

ISSUED DECEMBER 17, 1996

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA

PLOENPIDH P. HOUSTON	)	AB-6594
dba Monte Carlo Bar)	
3514 West Third Street	)	File: 47-255897
Los Angeles, CA 90020,	)	Reg: 95032824
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Ronald M. Gruen
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,	)	Date and Place of the
Respondent.	)	Appeals Board Hearing:
	)	August 7, 1996
	)	Los Angeles, CA
)	

Ploenpidh P. Houston, doing business as Monte Carlo Bar (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended appellant's on-sale general eating place license for 15 days, with five days thereof stayed for a probationary period of two years, for appellant's bartender allowing an alcoholic beverage to be sold and furnished to a person who was obviously intoxicated, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Business and Professions Code §§24200, subdivision (a), and 25602, subdivision (a).

¹The decision of the Department dated October 26, 1995, is set forth in the appendix.

Appearances on appeal include appellant Ploenpidh P. Houston, appearing through her counsel, Stephen H. Leventhal; and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on March 21, 1991. Thereafter, the Department instituted an accusation against appellant's license on April 27, 1995.

An administrative hearing was held on September 6, 1995, at which time oral and documentary evidence was received. At that hearing, the evidence showed that on March 17, 1995, appellant's bartender permitted an "acquaintance" (a patron who had frequented the premises over an extended period of time) to sell and furnish an alcoholic beverage (beer) to a person who was obviously intoxicated. Subsequent to the hearing, the Department issued its decision which ordered appellant's license suspended for 15 days, with five days thereof stayed for a probationary period of two years. Appellant thereafter filed a timely notice of appeal.

In her appeal, appellant contends that the acquaintance who served the obviously intoxicated patron was not appellant's employee or agent.

DISCUSSION

Appellant contends that the acquaintance who served the obviously intoxicated patron was not appellant's employee or agent, and therefore, appellant should not be held responsible for the acquaintance's acts.

Jerry Garcia, a Department investigator, testified that on March 17, 1995, at about 10:40 p.m., he and his partner entered the premises. A bartender was on duty.

Garcia observed a patron who during the investigation period, showed obvious signs of intoxication.² The patron on several occasions that evening, had conversations with Daniel Bauder, the "acquaintance" [RT 7-8, 15]. Both Bauder and other witnesses testified that Bauder from time to time, picked up empty bottles and placed them on the bar for the bartender; stocked the bar area with cases of beer obtained from the storage area; and had at times served beverages to patrons [RT 17, 27-28, 33-34, 58, 73].³

After one of the conversations with the patron who was observed to have the appearance of an intoxicated person, Bauder went behind the fixed bar and obtained four 12-ounce bottles of Corona beer, uncapped them, and handed them one at a time to the apparently intoxicated patron, who then handed three of the bottles to others (including the investigators). The patron handed Bauder some currency who then took the currency behind the fixed bar, and returned with change for the patron [RT 34-37, 69].

Bauder testified that he was not an employee but had worked at the premises for two years. He had been told by appellant that he could not help behind the bar [RT 60,

²Appellant did not raise the issue of obvious intoxication in the brief filed. Intoxication was shown, however, by the testimony [RT 15, 17, 20, 22, 24, 26, 29, 31-32, 35].

³The investigator testified that on three separate dates, he had seen Bauder picking up bottles and handing them to the bartender, and restocking the bar with cases of beer [RT 16].

Bauder testified that he was not an employee; that he had restocked the bar a few times; and had served alcoholic beverages to other patrons a few times previously and also that evening [RT 60, 67, 73-74].

67]. Bauder also testified that from his prior bartending experience, he knew it was illegal to serve a person who showed obvious signs of intoxication [RT 71].

There is no evidence in the record that Bauder was an employee. The question then is whether Bauder was the agent of appellant or the bartender. Civil Code §2298 states: "An agency is either actual or ostensible." Civil Code §2300 defines "ostensible agency" as: "An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be the agent who is not really employed by him." (2 Summary of California Law, Witkin, pages 52-53, contains a discussion of ostensible agency).

In the matter of Shin (1994) AB-6320, the Appeals Board found an ostensible agency where a co-licensee's daughter, while visiting the off-sale premises, was told by the father/co-licensee not to sell anything, but to watch out for thieves while the father was busy with another patron. While at the counter near her father, the daughter sold an alcoholic beverage to a minor, and accepted payment for the beverage, as she had access to the cash register, and used the same.

In the present matter, the bartender on duty was left in charge of the premises by appellant [RT 95].

A licensee is vicariously responsible for the unlawful on-premises acts of his employees. Such vicarious responsibility is well settled by case law. (Mack v. Department of Alcoholic Beverage Control (1960) 178 Cal.App.2d 149 [2 Cal.Rptr. 629, 633]; Morell v. Department of Alcoholic Beverage Control (1962) 204 Cal.App.2d 504 [22 Cal.Rptr. 405, 411]; and Harris v. Alcoholic Beverage Control Appeals Board (1962) 197 Cal.App.2d 172 [17 Cal.Rptr. 315, 320].)

Bauder was told by appellant not to work behind the bar, that is, to act as a bartender. Appellant by virtue of the bartender's act or failure to control Bauder, allowed Bauder to do all the things done by employees of the premises.

CONCLUSION

The decision of the Department is affirmed.⁴

RAY T. BLAIR, JR., CHAIRMAN
JOHN B. TSU, MEMBER
BEN DAVIDIAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴This final order is filed as provided by Business and Professions Code §23088, and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review pursuant to §23090 of said statute.