

Arntzen v City of New York

2022 NY Slip Op 30326(U)

February 1, 2022

Supreme Court, New York County

Docket Number: Index No. 159502/2021

Judge: Frank P. Nervo

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANK NERVO PART 04

Justice

-----X

KATHRYN ARNTZEN, PAULINE AUGUSTINE, DIEM BOYD, LESLIE CLARK, MARJORIE DIENSTAG, MARY PIZZA DENNIS, ROBIN FELSHER, DEBORAH GONZALEZ, DOROTHY GREEN, ELLEN KOENIGSBERG, MELISSA KRAWITZ, SHANNON PHIPPS, KATE PULS, LARRY ROBERTS, MARCELL ROCHA, ELIZABETH SABO, MICHAEL SIMON, GORDON STANLEY, STEVEN THALER, STUART WALDMAN, PATRICK WALSH, JUDITH ZABOROWSKI

INDEX NO. 159502/2021
MOTION DATE 12/23/2021
MOTION SEQ. NO. 002

Plaintiff,

DECISION + ORDER ON MOTION

- v -

CITY OF NEW YORK,

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 24, 25, 26, 27, 28, 29, 30, 31, 32

were read on this motion to/for DISMISS

Defendant City of New York seeks dismissal of the petition against it, contending that the matter is not yet ripe for judicial review. Petitioners oppose.

The instant petition relates to sidewalk cafes erected during the COVID pandemic along the streets of New York City, familiar to citizens and recent visitors of the City. As relevant herein, former Mayor de Blasio issued Emergency Executive Order 126 which, inter alia, directed the Department of Transportation to establish and administer a program to expand seating options

for restaurants, bars and other establishments in certain outdoor areas, including the sidewalk, curbside and street space and otherwise suspended various zoning laws related to same (Emergency Executive Order No. 126, Open Restaurants Program and the Expansion of Outdoor Seating in Phase 2, June 18, 2020). Thereafter, the Department of Transportation issued a negative declaration concluding that the proposed permanent open restaurant program and permanent zoning amendments would have no significant effect upon the environment. Petitioners challenge the negative declaration under the State Environmental Quality Review Act (SEQRA) and the City counterpart (CEQR).

The issue of ripeness, as raised by the instant motion, necessarily turns on when the injuries alleged by plaintiffs are deemed inflicted. An article 78 proceeding “must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner” (CPLR § 271[1]). The Court of Appeals has determined that this period begins when the petitioner has suffered “a concrete injury not amenable to further administrative review and corrective action” (*Matter of City of New York [Grand Lafayette Props. LLC]*, 6 NY3d 540, 548 [2006]).

Here, petitioners allege concrete injuries, environmental impacts including vermin, noise, and garbage, currently occurring. While the City Council may review the permanent open restaurant proposal, there is no guarantee that the Council will act and it is undisputed that the open restaurant program has continued in the interim, albeit in a purported temporary capacity. The Court's research on this issue reveals, "in some cases it may be the SEQRA process, not the rezoning, that inflicts the injury of which the petitioner complains"; indeed, this is one such case (*Matter of Eadie v. Town Bd. of Town of N. Greenbush*, 7 NY3d 306, 317 [2006]; see also *Matter of Save the Pine Bush v. City of Albany*, 70 NY2d 193 [1987]; c.f. *North Country Citizens for Responsible Growth, Inc. v. Town of Potsdam Planning Bd.*, 39 AD3d 1098 [2007], concrete injury arising after approval of site plan distinguishable from cases where SEQRA determination made by one agency and review by a legislative body thereafter sought). Consequently, the petition is ripe and dismissal on ripeness grounds is inappropriate.

Accordingly,

ORDERED that the City's motion to dismiss this petition is denied in its entirety; and it is further

ORDERED that defendant City shall serve and file, via NYSCEF, its responsive pleading within 10 days of notice of entry of this order, pursuant to CPLR § 3211(f); and it is further

ORDERED that the petition, motion sequence 001, is adjourned to February 28, 2022; and it is further

ORDERED that any requested relief not addressed herein has nevertheless been considered and is hereby denied.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

2/1/2022
DATE


FRANK NERVO, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT		

APPLICATION:

CHECK IF APPROPRIATE: