

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

AB-8014

File: 47-369460 Reg: 02052476

SERRANO INVESTMENT, INC., dba Mosun
680 South Coast Highway, Laguna Beach, CA 92651,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: December 2, 2003
Los Angeles, CA

ISSUED JANUARY 21, 2004

Serrano Investment, Inc., doing business as Mosun (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 25 days, with 10 of those days conditionally stayed for one year for violations of three conditions on its license, violations of Business and Professions Code sections 24200, subdivisions (a) and (b), and 23804.

Appearances on appeal include appellant Serrano Investment, Inc., appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

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

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on October 30, 2000. Thereafter, the Department instituted an accusation containing seven sub-counts against appellant charging that appellant, through its agents or employees, had violated three of the conditions on its license on various dates in 2001. The three conditions alleged to be violated are:

01. Sales, service and consumption of alcoholic beverages shall be permitted only between the hours of Sunday to Thursday from 10:00 a.m. and 11:00 p.m., and Friday and Saturday from 10:00 a.m. to 1:00 a.m. of the following day.

05. Entertainment provided shall not be audible beyond the area under the control of the licensee(s) as defined on the ABC-257 dated 8-28-00 and ABC-253 dated 8-28-00.

11. The rear and side doors shall be kept closed at all times during the operation of the premises except in cases of emergency.

(Exhibit 2 – Petition for Conditional License.)

An administrative hearing was held on June 5, 2002, at which time documentary evidence was received and testimony concerning the violation charged was presented by Department investigators Truc Vo and Naureen Zaidi, supervising investigator Rick Ryan, two Laguna Beach police officers, and the general manager of appellant's premises, Hansen Kamci.

Subsequent to the hearing, the Department issued its decision which determined that the violations had been established.

Appellant has filed an appeal raising the following issues: 1) Condition 1 was rendered unenforceable by a miscommunication by the Department; 2) substantial evidence does not support the finding that condition 5 was violated; and 3) condition 11 is unintelligible and, therefore, unenforceable.

DISCUSSION

I

On August 13, 2001, the Department's local district administrator sent appellant a letter notifying it of possible condition violations. The pertinent part of the letter stated: "Since January 26, 2001, Department investigators have been allowed to consume alcoholic beverages after 1:00am [sic] on Fridays."

Appellant's general manager, Hansen Kamci, sent a letter in reply, stating:

As for the consumption of alcoholic beverages after 1:00am [sic], a memo has been circulated to all bar staff informing them that last call is at 12:50 and absolutely no alcohol is to be served after 1:00am [sic], no exceptions. These policies will be strongly enforced, and closely monitored in compliance with licensing conditions.

Supervising investigator Ryan testified that he became concerned after receiving the letter that Kamci might not be clear as to the conditions on the license. He telephoned Kamci and left a message on Kamci's answering machine detailing the hours after which alcohol was not allowed to be served. Kamci returned Ryan's call, and they discussed the conditions related to hours and noise. Kamci told Ryan that he had a copy of the license conditions, and Ryan was under the impression that Kamci understood the conditions.

Kamci testified that he has been the general manager of the premises since it opened, but that he was not aware of the conditions on the license before he received the Department's August 13 letter.

Appellant contends that the letter and telephone calls from Ryan "infused a level of confusion into the condition that now renders the present enforcement of the condition completely unfair." Appellant argues that the 1:00 a.m. cut-off time mentioned in the Department's letter and the telephone conversation with Ryan led Kamci to

believe that the cut-off time was 1:00 a.m. every day of the week, not just on Fridays and Saturdays. These circumstances, appellant argues, made the condition ambiguous and, therefore, unenforceable.

The ALJ found, with respect to Kamci's testimony (Finding D):

Respondent's general manager, Hansen Kamci, testified that he has been the general manager at the premises since it opened, that he is responsible for the entire operation at the premises, that he received the Department's letter dated August 13, 2001, that he wrote the letter dated August 22, 2001 and that he spoke to Investigator Ryan on August 29, 2001. Kamci's testimony that he was not aware of the conditions on the premises [sic] license prior to receiving the Department's letter of August 13, 2001 is found not to be credible. It is difficult to believe that the person who is responsible for the entire operation at the premises would not be aware of the conditions on the premises license especially since Kamci advised Investigator Ryan that he had a copy of the conditions and that he would comply with them. If Kamci did have a copy of the conditions as he told Ryan, it certainly would have made sense for him to review them, and if he did not have a copy of the conditions, it certainly would have made sense for him to request a copy from the Department.

The ALJ did not believe that Kamci was ignorant of the existence of the conditions, and we see no reason to disagree with him. Conditions are to be "endorsed upon the license" (Bus. & Prof. Code, § 23802) and the licensee must post the license "in a conspicuous place upon the licensed premises." (Bus. & Prof. Code, § 24046.) Even if somehow Kamci was not informed about the conditions by the corporation's owners, it is hard to believe that he never encountered the posted license during the two years from the date the premises opened to his receipt of the Department's letter.

Appellant does not contend that the condition itself is ambiguous: "The terms of the condition itself seem straightforward by allowing sales, service and consumption of alcoholic beverages on Sunday through Thursday from 10:00 a.m. through 11:00 p.m. and on Friday and Saturday from 10:00 a.m. to 1:00 a.m. of the following day." (App.Br. at p. 6.) If Kamci had a copy of the conditions, and condition 1 is not ambiguous, there is no excuse for the lack of compliance with the condition.

Even if Kamci was not aware of the conditions on the license, appellant cannot prevail. The law demands that a licensee use substantial efforts to maintain a lawfully-conducted business. (*Givens v. Dept. of Alcoholic Beverage Control* (1959) 176 Cal.App.2d 529 [1 Cal.Rptr. 446, 450].) Just as ignorance of the law is not ordinarily a defense to a violation of law, ignorance of the conditions on the license should not be a defense to violating the conditions, particularly where the person pleading ignorance is ostensibly the person who "runs the operation." "Although an honest mistake of law is a valid ground for relief where a problem is complex and debatable, ignorance of the law coupled with negligence in ascertaining it will certainly sustain a finding denying relief. [Citations.]" (*A & S Air Conditioning v. John J. Moore Co.* (1960) 184 Cal.App.2d 617, 620 [7 Cal.Rptr. 592].) If Kamci was confused about the conditions after talking to investigator Ryan, he was negligent in not seeking clarification.

Whether or not Kamci knew of the conditions, the shareholder, officer, or agent of appellant who signed the petition for conditional license is assumed to know what the conditions are, and that person, as agent of the corporation, is responsible for seeing that the employees comply with the conditions. There was no allegation that the person signing the petition for conditional license was confused.

Appellant also contends that the time of the sale of beer in count 1, subcount G, is not clearly established by the evidence. The investigator testified first that the sale was made about 11:00 p.m., but later said it was about 11:15 p.m.

Appellant's contention that the time of the sale in subcount G was not clearly established is wrong. Exhibit 5, the receipt for the beer investigator Zaidi purchased on November 8, 2001, clearly shows that the time was 11:24 p.m.

II

Appellant contends that substantial evidence did not support findings of violations of condition 5 because no evidence was presented of any entertainment or music being provided by the premises at the times alleged and there were residences in the area that could have produced the sound noted by the investigator. Appellant asserts that the Department has the burden of proving every element of the allegations in the accusation, including the source of the sound.

Investigator Vo testified, and the ALJ found, that the music and the booming noise were coming from appellant's premises. His testimony is substantial evidence of the premises as the source of the noise. If the noise was coming from elsewhere, it was appellant's burden to present evidence to refute the investigator's testimony. Appellant did not do so.

III

Condition 11 provides that the back and side doors of the premises shall be closed at all times the premises is operating, except in the event of an emergency. Appellant contends this condition is unenforceable because it is "unintelligible." Appellant argues that the Department did not provide, and does not have, a definition of an "emergency," and "the depth and breadth of what may constitute an emergency renders use of that word not just impractical, but unenforceable." (App. Br. at p. 9.)

Appellant bases its contention that the Department does not know what an emergency is on the testimony of investigator Zaidi, which, appellant asserts was "that she did not know or understand what might constitute an emergency." However, the investigator actually testified that she had been trained how to react to an emergency, but she had not been given "a list of what constitutes an emergency." [RT 58.] Even if

Zaidi had testified as asserted by appellant, she could not be held to represent the Department's "knowledge" of what an emergency is.

Appellant admits in its brief that "emergency" is a word "of standard everyday use." As such, its meaning is readily ascertainable. "Emergency" is defined as "A serious situation or occurrence that happens unexpectedly and demands immediate action"; "A condition of urgent need for action or assistance" (The American Heritage Dict. (4th ed. 2000)); or "An unforeseen occurrence or combination of circumstances which calls for immediate action or remedy; pressing necessity; exigency" (Webster's Revised Unabridged Dict. (1998)). While more than one situation may qualify as an emergency, the category of situations is limited enough to make the term intelligible.

Zaidi testified that she saw no kind of emergency situation and that no one was in the vicinity of the open door at the time. This is substantial evidence of the lack of an emergency. Appellant presented no evidence to show that there was an emergency, so we can only conclude that Zaidi's testimony was accurate.

ORDER

The decision of the Department is affirmed.²

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

²This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

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