

Matter of Campaign for Buffalo History Architecture & Culture, Inc. v City of Buffalo
2021 NY Slip Op 32931(U)
December 30, 2021
Supreme Court, Erie County
Docket Number: Index No. 816904/2021
Judge: Emilio Colaiacovo
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STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

In the Matter of the Application of
THE CAMPAIGN FOR BUFFALO HISTORY
ARCHITECTURE & CULTURE, INC.,

Decision & Order

Petitioner,

Index #: 816904/2021

vs.

CITY OF BUFFALO and
ADM MILLING, CO.,

Respondents

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Colaiacono, J.

In this Article 78 proceeding, Petitioner seeks to void the emergency demolition order approved by the Commissioner of Permits and Inspection Services for the City of Buffalo, dated December 17, 2021. The demolition order condemned the property located at 250 Ganson Street in the City of Buffalo,

commonly referred to as the Great Northern Elevator (hereinafter “GNE”), which is a designated historic building. Petitioner contends that the Commissioner’s determination lacks a rational basis and that the order violates the State Environmental Quality Review Act (hereinafter “SEQRA”). Respondent City of Buffalo contends that the decision to condemn the GNE, which they argue posed an imminent threat to public health and safety, was supported by a rational basis and that the determination was consistent with a Type II SEQRA action as well as Buffalo City Code §337-28 that addresses “dangerous conditions”. Respondent ADM, unable to remedy the building damage and acknowledging that the building presents a safety hazard to its employees and members of the public, supports the emergency demolition order.

PROCEDURAL HISTORY

Petitioner submitted an Order to Show Cause with Temporary Restraining Order to the Emergency Term Judge on Sunday, December 19, 2021. Judge Dennis E. Ward, the Emergency Term Judge, granted a temporary restraining order, enjoining ADM from “any act to physically alter or demolish the Great Northern Elevator, including the removal of any materials from the site until ...this Order is modified by the assigned Justice.” See Order to Show Cause, dated December 19, 2021. Thereafter, upon assignment to this part, the Court extended the temporary restraining order until December 27, 2021.

On December 27, 2021, the Court heard oral argument on the petition. Upon the conclusion of oral argument, the Court reserved decision and directed the parties to submit to mediation with retired New York State Supreme Court Justice and Erie County Surrogate Court Judge Hon. Barbara Howe. The parties participated in mediation on December 27, 2021 and December 28, 2021. On December 28, 2021, the Court was advised by Judge Howe and counsel that mediation was unsuccessful, and the matter was being returned to the Court for further handling.

As such, the Court's decision is as follows.

FACTS

The property that is the subject of the emergency demolition order is the Great Northern Elevator. Construction on the GNE was completed in 1897. At the time, it was the largest grain elevator in the world and the first to run on electricity. Grain mills, dating back to the 1840's, were initially wooden structures. However, because grain proved to be highly combustible, there were innovations in the construction of grain mills that led to them being fire-proof and moisture proof. See Petition, ¶129. The GNE was one of the newly constructed and technologically advanced mills. In its prime, it had 30 working bins that could store 17,000 pounds, per square inch, of grain. Id. at ¶130. Located on Buffalo's "elevator alley", the GNE is one of the last brick-box mills still standing.

During a significant windstorm on December 11, 2021, the northern wall of the GNE collapsed. The day after, the City of Buffalo's Commissioner for Permits and Inspection Services, James Comerford, along with Public Works Inspectors, personally inspected the property and used aerial zone imagery to ascertain the extent of the damage. On December 13, 2021, the City issued an "Order to Remedy". In its Order, the City directed ADM to "provide the City of Buffalo with a Statement of Intent on the repair plan or demolition to the damaged section of the building within five days." See Affidavit of Brian M. Melber, Esq., ¶15. The Order also directed to either "secure or take down the portion of the building that is unsafe and endanger[s] life and safety of the occupants and the public." Id. at ¶17. In response, ADM produced a report from John A. Schenne, an engineer and geologist.

In his report, and subsequently confirmed in his affidavit, Schenne concluded that the property was unsafe and a threat to the health, safety and welfare of the public. See Affidavit of John A. Schenne, P.E., P.G., ¶12; see generally "Report on the Structural Condition of the Great Northern Grain Elevator Buffalo, New York," by Schenne & Associates, December 2021. More specifically, Schenne noted that soft lime mortar used with the bricks had all but deteriorated over 125 years and that there was inadequate lateral force bracing. Id. at ¶19. Schenne concluded that the "partial collapse of the north wall...demonstrates the structural deficiencies of this brick exterior and

exacerbates them, increasing the likelihood of additional collapse of the structure.” Id. The lack of mortar, which prevents the bricks from moving, could not be cured, in Schenne’s opinion. Further, the steel exterior sheeting on the headhouse of the roof also presented an imminent safety hazard. The sheeting, which is sparingly attached to the structure, could blow off and fall nearly 170 feet down and strike an employee or member of the public. This was extremely prescient since a four (4) foot piece of sheeting, weighing ten (10) pounds, fell 90 feet and nearly struck an employee shortly after the wind damage occurred. See generally Affidavit of Francis Cambell and Affidavit of Shawn Duffy. In his expert opinion, GNE was extremely dangerous and presented a serious safety hazard to the public. Id. at ¶18. Schenne found it impractical to remediate the structure and found that the only available option was immediate demolition.

After receiving Schenne’s report from ADM, reviewing the aerial drone footage, and conducting his own personal inspection, Commissioner Comerford contacted the Buffalo Fire Department and provided them with all the data collected and requested input. On December 17, 2021, Buffalo Fire Commissioner William Renaldo agreed with the emergency demolition determination. Later that same day, Commissioner Comerford, after “conducting and completing an extensive analysis of all available evidence... determined that the former grain elevator was structurally unsound, in imminent

danger of collapse, and posed an immediate threat to the health, welfare, and safety of the public, and...issued the Notice of Condemnation”. See Affidavit of James Comerford, ¶30.

STANDARD OF LAW & REVIEW

Here, Petitioner seeks a preliminary injunction, enjoining the Respondents from proceeding with the demolition of the GNE. On a motion for a preliminary injunction, the moving party must demonstrate by clear and convincing evidence a likelihood of ultimate success on the merits, irreparable injury if the injunction were not granted, and a balancing of equities in favor of granting the injunction. Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 N.Y.3d 839 (2005); Aetna Ins. Co. v. Capasso, 75 N.Y.2d 860 (1990). If any one of these three requirements are not satisfied, the motion must be denied. Faberge Intern., Inc. v. Di Pino, 109 A.D.2d 235 (1st Dep't. 1985). An injunction is a provisional remedy to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual. However, it is not to determine the ultimate rights of the parties. As such, absent extraordinary circumstances, a preliminary injunction will not issue where to do so would grant the movant the ultimate relief sought in the complaint. Reichman v. Reichman, 88 A.D.3d 680, (2nd Dep't. 2011); SHS Baisley, LLC v. Res Land, Inc., 18 A.D.3d 727 (2nd Dep't. 2005). In addition, preliminary injunctions should not be granted absent extraordinary or unique circumstances or where the final judgment may otherwise fail to afford complete

relief. SHS Baisley, LLC v. Res Land, Inc., 18 A.D.3d at 727, supra. However, the decision whether to grant or deny a preliminary injunction is within the sound discretion of the Court. Masjid Usman, Inc. v. Beech 140, LLC, 68 A.D.3d 942 (2nd Dep't. 2009).

Here, the Court must evaluate the preliminary injunctive standard in the context of the requirements under Article 78 of the CPLR. Article 78 of the CPLR is the main procedural vehicle to review and challenge administrative action in New York. On judicial review of an administrative action under CPLR Article 78, courts must uphold the administrative exercise of discretion unless it has "no rational basis" or the action is "arbitrary and capricious." Matter of Pell v. Board of Ed. Union Free School District, 34 N.Y.2d 222 (1974). "The arbitrary and capricious test chiefly relates to whether a particular action should have been taken or is justified . . . and 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. at 231; See also Jackson v. New York State Urban Dev Corp., 67 N.Y.2d 400 (1986). Rationality is the key in determining whether an action is arbitrary and capricious or an abuse of discretion. Matter of Pell v. Board of Education, 34 N.Y.2d at 231. The Court's function is completed on finding that a rational basis supports the administrative determination. See Howard v. Wyman, 28 N.Y.2d 434 (1971). "Where the administrative interpretation is founded on a rational basis, that interpretation

should be affirmed even if the court might have come to a different conclusion.” Mid-State Management Corp. v. New York City Conciliation and Appeals Board, 112 A.D.2d 72 (1st Dep’t. 1985) aff’d 66 N.Y.2d 1032 (1985); Matter of Savetsky v. Zoning Bd. of Appeals of Southampton, 5 A.D.3d 779 (2d Dep’t. 2004).

As such, the only issue before this Court is whether Commissioner Comerford’s decision to issue the emergency demolition order had a rational basis. If the Court finds that such a determination was not rational, then a preliminary injunction is warranted as Petitioner is likely to prevail on the merits of its petition. If the Court finds that there was a rational basis to support the demolition order, a preliminary injunction cannot be issued since Petitioners will not be able to demonstrate the success of the ultimate relief they seek.

DECISION

It is not lost on this Court the significance of this decision. While the Court recognizes the public interest in saving a historic building, this must be balanced with important concerns such as public safety. On its face, an old building missing a large portion of a wall, combined with the overall deteriorated nature of the building, is alarming. It is also undisputed that metal sheeting has come loose from the building. However, it is unclear whether the recent incident referenced in affidavits was caused by the wind damaged northern wall. Further, it is unclear whether any further deterioration is imminent or simply anticipated.

As previously noted, the Court’s decision rests squarely on whether there existed a rational basis to issue the demolition order. The affidavits supplied by the parties are conclusory in nature, often resorting to highly-nuanced statements that mirror the necessary statutory language supporting the demolition. As such, a more developed record is necessary before the Court can entertain the injunctive relief Petitioner seeks.

To that end, the Court hereby schedules a fact-finding hearing for January 3, 2022 at 9:30 a.m. This hearing will be limited to the issue of how the City reached its decision and, specifically, whether the Commissioner had a rational basis for issuing the Order for the demolition. The authority to issue such an order is vested solely with the Commissioner. See Buffalo City Code §103-38. As such, what other witnesses or experts would opine is of no moment. A more developed record, outside what has been already submitted, is needed before the Court can rule on the relief that is requested.

Until the hearing, the temporary restraining order shall remain in full force in effect.

This shall constitute the Decision of the Court.



Hon. Emilio Colaiacovo, J.S.C

ENTER
December 30, 2021