

Matter of DeRiver Inc. v New York State Liquor Auth.
2014 NY Slip Op 33141(U)
March 5, 2014
Supreme Court, Queens County
Docket Number: 17837/13
Judge: Howard G. Lane
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MEMORANDUM

SUPREME COURT - QUEENS COUNTY
IA PART 6

In the Matter of DE RIVER INC.,

BY: **LANE, J.**

Petitioner,

DATED: March 5, 2014

-against-

INDEX NO.: 17837/13

NEW YORK STATE LIQUOR AUTHORITY,

MOTION DATE:
October 3, 2013

Respondent.

MOTION CAL. NO.: 21

MOTION SEQUENCE NO.: 1

In this Article 78 proceeding, petitioner De River Inc., seeks a judgment: (1) staying respondent New York State Liquor Authority's (SLA) July 17, 2013 order of revocation and \$1000.00 bond claim of the on-premises liquor license held by De River Inc., doing business at 130-35 91ST Avenue, Richmond Hill, New York; (2) staying the September 10, 2013 order of "revocation for the record" of said liquor license; (3) rescinding the July 17, 2103 default determination; (4) rescinding the September 10, 2013 decision which denied petitioner's request to open the default; and (5) remanding case number 87703 and case number 89712 to the respondent for a full hearing on notice to petitioner and its counsel.

Petitioner De River Inc. operates a bar/lounge at the premises located at 130-35 91ST Avenue, Richmond Hill, New York

and alleges that it was granted an on-premises liquor license on June 7, 2005.¹ The bar/lounge is open on Friday, Saturday, and Sunday nights. Amar Singh is the sole shareholder and president of De River Inc. Mr. Singh alleges that from 2005 through 2010, he personally supervised the premises three nights a week, and ordered all food and liquor, and paid all bills. In 2010, his cousin Vishnu Singh and other family members tried to assist him; that he began working for a law firm full time during the day, and was present at the premises every other weekend; that Vishnu Singh is present and supervises the premises on alternating weekend nights and when Amar isn't available; and that six to eight licensed security guards work at the premises each night. Mr. Singh alleges that during an SLA investigation, he learned that because his cousin Vishnu Singh was assisting in the business, he should add him to the liquor license. Mr. Singh alleges on February 2, 2013, with the assistance of a paid business consultant George Nelson, he filed a corporate change application, seeking to add Vishnu Singh to the license. The SLA denied said application on March 22, 2013.

On May 8, 2013, respondent SLA issued a notice of pleading charging petitioner with multiple violations of the Alcohol Beverage Control Law and its governing rules and

¹It is noted that the SLA Board meeting agenda for July 17, 2013, states that the subject license was issued on May 26, 2006.

regulations, in that the licensee permitted the premises to become disorderly by suffering or permitting an altercation/assault/robbery to occur on the licensed premises on February 4, 2013, and by failing to exercise adequate supervision over the conduct of the licensed premises and permitting an altercation or assault to occur on the licensed premises, on March 18, 2013, and by failing to exercise adequate supervision over the conduct of the licensed premises. The notice of pleading stated that said charges were sufficient to revoke, cancel, or suspend the license. The notice set forth a hearing date of June 12, 2013, and among other things, informed the licensee that the failure to plead would be deemed a "no contest" plea, and that no further hearing would be held. Said notice of pleading is designated as "1316-2013/Case No. 89712".

On May 9, 2013, the SLA issued a notice of pleading charging De River Inc. with making its license available to a person not specified in the license, in that it permitted Vishnu Singh, Mike Kishore and Moka Restaurant and Club Inc., persons not authorized by the SLA, to avail itself of the license privilege since at least 2010, in violation of Section 111 of the Alcohol Beverage Control Act; that at least since 2010, in violation of Section 99-d(2) of the Alcohol Beverage Control Act the licensee effectuated a corporate change in its stockholders, offices and/or directors without the first obtaining the

permission of the SLA; that at least since 2010, the licensee used the trade name Moka Restaurant and Club Inc., in connection with the licensed business without first obtaining the permission of the SLA, in violation of 9 NYCRR 53.1(p); that at least since 2010, the licensed premises ceased to be operated as a bona fide premises within the contemplation of the license issued for the premises, in violation of 9 NYCRR 53.1 (d); that from January 19 through January 20, 2013 failed to comply with all applicable health, safety and governmental regulations in that two Notices of Violation had been issued, including one for noise. The notice of pleading stated that said charges were sufficient to cause to revoke, cancel, or suspend the license. The notice set forth a hearing date of June 12, 2013, and among other things, informed the licensee that the failure to plead would be deemed a "no contest" plea, and that no further hearing would be held. Said notice of pleading is designated as "1327-2013/Case No. 87703".

These notices of pleading are addressed to "De River Inc. MokaNYC" at the Richmond Hill address, and lists the licensee's name and residence address as Amar Singh, "229 West ARMSHAL STREET", Hempstead New York 11550, and the licensee's landlord and address as SDS Realty Corp., 79-20 211th Street, Bayside, New York 11364.

Petitioner De River Inc. defaulted in appearing at the

June 12, 2013 hearing. The SLA treated the default as a "no contest", and following a meeting of its Board, issued an order dated July 17, 2013, which sustained the charges in case number 89712 and case number 87703 and revoked petitioner's on-premises liquor license. Mr. Singh alleges that in August 2013, he received a letter from the SLA, dated July 30, 2013, stating that the charges had been sustained, that the liquor license had been revoked, and directing that the license be surrendered. Said letter refers to case numbers 89712 and 87703, and is addressed to De River Inc., MOKANY, at the Richmond Hill address, and to Mr. Singh at " 229 West AMRSHAL ST" in Hempstead, and to the landlord at the Bayside address.

On August 23, 2013, Mr. Singh requested that the SLA open his default, that the revocation and bond claim be set aside, and that De River Inc. be provided with an opportunity to defend itself. Mr. Singh asserted that he did not receive notice of the charges and therefore had a reasonable excuse for the failure to appear at the hearing. He also asserted a defense with respect to the assault charges set forth in case number 89712.

Mr. Singh alleges that at a July 2013 hearing in connection with a separate matter, the SLA representative reported that the records contained a misspelling of his residence address (Armshal St, instead of Marshal St) and that

said address was corrected at that time.

On April 8, 2013, the SLA issued a notice of proceeding in case number 89024, charging De River Inc. with the sale of alcohol to a person under the age of 21 on January 18, 2013. Mr. Nelson appeared as a representative at a hearing on June 11 and June 18, 2013, and presented several witnesses. The administrative law judge sustained the charges, and said charges were referred to the SLA Board. The SLA Board, at a hearing held on August 27, 2013, granted Mr. Singh's counsel's request to hold that matter over, until his request to open the default in case numbers 89712 and 87703 was determined. Mr. Singh was also granted leave to supplement the request to open the default, and in a letter dated September 6, 2013, provided a defense to the availing charge. On September 10, 2013, the SLA Board denied Mr. Singh's request to open the default, without stating the reason for its denial. With respect to case number 89024 (sale of alcohol to a minor), the SLA Board sustained the charge and revoked petitioner's license "for the record", as the license was previously revoked.

Petitioner now seeks a judgment rescinding the order of September 10, 2013 which denied his request to vacate the default, staying the revocation order of July 17, 2013 and rescinding said order which was made on default in case numbers 89712 and 87703. Petitioner asserts that it has a valid excuse

for the default in that Mr. Singh did not receive notice of the charges, and that it has a meritorious defense to both the assault charges and to the availing charge. Mr. Singh in his verified petition asserts that he did not receive a copy of the charges at his residence. With respect to the mailing to the licensed premises, petitioner has submitted a copy of the SLA's envelope, addressed to "De River Inc DBA: MOKANYC" at the Richmond Hill address, which indicates that it was sent by certified mail return receipt requested. A copy of the mailing receipt is postmarked May 15, 2013. Said envelope bears a postal label dated June 12, 2013, which reads "Return to Sender Unclaimed Unable to Forward".

Respondent, in opposition, asserts that petitioner was properly served with the charges in case numbers 89712 and 87703, in that copies of the notices of pleadings were mailed to the licensee at the subject premises pursuant to certified mail on May 14, 2013, and that copies of the notices of pleadings were sent by first class mail to Mr. Singh and to the property owner on May 14, 2013. Respondent has submitted an affidavit from Debra Mitchell, a clerk employed by respondent who is responsible for mailing notices of pleadings in disciplinary proceedings, detailing the SLA's mailing procedures. Respondent states that the mailings to Mr. Singh's address and to the property owner were not returned to its offices by the post office. Respondent

further asserts that petitioner has not demonstrated that it has a meritorious defense to the charges.

Judicial review of an administrative determination is limited to whether it "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 or discipline imposed" (CPLR 7803[3])." Here, the court's review of respondent's cancellation of petitioner's liquor license is limited to whether respondent properly denied petitioner's application to vacate its default (*Yarbough v Franco*, 95 NY2d 342 [2000]).

Pursuant to 9 NYCRR 54.1(a), disciplinary proceedings instituted by the New York State Liquor Authority:

"[d]isciplinary proceedings shall be commenced by serving a notice of pleading on the licensee. Such notice shall be deemed to have been duly served if delivered in person or if sent by registered or certified mail to the licensee addressed to the licensed premises and a copy thereof sent by first class mail to the residence of record of the licensee or of any officer or director of a corporate licensee, or any general partner of a partnership licensee." Subdivision (d) of this section provides : "[i]n the case of revocation proceedings, a copy of the notice of pleading shall be sent by first class mail to the owner of the building in which the licensed premises are situated, as

reflected in the files of the authority, at the last address in the files of the authority of such owner. Where the application for the license for the current period has indicated that the licensee occupies such premises under a written lease from a person other than such owner, a further copy shall be sent by first class mail to such lessor at his address as set forth in the files of the authority”.

The touchstones of procedural due process are notice and an opportunity to be heard (*Prue v Hunt*, 78 NY2d 364 [1991]; *Toolasprashad v Kelly*, 80 AD3d 530 [2011]). The constitutional requirements of procedural due process apply to proceedings before administrative agencies (*Wolfe v Kelly*, 79 AD3d 406 [2011]). Procedural due process requirements must be met before any default is actually taken (*In re Bouchard*, 29 AD3d 79, [2006]; *Tupaz v Clinton County, New York*, 499 F Supp 2d 182 [2007]; *Jaouad v City of New York*, 4 F Supp 2d 311 [1998]; see also *Taxraja Mgt., LLC v City of New York Env'tl. Control Bd.*, 33 Misc 3d 1225[A], [Sup Court, Queens County, 2011]). Although due process does not require actual notice before the government may extinguish a person's property interest, “due process requires the government to provide ‘notice 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.’ ” (*Jones v Flowers*, 547 US 220, 226 [2006],

quoting *Mullane v Central Hanover Bank & Trust Co.*, 339 US 306, 314 [1950]); accord *Matter of Harner v County of Tioga*, 5 NY3d 136, 140 [2005]; *Kennedy v Mossafa*, 100 NY2d 1, 9 [2003]; *Silverstein v Minkin*, 49 NY2d 260, 263 [1980], rearg denied 50 NY2d 929 [1980]). Here, the above cited governing rules and regulations require that the SLA personally serve the licensee, or notify the licensee by either certified or registered mail at the licensed premises and by first class mail at the licensee's residence. The evidence presented establish that copies of the subject notices were mailed to the licensed premises at the correct address by certified mail in compliance with 9 NYCRR 54.1(a). Certified mail that is returned to the sender as "unclaimed" merely indicates that the addressee failed to pick up the mail at the post office, not that it was improperly sent (see *Matter of Harner v County of Tioga*, 5 NY3d 136 [2005]; *Temple Bnai Shalom of Great Neck v Village of Great Neck Estates*, 32 AD3d 391 [2d Dept 2006]; *Cadle Co. v Tin-Angle Assoc.*, 18 AD3d 100 [1st Dept 2005]).

Mr. Singh denies receipt of the subject notices at his residence, and said notices were not returned to the respondent. Ordinarily, bare denials of receipt of a notice or other pleading is insufficient to controvert evidence of service and does not constitute a reasonable excuse for a default (see *Baez v Ende Realty Corp.*, 78 AD3d 576 [1st Dept 2010]; *Bryant v New York City*

Housing Authority, 69 AD3d 488 [2d Dept 2010]). Mr. Singh, however, also asserts that the respondent failed to correct the misspelled street address. Normally, service is considered complete when the document is entrusted into the custody of the United States Postal Service (*Vita v Heller*, 97 AD2d 464, 464-465 [2d Dept 1983] citing CPLR 2103, subd [b], par 2; *A & B Serv. Sta. v State of New York*, 50 AD2d 973 [3d Dept 1975], *mot for lv to app den* 39 NY2d 709 [1976]). The evidence presented here is insufficient to establish that respondent mailed the subject notices to Mr. Singh at the correct residence address. The notice of proceedings prepared by the SLA contain an incorrect and misspelled street address for Mr. Singh. There is no evidence that Mr. Singh provided the SLA with this incorrect address. Rather, it appears that the SLA maintained this misspelled address in its records, and failed to correct it. The affidavit of mailing submitted by Ms. Mitchell does not set forth the address for Mr. Singh's residence, and the attached notice of pleadings contain the incorrect and misspelled street address. Respondent, thus, has failed to establish that it provided petitioner with proper notice of the charges and hearing, in compliance with 9 NYCRR 54.1(see *Matter of Zucco Grocery Corp. v New York State Liquor Authority*, 203 AD2d 120 [1st Dept 1994]; *Matter of Neptune Inn Restaurant, Inc. v Division of Alcoholic Beverage Control of the New York State*

Liquor Authority, 193 AD2d 436 [1st Dept 1993]). Respondent's admittedly previous use of an incorrect and misspelled residence address for Mr. Singh and his appearance or default at other unrelated hearings does not obviate the SLA's failure to comport with due process by correctly addressing the notices of proceedings in this instance. The court further notes that respondent's recitation of matters pertaining to the subject licensee in case numbers 79832, 38170, and 65570 is irrelevant, as petitioner does not seek judicial review of the determinations made in those cases in this proceeding.

Respondent has also failed to establish that a licensee, in its application before the SLA, who seeks reconsideration of a default determination based upon the failure to provide proper notice is also required to establish a potentially meritorious defense. The court is unaware of any provision in the Alcohol Beverage Control Act, or the SLA's rules and regulations which would make the provisions of CPLR 5015(a) (1) applicable in such circumstances.

Accordingly, the petition is granted to the extent that respondent's determination of September 10, 2013 which denied petitioner's request to vacate its default is vacated, and respondent's determination of July 17, 2013, which revoked petitioner's on-premises liquor license, based upon said default is vacated, and the matter is remanded to the respondent for

further proceedings.

Settle judgment.

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Howard G. Lane, J.S.C.