[* 1]

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

PRESENT: CAROL EDMEAD J.S.C. PART 35

Justice

Orchard Street Associates LLC

-v-

NYS Liquor Authority

INDEX NO. 116111/07

MOTION DATE 12/12/07

MOTION SEQ. NO. 1

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 ☐ No

Upon the foregoing papers, It is ordered that this motion

The within motion is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED and ADJUDGED that the determination of the New York State Liquor Authority in the instant matter, is confirmed insofar as reviewed, the petition is denied, and the proceeding is dismissed on the merits, without costs; and it is further

ORDERED that counsel for the New York State Liquor Authority shall serve a copy of the Order with notice of entry within twenty (20) days of entry on counsel for petitioner.

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

Dated: 12/13/07

CAROL EDMEAD J.S.C.

J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

In the Matter of the Application of
ORCHARD STREET ASSOCIATES LLC

Petitioner,

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

-against-

NEW YORK STATE LIQUOR AUTHORITY,

Respondent.

Index No. 116111/07

DECISION/ORDER

EDMEAD, J.S.C.

MEMORANDUM DECISION

Petitioner Orchard Street Associates LLC ("petitioner") moves (1) for an order of cancellation of the On Premise Liquor License of Orchard Street Associates LLC, by respondent the New York State Liquor Authority ("respondent" or the "Authority"), for the premises at 200A Orchard Street, New York, New York 10002 (the "subject premises"); and for and order (2) directing respondent to reopen the matter for a hearing.

Petitioner's Contentions

Petitioner is licensed by respondent and operates a tavern at the subject premises. Petitioner failed to appear at a disciplinary hearing involving charges brought by respondent against petitioner. Petitioner never received a copy of those charges as they were sent to the subject premises while an entity named 200 Proof LLC was in occupancy.

Respondent was aware that petitioner's license was in safekeeping, yet notice was still sent to the subject premises which petitioner did not occupy. Respondent was aware that

petitioner was not occupying the subject premises as respondent issued a Temporary Permit to 200 Proof LLC on February 7, 2007, and respondent issued six monthly extensions of the Temporary Permit to 200 Proof LLC from May to November 2007. The continued renewal of the Temporary Permit is evidence of the fact that respondent had knowledge that petitioner was not at the subject premises where notice was sent.

Petitioner never received a copy of the charges as they were sent to the subject premises while 200 Proof LLC was in occupancy. Petitioner was never properly served with the Notice of pleading and hearing dated August 29, 2007. Petitioner has always appeared in all other matters before respondent in all prior matters.

Also, the underlying charges were dismissed in Criminal Court. And, the affidavit supplied on the Summons and Complaint filed by the Police Officer, even if taken as true, does not establish a violation of section 65 of the Alcoholic Beverage Control Law. The supporting affidavit does not establish that petitioner or any employee of the establishment was witnessed serving alcoholic beverages to anyone.

Petitioner's business is worth several thousands of dollars, and the loss of the On Premise Liquor License would reduce the value of the business to nothing. This would result in a severe financial loss to the petitioner.

Respondent has reopened other matters in the past under similar circumstances, including most recently in the matter of *NYSLA v 199 Bowery Rest Group LLC,* Case #03519-2007, on August 31, 2007.

Petitioner requested reconsideration of the matter, and said request was denied.

Respondent's Opposition

On or about November, 1996, respondent issued a license to petitioner, for on-premises sales and consumption of alcoholic beverages, for the subject premises. Said license has been renewed subsequently.

The police referral reports served as a valid basis for charges to be brought against petitioner. The Police Action report dated 04/14/06, concerning an incident on April 2, 2006, states, in part:

> "At TPO [time and place of occurrence] above named subject who is owner of premises did allow 15-20 patrons to dance on rear dance floor of premises without valid cabaret license, Summons issued 422495529-5"

The Police Action report dated 3/10/06, states, in part:

> "While traveling N/B [northbound] on Orchard between Stanton & E. Houston, Mr. Michael Drury [the president of petitioner Orchard Street Associates LLC] approached & described himself as the owner of the Orchard Bar. He stated he had a intox, disorderly patron who needed medical attention. He stated she was out of control, taking her clothes off & attempting to have sex with men in the bar. When patrons & security interceded she attempted to bite them. Upon checking aideds [sic] i.d., it was revealed she was only nineteen [sic] years old. One summons was issued for serving alcohol to a minor & aided was taken to B.I. [Beth Israel] Hospital"

By notice of pleading dated July 26, 2007, respondent commenced revocation proceedings against petitioner for the following offenses: (1) a sale to an under-aged person on March 10, 2006 in violation of Section 65(1) of the ABC Law; (2) failure to conduct adequate supervision over the business on March 10, 2006 in violation of Rules 36.1(f) and 54.2 of the ABC Law [9 NYCRR 48.2 and 53.1(f); (3) sale to an intoxicated person on March 10, 2006 in violation of Section 65(2) of the ABC Law; and (4) failure to conform with local regulation involving cabaret activity on April 2, 2006 in violation of Rules 36.1(f) and 54.3 of the ABC

Law [9 NYCRR 48.3 and 53.1(f)].

Copies of the notice of pleading were sent to the subject premises by both certified and ordinary mail. A copy was also sent to petitioner's principal, Michael Drury, at his home address of record, 554 West 50th Street, Apt. 4E, New York, New York 10019. Respondent was never notified of alternative mailing addresses for petitioner.

The notice of pleading set forth August 29, 2007 as the date by which petitioner was required to enter a plea. Petitioner never entered a plea, despite being properly served. Said failure constituted a plea of "No Contest."

In accordance with standard procedure, a report was prepared for the members of respondent Authority, documenting the nature of the offenses as well as the licensing history at the premises. Petitioner's request for reopening of the default was considered at a meeting on September 19, 2007, and said request was denied. Also, the members of the Authority sustained the charges and imposed a penalty of license cancellation, $1,000 bond forfeiture, plus a $10,000 civil penalty.

Petitioner then requested reconsideration of respondent's determination. Upon receipt of said request, a memorandum was prepared by respondent's Office of Counsel in Albany. Said memorandum, dated October 29, 2007, states in part as follows:

> The licensee requests the matter be reopened and the licensee be permitted to defend on the merits, stating that the licensee did not receive a copy of the Notice of Pleading and that the Authority knew that the licensee was no longer operating at the premises since a temporary retail permit was issued to another entity at the premises prior to the mailing of the Notice of Pleading, and since the forwarding address for the licensee had expired prior to said mailing. The licensee also argues that since the landlord's mailing address was incomplete that the Authority's charges were somehow jurisdictionally defective as to the licensee. Counsel notes that Authority records reflect a returned certified mailing -

forwarding address expired - as well as a returned first class mailing of the September 19, 2007 Full Board determination that had been sent to the premises. Counsel further notes that Authority records do not reflect the agency having received a request from the licensee to forward mail to a different address than the one on file with the Authority with the application.

Recommendation of Counsel

As it is the licensee's responsibility to inform the Authority of any change in mailing address information, and since the Authority followed its rules regarding service vis-a-vis the licensee, there is no jurisdictional defect as to the licensee from the misaddressed landlord mailings. As a result, Counsel recommends denial of Licensee's request without submission to the Full Board.

Chairman's determination

"Request for reconsideration Denied."

In imposing the measure of penalty involved, the Members of the Authority duly considered and appraised the nature and gravity of the violation involved, as well as the history at the subject premises. Said history sustained violations at the subject premises as discussed above.

The respondent's determination was an act within its discretion pursuant to Sections 2, 17, 112 and 118 of the Alcoholic Beverage Control Law. And, in light of the sordid history of trouble at the subject premises, the penalty was clearly not so disproportionate to the circumstances so as to shock one's sense of fairness.

Analysis

CPLR 7803 states that the court review of a determination of an agency, such as the New York State Liquor Authority, consists of 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, including abuse of discretion as to the measure or mode of penalty imposed. CPLR

7803(3) (*see Windsor Place Corp. v New York State DHCR*, 161 A.D.2d 279 [1st Dept.1990]; *Mazel v DHCR*, 138 A.D.2d 600 [1st Dept.1988]; *Bambeck v DHCR*, 129 A.D.2d 51 [1st Dept.1987], *lv. den.* 70 N.Y.2d 615 [1988]). An action is arbitrary and capricious, or an abuse of discretion, when the action is taken "without sound basis in reason and ... without regard to the facts." *Matter of Pell v Board of Education*, 34 N.Y.2d 222, 231(1974). Rationality is the key in determining whether an action is arbitrary and capricious or an abuse of discretion. *Matter of Pell v Board of Education*, 34 N.Y.2d, at 231. The court's function is completed on finding that a rational basis supports the New York State Liquor Authority's determination (*see Howard v Wyman*, 28 N.Y.2d 434 [1971]). Where the agency's interpretation is founded on a rational basis, that interpretation should be affirmed even if the court might have come to a different conclusion (*see Mid-State Management Corp. v New York City Conciliation and Appeals Board*, 112 A.D.2d 72 [1st Dept.], aff'd 66 N.Y.2d 1032 [1985]).

Pell v Board of Ed. of Union Free School Dist. No...., 356 N.Y.S.2d 833 N.Y. 1974, is instructive on the basic standard of Article 78 review:

> In article 78 proceedings the doctrine is well settled, that neither the Appellate Division nor the Court of Appeals has power to upset the determination of an administrative tribunal on a question of fact; the courts have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is substantial evidence. (Cohen and Karger, Powers of the New York Court of Appeals, s 108, p. 460; 1 N.Y.Jur., Administrative Law, ss 177, 185; see Matter of Halloran v. Kirwan, 28 N.Y.2d 689, 690, 320 N.Y.S.2d 742, 743, 269 N.E.2d 403 (dissenting opn. of Breitel, J.)). The approach is the same when the issue concerns the exercise of discretion by the administrative tribunals. The courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is arbitrary and capricious. (Cohen and Karger, Powers of the New York Court of Appeals, pp. 460--461; see, also, 8 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 7803.04 Et seq.; 1 N.Y.Jur., Administrative Law, ss 177, 184; Matter of Colton v. Berman, 21 N.Y.2d 322, 329, 287 N.Y.S.2d 647, 650--651, 234 N.E.2d 679, 681--682).

Pell

On judicial review of an agency action under CPLR Article 78, the courts must uphold the agency's exercise of discretion unless it has "no rational basis" or the action is "arbitrary and capricious." *Pell v Board of Ed. Union Free School District,* 34 NY2d 222, 230-31, 356 NYS2d 833, 839 (1974) "The arbitrary and capricious test chiefly 'relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact.' Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." 34 NY2d at 231, 356 NYS2d at 839 *See also Jackson v New York State Urban Dev Corp.,* 67 NY2d 400, 417, 503 NYS2d 298, 305 (1986) (on review of agency action under CPLR Article 78, the courts may not "second guess the agency's choice, which can be annulled only if arbitrary, capricious or unsupported by substantial evidence").

Moreover, where, as here, the agency's determination involves factual evaluation within an area of the agency's expertise and is amply supported by the record, the determination must be accorded great weight and judicial deference. *See Flacke v Onondaga Landfill Systems, Inc.,* 69 NY2d 355, 363, 514 NYS2d 689, 693 (1987). Courts are required to "resolve [any] reasonable doubts in favor of the administrative findings and decisions" of the responsible agency. *Town of Henrietta v Department of Envtl. Conservation,* 76 A.D.2d 215, 224, 430 NYS2d 440, 448 (4th Dep't 1980). *See also Jackson,* 67 NY2d at 417, 503 NYS2d at _____; *City of Rome v Department of Health Dept.,* 65 A.D.2d 220, 225, 441 NYS2d 61, 64 (4th Dep't 1978), *lv. To app. denied,* 46 NY2d 713, 416 NYS2d 1027 (1979).

And, "Where evidence conflicts, issues of credibility are the province of an administrative hearing officer, since 'the decisions by an Administrative Hearing Officer to credit

the testimony of a given witness is largely unreviewable by the courts.' " *Wooten v Finkle,* 285 AD2D 407, 408 (1st Dept 2001) (*quoting Berenhaus v Ward*, 70 NY2d 436, 443 (1987).

Here, substantial evidence supports the findings of the New York State Liquor Authority. (*see* Alcoholic Beverage Control Law §§ 106(5); 118; Rule 54.3).

The penalty imposed was not excessive. Accordingly, the determination must be confirmed.

With respect to the issue of notice, is a fundamental principle that notice must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections (*Mullane v Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 [1950]; *see also Kennedy v.Mossafa,* 100 N.Y.2d 1, 9, 759 N.Y.S.2d 429, 789 N.E.2d 607 [2003]).

It is clear that service by mail is complete upon deposit of a properly stamped and addressed letter in a depository under the exclusive care and custody of the United States Post Office (CPLR 2103, subd [b], par 2; subd [c]); this service is complete regardless of delivery to or receipt by the claimant (*see A. & B. Serv. Sta. v State of New York*, 50 AD2d 973, mot for lv to app den 39 NY2d 709).

The instant facts present a case for a finding that the notice procedure employed by the Authority satisfied due process. Here, the Authority mailed notices to petitioner by certified mail and first class regular mail. Also, notice was mailed to the address of petitioner's principal, Michael Drury. As petitioner's principal, Michael Drury bore the responsibility of updating his address and the mailing address for petitioner. Petitioner's failure to fulfill this duty does not render the Authority's procedures for mailing jurisdictionally infirm as the Authority attempted

notice through both certified and first class mailings.

Conclusion

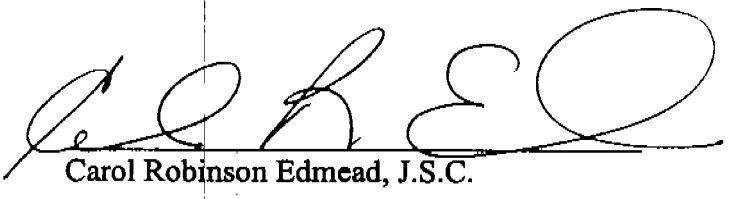
Based on the foregoing, it is hereby

ORDERED and ADJUDGED that the determination of the New York State Liquor Authority in the instant matter, is confirmed insofar as reviewed, the petition is denied, and the proceeding is dismissed on the merits, without costs; and it is further

ORDERED that counsel for the New York State Liquor Authority shall serve a copy of the Order with notice of entry within twenty (20) days of entry on counsel for petitioner.

This constitutes the decision and order of this court.

Dated: December 13, 2007



Carol Robinson Edmead, J.S.C.