

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

289

CA 17-01430

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF JONMARK CORPORATION, DOING
BUSINESS AS PREMIUM WINE & SPIRITS,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

NEW YORK STATE LIQUOR AUTHORITY AND ADDYS WINE
AND SPIRITS, INC., RESPONDENTS-RESPONDENTS.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (MATTHEW D. MILLER OF
COUNSEL), FOR PETITIONER-APPELLANT.

CHRISTOPHER R. RIANO, GENERAL COUNSEL, NEW YORK STATE LIQUOR
AUTHORITY, BUFFALO (JAIME C. GALLAGHER OF COUNSEL), FOR
RESPONDENT-RESPONDENT NEW YORK STATE LIQUOR AUTHORITY.

WALSH, ROBERTS & GRACE, BUFFALO (MARK P. DELLA POSTA OF COUNSEL), FOR
RESPONDENT-RESPONDENT ADDYS WINE AND SPIRITS, INC.

Appeal from a judgment of the Supreme Court, Erie County
(Catherine R. Nugent Panepinto, J.), entered May 8, 2017 in a CPLR
article 78 proceeding. The judgment, inter alia, dismissed the
petition.

It is hereby ORDERED that the judgment so appealed from is
unanimously affirmed without costs.

Memorandum: We affirm for reasons stated in the decision at
Supreme Court, which determined that the decision of respondent New
York State Liquor Authority to allow respondent Addys Wine and
Spirits, Inc. (Addys) to move its licensed liquor store to a new
location on the same street on which it was already located was not
arbitrary and capricious. We add only that, contrary to the
contention of petitioner, the court did not err in granting Addys'
pre-answer CPLR 3211 (a) (7) motion to dismiss the petition against
it. Where " 'evidentiary material outside the pleading's four corners
is considered, and the motion is not converted into one for summary
judgment, the question becomes whether the pleader has a cause of
action, not whether the pleader has stated one' " (*Matter of Palmore v
Board of Educ. of Hempstead Union Free Sch. Dist.*, 145 AD3d 1072, 1073
[2d Dept 2016], *lv denied* 30 NY3d 905 [2017]; see generally
Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]). Here, the facts
essential to petitioner's causes of action have "been negated beyond
substantial question by the [evidentiary material] submitted [with the
petition] so that it might be ruled that [petitioner] does not have

[a] cause[] of action" (*Guggenheimer*, 43 NY2d at 275).

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court