

The application is granted.
 denied.



Edgardo Ramos, U.S.D.J.
Dated: 12/18/14
New York, New York 10007



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December 17, 2014

BY FACSIMILE

Hon. Edgardo Ramos
United States District Judge
Southern District of New York
40 Foley Square
New York, New York 10007

A pre-motion conference will be held on January 22, 2015 at 10:00am. Plaintiff is directed to submit a written response not longer than 3 pages by 5:00 pm on January 15, 2015.

Re: Shahl York Avenue Co., LLC v. The City of New York, et al., 14 CV 7665
(ER)

Dear Judge Ramos:

I am an attorney in the office of Zachary W. Carter, Corporation Counsel of the City of New York, counsel for defendants, the City of New York ("City") and the New York City Landmarks Preservation Commission ("LPC"), in the above-referenced case. Pursuant to Your Honor's Individual Practice Rule 2(A)(ii), I write to respectfully request a pre-motion conference relating to a Rule 12(b)(6) motion to dismiss that defendants intend to file in lieu of an answer.¹

This is a purported action for declaratory relief under 42 U.S.C. § 1983 and the 14th Amendment to the United States Constitution, alleging that LPC's determination, dated May 20, 2014, denying plaintiff's hardship application violates plaintiff's substantive due process rights. By way of background, plaintiff, the owner of the landmark buildings at 429 East 64th Street and 430 East 65th Street (the "subject buildings"), applied to LPC to demolish the subject buildings and redevelop the site. In connection with its application, plaintiff alleged that it was incapable of earning a "reasonable return" under the New York City Landmarks Law ("Landmarks Law"). See New York City Administrative Code §§ 25-302(v) and 25-309(a)(1).²

¹ Defendants note for the Court that their answer to the complaint is due on December 17, 2014.

² The Landmarks Law defines "reasonable return" as a "net annual return of six per centum of the valuation of an improvement parcel." Administrative Code §25-302(v)(1).

The subject buildings are located on a full block of 15 central light court model tenement buildings on the Upper East Side in Manhattan. Built between 1898 and 1915, this block is one of the only two full block light court model tenements in the United States. The subject buildings were the last two buildings constructed on the block. Given the historical, cultural, and architectural significance of the buildings, LPC designated this block as a landmark on April 24, 1990. At that time, plaintiff opposed the designation. On August 16, 1990, the Board of Estimate, at its last meeting before it was abolished by the new City Charter, modified the landmark site by removing the subject buildings. On or around October 10, 2006, after learning that plaintiff began taking steps to redevelop the subject buildings, LPC re-calendared the subject buildings and amended the 1990 landmark designation of the block to include the subject buildings. Plaintiff unsuccessfully challenged the 2006 landmark designation of the subject buildings in State Court. Stahl York Ave. Co. LLC v. City of New York, 76 A.D.3d 290 (1st Dep't 2010) (upholding the landmark designation of the subject buildings). Thereafter, on October 7, 2010, plaintiff filed a hardship application at LPC, which is the subject of the instant action, seeking permission to demolish the landmark buildings on the grounds that plaintiff was not capable of earning a reasonable return on the property.³

By determination dated May 20, 2014, LPC denied plaintiff's hardship application, finding that plaintiff had failed to satisfy its burden of proving economic hardship under the law. On or around September 22, 2014, plaintiff commenced an Article 78 proceeding in New York State Supreme Court to challenge LPC's final determination as arbitrary and capricious and as a taking of plaintiff's property without just compensation. See Stahl York Ave. Co. LLC v. City of New York, Index No. 100999/2014, J. Stallman (Sup. Ct. N.Y. Co.).⁴ On or around September 22, 2014, plaintiff also commenced the instant action in this Court, alleging a due process violation.

As a preliminary matter, this Court should exercise its discretion and abstain from considering the instant claims against defendants. As set forth above, plaintiff has a pending Article 78 proceeding in New York State Supreme Court, New York County (J. Stallman). In that proceeding, the State Court will necessarily determine whether LPC's determination denying plaintiff's hardship application, was reasonable and rational or arbitrary and capricious. Such findings are entirely relevant to – and may be dispositive of – plaintiff's claims that its due process rights were violated. Indeed, to establish a violation of substantive due process, the plaintiff must prove that the government's action was "arbitrary and capricious action in the

³ The Landmarks Law provides property owners with relief from the provisions of the law if the improvement parcel that includes the designated improvement, as existing at the time of the application, is "not capable of earning a reasonable return." Where the application seeks to demolish the improvement, the owner must show that it "seeks good faith to demolish such improvement immediately (a) for the purpose of constructing on the site thereof with reasonable promptness a new building or other income-providing facility." Administrative Code § 25-309 (a).

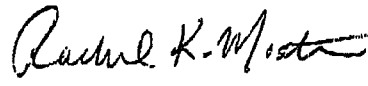
⁴ The Article 78 proceeding will be fully submitted before the New York State Supreme Court, New York County on or around February 23, 2015.

strict sense, meaning that there is no rational basis for the ... decision." See Natale v. Town of Ridgefield, 170 F.3d 258, 262 (2d Cir. 1999) (internal quotations omitted). Therefore, as a parallel proceeding is ongoing in the state court system that can, and will, address the plaintiff's allegations pertaining to the reasonableness and rationality of defendants' actions, application of the doctrine of abstention is warranted. See Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 816 (1976).

In addition, another basis for defendants' motion is that plaintiff's due process claim fails as a matter of law because plaintiff has not – and cannot – establish that it has a federally protectable property right in its application to demolish the subject buildings. Before a plaintiff seeks to prove that a state official's denial of an application or permit deprived it of a property right in violation of the standards of substantive due process, the plaintiff must first establish that it has a federally protectable property right in the application or permit. See Natale, 170 F.3d at 263; Yale Auto Parts, Inc. v. Johnson, 758 F.2d 54, 58-9 (2d Cir. 1985). This requires a demonstration that the plaintiff had a "clear entitlement" to the permit under state law. Generally, entitlement turns on "whether the issuing authority lacks discretion" to deny the permit or application. Natale, 170 F.3d at 263. Indeed, to have a "property interest entitlement to Fourteenth Amendment procedural protection," a person must have more than an abstract need or desire for it. Yale Auto Body, 758 F.2d at 58 (internal citations omitted). The plaintiff must show that, at the time the permit was denied, there was "no uncertainty regarding his entitlement to it under applicable state or local law, and the issuing authority had no discretion to withhold it in his particular case." Natale, 170 F.3d at 258, n. 1. Therefore, plaintiff's due process claim fails.

Here, plaintiff is not entitled to a permit to demolish the subject buildings as a matter of right. Rather, the Landmarks Law affords LPC broad authority and discretion in determining whether or not to grant hardship applications, such as plaintiff's application to demolish the subject buildings. It cannot be said that plaintiff had a "clear entitlement" to a permit to demolish the subject buildings. At all relevant times, LPC acted reasonably and rationally and in accordance with all applicable laws. Thus, plaintiff's cannot establish that LPC's determination to deny plaintiff's hardship application was arbitrary and capricious or in violation of due process. Accordingly, defendants respectfully request that this Court schedule a pre-motion conference or grant defendants permission to make a motion to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Thank you for your consideration herein.

Sincerely yours,

Rachel K. Moston
Assistant Corporation Counsel

cc: Alexandra A.E. Shapiro (via e-mail)