

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
SECOND JUDICIAL DEPARTMENT

Matter of Leitner v. Town of Oyster Bay Planning & Development
Department

2016 NY Slip Op 07028 (App. Div. 2016) · No. 2014-02890 · Decided October 26, 2016

SUMMARY

The Appellate Division, Second Department affirmed dismissal of a CPLR article 78 proceeding challenging a zoning variance and building permit in the Town of Oyster Bay. The court held that the challenge to the variance was untimely under Town Law § 267-c and CPLR 217, and that the administrative appeal from the building permit was untimely under Town Law § 267-a(5)(b).

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
WRITING FOR THE COURT	L. Priscilla Hall, J.P.; Jeffrey A. Cohen, J.; Robert J. Miller, J.; Betsy Barros, J.
JURISDICTION	New York
DECIDED	October 26, 2016
DOCKET	2014-02890
DISPOSITION	affirmed
PROCEDURAL POSTURE	Petitioners appealed from an order and judgment of the Supreme Court, Nassau County, dismissing their CPLR article 78 proceeding as time-barred.
STANDARD OF REVIEW	Review of the timeliness of a CPLR article 78 proceeding and the application of statutory filing periods.
PRECEDENTIAL VALUE	Published intermediate appellate decision
PARTIES	Brett Leitner, et al. v. Town of Oyster Bay Planning and Development Department, et al., Zoning Board of Appeals of Town of Oyster Bay, Karen Malamud

TOPICS

zoning

judicial review of agency action

statute of limitations

municipal law

appellate procedure

PRACTICE AREAS

zoning

municipal law

administrative law

civil procedure

appellate procedure

QUESTIONS PRESENTED

1. Whether the petitioners' CPLR article 78 challenge to the Zoning Board of Appeals' July 18, 2012 use-variance determination was timely.
2. Whether the petitioners' administrative appeal challenging the August 7, 2012 building permit was timely.

HOLDINGS

1. A CPLR article 78 challenge to the Zoning Board of Appeals' determination had to be commenced within 30 days after the determination was filed with the Town Clerk; because the determination was filed on July 18, 2012 and the proceeding was not commenced until June 13, 2013, the challenge was time-barred.
2. The administrative appeal challenging the building permit was untimely because Town Law § 267-a(5) (b) required the appeal to be taken within 60 days after filing of the administrative official's determination, and petitioners filed their appeal more than 60 days after the permit was issued.

KEY QUOTATIONS

*“Any such challenge had to be instituted within 30 days after the ZBA's determination was filed in the office of the Town Clerk” ([*1])*

*“The petitioners' administrative appeal challenging the issuance of the building permit also was untimely.” ([*1])*

FACTUAL BACKGROUND

The Zoning Board of Appeals granted a variance allowing a neighboring single-family home to be used as a parent-child residence, subject to plans dated May 14, 2012. The variance did not authorize an enclosed outside staircase. On August 7, 2012, the Planning Department issued a building permit based on revised plans that called for an exterior second-floor landing with stairs, and construction began around September 12, 2012. Petitioners challenged the permit administratively on December 20, 2012 and commenced the article 78 proceeding on June 13, 2013.

PROCEDURAL HISTORY

The Zoning Board of Appeals granted Karen Malamud a use variance on July 18, 2012, and the Town Planning Department issued a building permit on August 7, 2012. Petitioners filed an administrative appeal from the permit on December 20, 2012, and commenced a CPLR article 78 proceeding on June 13, 2013, seeking, among other relief, annulment of the variance and vacatur of the permit. The Supreme Court granted respondents' separate motions to dismiss the petition as untimely, and the Appellate Division affirmed.

DISPOSITION

affirmed

CASES CITED

- Matter of Cutalo v. Zoning Bd. of Appeals of Town of Huntington, 55 AD3d 830, 831
- Matter of Vega v. Scheyer, 18 AD3d 664
- Matter of Peehl v. Village of Cold Spring, 129 AD3d 844
- Matter of Clarke v. Town of Sand Lake Zoning Bd. of Appeals, 52 AD3d 997, 999
- Matter of Highway Displays v. Zoning Bd. of Appeals of Town of Wappinger, 32 AD2d 668

OPINION

PER CURIAM.

Matter of Leitner v Town of Oyster Bay Planning & Dev. Dept. (2016 NY Slip Op 07028) Matter of Leitner v Town of Oyster Bay Planning & Dev. Dept. 2016 NY Slip Op 07028 Decided on October 26, 2016 Appellate Division, Second Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports.

Decided on October 26, 2016 SUPREME COURT OF THE STATE OF NEW YORK Appellate Division, Second Judicial Department L. PRISCILLA HALL, J.P. JEFFREY A. COHEN ROBERT J. MILLER BETSY BARROS, JJ. 2014-02890 (Index No. 6822/13) [*1]In the Matter of Brett Leitner, et al., appellants, vTown of Oyster Bay Planning and Development Department, et al., respondents. Leitner Varughese PLLC, Melville, NY (Brett Leitner pro se of counsel), for appellants.

Leonard Genova, Town Attorney, Oyster Bay, NY (Anthony C. Curcio of counsel), for respondent Town of Oyster Bay Department of Planning and Development, sued herein as Town of Oyster Bay Planning and Development Department. Anthony J. Cincotta, Woodbury, NY (Thomas A. Abbate of counsel), for respondent Zoning Board of Appeals of Town of Oyster Bay. Law Office of Alan M. Gelb, P.C., New York, NY, for respondent Karen Malamud.

In a proceeding pursuant to CPLR article 78 to review a determination of the Zoning Board of Appeals of the Town of Oyster Bay dated July 18, 2012, which, after a hearing, granted the application of the respondent Karen Malamud for a use variance, and, in effect, to vacate a permit issued by the respondent Town of Oyster Bay Department of Planning and Development, the petitioners appeal from an order and judgment (one paper) of the Supreme Court, Nassau County (Cozzens, Jr., J.), entered December 11, 2013, which granted the respondents' separate motions to

DECISION & ORDER dismiss the petition as time-barred and, in effect, denied the petition and dismissed the proceeding.

ORDERED that the order and judgment is affirmed, with one bill of costs. In a determination dated July 18, 2012, made after a hearing attended by the petitioners, the respondent Zoning Board of Appeals of the Town of Oyster Bay (hereinafter the ZBA) granted an application made by the petitioners' next-door neighbor, the respondent Karen Malamud, for a variance to use a single-family home as a parent-child residence.

The decision to grant the variance was subject to plans dated May 14, 2012; however, construction of a proposed "enclosed outside staircase" was not permitted by the variance. On August 7, 2012, a building permit was issued by the respondent Town of Oyster Bay Department of Planning and Development (hereinafter the Planning Department) for the construction of a rear addition on Malamud's property based upon revised plans dated July 20, 2012.

Those revised plans included a provision to build an exterior second floor landing with stairs, differing from the plans dated May 14, 2012, which included a provision to build an enclosed exterior staircase. Construction of the addition commenced on or around September 12, 2012.

The petitioners filed their administrative appeal challenging the issuance of the building permit on December 20, 2012. The petitioners commenced this CPLR article 78 proceeding on June 13, 2013, *inter alia*, to annul the use variance and, in effect, vacate the building permit. Each respondent separately moved to dismiss the petition on the ground that the petitioners were time-barred from commencing the proceeding.

The Supreme Court granted the respondents' motions and dismissed the petition as time-barred. We affirm. Contrary to the petitioners' contention, their CPLR article 78 challenge to the ZBA's issuance of the use variance was not timely. Any such challenge had to be instituted within 30 days after the ZBA's determination was filed in the office of the Town Clerk (see Town Law § 267-c; CPLR 217).

Here, that filing occurred on July 18, 2012, and this proceeding was commenced on June 13, 2013. Accordingly, insofar as this proceeding is premised on the ZBA's determination, it is time-barred (see *Matter of Cutalo v Zoning Bd. of Appeals of Town of Huntington*, 55 AD3d 830, 831; *Matter of Vega v Scheyer*, 18 AD3d 664).

The petitioners' administrative appeal challenging the issuance of the building permit also was untimely. Town Law § 267-a(5)(b) provides that "[a]n appeal shall be taken within sixty days after the filing of any order, requirement, decision, interpretation or determination of the administrative official."

Here, the Planning Department issued the building permit on August 7, 2012, and the 60-day statutory period began to run on that date. Thus, the petitioners' December 20, 2012, filing of their administrative appeal to the ZBA was untimely (see Town Law § 267-a[5][b]; *Matter of Peehl v Village of Cold Spring*, 129 AD3d 844; *Matter of Clarke v Town of Sand Lake Zoning Bd. of Appeals*, 52 AD3d 997, 999; *Matter of Highway Displays v Zoning Bd. of Appeals of Town of Wappinger*, 32 AD2d 668).

In light of our determination, we need not address the parties' remaining contentions. HALL, J.P., COHEN, MILLER and BARROS, JJ., concur. ENTER: Aprilanne Agostino Clerk of the Court