

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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Argued - October 14, 2008

ROBERT A. LIFSON, J.P.
FRED T. SANTUCCI
RUTH C. BALKIN
ARIEL E. BELEN, JJ.

2007-11175

DECISION & ORDER

In the Matter of Pamela Calapai, respondent, v
Zoning Board of Appeals of Village of Babylon,
appellant.

(Index No. 15650/07)

Kressel, Rothlein, Walsh & Roth, LLC, Massapequa, N.Y. (David I. Roth of counsel), for appellant.

Law Offices of Bruce Kennedy, P.C., Amityville, N.Y., for respondent.

In a proceeding pursuant to CPLR article 78 to review a determination of the Zoning Board of Appeals of Village of Babylon dated April 24, 2007, which granted the petitioner's application to amend certain restrictions on a variance permitting her to maintain her garage for use as living space only to the extent of permitting such use for a period of three years, the appeal is from an order and judgment (one paper) of the Supreme Court, Suffolk County (Sgroi, J.), dated October 29, 2007, which denied the motion of the Zoning Board of Appeals of Village of Babylon to dismiss the petition pursuant to CPLR 3211(a) and 7804(f), inter alia, in effect, on the ground of the doctrine of res judicata, granted the petition, annulled the determination, and remitted the matter to the Zoning Board of Appeals of Village of Babylon for the issuance of documentation required for a certificate of occupancy permitting the garage to be used indefinitely as living space.

ORDERED that the order and judgment is reversed, on the law, with costs, that branch of motion which was to dismiss the petition pursuant to CPLR 3211(a) and 7804(f) on the

ground of, in effect, the doctrine of res judicata, is granted, the proceeding is dismissed, and the determination is confirmed.

In 2000 the petitioner requested approval from the Zoning Board of Appeals of the Village of Babylon (hereinafter the ZBA) for a variance to allow her to convert her one-car garage into a bedroom and bathroom to accommodate the special needs of her severely-disabled, paraplegic son. On October 18, 2000, the ZBA granted the application, upon the condition that, inter alia, the petitioner restore the property to its original use as a garage should any change in circumstances occur.

The petitioner converted the garage to living quarters, spending a sum in excess of than \$80,000, financed by a loan secured by the property, and met the requirements set by the ZBA with regard to the alteration. In September 2006, following the death of her son at 18 years of age, the petitioner applied to the ZBA to remove the conditions imposed upon the original variance and allow her to retain the property as renovated.

The ZBA granted the petitioner's application to the extent of permitting her to maintain the conversion for one year, after which she was to restore the property to its former condition. The petitioner then reapplied to delete that condition, and her reapplication was heard at a public hearing on February 28, 2007.

On April 18, 2007, the ZBA voted to amend the restrictions to allow the petitioner to maintain her garage as living space for an additional period of three years and required her to reapply for a continuation of the approval every three years hence. The ZBA further determined that, if she were to sell the property, she would be obligated to restore it to its former configuration.

The petitioner then commenced this CPLR article 78 proceeding to annul the determination and thus vacate the conditions that were imposed. Prior to answering, the ZBA moved to dismiss the petition based on objections in point of law, alleging that the petitioner was not aggrieved by the determination and, in effect, that the proceeding was barred by res judicata.

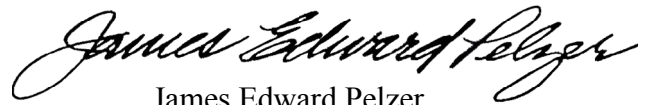
The doctrine of res judicata applies to quasi-judicial determinations of administrative agencies, including municipal zoning tribunals, and precludes relitigation of claims which previously were litigated on the merits or might have been so litigated at the time (*see Matter of Freddolino v Village of Warwick Zoning Board of Appeals*, 192 AD2d 839; *Palm Management Corp. v Goldstein*, 29 AD3d 801; *Town of Wallkill v Lachman*, 27 AD3d 724).

The issues raised on the variance application that is the subject of this appeal were raised in the petitioner's initial 2000 application to make alterations to her garage, and the change in circumstances that occurred, to wit, the death of the petitioner's son, cannot be viewed as unanticipated. Consequently, that branch of ZBA's motion which was to dismiss the petition on the ground of, in effect, the doctrine of res judicata should have been granted (*see Matter of Palm Mgt. Corp. v Goldstein*, 29 AD3d 801, 803-804; *Matter of Waylonis v Baum*, 281 AD2d 636, 638), and the determination dated April 24, 2007, requiring the petitioner to reapply for the extension of the variance three years from that date, should not have been annulled.

In light of our determination, the ZBA's remaining contention has been rendered academic.

LIFSON, J.P., SANTUCCI, BALKIN and BELEN, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive style with a large, prominent initial "J".

James Edward Pelzer
Clerk of the Court