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

PRESENT: BARBARA JAFFE Justice J.S.C. PART 5

8812 CAFFE INC.

- v -

NYS LIQUOR AUTHORITY

INDEX NO. 106974 ~~106974~~

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3, 5
Replying Affidavits	4

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

FILED

DEC 19 2011

NEW YORK
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 12/14/11
DEC 14 2011

BARBARA JAFFE J.S.C.
J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

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In the Matter of the Application of
8812 CAFFE INC.,

Petitioner,

For a Judgment under Article 78 of the Civil Practice Law and Rules,

-and-

NEW YORK STATE LIQUOR AUTHORITY,

Respondent.

----------x

Index No. 106974/11

Motion Date: 9/20/11

DECISION & JUDGMENT

BARBARA JAFFE, JSC:

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By order to show cause dated June 15, 2011, petitioner brings this Article 78 proceeding seeking an order vacating and annulling respondent's disapproval of its application for renewal of its liquor license and its determination sustaining disciplinary charges against petitioner and cancelling its license. Respondent opposes.

I. BACKGROUND

Petitioner, a domestic corporation with a principal place of business at 8812 Third Avenue, Brooklyn, New York 11209, owns a "lounge" located at that address. (Pet.). On October 3, 2008, respondent issued an on-premises liquor license to petitioner, which was to expire on September 30, 2010. (*Id.*).

On April 13, 2010, respondent issued a notice of pleading charging petitioner with

multiple noise, sanitation, and sign posting violations (*id.*, Exh. E), and by letter dated July 21, 2010, petitioner offered a no-contest plea conditioned on receipt of a maximum civil penalty of $10,000 and promised to file alteration and endorsement applications (*id.*, Exh. F). By letter dated September 13, 2010, respondent accepted petitioner's plea and imposed a $10,000 penalty due by October 8, 2010, which petitioner paid. (*Id.*, Exh. G).

Sometime before November 21, 2010, petitioner applied for renewal of its liquor license. (*Id.*, Exh. A). By letter of the same date, Virginia M. Aiello, petitioner's principal, authorized her son to retrieve the new license, as she was in the hospital. (Ans., Exh. 1). By letter dated December 7, 2010, respondent informed petitioner that it had received the application and that it "will not act on the application until a pending investigation/disciplinary action has been resolved" and that it "may continue to operate under the terms of [its] license pending a final decision." (Pet., Exh. A).

On December 20, 2010, a Beverage Control Investigator completed a report regarding petitioner, which provides, in pertinent part, that his investigation arose because questions existed as to petitioner's method of operation, that on December 2, 2010, he visited the premises, saw that it was closed, and learned from a car service driver that it had been closed for two weeks. (Ans., Exh. 3). The report also reflects that on December 16, 2010, he and another investigator visited the premises, ordered drinks, and asked a staff member whether food was available, and was told that "the place was too small to have a kitchen or microwave for food." (*Id.*).

By letter dated February 15, 2011, respondent informed petitioner that its application for renewal was disapproved and that written reasons for the disapproval were "forthcoming." (Pet.,

Exh. B). The letter also provided that petitioner:

> may request to have this decision reviewed by the Members of the Authority. Such a request should be submitted in writing within 4 months of the date of disapproval and should contain the reasons why you believe the disapproval should be overturned. Upon receipt of the request, a hearing will be scheduled. At the hearing, the hearing officer will consider the information supporting the disapproval and any information you submit. The hearing officer will then issue a report . . . . [which] will be submitted to the Members of the Authority for their final decision.

(*Id.*).

The same day, respondent issued a notice of pleading containing the following charges:

> 1. That on or before 12/2/2010, the licensee failed to conform with all representations set forth in the application, or approved amendments thereto, for the on-premises license under which such license was applied for and issued . . . .
>
> 2. That on 12/2/2010, the licensee failed to keep food available for sale to its customers . . . .

(*Id.*, Exh. C). The notice also provides that petitioner was required to respond in writing or appear in person on March 16, 2011 at 11:00 a.m.. (*Id.*). Petitioner did neither. (Pet.). A print-out from the United States Postal Service (USPS) website reflects that on February 18, 2011, the notice of pleading was sent to the premises via certified mail, and on March 17, 2011, was returned to respondent as unclaimed. (Ans., Exh. 8).

By letter dated April 6, 2011, respondent explained its disapproval of petitioner's renewal application as follows: Petitioner's original license was issued based on its representation that the premises would have a kitchen and serve food, that two investigators visited the premises and learned that it did not serve food, and that it was "not satisfied that [petitioner] holds the requisite character and fitness to hold a license." (Ans., Exh. 2). Respondent also advised that petitioner "may request to have this decision reviewed by Members of the Authority. Such a request should

be submitted in writing within sixty days from the date of this letter and should contain the reasons why you believe the disapproval should be overturned." (*Id.*). USPS records reflect that the letter was sent via certified mail to Aiello's residence, that two notices were left, and that it was returned to respondent as unclaimed. (*Id.*, Exh. 6). On April 13, 2011 at respondent's office, counsel for petitioner explained that petitioner defaulted on March 16 because Aiello was hospitalized, and that neither she nor her son, who remained in charge of the premises, received the notice of pleading. (Pet.). He also stated that the premises had "had a microwave for some time," but respondent nonetheless refused to vacate petitioner's default and cancelled the license (Ans., Exh. 9), and by letter and cancellation notice dated May 17, 2011, informed petitioner that its license was cancelled effective September 30, 2010. (Pet., Exh. D).

By affidavit dated June 15, 2011, Aiello states that she received the February 15 letter but not the notice of pleading, as she was hospitalized when it was sent, and her son, whom she left in charge of the establishment, never told her that he had received the notice. (Affidavit of Virginia M. Aiello, dated June 15, 2011).

By affidavit dated August 30, 2011, Debra Mitchell, respondent's clerk, describes the method by which notices of pleading are disseminated as follows: She sends one copy to the licensee's address via certified mail and another to the licensee's principal's residential address via first-class mail. She performed both mailings in this case on February 15. (Ans., Exh. 7).

By affirmation dated September 12, 2011, Jerome Sussman, Esq., petitioner's former attorney in proceedings with respondent, states that the premises remained closed until December 7 because petitioner could not operate without a license and that he had repeatedly and unsuccessfully contacted respondent after receiving the disapproval letter to determine why the

application was disapproved.

II. CONTENTIONS

Petitioner asserts that respondent's disapproval of its renewal application, refusal to vacate its default, and cancellation of its license are arbitrary and capricious, as respondent has failed to explain its disapproval and has already penalized it for similar violations, and Aiello's illness and the presence of a microwave on the premises constitute a reasonable excuse for the default and a meritorious defense to cancellation, respectively. (Pet.'s Mem. of Law).

In opposition, respondent contends that the petition should be dismissed with respect to the February 15 letter, as it was not a final determination, and petitioner has failed to exhaust its administrative remedies, that the April 6 letter provides a rational basis for the disapproval, and that petitioner provided neither a reasonable excuse nor a meritorious defense. (Mem. of Law in Opp.).

In reply, petitioner claims that respondent's failure to send the April 6 letter to Sussman or the premises address was arbitrary and capricious, as Sussman had repeatedly sought an explanation for the disapproval, and Aiello informed them that she was in the hospital. (Affirmation of Martin P. Mehler, Esq., in Reply, dated Sept. 12, 2011). Moreover, it maintains that the reasons set forth in the April 6 letter are irrational, as it could not file alteration and endorsement applications, thereby changing its method of operation, until its license was renewed, and the investigator ought not have relied on the staff member's statement that food was unavailable, as he was simply hired to play music and had no knowledge of the business. (*Id.*).

III. ANALYSIS

An Article 78 proceeding may only be brought to challenge an administrative agency's final, binding determination (CPLR 217[1]), and judicial review of same is limited to whether it "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed" (CPLR 7803[3]). "A determination is final . . . when the petitioner is aggrieved by [it]," which occurs "once the agency has issued an unambiguously final decision that puts the petitioner on notice that all administrative appeals have been exhausted." *(Matter of Carter v State of New York, Executive Dept., Div. of Parole*, 95 NY2d 267, 270 [2000]). Therefore, generally, and with certain exceptions not pertaining here, "one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law." (*Lehigh Portland Cement Co. v New York State Dept. of Envtl. Conservation*, 87 NY2d 136, 140 [1995]; *Sumner v Hogan*, 73 AD3d 618, 619 [1st Dept 2010]). Failure to do so bars an Article 78 proceeding. (*Matter of Connor v Town of Niskayuna,* 82 AD3d 1329 [2d Dept 2011]).

1. Refusal to vacate default and cancellation of license

My review of respondent's cancellation of petitioner's liquor license is limited to whether respondent properly denied petitioner's application to vacate its default. (*Yarbough v Franco*, 95 NY2d 342 [2000]). In order to establish entitlement to vacatur of the default, petitioner must demonstrate both a reasonable excuse for the default and a meritorious defense to the underlying charges. (*See Matter of Cherry v New York City Hous. Auth.*, 67 AD3d 438 [1st Dept 2009] [denying Article 78 petition to annul default judgment terminating tenancy, as petitioner offered neither reasonable excuse nor meritorious defense to underlying charges]).

Pursuant to 9 NYCRR 54.1(a), disciplinary proceedings instituted by the New York State Liquor Authority:

> shall be commenced by serving a notice of pleading on the licensee such that notice shall be deemed to have been duly served if delivered in person or if sent by registered or certified mail to the licensee addressed to the licensed premises and a copy thereto sent by first class mail to the residence of record of the licensee or of any officer or director of a corporate licensee . . . .

Mere denial of receipt of a notice or other pleading is insufficient to controvert evidence of service and does not constitute a reasonable excuse for default. (*Baez v Ende Realty Corp.*, 78 AD3d 576 [1st Dept 2010]; *Bryant v New York City Hous. Auth.*, 69 AD3d 488 [1st Dept 2010]; *Coyle v Mayer Realty Corp.*, 54 AD3d 713 [2d Dept 2008]).

Here, as Mitchell's affidavit and USPS records reflect that respondent mailed the notice to Aiello's residence and the premises address in compliance with 9 NYCRR 54.1(a), petitioner's denial that Aiello received it even if due to her hospitalization, does not excuse its default. Moreover, as it is undisputed that the notice was mailed to the licensed premises' correct address, and absent any explanation for Aiello's son's failure to retrieve its mail, the return of the notice as unclaimed does not render service improper nor does it excuse the default. (*See Rodriguez v G.W. Bridge Realty, Inc.*, 155 AD2d 271 [1st Dept 1989] [where, pursuant to CPLR 318, summons sent via certified mail to correct address returned to sender unclaimed, denial of receipt not reasonable excuse for default, as corporate defendant not permitted to "ignore notice of certified mail and leave such mail unclaimed"]; *see also Matter of County of Clinton [Bouchard]*, 29 AD3d 79 [3d Dept 2006] [in property tax proceeding, service proper and in accordance with due process despite "the fact that the certified mail- sent to the correct address- was returned 'unclaimed;'" "petitioner could have reasonably believed that respondent was

attempting to avoid notice by ignoring the certified mailings"]; *cf. Zucco Grocery Corp. v New York State Liquor Auth.*, 203 AD2d 120 [1st Dept 1994] [default judgment revoking petitioner's liquor license annulled for improper service of notice, as notice sent to incorrect address and attached return receipt not signed]; *Matter of Neptune Inn Rest., Inc. v Div. of Alcoholic Beverage Control of the New York State Liquor Auth.*, 193 AD2d 436 [1st Dept 1993] [default judgment revoking petitioner's liquor license annulled for improper service, as notice sent to petitioner's old address even though new one had been provided]).

Petitioner's claim that the premises had "had a microwave for some time" does not constitute a meritorious defense to the underlying charges, as it offered no proof that it had a microwave or another means of preparing food when the investigator visited the premises. Accordingly, respondent's refusal to vacate petitioner's default is neither arbitrary nor capricious.

2. Disapproval of renewal

In light of the above determination, respondent's disapproval of petitioner's renewal application is moot. In any event, as the February 15 letter expressly provides that petitioner may appeal the disapproval, it does not constitute a final, binding determination. Moreover, even if petitioner had received the April 6 letter, it too provides that petitioner may appeal the disapproval and thus is not a final, binding determination subject to Article 78 review.

Given this determination, petitioner's contentions as to respondent's service of the April 6 letter and the merits of its disapproval need not be considered.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED and ADJUDGED, that the petition is denied in its entirety and the proceeding

is dismissed.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

FILED

DEC 19 2011

NEW YORK
COUNTY CLERK'S OFFICE

DATED: December 14, 2011
New York, New York

DEC 14 2011