| **Robbins v New York City Landmarks Preserv. Commn.** |
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| 2018 NY Slip Op 31803(U) |
| July 27, 2018 |
| Supreme Court, New York County |
| Docket Number: 100647-18 |
| Judge: Arlene P. Bluth |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

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RICHARD ROBBINS,

Petitioner,

-against-

NEW YORK CITY LANDMARKS PRESERVATION COMMISSION

Respondent.

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**DECISION & ORDER & JUDGMENT**
**Index No. 100647-18**

Mot. Seq. 001

ARLENE P. BLUTH, JSC

The petition to invalidate the Certificate of No Effect granted by Respondent and to compel an application for a Certificate of Appropriateness is denied and this proceeding is dismissed.

**Background**

This Article 78 proceeding arises from Richard Robbins ("Petitioner") seeking, *inter alia*, a preliminary injunction to vacate the Certificate of No Effect ("CNE") that was issued to the owner of the building ("Owner"), located at 315 West 103rd Street in Manhattan ("Building") by the respondent Landmarks Preservation Commission ("Respondent"). Petitioner lives next door to the Building and claims he has suffered damages as a result of the horizontal and vertical additions made to the Building, which are directly visible from his apartment (Verified Petition at ¶9).

In 2009, the previous owner of the Building applied for and received a permit from the Department of Buildings ("DOB") for vertical and horizontal enlargements. The permit allowed for renovations that would add a fourth and fifth floor, a rear yard addition, and cellar enlargement. Construction on the rooftop and rear yard addition occurred from January to July

2009, when the DOB issued a stop work order ("SWO") that stopped construction.

The building was sold to the current owner in November 2014. By the time the area was designated as the Riverside-West Historic District in June 2015, the rear yard addition was nearly completed, as was part of the rear wall, two side walls, and roof. In December 2016, Owner removed what existed of the rear wall of the building. Petitioner filed a complaint with Respondent in December 2016 alleging that work continued when the SWO was in effect, and repeated concerns in January 2017 that work is beyond what is needed to weatherproof the building. In March 2017, DOB partially rescinded the SWO to allow the rear yard addition to be enclosed and weatherized because there were occupants in the building. In April 2017, DOB confirmed that the rear yard addition would conform to the approved weatherization plans.

In May 2017, Owner submitted an application for a work permit and architectural plans. In the application, Owner identified the work as (1) interior alterations and (2) modification of window openings on the rear or side of the non-street facing façade (Respondent's Memo of Law at 10). Respondent then issued a CNE permit on January 19, 2018 allowing for the construction of a "two-story rooftop addition and full-height rear yard addition" (Respondent's Exhibit G). The CNE noted "the modified masonry openings will not alter or destroy other protected features" and that the proposed work will not "result in the loss of, damage to, or adversely affect any significant architectural features...and that none of the works will be visible from the public thoroughfare" (Respondent's Exhibit G).

Petitioner alleges that from April to June 2017 construction work was performed on the Building that went beyond emergency weatherproofing. In May 2017 Community Board 7 unanimously passed a resolution calling for DOB to require the Building to have a Certificate of Appropriateness ("COA") from the Respondent (Petitioner's Exhibit 13). In August 2017

Petitioner claims that Owner wrote to Respondent stating "[o]ur intention is to avoid a public hearing and to obtain all approvals through staff level at LPC" (Order to Show Cause at 14).

Petitioner submitted a Freedom of Information Law ("FOIL") request to Respondent in December 2017 seeking all correspondence related to the subject property and any applications. Respondents sent a partial reply to the FOIL request in late February. Respondent claims it is continuing to produce "responsive, non-exempt, documents to Petitioner".

In May 2018, Petitioner commenced this Article 78 proceeding seeking: (1) a declaration that the CNE permit issued by Respondent to Owner is invalid and an annulment of the CNE, (2) a mandamus that a Certificate of Appropriateness ("COA") and a public hearing must be required for LPC to approve construction to the Building, (3) a judgment pursuant to Article 78 directing Respondent to comply with its duty under FOIL, (4) and awarding attorney's fees and litigation costs to Petitioner pursuant to New York Public Officer's Law § 89(4)(c).

Respondent claims that Petitioner's requests should be denied and the proceeding should be dismissed because (1) Petitioner has failed to name Owner as a necessary party in this proceeding, (2) Respondent's issuance of a CNE was rational and reasonable, (3) relief through mandamus is not appropriate in this case, and (4) Respondent has continued to reply to Petitioner's FOIL requests.

**Failing to Join Owner as a Necessary Party**

CPLR §1001(a) states "persons who ought to be parties if complete relief is to be accorded between persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." Joinder of a party may be excused in circumstances where "an effective judgment may be rendered in the absence of the person who is not joined" (CPLR § 1001[b][5]).

Here, Owner was not joined as a necessary party, even though a declaration invalidating the CNE permit would affect Owner because it would halt construction on the Building. However, Petitioner provided an Affidavit of Service showing service of the initial papers upon Owner (Petitioner's Affidavit of Service). Because it appears the Owner knew about this proceeding and declined to intervene, the Court will issue a decision on the merits.

**Mandamus to Compel**

Petitioner requests that the Court require Respondent to issue a Certificate of Appropriateness by seeking a mandamus to compel. "The extraordinary remedy of mandamus will lie only to compel the performance of a ministerial act, and only where there exists a clear legal right to the relief sought" (*Dekom v New York Dept. of Financial Services*, 110 AD3d 527, 973 NYS2d 163 [1st Dept 2013]). "It does not lie to enforce a duty that is discretionary… A ministerial act is best described as one that is mandated by some rule, law or other standard and typically involves a compulsory result. Discretionary acts, on the other hand, are not mandated and involve the exercise of discretion or judgment" (*Alliance to End Chickens as Kaporos v New York City Police Dept.*, 152 AD3d 113, 117, 55 NYS3d 31 [1st Dept 2017]).

Administrative Code §25-307(a) states to receive a COA permit issuance, "the commission shall determine whether the proposed work would be appropriate for and consistent with the effectuation of the purposes of this chapter. If the commission's determination is in the affirmative…it shall grant a certificate of appropriateness." [illegible] 63 Rules of the City of New York § 2-03 state "[a]ll applications for work on designated properties received by the Landmarks Preservation Commission are assigned to a professional staff member in the Preservation Department who will handle the project. The staff person will review the proposal to ascertain whether the materials submitted are sufficient for a determination to be made. If the

materials are sufficient, staff will certify the application as complete and issue the appropriate permit or take other action".

The Court finds that a mandamus to compel Respondent to issue a COA is not appropriate because Respondent's decision whether to issue a COA is discretionary and is not the performance of a ministerial, nondiscretionary act. Respondent has the ability to determine, in the first instance, which permit best fits each application. Respondent's ability to issue COA permits depends on its ability to determine "(1) the effect of the proposed work in creating, changing, destroying, or affecting the exterior architectural features...and (b) the relationship between the results of such work and the exterior architectural features of other, neighboring improvements" (Administrative Code §25-307[b][1]). Because deciding how the proposed work plans will impact the historical property involves discretion, issuing a COA falls outside the purview of the remedy of mandamus under an Article 78 proceeding.

**CNE Permit Invalidation**

In order to prevail, Petitioner must prove that the determination to issue the Certificate of No Effect "was arbitrary and capricious" (CPLR 7803[3]). "The courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is 'arbitrary and capricious'" (*Pell v. Board of Education,* 34 N.Y.2d 222, 231, 356 N.Y.S.2d 833, 839, 313 N.E.2d 321, 325 [1974]). The petitioner bears the burden of proof and must establish the allegations of the petition (*see Matter of Bergstein v. Bd. of Educ.* 34 N.Y.2d 318, 357 N.Y.S.2d 465, 313 N.E.2d 767 [1974]).

To issue a CNE, the Landmark Preservation Commission "shall determine: (a) whether the proposed work would change, destroy or affect any exterior architectural feature of the improvement on a landmark site... and (b) in the case of construction of a new improvement,

whether such construction would affect or not be in harmony with the external appearance of other, neighboring improvements on such site or in such district. If the commission determines such question in the negative, it shall grant such certificate; otherwise, it shall deny such request" (Administrative Code of City of NY § 25-306[a][1]).

The Court finds that there is a rational and reasonable basis for Respondent's issuance of the CNE. Construction on the Building had already begun by the time the Building was designated a historic landmark in 2015. In other words, when construction began Owner did not need construction approval from Respondent. Respondent's decision that because the two story enlargement and rear yard addition were built before 2015, the future related work should be classified as a modification rather than as an addition or enlargement is rational. Nor did Respondent abuse its discretion in reviewing the Owner's plans and determining that the proposed modifications to the building would be in harmony with the external appearance from the street/public thoroughfare (Respondent's Exhibit G). While Petitioner may dislike these modifications and not want to see them from his apartment, Petitioner did not show that Respondent was arbitrary and capricious in granting the CNE to Owner.

**FOIL Request**

Petitioner's request for an order directing Respondent to produce documents requested pursuant to his FOIL request is denied. An Article 78 proceeding "shall not be used to challenge a determination which is not final or can be adequately reviewed" (CPLR 7801[1]). Respondent claims that it has been providing Petitioner with the requested documents, and Petitioner stated that it was not provided with an approximate date for when the request will be granted or denied. Because this FOIL request is ongoing with documents still being provided and has not had a final determination, Petitioner has not exhausted his administrative remedies and an Article 78 is not

yet available to Petitioner.

**Attorney's Fees and Litigation Costs**

New York Public Officers Law states the court "may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed" (New York Public Officers Law § 89[4][c]). Because Petitioner has not prevailed at all in this proceeding, Petitioner is not awarded attorney's fees or litigation costs.

**Summary**

The Court finds that Petitioner failed to show that (1) Respondent was arbitrary and capricious in approving the Building's CNE, (2) that a mandamus to compel was appropriate to obtain a COA and public hearing, and that (3) he exhausted his administrative remedies on his FOIL request. Therefore, Petitioner's order to show cause is denied and this proceeding is dismissed.

Accordingly, it is hereby

ADJUDGED that the petition is denied and the proceeding is dismissed, without costs and disbursement to respondent.

**Dated: July 27, 2018**
**New York, New York**

**ARLENE P. BLUTH, JSC**

HON. ARLENE P. BLUTH
J.S.C.