

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14 ABC 07115

<p>N.C. Alcoholic Beverage Control Commission Petitioner</p> <p>v.</p> <p>Nick And Nates Pizzeria Inc T/A Nick And Nates Pizzeria</p> <p>Respondent</p>	<p>ORDER GRANTING SUMMARY JUDGMENT</p>
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THIS MATTER is before the Honorable Donald W. Overby, Administrative Law Judge presiding, for consideration of Petitioner's Motion for Summary Judgment filed with the Office of Administrative Hearings ("OAH") dated November 19, 2014. By order from ALJ Selina Brooks in her Request for Response to Motion, the Respondent was ordered to respond to Petitioner's Motion for Summary Judgment on or before December 5, 2014. Judge Brooks also ordered a response by Respondent to Petitioner's Motion for Sanctions on or before December 2, 2014.

This matter was originally set to be heard on December 3, 2014. On December 2, 2014, Respondent Patrick Lee Ewart moved, through counsel, to continue the case to a future date. Petitioner's Motion for Summary Judgment avers that Patrick Lee Ewart is the 100% owner of the Respondent business, Nick and Nates Pizzeria, Inc. By Order from this Tribunal dated December 12, 2014, the contested case was continued until January 5, 2015.

On November 19, 2014, counsel made an appearance for Jennifer Ewart Allen contending that she is the Respondent, and moved for a continuance. On December 3, 2014, by and through counsel, Jennifer Ewart Allen moved for an extension of time to respond to Judge Brooks' requests for response. The request was for the extension to be granted until January 2, 2015; however, the undersigned extended the time to respond until December 29, 2014. Jennifer Ewart Allen's response was not timely, being filed with OAH on January 5, 2015; however, this Tribunal is taking the response into consideration. In as much as the response is captioned Prehearing Statement, the averments will be considered as responses to both the Request for Sanctions and the Motion for Summary Judgment. Patrick Lee Ewart has not filed any further response.

Based upon the foregoing procedural history and matters of record, this Tribunal makes the following

CONCLUSIONS OF LAW

1. There is no genuine issue of material fact and summary judgment is appropriate for this contested case.

2. Petitioner Commission avers that Patrick Lee Ewart is the 100% stockholder of the Respondent corporation. Patrick Lee Ewart has been convicted of a felony and is not eligible to hold any ABC permit.
3. Jennifer Ewart Allen has not contended that she has any legal ownership of the corporation, other than her marital interest. The marital interest in property is a divisible interest by husband and wife when they separate, entitling each to respective shares in the value of marital property. In this instance, Ms. Ewart-Allen may have an interest in the businesses as a valuable asset, but her marital interest does not in and of itself change the structure of the corporation. The injunctive relief preserves the value of the on-going business but has no effect on the status of the ABC granted permit.
4. With all respect for the District Court, it is without jurisdiction as to the issue of the ABC permit. The ABC Commission is responsible for issuing all ABC permits. N.C. Gen Stat. § 18B-901(a). Appeals from the Commission lie with OAH. Judicial review of OAH decisions from the ABC Commission lie with Superior Court.
5. N.C. Gen. Stat. § 18B-900(c) establishes who qualifies to be issued a permit. It states:
 - (c) Who Must Qualify; Exceptions.--For an ABC permit to be issued to and held for a business, each of the following persons associated with that business must qualify under subsection (a):
 - (1) The owner of a sole proprietorship;
 - (2) Each member of a firm, association or general partnership;
 - (2a) Each general partner in a limited partnership;
 - (2b) Each manager and any member with a twenty-five percent (25%) or greater interest in a limited liability company;
 - (3) Each officer, director and owner of twenty-five percent (25%) or more of the stock of a corporation except that the requirement of subdivision (a)(1) does not apply to such an officer, director, or stockholder unless he is a manager or is otherwise responsible for the day-to-day operation of the business;
 - (4) The manager of an establishment operated by a corporation other than an establishment with only off-premises malt beverage, off-premises unfortified wine, or off-premises fortified wine permits;
 - (5) Any manager who has been empowered as attorney-in-fact for a nonresident individual or partnership.
6. There is nothing in the record before this Tribunal which demonstrates that Ms. Ewart-Allen was a part of the application process for the permit, nor that she met any of the qualifications set out in N.C. Gen. Stat. § 18B-900(c).
7. The dissolution of their marriage has resulted in a change in their business relationship. The dissolution of their marriage is of no consequence as to the permit. The change in the business relationship is treated no differently than any other business relationship,

whether it is between strangers, or even between husbands and wives living in marital bliss.

8. N.C. Gen. Stat. § 18B-903 explains what needs to be done when there is either a change in ownership or a change in management. It states:

(c) Change in Ownership.--All permits for an establishment shall automatically expire and shall be surrendered to the Commission if:

(1) Ownership of the establishment changes; or

(2) There is a change in the membership of the firm, association or partnership owning the establishment, involving the acquisition of a twenty-five percent (25%) or greater share in the firm, association or partnership by someone who did not previously own a twenty-five percent (25%) or greater share; or

(3) Twenty-five percent (25%) or more of the stock of the corporate permittee owning the establishment is acquired by someone who did not previously own twenty-five percent (25%) or more of the stock.

(d) Change in Management.--A corporation holding a permit for an establishment for which the manager is required to qualify as an applicant under G.S. 18B-900(c) shall, within 30 days after employing a new manager, submit to the Commission an application for substitution of a manager. The application shall be signed by the new manager, shall be on a form provided by the Commission, and shall be accompanied by a fee of ten dollars (\$10.00). The fee shall not be refundable.

(e) Transfer.--An ABC permit may not be transferred from one person to another or from one location to another.

9. It is clear that Ms. Ewart-Allen has no claim to the existing permit. It is clear that the permit is not transferrable. It is clear that Mr. Ewart is prohibited from having the permit. If Ms. Ewart-Allen desires an ABC permit she must apply to the ABC Commission.

Based upon the foregoing, Petitioner Commission's Motion for Summary Judgment is **ALLOWED**.

This the 14th day of January, 2015.

Donald W. Overby
Administrative Law Judge

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Pursuant to 26 NCAC 3.0129, for the purpose of correcting a clerical error, IT IS HEREBY ORDERED that the above-captioned Decision, issued from this Office on January 14, 2015 is amended to include the following language:

NOTICE

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 20th day of January, 2015.

Donald W. Overby
Administrative Law Judge