

**Matter of Huitres NYC, Inc. v New York City Dept. of
Consumer Affairs Council of the City of NY**

2014 NY Slip Op 30093(U)

January 15, 2014

Sup Ct, New York County

Docket Number: 100569/13

Judge: Carol E. Huff

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK CAROL E. HUFF NEW YORK COUNTY

Index Number : 100569/2013

HUITRES NYC, INC.

vs

NYC DEPT. OF CONSUMER AFFAIRS

Sequence Number : 001

ARTICLE 78

PART 32

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this ~~motion~~

motion is decided in accordance

with accompanying memorandum decision

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

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: JAN 15 2014

CH
CAROL E. HUFF J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

-----X

In the Matter of the Application of : Index No. 100569/13
HUITRES NYC, INC.,

Petitioner, :

For a Judgment Pursuant to Article 78 of the Civil Practice :
Law and Rules,

- against - :

NEW YORK CITY DEPARTMENT OF CONSUMER :
AFFAIRS COUNCIL OF THE CITY OF NEW YORK,

Respondent. :

-----X

CAROL E. HUFF, J.:

In this Article 78 proceeding, petitioner seeks an order annulling the determination of respondent Council of the City of New York (“City Council”), Resolution No. 1479 dated August 22, 2012, which denied petitioner’s application for a sidewalk café.

To open a sidewalk café a restaurant owner must, first, obtain revocable consent to use the public sidewalk as a café and, second, obtain a license from respondent New York City Department of Consumer Affairs (“DCA”) for such use. NYC Admin. Code § 20-224(a). DCA has authority to grant revocable consent, but the City Council may resolve to review the application itself pursuant to NYC Admin. Code § 20-226(e). In that case, final authority over the application rests with the City Council.

Here, the City Council chose to review petitioner’s application. A public hearing was noticed and was held on August 20, 2012, before the City Council’s Zoning and Franchises

Subcommittee of the Land Use Committee. In the course of the hearing the Subcommittee heard testimony from petitioner's owner, considered a statement from the council member in whose district the restaurant was located, and heard further testimony from a member of the local community board and from a member of the City Council's Land Use Division. The testimony largely addressed the sufficiency of the architectural plans submitted with the application, as well as the history of noise complaints and the restaurant's response to the complaints.

On August 21, 2012, the Chairperson of the Subcommittee moved to disapprove the application on the basis of inaccuracies in the architectural plan and quality of life issues relating to noise complaints. The Land Use Committee unanimously adopted the motion to disapprove the application, as did the full City Council when it passed Resolution No. 1479 on August 22, 2012. On August 23, 2012, it filed the Resolution with the Mayor's office. On that day a full report of the application and Resolution was posted on the City Council web site. Respondents' Ex. 32.

Petitioner states that it received a letter from DCA in "mid-February" 2013, denying its application for a license for a sidewalk café. Petitioner commenced this proceeding on April 5, 2013.

Respondents contend that petitioner is barred by the four-month statute of limitations pertaining to Article 78 proceedings (CPLR 217) because petitioner did not commence this proceeding within four months of the City Council's adoption of the Resolution and its online posting. At the latest, according to respondents, the proceeding should have commenced within four months of September 4, 2012, the date by which the City Council was required to decide the application pursuant to NYC Admin. Code § 20-226(f).

Petitioner contends that it never received written notice of the City Council's action, and did not learn of the denial of its application until the February DCA letter. Petitioner does not cite any law indicating the type of notice that the City Council was obligated to provide petitioner.

Even if petitioner had been entitled to mailed written notice, it should have known it was aggrieved by the City Council's action long before DCA notified it that it had denied its application for a license, which was contingent upon prior approval of revocable consent by the City Council.

In those situations where a party is entitled to written notice, the statutory period of limitations does not begin to run until notice is received in that form. In circumstances where a party would expect to receive notification of a determination, but has not, the Statute of Limitations begins to run when the party knows, or should have known, that it was aggrieved by the determination.

90-92 Wadsworth Ave. Tenants Assn. v City of New York Dept. of Housing Preservation, 227

AD2d 331, 331 (1st Dept 1996) (citations omitted). Petitioner was a full participant in the City Council proceedings, its owner testifying and negotiating with a council member. The Resolution was passed immediately upon the conclusion of the proceedings and posted clearly on the City Council web site. Accordingly, this proceeding was not timely commenced.

In any event, petitioner could not have prevailed on its argument that the Resolution was arbitrary and capricious. Petitioner had no inherent right to use the public sidewalk for its commercial purposes, and the City Council's Resolution was based on evidence presented by petitioner, the local council member, a community board member and a member of the Land Use Committee.

Accordingly, it is
ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: **JAN 15 2014**


CAROL E. HUFF
J.S.C.

UNFILED JUDGMENT

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