Brown v City of New York
2020 NY Slip Op 32937(U)
September 4, 2020
Supreme Court, New York County
Docket Number: 154630/2020
Judge: Lynn R. Kotler

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

ROBIN R. BROWN and MICHAEL A. HARDY — INDEX NO. 154630/2020

MOT. DATE

- v -

MOT. SEQ. NO. 001

CITY OF NEW YORK et al.

PENNY BARTEN — INDEX NO. 150216/2020

MOT. DATE

- v -

MOT. SEQ. NO. 001

ROBIN R. BROWN and MICHAEL A. HARDY

The following papers were read on this motion to/for Article 78 (154630/20) and RPAPL 881 (150216/20)

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits ECFS DOC No(s)._____
Notice of Cross-Motion/Answering Affidavits — Exhibits ECFS DOC No(s)._____
Replying Affidavits ECFS DOC No(s)._____

These related special proceedings arise from work which Penny Barten, petitioner in 150216/20 (the "RPAPL 881") and a respondent in 154630/20 (the "Article 78"), seeks to perform in connection with the building she owns and resides at located at 15 West 122nd Street, New York, New York ("Barten's premises"). Barten initially commenced the RPAPL 881 in order to obtain a license to access the roof of the premises adjacent to her building, and install protections thereon, which is owned by Robin R. Brown and Michael A. Hardy (sometimes "Brown/Hardy") and located at 17 West 122nd Street, New York, New York (the "Brown/Hardy premises"), petitioners in the Article 78 and respondents in the RPAPL 881. As is relevant to these proceedings, both Barten and Brown/Hardy's properties are located in the original Mount Morris Park Historic District ("MMPHD"). In the interest of judicial economy, both proceedings are hereby consolidated for consideration and disposition in this single decision/order.

At the outset, the parties' letters filed with the court on 9/3/20 and 9/4/20 regarding the temporary restraint enjoining Barten from construction pending the hearing of the Article 78, which Barten voluntarily agreed to, are rejected as moot in light of the court's decision/order herein.

According to the amended petition in the RPAPL 881, the work which Barten seeks to perform "requires the construction of a bulkhead on the present rooftop; in connection therewith [Barten] is constructing an additional level on approximately one-half of the roof of [Barten's] Premises." Barten explains that "[r]oof protection is needed for the safety of Brown/Hardy's property and the safety of the public."

Dated: 9/4/20

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☒ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**

2. Check as appropriate: Motion is ☐ **GRANTED** ☒ **DENIED** ☒ **GRANTED IN PART** ☐ **OTHER**

3. Check if appropriate: ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**

☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

After much back-and-forth negotiation between the property owners and their counsel, and conferences with the court, Brown and Hardy not only oppose the RPAPL 881 license but also commenced the Article 78, arguing that "the additional fourth story [on Barten's premises] with its guard rails, ladder and the required extension of [] chimneys is more than minimally visible from the north/south thoroughfares on each side of the block where the premises in question are located and, as such, inconsistent with and destructive of the distinctive and homogeneous late nineteenth century townhouses which the MMPHD was established to protect." Brown and Hardy contend that the New York City Landmarks Preservation Commission ("LPC") "improperly approved the addition at the staff level, via a Certificate of No Effect ([] "CNE") thereby depriving petitioners and other residents of the MMPHD of the opportunity to appear at a hearing before the LPC to make their views known." Brown and Hardy seek an order annulling the CNE, directing LPC to withdraw the CNE and take no further steps regarding Barten's plans until a public hearing is held, directing the New York City Department of Buildings ("DOB") to revoke the permit allowing construction planned by Barten at Barten's premises and enjoining Barten from undertaking any further construction.

In their answer, respondents LPC, DOB and the City of New York (collectively the "City Respondents") oppose Brown/Hardy's petition. They maintain that LPC's determination to issue the CNE and the three amendments was not arbitrary, capricious, an abuse of discretion, an error of law, or in violation of lawful procedure. The City Respondents explain the process by which Barten applied for the CNE along with the subsequent three amendments to the CNE. In its March 5, 2020 Third Amendment to the CNE MISC-20-07687 (the "subject amendment"), the LPC stated:

> Pursuant to Section 25 306 of the Administrative Code of the City of New York the Landmarks Preservation Commission issued Certificate of No Effect 19 24553 (LPC 19 24553) on July 17 2018 approving a proposal for installation of rooftop mechanical equipment at the subject premises.
>
> …
>
> Subsequently on February 7 2020 the Commission received a proposal for another amendment to the work under that permit. The proposed amendment consists of expanding/modifying the scope of work to include the installation of metal railings at the roof of the one story rooftop addition and the vertical extension of existing chimney flues to be 3 [feet] above the rooftop addition with brushed metal finish as shown in existing conditions photographs as seen in a mock up viewed by staff on February 18 2020 and on drawings labeled A 107 02 A 107A 01 A 111 02 and A 113 02 dated (revised) February 18, 2020 and prepared by Thomas Barry R A all submitted as components of the application Accordingly the Commission reviewed the request and finds that the work is in accordance with the provisions set forth in Title 63 of the Rules of the City of New York Section 2 15 for Rooftop and Rear Yard Additions or Enlargements including Section 2 15(d)(2) for non occupiable rooftop additions on buildings in a historic district. Section 2 21 for Installation of Heating Ventilation Air Conditioning and other Mechanical Equipment including Section 2 21(g)(2) for installation of HVAC and other mechanical equipment on rooftops and terraces and that the revised scope of work is in keeping with the intent of the original approval. Based on these findings Certificate of No Effect 19 24553 (LPC 19 24553) is hereby amended….

Based upon the LPC's actions as well as the scope of Barten's planned work, the City Respondent argue that the LPC rationally and reasonably determined that the proposed work at the subject premises complied with the Commission's rules and would not "change, destroy or affect any exterior architectural feature of the improvement" and "would be in harmony with the external appearance of other, neighboring improvements in such a district." The court agrees.

In an Article 78 proceeding, the applicable standard of review is whether the administrative decision: was made in violation of lawful procedure; affected by an error of law; or arbitrary or capricious or an abuse of discretion, including whether the penalty imposed was an abuse of discretion (CPLR § 7803 [3]). An agency abuses its exercise of discretion if it lacks a rational basis in its administrative orders. "[Tlhe proper test is whether there is a rational basis for the administrative orders, the review not being of determinations made after *quasi*-judicial hearings required by statute or law" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck. Westchester Countv*, 34 NY2d 222, 231 [1974]) (emphasis removed); *see also Matter of Colton v. Berman*, 21 NY2d 322, 329 (1967).

Pursuant to City Charter § 3020 and Landmarks Law § 25-301, the LPC is vested with the exclusive authority and discretion to consider and designate landmarks subject to modification or recision by the New York City Council ("City Council"). Landmarks Law § 25-304 defines the scope of the Commission's powers:

> b. … the commission may, ... apply or impose, with respect to the construction, reconstruction, alteration, demolition or use of such improvement or landscape feature or the performance of minor work thereon, regulations, limitations, determinations or conditions which are more restrictive than those prescribed or made by or pursuant to other provisions of law applicable to such activities, work or use.

Here, Brown and Hardy have failed to establish that the LPC's issuance of the CNE and its subsequent amendments was irrational or arbitrary. Brown and Hardy argue that under 63 RCNY § 2-15(c), a CNE could only issue if the additional fourth story were non-occupiable space and only minimally visible. However, as counsel for the City Respondents' explains, citing 63 RCNY § 2- 15(c)(2)(i)(B): "an extension of a chimney can be visible and approved if the 'quantity and dimension of the flue extension will be limited to the greatest extent feasible;' if the 'proposed chimney or exhaust flue extension will be seen in combination with other existing additions, enlargements, or other construction of a comparable size;' and the 'flue extension will not draw undue attention it itself or detract from significant features of the buildings on which it is located.'"

Brown and Hardy's contention that the chimney "is more than minimally visible" is unavailing. LPC staff went to the subject premises, reviewed the proposed vertical flue extension mock up, took photographs from varying viewpoints, including the street level, and based thereupon reasonably assessed that the proposed changes could be approved pursuant to 63 RCNY § 2-15(c)(2)(i)(A)-(C). Indeed, counsel explains "[a]fter analyzing the visibility, the Director of the Preservation Department at LPC, Cory Herrala, determined that the "visibility even in the winter is contextually minimal (at a distance, oblique angle, obscured by limbs, etc.).".

Since an application for a CNE does not require a public hearing (see Administrative Code § 25-306), the Article 78 petition must be denied and the proceeding dismissed.

The court now turns to the RPAPL 881. RPAPL § 881, entitled "[a]ccess to adjoining property to make improvements or repairs" provides as follows:

> When an owner or lessee seeks to make improvements or repairs to real property so situated that such improvements or repairs cannot be made by the owner or lessee without entering the premises of an adjoining owner or his lessee, and permission so to enter has been refused, the owner or lessee seeking to make such improvements or repairs may commence a special proceeding for a license so to enter pursuant to article four of the civil practice law and rules. The petition and affidavits, if any, shall state the facts making such entry necessary and the date or dates on which entry is sought. Such license shall be granted by the court in an appropriate case upon such terms as justice requires. The licensee shall be

> liable to the adjoining owner or his lessee for actual damages occurring as a result of the entry.

Applying a reasonableness standard, the court must balance the interests of the parties and should issue the license "when necessary, under reasonable conditions, and where the inconvenience to the adjacent property owner is relatively slight compared to the hardship of his neighbor if the license is refused" (*Chase Manhattan Bank [Natl. Assn.] v. Broadway, Whitney Co*., 57 Misc2d 1091, 1095 [SupCt Queens Co 1968], *affd.* 24 NY2d 927 [1969]; *see also Board of Managers of Artisan Lofts Condominium v. Moskowitz*, 114 AD3d 491 [1st Dept 2014]).

Barten has established that she cannot make the proposed improvements to her real property without entering Brown/Hardy's property. Barten has further demonstrated that the temporary license she seeks is necessary to protect the Brown/Hardy premises as well as the public in connection with Barten's construction project and comply with applicable rules and regulations during same. In turn, Brown and Hardy have failed to rebut that showing. Therefore, the petition for a temporary license to access and install roof protections on the Brown/Hardy premises is granted.

The terms of the license are within the court's discretion (RPAPL § 881 ["Such license shall be granted by the court in an appropriate case upon such terms as justice requires"]; see also *2225 46th Street, LLC v. Giannoula Hahralampopoulos*, 55 Misc3d 621 [Sup Ct, Queens Co 2017]). Petitioner seeks a license permitting her, her agents, contractors and employees permission to enter upon the roof of the Brown/Hardy premises, for a period of up to 12 months after notice of entry, to install and maintain roof protection, and to have access to the roof of the Brown/Hardy premises during such period in order to complete the construction project on Barten's premises. While Barten opposes paying any license fee, she represents that she "has provided the proof of the necessary insurance to [Brown and Hardy] and will pay for any and all damages which occur as a result to [the Brown/Hardy p]remises from the specified work and the required access to [their] roof." The court agrees on all points except as to the license fee.

While the parties have attempted to negotiate in good faith, they have failed to reach an agreement and Brown and Hardy have resorted to pursing their administrative/legal remedies vis-à-vis the City Respondents. Such actions do not necessarily disqualify them from receiving a license fee, the purpose of which is to compensate them for Barten's use of their property and the loss of their use and enjoyment of same. The court rejects Barten's implicit position that Brown and Hardy's unsuccessful attempt to advocate for their interests and those of the community in their historic district should be penalized by forfeiting what is an otherwise customary license fee. Further, as noted by Justice Saitta in *North 7-8 Investors, LLC v. Newgarden* (43 Misc3d 623 [Sup Ct, Kings Co 2014]), "[t]he Court must be mindful of the fact that it is called upon to grant access after the parties have failed to reach an agreement, and must not allow either party to overreach and use the Court to avoid negotiating in good faith."

After taking into consideration the nature and extent of the access which Barten requires to perform the construction work to her premises, the court finds that the sum of $500 per month should be paid to Brown and Hardy as a fee for the temporary license granted in this decision/order.

Conclusion

In accordance herewith, it is hereby

ORDERED that the Article 78 petition under Index Number 154630/2020 is denied and this proceeding is dismissed and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the temporary restraint ordered by the court in the order to show cause dated July 13, 2020 (NYSCEF Doc. 21) is lifted and vacated; and it is further

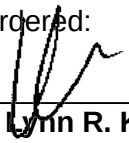
ORDERED that the RPAPL 881 petition under Index Number 150216/2020 is granted to the extent that petitioner Penny Barten, her agents, contractors and employees are hereby granted a temporary license to enter upon the roof of the Brown/Hardy premises located at 17 West 122nd Street, New York, New York, for a period of up to 12 months after service of this order with notice of entry, to install and maintain roof protection, and to have access to the roof of the Brown/Hardy premises during such period in order to complete the construction project on Barten's premises; and it is further

ORDERED that as a condition of the temporary license granted to petitioner Penny Barten, her agents, contractors and employees, she must pay a $500 per month license fee to respondents Robin R. Brown and Michael Hardy for so long as she continues to access the Brown/Hardy premises and/or installs/maintains roof protections thereon.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 9/4/20
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.