9th & 10th St. LLC v City of New York
2019 NY Slip Op 30454(U)
February 8, 2019
Supreme Court, New York County
Docket Number: 161272/17
Judge: Alexander M. Tisch
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 52

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9TH & 10TH STREET LLC,

Plaintiffs,

-against-

THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF BUILDINGS,

Defendants.

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DECISION & ORDER

Index No.: 161272/17

HON. ALEXANDER M. TISCH:

In this declaratory judgment action, the defendants City of New York (the City) and the New York City Department of Buildings (DOB; together, defendants) move to dismiss the complaint, pursuant to CPLR 3211 (motion sequence number 001). For the reasons stated herein, this motion is granted and this action is dismissed.

BACKGROUND

Plaintiff 9th & 10th Street LLC (landlord) is the owner of a five-story building (the building) located at 605 East 9th Street in the County, City and State of New York. *See* notice of motion, Moston affirmation, exhibit A (complaint), ¶ 11. The building was formerly operated by the City as a public elementary school (P.S. 64), but it was closed in 1977, and eventually sold to the landlord at a public auction in 1998. *Id.*, ¶¶ 15-17. Landlord wishes to renovate the building, and ostensibly to use it as a "college or school dormitory." *Id.*, ¶ 14. This declaratory judgment action involves the dispute between the landlord, who contends that the New York City Zoning Resolution authorizes it to proceed with its plans immediately, and defendants, who contend that it does not.

This dispute is not new. Landlord originally filed a construction application with the DOB in 2004, which included a plan to raise the building to 19 stories in height and to renovate it extensively. *See* notice of motion, Moston affirmation, exhibit A (complaint), ¶ 4, fn 1. The DOB rejected that application, and the DOB's rejection was upheld by the New York City Board of Standards and Appeals (BSA) in 2005. *Id.*, ¶¶ 21-28. The matter was then litigated, and the Court of Appeals eventually upheld the BSA's ruling in 2008. The relevant portion of the Court of Appeals' decision in *Matter of 9th & 10th St. L.L.C. v Board of Stds. & Appeals of City of N.Y.* (10 NY3d 264 [2008]) found as follows:

> "[Landlord] relies, as did the Appellate Division majority, on [the holdings set forth in *Matter of Di Milia v Bennett*, 149 AD2d 592 (2d Dept 1989) and *Matter of Baskin v Zoning Bd. of Appeals of Town of Ramapo*, 40 NY2d 942 (1976)] for the proposition that a building permit cannot be withheld because of concern that the proposed building will be used illegally. Petitioner reads *Di Milia* and *Baskin* too broadly. Both cases hold that the mere possibility of a future illegal use is not an adequate reason for withholding a building permit. But where, as here, officials reasonably fear that the legal use proposed for a building will prove impracticable, it is not improper to insist on a showing that the applicant can actually do what it says it will do.
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> "In both *Di Milia* and *Baskin*, municipal authorities denied permits to construct one-family dwellings, because they feared that the houses might be converted to illegal two-family dwellings. Nothing in either opinion, however, suggests that one-family use was unlikely or impractical. On the contrary, Justice Shapiro's dissent in *Baskin*, which we adopted, says that 'the residence will concededly be occupied by ... one family.' At least in *Baskin*, the municipality's concern was that, because of the design of the home, it might, after being occupied by one family for some time, easily be occupied, illegally, by two. From the terse opinion in *Di Milia*, it appears that the concern there was similar. In each case, the court held that this possibility of 'future illegal use' (*Di Milia*, 149 AD2d at 593) was not a valid reason for withholding a building permit.
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> "*Di Milia* and *Baskin* would be applicable here if it were clear that petitioner's proposed building would be used initially as a dormitory. If that were the case, the mere possibility that it could later be converted to illegal apartment use would not justify withholding a building permit. But here, the Department of Buildings

> doubted that dormitory use would ever be possible, and asked for assurances—in the form of a connection with an educational institution—that it would be.
>
> "To seek such assurances seems no more than prudent. It would create needless problems if petitioner built a 19 story building, only to find that it could not use it in a legally-permitted way. The City would then face a choice between waiving the legal restrictions and requiring the building to remain vacant or be torn down. The City's officials did not act arbitrarily or capriciously in trying to avoid that dilemma."

10 NY3d at 269-270.

In 2005, before the Court of Appeals rendered the foregoing decision, the New York City Charter and Administrative Code were amended to add a provision, known as the "dorm rule," which provides, in part, as follows:

> "(a) Applicability. Student dormitory is classified under the Zoning Resolution of the City of New York as a Use Group 3, community facility use. The Zoning Resolution allows residences of all kinds, including residences for students, under a Use Group 2 classification. This rule sets forth the criteria the Department [of Buildings] shall use to designate a Class A building or part of a building as a Use Group 3 student dormitory. An owner that seeks to classify a rooming unit as a dormitory shall be subject to the provisions set forth in 1 RCNY 15-04(e).
>
> "(b) Definition. A student dormitory is a building or part of a building that is (1) operated by, or on behalf of, institution(s) that provide full-time day instruction and a course of study that may be pursued in fulfillment of the requirements of §§ 3204, 3205 and 3210 of the New York State Education Law, or post-secondary institution(s) authorized to grant a degree by the Regents of the University of the State of New York; (2) to house students enrolled at such institution(s). A student dormitory shall not be a single dwelling unit.
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> "(c) Required documentation. No permit shall be issued to create a student dormitory unless the following documentation has been submitted to the Department:
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> > "(1) Proof of ownership or control.
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> > "(i) Copies of documents demonstrating that the owner of the building or part of the building for which such permit is sought is an educational institution that provides a course of study that meets

> the requirements of subdivision (b) of this section, or
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> "(ii) Copies of a lease of the building or part of the building for a minimum ten year term by an educational institution that meets the requirements of subdivision (b) of this section, or
>
> "(iii) Copies of documents evidencing (A) the establishment of a non-profit entity, all of whose members, directors, trustees, or other individuals upon whom is conferred the management of the entity, are representatives of participating educational institutions that meet the requirements of subdivision (b) of this section to provide dormitory housing for students of such participating educational institutions; and (B) ownership or control of the building or part of the building by such non-profit entity for such purpose in the form of a deed or lease for a minimum ten-year term..."

1 RCNY § 51-01.

On June 20, 2006, the New York City Landmarks Preservation Commission voted to landmark the building. *See* notice of motion, Moston affirmation, exhibit A (complaint), ¶¶ 34-35. Thereafter, in February 2013, landlord filed a new construction application with the DOB that provided only for the renovation of the existing five-story structure, which included copies of the leases required by subparagraph 51-01 (c) (1) (ii) of the dorm rule. *Id.*, ¶¶ 41-51. The DOB initially granted that application, but later issued stop work orders in 2014. *Id.*, ¶¶ 57-68. The original building tenants were supposed to have been The Cooper Union College and The Joffrey Ballet School; however, they both terminated their leases in 2016. *Id.* Landlord then executed another lease with Adelphi University as a replacement tenant for the building; however, Adelphi terminated that lease, too, in 2017. *Id.*, ¶¶ 41-52, 89-125. There is currently no proposed tenant for the building. Undeterred by this, however, on December 20, 2017 landlord filed a summons and complaint setting forth a single claim for a declaratory judgment

that 1 RCNY 51-01 does not now apply to the building. Defendants did not file an answer to this complaint. On January 5, 2018, the landlord wrote to the DOB to request "a final determination" regarding its second construction application. *Id.*; Bruno aff, ¶ 3, exhibit A. On January 24, 2018, the DOB wrote back to the landlord denying its request, and stating as follows:

> "We have received your letter dated January 5, 2018. To the extent that you have requested that the [DOB] issue a final determination on various issues related to Job # 121329801 (the 'Application'), the proper procedure to obtain such determinations is to file a 'ZRD1: Zoning Resolution Determination Form' to request an interpretation of specific aspects of the Zoning Resolution. I have attached a copy of the form and instructions, which you may find on our public website."

Id.; Bruno aff, ¶ 4, exhibit B. To date, the landlord has not done so. Instead, what is now before the Court is defendants' motion to dismiss the declaratory judgment complaint on the ground of ripeness (motion sequence number 001).

DISCUSSION

As was previously mentioned, landlord's complaint includes one sole cause of action for declaratory relief. *See* notice of motion Moston aff, exhibit A (complaint), ¶¶ 138-146. Declaratory judgment is a discretionary remedy which may be granted "as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." CPLR 3001; *see e.g. Jenkins v State of N.Y., Div. of Hous. & Community Renewal*, 264 AD2d 681 (1st Dept 1999). Generally, a motion to dismiss the complaint in an action for a declaratory judgment "presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration." *Matter of Jacobs v Cartalemi*, 156 AD3d 635, 637 (2d Dept 2017), *quoting Staver Co. v Skrobisch*, 144 AD2d 449, 450 (2d Dept 1988); *citing Rockland Power & Light Co. v City*

of New York, 289 NY 45, 51 (1942); *North Oyster Bay Baymen's Assn. v Town of Oyster Bay*, 130 AD3d 885, 890 (2d Dept 2015); *Bregman v East Ramapo Cent. Sch. Dist.*, 122 AD3d 656, 657 (2d Dept 2014). Here, however, defendants do not challenge either the pleading or the merits of landlord's declaratory judgment claim; but, instead, they argue that the landlord's claim is not ripe for judicial review. *See* defendants' memorandum of law at 10-15. In *Matter of Committee to Save Beacon Theater v City of New York* (146 AD2d 397 [1st Dept 1989]), the First Department summarized the case law governing "ripeness" challenges as follows:

> "The Court of Appeals in [*Church of St. Paul & St. Andrew v Barwick*, 67 NY2d 510 (1986)] utilized a two-part analysis for determining whether a request for declaratory judgment that the New York City Landmarks Preservation Law was unconstitutional, as applied to the plaintiff, was ripe for judicial determination. That analysis required the court, first, to determine whether the issues presented are 'appropriate for judicial resolution,' and second, to 'assess the hardship to the parties if judicial relief is denied.'
>
> "The 'appropriateness' inquiry looks to whether the administrative action is final, that is, whether the agency has arrived at a 'definitive position' on the issue inflicting 'an actual, concrete injury' or whether the action relies on factors as yet unknown.
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> "The second portion of the inquiry requires an evaluation of whether withholding (or granting) judicial review will result in hardship to either of the parties, as well as its potential effect on the agency and its program. 'Essentially, this inquiry, from the standpoint of the challenging party, entails an examination of the certainty and effect of the harm claimed to be caused by the administrative action: whether it is "sufficiently direct and immediate" (citation omitted).... If the anticipated harm is insignificant, remote or contingent (citation omitted) the controversy is not ripe.' 'A fortiori, the controversy cannot be ripe if the claimed harm may be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party.'"

146 AD2d at 402-403 (internal citations omitted).

In their memorandum of law, defendants argue that the landlord has "admitted" to failing the "appropriateness" prong of the ripeness analysis set forth in *Church of St. Paul & St. Andrew*,

since its January 5, 2018 letter to the DOB overtly requests a "final determination" from the agency that the dorm rule does not apply to its pending construction application, which perforce means that no such "final determination" has yet been rendered. *See* defendants' memorandum of law at 11; notice of motion, Bruno aff, exhibit A. Landlord, unaccountably, only responds that "such a determination is not for the plaintiff [i.e., itself] to make." *See* plaintiff's memorandum of law at 11. The Court finds that this is an illogical statement that amounts to no more than a semantic argument. The Court also finds that plaintiff's January 5, 2018 letter, and the DOB's January 24, 2018 response, both speak for themselves. The former plainly requests a "final determination" from the DOB, and the latter plainly states that the agency has not, and cannot, render[ed] such a determination until the landlord observes the proper procedures to submit that request. As a result, the only reasonable conclusion that the Court can draw is that the DOB has *not* "arrived at a definitive position" on the applicability of the dorm rule to the landlord's application that would "inflict an actual, concrete injury" on the landlord if the determination were adverse. Therefore, the Court finds that the landlord has failed the "appropriateness" prong of the ripeness test.

With respect to the "hardship" prong, defendants argue that the landlord's claim fails that too, because "plaintiff's claimed harm may be prevented or ameliorated by further administrative action." *See* defendants' reply memorandum at 7-8. Defendants note that the landlord "has not availed itself of administrative remedies that could ameliorate the claimed harm," specifically because the landlord "did not file a ZRD1 Request with the DOB," or otherwise seek relief from that agency, or from the BSA, which handles appeals from DOB orders. *Id.* The landlord responds that "although exhaustion of administrative remedies is often required," the Court of

Appeals also recognizes a "futility exception" to this rule where no available administrative remedy will afford the applying party the relief it seeks. *See* plaintiff's memorandum of law at 11. However, the landlord does not explain how the DOB or the DSA is incapable of affording it any relief via administrative action. Instead, the landlord states that its' construction application for the building "has been rebuffed numerous times by the DOB." *Id.* This does not constitute "an exercise in futility," as case law defines that term. *See e.g. Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 (1978), *citing Usen v Sipprell*, 41 AD2d 251 (4th Dept 1973). Certainly, the DOB is capable of issuing an order approving the landlord's application. However, the law requires such applications to comport with the requirements of the Building Code and the Zoning Resolution. If the landlord's application does *not* comport with those requirements, then the agency may correctly deny it. It is incumbent on the landlord to present a legally sufficient application, and it is within the landlord's sole power to do so. Because the landlord has not demonstrated that exhausting its administrative remedies before the DOB and/or BSA herein would constitute an "act of futility," the Court finds that the landlord is, indeed, bound by the doctrine of exhaustion of administrative remedies herein. *See e.g. Matter of Contest Promotions-NY LLC v New York City Dept. of Bldgs.*, 93 AD3d 436 (1st Dept 2012) (Petitioner required to final determination from the DOB, and thereafter appeal that determination to the BSA, prior to commencing Article 78 proceeding). Because the landlord has failed to exhaust these remedies, the Court concludes that "the anticipated harm is insignificant, remote or contingent," and that the landlord's declaratory judgment claim fails the "hardship" prong of the ripeness test. *Matter of Committee to Save Beacon Theater v City of New York*, 146 AD2d at 403. Accordingly, having found that the landlord's claim fails both

prongs of that test, the Court further finds that the landlord's declaratory judgment claim is not ripe for judicial review, and rules that defendants' motion should be granted, and that this complaint should be dismissed.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3211, of defendants the City of New York and the New York City Department of Buildings (motion sequence number 001) is granted, and the instant complaint is dismissed in its entirety, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants.

Dated: New York, New York
February 8, 2019

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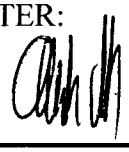

Alexander M. Tisch, J.S.C.

HON. ALEXANDER M. TISCH