

Matter of S DiCarlo, Inc. (Albany OP 773) v Boyle

2007 NY Slip Op 31360(U)

May 25, 2007

Supreme Court, Albany County

Docket Number: 0683606/2007

Judge: George B. Ceresia

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of
S DICARLO, INC. (ALBANY OP 773),

Petitioner,

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

-against-

Index No. 6836-06

RJI No. 01-06-ST7083

DANIEL B. BOYLE, CHAIRMAN OF
DIVISION OF ALCOHOLIC BEVERAGE
CONTROL, STATE LIQUOR AUTHORITY
OF THE STATE OF NEW YORK,

Respondent.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding

Appearances: Linnan & Fallon, LLP
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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

Petitioner commenced the instant article 78 proceeding seeking review of a determination which imposed a civil penalty of \$3,000.00 based upon findings of unlawful sales of alcoholic beverages to intoxicated persons. The petition alleges that petitioner was deprived due process of law by the 40 day “delay” between the date of the unlawful sales and service of the charges and the delay of 18 months before the hearing. The petition also asserts claims of denial of Freedom of Information Law requests, that there was an insufficient basis for conducting the investigation, that the respondent improperly cancelled a training program for petitioner’s employees and then conducted a “sting” operation before the training was rescheduled, that the investigation amounted to selective enforcement, that petitioner was denied documents material to its defense, that petitioner was denied the right to confront baseless allegations of prior violations, that the delay exacerbated credibility issues, and that petitioner was not given sufficient notice of the date and time of the full board meeting at which the charges were finally determined.

The denial of the Freedom of Information Law requests occurred in 2004. No administrative appeal was ever taken. As such, petitioner has failed to exhaust his administrative remedies as required before seeking judicial review (see Matter of Patterson v Smith, 53 NY2d 98 [1981]; Watergate II Apts. v Buffalo Sewer Auth., 46 NY2d 52, 57 [1978]). Moreover, the statute of limitations in an article 78 proceeding is four months (CPLR §217[1]). Any challenge to such determination is clearly untimely. Accordingly, petitioner is not entitled to any relief with respect to his FOIL claims.

Petitioner also failed to raise the claims with respect to delay in granting a hearing at the hearing or in his submissions to the full board of the New York State Liquor Authority. As above, he has failed to exhaust his administrative remedies. Moreover, the record indicates that the hearing was initially scheduled for November 21, 2003, and thereafter for May 11, 2004. Petitioner's attorney requested adjournments of both such dates. It therefore appears that the delay was substantially attributable to petitioner. Furthermore, mere delay in providing a hearing does not warrant any relief absent some actual prejudice caused by the delay (see Matter of Kelly v Casale, 263 AD2d 889 [3d Dept 1999]; Matter of Bonhomme v New York State Liq. Auth., 221 AD2d 882 [3d Dept 1995]; Matter of A.J. & Taylor Rest. v New York State Liq. Auth., 214 AD2d 727 [2d Dept 1995]). A petitioner in support of an article 78 proceeding must submit "factual allegations of an evidentiary nature or other competent evidence tending to establish his or her entitlement to the requested relief" (Matter of Rodriguez v Goord, 260 AD2d 736, 736-737 [3d Dept 1999]; see also Matter of Barnes v La Vallee, 39 NY2d 721 [1976]; Matter of Tebout v Goord, 290 AD2d 833 [3d Dept 2002]; Matter of Vandermark-Crayne v New York State Dept. of Civ. Serv., 225 AD2d 979 [3d Dept 1996]). Conclusory assertions are insufficient. Petitioner has offered only the most conclusory assertions that the delay in providing a hearing prejudiced its defense. As such, the claim is without merit.

Petitioner's primary claim is that the delay in serving charges, amounting to 40

days from the violations, caused significant prejudice and served to deny it due process. Indeed, petitioner has shown that it has a security camera system covering its entire premises. However, the recordings are automatically recorded over after 30 days. Certainly the photographic record might have been helpful to petitioner's defense, as the charges involve serving alcoholic beverages to visibly intoxicated persons. In addition, petitioner contends that the delay prevented it from investigating the charges which might have led to evidence to attack the credibility of the investigator.

Alcoholic Beverage Control Law § 118 provides that charges may be served at any time during the license period or its renewal, amounting to between two and four years depending upon whether the violation occurred at the beginning or end of a license renewal period. It has been held that such provision amounts to a statute of limitations (see Matter of Hacker v State Liq. Auth. of State of N. Y., 19 NY2d 177, 183 [1967]; Matter of 3902 Long Beach Rd. v New York State Liq. Auth., 155 AD2d 463, 464 [2d Dept 1989]). The charges herein were certainly served within the applicable statute of limitations.

Petitioner has shown that its defense has been made more difficult by the passage of more than 30 days (assuming that the patrons were not visibly intoxicated). Given the nature of the type of charges which are brought by the State Liquor Authority, such as unlawful sales to minors or intoxicated persons, excessive noise, disorderly conduct and lewd behavior, a licensee would always be in a substantially better position to defend

against the charges if notified immediately, as it could identify the persons involved as well as other witnesses. Such circumstances are also applicable to almost any criminal or quasi-criminal proceeding. However, requiring that a licensee be notified of or served with charges immediately would interfere with undercover investigations and impose an undue burden on the respondent. Moreover, petitioner has offered only unsubstantiated, conclusory assertions that respondent intentionally waited to serve the charges, knowing that the video records would be erased after 30 days. The Court finds that petitioner has not even shown an unreasonable delay sufficient to constitute laches, and certainly has not established a delay of constitutional dimension. It is therefore determined that the 40 day period does not constitute delay and did not deprive petitioner of due process (see Matter of Bonhomme v New York State Liq. Auth., 221 AD2d at 883).

Many of petitioner's remaining claims relate to respondent's alleged program of investigating bars and restaurants which have been identified by those arrested for drunken driving as the last establishment they patronized. Petitioner contends that the results of such investigatory technique provide an insufficient basis to investigate its operation, that the program amounts to selective enforcement, that petitioner was denied documents relevant to its defense, and that it was not allowed to confront "baseless" allegations of prior violations. None of such objections are directly related to the charges against petitioner nor would they tend to establish that the particular charges were false. Pursuant to Alcoholic Beverage Control Law § 106 (15), all licensed premises are subject

to inspection at any time when the premises are open for business by representatives of the State Liquor Authority (see e.g. Matter of M.P.N. Inc. v New York State Liq. Auth., 206 AD2d 430 [2d Dept 1994]; Matter of Corey v State Liq. Auth., 34 AD2d 1094 [4th Dept 1970]). There is no requirement that there be probable cause for an investigation (see Matter of Cambridge Pub v State Liq. Auth., 27 NY2d 625 [1970]). Petitioner has not offered any evidentiary proof that the investigation was undertaken for some unlawful purpose nor is there any claim that petitioner is a member of a suspect classification, which might give rise to some constitutional issue. The Court therefore finds that the reasons behind investigating petitioner's establishment are irrelevant to any viable defense to the charges.

Petitioner has also failed to offer any proof that the reports from drunken drivers as to having been served at petitioner's establishment were considered by the full board of the State Liquor Authority. Indeed, the record shows otherwise. The determination of the board indicates that it considered petitioner's full adverse history, which includes sustained charges of lewd and indecent conduct, breast exposure, genital exposure, employment of a minor, sale to a minor and improper conduct. There is no mention of unconfirmed reports of sales to intoxicated persons. In any event, the reports have no relevance to whether the petitioner's employees committed the specific unlawful sales which are the subject of the charges. Petitioner has not challenged the amount of the fine as excessive, which is the only issue to which such reports might be relevant.

Petitioner has also objected to the fact that the State Liquor Authority cancelled a training class addressed to preventing sales to intoxicated persons, and then continued the under cover investigation before the class could be rescheduled. Such claim is not relevant to whether or not petitioner's employees engaged in the unlawful sales. As above, the only issue such claim would be relevant to is mitigation of the offense and the amount of the penalty. Again, petitioner has not raised such claim herein.

Finally, petitioner objects that it was not given sufficient notice of the date and time when the subject charges would be considered by the full board, preventing it from appearing and arguing its case. The cover letter enclosing the findings and recommendation of the Administrative Law Judge stated that petitioner could submit a written statement in controversion of any of the findings to the Hearing Bureau. It stated as follows:

“PLEASE BE AWARE THAT THIS WILL BE YOUR ONLY OPPORTUNITY TO CONTROVERT OR OTHERWISE COMMENT ON THE FINDINGS OF THE ADMINISTRATIVE LAW JUDGE. WHEN THIS MATTER IS PRESENTED TO THE MEMBERS OF THE STATE LIQUOR AUTHORITY, THE MATTER WILL BE PRESENTED WITHOUT ORAL ARGUMENT.”
(Capitals in original).

An identical claim has been found to be without merit by the Appellate Division, Fourth Department.

“There is no merit to the contention of petitioner that the penalty was arbitrary and capricious because respondent denied petitioner the opportunity to appear personally and present oral argument controverting respondent's proposed findings. Neither the Alcoholic Beverage Control Law nor the regulations require respondent to provide petitioner with an opportunity to present oral argument

before anyone other than the Hearing Officer (see, Alcoholic Beverage Control Law § 119; 9 NYCRR 54.4 [f], [g]). The procedure prescribed by the regulations makes respondent's action 'a form of administrative review of the hearing officer's findings rather than a primary determination' (Matter of Sorrentino v State Liq. Auth., 10 NY2d 143, 149)." (Matter of Tops Mkts. v New York State Liq. Auth., 217 AD2d 905, 906 [4th Dept 1995]).

As such, the claim fails to state a cause of action.

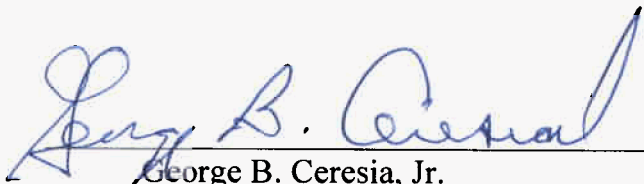
It is therefore determined that the petition shall be dismissed. Based upon the foregoing, petitioner is not a prevailing party. Its request for attorney fees shall be denied in all respects.

Accordingly it is hereby,

ORDERED, that the petition is hereby dismissed.

This shall constitute the decision, order and judgment of the Court. All papers are returned to the attorneys for the respondent, who are directed to enter this Decision/Order/Judgment without notice and to serve the attorneys for petitioner with a copy of this Decision/Order/Judgment with notice of entry.

Dated: Troy, New York
May 25, 2007


George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order to Show Cause dated October 6, 2006; Petition verified September 29, 2006 with Exhibits A-V annexed;

2. Affirmation of James D. Linnan, Esq. dated September 29, 2006;
3. Affirmation of Charlene S. Fallon, Esq. dated September 29, 2006;
4. Supplemental Affirmation of James D. Linnan, Esq. dated October 5, 2006;
5. Amended Petition verified January 12, 2007;
6. Answer verified February 26, 2007;
7. Affidavit of Lisa M. Bonacci, Esq. sworn to February 26, 2007 with Exhibits A-T annexed;
8. Respondent's Memorandum of Law dated February 26, 2007;
9. Petitioner's Memorandum of Law dated February 27, 2007.