

**Matter of Filos Liq. Store, Inc. v New York State  
Liq. Auth.**

2008 NY Slip Op 30075(U)

January 9, 2008

Supreme Court, Suffolk County

Docket Number: 0035845/2007

Judge: Gary J. Weber

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such person to continue to hold a permit or license, or for the offering of false testimony under oath at such inquiry or hearing.

The ALJ, after a hearing, issued a report recommending that the charges be sustained. Respondent adopted the report and its determination that the charges had been sustained and imposed a penalty of forfeiture of the \$1,000 bond that had been posted and cancelled the Petitioner's warehouse permit.

#### The Facts As Determined by the Respondent

A hearing was commenced on April 23, 2007 and concluded on May 7, 2007 before Edward Rodriguez, ALJ at the New York State Liquor Authority located at 317 Lennox Avenue, New York City. The following factual determinations were made:

In November of 2004 the Respondent undertook an investigation of an entity called 484 JJ Enterprises located in Hicksville, NY. This investigation was based upon a complaint by the exclusive distributor of Absolute Vodka. In this complaint the distributor contended that 484 JJ Enterprises was advertising and selling Absolute Vodka when none had been delivered to 484 JJ Enterprises for nearly one year. The implication, as far as the Respondent was concerned, was that 484 JJ Enterprises might have been purchasing Absolute Vodka out of state and avoiding the state liquor tax.

The investigation of 484 JJ Enterprises led the Respondent to make inquiry of the Petitioner concerning its relationship to 484 JJ Enterprises. Upon all of the evidence, it is uncontested that the Petitioner legally stored liquor for 484 JJ Enterprises and rented space for this purpose to 484 JJ Enterprises. During this investigation, in November of 2004, Petitioner permitted the Respondent complete access to his premises for an inspection and provided a written statement detailing the fact that it stored liquor for 484 JJ Enterprises. Respondent's investigator made a cursory examination of the inventory in the Petitioner's warehouse and prepared a report indicating that no Absolute Vodka was then being stored on the premises.

By letter dated January 13, 2005, the Respondent, by its investigator Stephen Nemeth, directed the Petitioner to appear on January 27, 2005 at the Enforcement Bureau located at 317 Lennox Avenue in New York City, and to bring with him both personal and corporate income tax returns for the years 2002 and 2003, as well as the corporate kit. It is undisputed that Anthony Filacouris appeared with his attorney, Joseph Corrado, Esq., on January 27, 2005. The Petitioner further testified that he produced the requested tax returns, but that he never had a corporate kit. Investigator Stephen Nemeth testified that he did not remember whether the requested items were, in fact, produced on this date. *Petitioner's Exhibit C, Revocation Hearing Minutes at Page 67 line 14 through page 68 line 10.* At the conclusion of this interview Investigator Nemeth made a written list of five things he needed: personal questionnaire, corp. returns 2002 and 2003, personal returns 2002 and 2003, business checking account all of 2004 and corporate kit. This list closed with a sentence "will provide within 30 days" and was signed by Anthony Filacouris. In February of 2005 the Respondent closed its investigation of 484 JJ Enterprises. This concluded all inquiry and contact between the Respondent and the Petitioner until the charges that are the subject of this petition were noticed one year and eight months later.

The ALJ in his report, as adopted by the Respondent, concluded that the charges had been sustained.

#### Additional Uncontroverted Facts in the Record, but Not Included in Report

Anthony Filacouris testified that after investigator Nemeth came to the Petitioner's premises on November 5, 2007 other investigators from the Respondent came, as well as investigators of the New York State Department of Taxation and Finance. These investigators examined the entire inventory in his warehouse and compared it with records from "484." No charges of any sort arose from these investigations. Mr. Filacouris testified that he had

given his tax returns to his attorney.<sup>1</sup> Further, counsel for the Petitioner represented that he had intended to subpoena the Petitioner's former counsel, but that former counsel was not amenable to service of process. The tax returns for 2002 and 2003 and business checking account for all of 2004 were produced at the hearing.

#### The Law

The proceedings were infected by an error of law, and even had this error not rendered the proceedings nugatory, the penalty imposed was arbitrary, capricious and excessive.

Counsel for the Petitioner is correct that the allegations that Petitioner violated 9 NYCRR 53.1(o) were never pleaded or proved. Petitioner never failed to appear and give testimony, there is no evidence that he was ever called to give sworn testimony, and, further, he appeared voluntarily when requested to give unsworn answers to the investigator's inquiry.

Counsel for the Petitioner is also correct that the Respondent, even to this date, has not identified the provision of the Alcohol Beverage Control Law Petitioner which is alleged to give rise to a violation of 9 NYCRR 53.1(f).

Moreover, the basis for the cancellation of the Petitioner's license is its purported failure to produce records after Anthony Filacouris signed the list at the close of the meeting with Investigator Nemeth in January of 2005. In essence, the Petitioner is being punished for its willing cooperation. Petitioner would have been well within its rights to request that the Respondent issue a subpoena for the requested records, and such a subpoena could then be the subject of a motion to quash.

The requisites for an investigatory subpoena duces tecum are: (1) that the issuing agency has authority to engage in the investigation and issue the subpoena, (2) that there is an authentic factual basis to warrant the investigation, and (3) that the evidence sought is reasonably related to the subject of the inquiry. *Abrams v. Thruway Food Market and Shopping Center, Inc.*, 147 AD2d 143 (2<sup>nd</sup> Dept. 1989). It is, at best, questionable whether the income tax records of the Petitioner, both private and corporate, could have been the subject of a subpoena duces tecum on the facts as presented, most especially, since the object of the inquiry in the first place was a third party which merely rented space from petitioner.

In essence, the holographic list of documents the Investigator requested be produced within 30 days, and the subsequent prosecution for the alleged failure to produce these materials is insufficient to sustain a claim that the Petitioner violated some unstated provision of the Alcohol Beverage and Control Law.

Moreover, it is hard to see how Respondent's request for documents could be reasonably related to the subject of the inquiry since by the time Petitioner sought the disputed sanctions now at bar against the Respondent, (some 18 months after the fact) the investigation as against 484 J.J. Enterprises had been concluded.

Even if there were such a violation, cancellation of the permit and the imposition of a \$1,000 penalty is entirely disproportionate on the facts of this case, and unwarranted.

The Court does note that the Verified Answer that has been submitted to this Court in opposition to the petition does not address the objections raised to the proceedings before the Administrative Law Judge or the lack of specificity in the original notice of pleading.

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<sup>1</sup>Counsel for the Petitioner represented to the ALJ that Joseph Corrado, Esq. had been disbarred in May of 2006. The records of the unified court system confirm that Joseph Corrado "resigned from the bar - disciplinary reason."

The Respondent makes reference to matter *de hors* the record, specifically: a denial of an application for a liquor license by Anthony Filacouris in 2002; and the alleged conviction of Mr. Filacouris' parents in an unrelated proceeding concerning unpaid sales tax. These references have been ignored by the Court as irrelevant, and the Court will not speculate as to the reason the Respondent included them in its submission.

In view of the foregoing determination the Court need not transfer this proceeding to the Appellate Division upon the question of whether there was substantial evidence to support the determination, or whether a higher burden is required by due process upon a matter involving Mr. Filacouris' livelihood. *See Miller v. DeBuono, 90 NY2d 783 due process requires more than substantial evidence in the case of some liberty interests.*

The petition is granted in all respects.

**ORDER**

**ORDERED** that petition(Mot. #001) is granted; and it is further

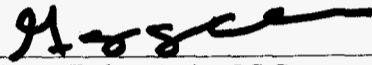
**ORDERED** that the determination of the Respondent dated November 7, 2007 which cancelled the Petitioner's warehouse permit for premises located at 155 Florida Street, East Farmingdale, NY, and imposed a penalty of \$1,000 is vacated and annulled; and it is further

**ORDERED** that Respondent is directed to immediately reinstate the Petitioner's warehouse license and to return any penalty to the Respondent that has been paid; and it is further

**ORDERED** that the Petitioner is directed to serve a copy of this decision and order together with a notice of entry on the Respondent as soon as is practicable.

This shall constitute the decision and order of the court.

Dated: January 9, 2008

  
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Gary J. Weber, Acting J.S.C.

Final Disposition  
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