

Seven D, LLC v New York City Dept. of Bldgs.

2012 NY Slip Op 32818(U)

November 9, 2012

Supreme Court, New York County

Docket Number: 103059/2012

Judge: Joan B. Lobis

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

PRESENT: LOBIS
Justice

PART 6

SEVENTH

- v -

NYC DEPT OF BUILDINGS

INDEX NO. 103059/12
MOTION DATE 7-27-12
MOTION SEQ. NO. 201
MOTION CAL. NO. _____

The following papers, numbered 1 to 601 were read on this motion to for Art. 78 relief.

Notice of Motion/ Petition Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED
1-28
x-mot 29-46; x-mot 47-51
52-55; 56-59
x-mot reply 60-61

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING JUDGMENT DECISION

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 11/9/12 [Signature]
JOAN B. LOBIS J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

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

-----X

In the Matter of the Application of
SEVEN D, LLC,

Petitioner,

For a Judgment Pursuant to
Article 78 of the CPLR

-against-

Index No. 103059/2012

NEW YORK CITY DEPARTMENT OF BUILDINGS,
and, For Related Relief Against,

Decision, Order, and Judgment

101 AVENUE D ASSOCIATES, LLC.,

THE LOWER EASTSIDE GIRLS CLUB OF
NEW YORK, INC., and

101 AFFORDABLE, LLC,

Respondents.

-----X

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

In June 2012, petitioner Seven D, LLC, brought this proceeding by order to show cause, seeking a court order compelling respondent New York City Department of Buildings (“DOB”) to investigate its complaint that co-respondents 101 Avenue D Associates, LLC, The Lower Eastside Girls Club of New York, Inc., and 101 Affordable, LLC (collectively “Owner Respondents”) impermissibly reduced or eliminated the seismic gap between their building and petitioner’s building and installed a permanent lateral support system between the two buildings, in violation of the Building Code and without the proper permits; an order compelling Owner Respondents to cooperate in providing DOB and petitioner access to the support system; and a temporary restraining order (“TRO”) enjoining DOB from issuing any further permits to Owner Respondents and enjoining Owner Respondents from any further construction on its building.

Respondents cross-moved to dismiss the petition on various grounds. The relief which petitioner initially sought in its order to show cause became moot between the time that the order to show cause was filed and the time the proceeding was fully submitted, but instead of withdrawing the petition, petitioner sought alternative relief in its opposition to respondents' respective cross motions.

Since 2010, Owner Respondents have been erecting a building next to petitioner's building. In the summer of 2011, Owner Respondents' construction caused petitioner's building to suffer some settlement and movement, and Owner Respondents had to install temporary bracing to protect petitioner's building from further movement. With respect to further potential settlement or movement, Owner Respondents proposed to DOB that they install a permanent support system through a lateral bearing connection installed at the floor level of petitioner's building, thereby connecting the two properties. Owner Respondents informed DOB that this proposed permanent structure would encroach on the required seismic gap between the two buildings. The Building Code requires that a seismic gap exist between two neighboring buildings so that, in the event of an earthquake or strong winds, the buildings do not collide; however, the seismic gap requirement can be waived with DOB's approval.

The petition asserted that in February and March 2012, petitioner's inspector found concrete curbs and wooden forms along the south interior walls of Owner Respondents' building, which petitioner believed were not part of the temporary bracing or the DOB-approved plans. In March 2012, Owner Respondents' inspector confirmed to petitioner that these curbs and forms were part of a permanent support system that would physically connect the two buildings. At this point

in time, petitioner had not consented to its building being permanently connected to Owner Respondents' building and believed that Owner Respondents were constructing a permanent support system without DOB's approval. Over the next three months, petitioner repeatedly complained (via written and telephonic complaints) to DOB that Owner Respondents were constructing a permanent support system without DOB's required approval. On June 13, 2012, DOB inspected petitioner's complaints and found no violations and that the work conformed to plans.

Petitioner filed its order to show cause on June 20, 2012. Petitioner argued that DOB's recent determination that Owner Respondents' work conformed to plans was wrong because DOB never approved plans for a permanent support system. Citing a number of sections of the Building Code, petitioner argued that DOB had taken no action to investigate and inspect petitioner's complaints; that DOB must investigate all complaints of unsafe or hazardous conditions; and that the elimination of the seismic gap is an unsafe and hazardous condition. Petitioner further argued that DOB must issue a violation and a Stop Work Order pursuant to its obligations under the Building Code and related rules and regulations.

On June 20, 2012, the parties appeared before the court on the TRO. DOB presented a report from an inspection dated June 6, 2012, indicating that it had inspected Owner Respondents' building in response to correspondence that it had received regarding horizontal and vertical movement and a request for a Stop Work Order. The inspector had recommended that no Stop Work Order be issued because all work found at the time of the inspection was permitted with approved plans. Petitioner complained that DOB had not actually inspected the permanent lateral supports and the seismic gap. After hearing from both sides, the court was not convinced that a TRO was required and declined to issue the TRO.

Respondents respectively cross-moved to dismiss the petition. Owner Respondents asserted that while the concrete curbs were permanently affixed to their own building, the structure was not permanently affixed to petitioner's building. Owner Respondents maintained that the concrete curbs provide a "friction" connection to petitioner's building but do not impact the operation and functionality of petitioner's building. Owner Respondents also asserted that on January 23, 2012, DOB's Deputy Borough Commissioner approved the encroachment of the seismic gap and that on June 12, 2012, DOB approved revised structural drawings. Owner Respondents argued that the petition should be dismissed because petitioner was asking the court to compel DOB to perform purely discretionary acts not subject to mandamus.

DOB cross-moved for dismissal of the petition on the grounds that the petition failed to state a cause of action against DOB; that the court lacked subject matter jurisdiction because petitioner could not mandamus the DOB; and because petitioner had not exhausted its administrative remedies prior to commencing the special proceeding. DOB argued that mandamus may not be sought against DOB, and that if petitioner is challenging DOB's approval of a waiver of the seismic gap requirements, the challenge is premature because petitioner has not challenged the waiver before the Board of Standards and Appeals ("BSA"). Regardless, DOB argued, its inspection of the premises showed that a Stop Work Order was unnecessary because Owner Respondents' work conformed to approved plans.

In support of its cross motion, DOB asserted that after Owner Respondents proposed to erect a lateral bearing connection which would encroach on the seismic gap, in January 2012 DOB approved—in concept—an alternative to providing the required seismic gap. In an affidavit,

DOB's Deputy Borough Commissioner set forth that the DOB-approved design—concrete curbs, anchoring, and foam joints—is an equally safe alternative to the seismic gap. The Commissioner set forth that to the extent that the anchoring and seismic resistance construction would breach the exterior of petitioner's wall, petitioner's permission would be required. The Commissioner set forth that plans pursuant to the aforementioned design were filed with DOB and approved on June 12, 2012. DOB also submitted an affirmation from its inspector, who set forth that he inspected the premises on June 25, 2012, with a copy of the approved plans. He stated that he observed that Owner Respondents' work was being carried out in substantial accordance with approved plans, though the work was incomplete. The inspector set forth that he observed that no anchors had yet been installed on petitioner's wall, which he was able to observe because the conditions were exposed (Owner Respondents had opened up the sheetrock so that the DOB inspector could inspect the premises).

In opposition to the cross motions, petitioner asserted that it sought alternative relief from the court, namely, a court order compelling DOB to re-inspect the premises with petitioner and its experts to confirm the existing conditions at Owner Respondents' property; compelling DOB to issue a violation to Owner Respondents for performing work without a permit; and compelling DOB to withhold final approvals and issue a Partial Stop Work Order for all work involving anchoring and seismic resistance construction until petitioner provides its written authorization for such work.

Apparently, after petitioner served its opposition to the cross motions, Owner Respondents filed a revised application with revised plans at DOB; the new plans do not show a permanent physical attachment to petitioner's building. DOB approved this revised application on July 23, 2012.

It is well established that “a mandamus to compel may not force the performance of a discretionary act, but rather only purely ministerial acts to which a clear legal right exists.” In re Anonymous v. Comm’r of Health, 21 A.D.3d 841, 842 (1st Dep’t 2005); C.P.L.R. § 7803(1). “A discretionary act ‘involve[s] the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result.’” N.Y. Civ. Liberties Union v. State of N.Y., 4 N.Y.3d 175, 184 (2005), quoting Tango v. Tulevech, 61 N.Y.2d 34, 41 (1983).

A mandamus is simply not available to petitioner under these circumstances. Putting aside the fact that petitioner all but concedes that the relief it initially sought in the petition is moot, and the fact that it is improper for petitioner to seek new relief in opposition to a cross motion to dismiss, petitioner has not established a clear legal right to the relief that it seeks. Petitioner has failed to articulate any governing rule that requires DOB to re-inspect premises under the present circumstances or that requires DOB to invite petitioner’s experts to the inspection. Additionally, whether or not to issue a Stop Work Order is a discretionary act¹ and petitioner has not shown otherwise. Most importantly, while it does appear that Owner Respondents took steps towards permanently affixing their building to petitioner’s building without obtaining petitioner’s permission, the fact is that petitioner’s building and Owner Respondents’ building have never been permanently and physically connected nor are there any current plans to permanently and physically

¹ Pursuant to New York City Building Code § 28-207.2, “[w]henver the commissioner [of DOB] finds that any building work is being executed in violation of the provisions of [the Building Code], the zoning resolution, or of any laws or rules enforced by [DOB], or in a dangerous or unsafe manner, the commissioner or his or her authorized representative may issue a stop work order.” (Emphasis added).

connect the two buildings. Finally, petitioner does not have standing to seek an order compelling DOB to issue a violation to Owner Respondents for allegedly performing work without a permit. Petitioner's private rights are not affected by this determination. Donohue v. Cornelius, 17 N.Y.2d 390, 397 (1966). Moreover, DOB has performed a number of inspections and has specifically not found violations. If petitioner disagrees with DOB's determination to waive the seismic gap requirements, it is undisputed that petitioner must first exhaust its administrative remedies and appeal DOB's determination to the BSA before resorting to an Article 78 petition. Accordingly, it is hereby

ORDERED and ADJUDGED that the petition is denied, the cross motions are granted in accordance with the above decision, and the proceeding is dismissed.

Dated: November 9, 2012

ENTER:



JOAN B. LOBIS, J.S.C.