Rose Ancona, Inc. v New York State Liq. Auth.

2010 NY Slip Op 31024(U)

April 22, 2010

Supreme Court, New York County

Docket Number: 100858-10

Judge: Judith J. Gische

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SCANNED ON 4/28/2010

[* 1]

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

PRESENT: HON. JUDITH J. GISCHE PART 10

Justice

Index Number : 100858/2010

ROSE ANCONA, INC.

VS.

NYS LIQUOR AUTHORITY

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

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).

APR 22 2010

Dated: April 22, 2010

HON. JUDITH J. GISCHE J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

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Rose Ancona, Inc.

Petitioner (s),

-against-

New York State Liquor Authority,

Respondent (s).

----------x

DECISION/ ORDER
Index No.: 100858-10
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Notice of pet/ verif pet w/RA affid, exhs	1
Resp's verif answer w/SW affid, exhs	2
Pet's further support/reply w/affirm, exhs	3
Steno mins 4/1/10	4

This judgment has not been entered by the County Clerk UNFILED JUDGMENT
and notice of entry cannot be served based hereon. To
enter judgment, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is a summary proceeding brought under Article 78 of the CPLR by petitioner Rose Ancona, Inc. ("petitioner"), the applicant for a liquor license, against respondent the New York State Liquor Authority ("respondent"). Petitioner's application for removal of its liquor license was denied; petitioner seeks an order vacating respondent's decision. Respondent has answered the petition and raised points of law seeking the dismissal of the petition (CPLR 7804 [f]). Where a motion to dismiss is premised upon CPLR §7804 [f], only the petition and the exhibits attached thereto may be considered and all the allegations contained therein are deemed to be true (Green Harbour Homeowners' Ass'n, Inc. v. Town of Lake George Planning Board, 1 AD3d 744 [3rd Dept 2003]). Applying

these legal principles, the court's decision is as follows:

Facts considered and arguments presented

Petitioner operates a retail liquor store in Coram, Town of Brookhaven in Suffolk County ("Coram") and holds package store liquor license ("license") that was issued by respondent on July 30, 2008. The license allows petitioner to sell hard liquor and wine for consumption off the premises. On May 5, 2009 petitioner applied to remove that license from its present location in Coram to Hauppauge, Town of Smithtown, Suffolk County ("Hauppauge"). The Coram store was not doing well and petitioner believed the new location, within a strip mall, would be more profitable, since it is located at a busy intersection. Petitioner has entered into a lease for the space, formerly a tanning salon, and expended $18,000 in renovations.

Following a meeting by the respondent's full board on October 14, 2009 ("meeting") respondent notified petitioner that its application had been denied. In its written denial dated December 28, 2009 ("denial"), the respondent indicated that there are five (5) liquor or "package" stores within 2.2 miles of the strip mall and one of the stores is just .25 miles from the mall. According to respondent, the stores are "already competing for business and it would be poor judgment indeed for the [respondent] to dilute that market further by issuing an additional package license at the proposed location." Respondent stated that with so many stores in such close proximity, there is a "substantial likelihood [of] an increase in Alcohol Beverage Control Law violations to increase sales and stay afloat." The violations referred to include sales to minors, intoxicated people and the purchase of inventory from unauthorized sources. Respondent also cited the "strenuous opposition to the application before the Authority . . ." The opposition was from three of the package

store owners in the area. Each of these owners cited the economic downturn and voiced concerns that the new store would impact upon their sales. The only support for the application came from Ms. Ancona, principal of petitioner.

Part of the application process not only requires that petitioner provide its own financial records, but the five (5) other store were also instructed by respondent to provide the figures of their gross sales for the past four (4) years. Petitioner's principal (Ms. Ancona) states that the money she has spent on preparing the store and other expenses should be taken into account by respondent if it is considering the economic impact her business will have on the area.

Petitioner contends the respondent's decision was not reasonably based, arbitrary and capricious, and not supported by the record. Petitioner argues that its proposed store – "Vita's Grapes of Italy" – was envisioned as an upscale wine shop with most (80%) of its inventory being wine, not hard liquor, and that none of the other stores in that area cater to this under-served niche market. Ms. Ancona states she spent $18,000 on preparing the new space and incurred other expenses which should have also been taken into consideration by respondent if it was considering the economic impact of petitioner's application.

Discussion

Although respondent contends that this petition is premature because petitioner has not exhausted its administrative remedies, this argument fails because the NYSLA has made a decision and section 52.1 of the Rules of the State Liquor Authority (9 NYCRR 52.1), affording the applicant a hearing after disapproval of an application, does not apply. 9 NYCRR § 52.1 provides that "when a local board has disapproved an

application, the applicant shall be afforded a hearing for the purpose of producing any such evidence before the Authority as he shall desire with reference to the reasons for disapproval state by the local board." However, the statutory authority for this rule is Alcohol and Beverage Control Law ("ABCL") § 54, "License to sell beer at retail for consumption off premises." Petitioner owns a liquor store, not a grocery store, and petitioner plans to open a new liquor store at a different. Thus, petitioner holds a liquor store license under ABCL § 63 which is a "license to sell liquor at retail for consumption off the premises," not a beer license. Thus, the court turns to the substantive issues raised in respondent's answer and motion to dismiss.

A liquor license that is issued to any person, etc., is confined to the premises licensed, and cannot be transferred, except in the discretion of the NYSLA (ABCL § 111). This is, presumably, to prevent "undesirable persons," who are ineligible to obtain such license on their own, from operating through a straw man (Specialty Restaurants Corp. v. Barry, 262 AD2d 926 [2nd Dept 1999]).

A licensee seeking the transfer or "removal" of its liquor license to a different location, etc., must file an application with the NYSLA for permission to remove the license (ABCL § 99-d). The decision to grant or deny the removal application "shall be made [by the NYSLA] in accordance with public convenience and advantage" (ABCL § 63 [6]).

At one time, liquor licenses were routinely denied in situations where there were clusters of retail stores to prevent the unlimited grouping of stores. This resulted in legally protected monopolies (In the matter of Hub Wine & Liquor v. State Liquor Authority, 16 NY2d 112, 116 [1965] *rearg den* 16 NY2d 992 [1966]). Changes in the law, however, repealed and dispensed with that formulaic approach, embracing "a free market for the

sale of liquor to the consumer" (In the matter of Hub Wine & Liquor v. State Liquor Authority, 16 NY2d at 117). Thus, each application must be decided on its own merits, and considered on the promotion of "public convenience and advantage," rather than the robotic application of distance requirements (Id. at 119).

"Public convenience" refers to the accessibility of stores and involves considerations of distance and the overcrowding of present facilities (Forman v. New York State Liquor Authority, 17 N.Y.2d 224, 230 [1966]; *also* Circus Disco, Ltd. v. New York State Liquor Authority, 51 NY2d 24 [1980]). "Public advantage" has been defined broadly and encompasses "social and similar problems, and involves the State's general policy as to the sale of alcoholic beverages for off-premises consumption (Forman v. New York State Liquor Authority, 17 N.Y.2d at 230; *also* Circus Disco, Ltd. v. New York State Liquor Authority, supra). The NYSLA's decision to deny an application for removal is subject to review by the courts (ABCL § 121 [4]; Rockower v. State Liquor Authority, 4 NY2d 128 [1958]; Lenward Liquor v. New York State Liquor Authority, 19 AD2d 612 [1st Dept 1963]; Scudder v. O'Connell, 272 A.D. 251 [1st Dept 1947]). These requirements embody the general public policy underpinnings of the liquor laws (ABCL § 2; Forman v. New York State Liquor Authority, *supra*).

According to the petition, respondent acted arbitrarily and capriciously by denying its removal application because there are five (5) pre-existing liquor stores in the immediate area where it seeks to open its new liquor store. In deciding whether the respondent acted arbitrarily and capriciously in disapproving petitioner's application, the court must examine the reasons provided by the respondent (Pierakos v. Brand Beverages, Inc., 31 A.D.2d 732 [4th Dept 1968] *aff'd* 25 NY2d 714 [1969]). The burden of

making a prima facie case is on the petitioner challenging the denial (Pierakos v. Brand Beverages, Inc., *supra*). If the respondent's determination is not arbitrary or capricious, an abuse of discretion and has a rational basis, then it must be sustained (Pizzaguy Holdings, LLC v. New York State Liquor Authority, 39 A.D.3d 1072 [3rd Dept 2007]). A removal license application is subject to the same scrutiny as a new license, thus NYSLA has great discretion in deciding whether to grant that application than, for example, revoking an existing license (ABCL § 63 [6]; *see* Pierakos v. Brand Beverages, Inc., *supra*).

By statute, the holder of a liquor license must provide the NYSLA access to its books and records, including information about its gross revenues (ABCL § 105 [15]). Not only did the respondent consider the gross sales figures of the stores in the immediate area, it also considered petitioner's own financial condition and reasons for wanting to relocate its store. NYSLA found that the 2009 gross sales reported by the existing stores had declined by almost 50% drop from 2008.

The NYSLA cannot blindly apply distance restrictions to protect existing liquor business in a particular area because such "arbitrary and compulsory distances between package stores . . . have no present purpose except to restrict competition" (In the matter of Hub Wine & Liquor v. State Liquor Authority, 16 NY2d at 117). The NYSLA can, however, consider evidence that liquor sales in the immediately surrounding area where the applicant wants to open a new store are unlikely to sustain an additional store and that the existing liquor stores are adequately serving the public's needs, convenience and advantage (In the matter of George B. Hansen v. New York State Liquor Authority, 77 AD2d 703 [3rd Dept 1980]).

The NYSLA has set forth reasons to support its decision denying the removal

application. Respondent did not deny petitioner's application because its store will unfairly compete with the existing stores in the area and the NYSLA is protecting the revenues of those stores. Rather, respondent determined that the public's convenience and advantage is being more than adequately served – if not over served - by the five (5) pre-existing liquor stores in that area, each of which has reporting a steep (50%) decline in its gross revenues.

Respondent also took into consideration petitioner's own reason for opening a new store: the store in Coram has been adversely affected by the presence of another liquor store that opened in that area and petitioner is hoping the new location will be more profitable. Respondent specifically states that "the proposed location will not prove ideal for the applicant" since the new store would face similar challenges as the old store. Respondent also considered the potential for liquor law violations as these business vie with one another for decreased or decreasing business and face increasing financial pressure (Oliver v. State Liquor Authority, 34 AD2d 676 [2nd Dept 1970]). Although petitioner has already invested $18,000 in renovating the proposed store, the financial expenditures by the applicant in preparation do not have to (and should not) be considered by the NYSLA in the absence of extenuating circumstances (Tirdwell v. State Liquor Authority, 15 AD2d 773 [1st Dept 1962]). The respondent's decision is entitled to great deference, provided the NYSLA exercises its discretion within the law. The issue of whether an application meets the standards of "public convenience" and "public advantage" is delegated to the NYSLA, and a decision on that issue will not be disturbed unless it is arbitrary or capricious and without a rational basis (Sinacore v. New York State Liquor Authority, 21 NY2d 379 [1968]). Where there are policy considerations articulated

by the respondent as a basis for the denial, the court cannot substitute its own judgment, even if it would have arrived a different decision (Sinacore v. New York State Liquor Authority, supra).

Although the respondent cites the "strenuous" objections of other liquor store owners in the area, the reason the removal application was denied was not because they objected to petitioner's application, but because the NYSLA decided that public convenience and advantage will not be served by adding a new store at the proposed location (In re application of 401 East 138th Street v. New York State Liquor Authority, 75 AD2d 730 [1st Dept 1980]). The respondent's decision is rationally based. Since the challenged decision is neither arbitrary nor capricious, it may not be disturbed. The petition is, therefore, dismissed.

Conclusion

In accordance with the foregoing,

IT IS HEREBY

ORDERED, DECREED AND ADJUDGED that the motion to dismiss the petition is hereby granted and this proceeding is dismissed; and it is further

ORDERED that any other requested relief not expressly addressed is hereby denied; and it further

ORDERED that this constitutes the decision, order and Judgment of the court.

Dated: New York, New York
April 22, 2010

ENTER:

Hon. Judith J. Gische, J.S.C.

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).