

**Matter of 1429 Realty Assoc., Inc. v New York  
State Liq. Auth.**

2008 NY Slip Op 32029(U)

July 16, 2008

Supreme Court, New York County

Docket Number: 0105827/2008

Judge: Marilyn Shafer

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

PRESENT: SHAFFER  
Justice

PART 8

1429 REALTY ASSOCIATES INC.

INDEX NO. 105829/08

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 01

MOTION CAL. NO. \_\_\_\_\_

- v -  
N.Y.S. LIQUOR AUTHORITY

The following papers, numbered 1 to 4 were read on this ~~motion to for~~ Arts. 78 petition

Petition, Memo of law  
Notice of ~~Motion/Order to Show Cause~~ — Affidavits — Exhibits ...

PAPERS NUMBERED

1, 2, 3,

4

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

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

petition is denied in  
accord with the annexed memorandum-

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

**FILED**  
JUL 21 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

**SHAFFER**  
**J.S.C.**

Dated: 7/16/08

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 — NEW YORK COUNTY

PRESENT: HON. MARILYN SHAFER PART 8  
Justice

In the Matter of the Application of  
1429 Realty Associates, Inc.,

INDEX NO. 105829/08

Petitioner,

MOTION DATE

MOTION SEQ. NO. 001

For a Judgment Under Article 78 of the Civil  
Practice Law and Rules

MOTION CAL. NO.

-against-

NEW YORK STATE LIQUOR AUTHORITY,

Respondent.

The following papers, numbered 1 to 4, were read on this petition under Article 78 of the  
Civil Practice Law and Rules:

Notice of Petition – Exhibits

Memorandum of Law

Answer – Exhibits

**FILED**  
JUL 21 2008  
COUNTY CLERK'S OFFICE  
NEW YORK  
PAPERS NUMBERED  
1,2  
3  
4

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that the petition is denied.

This is a petition under Article 78 of the CPLR, seeking review of the decision by the  
New York State Liquor Authority which denied petitioner's application for a license to operate a  
retail liquor store.

Background

Petitioner corporation, whose sole shareholder is Valber Rogue, applied for a license to

open a retail liquor store, at 300 East 78<sup>th</sup> Street, in June, 2006. At the time of the application, the premises were vacant. The license of a prior liquor store had been cancelled for making false material statements.

The application was considered by the Authority at its February 7, 2007 meeting at which time it was disapproved:

The Authority finds that Valber Rogue has a history of making false representations regarding the existence of his ownership interests in multiple liquor licensees. The Authority further finds that there is a pattern of deceitful financial transactions and the submission of fraudulent documents that directly or indirectly involving (sic) Mr. Rogue. As a result of these findings, the Authority concludes that he does not possess the requisite character and fitness to be entrusted with an additional liquor license. Therefore, the Authority finds that Mr. Rogue's ownership of the applicant corporation creates overwhelming good cause to deny the application.

The Authority's decision was based *inter alia* upon a report which found that the prior liquor store at the premises had been owned by "Rogue American Bottles, Inc.", a corporation solely owned by Seong Chong Jhu. Mr. Jhu submitted applications to renew the license in 2004 and to transfer it to American Bottle, Inc. in 2005, notwithstanding having died in 2002. It appeared that at the time of the filing of the false documents, Mr. Rogue controlled the corporation.

The report also detailed an undisclosed ownership interest by Mr. Rogue in another entity owned by Mr. Jhu, Seong & Iggy's Restaurant, Inc., and violation of several other ABC regulations, including failure to report changes in corporate ownership.

Mr. Rogue does not personally dispute any of the Authority's allegations but submits an attorney's affirmation stating that Mr. Rogue "was not listed as a shareholder of American Bottle, Inc." and that a corporation change application, adding Mr. Rogue as a shareholder in Seong &

[\* 4 ]

Iggy's Restaurant Inc., was duly filed.

#### Discussion

Judicial review in an Article 78 proceeding is limited to a determination of whether the administrative action complained of is arbitrary and capricious or lacks a rational basis (*In re Application of Chelrae Estates, Inc v State Division of Housing and Community Renewal, Office of Rent Administration*, 255 AD2d 387, 389 [1<sup>st</sup> Dept. 1996] citing *Matter of Pell v Board of Education*, 34 NY2d 222, 230-231 [1974]). An Article 78 proceeding is limited to consideration of the evidence and arguments raised before the agency when the administrative determination was rendered and “[t]he function of the court . . . is to determine . . . whether the determination had a rational basis in the record (*In re Application of HLV Associates v Aponte*, 223 AD2d 362, 363 [1<sup>st</sup> Dept. 1996] citing *Matter of Fanelli v New York City Conciliation & Appeals Bd.*, 90 AD2d 756, 757 [1<sup>st</sup> Dept. 1982]). Courts are not permitted to substitute their judgment for that of the administrative agency where the decision is rationally based on the record. (*In re Application of Royal Realty Co v New York State Division of Housing and Community Renewal*, 161 AD2d 404, 405 [1<sup>st</sup> Dept. 1990]; *Matter of Levine v New York State Liq Auth*, 23 NY2d 863, 864 [1969][“Judicial review of an administrative action is limited to the record made before the agency”])

The law is clear that prior misconduct may be used as a basis to reject a liquor license application. (*Schmidt & Sons, Inc v New York State Liquor Authority*, 73 AD2d 399 [1<sup>st</sup> Dept 1980]) In particular, prior violations of the ABC Law and the rules of the Authority can constitute a valid basis for license denial. (*Zito v New York State Liquor Authority*, 86 AD2d 959 [4y<sup>th</sup> Dept 1982]; *Herms v New York State Liquor Authority*, 35 AD2d 833 [2d Dept 1970] *affd*

52 NY2d 956 [1971]

It cannot be said from this record that the Authority's denial of petitioner's application for a liquor license is arbitrary and capricious or that it lacks a rational basis.

Accordingly, it is

Ordered that the petition is denied.

This reflects the decision and order of the court.

Dated:

7/16/08

~~MARILYN SILVER~~  
~~J.S.C.~~

J.S.C.

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION

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