Matter of Xiaofan Qi v Office of Admin. Trials & Hearings
2025 NY Slip Op 35385(U)
January 13, 2025
Supreme Court, Queens County
Docket Number: Index No. 724116/2023
Judge: Karen Lin

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: PART 24

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In the Matter of the Application of CPLR § 78
XIAOFAN QI
ZHI GUO,

Petitioners,

-against-

Office of Administrative Trials and Hearings (OATH)
The New York City Department of Buildings (DOB),

Respondents.

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Index No. 724116/2023

Motion Seq. No. 1

DECISION AND ORDER

The following numbered papers read on this petition pursuant to CPLR article 78 to annul the determination of the New York City Office of Administrative Trials and Hearings (OATH) Appeals Division sustaining a violation of the New York City Zoning Resolution § 23-44 against the petitioner Xiaofan Qi as issued by the New York City Department of Buildings (DOB).

Papers	*NYSCEF Doc. No.*
Notice of Petition - Affidavits - Exhibits	1-13; 17
Answering Affidavit - Exhibits	22-36
Reply Affidavit	40-43

Upon the foregoing papers it is ordered that the petition is determined as follows:

The petitioners Zhi Guo and Xiaofan Qi are husband and wife and reside at property known as and located at 85-07 25th Avenue, East Elmhurst, New York (the property). Xiaofan Qi is the owner of the property. In 2019, the petitioners erected a fence surrounding the front and backyard of the property.

On July 2, 2019, the DOB issued a summons (the July 2019 summons) to Xiaofan Qi. The July 2019 summons indicated that the fence violated the height requirement promulgated by Administrative Code of the City of New York § 27-509 and New York City Building Code (Administrative Code of City of NY, title 28, ch 7) §§ 3111.1 (2008 code) and 3112.1 (2014 code). These statutes each state in relevant part that in residence districts, as established by the New York City Zoning Resolution, fences are permitted to be erected to a maximum height of six feet above the ground.

A hearing was held, and in a decision dated October 2, 2019, OATH Hearing Officer Javier Nieves (H.O. Nieves) found that the DOB failed to establish that Xiaofan Qi violated the abovementioned statutes contained in the July 2019 summons. Specifically, H.O. Nieves stated that Xiaofan Qi demonstrated that the fence surrounding the property was six feet high, not over six feet, and thus, conformed with the applicable statutes. As such, the July 2019 summons was dismissed.

Two years later, on October 25, 2021, the DOB issued Xiaofan Qi a second summons (the October 2021 summons). The October 2021 summons indicated that the fence violated the height requirement promulgated in New York City Zoning Resolution § 23-44 entitled "Permitted Obstructions in Required Yards or Rear Yard Equivalents." NY City Zoning Resolution § 23-442 (a) (2)[1] states in relevant part that in all residence districts, in any yard or rear yard equivalent, fences are not to exceed four feet in height, except that for corner lots, a fence may be up to six feet in height.

A hearing on the second summons was held on December 20, 2022. In a decision dated December 21, 2022, OATH Hearing Officer Donald Lash (H.O. Lash) rejected the petitioners' argument that the dismissal of the July 2019 summons should have been accorded res judicata effect, precluding the issuance of the October 2021 summons. H.O. Lash found the violation of Zoning Resolution § 23-44 to be established. Xiaofan Qi filed an appeal of H.O. Lash's decision. In a decision dated June 29, 2023, the OATH Appeals Division affirmed H.O. Lash's decision sustaining a violation of Zoning Resolution § 23-44 against Xiaofan Qi.

The petitioners commenced the instant proceeding pursuant to CPLR article 78 against DOB and OATH to annul the decision by the OATH Appeals Division. The petitioners rely on, among other things, the doctrines of res judicata and collateral estoppel. In opposition, the respondents contend, among other things, that the doctrine of res judicata is not applicable and that the determination made by the OATH Appeals Division was not arbitrary and capricious.

"It is well settled that the standard for judicial review of an administrative determination pursuant to CPLR article 78 is limited to inquiry into whether the agency acted arbitrarily or capriciously" (*Arbuiso v New York City Dept. of Bldgs.*, 64 AD3d 520, 522 [1st Sept 2009]; *see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Town of Scarsdale &*

[1] At the time that the October 2021 summons was issued, the language of NY City Zoning Resolution § 23-442 (a) (2) was located in NY City Zoning Resolution § 23-44 (a)(9).

Mamaroneck, Westchester County, 34 NY2d 222, 231 [1974]). "Once it has been determined that an agency's conclusion has a sound basis in reason, the judicial function is at an end" (*Arbuiso v New York City Dept. of Bldgs.*, 64 AD3d at 522; *see Paramount Communications v Gibraltar Cas. Co.*, 90 NY2d 507, 514 [1997]).

"The doctrine of res judicata precludes a party from litigating 'a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter' " (*Josey v Goord*, 9 NY3d 386, 389 [2007], quoting *Matter of Hunter*, 4 NY3d 260, 269 [2005]). "Under New York's transactional approach to the rule, 'once a claim is brought to final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy' " (*Josey v Goord*, 9 NY3d at 389-390, quoting *O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]).

"Additionally, res judicata is generally applicable to quasi-judicial administrative determinations that are 'rendered pursuant to the adjudicatory authority of an agency to decide cases before its tribunals employing procedures substantially similar to those used in a court of law' " (*Josey v Goord*, 9 NY3d at 390, quoting *Ryan v New York Tel. Co.*, 62 NY2d 494, 499 [1984]). However, before applying "res judicata to an administrative decision ... 'it is necessary to determine whether to do so would be consistent with the function of the administrative agency involved, the peculiar necessities of the particular case, and the nature of the precise power being exercised' " (*Josey v Goord*, 9 NY3d 386 at 390, quoting *Matter of Venes v Community School Bd. of Dist. 26*, 43 NY2d 520, 524 [1978]).

Here, assuming that the October 2021 summons arose from the same transaction or occurrence or series of transactions as the July 2019 summons, precluding the DOB from charging a violation of New York City Zoning Resolution § 23-442 (a) (2), and barring OATH from adjudicating the alleged violation, would be inconsistent with enforcing the New York City Zoning Resolution in all residence districts (*see Lexington Assoc., LLC v City of New York*, 222 AD3d 458, 461 [1st Dept 2023]). Otherwise, the petitioners would be afforded treatment different from that given to other homeowners of the same class by allowing a fence exceeding four feet in height despite the clear statutory mandate to the contrary (*see id.*).

Moreover, the OATH Appeal Division's decision to reject the petitioners' res judicata defense was not arbitrary and capricious or affected by an error of law (*see* CPLR 7803 [3]; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Town of Scarsdale &*

Mamaroneck, Westchester County, 34 NY2d at 231; *Lexington Assoc., LLC v City of New York*, 222 AD3d at 462). The decision found, relying on its administrative precedent, that the October 2021 summons did not cite the same section of law as the July 2019 summons and that the petitioners' fence was a continuing violation for which res judicata does not apply (*see DOB v Xiaofan Qi*, Appeal No. 2300263, [June 29, 2023], citing *NYC v Leon Goldstein*, Appeal No. 1100289 [November 17, 2011]). "This interpretation was 'not irrational or unreasonable' and 'should be upheld' " (*Lexington Assoc., LLC v City of New York*, 222 AD3d 458 at 462, quoting *Matter of City of New York v New York State Nurses Assn.*, 130 AD3d 28, 34 [1st Dept 2015]).

Additionally, upon review of the petitioners' submissions to H.O. Lash and to the OATH Appeals Division in support of dismissal of the October 2021 summons, the court notes that they failed to make any substantive argument relying on the doctrine of collateral estoppel. Thus, it was not arbitrary and capricious for the OATH Appeals Division to neglect to consider and discuss the doctrine of collateral estoppel in its decision. Last, petitioner's contention that there was selective enforcement because the adjacent and other houses in the neighborhood also have six-foot-high fences, without more, does not constitute grounds to set aside the administrative determinations.

Accordingly, it is hereby

ORDERED that the petition seeking to annul the decision of the OATH Appeals Division, dated June 29, 2023, sustaining a violation of Zoning Resolution § 23-44 brought against Xiaofan Qi by the DOB, is denied and dismissed.

Dated: January 13, 2025
Long Island City, New York

FILED
1/16/2025
COUNTY CLERK
QUEENS COUNTY

HON. KAREN LIN, J.S.C.