Matter of NY Palm Tree, Inc. v New York State Liq. Auth.

2007 NY Slip Op 33993(U)

December 5, 2007

Supreme Court, New York County

Docket Number: 0114734/2007

Judge: Joan Madden

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SCANNED ON 12/11/2007

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

PRESENT: HON. JOAN A. MADDEN **PART 11**
Justice

In the matter of New York Palm Tree, Inc.

Plaintiff,

- v -

New York State Liquor Authority,

Defendant.

INDEX NO.: 114734/07

MOTION DATE: 12/3/07

MOTION SEQ. NO.: 001

MOTION CAL. NO.:

The following papers, numbered 1 to _____ were read on this motion to/for_____________________

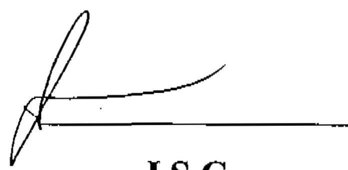
	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ________	
Answering Affidavits — Exhibits ____________	
Replying Affidavits ____________	

Cross-Motion: [ ] Yes [X] No

Upon the foregoing papers, it is ordered that this ~~motion~~ petition 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).

Dated: December 5, 2007



J.S.C.

Check one: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

[* 2]

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

In the Matter of the Application of
NY PALM TREE, INC.,

Petitioner,

INDEX NO. 114734/07

For a Judgment under CPLR Article 78

-against-

NEW YORK STATE LIQUOR AUTHORITY,

Respondent.

-- X

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JOAN A. MADDEN, J.:

In this Article 78 proceeding, petitioner NY Palm Tree Inc. seeks an order annulling the determination of respondent New York State Liquor Authority ("the Authority") denying petitioner an on-premises liquor license for the premises located at 4 East 28th Street, New York, NY ("the premises"). The Authority opposes the petition, which is granted to the extent of annulling the determination and remanding the matter to the Authority for further consideration.

Background

In or about early 2006, petitioner entered into a contract with Orchid Entertainment Inc. ("Orchid") in which it paid Orchid $12,000 for the transfer of Orchid's on-premise liquor license to petitioner for the premises, and the lease for the premises. As part of the application process, petitioner notified the local community board, Manhattan Community Board Five ("the community board") of it application for the transfer of the on-premise liquor license.

On March 10, 2006, following a meeting on the previous day, the community board

passed a resolution recommending the denial of petitioner's application, indicating that the premises was located between two residential apartment complexes, that ever since receiving its liquor license in 2005, Orchid, under the guise of operating the establishment as a restaurant, operated the premises as a club with loud music and dancing five to six days a week sometimes until 10:30 am. The community board cited quality of life concerns raised by the operation of the club, including noise, double/triple parked cars, sidewalk debris, complaints to the police involving the premises, lines on the streets, violence involving a bouncer, and urination on the sidewalk. The community board also noted that the premise lacked a cabaret license or proper certification of occupancy to permit a dance club, and also did not have a place assembly permit. Notably, the conditions cited by the community board were in connection with the operation of the club by Orchid. With respect to the petitioner, the community board stated that petitioner did not have a lease (this was subsequently remedied) and had provided certain unspecified inconsistent information.

After petitioner took possession of the premises, it obtained a place of assembly permit for the premises as an eating and drinking establishment. The permit does not allow dancing. The application indicates that petitioner plans to use the lounge for corporate events three or four times a month, and the papers indicate that its regular hours of operation will be Monday or Thursday[1], Friday and Saturday from 6:00 pm to 3:00 am, and that the form of entertainment will include a live deejay playing fusion, jazz and pop music.[2] The lounge, which has a 150 person

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[1]The application indicates that the lounge will sometimes operate of Mondays instead of Thursdays.

[2]The court notes that the petition describes the premises as a quiet lounge which caters to corporate events, and does not mention that it will be opened until 3:00 am and employ a deejay.

capacity, has ten tables with forty seats and a thirty foot bar. The lounge will serve food and its menu includes ten appetizers and five salads.

On July 11, 2006, petitioner applied for an on-premise liquor license for the premises, and tendered the required licensee fee and bond, together with the lease and contract with Orchid. As part of the application process, petitioner applied for a temporary retail permit so that it could conduct business and sell alcoholic beverages on the premises. The initial permit was for 90 days and expired on November 30, 2006. Subsequently, the Authority approved the temporary permit and issued 11 renewals of the temporary permit to petitioner, the last of which expired on October 31, 2007.

In the meantime, by letter dated April 24, 2007, petitioner requested that the community board reconsider its resolution, noting that the place of assembly violation, which had predated its possession of the premises, had been cured. The community board, however, declined to reconsider the resolution. In June 2007, petitioner again requested, and the community board denied, plaintiff's request for reconsideration.

By notice of disapproval dated August 16, 2007, the Authority denied petitioner's application, without prejudice, based on a violation by Orchid of subdivision 5(a) of section 126 of the Alcoholic Beverage Control Law which forbids a licensee to hold a liquor license when another liquor license of the same licensee has been revoked. As indicated above, following this disapproval, the Authority continued to issue temporary permits to petitioner until October 31, 2007. The Authority subsequently decided that a proscription against the premises would not be issued as a result of Orchid's violation and thus would not preclude petitioner from obtaining a

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to play music.

license.

On October 31, 2007, the Authority heard petitioner's application at a meeting of Authority's members and voted to disapprove petitioner's application for a license. The decision stated that "after reviewing and considering all relevant evidence, including the strenuous opposition by the local community board as well as applicant's arguments in support of the application, [the Authority] finds that granting the license would not be in the public interest."

In support of this conclusion, the Authority relied on a provision of the Alcoholic Beverage Control Law, which provides that it may not grant a license if the premises sits within 500 feet of three or more existing premises with liquor licenses (ABC Law § 64-a [7][a]) unless if, after consulting with the community board, the Authority determines that the granting of the license is in the public interest, after a hearing held (ABC Law § 64-a [7][d]) . In this case, the Authority noted that such a hearing was held on August 1, 2006 (hereinafter the "500-foot hearing") and that it decided to deny the application after considering the relevant factors under ABC Law § 64-a (6)(a-f), including the opposition submitted by the local community board, the adverse criminal history and violations at the premises, the increases in noise levels, as well as the effect on vehicular and pedestrian traffic.

The Authority also indicated that after petitioner took possession of the premises, complaints about vehicular and pedestrian traffic and lines outside the premises and noise complaints have continued, and that petitioner has failed to provide a sufficient plan of supervision to correct the problem since the lounge is open until 3:00 am "with a focus on patrons consuming alcohol and listening to music until early morning." It further found that neither of the owners, who were managing the lounge part-time, had any experience in managing

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the type of operation, and that they had not made an appropriate plan to supervise the premises, especially in light of the history of violations and criminal activity at the premises.

The Proceeding

On November 2, 2007, petitioner commenced this proceeding by order to show cause seeking to annul and vacate the Authority's determination, and this court entered a temporary restraining order enjoining the Authority from closing the premises or interfering with the lawful operation of its business during the pendency of the proceeding.

Petitioner argues that the Authority's determination was irrational as although its application was initially subject to the 500-foot law relied on by the Authority, that one of the three surrounding on-premise liquor licensees, known as Scopa on East 25th Street, has since closed. Petitioner alternatively argues that even if the 500-foot law applied, the Authority's determination should be annulled as it was based on outdated and erroneous information, which was not relevant to the premises over the last 14 months. Specifically, petitioner asserts that it meets the requirements of public convenience and advantage and public interest as enumerated under section 64 of the Alcoholic Beverage Control Law since it has operated its business for the past 14 months, and that contrary to the unsubstantiated statements in the determination, petitioner has not received any complaints regarding noise or vehicular traffic, and that Authority made no attempt to verify the allegedly more recent complaints by the community board. Petitioner also notes that no one from the community board attended the 500-foot hearing.

In opposition, the Authority submits a verified answer dated November 13, 2007, in which it attaches, inter alia, documentation as to Orchid's violations, the March 10, 2006

resolution of the community board, petitioner's further request for reconsideration to the community board, and its October 31, 2007 determination. With respect to the community's opposition, the Authority relies on the objections contained in the March 10, 2006 resolution, the community board's subsequent refusal to reconsider petitioner's application, and a statement that "the community's concerns about excess noise emanating are legitimate in light of both the past history and the [petitioner's] plan to stay open until 3:00 am." Notably, the Authority submits no evidence of any specific complaints from the community regarding petitioner's operation of the premises, and record indicates that no one from the community board appeared at the 500-foot hearing, and no other person objected to the license application, and that no post-hearing submissions were made by objecting parties following the hearing .

On November 20, 2007, petitioner sought reconsideration from the Authority and the local community board, asserting that there were now only two on-premises liquor licensees within 500 feet of premises, so that the 500-foot law does not apply, and that during the 15-month period petitioner had been serving alcoholic beverages, it had undergone numerous inspections but no violations have been issued, and that it has not been made aware of any complaints regarding its operation. Petitioner also submitted a copy of a petition from 141 residents in the area in favor of granting petitioner the license.

Neither the Authority nor the community board responded to petitioner's request for reconsideration by the December 2, 2007 control date set by the court for the purposes of affording such reconsideration.

Discussion

In an Article 78 proceeding, judicial review is limited to the question of whether the

administrative agency's determination was warranted on the record and has a rational basis in the law. Schmidt & Sons, Inc. v New York State Liquor Authority, 73 AD2d 399 (1st Dept 1980), aff'd, 52 N.Y.2d 751 (1980); One St. Mark's Place Wines & Liquors, Inc. v N. Y. State Liq. Auth., 82 AD2d 734 (1st Dept 1981). "Courts will not disturb the exercise of administrative discretion unless it is deemed to be arbitrary and capricious," and thus lacking rational basis on the record as a whole. Schmidt, supra at 404. And, a court may not substitute its own judgment for that of the administrative agency, even if it might have reached a different conclusion on the facts. Schmidt, supra, at 404; Davidson v O'Connell, 90 NYS2d 10 (1947). The ability to engage in the business of selling alcoholic beverages is a privilege, as there is no inherent right to a liquor license. Wager v New York State Liquor Authority, 4 NY2d 465 (1958); Rios v State Liquor Authority, 32 AD2d 995 (3rd Dept. 1969). The discretion to grant that privilege lies with the New York State Liquor Authority as is vested by statute. See Alcoholic Beverage Control Law §§ 2, 17.

Pursuant to the Alcoholic Beverage Control Law, the Authority is empowered to "determine whether public convenience and advantage will be promoted by the issuance of licenses to traffic in alcoholic beverages, the increase or decrease in the number of thereof and the location of premises licensed, subject only to the right of judicial review herein provided for." Alcoholic Beverage Control Law, § 2. Section 17 of the Alcoholic Beverage Control Law grants the Authority discretion to issue new licenses, while Section 111 governs the transfer of licenses.

The Authority must decide each application on its own merits to find whether granting the application would promote public convenience and advantage, and it may not "avoid its duty by formulating and promulgating a predetermined policy to cover every such application." Hub

Wine & Liquor Co. v State Liquor Authority, 16 NY2d 112, 119 (1965), motion to vacate denied by, 16 N.Y.2d 829 (1965), rehearing denied by, 16 N.Y.2d 992 (1965), remittitur denied by, 16 N.Y.2d 993 (1965); see also, Coe v Di Stefano, 50 Misc2d 967, 970 (1966).

Under section 64 of the Alcoholic Beverage Control Law, before issuing a license to sell alcohol at retail for consumption on premises, respondent must consider "whether public convenience and advantage and the public interest will be promoted" by granting of a license. This section applies to the transfer of licenses as well as the issuance of new licenses. Cleveland Place Neighborhood Assoc. v. New York State Liquor Authority, 268 AD2d 6, 11 (1st Dept 2000).

In making this determination, the Authority may consider any or all of the following factors under Alcoholic Beverage Control Law section 64 (6-a):

"(a) The number, classes and character of licenses in proximity to the location and in the particular municipality or subdivision thereof

(b) Evidence that all necessary licenses and permits have been obtained from the state and all governing bodies

(c) Effect of the grant of the license on vehicular traffic and parking in proximity to the location

(d) The existing noise level at the location and any increase in noise level that would be generated by the proposed premises.

(e) The history of liquor violation and reported criminal activity at the proposed premise

(f) Any other factors specified by law or regulation that are relevant to determine the public convenience and advantage and public interest of the community."

This section is "intended to guide [the Authority] in assuring that 'appropriate factors are taken into consideration which relate to the business and the impact it has...[and] to assure that

quality of life impacts are fully incorporated into responsible state decision-making apparatus'." Cleveland Place Neighborhood Assoc. v. New York State Liquor Authority, 268 AD2d at 10, quoting, 1993 NY Legis. Ann, at 515.

Under section 64(7)(f) of the Alcoholic Beverage Control Law, a liquor license for on-premise consumption may not be issued for a premises within 500 feet of three or more existing licensed premises except upon a finding that such license would be in the public interest, which finding is to be made after consultation with the municipality or community board at a hearing on notice to the applicant and the municipality and community board.

In this case, respondent considered petitioner's application under the above-provision, known as the 500-foot rule, and found that based on the community board's opposition and the various factors under section 64 (6-a), that a transfer of the license should not be permitted.

However, petitioner asserts, and the Authority does not deny, that since petitioner's application was determined, one of the three surrounding liquor licensees has closed. Thus, it would appear that the presumption against granting a license under section 64(7)(f) would not longer be applicable. Furthermore, when given an opportunity to reconsider the application in light of this purported change in circumstances, the Authority took no action and provided no explanation for its apparent refusal to do so.

In addition, while the Authority's determination afforded great weight to the community board's opposition to petitioner's application, such opposition was based on a resolution which focused primarily on the conduct of the prior owner and predated petitioner's taking possession of the premises and obtaining a place of assembly permit for the premises. Moreover, although the determination cited more recent complaints related to vehicular and pedestrian traffic, lines

outside the premises, and noise, the record contains no evidence substantiating or verifying these complaints. Although the court recognizes that the Authority is required to "heed to community opposition" (Soho Community Council v. New York State Liquor Authority, 173 Misc2d 632 [Sup Ct. NY Co. 1997), and that there may potentially be a valid basis for such opposition in this case, the record indicates that the determination relied almost exclusively on a resolution based, in the most part, on outdated information. Moreover, while the court is not unconcerned about the alleged recent complaints, there is no substantiation in the record for such complaints.

In contrast, in Soho Community Council, 173 Misc2d at 633, in which the court annulled the determination of the Authority granting a liquor license to a proposed dance club within 500 feet of approximately 22 other clubs serving alcohol, the record contained evidence that the application was "overwhelming opposed by hundreds of residents, community groups, galleries and other businesses, and several of New York's State and City public officials." Similarly, in Ban the Bar Coalition v. New York State Liquor Authority, 12 Misc3d 1192(A), in annulling the Authority's decision to grant a liquor license to a proposed restaurant within 500 feet of 12 other licensed premises, the court pointed to substantial evidence of opposition to the license, including a petition with the signatures of 177 residents opposing the license, the opposition of several public officials, 58 letters from various residents of the area, and the testimony of seven witnesses at the 500-foot hearing. While the quantum of opposition from the community is not determinative, in this case, the record contains evidence as to the prior club's operation but no evidence to support the alleged complaints as to petitioner's operation of the premises.

Furthermore, while the Authority's determination cites the conduct of the prior owner and the violations at the premises, in the absence of a relationship between the prior owner and

the applicant, the prior history alone does not provide a basis for denying the application. See 512-3rd Street, Inc. v. New York State Liquor Authority, 217 AD2d 1010 (4th Dept 1995)(annulling determination of Authority denying on-premises liquor license based on the prior history of the premises in the absence of any showing of an ownership interest between the petitioner and prior owner). Likewise, the Authority's conclusion that the new owners lack the experience to manage a premises with a history of violations and illegal activities, is unsupported by the record and constitutes speculation. See Santini Restaurants, Inc. v. State Liquor Authority, 32 AD2d 514 (1st Dept 1969)(supposition that principals of the licensee would not exercise the "proper degree of personal supervision" over the licensed premises to ensure the premises would be operated in an orderly and lawful manner was based on speculative inferences and thus did not justify denial of liquor license); Ha Ha Ha, Inc. v. New York State Liquor Authority, 262 AD2d 1008 (4th Dept 1999)(concerns of liquor authority that the sole officer of corporation seeking a liquor license did not have adequate experience to manage a business serving alcoholic beverage was based on speculation and did not constitute a rational basis for denying a liquor license).

In arriving at a determination whether to grant or deny a license, the Authority is "entitled to rely on all facts which exist so long as they are reliable and trustworthy." Hayes v New York State Liquor Authority, 39 AD2d 482, 483 (4th Dept 1972); see also, Fink v Cole, 1 NY2d 48, 52 (1956). Where, the Authority's conclusions are rooted in speculative inferences, and are unsupported by the record, its determination should be annulled (Matter of Matty's Restaurant v New York State Liquor Authority, 21 AD2d 818 (2nd Dept 1964), aff'd, 15 N.Y.2d 659 (1964)) and remitted to the respondent for further consideration (Hayes, supra at 484); see also, Forman, supra (remitting matter to respondent State Liquor Authority for reconsideration

when record did not indicate how the licensing of a liquor store would promote the public convenience or public advantage).

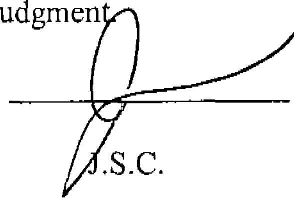
Here, as in the above cited cases, the record indicates that the Authority's determination was based on incomplete and/or outdated facts so that it must be annulled and the matter should be remitted to the Authority for further investigation of the current conditions, including the number of licensees within 500 feet of the premises, the basis for any community opposition, and for determination based on the record as to the facilitation of the public convenience and advantage and the public interest. In reaching this conclusion, the court makes no determination as to any of the alleged complaints from the community or as to the underlying merits of application for the transfer of the license.

Conclusion

In view of the above, it is

ORDERED and ADJUDGED that the petition is granted and the respondents' determination of October 31, 2007 is annulled and the matter is remitted to the Authority for proceedings consistent with this decision, order and judgment.

DATED: December 5, 2007



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