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

AB-7026b
File: 20-214181 Reg: 97041573

THE SOUTHLAND CORPORATION and BARRY A. GAUTHIER
dba 7-Eleven Food Store
109 West Lambert Road, Brea, CA 92621,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: May 9, 2002
Los Angeles, CA

ISSUED SEPTEMBER 11, 2002

The Southland Corporation and Barry A. Gauthier, doing business as 7-Eleven Food Store (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their off-sale beer and wine license for 35 days, with 10 days thereof stayed for a probationary period of one year, for their clerk, Carlos Torres, having sold an alcoholic beverage (beer) to Matt Keyworth, a minor, contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellants The Southland Corporation and Barry A. Gauthier, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing

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[1]The decision of the Department, dated September 6, 2001, is set forth in the appendix.

through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

This is the third appeal in this matter, all of which stem from the sale of an alcoholic beverage to a minor decoy.

The original appeal was from an order of the Department denying appellants' discovery request for the identities of other licensees who may have sold an alcoholic beverage to that same decoy during certain time periods. The Appeals Board ruled that it lacked jurisdiction at that time to hear the appeal. (The Southland Corporation /Gauthier (1998) AB-7026.)

The second appeal followed a decision by the Department which sustained the sale-to-minor charge. The Board reversed the decision, and ordered the case remanded to the Department for further proceedings with respect to the issues concerning the appearance of the decoy, and appellants' entitlement to discovery of the identities of other licensees who may have made sales to the decoy in question on the same day as the sale by appellants' clerk.[2]

Upon remand, the Department entered an order remanding the matter to Administrative Law Judge Rodolfo Echeverria, directing him to conduct, initially, a hearing to permit an offer of proof by the licensees of the impact of the discovery. An amended order, entered April 25, 2001, directed the Department's compliance with appellants' discovery request, as limited by the Appeals Board, and further directed

[2] In Circle K, Inc. (1999) AB-7080, the Board held that the Department erred in limiting its assessment of the decoy's appearance under Rule 141(b)(2) to physical appearance, and, in The Circle K Corporation (2000) AB-7031a, that a licensee charged with having sold an alcoholic beverage to a minor decoy was entitled to discovery of the names and addresses of other licensees, if any, who sold to the same decoy in the course of the same decoy operation.

Judge Echeverria:

> "... to initially take further evidence and argument, by way of affidavit and briefing only, as to what new evidence [appellants] intend to offer at any further hearing ... and how such evidence is relevant to the proceeding. Following the submission of any such additional evidence and argument, and any response from the Department, the Administrative Law Judge shall thereafter hold any further proceedings as he determines are necessary and appropriate, in his exclusive discretion, including, inter alia, issues pertaining to Rule 141 (b)(2)."

The present appeal arises from the Department's adoption of Judge Echeverria's proposed decision submitted by him following such remand. In that decision, Judge Echeverria found that the decoy's appearance was that which could generally be expected of a person under twenty-one years of age under the actual circumstances presented to the seller, and concluded that no further proceedings were necessary as a result of the Department's compliance with the Board's discovery ruling. In this latter regard, Judge Echeverria stated:

> "... [Appellants'] Offer of Proof fails to establish the actual existence of any new and relevant evidence to support its request for further proceedings. Additionally, the record clearly shows that [appellants'] attorneys also represented the only other licensee whose licensed premises sold to the decoy in the instant case during the same work shift, and that the [appellants'] attorneys had knowledge of the other licensee as well as the identity of the other seller prior to the actual hearing in the instant matter.[2] Therefore, the [appellants'] attorneys knew the identity of the only other seller during the same work shift and they could have produced the other seller at the hearing of October 1, 1998 if they felt that the testimony of the other seller was relevant and important in the instant case. In light of the facts stated above, the [appellants] have failed to establish that new evidence exists at the present time and there is no new evidence for the Administrative Law Judge to consider. Furthermore, at the time of the initial hearing in the instant matter, the [appellants] knew the identity of the only other seller of alcoholic beverages to the same decoy during the same work shift, and they had an opportunity to conduct a full and fair cross-examination of both the decoy and the police officer."

> "[2] The Department's reply brief dated July 17, 2001 accurately points out that the [appellants'] attorney submitted a Notice of Defense in the 7-Eleven/Atwal case on November 19, 1997, and that both the instant matter and the 7-Eleven/Atwal case were tried by [appellants'] counsel on the same date and before the same Administrative Law Judge. The 7-Eleven Atwal case (AB-7023a)

was also appealed and is presently pending before this Administrative Law Judge."[3]

Appellants have filed a timely appeal, and now contend that they were improperly denied the opportunity to present newly-discovered evidence and conduct further cross-examination of the minor decoy and police officers based upon information derived as a result of discovery.

DISCUSSION

Appellants contend that the Department erred both in requiring the submission by appellants of an offer of proof of the newly-discovered evidence derived as a result of the discovery ordered by the Appeals Board, and by concluding that the offer of proof submitted by appellants was so deficient as not to warrant any further hearing.

Appellants did not object to the procedure the Department used until it raised it as an issue on appeal. The Department contends that appellants' failure to object should be deemed a waiver of the issue. We see no need to address the issue concerning the procedure adopted by the Department because, as the Administrative Law Judge found, appellants, through their attorneys, possessed at the time of the initial hearing the very information that was ultimately disclosed to them through the discovery provided following the Appeals Board ruling.

The decoy in this matter was able to purchase an alcoholic beverage at only one other premises on the night in question: the 7-Eleven store located at 295 West Central Avenue, Brea, CA. Although not noted in the record, we take official notice of the record in connection with the proceeding on the accusation against that 7-Eleven store, which had an appeal before this Board - 7-Eleven, Inc./Atwal, File No. 329169, Reg.

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[3] The 7-Eleven/Atwal case is presently pending before the Appeals Board and raises the same issues as the present appeal.

No. 97 041572 - which was remanded to the Department for such further proceedings as might be necessary with respect to the same discovery issue as in appellant's case. 7-Eleven also has a currently pending appeal before this Board in that case. Appellants' counsel represented 7-Eleven with regard to the accusation filed against it in that case, filing a Notice of Defense on November 20, 1997. The hearing in the present matter took place on October 1, 1998.

Obviously, appellants' counsel was in possession of knowledge they purported to lack, but called no witness nor offered any evidence from that matter during the hearing on appellants' accusation. Appellants are not entitled to a second bite at the apple.

The general rule of agency, that notice to or knowledge possessed by an agent is imputable to the principal, applies for certain purposes in the relation of attorney and client. (*Freeman* v. *Superior Court* (1955) 44Cal.2d 533 [282 P.2d 857, 860].) As explained in 2 Witkin, Summary of California Law, §101, pp. 98-99 (9th ed. 1987):

> "The test of imputed notice is whether the facts *concern the subject matter* of the agency and are *within its scope*. Generally speaking, notice is imputed to the principal of any facts relating to the subject matter of the agency of which the agent acquires knowledge or notice while acting as such within the scope of his authority. It is not enough that the facts concern the business of the principal; they must be so related to the subject of the agency as to bring them within the duties of the agent." (Emphasis in original.)

We think that the knowledge acquired by the Solomon, Saltsman & Jamieson law firm in the course of its representation of both of the licensees who were sellers to the decoy in question is imputable under the rule as stated above. Evidence that the Solomon, Saltsman & Jamieson law firm represented the other licensee, received a copy of the accusation which identified the other licensee, the clerk, and the decoy, and filed a notice of defense, would warrant the imputation of such knowledge. Thus, if, as has been shown, the Solomon, Saltsman & Jamieson law firm was aware at the time of

the initial hearing of the identity of any other clerk or clerks who sold to the decoy in question, it cannot be said that appellant was prejudiced by not being provided such information through discovery. Appellant was, as a result of knowledge possessed by its attorneys, in a position to conduct a full cross-examination at the original hearing.

ORDER

The decision of the Department is affirmed.[4]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[4] This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.