Barry's Bootcamp NYC LLC v Board of Stds. & Appeals of the City of N.Y.
2020 NY Slip Op 30219(U)
January 30, 2020
Supreme Court, New York County
Docket Number: 159645/2019
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD **PART** IAS MOTION 35EFM

Justice

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BARRY'S BOOTCAMP NYC LLC,

Plaintiff,

- v -

BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF BUILDINGS

Defendant.

----------X

INDEX NO. 159645/2019

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 25, 33, 34, 37, 39, 40, 41, 42, 43, 44, 45

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents and the memorandum decision below, it is

ORDERED and ADJUDGED that the application, pursuant to CPLR Article 78, of petitioner Barry's Bootcamp NYC LLC (motion sequence number 001) is denied and the petition is dismissed; and it is further

ORDERED that the stay of enforcement of the May 21, 2019 order of the respondent Board of Standards and Appeals of the City of New York (Calendar No 2016-1208-BZ), which the court initially granted in the October 4, 2019 order to show cause submitted by petitioner Barry's Bootcamp NYC LLC and later extended in its January 21, 2020 interim order, be and hereby is vacated; and it is further

ORDERED that counsel for petitioner shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on counsel for respondent.

CASE DISPOSED

In this Article 78 proceeding, petitioner Barry's Bootcamp NYC LLC (petitioner) seeks an order to vacate a resolution of the respondent Board of Standards and Appeals of the City of New York (BSA) as arbitrary and capricious (motion sequence number 001). For the following reasons, petitioner' application is denied, the court's previous stay against the enforcement of the BSA's resolution is vacated, and this proceeding is dismissed.

FACTS

Petitioner is a limited liability corporation that owns and operates physical fitness/health club/gymnasium/training facilities. *See* verified petition, ¶¶ 9, 22. One such facility is located in the first and second floor commercial unit of a mixed use, residential/commercial apartment building (the building) located at 300 East 64th Street in the County, City and State of New York. *Id*., ¶¶ 2, 23-24, 29. Petitioner began operating its facility there in January 2016. *Id*., ¶ 23. The BSA is the New York City agency charged with enforcing the Zoning Resolution. *Id*., ¶ 10.

Petitioner avers that the building is located in a "C2-8" and "C2-5/R8B" zoning district, in which the Zoning Resolution does not allow the operation of health clubs unless the owner first obtains a "physical culture establishment" (PCE) special permit. *See* verified petition, ¶¶ 14-18. Petitioner submitted its application for such a permit to the respondent Department of Buildings [DOB] in January 2016. *Id*., ¶¶ 19, 32. On January 8, 2016, the DOB issued a notice of objection that denied petitioner's application on the ground that its operations in the building violated the Zoning Resolution (specifically, ZR32-31), and referred the matter to the BSA. *Id*., ¶¶ 33-34; exhibit D. Petitioner resubmitted its application to the BSA on January 13, 2016. *Id*.; exhibit B.

The BSA then began its review of petitioner's PCE special permit application, and eventually issued three notice and comments letters, held five days of hearings and conducted an

on-site inspection. *See* verified petition, ¶¶ 36-103. The BSA received complaints from several of the building's residential tenants about noise and vibrations caused by petitioner's operations there, but also considered petitioner's evidence of its ongoing efforts to remediate those complaints. *Id.*; exhibits F-U. Ultimately, the BSA issued Resolution # 2016-1208-BZ on May 21, 2019 which denied petitioner's PCE special permit application, and found as follows:

"Whereas, [petitioner] . . . continued its operations as usual, the [BSA] received noise logs from the two residential tenants who had previously complained about disturbances from the PCE space indicating that both residents continued to hear the sound of weight drops, bass from amplified music and instructors voices in their dwelling units after the May 17 hearing, as well as, testimony from a third residential tenant . . . complaining of hearing weight drops from the PCE space in her fifth-floor dwelling unit; and

> "Whereas, pursuant to ZR § 73-03 (General Findings Required for All Special Permit Uses and Modifications), to grant a special permit use, the [BSA] must make, not only the findings required in the applicable Zoning Resolution section, but also find:
>
> '[t]hat, under the conditions and safeguards imposed, the hazards or disadvantages to the community at large of such special permit use . . . at the particular site are outweighed by the advantages to be derived by the community by the grant of such special permit. In each case the [BSA] shall determine that the adverse effect, if any, on the privacy, quiet, light and air in the neighborhood of such special permit use . . . will be minimized by appropriate conditions governing location of the site, design and method of operation;' and
>
> "Whereas the [BSA] cannot determine that the adverse effects of the subject PCE use, which has operated at the site since January 2016 without a PCE special permit, on the privacy, quiet, light and air in the neighborhood, and more specifically, in the subject building, can be minimized by appropriate conditions as evidenced by [petitioner's] failure to adequately address the concerns of the tenants raised in public hearing; and
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> "Therefore, it is Resolved [that the] decision of the [DOB] dated January 8, 2016 . . . is sustained and this application is hereby denied."

Id.; exhibit A.

Aggrieved, petitioner commenced this Article 78 proceeding on October 3, 2019 seeking an order to annul and vacate the BSA's May 21, 2019 resolution, and to direct the BSA to issue it a PCE special permit. *See* verified petition. Respondents filed an answer on January 6, 2020. *See* verified answer. Previously, petitioner had submitted an order to show cause seeking a temporary restraining order, which the court signed on October 4, 2019. *See* order to show cause. That order included a stay on the enforcement of the BSA's May 21, 2019 resolution. *Id.* The court subsequently heard oral argument on this matter on October 29, 2019 and January 21, 2020, and on the latter date issued an interim order which continued the stay "with the proviso that the court will issue a written decision on petitioner's Article 78 application on an expedited basis." *See* interim order (motion sequence number 001). The parties having fully briefed the issues, the court now issues that decision.

DISCUSSION

The court's role in an Article 78 proceeding is to determine, upon the facts before the administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious. *See Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 (1974); *Matter of E.G.A. Assoc. Inc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302 (1st Dept 1996). A determination is only deemed arbitrary and capricious if it is "without sound basis in reason, and in disregard of the facts." *See Century Operating Corp. v Popolizio*, 60 NY2d 483, 488 (1983), *citing Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231. However, if there is a rational basis for the administrative determination, there can be no judicial interference. *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale &*

Mamaroneck, Westchester County, 34 NY2d at 231-232. Here, petitioner raises two arguments as to why the BSA's May 21, 2019 decision was "arbitrary and capricious." Neither is persuasive.

First, petitioner argues that "the BSA lacked reasonable grounds to deny [its] application for a special permit." *See* petitioner's mem of law at 7-17. Petitioner particularly complains that "the BSA arbitrarily and deliberately disregarded and cast doubt on petitioner's obvious responsiveness to both the [complaining] residents . . . its commitment, consistent efforts and investment in resolving and improving the noise conditions, and the actual progress petitioner had made regarding the noise complaints since the first public hearing." *Id*. at 8. Petitioner then recites at length all of the measures that it undertook regarding noise remediation, including retaining two acoustical consultants, but concludes that "the BSA constantly and consistently disregarded petitioner's efforts and responsiveness and refused to accept the results of sound testing which it had directed petitioner to engage in." *Id*. at 9-16. The court notes that this section of petitioner's memorandum consists entirely of factual disputes rather than legal arguments, and that no case law is cited. For its part, the BSA's responds that its May 21, 2019 resolution included all of the findings that are mandated by Zoning Resolution §§ 75-03 & 75-36, and asserts that those findings were supported by the evidence in the administrative record. See respondents' mem of law at 8-12. Upon review, the court agrees.

The Appellate Division, Second Department, has held that:

"Unlike a variance which gives permission to an owner to use property in a manner inconsistent with a local zoning ordinance, a special exception gives permission to use property in a way that is consistent with the zoning ordinance, although not necessarily allowed as of right. Thus, the burden of proof on an owner seeking a special exception is lighter than that on an owner seeking

a variance. The owner must show compliance with legislatively imposed conditions pertaining to the intended use before a special exception permit may be granted. The denial of a special exception permit must be supported by evidence in the record and may not be based solely upon community objection. However, where such evidence exists, deference must be given to the discretion of the board authorized to rule upon the application. A court may not substitute its own judgment for that of the board, even if such a contrary determination is itself supported by the record."

Matter of M&V 99 Franklin Realty Corp. v Weiss, 124 AD3d 783, 784-785 (2d Dept 2015) (internal citations and quotation marks omitted). Here, the BSA's resolution indicated that the "legislatively imposed conditions pertaining to the intended use" mentioned above were set forth in ZR § 73-03. *See* verified petition, exhibit A. The resolution correctly interpreted that ordinance to require that the BSA determine that "any adverse effect" on the "privacy and quiet" in building would be "minimized by appropriate conditions" undertaken by petitioner to reduce the noise caused by its operations in order to justify the board's issuance of a special permit. *Id.* The resolution also set forth the BSA's conclusion that it could not make such a determination in light of the fact that three of the building's residential tenants had filed noise complaints, and had also indicated that the noise persisted even after petitioner had undertaken several acoustical consultations and implemented several remedial measures. *Id.* The court finds that this text makes it clear that the record before the BSA contained discrete and particularized noise complaints from several individual building residents, and that the complaints were not an unspecified "community objection." The court also finds that it was reasonable for the BSA to determine that it could not grant petitioner a special permit in view of the ongoing and apparently irremediable noise caused by its health club operations at the building, since petitioner's inability

to sufficiently contain said noise meant that the "adverse effects on the building's privacy and quite" were not "minimized" to a degree that would justify granting petitioner's application for a special permit. The court finally finds that it is proper to defer to the BSA's determination. *Matter of M&V 99 Franklin Realty Corp. v Weiss*, 124 AD3d at 784-785; *see also Matter of Metropolitan Assoc. Ltd. Partnership v New York State Div. of Hous. & Community Renewal*, 206 AD2d 251, 252 (1st Dept 1994), citing *Matter of Salvati v Eimicke*, 72 NY2d 784, 791 (1988) ("[t]he interpretations of a respondent agency of statutes which it administers are entitled to deference if not unreasonable or irrational").

Petitioner's objection that the BSA refused to consider the results of its second acoustical consultation is belied by the record. The transcript of the May 21, 2019 hearing shows: 1) that the BSA received that report; 2) that the board members discussed the report's conclusion that petitioner would have to perform significant structural renovation work (specifically, constructing a "box within a box") in order to contain the health club's noise; and 3) that the board members also admonished petitioner for choosing to perform a second acoustical inspection instead of promptly commencing the renovation work, as the BSA had previously ordered petitioner to do. *See* verified petition, exhibits S and T. The BSA specifically noted that the building's tenants had reconfirmed their noise complaints several days earlier at a hearing on May 17, 2019, and emphasized the point that the second acoustical inspection did not constitute an attempt to resolve those complaints. *Id.*, exhibit A. Therefore, petitioner's contention that the BSA ignored the results of its second acoustical consultation is unfounded, since the record shows that the BSA did receive the report, but upbraided petitioner for failing to do renovation work instead. Accordingly, and the court rejects petitioner's first argument.

Next, petitioner argues that "the BSA's inconsistent treatment of PCE special permit applications absent explanation was arbitrary and capricious." *See* petitioner's mem of law at 18-20. The Court of Appeals holds that an administrative agency's determination is presumed to be arbitrary and capricious "when it 'neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts.'" *Matter of 20 Fifth Ave., LLC v DHCR*, 109 AD3d 159, 163 (1st Dept 2013), quoting *Matter of Lantry v State of New York*, 6 NY3d 49, 58 (2005). Here, petitioner presents two BSA resolutions which, it asserts, show that the board treated its special permit application differently and inconsistently with other health club special permit applications. *See* petitioner's mem of law at 18-20; verified petition, exhibits V and W. The BSA responds that these two matters are factually inapposite, however, so they cannot support an "inconsistent treatment" argument. See respondents' mem of law at 12-14. Upon examination, the court again agrees. The first, Resolution # 332-01-BZ, denied a special permit on the grounds that the petitioner health club had not complied with Zoning Resolution requirements concerning floor space and egress. *Id.*, exhibit V. It is inapposite because it did not involve noise complaints. The second, Resolution # 264-13-BZ, conditionally granted the petitioner health club's special permit application for a one-year provisional period, but denied the petitioner's renewal application a year later because the BSA found that the petitioner health club had failed to adhere to the terms of a noise-minimization plan that it had proposed. *Id.*, exhibit W. However, in that resolution, the BSA noted that the granting a provisional special permit was an "extraordinary" act that it normally did not perform, and that there was no proscribed procedure for an applicant to follow in order to obtain one. In that case, the petitioner health club had taken it upon itself to generate a "noise reduction plan" after retaining acoustical and engineering consultants. The petitioner health club had also asked the

local community board and Fire Department to review the plan, and had presented their letters of approval to the BSA as part of its application. Here, the record does not reflect that petitioner ever made a similar request to the BSA or generated a similar plan.[1] Therefore, the fact that the BSA once issued a provisional permit to a far more proactive applicant has no bearing in the instant petitioner's situation, and the court finds that that second BSA resolution is inapposite. Therefore, the court rejects petitioner's second argument, and concludes that petitioner has failed to establish that the BSA's May 21, 2019 resolution was "arbitrary and capricious." Accordingly, the court finds that petitioner's Article 78 petition should be denied.

In its opposition papers, the BSA also argues that "petitioner is not entitled to mandamus relief;" i.e., to an order requiring the BSA to issue it a special permit, or to "injunctive relief." See respondents' mem of law at 14-17. The court does not reach the former argument, but agrees with the latter one. Pursuant to CPLR 6301, "[a] temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had." However, the Court of Appeals holds that "[t]he party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor." *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 (2005), *citing* CPLR 6301. Here, petitioner cannot demonstrate a "probability of success on the merits," since the court has determined that its Article 78 petition lacks merit and should be denied. As a result, the court concludes that

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[1] Petitioner noted that Community Board 8, within whose purview the building is located, did issue a letter of recommendation dated March 9, 2016 that urged the BSA to approve petitioner's special permit application. *See* verified petition, ¶ 35; exhibit E. However, petitioner never presented a noise reduction plan to Community Board 8.

petitioner's request for a preliminary injunction should also be denied, and therefore vacates the temporary restraining order that it originally issued on October 4, 2019, and later continued in its January 21, 2020 interim order.

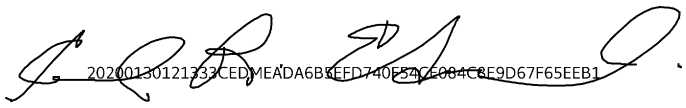
CONCLUSION

ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED and ADJUDGED that the application, pursuant to CPLR Article 78, of petitioner Barry's Bootcamp NYC LLC (motion sequence number 001) is denied and the petition is dismissed; and it is further

ORDERED that the stay of enforcement of the May 21, 2019 order of the respondent Board of Standards and Appeals of the City of New York (Calendar No 2016-1208-BZ), which the court initially granted in the October 4, 2019 order to show cause submitted by petitioner Barry's Bootcamp NYC LLC and later extended in its January 21, 2020 interim order, be and hereby is vacated; and it is further

ORDERED that counsel for petitioner shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on counsel for respondent.



1/30/2020
DATE

CAROL R. EDMEAD, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED	X	DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE