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

NIZAM PETER KETTANEH and HOWARD LEPOW, Petitioners,	
For a Judgment Pursuant to Article 78 Of the Civil Practice Law and Rules	Index No. 113227/08 (LOBIS)
-against-	
BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK, MEENAKSHI SRINIVASAN, Chair, CHRISTOPHER COLLINS, Vice Chair of said Board, and CONGREGATION SHEARITH ISRAEL a/k/a THE TRUSTEES OF CONGREGATION SHEARITH ISRAEL IN THE CITY OF NEW YORK, Respondents.	**AFFIRMATION OF CLAUDE M. MILLMAN IN OPPOSITION TO MOTION OF PETITIONERS TO FILE SUR-REPLY**

CLAUDE M. MILLMAN, an attorney duly admitted to practice in the courts of the State of New York, affirms the following to be true under the penalties of perjury:

Introduction

1. I am a partner at Proskauer Rose LLP, counsel to Respondent "Congregation Shearith Israel a/k/a the Trustees of Congregation Shearith Israel in the City of New York" (the "Congregation"). I am submitting this affirmation to set forth the Congregation's opposition to Petitioners' motion, dated June 16, 2009, "for an Order providing permission to the Petitioners to file a further Reply in the pending proceeding."

2. Petitioners' motion should be denied. The purported basis for Petitioners' motion is their assertion that "the Respondents herein have in essence served papers which are in the nature of a sur-reply, but in a related case in which the Petitioners are nor [sic] parties."

Affirmation of Alan D. Sugarman, dated June 16, 2009, ¶ 2. Respondents have not filed a "sur-reply."

Background

3. Petitioners Kettaneh and Lepow filed this Article 78 proceeding (the "Kettaneh Action") to set aside a resolution of the Board of Standards and Appeals (the "BSA") issuing variances for property owned by the Congregation. Around the same time, other opponents of the project filed what purported to be a plenary action seeking a declaratory judgment to invalidate the same BSA resolution (the "Landmark West! Action"). The two actions were deemed related and assigned to this Court. They were not consolidated.

4. Respondents, who were named as defendants in the Landmark West! Action, moved to dismiss the Landmark West! Action.

5. Petitioners in the Kettaneh Action took no steps with respect to the Landmark West! Action. They did not seek to intervene there; they did not seek to have the actions consolidated; they did not seek to have the Landmark West! Action stayed; and they in no way assisted in Respondents' efforts to have it dismissed. Indeed, from a strategic perspective for Petitioners, it was good for opponents of the BSA resolution to pursue challenges in two different suits (one plenary; one Article 78). The Kettaneh Action Petitioners, therefore, had every reason to hope that the Court would allow the Landmark West! Action to proceed as a plenary suit.

6. On March 31, 2009, the Court heard oral argument in both actions. At various points, the Court asked the parties for their views on whether there were differences between the two cases. Counsel in the Kettaneh Action pointed to their similarities. *See* 3/1/09 Transcript at 6-7 ("we believe they raise the same issue") (Exhibit A). As counsel for the City Respondents informed the Court at oral argument, in addition to raising arguments that were in the Kettaneh

Action, the petitioners in the Landmark West! Action purported to challenge the jurisdiction of the BSA (an argument which the Petitioners in the Kettaneh Action did not raise).

7. On April 17, 2009, the Court issued a decision converting the complaint in the Landmark West! Action into an Article 78 petition. The Court stated: "Defendants, now referred to as respondents, shall have ten (10) days from the date of service of a copy of this order with notice of entry, to serve and file their answers and objections in point of law, or otherwise move with respect to the petition." *See* 4/17/09 Decision and Order at 5 (Exhibit B).

8. After receiving extensions of time from this Court, Respondents in the Landmark West! Action complied with the Court's order by submitting their answers and memoranda of law in opposition to the petition in the Landmark West! Action.

Argument

9. The Court should deny Petitioners' motion to submit a sur-reply.

10. First, the motion is procedurally defective. It seeks a sur-reply to a brief that was never even filed in this action. It can be denied on that basis alone.

11. Second, the Petitioners in this action have had ample opportunities to be heard and have seized on those opportunities in spades. Petitioners submitted a 102-page memorandum of law in support of their petition. *See* Kettaneh and Lepow Revised Memorandum of Law in Support of Petition. Petitioners then submitted a 56-page reply brief in further support of their petition. *See* Petitioners' Reply Memorandum of Law in Further Support of Verified Petition. Petitioners' counsel also then held the floor for a significant portion of the oral argument that was heard in this Court. Thus, with the benefit of Petitioners' 158 pages of briefing and their oral arguments, the Court is now clearly aware of Petitioners' point of view. No further briefing is needed.

12. Third, the opponents of the BSA resolution will get the last word before this Court even if the Court denies this motion. Petitioners in the Landmark West! Action have responded to Respondents' briefs in the Landmark West! Action, having provided the Respondents with a reply brief on Friday, June 19, 2009, per stipulation between the parties. Given that the petitioners in both cases are taking the same position – that the Resolution should be set aside – an ***additional*** response from counsel to Petitioners in this action is not needed.

13. Fourth, there was nothing improper about the briefs that Respondents submitted in the Landmark West! Action. Respondents did precisely what they were supposed to do, consistent with the Court's order: They submitted papers that would be responsive to the petition in the Landmark West! Action. Everything in the briefs that the Congregation filed in the Landmark West! Action was responsive to the petition filed in that suit. The briefs that the Respondents filed there were filed as-of-right.

14. It could not possibly have come to any surprise to Petitioners in this case that the briefs that Respondents were required to file in the Landmark West! Action addressed some of the issues that Petitioners have also raised in this action. Nor is it surprising that some of the portions of the Congregation's brief in the Landmark West! Action that address overlapping issues are superior to the corresponding portions of the brief that the Congregation filed in this action. As the Congregation's brief in the Landmark West! Action was filed three months after the Congregation filed its brief in the Kettaneh Action and after oral argument was heard in both cases, one would expect the Congregation's papers in the Landmark West! Action to be superior. The Congregation had more time to conduct research for the Landmark West! brief. Moreover, as oral argument crystallized some of the issues, the Congregation was able to benefit from that learning in preparing the brief filed in the Landmark West! Action.

15. None of this, however, is remotely improper. Nor is it Respondents' doing. It is a by-product of the strategy pursued by the Petitioners in both cases, to bring two different suits, with two different briefing schedules. It is not a basis upon which to afford Petitioners here yet another brief. Indeed, given that both cases involved challenges to the same BSA resolution, Petitioners in the Kettaneh Action could have sought to intervene in the Landmark West! Action or could have sought to consolidate the two actions. For apparent strategic reasons, they chose not to do so. Having intentionally filed separate actions, and having intentionally kept the actions separate, Petitioners cannot now complain that they should be permitted to respond to a brief filed in very lawsuit that they have eschewed.

16. Indeed, affording these Petitioners another brief would lead to a disturbing precedent. Suppose, for example, that a lawyer in Case A submits a brief before Justice X concerning an issue that can arise in numerous lawsuits, say the law of contribution. Imagine, then, that the very same lawyer has another, unrelated case (Case B) before Justice X for a different client that also happens to raise the same issue under the law of contribution. Finally, imagine that, after attending oral argument in Case A, this lawyer submits a brief in Case B that addresses concerns that Justice X raised during oral argument in Case A, but that are equally relevant to Case B. Under the untenable theory of sur-replies that the Petitioners in our case (the Kettaneh Action) espouse, Justice X would have to notify the opponents of the lawyer in Case A that the brief that Justice X is reading in Case B is also informative as to the issue before the Court in Case A. Moreover, under that unprecedented theory, Justice X would have to give those same opponents in Case A an opportunity to reply to the brief in Case B. The Congregation respectfully submits that, since it is undisputed that the Congregation's brief in the Landmark West! Action was

relevant to the issues before the Court in the Landmark West! Action, then it was properly filed as-of-right there and did not entitle the Petitioners in this action to be heard yet again.

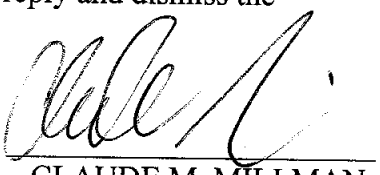
17. Finally, contrary to the Petitioners' suggestion, the Congregation did not violate any order of this Court when it identified for the Court, in the brief that the Congregation filed in the Landmark West! Action, page numbers in the administrative record that support the BSA's findings. Petitioners mysteriously rely on the following portion of the oral argument transcript to support their contention that the Court somehow restricted what Respondents could file in the Landmark West! Action:

> MR. MILLMAN: Your Honor, would it be helpful regarding the issue of page numbers? And in the record, we could provide your Honor with very simple one page or two page identifying the findings?
>
> THE COURT: Are they in the papers?
>
> MR. MILLMAN: I'm not sure.

Affirmation of Alan D. Sugarman, dated June 16, 2009, Exhibit 1 at 43. The Court never said, there or elsewhere, that, in the context of responding to the converted petition in the Landmark West! Action, the Congregation would be prohibited from identifying the record pages that support the BSA's findings. Indeed, on April 17, 2009, ***after*** the oral argument relied on by Petitioners, the Court issued its decision in the Landmark West! Action and expressly authorized the Congregation to respond to the petition in the Landmark West! Action. *See* 4/17/09 Decision and Order at 5 (Exhibit B). Thus, even if the Court rejected a sur-reply in the Kettaneh Action (and, in fact, none was discussed), the Congregation was clearly authorized to file a brief in the Landmark West! Action and to include, among other things, a listing of the BSA findings and the record pages that support those findings.

Conclusion

18. Petitioners have not made the case for yet another brief. Notably, were the Court to grant Petitioners' procedurally flawed motion, it would invite yet another monster brief from Petitioners who to date have already filed a 102-page memorandum of law and a 56-page reply memorandum. The Court should deny Petitioners' motion for a sur-reply and dismiss the Petition in this action on the merits.



CLAUDE M. MILLMAN

Dated: June 23, 2009

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK: TRIAL TERM PART 6

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LANDMARK WEST, INC., 103 CENTRAL PARK WEST CORP., 18 OWNERS CORP., 91 CENTRAL PARK WEST CORP. AND THOMAS HANSEN,

Plaintiffs

- against -

THE CITY OF NEW YORK, BOARD OF STANDARDS AND APPEALS, NYC PLANNING COMMISSION, HON. ANDREW CUOMO, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK AND CONGREGATION SHEARITH ISRAEL,

Defendants

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Index No. 650354-2008

- -

NIZAM PETER KETTANEH and HOWARD LEPOW,

Petitioner

- against -

BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK, MEENAKSHI SRINIVASAN, CHAIR, CHRISTOPHER COLLINS, VICE-CHAIR, AND CONGREGATION SHEARITH ISRAEL a/k/a THE TRUSTEES OF CONGREGATION SHEARITH ISRAEL IN THE CITY OF NEW YORK,

Respondents

- -

Index No. 113227-08

March 31, 2009
60 Centre Street
New York, New York 10007

Lester Isaacs - Official Court Reporter

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Proceedings

MR. ROSENBERG: I don't know. I know that my case -- I don't know what the differences between their cases are.

THE COURT: Counsel for the City, since you're involved in both cases and you're moving to dismiss, anyone that's in the Landmark case.

MS. HOGGAN: Yes.

THE COURT: Can you distinguish the differences between the two cases?

MS. HOGGAN: If you give me a minute.

THE COURT: Sure.

MR. SUGARMAN: Your Honor, if I may. While counsel is looking at our papers, would you like my view?

THE COURT: My law secretary, Ms. Sugarman, we determined that there was no relationship.

MR. SUGARMAN: None at all.

THE COURT: Unless you're trying to get me off the case?

MR. SUGARMAN: No. I think one of the important issues in the case is the problem in the City Planning, the Department of City Planning. With Landmarks, the have over seen jurisdiction over granting waivers of the zoning laws for the purpose based upon Landmark's hardships, that's not what is

BSA. So the landmark question as to them, as a defendant and properly so, we believe we raise the same issue.

THE COURT: If I understand it, in reviewing. I made a start review, I have not read everything. I have read mostly the papers in the Kettaneh, but not in the Landmark cases, I thought Landmark approved it.

MR. SUGARMAN: Landmark approved the project from the point of view of from the certificate appropriateness. They do not look at the Zoning Law. They are specifically prohibited from doing this. Landmark has a whole separate procedure of 74, 711 where they consider the hardship by the applicant. And the applicant has to show their financial hardship. They have to show that information and generally their encumbrances and other conditions put on the property, as part of that process, and then it's pursued. But the Department of City Planning, that's to get a waiver of the Zoning Laws, that the Board of Standards and Appeals is not involved in that process.

This applicant started off in 2001, that's when the case started, asking for 74 711 relief from Landmarks and for whatever reason they withdraw it

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

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LANDMARK WEST! INC., 103 CENTRAL PARK WEST CORPORATION, 18 OWNERS CORP., 91 CENTRAL PARK WEST CORPORATION and THOMAS HANSEN,

Plaintiffs,

Index No. 650354/08

Decision and Order

-against-

CITY OF NEW YORK BOARD OF STANDARDS AND APPEALS, NEW YORK CITY PLANNING COMMISSION, HON. ANDREW CUOMO, as Attorney General of the State of New York, and CONGREGATION SHEARITH ISRAEL, also described as the Trustees of Congregation Shearith Israel,

Defendants.

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

Motion Sequence Numbers 001 and 002 are consolidated for disposition. In Motion Sequence Number 001, defendant Congregation Shearith Israel (the "Congregation"), moves, pursuant to C.P.L.R. Rule 3211(a)(7), for an order dismissing the amended complaint for failure to state a cause of action. In Motion Sequence Number 002, defendants City of New York Board of Standards and Appeals ("BSA") and New York City Planning Commission (the "Commission"), together referred to as the "City Defendants", also move to dismiss pursuant to C.P.L.R. Rule 3211(a)(7). The sole ground on which both motions rely is the contention that this action was erroneously commenced as a plenary action, rather than as an Article 78 proceeding.

This action seeks to challenge the August 26, 2008 determination of the BSA, Resolution 74-07-BZ (the "BSA Resolution"), which approved the Congregation's application for a variance for

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the property located at 6-10 West 70th Street in Manhattan. According to the Complaint, the BSA Resolution would permit the Congregation to violate zoning regulations in its planned construction of a new building which will contain a residential tower with five luxury condominium apartments.[1]

Initially, at oral argument, this court raised a concern that the Attorney General was not present and had not appeared in this action. By letter dated April 3, 2009, the City Defendants served the Attorney General with a copy of the City Defendants' motion. According to the letter, the Attorney General has been served with the Complaint and with other papers in this action. To date, the court has not received any submissions from the Attorney General.

The Congregation and the City Defendants argue that plaintiffs deliberately chose to commence this as a declaratory judgment action, rather than as an Article 78 proceeding, because had it been commenced as an Article 78, it would be untimely. Case law supports their contention that parties should not be permitted to circumvent that shorter statute of limitations set forth for Article 78 proceedings "through the simple expedient of denominating the action one for declaratory relief." New York City Health and Hosps. Corp. v. McBarnette, 84 N.Y.2d 194, 201 (1994).

The statute of limitations for an Article 78 proceeding is set forth in C.P.L.R. § 217(1), which provides that "[u]nless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner." Pursuant to the New York City

[1] This court also has before it a related case, Kettaneh v. Board of Standards and Appeals, Index No. 113227/08, which also challenges the BSA Resolution; this matter was brought as an Article 78 proceeding, within the thirty (30) day period.

Administrative Code (the "Administrative Code"), the time to challenge a final determination of the BSA is shorter than the four months provided in the C.P.L.R. Section 25-207 of the Administrative Code provides that

> [a]ny person or persons, jointly or severally aggrieved by any decision of the [BSA] may present to the supreme court a petition duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. Such petition must be presented to a justice of the supreme court or at a special term of the supreme court within thirty days after the filing of the decision in the office of the board.

Therefore, instead of four months, plaintiffs had thirty (30) days within which to bring this action. Defendants assert that since the BSA determination was made on August 26, 2008, and this action was commenced on September 29, 2008, this action is untimely under the Administrative Code, and that plaintiffs should not be able to circumvent the Administrative Code by filing this as a plenary action rather than an Article 78 proceeding.

The Congregation and the City Defendants are simply wrong. They used the incorrect date to begin calculating the time period within which to commence this proceeding. The Administrative Code plainly states that the time to bring a proceeding is "thirty days after the filing of the decision in the office of the board." (Emphasis added.) The last page of the BSA Resolution contains the following language, in bold italic type with dates underlined:

CERTIFICATION

This copy of the Resolution
dated August 26, 2008
is hereby filed by
the Board of Standards and Appeals
dated August 29, 2008

Jeff Mulligan /s/
Jeff Mulligan
Executive Director

Thus, the calculation of the thirty-day period begins on August 29, not August 26. Once the period is calculated from the correct date, it is clear that plaintiffs had until September 29, 2008 to bring a proceeding to challenge the BSA Resolution.[2]

Plaintiffs first commenced this action on September 26, by electronic filing. Even if this court were to utilize the date that the amended complaint was filed, which was September 29, this action would still be timely. Therefore, defendants' argument that this action should not be converted to an Article 78 proceeding because such a proceeding is untimely is without merit. Since the statute of limitations had not expired as of the date of commencement, this is not a reason to deny converting this action to an Article 78 proceeding.

Defendants also assert that this court should not convert this proceeding to an Article 78 proceeding because plaintiffs were given an opportunity to stipulate to a conversion before the motions to dismiss were filed. Notably absent from defendants' argument is whether they would have been willing to waive the affirmative defense, which all parties erroneously believed to be valid, of statute of limitations. Plaintiffs were not required to consent to the conversion, and neither their failure to do so, nor their failure to affirmatively cross-move for such relief, bars the conversion of this proceeding.

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[2] August 29, 2008 was a Friday. Thirty days from that date was Sunday, September 28. Since the thirtieth day was a Sunday, pursuant to General Construction Law § 25-a, the limitations period is extended until the next business day. Therefore, plaintiffs had until Monday, September 29 to commence an action or proceeding to challenge the BSA Resolution. Rodriguez v. Saal, 43 A.D.3d 272, 276 (1st Dep't 2007).

This court has the power to convert a declaratory judgment action into an Article 78 proceeding, sua sponte. C.P.L.R. §103(c); Rosenthal v. City of New York, 283 A.D.2d 156 (1st Dep't 2001), lv. denied 97 N.Y.2d 654 (2001). Therefore, plaintiffs' failure to move for such relief, or failure to consent to such a conversion, does not preclude this court from converting this action into an Article 78 proceeding. Plaintiffs are challenging the BSA Resolution. Although plaintiffs couch some of their objections in terms of the BSA having lacked jurisdiction and having given deference to the Congregation under an unconstitutional delegation of authority, the crux of their allegations is that the determination was arbitrary and capricious and erroneous as a matter of law. Allegations that the BSA failed to follow procedures and violated state laws in reaching its determination are claims that are properly adjudicated in an Article 78 proceeding. Rosenthal, supra.

Accordingly, for the reasons set forth above, this court converts this action into a special proceeding, pursuant to Article 78 of the C.P.L.R. The motions to dismiss are denied. Defendants, now referred to as respondents, shall have ten (10) days from the date of service of a copy of this order with notice of entry, to serve and file their answers and objections in point of law, or otherwise move with respect to the petition.

This constitutes the decision and order of the court.

Dated: April 17, 2009

JOAN B. LOBIS, J.S.C.