

Matter of Lozowski v Town of N. Hempstead

2012 NY Slip Op 31698(U)

June 10, 2012

Sup Ct, Nassau County

Docket Number: 011547/11

Judge: James P. McCormack

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. JAMES P. McCORMACK
Acting Supreme Court Justice

In the Matter of the Application of
STANLEY N. LOZOWSKI

TRIAL/IAS, PART 43
NASSAU COUNTY

Petitioner,

INDEX NO.: 011547/11

For a Judgment Pursuant to Article 78 of the
Civil Practice Law and Rules

MOTION SUBMISSION
DATE: 3/14/12

-against-

MOTION SEQUENCE
NOS. 1 & 2

TOWN OF NORTH HEMPSTEAD,

Respondent.

The following papers read on this motion:

- Notice of Motion/Supporting Exhibits.....XX
- Affirmation in Opposition.....X
- Reply Affirmation.....X

Petitioner petitions this court for copies of certificates of completion for a garage and a two dormers which he believes should have been issued under Town of North Hempstead permit number 11985 and 13251. Petitioner argues that the respondent, Town of North Hempstead lost, misplaced or misfiled the original certificates of completion that were issued on these permits in the 1940's. Respondent, Town of North Hempstead, moves this court for an order dismissing the petition in this proceeding pursuant to CPLR §§ 7804(f) and 3211(a)(3) on the grounds that the petitioner failed to exhaust its remedies pursuant to Town Law § 267-a and the Code of

the Town of North Hempstead, and that he is not the actual property owner, but rather, the son of the property owner and that he therefore lacks standing to appear before this court.

On August 18 2011, petitioner commenced a special proceeding pursuant to Article 78 of the CPLR to compel the Town to replace the certificates of completion, which he alleges were issued when his parents received permits for the construction of a garage, two upstairs dormers and a terrace at the premises located at 503 Beech Street, New Hyde Park, New York, currently designated on the Nassau County Land and Tax Map as Section 8, Block 347, Lot 12 (the "Premises").

According to Town records, on or about December 28, 1942, a certificate of occupancy was issued for a one family dwelling for the Premises. Thereafter, the Town's Building Department approved permit number 11985 on June 20, 1944, for the construction of a one car detached garage on the premises. On April 24, 1946, the Town's Building Department approved permit number 13251 to construct two dormers on the existing structure at the Premises. According to the Commissioner of the Department of Building, Kevin Cronin, the Building Department has no record of any certificates of completion ever being issued regarding the permits numbered 11985 and 13251.¹

According to the Town, in the 1940's and 1950's, the proper procedure for obtaining a certificate of completion required a property owner to make an application

¹ Affidavit of Kevin Cronin, Department of Building, Safety Inspection and Enforcement, page 2.

for a permit and pay the requisite fee, and upon approval they would be allowed to commence work at the location. After the work was completed, applicants would be required to pay a separate fee for a certificate of completion once a final inspection had occurred. Consequently, many property owners received the permit to commence the work, thereafter completed the work, and then never made the appropriate application to the Town, along with the requisite fee, for a certificate of completion.

This procedure was in place for many years, well before banks and lenders required certificates of completion as part of the mortgage review process. This two-pronged application process is no longer in use and presently the fees for the permit and certificate of completion are collected upon the submission of the permit application.

Pursuant to Town Code § 2-17: "The Building Commissioner shall issue a certificate of completion if it is found that the proposed work has been completed substantially in accordance with the permit and the laws applicable thereto". In order to complete this process, a property owner must submit an application, the requisite fee, electrical certificate (if required), final survey and have a final inspection to confirm that the work complied with the specifications in the permits. According to the Town's records the final inspection was completed as to permits numbered 11985 and 13251, and accordingly a final inspection would not be required. However, despite the inspection having occurred over sixty years ago, it would be necessary for the petitioner to submit an application, fee, current electrical certificate, and a final survey in order for the Town to issue the certificate of completion associated with these permits.

The petitioner has filed the present application alleging that the Town of North Hempstead has lost the certificates of completion that he apparently believes were issued in the 1940's. In fact, neither the petitioner, nor his parents, have ever applied for the certificates of completion and therefore the Building Department has yet to make a determination related to the requested relief.

In the present case, the Building Department has not made a determination whether the certificates of completion should be issued. In fact, assuming *arguendo*, the petitioner had made the proper application for the certificates of completion, and had received denials from the Building Commissioner, then pursuant to Town Law § 267-a and Town Code § 70-2525, the petitioner would have a right to appeal the building Commissioner's determinations to the Town Board of Zoning and Appeals (the "BZA"). According to Town Law § 267-a, the BZA may review a determination made by the administrative official charged with the enforcement of any local law adopted pursuant to Article 16 of Town Law. As the administrative officials charged with, *inter alia*, the enforcement of Building and Zoning Codes, the BZA may review a determination of the Building Commissioner made pursuant to Town Code § 70-225. Accordingly, a decision by the BZA would be considered a final determination and would be a condition precedent to this court exercising its jurisdiction pursuant to Article 78 of the CPLR.

"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" (*Matter of Aliano v Oliva*, 72 AD3d 944, 946 [2nd Dept. 2010] quoting

Watergate II Apts. v Buffalo Sewer Auth., 46 NY2d 52, 57 [1978]; see *Matter of Goldberg v Incorporated Vil. of Roslyn Estates*, 61 AD3d 756 [2nd Dept. 2009]; *Matter of Lucas v Village of Mamaroneck*, 57 AD3d 786 [2nd Dept. 2008]). This doctrine furthers the goals of relieving the courts of the burden of deciding questions entrusted to an agency, preventing premature judicial interference with the administrators' efforts to develop, even by some trial and error, a co-ordinated, consistent and legally enforceable scheme of regulation and affording the agency the opportunity, in advance of possible judicial review, to prepare a record reflective of its "expertise and judgment" (*Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d at 57, *supra*).

The exhaustion rule, however, is not an inflexible one. It is subject to important qualifications. It need not be followed, for example, when an agency's action is challenged as either unconstitutional or wholly beyond its grant of power (*cf. Matter of First Nat. City Bank v City of New York*, 36 NY2d 87, 92-93 [1975]), or when resort to an administrative remedy would be futile (*Matter of Podolsky v Daniels*, 21 AD3d 559 [2nd Dept. 2005]) or when its pursuit would cause irreparable injury (*Matter of Schiavone/Shea/Frontier-Kemper v New York City Dept. Of Env'tl. Protection*, 274 AD2d 586 [2nd Dept. 2000]; *Matter of good Samaritan Hosp. v Axelrod*, 150 AD2d 775 [2nd Dept. 1989]).

In the case at bar, the petitioner could have first made a proper application to the Town of North Hempstead Building Department prior to commencing this litigation, but it failed to do so. Once proper application had been made to the Town of North Hempstead Building Department the application could have actually been approved,

which would obviate the need for a proceeding such as this entirely. In the alternative, the application for a certificate of completion could have been rejected, which would trigger the petitioner's right to make application to the BZA. Only after an adverse ruling from the BZA would this court then have jurisdiction under Article 78 of the CPLR.

Moreover, the petitioner failed to demonstrate that an exception to the exhaustion of administrative remedies doctrine applies here (see *Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d at 57, *supra*). Further, the petitioner failed to establish that a future review of a potential adverse determination by the Building Commissioner would be futile (see *Lehigh Portland Cement Co. v New York State Dept. of Envtl. Conservation*, 87 NY2d 136, 146 [1995]; *Waterways Dev. Corp. v Lavelle*, 28 AD3d 539, 541 [2nd Dept. 2006]; *Breezy Point Coop. v City of New York*, 176 AD2d 909, 911 [2nd Dept. 1991]).

Accordingly, the petitioner failed to seek or obtain an initial determination regarding an application for a certificate of completion that was never submitted to the Town of North Hempstead and, consequently, could not have sought or obtained administrative review of a determination that has not been made. Until the petitioner has exhausted all administrative remedies, this court may not exercise jurisdiction under Article 78 of the CPLR (see *Island Holdings, LLC v 995 Manor Rd., LLC*, 78 AD3d 1007 [2nd Dept. 2010], *Matter of Vinrus Corp. v Village of Pelham Manor Bldg. Inspector*, 66 AD3d 690 [2nd Dept. 2009]; *Matter of Goldberg v Incorporated Vil. of Roslyn Estates*, 61 AD3d 756 [2nd Dept. 2009]; *Matter of Brunjes v Nocella*, 40 AD3d 1088 [2007]).

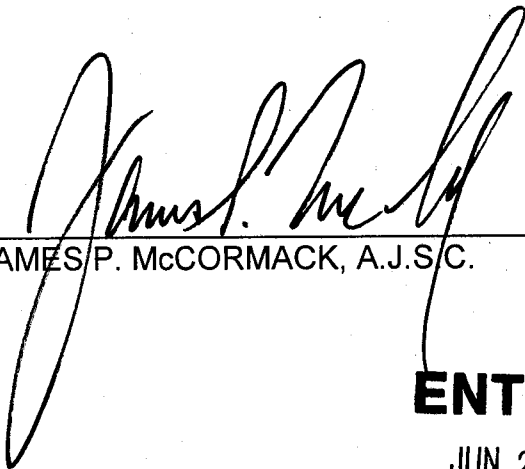
In light of the foregoing it is not necessary to reach the respondent's arguments regarding the petitioner's standing to sue.

The respondent's motion to dismiss is GRANTED

The Petition is DISMISSED.

This constitutes the Decision and Order of the Court.

Dated: June 10, 2012



JAMES P. McCORMACK, A.J.S.C.

ENTERED
JUN 20 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE