin further construction is somewhat moot.

Consequently, petitioners have not established the "likelihood of success" and "irreparable harm" requisites for a preliminary injunction. This Court need not and will not attempt to "balance the equities" to see in which side's favor they tip.

Amendment

As best this Court can tell from the instant Order to Show Cause (NYSCEF Doc 61), petitioners want to amend their pleading solely to include the Developer, 1228 Madison Avenue Development Lessee, LLC, as a party respondent. That request is granted for what this Court hopes are obvious reasons, including giving the Developer standing to oppose the instant, now-amended, petition.

Final Analysis

Petitioners faced a Byzantine administrative process and a Catch-22: any attempt at redress at any given moment in time could have been considered (or argued to be) either premature (failure to exhaust administrative remedies) or too late (beyond the applicable Statute of Limitations). The current (and continuing) Covid-19 pandemic, which has created logistical

impediments in the Court system (which, fortunately, are resolving, albeit slowly), has further hindered petitioners' quest for judicial relief. But in the final analysis what has tripped them up, in this Court's eyes, is their inability to demonstrate that the building is or will be illegal, or that any possible illegality is a sufficient basis to issue the drastic remedy of a preliminary injunction, which at any rate appears to be somewhat moot. Finally, courts must bestow deference on the rulings of specialized administrative tribunals such as DOB (and BSA).

Conclusion

Thus, for the reasons set forth herein, the Clerk is hereby directed to restore this proceeding to active status; the instant motion is denied to the extent that it seeks relief in the nature of mandamus, is denied to the extent that it seeks a preliminary injunction, and is granted only to the extent that it seeks to amend this special proceeding to add non-party 1228 Madison Avenue Development Lessee, LLC as a respondent; and the Clerk is also hereby directed to amend the caption and the file accordingly.

<u>8/6/2020</u> DATE					<u>ARTHUR F. ENGORON, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE