

**Matter of R & S Produce Corp. v Bus.
Integrity Commn. of City of N.Y.**

2009 NY Slip Op 31076(U)

April 15, 2009

Supreme Court, New York County

Docket Number: 103667/09

Judge: Nicholas Figueroa

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. NICHOLAS FIGUEROA
Justice

PART 46

R+S Circus Produce Corp.

INDEX NO.

103667109

MOTION DATE

MOTION SEQ. NO.

1

MOTION CAL. NO.

Business Integrity Commission, et al.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1

Answering Affidavits — Exhibits _____

1

Replying Affidavits _____

1

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

See accompanying Decision and Judgment.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 4/15/09

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
In the Matter of the Application of

R AND S PRODUCE CORP.,

Petitioner,

Index No. 103667/09

-against-

DECISION AND JUDGMENT

THE BUSINESS INTEGRITY COMMISSION OF THE
CITY OF NEW YORK, and THOMAS McCORMACK,
CHAIRMAN,

Respondents.

Nicholas Figueroa, Justice:

UNFILED JUDGMENT
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In this Article 78 proceeding, petitioner seeks an order directing respondent, The Business Integrity Commission of the City of New York ("BIC"), to render an immediate determination on petitioner's application for permanent registration as a wholesaler at the Hunts Point Produce Market ("the Market") in the Bronx, New York ("the Application"). Petitioner claims that respondents have unreasonably delayed making such a determination.

The registration process at issue is an aspect of the special governance over public wholesale markets that the City put into place in 1997 to address the problem of organized crime in a key industry. The statutory framework for such governance is contained in title 22 of the City's Administrative Code, pursuant to which regulations (title 66 of the Rules of the City of New York) were promulgated by BIC's predecessor in 1997.

Under section 22-251 of the Code, food wholesalers located at or operating within a designated public wholesale market must be registered with BIC. Under section 22-259 of the Code, however, BIC may deny an application to register if the agency is not satisfied that the

applicant is of “good character, honesty and integrity” and “financial[ly] responsib[le].”

Petitioner filed the Application with BIC on October 12, 2007, some three months after entering into a contract to purchase the interests of a certain Market wholesaler. Approximately eighteen months have elapsed since then without a determination on the Application by respondent. According to the petition, which was filed on March 18, 2009, and heard on March 31, 2009, the other party to petitioner’s contract has asserted its intent to “opt out” if BIC does not “resolve this matter.” Petitioner maintains that respondent’s failure to have rendered a timely determination constitutes a “dereliction” of duty amounting to arbitrary and capricious inaction and thus a basis for Article 78 relief in the nature of mandamus.

Although the parties disagree about the conclusion to be drawn from the facts material to this proceeding, there is no dispute as to those facts per se, which are as follows. The Application, which showed that petitioner proposed to purchase two store units and two office units in the Market, was signed by petitioner’s President-Treasurer/50 percent shareholder (“the Principal”). It also listed, among other things, the Principal’s current business interests. After a background investigation, respondent sent a letter to petitioner, dated January 7, 2008, asking for further information, particularly concerning certain inconsistencies and omissions in the Application, and expressing concern about a possible connection between an R and S employee, or one or more R and S officers, to certain individuals (“C” and “T”) who were reputedly linked to organized crime.

Petitioner’s counsel responded to respondent’s inquiry in two stages, first by letter dated January 28, 2008, and, second, by letter dated April 2, 2008. As part of such correspondence, counsel identified a certain individual (“C.”) as co-owner of some or all of the Principal’s other

business interests. That information suggested to respondent that there was cause for concern that the Principal was associated with persons having mob connections and might himself have a criminal record in his native Sicily, as reported in an Italian newspaper. Further correspondence followed, first from respondent, seeking more detailed information, then from petitioner's counsel, on May 14, 2008. Pursuant to additional correspondence, the Principal appeared for a deposition on July 23, 2008. In such deposition, the Principal indicated that he had daily business dealings with another individual ("S.") who reputedly was connected to organized crime and that the Principal had also recently cashed out of his investment in a company owned by "C." On the other hand, the Principal also testified that he had never been arrested in Italy notwithstanding the newspaper report to the contrary. Thereafter, from July 24, 2008, through October 7, 2008, petitioner's counsel forwarded to respondent various documents in support of the proposition that the Principal had not in fact been arrested in Italy and also to demonstrate that default judgments outstanding against certain of the Principal's businesses were being addressed by petitioner.

On January 12, 2009, in a letter to petitioner's counsel, respondent asked that petitioner document the Principal's claim that in December 2007 he had terminated his interests in a certain produce company owned by C. Petitioner's counsel responded by letter dated January 26, 2009, to the effect that there was no document evidencing the Principal's investment in such company, but that an annexed letter from an officer of the company showed that such investment had ended. The petition commencing this proceeding was filed two months thereafter.

In a supplemental affirmation filed in this proceeding, respondent avers that it has continued to pursue certain investigative leads in the two months following the most recent

correspondence between it and petitioner's counsel. Respondent proposes that it needs at least one more week (from the date of filing of the affirmation) to determine whether to pursue other avenues of investigation or, if not, whether a grant or denial of the Application is indicated. The respondent notes that if it determines to grant the Application, the process can be completed by the agency "relatively quickly." If on the other hand it determines to deny the application, respondent avers that it will need another four or five months to complete certain identified standard procedures. As described in the affirmation, such procedures include among other things the preparation of a lengthy written report and a review by the Commissioners, who are projected to convene for formal consideration no sooner than August 2009 and perhaps as late as September 2009. In reply, petitioner for its part maintains that respondent's proposed time-line reflects nothing more than the agency's intention to protract the registration process indefinitely.

The issue thus raised is whether the undisputed facts establish that, as petitioner argues, respondent has neglected its duty as defined by statute and regulation. According to petitioner, precedent from the Court of Appeals, *Utica Cheese, Inc. v Barber*, 49 NY2d 1028, establishes that there has been such neglect here as a matter of law.

Utica Cheese was an Article 78 proceeding involving a petitioner company's application to a State agency for a license to be a milk dealer. The petition had been filed some nine months after respondent undertook an investigation into whether the petitioner had connections to organized crime. By the time the matter came before the Court of Appeals, some 16 months had elapsed since the petitioner had filed its application for the license. The respondent agency claimed, however, that it was holding its investigation in abeyance pending possible receipt of certain confidential information from three law-enforcement agencies in other jurisdictions. The

respondent explained that such information might surface if one of those other agencies eventually decided to bring criminal proceedings against certain individuals. Thus, as the Court of Appeals put it, the respondent's position was that it was "unable to provide a better estimate of when, if ever, [it] will be able to ascertain the relevance and availability of the further information he seeks other than that it will be at some unknown time in the future" (*Utica Cheese v Barber, supra*, at 1030). In light of such open-ended projection by the respondent, the court concluded that, "fairness to the [petitioner] therefore requires that a hearing be held and a determination rendered promptly," directing that "these steps be accomplished no later than 90 days from the date of this decision...." (*id.*).

According to petitioner, *Utica Cheese* squarely applies here and points decidedly toward the mandamus relief that petitioner seeks. In such connection, it must be noted that *Utica Cheese* involved an express mandate of the State Administrative Procedure Act, *i.e.*, that State agencies perform their duties within a "reasonable time" (102[3]). But respondent does not argue that as a City agency it is not implicitly subject to the same sort of mandate under the Code. Accordingly, the question remains whether the absence of a determination on the Application by this juncture amounts to a *per se* failure by respondent to act within a reasonable time.

Petitioner argues that the *Utica Cheese* ruling suggests the proposition that circumstances such as those in the instant case (where the length of the investigation exceeds that in *Utica Cheese*) require a mandamus. Indeed, the Court in that case had noted that 16 months ordinarily would constitute more than a reasonable time to act upon such an application (*id.*). The Court also noted, however, that the "ordinary" standard did not apply where an agency was obliged to investigate "unusual" matters (presumably meaning matters that by their nature were largely if

not entirely covert and thus not readily probed). If the Court nevertheless directed the respondent in its case to render a determination within a limited amount of time, it clearly did so because the respondent was proposing to defer its determination until certain contingencies came to pass, if ever. In other words, the mandamus in *Utica Cheese* issued because the respondent was, in effect, asking that it be allowed to defer a determination indefinitely. Respondent in this case is not asking for the same type of open-ended dispensation.

In any event, resolution of the issue between the present parties should be informed by established principle. Thus, precedent and common sense make it clear that, “administrative delay may be justifiable when its source lies in the complexity of the issues to be resolved” (*Cortlandt Nursing Home v Axelrod*, 66 NY2d 169, 181). The record indicates that the course of respondent’s probe thus far has been extended as a result of questions raised not only by the Application itself, but also, by petitioner’s responses to the questions put to it. Respondent asks that it be allowed some six more months to render its determination if it decides to deny the Application. Ordinarily, the court might simply defer to the agency’s expertise in gauging the time it needs. However, under the circumstances, deference to the agency’s timetable is problematic. That is, respondent proposes to issue its determination no earlier than some point in September 2009 in order to allow its Commissioners to pass on the matter formally at their regularly scheduled meeting, either in August or September 2009. This proposal must be viewed in the light of the Code provision that directs respondent to promulgate a regulation

establish[ing] ... a procedure for the preliminary review of registration applications for businesses not previously operating in a market that are considering the purchase of a wholesale business or a market business, and for the expedited completion of registration review upon entry into a purchase and sale agreement.

Petitioner points to the above provision as a self-enforcing promise of expedited treatment where, as here, there is a pending purchase contract (a promise that petitioner maintains has been broken). As it happens, petitioner's reading is somewhat off the mark. To be sure, the provision contemplates that there be a procedure for advance vetting of a prospective applicant (to speed the registration process in the event that he or she ultimately enters into a purchase contract). But the provision does not itself establish such a procedure.

Unfortunately, however, in the dozen years since the statute directed respondent to promulgate a regulation offering such a procedure, respondent has yet to do so. In view of such regulatory foot-dragging, it would be adding present injury to past insult if petitioner were obliged to await the Commissioners' formal meeting in August or September for disposition of the Application. Accordingly, respondent is directed to render its determination no later than 100 days from the date of service of notice of entry of this decision (thus allowing respondent to complete the stages of its work described in its supplemental affirmation, but not allowing respondent to postpone its determination until the Commissioners' formal meeting); provided, however, that respondent has leave to seek an extension of such deadline by filing, within 5 days of the date of service of notice of entry of this decision, a supplemental affirmation identifying

need for further investigatory steps warranting such extension.

This constitutes the decision and Judgment of the court.

Dated: April 15, 2009

ENTER:



J.S.C.

UNFILED JUDGMENT

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