

29 A.D.3d 801

Supreme Court, Appellate Division, Second Department, New York.

In the Matter of PALM MANAGEMENT CORPORATION, appellant,

v.

Andrew GOLDSTEIN, et al., respondents-respondents, et al., respondents.

May 16, 2006.

Synopsis

Background: Operator of inn and restaurant brought Article 78 proceeding to review determination in which village's zoning board of appeals annulled portions of certificate of occupancy related to operator's use of outdoor dining area with accompanying structural improvements and use of barn as dormitory with accompanying structural improvements. The Supreme Court, Suffolk County, Emerson, J., denied petition and dismissed proceeding. Operator appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] board's determination that operator's use of patio for outdoor dining was illegal nonconforming use was entitled to judicial deference, but

[2] res judicata barred challenge to operator's use of barn as living quarters, the accompanying structural improvements, and patio awning.

Affirmed as modified.

West Headnotes (7)

[1] **Zoning and Planning**

↳ Existence of use in general

Zoning and Planning

↳ Decisions of boards or officers in general

Determination of village's zoning board of appeals that use by operator of inn and restaurant

of patio for outdoor dining was illegal nonconforming use was entitled to judicial deference in Article 78 proceeding reviewing determination in which board annulled portion of certificate of occupancy related to operator's use of patio for outdoor dining, inasmuch as operator did not demonstrate that such use was pre-existing nonconforming use at the time village's zoning ordinance was enacted, there was no basis in the record to disturb board's determination that use of patio for outdoor dining was not proper accessory use under ordinance, which was entitled to great deference, and no special permit or use variance was issued to authorize outdoor dining in patio area. [McKinney's CPLR 7801 et seq.](#)

[2 Cases that cite this headnote](#)

[2]

Administrative Law and Procedure

↳ Res judicata

Zoning and Planning

↳ Conclusiveness and collateral attack

Res judicata barred challenge to use by operator of inn and restaurant of barn as living quarters, the accompanying structural improvements, and operator's patio awning as they existed when village's zoning board of appeals specifically rejected previous challenges to those matters on the ground that those challenges were barred by statute of limitations, which was a final determination on the merits.

[2 Cases that cite this headnote](#)

[3]

Zoning and Planning

↳ Defenses to Enforcement

When local building inspector improperly issues certificate of occupancy and, as a result, property owner acts in violation of zoning ordinance, zoning board of appeals may correct mistake by enforcing zoning ordinance.

[1 Cases that cite this headnote](#)

preclusion purposes, to bar a second action.

[2 Cases that cite this headnote](#)

[4]

Estoppel

↳ Estoppel Against Public, Government, or Public Officers

Estoppel is not available against a local government unit for the purpose of ratifying an administrative error.

[Cases that cite this headnote](#)

[5]

Zoning and Planning

↳ Estoppel or inducement

Zoning and Planning

↳ Time for proceedings

Municipality is not estopped from enforcing its zoning laws either by the issuance of a building permit or by laches.

[Cases that cite this headnote](#)

[6]

Administrative Law and Procedure

↳ Res judicata

Zoning and Planning

↳ Conclusiveness and collateral attack

Principles of res judicata and collateral estoppel apply to quasi-judicial determinations of administrative agencies, such as zoning boards, and preclude the relitigation of issues previously litigated on the merits.

[3 Cases that cite this headnote](#)

[7]

Judgment

↳ Merits of controversy in general

Dismissal on the ground of untimeliness is at least sufficiently close to the merits, for claim

Attorneys and Law Firms

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GLORIA GOLDSTEIN, J.P., **WILLIAM F. MASTRO**, **REINALDO E. RIVERA**, and **ROBERT J. LUNN**, JJ.

Opinion

***801** In a proceeding pursuant to CPLR article 78 to review a determination of the respondent Zoning Board of Appeals of the Village of East Hampton dated September 24, 2004, which, after a hearing, annulled those portions of a certificate of occupancy, issued October 29, 2003, relating to the petitioner's use of an outdoor dining area with accompanying structural improvements, and the use of a barn as a dormitory with accompanying structural improvements, the petitioner appeals from a judgment of the Supreme Court, Suffolk County (Emerson, J.), dated May 2, 2005, which denied the petition and dismissed the proceeding.

ORDERED that the judgment is modified, on the law, by deleting the provision thereof denying the petition in its entirety, and substituting therefor a provision granting the petition to the extent of annulling so much of the determination dated September 24, 2004, as annulled those portions of the certificate of occupancy relating to the presence of a patio awning on the premises and the use of a barn as a dormitory with accompanying structural improvements, both as described in a prior resolution of the respondent Zoning Board of Appeals of the Village of East Hampton filed May 14, 2001, and otherwise denying the petition; as so modified, the judgment is affirmed, without costs or disbursements.

The petitioner operates an inn and restaurant at the subject premises in the Village of East Hampton as a pre-existing nonconforming use under the local zoning ordinance. It is undisputed that in 1987 the petitioner was issued a building permit for the construction of a large awning over a patio on the premises. Moreover, in 1989, a Certificate of Occupancy (hereinafter C.O.) was issued for the property which approved an *802 existing barn on the premises as “a detached two-story frame building occupied as help’s quarters—first floor contains three bedrooms and second floor contains four bedrooms and living room.” Thereafter, a 1993 C.O. again approved both the presence of the awning and the use of the barn as living quarters, describing them as “[a] slate patio partially covered with an awning, and [a] legal preexisting nonconforming two-story frame building occupied as help’s quarters—first floor consists of two bedrooms and a bath, second floor consists of three bedrooms, bath and living room.”

On June 22, 2000, in response to various complaints from neighboring residents, the village code enforcement officer rendered a determination finding, inter alia, that the patio awning had been approved and permitted in 1987, and that the barn’s use as a dormitory had been authorized in previous C.O.s. The determination advised the residents to seek any further redress regarding these matters from the village Zoning Board of Appeals (hereinafter the ZBA). **673 The residents appealed the determination to the ZBA, which rejected their arguments in a resolution filed May 14, 2001. With regard to the claims of the residents that the patio awning violated the zoning ordinance and that the barn was being used unlawfully as living quarters for employees of the inn, the ZBA determined that “the statute of limitations has long expired” because “[t]he underlying determinations which aggrieve the applicants are the building permit for the awning, issued April 17, 1987, and the certificate of occupancy for the ‘help’s quarters,’ issued September 6, 1989.”

On October 29, 2003, the village code enforcement officer issued another C.O. for the premises which again acknowledged that the patio was partially covered by an awning and that the barn was being used as a “dormitory/storage building.” In addition, the 2003 C.O. recited for the first time that the partially covered patio was being used as an “outdoor dining patio.”

Neighboring residents of the inn again appealed to the ZBA contending, inter alia, that the use of the patio as an outdoor dining area and the use of the barn as living quarters, as well as the structural changes made to the premises to accommodate those uses, violated the zoning ordinance. In a determination dated September 24, 2004, the ZBA agreed

with the residents and adopted a resolution annulling those portions of the 2003 C.O. authorizing these uses and improvements. The ZBA concluded, inter alia, that the outdoor dining and dormitory uses were not pre-existing nonconforming uses and did not constitute valid accessory uses.

***803** The petitioner thereafter commenced this proceeding pursuant to CPLR article 78 to review the ZBA’s determination. The Supreme Court denied the petition and dismissed the proceeding, finding that the ZBA’s determination was rational and that the ZBA was not bound by its 2001 determination rejecting similar challenges by the neighboring residents as time-barred. We modify the judgment.

[1] We agree with the Supreme Court that the ZBA properly annulled that portion of the 2003 C.O. relating to the use of the patio for outdoor dining. The petitioner failed to demonstrate that the use of the patio for outdoor dining was a preexisting nonconforming use at the time that the zoning ordinance of the Village of East Hampton was enacted. Furthermore, the ZBA’s determination that the utilization of the patio for outdoor dining was not a proper accessory use under the ordinance is entitled to great deference (*see Matter of New York Botanical Garden v. Board of Stds. & Appeals of City of N.Y.*, 91 N.Y.2d 413, 420, 671 N.Y.S.2d 423, 694 N.E.2d 424; *Verstandig’s Florist v. Board of Appeals of Town of Bethlehem*, 229 A.D.2d 851, 852, 645 N.Y.S.2d 635), and we discern no basis in the record for disturbing that determination. Additionally, there is no evidence that a special permit or a use variance was ever issued to authorize outdoor dining in the patio area. Accordingly, the Supreme Court properly deferred to the ZBA’s determination that the use of the patio for outdoor dining was an illegal nonconforming use.

[2] [3] [4] [5] [6] By contrast, to the extent that the ZBA annulled those portions of the 2003 C.O. relating to the barn’s use as living quarters and its accompanying structural improvements, as well as to the patio awning which was the subject of the 1987 building permit, the determination was contrary to law because the 2001 determination of the ZBA was entitled to res judicata effect with regard to those matters. It is true, as the respondents observe, that where a local building inspector improperly issues a C.O., and as a result **674 the property owner acts in violation of the zoning ordinance, a zoning board of appeals may nevertheless correct the mistake by enforcing the zoning ordinance (*see Matter of Elichar Realty Corp. v. Town of Eastchester*, 150 A.D.2d 444, 541 N.Y.S.2d 53). Indeed, “[e]stoppel is not available against a local government unit for the purpose of ratifying an administrative error” (*Morley v. Arricale*, 66 N.Y.2d 665,

667, 495 N.Y.S.2d 966, 486 N.E.2d 824), and “ ‘[a] municipality, it is settled, is not estopped from enforcing its zoning laws either by the issuance of a building permit or by laches’ ” (*Matter of Parkview Assoc. v. City of New York*, 71 N.Y.2d 274, 282, 525 N.Y.S.2d 176, 519 N.E.2d 1372, cert. denied 488 U.S. 801, 109 S.Ct. 30, 102 L.Ed.2d 9, quoting *City of Yonkers v. Rentways, Inc.*, 304 N.Y. 499, 505, 109 N.E.2d 597). However, *804 while the ZBA may enforce the zoning ordinance, even in light of a mistake by the code enforcement officer, the principles of res judicata and collateral estoppel apply to quasi-judicial determinations of administrative agencies, such as zoning boards, and preclude the relitigation of issues previously litigated on the merits (see *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 478 N.Y.S.2d 823, 467 N.E.2d 487; *Matter of Timm v. Van Buskirk*, 17 A.D.3d 686, 793 N.Y.S.2d 520; *Matter of Waylonis v. Baum*, 281 A.D.2d 636, 723 N.Y.S.2d 55).

[7] Under the circumstances of this case, the doctrine of res judicata bars a challenge to the use of the barn as living quarters, as well as to the accompanying structural improvements and the patio awning as they existed at the time of the ZBA’s previous 2001 determination. In that 2001 determination, the ZBA specifically rejected the

challenges to those matters on the ground that they were barred by the statute of limitations. A dismissal on the ground of untimeliness “is at least sufficiently close to the merits for claim preclusion purposes to bar a second action” (*Smith v. Russell Sage Coll.*, 54 N.Y.2d 185, 194, 445 N.Y.S.2d 68, 429 N.E.2d 746; see *Matter of Koeppel v. Wachtler*, 183 A.D.2d 829, 583 N.Y.S.2d 977). As the ZBA’s 2001 dismissal of the challenges as untimely constituted a final determination on the merits, those same challenges could not be raised in this proceeding, nor could the ZBA revisit them. Accordingly, the Supreme Court should have granted the petition in part and annulled the ZBA’s determination to the extent that it annulled those portions of the 2003 C.O. relating to the use of the barn as a dormitory, the structural improvements made in connection with that use, and the patio awning.

All Citations

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