

**Matter of 565 W. Side Cafe Corp. v
New York State Liq. Auth.**

2023 NY Slip Op 32855(U)

August 17, 2023

Supreme Court, New York County

Docket Number: Index No. 151809/2023

Judge: John J. Kelley

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

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

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In the Matter of
565 WEST SIDE CAFE CORP.,

Petitioner,

- v -

THE NEW YORK STATE LIQUOR AUTHORITY,

Respondent.

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INDEX NO. 151809/2023

MOTION DATE 05/05/2023

MOTION SEQ. NO. 001

**DECISION, ORDER, AND
JUDGMENT**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

In this proceeding pursuant to CPLR article 78, the corporate petitioner seeks judicial review of a February 1, 2023 New York State Liquor Authority (SLA) determination approving the application of the petitioner's licensed principal for reconsideration of a prior offer to pay fines in settlement of disciplinary charges arising from his operation of the corporate petitioner, and thereupon instead to cancel the principal's liquor license and forfeit his bond in settlement of those disciplinary charges. The SLA answers the petition and files the administrative record. The petition is denied, and the proceeding is dismissed.

Richard Wong had been the principal of the corporate petitioner, 565 West Side Cafe Corp., doing business as 207 Prime Bar & Grill at 565 West 207th Street in Manhattan. The SLA had issued Wong an on-premises license to sell alcoholic beverages via that business.

On December 17, 2019, the SLA preferred a series of six charges against Wong, alleging that, on numerous occasions during 2019, he violated the Alcoholic Beverage Control Law and its implementing regulations by permitting Carlos Castro Fernandez and Huascar Rodriguez to avail themselves of employing Wong's license without SLA permission, as well as

by keeping liquors and wines upon the licensed premises in a container other than the original sealed package, purchasing and receiving alcoholic beverages for resale from a person not duly licensed to sell those products for resale, and failing to keep and maintain adequate and accurate records. Shortly thereafter, in early 2020, the SLA preferred an additional series of 13 charges against Wong, alleging that, on several additional occasions in 2019, Wong violated the Alcoholic Beverage Control Law and applicable SLA regulations by, among other things, permitting the licensed premises to become disorderly, failing to control the premises, failing to abate a sustained and continuing pattern of noise, disturbance, misconduct, and disorder on or about the licensed premises, allowing a physical altercation to occur at the premises, violating local building, fire, and sidewalk codes, permitting the sale of marijuana and the provision of hookah services without a tobacco license at the premises, and exceeding the maximum occupancy level at the premises. In a later series of 11 charges, which addressed operations at the licensed premises between January 2020 and October 2020, the SLA averred that Wong violated the Alcoholic Beverage Control Law and applicable SLA regulations by engaging in similar conduct on numerous occasions during that period of time.

On April 16, 2021, Wong sold the corporate business and turned over the keys to the subject premises to Ramon O. Pena, who was not licensed by the SLA to sell or distribute alcoholic beverages at the premises. Wong averred in an affidavit that he requested Pena to return the liquor license to him, but that Pena failed or refused to do so. On September 13, 2022, the SLA preferred an additional series of 12 charges against Wong, alleging that he unlawfully permitted Pena to avail himself of the use of his license without SLA permission, and further alleging that, subsequent to April 16, 2021, the business committed numerous violations of the Alcoholic Beverage Control Law and applicable SLA regulations by failing to conform with local building, fire, health, food preparation, and sidewalk codes, and continuing to provide hookah services to customers without a tobacco license.

Wong, through his purported attorney, effectively pleaded no contest to the most recent 23 charges, and offered to pay the sum of \$5,000 in fines to the SLA to settle or resolve those charges, but the SLA rejected it in October 2022, and made a counterproposal to settle the charge in consideration of the payment of \$10,000 in fines. On December 15, 2022, however, Wong submitted an email to the SLA's prosecutor, informing the SLA that he was requesting that the SLA cancel his liquor license and claim the bond that he had posted with the SLA when he initially was licensed, and further stating that he had not retained the attorney who had made the settlement offer on his behalf. Rather, he suggested that that attorney had been retained by Pena on behalf of the unlicensed corporate petitioner. In a February 1, 2023 determination, an SLA board approved Wong's request for "reconsideration," and accepted his offer to cancel the license and forfeit his bond.

The corporate petitioner now seeks to annul the February 1, 2023 determination, reinstate the license, withdraw the no contest plea, and be permitted to defend all of the charges on the merits. The SLA counters that Wong, and not the corporate petitioner, was the subject licensee, that Wong did not retain the attorney representing the corporate petitioner to represent him or speak on his behalf, and that, consequently, the petitioner lacks standing to prosecute this proceeding. Moreover, it contends that the SLA's determination had a rational basis and, thus, was not arbitrary and capricious. The court agrees with the SLA and denies the petition on both of those grounds.

With respect to administrative determinations made by the SLA, "[t]he petitioner, who is not a licensee, has no standing to maintain this proceeding enjoining action that might be taken against parties who are licensees" (*Matter of Gifts By Wire v Bruckman*, 253 App Div 350, 350 [1st Dept 1938], *affd* 278 NY 499 [1938]; see *Murray v State Liquor Auth.*, 139 AD2d 461, 462 [1st Dept 1988]). Hence, the petition and proceeding must be dismissed on that ground.

Moreover, there is no merit to the petition in any event.

Where, as here, an administrative determination is made, and there is no statutory requirement of a trial-type hearing, that determination must be confirmed unless it is arbitrary and capricious, affected by an error of law, or made in violation of lawful procedure (see CPLR 7803[3]; *Matter of Madison County Indus. Dev. Agency v State of N.Y. Auths. Budget Off.*, 33 NY3d 131, 135 [2019]; *Matter of Lemma v Nassau County Police Officer Indem. Bd.*, 31 NY3d 523, 528 [2018]; *Matter of McClave v Port Auth. of N.Y. & N.J.*, 134 AD3d 435, 435 [1st Dept 2015]; *Matter of Batyreva v New York City Dept. of Educ.*, 50 AD3d 283, 283 [1st Dept 2008]; *Matter of Rumors Disco v New York State Liquor Auth.*, 232 AD2d 421, 421 [2d Dept 1996]). Inasmuch as the petitioner made no allegations that the SLA's determination was made in violation of lawful procedure or constituted an error of law, the SLA's determination to approve Wong's request for reconsideration, and thereupon accept his surrender of the license and forfeiture of the bond, must be confirmed unless it was arbitrary and capricious.

A determination is arbitrary and capricious where it is not rationally based, or has no support in the record (see *Matter of BarFreeBedford v New York State Liq. Auth.*, 130 AD3d 71, 77-78 [1st Dept 2015]; *Matter of Gorelik v New York City Dept. of Bldgs.*, 128 AD3d 624, 624 [1st Dept 2015]), or where the decision-making agency fails to consider all of the factors it is required by statute to consider and weigh (see *Matter of Kaufman v Incorporated Vil. of Kings Point*, 52 AD3d 604, 608 [2d Dept 2008]). Stated another way, a determination is arbitrary and capricious when it is made "without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). Consequently, an agency determination is arbitrary and capricious where the agency provides only a "perfunctory recitation" of relevant statutory factors or other required considerations as a basis for its conclusions (*Matter of BarFreeBedford v New York State Liq. Auth.*, 130 AD3d at 78; see *Matter of Wallman v Travis*, 18 AD3d 304, 308 [1st Dept 2005] ["perfunctory discussion"]), provides no reason whatsoever for its determination (see *Matter of Rhino Assets, LLC v New York City*

Dept. for the Aging, SCRIE Programs, 31 AD3d 292, 294 [1st Dept 2006]; Matter of Jones v New York State Dept. of Corrections & Community Supervision, 2016 NY Misc LEXIS 15778, *1-2 [Sup Ct, Erie County, Jul. 28, 2016]), or provides only a post hoc rationalization therefor (see Matter of New York State Chapter, Inc., Associated Gen. Contrrs. of Am. v New York State Thruway Auth., 88 NY2d 56, 756 [1996]; Matter of L&M Bus Corp. v New York City Dept. of Educ., 71 AD3d 127, 135 [1st Dept 2009]).

As the SLA correctly argued, pursuant to 9 NYCRR 54.2(a), the submission of a no contest plea signifies that the charges that had been preferred by the SLA are deemed sustained, and that no further hearing shall be held. Moreover, it correctly noted that a request for reconsideration is a matter of agency discretion (see Matter of C. Schmidt & Sons, Inc. v New York State Liquor Auth., 52 NY2d 751, 753 [1980]; Matter of Schafer v New York State Teachers' Retirement Sys., 175 AD3d 1644, 1647 [3d Dept 2019]). Based upon Wong's request for reconsideration and his offer, as licensee, to surrender his license and forfeit his bond, the SLA did not abuse its discretion in considering the request for reconsideration, and rationally accepted the licensee's plea of no contest to all of the charges in consideration of such surrender and forfeiture.

Accordingly, it is

ORDERED that the petition is denied; and it is

ADJUDGED that the proceeding is dismissed.

This constitutes the Decision, Order, and Judgment of the court.

JOHN J. KELLEY, J.S.C.

8/17/2023

DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE