[* 1]

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

PRESENT: Hon Joan M. Kenney PART 11

Index Number : 114684/2006

EMPIRE MANAGEMENT

VS

STATE LIQUOR AUTHORITY

Sequence Number : 001

ARTICLE 78

INDEX NO.

MOTION DATE 1-18-07

MOTION SEQ. NO.

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this application to/for Art. 78 relief

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this application is decided in accordance with the annexed Memorandum Decision, Order & Judgment

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).

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

Dated: May 16, 2007

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

----------X

In the Matter of the Application of
EMPIRE MANAGEMENT & PRODUCTIONS, INC.,
d/b/a THE CHANCE CLUB,

Petitioner,

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

-against-

Index No. 114684/06

THE NEW YORK STATE LIQUOR AUTHORITY,

Respondent.

----------X

JOAN A. MADDEN, J.:

In this Article 78 proceeding, petitioner Empire Management & Productions, Inc. d/b/a The Chance Club ("Empire") moves for a judgment annulling the determination of respondent New York State Liquor Authority's ("Authority") which suspended Empire's on-premises liquor licensee for seven days and imposed a $3,000 fine, and vacating the civil penalty and bond claim. The Authority opposes the petition, which is granted to the extent set forth below.

Background

Empire owns and operates an establishment that sells alcoholic beverages pursuant to an on-premises liquor license issued by the Authority. The Authority possesses the power to, inter alia, issue, revoke and suspend licenses or permits to sell alcoholic beverages subject to certain rules and procedures. (Alcohol Beverage Control Law ("the ABC Law") § 17; Rules of the State Liquor Authority [9 NYCRR 53.1 et seq.]).

By Notice of Pleading dated March 1, 2006, the Authority commenced revocation proceedings against the petitioner Empire based on the following offenses: (1) selling an unlimited amount of drinks during a set time for a fixed price prior to January 31, 2006, in

violation of § 117-a(1)(a) of the ABC Law, (2) failure to exercise adequate supervision over the premises on February 1, 2006 in violation of Rule 54.2 and Rule 36.1(f) of the Rules of the Authority [9 NYCRR 48.2 and 53.1(f)], (3) selling alcoholic beverage(s) to visibly intoxicated person in violation of § 65(2) of the ABC Law, (4) using unauthorized trade names on February 1, 2006 in violation of Rule 36.1(p) [9 NYCRR 53.1(p)]. The Notice of Pleading indicated the hearing would occur on March 24, 2006 at 11:00 am, and notified the licensee that "...YOUR FAILURE TO PLEAD WILL BE DEEMED A 'NO CONTEST' PLEA AND NO FURTHER HEARING WILL BE HELD."

Empire did not respond to the Notice of Pleading or appear and enter a plea on the March 24th hearing date set forth in the Notice of Pleading. Pursuant to the Rules of the Authority (9 NYCRR 54.2(a)(b))[1], the default was treated as a plea of no contest. A report dated September 13, 2006 was then prepared by the Authority's Office of Counsel, which summarized certain facts relevant to the case, recited Empire's history of prior violations, and recommended a maximum penalty of "[r]evocation plus bond claim." Before a meeting of the commissioners of the Authority scheduled for September 20, 2006, counsel for Empire sought to vacate Empire's default. At the meeting, the Authority denied Empire's request to set aside the default, ordered

---

[1]Section 54.2(a) provides, part, that: "After a disciplinary proceeding has been commenced, the licensee shall be afforded an opportunity to plead either 'not guilty' or 'no contest' to the charges on or before the scheduled date. If the licensee pleads 'no guilty' a hearing shall be scheduled. If the licensee pleads 'no contest,' the charges shall be deemed sustained, and no further hearing shall be held....

Section 54.2 (b) provides that "[f]ailure of a licensee to plead on or before the pleading date shall be deemed and plea of 'no contest.' and no further hearing shall be held."

Empire's license suspended for seven days, and imposed a civil penalty of $3,000. The Authority ordered that the suspension forthwith and directed that the $3,000 penalty be paid within 20 days or that the penalty would be "a bond claim" of $1,000 and cancellation.[2]

Empire now seeks to vacate its default and to annul the Authority's determination. Empire argues that it was not aware of the proceeding since the Notice of Pleading was not received by management or anyone of authority at Empire's place of business, and that Empire had never previously failed to respond to the Authority's notices. Empire further argues that the Authority ignored its long-standing practice of notifying Empire's counsel, who was already representing Empire on other charges brought by the Authority, and that Empire was denied due process as a result of the Authority's failure to send a duplicate notice to Empire's counsel. Empire also asserts that, under the circumstances here, it is entitled to equitable relief

In opposition, the Authority submits a verified answer, together with evidence indicating that Empire has been subject to previous charges and has defaulted in appearing. The Authority also submits evidence that the Notice of Pleading was sent to Empire's place of business to the attention of Empire Management & Productions, Inc. by both certified and ordinary mail, and indicates in the verified answer that the Notice of Pleading was sent the home address of Empire's principal. The Authority thus alleges that service was proper, and that Empire has demonstrated neither an excusable default nor a meritorious defense, and that the determination was within its discretion.

In its supplemental papers, which were submitted with permission of the court after oral

---

[2] No injunctive relief was sought by petitioner, and it is unclear from the record whether it paid the fine.

argument, Empire contends that the Authority violated its own rules since the Authority's determination was based on a summary prepared by the Authority's Office of Counsel rather than by a Hearing Officer as required by the Rules of the Authority (9 NYCRR § 54.4(h)[3]) Empire further argues that it was harmed as the result of the Authority's failure to follow the rule since the Office of Counsel which prosecuted the case also summarized the facts and recommended the penalty to be imposed.

Although given an opportunity to submit supplemental papers regarding the issue of whether the failure of the Hearing Officer to prepare a summary violated the Authority's rules, the Authority did not do so.

Discussion

Judicial review of the determination of a body or officer is limited to whether the determination was made "in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803 [3]). Therefore, a court may not substitute its judgment for that of an administrative agency when there is a rational basis for the agency's determination Nehorayoff v Mills, 95 NY2d 671 (2001).

On the other hand, although it is well settled that the interpretation given a statute by the agency charged with its enforcement is entitled to great weight (Raritan Dev. Corp. v Silva, 91 NY2d 98 [1997]; Fineway Supermarkets, Inc. v State Liquor Authority, 48 NY2d 464 [1979]), a court need defer to it only if a rational basis exists for the agency's construction. Matter of

---

[3]9 NYCRR 54.4 (h) provides that "[s]ubject to the supervision and control of the authority, in all cases where the licensee has pleaded 'no contest' to the charge or charges, the hearing officer shall summarize the facts of the case and shall recommend the penalty to be imposed by the authority."

Tommy and Tina, Inc. v. Dept. of Consumer Affairs, 95 AD2d 724 (1st Dept), aff'd, 62 NY2d 671 (1983). Moreover, "[i]t is well-established that an administrative body is bound by, and may not ignore, its own rules and regulations." Ginny Rest., Inc. v State Liquor Authority, 203 AD2d 973, 974 (4th Dept 1994), citing, Matter of Rankin v. Lavine, 41 NY2d 911 (1977).

As a preliminary matter, it cannot be said that the Authority acted irrationally when it declined to vacate Empire's default. While it is generally preferable to have cases decided on their merits, a party seeking to vacate a default must demonstrate a reasonable excuse and a meritorious defense. Gray v B. R. Trucking Co., 59 NY2d 649 (1983). Here, the Authority submits evidence that Empire was served with the Notice of Pleading in accordance with the Rules of the Authority,[4] and Empire does not controvert this showing, but maintains that its default was inadvertent, and that its counsel should have been served. Notably, however, the Rules of the Authority do not require service on the licensee's counsel of record, and no due process violation resulted from the failure to make such service. See Sun v. New York State Division of Housing and Community Renewal, 137 Misc2d 434 (Sup Ct NY Co. 1987)(failure to serve rent overcharge complaint on attorney did not violate due process since there was no additional requirement that service be made on counsel). In addition, Empire submits no evidence that it had a meritorious defense to the charges sustained against it, or that it is entitled to equitable relief .

---

[4]9 NYCRR §54.1(a) requires the Authority to send a copy of the Notice of Pleading to the licensee in person or by registered or certified mail to the licensee addressed to the licensed premises and a copy thereof sent by first class mail to the residence of record of the licensee or any officer or director of the licensee. In a revocation proceeding, the Notice of Pleading must also be sent by first class mail to the owner of the building where the licensed premises are situated as reflected in the files of the Authority. While it is unclear whether this requirement was satisfied by service on Empire, Empire does not raise this issue.

That being said, however, Empire is correct in its assertion that Authority failed to follow its own rule (9 NYCRR § 54.4 [h]) which requires that the Hearing Officer summarize the facts of the case and recommend the penalty, rather than the Authority's Office of Counsel which prosecuted the case. Moreover, the failure of the Authority to follow its own rules provides grounds for annulling the determination of the Authority . See e.g. Squeeze Inn, Inc. v New York State Liquor Authority, 176 AD2d 645 (1st Dept 1991)(trial court properly annulled determination of the Authority based on its failure to set forth maximum penalty that might be assessed in its Notice of Pleading); Ginny Rest. v State Liquor Authority of State of N.Y., 203 AD2d at 973 (same). Furthermore, as the Authority submits no papers on the issue, the record contains no explanation from the Authority as to why its determination should not be annulled as a result of its failure to comply with its own rule.

Under these circumstances, the determination of September 20, 2006 should be annulled as it was made without the benefit of the Hearing Officer's summary of facts and recommendation of a penalty as mandated by the Authority's own rule.

Accordingly, it is

ORDERED AND ADJUDGED that the petition is granted to the extent of annulling the determination of September 20, 2006 and vacating any penalty provided therein, and remanding the matter to the Authority for a new determination based on the summary of facts and recommended penalty of a Hearing Office in accordance with 9 NYCRR § 54.4 (h).

Dated: ~~April~~ May 16 ,2007

J.S.C.