Matter of Twenty-Seven Twenty-Four Realty Corp. v Srinivasan
2012 NY Slip Op 31261(U)
May 7, 2012
Sup Ct, New York County
Docket Number: 110501/11
Judge: Joan B. Lobis

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Joan B. Lobis **PART** 6

Justice

Index Number : 110501/2011
TWENTY-SEVEN TWENTY-FOUR
vs.
SRINIVASAN, MEENAKSHI
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____

MOTION DATE 2/17/12

MOTION SEQ. NO. _____

The following papers, numbered 1 to 8 **, were read on this motion to/for** annul Board's resolutions.

Notice of Motion/Order to Show Cause — Affidavits — Exhibits Petition | **No(s).** 1-3

Answering Affidavits — Exhibits _____ | **No(s).** 4-7c

Replying Affidavits _____ | **No(s).** 8

Upon the foregoing papers, it is ordered that this motion is

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

FILED

MAY 14 2012

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 5/7/12

_____, J.S.C.
JOAN B. LOBIS

1. **CHECK ONE:** ..... ☑ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

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IN THE MATTER OF THE APPLICATION OF
TWENTY-SEVEN TWENTY-FOUR REALTY CORP.,

Petitioner,

Index No. 110501/11

FOR A JUDGMENT PURSUANT TO ARTICLE 78
OF THE CIVIL PRACTICE LAW AND RULES

Decision and Order

-against-

MEENAKSHI SRINIVASAN, Chair, CHRISTOPHER COLLINS, Vice-Chair, and DARA OTTLEY-BROWN, SUSAN M. HINKSON and EILEEN MONTANEZ, Commissioners, Constituting the NEW YORK CITY BOARD OF STANDARDS AND APPEALS, and NEW YORK CITY DEPARTMENT OF BUILDINGS,

Respondents.

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JOAN B. LOBIS, J.S.C.:

Petitioner Twenty-Seven Twenty-Four Realty Corp. brings this proceeding under Article 78 of the C.P.L.R. seeking an order annulling the August 16, 2011 resolution of respondent New York City Board of Standards and Appeals (the "BSA"), and directing the BSA to reverse the determinations of respondent New York City Department of Buildings (the "DOB") disapproving petitioner's job applications to grandfather four advertising signs as legal nonconforming uses.

Petitioner is the owner of a building located at 27-24 21st Street in Astoria, Queens (the "Subject Property"), which it purchased on or about October 4, 1993. The Subject Property is a five-story residential building with a commercial space on the ground floor. The facade bears four (4) illuminated advertising signs, two located on the north wall and two located on the south wall.

On or about May 21, 2009, petitioner sought a preconsideration from the DOB that the four advertising signs be accepted as grandfathered signs under New York City Zoning Resolution[1] ("ZR") § 52-83. On April 26, 2010, the DOB denied petitioner's request on the grounds that the evidence submitted for the advertising signs on the south wall failed to establish that the signs were continuously used without a two-year interruption and that there was no evidence submitted for the signs on the north wall regarding its legal use prior to 1961. On or about May 26, 2010, petitioner appealed the April 26, 2010 determination to the BSA. By letter dated August 19, 2010, the DOB notified petitioner that its appeal was not ripe for review by the BSA because the April 26, 2010 determination was not a final determination upon which an appeal could be taken. On or about February 10, 2011, petitioner filed four job applications with the DOB to legalize the four advertising signs at the Subject Property. On or about February 14, 2011, the DOB disapproved the four application based on the April 26, 2010 determination and found that the four illuminated signs were not permitted in the Subject Property's zoning district.

Petitioner appealed the February 14, 2011 determination to the BSA, requesting reconsideration that the four signs be grandfathered as legal non-conforming use. Public hearings were conducted on May 17, 2011 and July 12, 2011. Marnie Kudon, Esq., Elizabeth Booth, Vincent Sokolich, and Norman Mersky testified on behalf of petitioner. John Egnatios-Benne, Esq., testified on behalf of the DOB. In support of its appeal, petitioner submitted records from the State of New York Division of Housing and Community Renewal, confirming that Elizabeth Booth is a tenant in

[1] The Zoning Resolution was enacted in 1916 and was most recently reformed in 1961 due to changes in population and land use.

a rent-controlled unit at the Subject Property; New York State Department of Business records; deed records; affidavits of Elizabeth Booth, Vincent Sokolich, Steven Sokolich, and Norman Mersky attesting to the continuous use of the four advertising signs collectively since the 1950's; leases for the north and south walls for the advertising of signs; proof of payment for such leases; assignments of leases; certificates of insurance; written correspondence with petitioner's current lessee; and photographs of the advertising signs taken between 1972-1998 and 2006-2010. Petitioner submitted no photographs or lease documents from 1961-1971 or for a period in the 1980's.

On August 16, 2011, the BSA issued Resolution No. 94-10-A (the "BSA Resolution"), upholding the DOB's determination that the four signs were not entitled to nonconforming use protection because, although the signs were lawfully established prior to the ZR's reformation on December 15, 1961, petitioner failed to establish that the signs had been in continuous use since December 15, 1961. In reaching its determination, the BSA found, inter alia, that: (1) the ranges of dates of the photographs did not establish any actual date and were insufficient; (2) the sign leases did not establish the actual use of the sign; and (3) the affidavits did not provide sufficient details about the signs to be relied upon. In deciding the appeal, the BSA relied on the DOB's Technical Policy and Procedure Notice 14/1988 (the "TPPN"). The TPPN sets forth four types of evidence, in order of preference, of continual nonconforming use, which have been accepted by the DOB Borough Commissioner. Category "A" evidence is the most preferred and includes records from any City agency, such as tax records and registration cards. Category "B" evidence includes records, bills, or other documentation from public utilities. Category "C" evidence includes any other documentation or bills indicating the use of the building. Category "D" evidence

is accepted only after a satisfactory explanation that documents in Categories "A" through "C" do not exist, and it includes closely-scrutinized affidavits regarding the use of the building.

Petitioner now brings this Article 78 proceeding, seeking the above-referenced relief, on the grounds that the BSA Resolution is arbitrary, capricious, inconsistent, and not supported by substantial evidence. Primarily, petitioner argues that it is not required to establish that the signs were not discontinued for more than two years in order to continue the nonconforming use because the signs were lawfully established as early as 1939. Petitioner states that requiring it to establish continuous use is unjustified and constitutes an illegal taking. Petitioner asserts that the four advertising signs provide it with a combined annual revenue of approximately $60,000, and that its rights and investments should not be disturbed by the subsequent reformation of the ZR.

Petitioner also argues that the BSA Resolution is arbitrary because it creates an impossible and inconsistent standard for petitioner to satisfy. Petitioner asserts that the TPPN was never produced prior to the appeal and that it is not specific to advertising signs. Petitioner complains that the BSA applied standards which are not explicitly stated in the TPPN, such as requiring proof of actual use of the advertising signs by the lessees. It asserts that the BSA arbitrarily failed to appreciate that no electricity bills existed to satisfy Category "B" of the TPPN, and that it should have given greater weight to the affidavits submitted and testimonies heard. Additionally, petitioner argues that the BSA Resolution is unsupported by the record because the BSA failed to consider the certificates of insurance, proof of rent payments, list of advertising signs, and written correspondence from the lessee. Petitioner further argues that the BSA rendered a decision based

on an incomplete record because the DOB failed to comply with the BSA's request that it produce examples of cases where the DOB had approved lawful nonconforming use of advertising signs and the types of acceptable evidence upon which the DOB relied in those cases.

In its answer and response papers, respondents argue that the BSA Resolution was rational, reasonable, and supported by the record. Respondents maintain that it is petitioner's burden to establish continuity. Respondents assert that illuminated advertising signs are not permitted as-of-right within the Subject Property's zoning district, and that the DOB requires a party seeking approval of nonconforming use to establish that: (1) the nonconforming use was lawfully established prior to December 15, 1961; and (2) the use was not discontinued for a period of two or more years since becoming nonconforming. Respondents maintain that the BSA reasonably found that the signs on the north and south walls were lawfully established prior to December 15, 1961, but that petitioner failed to establish that the signs have remained in continuous use, without any two-year interruption, since they became nonconforming.

Further, respondents argue that the evidence submitted regarding the advertising signs on the north and south walls fails to satisfy the standard set forth in the TPPN. Respondents state that the majority of evidence petitioner provided were from Categories "C" and "D." Respondents aver that, taken together, the evidence established that the advertising signs existed at the Subject Property intermittently, at best, and that there existed sufficient gaps of times unaddressed by the evidence that could not be ignored. Respondents assert that the BSA rationally determined that the leases should be given limited weight because they only reflect a right to occupy the walls, not the

actual use of the walls for advertising signs. Even if the BSA were to accept the leases as satisfactory evidence, respondents point out that there was neither a lease nor a photograph for either wall from 1961 to 1971 or from 1982 to 1990. Respondents argue that the BSA rationally determined that the affidavits submitted by petitioner should be afforded limited evidentiary value because the affidavits were potentially biased, neglected to provide sufficient detail, and failed to establish a time line of continuous use from 1961 to the present.

"'It is not the function of judicial review in an article 78 proceeding to weigh the facts and merits *de novo* and substitute its judgment for that of the body reviewed, but only to determine if the action sought to be reviewed can be supported on any reasonable basis.'" In re Clancy-Cullen Storage Co., Inc. v. Bd. of Elections of the City of N.Y., 98 A.D.2d 635, 636 (1st Dep't 1983) (emphasis in original), quoting In re Kayfield Constr. Corp. v. Morris, 15 A.D.2d 373, 378 (1st Dep't 1962). "[A]n agency's interpretation of a statute that it is charged with administering is entitled to deference if it is not irrational or unreasonable." In re Smith v. Donovan, 61 A.D.3d 505, 508 (1st Dep't) (citations omitted), leave to appeal denied, 13 N.Y.3d 712 (2009). The BSA consists of five individuals with expertise in land use and planning, and "is the ultimate administrative authority charged with enforcing the Zoning Resolution." In re Toys "R" Us v. Silva, 89 N.Y.2d 411, 418 (1996). There is a special deference given to determinations of zoning boards and other bodies. In re Khan v. Zoning Bd. of Appeals of the Village of Irvington, 87 N.Y.2d 344, 351 (1996). The "BSA's interpretation of [the ZR's] terms must be 'given great weight and judicial deference, so long as the interpretation is neither irrational, unreasonable nor inconsistent with the governing statute.'" Toys "R" Us, 89 N.Y.2d at 418-19, quoting In re Trump-Equitable Fifth Ave. Co. v. Gliedman, 62

N.Y.2d 539, 545 (1984) (remaining citation omitted). The BSA's determination must not be disturbed if there is a rational basis and it is supported by substantial evidence. Toys "R" Us, 89 N.Y.2d at 419. "When reviewing the determinations of a Zoning Board, courts consider 'substantial evidence' only to determine whether the record contains sufficient evidence to support the rationality of the Board's determination." In re Sasso v. Osgood, 86 N.Y.2d 374, 385 fn.2 (1995).

Here, the parties do not dispute that the four illuminated signs on the north and south walls are not permitted as-of-right in the Subject Property's zoning district. Under ZR § 52-11, a nonconforming use "may be continued, except as otherwise provided." ZR § 52-61 provides that:

> If, for a continuous period of two years, either the #non-conforming use# of #land with minor improvements# is discontinued, or the active operation of substantially all the #non-conforming uses# in any #building or other structure# is discontinued, such land or #building or other structure# shall thereafter be used only for a conforming #use#. Intent to resume active operations shall not affect the foregoing.

Further, New York courts have consistently found that the owner of a property bears the burden of proving that the nonconforming use is in compliance with the ZR. See In re Syracuse Aggregate Corp. v. Weise, 51 N.Y.2d 278, 284-5 (1980); In re Mohan v. Zoning Bd. of Appeals of Town of Huntington, 1 A.D.3d 364 (2d Dep't 2003); In re Quade v. Zoning Bd. of Appeals, 248 A.D.2d 386 (2d Dep't 1998).

The court finds unpersuasive petitioner's argument that the BSA acted arbitrarily and capriciously by applying the continuity requirement set forth in ZR § 52-61. The ZR expressly prohibits the continuation of a nonconforming use if the use has been discontinued for a period of

two or more years. ZR § 52-61. Petitioner bore the burden of establishing the continuity of the nonconforming uses from 1961 onward. Moreover, In re Yung Bros. Real Estate Co., Inc. v. LiMandri, 26 Misc. 3d 1203(A) (Sup. Ct. N.Y. Co. 2009), the case which petitioner cites, does not support petitioner's position. In Yung, the lower court issued an order staying the respondents from removing the sign in question. Id. In doing so, lower court made a procedural determination that petitioners had demonstrated a likelihood of prevailing on the issue of whether the sign existed at the time it became nonconforming. Id. Recently, however, on reviewing the issue of substantial evidence, the First Department upheld the agency's determination ordering petitioners to remove the nonconforming sign, concluding that petitioners failed to fulfill their burden of demonstrating that the sign existed at the premises at the time it became nonconforming. Yung Bros. Real Estate Co., Inc. v. LiMandri, 92 A.D.3d 508 (1st Dep't 2012). Additionally, petitioner cites Costa v. Callahan, 41 A.D.3d 1111 (3d Dep't 2007), for the proposition that nonconforming uses in existence when the ZR was enacted are constitutionally protected. However, Costa is not at odds with the ZR. The ZR expressly permits the continuation of nonconforming uses under certain conditions. The holding in Costa does not bar the imposition of conditions– such as the continuity requirement– in order to maintain a legal nonconforming use, and subsequent case law has recognized this requirement. See, e.g., In re Toys "R" Us v. Silva, 89 N.Y.2d 411, 418 (1996). Therefore, it was rational for the BSA to consider whether the nonconforming use of the signs had been discontinued for a period of two or more years.

Additionally, the court finds unpersuasive petitioner's argument that it is irrational for the BSA to rely upon the TPPN. Petitioner argues that the TPPN is ambiguous because it is not

specific to advertising signs. However, the DOB formulated the TPPN as a guideline in determining all nonconforming cases, and it is not purported to be an exhaustive list of acceptable documents. Petitioner was not precluded from submitting additional documentation that would establish continuity, and was also afforded an opportunity to supplement its evidence after receipt of the TPPN. Therefore, in the absence of a more specific guideline, it is rational for the BSA to rely upon the TPPN, and uphold the DOB's reliance upon the TPPN, in cases involving advertising signs.

Moreover, the court finds unpersuasive petitioner's argument that the BSA misapplied the TPPN. For example, petitioner argues that the affidavits and testimonies should have been accepted as credible, and that had they been regarded as true, the cumulative evidence would have established continuity. However, the court does not find that the BSA abused its discretion by weighing the evidence in the manner in which it did. Given its expertise and its authority to interpret the ZR, the BSA is entitled to make credibility findings. Determining that petitioner's witnesses are potentially biased, that their testimonies and affidavits lack specificity, and that there is insufficient corroborating evidence, is a rational conclusion. The court cannot review the credibility of the witnesses de novo. In re Clancy-Cullen Storage Co., Inc. v. Bd. of Elections of the City of N.Y., 98 A.D.2d 635, 636 (1st Dep't 1983).

Furthermore, the court finds unpersuasive petitioner's argument that the BSA Resolution was not based on substantial evidence because the DOB failed to present examples of cases in which it permitted legal nonconforming use of advertising signs and the types of evidence it accepted in those cases. Petitioner argues that the DOB's failure to produce such documents

should trigger a negative inference and demonstrates that the TPPN's standard is impossible to satisfy. However, petitioner does not indicate how the DOB's failure to produce this information affected its burden to prove continuity. The BSA took into consideration petitioner's grievance and reserved the right to make further inquiries if there existed a necessity. The fact that the DOB submitted no examples did not precluded plaintiff from submitting additional forms of evidence to establish continuity. The BSA's determination that petitioner failed to establish continuity was not without reasonable basis and was based upon, inter alia, photographs, affidavits, and leases submitted by petitioner and testimony heard on the matter, taking into account the quantity and quality of the evidence. Therefore, the BSA's decision to not require further information from the DOB was rational.

Accordingly, it is hereby

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: May 7, 2012

ENTER:

JOAN B. LOBIS, J.S.C.