

**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

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

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