

**Matter of New York Tel A Star Communications, Inc.  
v Department of Info. Tech. & Telecom. of the City of  
N.Y.**

2010 NY Slip Op 33133(U)

October 28, 2010

Supreme Court, New York County

Docket Number: 106785/10

Judge: Judith J. Gische

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

PRESENT: Gische  
Justice

PART 10

New York Tel A Star

INDEX NO. 106785/10

MOTION DATE \_\_\_\_\_

- v -  
Dept. Info. Tech. & Tel. of the City of New York

MOTION SEQ. NO. 01

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for Ans 75

PAPERS NUMBERED

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

... IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.

**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: 10/28/10

J. Gische  
HON. JUDITH J. GISCHÉ 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: IAS 10

-----x

In the Matter of the Application of

New York Tel A Star Communications, Inc.

Petitioner,

Decision/Order  
Index# 106785/10

for a Judgment Pursuant to Article 78 of the  
Civil Practice Law and rules in the Nature of  
Mandamus and Prohibition

Mot. Seq. : #001

-against-

Department of Information Technology and  
Telecommunication of the City of New York

Respondent.

-----x

Hon. Judith J. Gische:

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

Pursuant to CPLR §2219(A) the following papers were considered in connection  
this Article 78 proceeding:

<b>PAPERS</b>	<b>NUMBERED</b>
OSC, PH affd., MM affd., exhibits.....	1
Notice of Cross-motion, JH affirm., MA affd., exhibits .....	2
JH supp. affirm., exhibits.....	3
PH affd. On opp to X-motion. MM affirm., exhibits.....	4

*Upon the foregoing papers, the decision and order of the Court is as follows:*

In this Article 78 proceeding, petitioner, New York Tel A Star Communications,  
Inc. ("Tel A Star") seeks to annul determinations it claims were made by respondent,  
Department of Information Technology and Telecommunications ("DOITT") on February  
8, 2010 and May 13, 2010. It also seeks collateral relief, enjoining respondent from  
taking action to revoke permits to maintain and operate certain public pay phones or  
otherwise taking action to prevent Tel A Star from maintaining or operating such public

[\* 3]

pay phones. DOITT has moved, pre answer, to dismiss the petition, based upon the expiration of the statute of limitations and failure to state a cause of action. Tel A Star opposes the motion.

Where a motion to dismiss is premised upon CPLR §7804 [f], only the petition and the exhibits attached thereto may be considered and all the allegations contained therein are deemed to be true (Green Harbour Homeowners' Ass'n, Inc. v. Town of Lake George Planning Board, 1 AD3d 744 [3<sup>rd</sup> Dept 2003]). Similar to a motion to dismiss brought pursuant to CPLR § 3211, the court is required to presume the truth of all allegations contained in the challenged pleadings and resolve all inferences which may reasonably flow therefrom in favor of the non-movant (Cron v. Hargro Fabrics, Inc., 91 NY2d 362 [1998]; Sanders v. Winship, 57 NY2d 391 [1982]). Thus, the court's inquiry on this motion to dismiss is whether the petitioner has a cause of action, not whether it has stated one (Guggenheimer v. Ginzberg, 43 NY2d 268 [1977]; DePaoli v. Board of Educ., Somers Cent. School Dist., 92 AD2d 894 [2<sup>nd</sup> Dept 1983]).

Tel A Star owns and operates certain public pay phones located on public rights of way (sidewalks) within the City of New York. DOITT is an agency of the City of New York authorized to administer telecommunications franchises, including franchises for private parties to operate public pay phones on City property. On or about February 8, 2010 DOITT sent a communication to Tel A Star which states in pertinent part:

“ As you were previously notified, through various correspondence and meetings, the Department of Information Technology and Telecommunications (DoITT”) determined, based upon analysis of [your] VENDEX forms and additional process, that [you] failed to complete the VENDEX process successfully. By failing to complete this process successfully, [you] failed to meet an essential condition of [the City's Franchise and Concession Review Committee]'s approval and [the City's

Franchise and Concession Review Committee] was therefore deemed to have determined no to approve a franchise for [you]"

The City notified [you] that ...[you] had sixty(60) days following notice to either (1) enter into and agreement to sell its public pay telephones to an entity that has been awarded a public pay telephone franchise by the City... or (2) remove its public pay telephones from the City's property. DOITT is now seeking to enforce this determination."

\*\*\*\*

If [you fail] within sixty (60) days to (1) enter into an agreement to sell [your] public telephones as described above, or (2) remove all of [your] public pay telephones from City property. Then all of [your public pay telephones] located on City property shall be subject to removal by the City..."

In a subsequent communication dated May 13, 2010 DOITT notified Tel A Star that unless certain specifically identified public pay telephones were removed from City property within five (5) business days, the City would consider the property abandoned and would remove the property itself at Tel A Star's expense.

There are two stated causes of action in the petition. The first cause of action challenges DOITT's action in: [1] denying Tel A Star a franchise to operate its public pay telephones on City property; [2] failing to recognize its right to otherwise continue to operate public pay telephones because it is on an interim registry [3] only giving it 5 days to remove its public pay telephones and [4] denying it the right to seek a fair price to sell its public pay telephones. In the second cause of action petitioner seeks both monetary damages and injunctive relief prohibiting DOITT from removing the public pay phones based on a claim that DOITT is acting in excess of its authority.

In 1995, provisions of the New York City Administrative Code were enacted which generally provided that no public pay phones could be operated on public property without both a franchise and a permit issued by DOITT. NYCAC §§23-402,

23-403. DOITT, through its Commissioner, became empowered to issue permits at his/her discretion if it were otherwise in the best interest of the City.

Public Pay Phones that had been in operation before 1995 were allowed to continue to operate as interim eligible public pay phones, provided that they fulfilled certain conditions. Certain events would, however, defeat the right of an interim eligible public pay phone to continue in operation, including a determination by DOITT not to award a franchise agreement to the operator/owner or a determination by the City's Franchise and Concession Review Committee not to approve a proposed franchise agreement by the operator/owner. In such circumstances, the operation of the public pay phones would become unlawful sixty (60) days after notice to the owner/operator. RCNY §§ 6-01, 6-21 to 6-25.

Sometime after the 1995 laws were enacted, Tel A Star sought permits and franchises to operate and maintain its public pay phones. The franchises were approved in or about 1999, subject to a number of conditions, including the successful completion of VENDEX by the applicant. By May 30, 2000 DOITT determined that Tel A Star had not complied with the VENDEX requirements and a letter was sent notifying it that "by failing to complete this process successfully, [you have] failed to meet an essential condition of [the City's Franchise and Concession Review Committee] approvals, and [the City's Franchise and Concession Review Committee] can therefore be deemed to have determined not to approve a franchise for [you]."

Correspondence between DOITT and Tel A Star's attorneys thereafter followed. By June 30, 2000 another letter was sent by DOITT informing Tel A Star that it has sixty (60) days to either sell its public pay phones to an authorized franchisee or remove

them from City property. The letter expressly stated that Tel A Star is considered a non-holder of a City franchise.

Notwithstanding the May 30, 2000 and the June 30, 2000 letters, Tel A Star continued to operate its public pay phones and pay the City operation fees. It is undisputed that additional time was given because there was a pending litigation between DOITT and another owner operator of public pay phones, the resolution of which would have precedential value in the instant case. That collateral litigation concluded, causing the DOITT to reset the sixty (60) day period for Tel A Star to either sell or remove its public pay phones from City property. See: Global Network Communications, Inc. v. City of New York, 562 F3d 145 (CA2 [NY] 2009).

There is no dispute that this Article 78 proceeding is governed by a four month statute of limitations. CPLR § 217(1). DOITT claims that the underlying basis for this petition is to challenge the decision made in 2000 denying Tel A Star a franchise to operate its public pay telephones on city property. It argues that having failed to challenge the determination within four months of the 2000 letters, the determination is now binding on Tel A Star. DOITT claims that its recent letters are simply in furtherance of and to enforce the original determination to deny Tel A Star a franchise in the first place.

Tel A Star claims that the four month statute of limitations does not run from 2000, when it was its right to a franchise was "deemed denied", because there is later correspondence indicating that DOITT was reconsidering the whole matter. It also claims that it was never "denied" a franchise; only that DOITT failed to send it an agreement to sign. According to Tel A Star, the City's Franchise and Concession

Review Committee actually approved awarding it a franchise. It claims that, in any event, because the City failed to take action in accordance with the letters sent in 2000, the statute of limitations was tolled.

The court finds that the claims made by Tel A Star in this proceeding are time barred. The underlying relief sought all relates to the decision made by DOITT in 2000, that Tel A Star was not entitled to a franchise. As a consequence of that decision, Tel A Star's interim permit to operate and maintain payphones on City property was terminated, and its right to either sell or remove the phones was triggered. If Tel A Star disagreed with the administrative action taken DOITT in 2000, the time to challenge it was within four months thereof. Best Payphones Inc. v. Dep't of Info Technology and Telecommunications, 5 NY3d 30 (2005). Having failed to bring an action until 2010, the claims are now time barred.

Tel A Star's argument, that the 2000 letters were rescinded, is not supported in this record. It has not presented any documentary proof of such rescission and Mr. Hirakis' recollection that it occurred is not a sufficient basis for this Court to reach such a conclusion.

Even if there were, as Tel A Star claims, ongoing reconsideration of the issue, it would not affect the accrual date of the claim. De Millio v. Borghard, 55 NY2d 216 (1982). In any event, there is no proof of ongoing reconsideration by DOITT.

The fact that DOITT did not act to enforce its decision for many years thereafter does not "toll" the statute of limitations. If what Tel A Star is really arguing is that DOITT should be equitably estopped from asserting the statute of limitations, that argument fails as well. The doctrine of estoppel will be applied to governmental

agencies in only exceptional cases. Mayayev v. Metropolitan Transp. Authority Bus, 74 AD3d 910 (2<sup>nd</sup> dept. 2010). A municipality may be estopped from asserting that a claim was untimely filed when its improper conduct induced reliance by plaintiff who changed his or her position to his/her detriment as a result. Yassin v. Sarabu, 284 AD2d 531 (2<sup>nd</sup> dept. 2001). At most there was forbearance by the city in asserting its rights; this is not improper conduct. Nor did Tel A Star change its position as a result thereof. All it did was continue to operate its public pay phones.

Consequently, this court holds that the Article 78 proceeding is time barred and must be denied. Since the injunctive and monetary relief sought is ancillary to the Article 78 petition, it fails as well.

**Conclusion**

In accordance herewith it is hereby:

ORDERED AND ADJUDGED that Article 78 petition and ancillary request for injunctive and monetary relief is hereby dismissed with prejudice, and it is further

ORDERED AND ADJUDGED that any and all interim stays are hereby vacated, and it is further

ORDERED AND ADJUDGED that any requested relief not otherwise granted herein is denied and that this constitutes the decision, order and judgment of the Court.

Dated: New York, NY  
October 28, 2010

SO ORDERED:

**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).  
J.C. J.S.C. 