

4TS II LLC v New York City Dept. of Bldgs.
2022 NY Slip Op 32718(U)
August 11, 2022
Supreme Court, New York County
Docket Number: Index No. 156160/2022
Judge: Lyle E. Frank
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

-----X

4TS II LLC,

Petitioner,

- v -

THE NEW YORK CITY DEPARTMENT OF BUILDINGS,
ERIC ULRICH

Respondent.

-----X

INDEX NO. 156160/2022

MOTION DATE 07/26/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42 were read on this motion to/for PREL INJUNCTION/TEMP REST ORDR.

Petitioner brings the instant petition pursuant to CPLR § 7803, alleging that respondents' were arbitrary and capricious in approving the MTA Controlled Pedestrian Access Zone Logistics Plan dated April 18, 2022 (the "Protection Plan,") for the premises located at One Times Square, NY, NY. For the reasons set forth below, the petition is denied¹.

Petitioner contends that the respondents' approval of the subject protection plan, will create a dangerous condition on the sidewalk that abuts its premises, 4 Times Square.

Respondents oppose the instant petition.

Facts

In March and May 2022, DOB issued several permits allowing non-party to this proceeding, Jamestown OTS, LP ("the developer"), to perform work on their property located at One Times Square, New York, New York.

¹ The Court notes that there is the parallel action filed by Petitioner against the developer, 4TS II LLC v. Jamestown OTS, L.P. (Index No. 156318/2022) (the "Developer Action").

The proposed work includes, a gut renovation, adding a vertical enlargement to the top of the preexisting 22-story building to make it a 25-story building, adding a new curtain wall system and façade re clad, and adding an exterior elevator to the outside of the building.

According to the diagram in the protection plan, the sidewalk shed would be constructed on “Broadway Plaza,” adjacent to the construction work being done at the subject building at One Times Square, and adjacent to petitioner’s property at 4 Times Square. The protection plan requires a sidewalk shed of approximately twenty (20) feet in width to be constructed on the North, West, and South sides of One Times Square – along 43rd Street, Seventh Avenue, and 42nd Street, respectively.

Beyond the work zone and beginning approximately sixty feet from the ground level façade of One Times Square on Broadway, the protection plan requires the construction of a sidewalk shed over the remaining third of Broadway and the entirety of the pedestrian sidewalk adjacent to the petitioner’s premises.

Standard of Review

In an Article 78 proceeding, the scope of judicial review is limited to whether a governmental agency’s determination was made in violation of lawful procedures, whether it was arbitrary or capricious, or whether it was affected by an error of law (*see* CPLR § 7803[3]; *Matter of Pell v Board of Educ.*, 34 NY2d 222, 230 [1974]; *Scherbyn v BOCES*, 77 NY2d 753, 757-758 [1991]). A determination subject to review under Article 78 exists when, first, the agency “reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be significantly ameliorated by further administrative action or by steps available to the complaining party” (*Walton v New York State Dept. of Correctional Servs.*, 8 NY3d 186, 194 [2007]). Article 78 review is permitted, where it is alleged a determination was

made “in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion....” CPLR §7803(3).

“It is hornbook law that 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.” *Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978] (citing *YMCA v Rochester Pure Waters Dist.*, 37 NY2d 371, 375 [1975]); see also CPLR § 7801(1). It is well settled that a failure to timely exhaust administrative remedies precludes judicial review. *Rodriquez v City of N.Y.*, 55 AD2d 532, 533 [1st Dept 1976] (“Petitioner cannot now be permitted to undo by court action that which he could have accomplished had he pursued his administrative remedies”); *Matter of Contest Promotions-NY LLC v NY City Dept. of Bldgs.*, 93 AD3d 436, 437 [1st Dept 2012].

Discussion

It is undisputed that the New York City Board of Standards and Appeals (“BSA”) has jurisdiction to hear appeals regarding DOB work permits and other DOB final determinations. Petitioner submitted its appeals request to BSA on July 22, 2022. On July 26, 2022, BSA responded that BSA did not have jurisdiction as “there is not final determination within the meaning of the BSA Rules of Practice and Procedure”. See NYSCEF Doc. 41.

Petitioner contends that it did in fact exhaust its administrative remedies and if the Court determined it had not that it should be excused because further administrative remedies would be futile. The Court does not agree. Contrary to petitioner’s contention, it failed to *timely* appeal to the BSA regarding the approval of the plan dated April 8, 2022. Pursuant to the Administrative Code, petitioner had 30 days to seek an appeal from the date of the final determination, which

based on the record before the Court was April 8, 2022, when the protection plan was approved. Petitioner fails to address how its untimely application was not fatal.

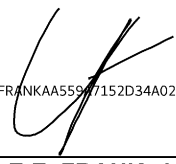
DOB contends, and this Court, agrees that petitioner has failed to exhaust its administrative remedies and as such the Court need not reach respondents' remaining arguments in opposition to the instant petition.

Even assuming *arguendo* that this Court were to find that additional administrative remedies would be futile, petitioner has simply failed to establish its prima facie entitlement to the relief sought. Preliminarily, the Court notes that the subject sidewalk shed that is being constructed pursuant to the protection plan does not abut petitioner's property. Petitioner's assertion of safety concerns and congestion are all speculative and not supported by any admissible evidence. In contrast, respondents have affirmatively established, through the affidavit of its Chief Plan Examiner for the Site Safety Plan Examination unit, that the protection plan is necessary, consistent with the applicable building codes and "failure to construct a sidewalk shed for this proposed work would create a very real and very dangerous public safety hazard of falling debris." *See* NYSCEF Doc. 10.

Moreover, petitioner's argument that Building Code § 3307 limits sidewalk sheds is unavailing; rather that statute dictates when sidewalk sheds are affirmatively required. Contrary to petitioner's contentions, the statute does not restrict the issuances of permits that impose regulations beyond the requirement. To read it as petitioner contends would hamstring DOB in its case by case evaluation to protect the public from falling debris and other potential hazards. In addition, the Court need not even reach this issue because the shed would abut the staging area of the One Times Square building.

Finally, the Court finds unavailing petitioner’s argument that case law mandates a finding for petitioner as the instant project is identical to a recent construction project at the same location, as the petitioner has failed to meet their burden that the projects are virtually identical. Moreover, the Court finds it highly unlikely that respondent could meet their burden due to the complexity of the One Times Square project, as discussed above.² Accordingly, it is hereby

ADJUDGED that the petition is denied.

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LYLE E. FRANK, J.S.C.

8/11/2022
DATE

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED		
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

APPLICATION:

CHECK IF APPROPRIATE:

<input type="checkbox"/>	NON-FINAL DISPOSITION		
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

² The Court, however, does disagree with respondent that the petition should be denied for failing to include a necessary party. Petitioner brought a separate action against the developer; the developer appeared at oral argument and had a full opportunity to be heard. As this matter is being disposed with this decision, there is no need for consolidation.