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

AB-8009
File: 48-311232 Reg: 01051293

MAMDOUH ADLY SALIMAN dba McRed's Lounge
13235 Victory Boulevard, Van Nuys, CA 91401,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: None

Appeals Board Hearing: December 3, 2002
Los Angeles, CA

ISSUED FEBRUARY 5, 2003

Mamdouh Adly Saliman, doing business as McRed's Lounge (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended his license for 25 days, 10 days thereof conditionally stayed subject to one year of discipline-free operation, for having permitted a minor to enter and remain in the premises without lawful business therein, for having permitted the consumption of alcoholic beverages outside the edifice of the premises, and for holding and offering for sale contaminated distilled spirits, in violation of Business and Professions Code sections 25665 and 25612.5, subdivision (c)(3); Penal Code section 347b; and Health and Safety Code sections 110545, 110560, and 110620.

Appearances on appeal include appellant Mamdouh Adly Saliman, appearing through his counsel, Barry J. Post, and the Department of Alcoholic Beverage Control,

[1]The decision of the Department, dated August 12, 2002, is set forth in the appendix.

appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on July 22, 1996. Thereafter, the Department instituted an accusation against appellant charging various violations of the Alcoholic Beverage Control Act.

On August 12, 2002, the Department, acting through its Chief Counsel, Matthew D. Botting, entered an order by default, pursuant to Government Code section 11520, sustaining each of the charges of the accusation. Section 11520 provides, in part:

> If the respondent either fails to file a notice of defense or to appear at the hearing, the agency may take action based upon the respondent's express admissions, or upon other evidence and affidavits may be used as evidence without any notice to respondent; and where the burden of proof is on the respondent to establish that the respondent is entitled to the agency action sought, the agency may act without taking evidence.

Appellant has filed a timely notice of appeal, supported by declarations of Stanley H. Rozanski and Barry J. Post, appellants' counsel, in which it is contended that, contrary to understandings reached between counsel for appellant and representatives of the Department, appellant was not given sufficient notice of the Department's intention to go forward with the administrative proceeding, and, as a consequence, was deprived of the opportunity to defend against the charges of the accusation. Rozanski claims that in a discussion with Timothy A. Clark (the District Administrator for the Department) and Timothy McGonigle (a paralegal employed by the Department), Clark and McGonigle "agreed, among other things, to stay the administrative matter pending completion of the related criminal case." Rozanski further claims that, in a conversation with Department Attorney Jonathon Logan on

August 29, 2001,[2] to discuss a Department discovery request, and in a conversation with Clark and McGonigle, the Department's representatives reaffirmed that the administrative matter would be stayed, and notice would be given once the Department decided to proceed. Rozanski states that no further communications took place between himself and the Department about the administrative matter.

Rozanski's associate, Barry Post, states in a declaration that he spoke to Clark, McGonigle, and other unidentified Department personnel, all of whom confirmed the agreement to stay the administrative matter. He further states that he visited the Department's Van Nuys office on or about November 29, 2001, to examine bottles of alcohol which had been confiscated from appellant's premises, and that during a telephone conversation with McGonigle arranging for the visit, he confirmed the agreement to stay the proceeding.

The Department disputes the assertions in the Rozanski and Post declarations. A declaration of Matthew G. Ainley asserts that he personally informed Rozanski in mid-November 2001, that the Department intended to seek a default if a notice of defense was not filed. Additionally, declarations of District Administrator Clark and paralegal McGonigle deny they entered into any agreement to stay prosecution of the accusation. Although the Department's brief states that Logan does not recall any conversation with Rozanski, Logan has not filed a declaration.

Regrettably, none of the declarations are accompanied by any memorandum, time sheet or other contemporaneous document which would tend to corroborate the claims of the various conversations the declarants describe. The Board is left with the

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[2] This is the date contained in appellant's brief. In Rozanski's declaration, the date is given as August 28, 2001.

unenviable and difficult task of resolving the dispute with only the competing declarations to guide it.

The failure of a respondent to file a notice of defense when served with an accusation constitutes a waiver of respondent's right to a hearing. (Gov. Code §11506, subd. (c).) Although the Department has discretion to grant a hearing where there has been such a waiver, it did not do so here.

A licensee against whom a default decision has been entered may, within seven days after service of that decision, by written motion, request that the decision be vacated. (Gov. Code §11520, subd. (c).) The grounds for such a motion may include, but are not limited to, failure to receive notice of the accusation, or mistake, inadvertence, surprise, or excusable neglect. Appellant did not file such a motion.

Section 11520, subdivision (c), is permissive in form, indicating to us that a party who bypasses that option in favor of an immediate appeal should not be said to have waived its objection to what it claimed was an abuse of discretion in the entry of the default order. Hence, we will consider appellant's appeal on its merits.

As the proponent of the contention that there was an agreement to stay proceedings on the accusation, the burden is on appellant. By the same token, it is appellant's burden to show the default should not have been entered. Obviously, if appellant is able to satisfy the Board that there was an agreement to stay the proceedings on the accusation, he will have met both burdens.

One problem we have with appellant's position, aside from the absence of any documentary support for the contentions in the declarations filed by his attorneys, is that, if, as contended, there was an agreement to stay proceedings on the accusation, why was discovery being conducted, as the Rozanski, Post, Ainley and McGonigle

declarations all seem to indicate was the case.

Even if there had been an agreement between Rozanski and Logan, Clark, and McGonigle, it would have been repudiated by Ainley's warning of the consequences if a notice of defense was not forthcoming. We think it of some significance that, while there is a reference to Ainley in Rozanski's handwritten notes (on Exhibit C to appellant's opening brief), Rozanski does not refer to Ainley either in his declaration or in the brief.

All things considered, we must conclude that appellant has failed to establish by a preponderance of the evidence that there was an agreement to stay prosecution of the charges of the accusation. The Department did not abuse its discretion in entering the default order.

ORDER

The decision of the Department is affirmed.[3]

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

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[3] 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.