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

AB-9208
File: 42-384531 Reg: 10073856

JOSE MARTIN and SHERRIE MARTIN, dba Las Copas Bar
5190 Etiwanda Avenue, Mira Loma, CA 91752,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: none

Appeals Board Hearing: December 6, 2012
Los Angeles, CA

ISSUED JANUARY 16, 2013

Jose Martin and Sherrie Martin, doing business as Las Copas Bar (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their license for their having permitted drink solicitation activity in violation of Business and Professions Code section 24200.5, subdivision (b), and Business and Professions Code section 25657, subdivisions (a) and (b); and for permitting an employee to solicit and accept a drink for her consumption, in violation of Department rule 143.[2]

Appearances on appeal include appellants Jose Martin and Sherrie Martin,

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[1]The decision of the Department, dated November 16, 2011, is set forth in the appendix.

[2]Cal. Code Regs., tit. 4, §143.

appearing through their counsel, Ralph Barat Saltsman and Autumn M. Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale beer and wine public premises license was issued on May 6, 2002. On November 18, 2010, the Department instituted a 55-count accusation, charging that appellants permitted drink solicitation activity in violation of Business and Professions Code section 24200.5, subdivision (b), and Business and Professions Code section 25657, subdivisions (a) and (b); and that appellants permitted an employee to solicit and accept a drink for her consumption, in violation of Department rule 143.

According to the Department's records, the Accusation, a Notice of Defense, a Statement re: Discovery, and the Department's Request for Discovery, were served on appellants on March 17, 2011. Nothing having been filed, the Department mailed a warning letter to appellants on September 27, 2011, stating that a Default Judgment would be entered if a response was not received within 20 days. Appellants did not file a Notice of Defense, and the Department issued its Decision Following Default, revoking appellants' license, on November 16, 2011.

Appellants have filed a timely appeal alleging that the Accusation was not properly served.[3]

[3]Appellants' closing brief raised issues not included in their opening brief. These issues are addressed in part II of this summary.

DISCUSSION

I

Appellants contend in their Opening Brief that the Department failed to ensure proper service of the Accusation, in violation of California Government Code section 11505, and that this constitutes good cause to vacate the Default Judgment. Appellants maintain they were never served, and never received the Accusation or other documents purportedly sent by the Department, until after the Default Judgment was entered against their license.

Government Code section 11505 states in pertinent part:

> (a) Upon the filing of the accusation the agency shall serve a copy thereof on the respondent as provided in subdivision (c). . . .

Subdivision (c) provides:

> (c) The accusation and all accompanying information may be sent to the respondent by any means selected by the agency. But no order adversely affecting the rights of the respondent shall be made by the agency in any case unless the respondent shall have been served personally or by registered mail as provided herein, or shall have filed a notice of defense or otherwise appeared. Service may be proved in the manner authorized in civil actions. Service by registered mail shall be effective if a statute or agency rule requires the respondent to file the respondent's address with the agency and to notify the agency of any change, and if a registered letter containing the accusation and accompanying material is mailed, addressed to the respondent at the latest address on file with the agency.

Appellants maintain that section 11505 was violated because appellants did not receive the Accusation personally or by registered mail. Appellants assert that they were denied their right to a hearing by this failure of adequate notice.

California Code of Regulations section 145[4] specifies:

For the purpose of subdivision (c) of Section 11505 of the Government

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[4]Cal. Code Regs., tit. 4, §145.

> Code, notices which are required to be served by registered mail may be served by certified mail pursuant to Section 8311[5] of the Government Code, and shall be mailed to the licensee at the premises for which his license is issued. Any licensee who desires to have such notices mailed to him at an address other than his licensed premises shall file with the department a specific request for that purpose, and in such case notices shall be sent to the licensee at such address. Such licensee shall notify the department of a change in address, and specifically request the department to mail notices to the changed address.

In *Miller Family Home, Inc. v. Department of Social Services* (1997) 57 Cal.App.4th 488, 492 [67 Cal.Rptr.2d 171] the court said: "Certified mail is equivalent to registered mail for purposes of Government Code section 11505, subdivision (c). (Gov. Code, §8311.)" The court goes on to say:

> In *Evans v. Department of Motor Vehicles* (1994) 21 Cal.App.4th 958 [26 Cal.Rptr.2d 460], we held that this statutory scheme for serving notice of an agency's disciplinary action by certified mail at the licensee's latest address on file with the agency satisfies due process because it was reasonably calculated to provide the licensee with notice of the disciplinary proceeding. (*Id*. at pp. 963, 970.) ***Actual notice is not required***. (*Id*. at p. 971; accord, *Baughman v. Medical Board* (1995) 40 Cal.App.4th 398, 402 [46 Cal.Rptr.2d 498].) [Emphasis added.]

According to the Department, in 2005, the licensees requested that the ABC change their mailing address from 535 E. Hoover Ave., Orange, CA to P.O. Box 68, Mira Loma, CA. (Dept.Br. at p.4.) A Declaration attached to the Department's Brief confirms this change of address form in the licensees' file, as well as a renewal notice dated April 16, 2010, confirming this same post office box mailing address. The Accusation was also sent by certified mail to this post office box.

Appellants contend that service was improper because they did not receive

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[5]California Government Code section 8311 provides: "Whenever any notice or other communication is required by any law to be mailed by registered mail to or by the state, or any officer or agency thereof, the mailing of such notice or other communication by certified mail shall be deemed to be sufficient compliance with the requirements of such law."

actual notice, but this appears to be a direct result of their failure to pick up their certified mail in a timely fashion. Appellants did receive a copy of the Default Judgment mailed to this same address, confirming that the Department utilized the correct address. As the court stated in *Evans, supra,* actual notice is not a requirement for proper service. Appellants cannot create a defense by failing to pick up a legal notice sent to them in accordance with Government Code section 11505 and Department rule 145.

II

In Appellants' Closing Brief, they argue a number of additional theories, not previously raised in their Opening Brief, in support of their appeal to either reverse or remand the Department's decision. Appellants have presented no justification for failing to raise these arguments in their Opening Brief.

The court in *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 763-766 [60 Cal.Rptr.2d 770], when presented with a reply brief raising new issues, rejected that appellant's attempt:

> We refuse to consider the new issues raised by defendant in his reply brief. "Points raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument." (*American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453 [13 Cal.Rptr.2d 432].) "Obvious reasons of fairness militate against consideration of an issue raised initially in the reply brief of an appellant." (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 295, fn. 11 [142 Cal.Rptr. 429, 572 P.2d 43].) " 'Obvious considerations of fairness in argument demand that the appellant present all of his points in the opening brief. To withhold a point until the closing brief would deprive the respondent of his opportunity to answer it or require the effort and delay of an additional brief by permission. Hence the rule is that points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before.' " (*Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8 [265 Cal.Rptr. 788].)

The only issue raised and discussed in appellants' Opening Brief was that they had not been properly served with the accusation. The Department's Response Brief addressed that issue. In so doing, it attached declarations and documentation showing that its efforts to serve the accusation package relied on the most current mailing address supplied by appellants. (See Declarations of Michelle Arroyo dated June 25, 2012; Michele Andreotti dated June 26, 2012 and October 6, 2012; Judy Carlton dated July 2, 2012; and declaration of David Sakamoto dated August 12, 2012.)

Appellants' Closing Brief attacks the procedures followed by the Department in conducting and documenting default proceedings, claiming the Department did not comply with statutory procedures designed to provide due process in a default.[6] Appellants argue, in substance, that they were entitled to all the trappings of an adjudicatory hearing at which witnesses could be called and cross-examined on the reasons for the default.

Nowhere do appellants claim that the mailing address used by the Department was not the official address they supplied to the Department. Every argument they make in their Closing Brief is one they forfeited by failing to claim the accusation package, sent by certified mail on March 17, 2011 to an address supplied and confirmed by appellants themselves, as well as by ignoring the default warning letter sent September 27, 2011 -- again by certified mail to both the official address of record and to the premises directly. Ultimately, when the Decision Following Default arrived by certified mail at the same address of record appellants provided to the Department, appellants acknowledged its receipt. (See Declaration of Jose Martin, Exhibit 1 to

[6]Our review of the various statutes and regulations cited by appellants found none directed at the conduct of default proceedings.

appellants' Opening Brief.)

This Board is not so naive as to think that it did not occur to appellants, knowing that a certified mailing from the Department (the initial accusation package) could only be bad news, to contrive a scheme to postpone that bad news as long as possible, which, up until now, they have succeeding in doing.

If there ever was any validity to appellants' claim, there was a remedy by which it could have been tested. Government Code section 11520, subdivision (c), provides:

> Within seven days after service on the respondent of a decision based on the respondent's default, the respondent may serve a written motion requesting that the decision be vacated and stating the grounds relied on. The agency in its discretion may vacate the decision and grant a hearing on a showing of good cause. As used in this subdivision, good cause includes, but is not limited to, any of the following:
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> (1) Failure of the person to receive notice pursuant to Section 11505.
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> (2) Mistake, inadvertence, surprise, or excusable neglect.

Had such a motion been filed, the sham nature of appellants' claims could have been exposed in short order.

> It has long been the law in this state that "where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy be exhausted before the courts will act." [Citations.] . . . Exhaustion of administrative remedies is a jurisdictional prerequisite to judicial review of an administrative decision "even though the administrative remedy is couched in permissive language." [Citations.]

(*Marquez v. Gourley* (2002) 102 Cal.App.4th 710, 713-714 [125 Cal.Rptr.2d 784].) No motion was filed. Instead, appellants chose to appeal, thereby gaining further delay by virtue of the automatic stay accompanying the appeal.

For all these reasons, we are fully satisfied that this appeal lacks merit, and

borders on the frivolous.[7]

ORDER

The decision of the Department is affirmed.[8]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[7]We are unpersuaded by counsel's argument that the default order was the product of a legal secretary. However, we do believe the Department would do well to reconsider their procedure for issuing Decisions Following Default. Having such default judgments signed by the general counsel would certainly seem to this Board to be a preferable procedure to having them signed by non-attorney personnel. This would avoid the potential appearance of legal decisions being made by support staff.

[8]This 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.