

**Luis Skibar Beatriz Rodriguez LLC v 338 W. 15th St.
LLC**

2023 NY Slip Op 33276(U)

September 21, 2023

Supreme Court, New York County

Docket Number: Index No. 157241/2018

Judge: Judy H. Kim

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JUDY H. KIM PART 05RCP

Justice

-----X

LUIS SKIBAR BEATRIZ RODRIGUEZ LLC,
Plaintiff,

INDEX NO. 157241/2018

MOTION DATE 12/20/2022

MOTION SEQ. NO. 006

- v -

338 WEST 15TH STREET LLC, JACOB BEN-MOHA, NYC
DEPARTMENT OF BUILDINGS,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

338 WEST 15TH STREET LLC,

Third-Party
Index No. 595249/2020

Third-Party Plaintiff,

-against-

BONILLA & SONS, INC., TUDOR INSURANCE COMPANY,

Third-Party Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 120, 129, 130, 131, 132, 133, 134, 136, 139, 145

were read on this motion for DISMISSAL.

Upon the foregoing documents, the New York City Department of Building’s motion to dismiss this action as against it is granted for the reasons set forth below.

Plaintiff is the owner of the building located at 340 West 15th Street, New York, New York (the “Building”). Plaintiff’s members, Luis Skibar and Beatriz Rodriguez De Armas, purchased the Building from Ernesto D. Fuentes in 2016 and transferred ownership to plaintiff in 2019. Plaintiff alleges that, prior to the 2016 purchase, Fuentes permitted defendant 338 West 15th Street LLC (“338 West”), the owner of the neighboring building, 338 West 15th Street (the “Neighboring

Building”), to enter the Building and perform work within the Building in order for the Neighboring Building to receive a Certificate of Occupancy from the New York City Department of Buildings (“DOB”) (NYSCEF Doc. No. 95 [Am. Compl. at ¶13]). 338 West agreed to obtain work permits from the DOB relating to 338 West’s work in the Building and to undertake all work necessary to close out these permits (Id. at ¶14).

Plaintiff alleges that, at the time this lawsuit was filed on August 2, 2018, the permits 338 West opened with the DOB with respect to its work on the Building remained open, as work still needed to be performed before these permits could be closed and a Certificate of Occupancy issued (NYSCEF Doc. No. 95 [Am. Compl. at ¶¶33-34]). After this action was commenced, 338 West and Jacob Ben-Moha (a member of defendant 338 West) filed various forms with the DOB in an effort to close out these permits, including four forms—a PW1 Form, a PW7 Form, a TRI Form, and a TR8 Form—that incorrectly listed Ben-Moha as the owner of the Building. Based on these permits, DOB issued a final Certificate of Occupancy, effective October 20, 2020, for the Neighboring Building (the “C/O”) (Id. at ¶61). On or about November 13, 2020, plaintiff moved to amend the complaint to, inter alia, demand an injunction directing DOB to remove the purportedly fraudulent forms filed by 338 West and Ben-Moha and to revoke the C/O that was issued by the DOB and remove it from the DOB records.

DOB now moves, pursuant to CPLR §3211(a)(2) and (a)(7), to dismiss this action on the grounds that: (i) plaintiff failed to exhaust administrative remedies prior to bringing this claim; and (ii) to the extent plaintiff seeks an order directing DOB to remove the permits and C/O from its records, plaintiff is not entitled to such relief.

In opposition, plaintiff argues that the exhaustion doctrine does not apply because plaintiff only learned that the incorrect forms were filed with the DOB nine months after they were filing

and, upon learning of same, promptly moved in this action for an order directing defendants to remove same and bar any further such filings. Plaintiff also argues that exceptions to the exhaustion doctrine apply. Finally, it argues, citing Klosterman v Cuomo, 61 NY2d 525 (1984), that regardless of whether plaintiff has exhausted its remedies, the Court has the power to issue a declaratory judgment directing an administrative agency to discharge mandatory duties, and that DOB has a mandatory duty to correct and remove documents with false information within its records.

DISCUSSION

The DOB's motion is granted. "Subject to certain exceptions not applicable here, 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" (Is. Realty Holdings, LLC v 995 Manor Rd., LLC, 78 AD3d 1007, 1008 [2d Dept 2010] [internal citations and quotations omitted]). Here, the DOB's issuance of certificates of occupancy is subject to review only by the Board of Standards and Appeals ("BSA") (See Byrne v Board of Standards and Appeals of City of New York, 5 AD3d 261 [1st Dept 2004] citing New York City Charter §§645[b][3]), which review must be sought within thirty days of a final determination of the Commissioner of the Department of Buildings (See 128 Hester St. Tenants Ass'n v 128 Hester LLC, 2009 NY Slip Op. 32284[U] [Sup Ct, New York County 2009]; see also New York City Charter § 669; 2 RCNY §1-06.3). Once the BSA issues a decision, that decision may then be appealed to Supreme Court within thirty days after the filing of the BSA's decision in the office of the board (See Administrative Code §25-207). As plaintiff failed to appeal to the New York City Board of Standards and Appeals prior to seeking the relief sought herein its failure to exhaust its administrative remedies mandates denial of this action (Is. Realty Holdings, LLC v 995 Manor Rd., LLC, 78 AD3d 1007, 1008 [2d Dept 2010] [internal citations and quotations omitted]).

Plaintiff's arguments to the contrary are unavailing. While plaintiff correctly notes that the exhaustion requirement "need not be followed ... when an agency's action is challenged as either unconstitutional or wholly beyond its grant of power, when resort to an administrative remedy would be futile or when its pursuit would cause irreparable injury" (Martinez 2001 v New York City Campaign Fin. Bd., 36 AD3d 544, 548 [1st Dept 2007] [internal citations omitted]), plaintiff offers no arguments that any of these exceptions apply.

Plaintiff's argument that the exhaustion requirement is inapplicable because it's time to challenge the permits filed by 338 West expired before it was aware of these permits is also unavailing. In fact, plaintiff's time to challenge the permits underlying the C/O expired on November 19, 2020, thirty days after the C/O was issued, and plaintiff was aware of the C/O prior to this date, as it moved to amend its complaint to seek the revocation and removal of the C/O on November 13, 2020 and annexed a copy of the C/O to its motion papers.

Finally, to the extent that plaintiff seeks mandamus relief in the form of an order directing DOB to revoke and remove the underlying permits and C/O, such relief is inappropriate here. Mandamus to compel is

a judicial command to an officer or body to perform a specified ministerial act that is required by law to be performed. It does not lie to enforce a duty that is discretionary. The availability of mandamus to compel the performance of a duty does not depend on the applicant's substantive entitlement to prevail, but on the nature of the duty sought to be commanded—i.e., mandatory, non-discretionary action...

(All. to End Chickens as Kaporos v New York City Police Dept., 152 AD3d 113, 117 [1st Dept 2017] [internal citations and quotations omitted], affd, 32 NY3d 1091 [2018]).

All of the acts plaintiff seeks to compel are discretionary. To wit, Administrative Code of the City of New York § 28-105.10 provides that "[t]he commissioner is authorized to suspend or

revoke a permit issued under the provisions of this code” (Administrative Code §28–105.10 [emphasis added]) while Administrative Code of the City of New York §28-105.10.1 specifies that

The [DOB] commissioner may, on written notice to the permit holder, revoke any permit ... whenever there has been any false statement or any misrepresentation as to a material fact in the application or submittal documents upon the basis of which such approval was issued

(Administrative Code §28-105.10.1 [emphasis added]).

Administrative Code of the City of New York §28-118.17 provides, in turn, that

The [DOB] commissioner is authorized to request, in writing, pursuant to section 645 of the New York city charter that the board of standards and appeals or a court of competent jurisdiction revoke, vacate, or modify a certificate of occupancy issued under the provisions of this code whenever the certificate is issued in error, or on the basis of incorrect information provided to the department...

(Administrative Code §28-118.17).

These provisions demonstrate that “the determination of whether or not to revoke a permit [or certificate of occupancy] based upon material misrepresentations in the application is within the discretion of the DOB commissioner” and therefore “the court has no authority to direct” such revocation (159-MP Corp. v Cab Bedford, LLC, 53 Misc 3d 803, 814-15 [Sup Ct, Kings County 2016], affd on other grounds, 181 AD3d 758 [2d Dept 2020]).

Neither is the removal of documents from DOB records a proper subject for mandamus relief. New York City Charter §1133(f) provides that “[n]o records shall be destroyed or otherwise disposed of by an agency, officer or employee of the city unless approval has been obtained from the commissioner of records and information services, the corporation counsel and the head of the agency which created or has jurisdiction over the records who shall base their determinations on the potential administrative, fiscal, legal, research or historical value of the record” (New York City Charter §1133[f] [emphasis added]; see also 49 RCNY §1-01). Given the clear discretion on

this issue given to the commissioner of records, corporation counsel, and the head of the DOB, such an order would not be a proper subject for mandamus relief.

Petitioners' reliance on the Court of Appeals' decision Klostermann v Cuomo, 61 NY2d 525 (1984), to support a contrary conclusion is misplaced. In that case,

petitioners were present or former patients at State psychiatric hospitals who sought mandamus relief compelling the responsible administrative agency to prepare written aftercare plans pursuant to the provisions of Mental Hygiene Law §29.15 (f)-(h). Despite recognizing that the creation of the plans would involve the exercise of discretion, the Court granted mandamus relief since the duties imposed by the statute were mandatory and nondiscretionary. The Court explained that there is a distinction between “those acts the exercise of which is discretionary from those acts which are mandatory but are executed through means that are discretionary”

(Morrison v New York State Div. of Hous. and Community Renewal, 241 AD2d 34 [1st Dept 1998] [internal citations and quotations omitted], revd on other grounds, Matter of Morrison, 93 NY2d 834 [1999] [remanded to the trial court with directions to dismiss on grounds that issues presented were moot]). In contrast to Klostermann, “the act sought to be compelled here ... is itself discretionary” and, as there is “no clear legal right to relief,” mandamus is inappropriate (Id.).

Accordingly, it is

ORDERED that defendant New York City Department of Building's motion to dismiss is granted and this action is hereby dismissed as against it; and it is further

ORDERED that the action is severed and continued under this index number with respect to the remaining defendants, 338 West 15th Street LLC and Jacob Ben-Moha; and it is further

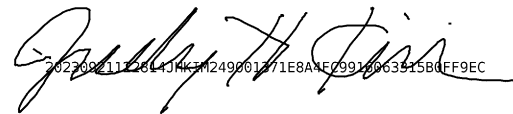
ORDERED that the caption is to be amended to reflect the dismissal of the New York City Department of Buildings and all future papers filed with the court bear the amended caption; and it is further

ORDERED that within ten days of the date of this decision and order, counsel for the New York City Department of Buildings shall serve a copy of this decision and order, with notice of entry, on plaintiff as well as the Clerk of the Court (60 Centre St., Room 141B) and the Clerk of the General Clerk’s Office (60 Centre St., Rm. 119), who are directed to enter judgment accordingly; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E filing” page on this court’s website at the address www.nycourts.gov/suptctmanh); and it is further

ORDERED that, in light of the dismissal of the New York City Department of Buildings, the Clerk of the Court is directed to transfer this matter to the inventory of a non-City Part.

This constitutes the decision and order of the Court.



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9/21/2023

DATE

HON. JUDY H. KIM, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE