New York Supreme Court

Appellate Division – First Department

In the Matter of the Application of,

WEST 58TH STREET COALITION, INC.; 152 W. 58 ST. OWNERS CORP.; SUZANNE SILVER-STEIN; CARROLL THOMPSON; XIANGHONG DI (STELLA) LEE; DORU ILIESIU; and ELIZABETH EVANS-ILIESIU,

Petitioners-Appellants,

For an Order and Judgment Pursuant to CPLR Article 78

-against-

THE CITY OF NEW YORK; BILL DE BLASIO, in his official capacity as Mayor of the City of New York; SCOTT M. STRINGER, in his official capacity as Comptroller of the City of New York; THE NEW YORK CITY DEPARTMENT OF HOMELESS SERVICES ("DHS"); THE NEW YORK CITY HUMAN RESOURCES ADMINISTRATION ("HRA"); THE NEW YORK CITY DEPARTMENT OF BUILDINGS ("DOB"); STEVEN BANKS, in his official capacity as Commissioner of DHS and Commissioner of HRA; JACQUELINE BRAY in her official capacity as Deputy Commissioner of HRA; WESTHAB, INC.; NEW HAMPTON, LLC; JOHN PAPPAS; PAUL PAPPAS; B GENCO CONTRACTING CORP.; TMS PLUMBING & HEATING CORPORATION; and BASS ELECTRICAL CORPORATION,

Respondents-Respondents.

NY County Index No.: 56196/2018

AD No.: 2019-3801

MEMORANDUM OF LAW IN OPPOSITION

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PRELIMINARY STATEMENT

Petitioners-Appellants, West 58th Street Coalition, Inc., 152 W. 58 St. Owners Corp., Suzanne Silverstein, Carroll Thompson, Xianghong Di Stella Lee, Doru Iliesui and Elizabeth Evans-Iliesiu (collectively referred to herein as the "Petitioners" or "Appellants" as appropriate) submit this memorandum of law in opposition to the motion to reargue an order of this Court, dated August 13, 2020, (1) modifying an order of the Supreme Court, New York County (Tisch, J.), dated April 25, 2019, which denied and dismissed Appellants' Article 78 Petition challenging the determination by Respondents, New York City Department of Homeless Services ("DHS"), New York City Human Resources Administration ("HRA"), and the New York City Department of Buildings ("DOB") (together with the remaining governmental Respondents, the "City" or "City Respondents") to open a homeless shelter (the "Proposed Shelter" or "Proposed Facility") and (2) directing a hearing on whether the use is consistent with general safety and welfare standards.

Petitioners maintain that the Proposed Shelter falls into the R-1 category, resulting in a change in occupancy that requires the owners to comply with the Current version of the Building Code. Although Petitioners disagree with this Court's contrary interpretation of the Building Code, Petitioners agree that issues of fact exist as to whether the Building's proposed use would protect the safety and

welfare of its occupants, as required by New York City Administrative Code § 27-118.

The City failed to establish that the Court overlooked a fact or misapplied controlling law in reaching this conclusion. All the City's arguments were either rejected by this Court or not presented on appeal. Thus, this Court should deny City's motion to reargue.

Both parties, however, recognize that this appeal presents issues of public importance that should be decided by the Court of Appeals, as demonstrated by Petitioner's own motion for leave to appeal. Therefore, Petitioners do not oppose the City's motion for leave to appeal.

LEGAL STANDARD FOR REARGUMENT

"A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law." Foley v. Roche, 68 A.D.2d 558, 567 (1st Dep't 1979). A motion for reargument is not a vehicle to argue the same questions previously decided or to advance new arguments. See Foley, 8 A.D.2d at 567; Fosdick v. Town of Hempstead, 126 N.Y. 651, 652-53 (1891); Simpson v. Loehmann, 21 N.Y.2d 990, 990-991 (1968). Accordingly, a successful motion to reargue identifies a dispositive argument that

was raised but not considered by the Court. See Foley, 8 A.D.2d at 567; Fosdick, 126 N.Y. at 652-53; Simpson, 21 N.Y.2d at 990-991.

ARGUMENT

POINT I

THE COURT DID NOT OVERLOOK OR MISAPPREHEND THE RELEVANT FACTS OR MISAPPLY A CONTROLLING PRINCIPLE OF LAW

A. A Safety Hearing Was Appropriate Under The Circumstances

Article 78 of the Civil Practice Law and Rules (CPLR) authorizes the petitioner to ask a court to decide whether a determination by a governmental body or officer "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." CPLR 7803(3). The courts have the power to order a hearing if "a triable issue of fact is raised". CPLR 7804(h).

Section 27-118(b) of the New York City Administrative Code ("the 1968 Grandfathering Provision") provides that when an alteration involves a change in the occupancy or use to only a portion of a building there are two consequence. First, "the alteration work involved in the change…shall be made to comply with the requirements of this code[.]" Id. Second, "the remaining portion of the building shall be altered to such an extent as may be necessary to protect the safety

and welfare of the occupants." Id. Here, the Court arrived at the unremarkable conclusion that the evidence in the record raised a triable issue of fact about whether the proposed use of the unchanged "portion of the building" would "protect the safety and welfare of the occupants." New York City Administrative Code § 27-118(b).

B. The City Failed To Articulate a Basis For Reargument

Faced with this straightforward application of the law, the City argues that the Court overlooked that ordering a hearing would violate the law governing temporary certificates of occupancy. For example, the City claims the Court neglected to apply the law related to the respective roles of the DOB and the reviewing court to its analysis of "whether the building's temporary use would jeopardize public safety." City's Memo of Law at 7-8. Similarly, the City contends that this Court's decision "rests on City Charter and Administrative Code provisions that direct DOB to assess whether the building's 'temporary occupancy and use' would 'in any way jeopardize life or property.'" City Memo of Law at 11 (quoting Charter § 45(b)(3)(f) and New York City Administrative Code § 28-118.15). From this premise, the City concludes that "this Court overlooked the narrow focus of the temporary use and occupancy assessment and remanded this case for judicial fact-finding on permanent features of the building, ones entirely unrelated to temporary use." City Memo of Law at 11-12. These arguments

misconstrue this Court's decision and do not present a fact that was overlooked by the Court or a misapplication of a controlling principle.

This Court's decision correctly focuses on the 1968 Grandfathering Provision, which requires the unchanged portion of the building to "be altered to such an extent as may be necessary to protect the safety and welfare of the occupants." See New York City Administrative Code § 27-118(b). The issuance of a TCO does not change this requirement. This Court mentioned the TCO only because the City argued that the existence of a TCO demonstrated that the City had already determined the Building satisfied 1968 Grandfathering Provision. See Resp. Br. at 53-54. In response, the Court did not invalidate the TCO but properly held it created a rebuttable presumption of safety, as Petitioners argued.

The City's arguments on this motion fortify that conclusion. As the City concedes, the inquiry under 1968 Grandfathering Provision is broader than the inquiry for a temporary use and occupancy assessment. See City's Memo of Law at 11-12. But even if the TCO could serve as a proxy for the conclusion required by 1968 Grandfathering Provision that the Building would be safe, that conclusion is still subject to judicial review. As Petitioners explained in the reply brief, "[t]he City cannot point to its own self-certification (through DOB) to justify the very conduct that is being challenged." See Reply Br. at 15.

In this case, the Court correctly concluded that a hearing under CPLR 7804(h) is warranted because of the overwhelming evidence the Building would not protect the safety and welfare of the occupants. In short, the City's contention that the court "neglected" to apply the proper law with regard to "whether the building's temporary use would jeopardize public safety" is inaccurate because the Court's decision did not address the building's *temporary* use. See City's Memo of Law at 11 (quotation marks omitted).

Further, this argument is not a basis for reargument because this Court has already rejected it on appeal. See Foley, 8 A.D.2d at 567; Fosdick, 126 N.Y. at 652-53; Simpson , 21 N.Y.2d at 990-991. Before this Court, the City advanced the erroneous argument that the DOB's mere issuance of the partial TCO constitutes irrefutable proof that the Building is safe and satisfies the City's obligation to determine whether the Building endangers the general safety and public welfare. See Resp. Br. at 53-54.

The City also had the opportunity to distinguish the authority holding the issuance of a TCO creates a presumption that a building complies with New York City law but can be rebutted by the submission of expert affidavits establishing that the building does not comply with the building code or is otherwise unsafe. See Bd. of Managers of Loft Space Condo v. SDS Leonard, LLC, 142 A.D.3d 881, 882 (1st Dep't 2016); Cirino by Gkanios v. Greek Orthodox Cnty. of Yonkers, Inc.,

193 A.D.2d 576 (2d Dep't 1993); Slomin v. Skaarland Constr. Corp., 207 A.D.2d 639 (3d Dep't 1994) (the issuance of a certificate of occupancy would not preclude a finding that there was a dangerous condition in the building). Petitioners raised these arguments in the opening brief (see Appellants' Br. at 32), and the City attempted to distinguish them on the ground that they do not arise in the context of an Article 78 proceeding. The Court rejected this argument and relied on the cases cited by Petitioners. See Graves-Poller Affirmation, Exhibit B at 20. On this motion, the City presents the exact same argument. Compare Respondent's Br. at 50 with City's Memo of Law at 10. Because the City has recycled the same arguments that were rejected on appeal, all the arguments related to the temporary certificate of occupancy are not a basis for reargument. See Foley, 8 A.D.2d at 567; Fosdick, 126 N.Y. at 652-53; Simpson, 21 N.Y.2d at 990-991.

The Court should not be misled by the City's new argument that the DOB can dismiss the legitimate safety concerns in the record without being subject to judicial review due to the nature of those concerns. According to the City, a hearing "makes little sense" because Petitioners challenge "permanent features" of the Building that comply with pre-1968 standards. See City's Memo of Law at 11-14. This argument lacks merit and does not present a controlling principle of law misapplied by this Court because it was not presented on appeal.

As an initial matter, the City does not offer any support for its conclusion that the challenged features are "permanent" in any meaningful sense. See City's Memo of Law at 2, 3 and 11. Petitioners experts stated that the Building was a "fire trap" and a "disaster waiting to happen" because, among other things, (a) the Building has only a single means of egress for 150 men; (b) the sole means of egress is too far from the residential rooms; (c) the stairs are too narrow and contain stair winders; (d) the Building contains "dead-end" and "too-narrow" corridors; (e) the Building does not have a means of egress that exits directly to the street; and (f) the Building does not have sprinklers in the residential rooms. (A-140-157; A-166; A-171-174; A-2077-2081; A-2083-2084).[1] The City characterizes these challenges as "permanent" without pointing to any record evidence that these dangerous conditions could not be changed.

The City's argument is not strengthened by the fact that some of these conditions are permitted by pre-1968 standards. The 1968 Grandfathering Provision presupposes that a building can comply with pre-1968 standards but still require alterations to protect the safety and welfare of its occupants. See New York City Administrative Code § 27-118. In fact, that is the whole point of the 1968 Grandfathering Provision. In any event, this argument does not provide a

[1] Numbers preceded by "A-" and found in parentheses refer to pages of the appendix.

basis for reargument because the City did not raise this argument on appeal. See generally Resp. Br.

The DOB allowed the owners to take advantage of the 1968 Grandfathering Provision, it necessarily concluded that the owner did not need to make, or already made, alterations to protect the safety and welfare of the occupants. That conclusion – separate and apart from the issuance of a temporary certificate of occupancy – is subject to judicial review. The overwhelming evidence of safety concerns raised a triable issue of fact as to whether the 1968 Grandfathering Provision was satisfied. Thus, the Court correctly decided that a hearing was appropriate.

In sum, the Court should deny the motion for reargument because the City failed to establish that the Court overlooked a fact or misapplied controlling law, and all the City's arguments were either rejected by this Court or not presented on appeal. Petitioners, however, do not oppose the City's motion for leave to appeal because, as explained in Petitioner's own motion for leave to appeal, this appeal presents novel issues of public importance.

CONCLUSION

WHEREFORE, Appellants respectfully request that this Court deny the motion for reargument.

Dated: New York, New York
September 24, 2020

Yours, etc.

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