

**Matter of Rumcats, Inc. v Board of Trustees of the
Inc. Vil. of Rockville Ctr.**

2007 NY Slip Op 32758(U)

September 4, 2007

Supreme Court, Nassau County

Docket Number: 13954-07

Judge: Geoffrey J. O'Connell

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. GEOFFREY J. O'CONNELL

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

In the Matter of the Proceeding By

RUMCATS, INC. d/b/a RAPTURE
and JEFFREY RUMMAN,

Petitioners,

INDEX No. 13954/07

For a Judgment Pursuant to Article 78 CPLR
Reversing, Annuling, Modifying and/or
Setting Aside a Resolution Issued By

MOTION DATE: 8/21/07

THE BOARD OF TRUSTEES OF THE
INCORPORATED VILLAGE OF
ROCKVILLE CENTRE,

MOTION SEQ. No. 1

Respondents.

The following papers read on this motion:

- Order to Show Cause/Affirmation/Petition/Memorandum of Law/Exhibits
- Affirmation in Opposition/Attachments/Memorandum of Law/Exhibits
- Reply Affirmation/Reply Memorandum of Law
- Verified Answer/Memorandum of Law

Petitioners Rumcats, Inc., d/b/a Rapture (hereinafter "Rumcats") and Jeffrey Rumman apply to the Court for an order setting aside a resolution adopted by Respondent Board of Trustees of the Village of Rockville Centre. The challenged resolution adopted the "Report and Recommendation" of a hearing officer who found that the Mayor's decision not to renew Petitioner Rumcats' business license should be approved.

Facts

On May 12, 2006 the Village of Rockville Centre issued a business license to Rumcats to operate a night club named Rapture that featured dancing and a deejay. Petitioner Jeffrey Rumman is the sole officer, director and shareholder of Rumcats. Rapture opened for business on June 3, 2006. That same day Rumcats applied to the Village to amend the business license to permit an "adult cabaret." The application was denied on Aug. 29, 2006. On Sept. 12, 2006 one or both of the Petitioners commenced an action in federal court challenging Ordinance 340-116 of the Rockville Centre Village Code entitled "Regulation of adult use establishments." After a hearing held on March 27, 2007, Judge Leonard Wexler of the United States District Court for the Eastern District denied the application for a preliminary injunction preventing the Village from enforcing the challenged ordinance. (See, Exhibit K, Return of Proceedings).

Rumcats business license had an expiration date of March 1, 2007. On Jan. 23, 2007 Petitioner Rumman submitted a license renewal application. At the request of the Village a supplemental affidavit dated Mar. 5, 2007 clarifying certain points was submitted. By letter dated Mar. 8, 2007, Mayor Eugene J. Murray notified Petitioner Rumman that the renewal application was denied on the following grounds:

"(a) violations of Village Code Chapter 222 and other local laws as pursuant to which such licenses were granted; and (b) carrying out the licenses business, enterprise or activity in an unlawful manner, and in way [sic] to breach the peace and constitute a menace to public health, safety and general welfare."

The letter also notified Petitioner Rumman of his right to appeal. Petitioner exercised that right and a hearing pursuant to Section 222-13 of the Village Code was held on April 18, 2007. In a written "Report and Recommendations" dated July 25, 2007, the Hearing Officer recommended that the denial of a business license be sustained. Thereafter, on Aug. 2, 2007, the Board of Trustees adopted the challenged resolution accepting and adopting the Hearing Officer's "Report and Recommendations."

Discussion

1) The Challenge to Chapter 222 of the Rockville Centre Code

Petitioners contend that Chapter 222 of the Rockville Center Code is unconstitutional alleging that it gives the Mayor unfettered discretion in deciding whether to grant or renew business licenses. They also contend that the Mayor's denial of the renewal application was defective in that it made no findings and merely recited the language of the ordinance.

Section 222-12 lists the grounds upon which the Mayor or licensing officer may suspend or revoke a license. The grounds include fraud, violation of any local law, conviction of a crime, unauthorized transfer of the license and; "Carrying out the licensed business, enterprise or activity in an unlawful manner or in such a way as to breach the peace or constitute a menace to health, safety or general welfare of the public." Section 222-9 provides; "Any of the causes set forth in § 222-12 of this chapter shall be sufficient basis for the refusal to renew a license." Thus, the Mayor's discretion is not unfettered, but limited to those grounds set forth in Section 222-12. Moreover, the same section confers upon the applicant the right to a hearing and to a review by the Board of Trustees.

Petitioners contend that Chapter 222 of the Rockville Centre Village Code fails to curtail administrative discretion with an "express or clearly implied standard, policy and purpose" citing *Matter of Bologno v O'Connell* (7 NY2d 155, 159 [1959]). However, where ". . . the actions of a party are clearly within the ambit of the statute, courts will not strain to imagine hypothetical situations where the application of a statute or ordinance would be unclear (citations omitted)." *Town of Islip v Cavignlia*, 141 AD2d 148, 163 [2d Dept, 1988], *aff'd* 73 NY2d 544 [1989]).

Finally, it is not the Mayor's denial which this Court is called upon to review, but the action of the Board of Trustees in accepting and adopting the "Report and Recommendations" of the Hearing Officer which followed a hearing and includes findings of fact.

2) The Hearing Notice

Petitioners contend that the notice of hearing before the Hearing Officer was defective, not because Petitioners did not receive notice which they did, but because there was no notice to "all persons interested or affected."

Rockville Centre Code § 222-13 requires that a hearing before a hearing officer be held within 30 days after the filing by the license applicant of a written request for a hearing to review the denial by the Mayor or licensing officer of the application. It contains no notice requirement. The transcript of the hearing at page 9 reflects a statement from Petitioners' attorney he had been in discussions with the attorney for the Village for two weeks in anticipation of the hearing. At the hearing itself the Hearing Officer offered Petitioners' attorney a continuance to produce witnesses or offer evidence, but the offer was declined. (Hearing minutes, page 188).

Petitioners cite Village Law § 21-2100 which provides in part; "Any notice of a hearing, not otherwise specifically required by law shall be given in the following manner: a) by publication of such notice in the official newspaper" However, that statute, by its terms, applies to the adoption of a local law or "any other action taken by a village board" No claim is made that there was defective notice given of the Resolution of the Village Board accepting and adopting the "Report and Recommendations" of the Hearing Officer. No interested person has claimed that they were deprived of the opportunity to be heard at the hearing before the Hearing Officer by a lack of notice or for any other reason.

3) The Village Code's Hearing Safeguards

Petitioners argued without benefit of authority that Chapter 222 of the Rockville Centre Code is defective in that it fails to provide for procedural safeguards at any hearing. An administrative hearing may be more or less informal and free of technical evidentiary or procedural rules so long as no essential element of a fair trial is dispensed with. (*Matter of Sowa v. Looney*, 23 NY2d 329, 333 [1968]; *Matter of Hecht v Monaghan*, 307 N.Y. 461, 470[1954]). Petitioners have failed to identify any element of a fair hearing that they were deprived of in this case.

4) Reliance upon Hearsay Evidence

Petitioners assert that the Hearing Officer erred in admitting and relying upon hearsay evidence. Hearsay evidence can be the basis of an administrative determination that a license should be revoked. (*Matter of Gray v Adduci*, 73 NY2d 741 [1988]). Evidence which is entirely hearsay may, if sufficiently probative,

constitute the substantial evidence necessary to sustain an administrative determination. (*In re Café La China v New York state Liquor Authority*, ___ AD3d ___, 2007 WL 2264545 [1st Dept, 2007]).

5) The Sufficiency of the Evidence

The Hearing Officer's "Report and Recommendation" accepted and adopted by the Board of Trustees was based on ten specific incidents. Those incidents may summarized as follows: (1) a complaint of loud music during the day on July 14, 2006; (2) double the legal occupancy and a fire risk from an inoperative fire alarm and extension cords on Oct. 2, 2006; (3) police responding to a fight outside Rapture on Oct. 8, 2006, "Teen Night," found more than occupants than legally permitted and juveniles behind the bar unsupervised; (4) a complainant who admitted to drinking at Rapture though underage claimed he was assaulted and robbed off the premises on Oct. 29, 2006; (5) a noise complaint at 9:05 p.m. on Nov. 6, 2006; (6) underage agents were served alcohol at Rapture on Nov. 18, 2006 and a referral was made to the State Liquor Authority; (7) a fight at Rapture on Jan. 1, 2007 led to two arrests and a police officer was injured effecting an arrest; (8) on Feb. 2, 2007 two males after leaving Rapture were attacked in an adjacent alley and two Rapture bouncers intervened; (9) on Feb. 23, 2007 gunshots were fired from the rear of the building in which Rapture is located and an automobile belonging to a Rapture patron had bullets embedded in it; and (10) on Mar. 3, 2007 a Rapture bouncer was assaulted by a patron.

The only witness at the hearing was Police Commissioner John P. McKeon whose testimony was based upon police reports. Petitioner Rumman did not testify and Petitioners called no other witnesses.

In reviewing an administrative determination denying a license renewal the court is called upon to determine whether there exists a rational basis to support the denial so that it cannot be said to be arbitrary and capricious. (*Matter of M.S.B.A. v Markowitz*, 23 AD3d 390 [2d Dept, 2005]). Unlike the State Liquor Authority in *Matter of Beer Garden v New York State Liquor Authority* (79 NY2d 266 [1992]) the Board of Trustees, in reaching its determination to accept and adopt the Hearing Officer's "Report and Recommendations," was not limited by any statute to activities suffered or permitted by the applicant to occur on the applicant's premises. Rather the Board was free to consider disturbances, violence, fighting, noise and

criminal activity in the vicinity of the subject premises. (*cf.*, *Flatiron Community Association v New York State Liquor Authority*, 6 Misc2d 267 [Sup.Ct. N.Y., 2004]).

The Court finds that there was a rational basis for the Board's action.

Petitioners, in a Reply, seek to argue that a charge of maintaining a disorderly premises in violation of Alcohol Beverage Control Law § 106 based on the events of Oct. 29, 2006 was dismissed after a hearing by an Administrative Law Judge within the State Liquor Authority. Petitioners claim that, in consequence of that determination, the Board of Trustees was not entitled to rely upon any of the untested allegations in the police reports. Respondents argue that the Reply was untimely.

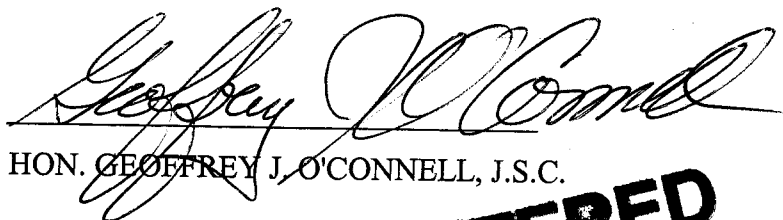
Assuming the Reply to be timely, it still does not provide a basis for setting aside the Board's determination. As noted, different criteria apply in a proceeding under Alcohol Beverage Control Law § 106 and on an application for a license renewal. (Compare, *State Liquor Authority in Matter of Beer Garden v New York State Liquor Authority*, 79 NY2d 266 [1992], with *Flatiron Community Association v New York State Liquor Authority*, 6 Misc2d 267 [Sup.Ct. N.Y., 2004]). Moreover, the incident on Oct. 29, 2006 was based on the complaint of a civilian who failed to honor a subpoena to appear in the SLA proceeding and was contradicted by the testimony of Petitioner Rumman. Petitioner Rumman declined to give similar testimony before the Hearing Officer who appropriately drew a negative inference from that failure. Finally, the determination of the Administrative Law Judge in the SLA proceeding is dated March 29, 2007 or 20 days prior to the proceeding before the Hearing Officer and yet the issue is raised for the first time in a Reply without explanation.

The Petition is dismissed.

It is, SO ORDERED.

Dated:

Sept 4, 2007


HON. GEOFFREY J. O'CONNELL, J.S.C.

ENTERED

SEP 06 2007

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