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

AB-9006
File: 47-212187 Reg: 07067395

BIG BILLY INC., dba Slim's
333 11th Street, San Francisco, CA 94103-4313,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: April 1, 2010
San Francisco, CA
ISSUED JULY 20, 2010

Big Billy Inc., doing business as Slim's (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 25 days, 15 of which were conditionally stayed, subject to one year of discipline-free operation, for having violated a condition on its license prohibiting entertainment audible beyond the area under the control of the licensee, a violation of Business and Professions Code section 23804.

Appearances on appeal include appellant Big Billy Inc., appearing through its counsel, Susan J. Harriman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general bona fide public eating place license was issued in

[1]The decision of the Department, dated March 3, 2009, is set forth in the appendix.

2006.[2] On December 6, 2007, the Department filed an accusation against appellant charging, in each of three counts, that on a specific date in 2007, appellant violated a condition placed on its license requiring that "entertainment provided shall not be audible beyond the area under the control of the licensee," a violation of Business and Professions Code section 23804.

An administrative hearing was held on September 11 and 12, 2007, at which time oral and documentary evidence was received. The Department presented the testimony of two San Francisco police officers, one employee of the Department of Public Health, and one nearby resident. Appellant presented the testimony of its general manager, its operations manager, an inspector from the San Francisco Entertainment Commission, a code enforcement planner from the San Francisco Planning Department, and one nearby resident.

The evidence established that, with respect to two of the dates in question, police responded to complaints from Jodi Watson and Kirby Watson, residents at 45 Juniper Street, approximately one city block from appellant's establishment. The third date in question involved a visit to the Juniper Street address by an environmental health specialist employed by the Department of Public Health.

Appellant operates a restaurant and nightclub on 11th Street in the South of Market Entertainment District (SOMA). According to the testimony of Dawn Holliday, appellant's general manager, there are several other clubs which offer amplified music located directly across the street or down the block from appellant.

Subsequent to the hearing, the Department issued its decision which determined

[2] Appellant has been licensed in this location since 1988.

that the violations had been established, and ordered the suspension from which this timely appeal has been taken.

Appellant raises two issues: (1) the findings are not supported by substantial evidence, and (2) the condition is unconstitutionally vague as applied. Appellant contends that none of the Department witnesses was able to establish with any degree of certainty that the entertainment audible at 45 Juniper Street emanated from appellant's nightclub, rather than from one of the other clubs in close proximity to appellant. Appellant further contends that the condition is unconstitutionally vague, and infringes on appellant's First Amendment rights. (See Part II, *infra*.)

DISCUSSION

I

Appellant contends that the Department's decision is not supported by substantial evidence. "Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456] and *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

When findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].) Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (*Brookhouser v. State of California* (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].)

"[T]he focus is on the quality, not the quantity of the evidence. Very little solid evidence may be 'substantial,' while a lot of extremely weak evidence might be 'insubstantial.'" (*Toyota Motor Sales U.S.A., Inc.* v. *Superior Court*, *supra*.) Of course, "[t]rial court findings must be supported by substantial evidence *on the record taken as a whole*. Substantial evidence is not [literally] *any* evidence--it must be reasonable in nature, credible, and of solid value." (*Hill* v. *National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 51 [26 Cal.Rptr.2d 834, 865 P.2d 633], italics [and bracketed insertion] added.)

In reviewing a decision to determine whether it is supported by substantial evidence, the Appeals Board "may not confine [its] consideration to isolated bits of evidence, but must view the whole record in a light most favorable to the judgment, resolving all evidentiary conflicts and drawing all reasonable inferences in favor of the decision of the [Department]. [Citation.] . . . [W]e must accept any reasonable interpretation of the evidence which supports the [Department's] decision." (*Beck Development Co., Inc. v. Southern Pacific Transportation Company* (1996) 44 Cal.App.4th 1160, 1203 [52 Cal.Rptr.2d 518].)

The Department's case rests on the testimony of three witnesses, each of whom testified with respect to one of the three incidents charged in the accusation.

The Department's first witness, San Francisco Police Officer Adam Street, testified that on April 27, 2007, he responded to a noise complaint from Kirby Watson, one of the residents at 45 Juniper Street. In a written report (Exhibit 4) he prepared near the time of his investigation, Officer Street stated that Watson said he had called the police numerous times, as well as the Entertainment Commission and the ABC, and noise from appellant's club still continued. Officer Street wrote that while he was talking

to the resident in front of his house, "I could hear a very loud audible bass noise coming from the back of Slim's." He wrote further that he advised the staff at Slim's of the complaint, and notified them of the possibility of being cited if the noise continued.

In his direct testimony, Officer Street said that, while standing in front of the residence, he could hear a low bass noise, from music, and could see a few puddles vibrating and windows moving. He went to Slim's and spoke to the manager, "and it was the same music that was coming out the front door."

On cross-examination, Officer Street described the low bass as "fairly easy to hear," and the music as hip-hop or possibly reggae. On re-direct examination, he acknowledged that he did not check to see if any of the other clubs were open, and he assumed Slim's had lowered the volume of the music since he got no return call. On further cross-examination, Officer Street testified he was familiar with all the clubs in the area, and at times had heard noise coming from Butter, an establishment at 354 11th Street, across the street from Slim's, from Fat City, directly across the street from Slim's, and from Caliente, another establishment in the area.

In response to questions from Judge Lo, Officer Street estimated the distance from Slim's front door to 45 Juniper Street to be about a hundred yards.[3]

Michael Young, also a San Francisco police officer, testified about an incident on July 25, 2007. He responded to a complaint from a resident at 45 Juniper Street, and while there was able to hear what sounded like "either live music or a DJ playing alternative rock or some kind of rock music." He went to Slim's and spoke with the manager about the neighbor's request that the music be turned down. He believed she

[3] Based on all the testimony, Judge Lo found the distance to be 75 yards. (Finding of Fact II.)

did turn it down.

In his written report (Exhibit 6), Officer Young wrote that he spoke to two residents at 45 Juniper Street, Jeanmarie Guenot and Jodi Watson, both of whom complained about music from Slim's. Officer Young wrote that he could hear music from Slim's, and spoke to an employee of Slim's about it.

On cross-examination, Officer Young said he could not tell whether the music he heard was live music or music from a DJ. He was sure he drove past the other clubs in the area "many times" that night, and could not recall whether there was any amplified music coming from Butter or Loft 11, other clubs located nearby. In response to a question from Judge Lo, Officer Young said he was "satisfied" the music was from Slim's, because when he spoke with Slim's manager, he heard the same music coming from the front, and if not satisfied he would have searched further for its source.

Thomas Rivard, a Department of Health inspector in charge of the noise control program for the City of San Francisco, testified that while he was at 45 Juniper Street he could hear music that he could tell by listening was coming from Slim's. He acknowledged that he did not visit Slim's to confirm this. He described the music as a "rythmatic bass tone" from a guitar. He took readings using a sound meter, and none of them were in violation of San Francisco's noise ordinance.

Applying the standards discussed above, we are unable to agree with appellant that the Department's evidence is not substantial.

Appellant did not present evidence contradicting or impeaching the Department's witnesses. Instead, it offered the results of many noise measurements throughout the year in question which established that appellant's music did not exceed the noise limits of the San Francisco noise ordinance, and argues that only if the entertainment noise

emanating from Slim's exceeds the San Francisco noise limits can the condition be violated. In effect, this would permit the city's judgment of what noise levels are permissible to bind the Department in its licensing process, and eliminate the protection afforded nearby residents from bothersome noise. While appellant defends its First Amendment right to play music, the reality is that the bass levels of the music that reached nearby residents were little more than noise and vibration. (See Section II, *infra*.)

II

In light of our determination that the Department's evidence established that appellant's establishment was the source of the "audible entertainment", we find it necessary to address appellant's constitutional arguments set forth at length in its opening and closing briefs, and first touched on at the close of the administrative hearing. Appellant argues that the condition in question is unconstitutionally vague, invites arbitrary and inconsistent enforcement, and violates appellant's First Amendment rights by effectively banning all audible music unless it is applied using an objective standard of noise measurement.

The condition in question, "Entertainment provided shall not be audible beyond the area under control of the licensee," is found in many of the licenses issued by the Department, and is no stranger to this Board. (See, e.g., *Pittera* (1999) AB-7170; *Fahime, Martin, etc.* (1997) AB-6650; *Wichman* (1997) AB-6637.) The condition, as written, appears to be fairly straightforward. If entertainment noise reaches beyond the area under the control of the premises, the condition is violated. Appellant asserts that the Department is free to charge a condition violation even if the noise that "escapes" can be heard only a few feet beyond the area under control of the licensee, or barely

heard at all. But that is not this case.

In *Wichman*, *supra*, the licensees contended that the condition was ambiguous. The Board acknowledged that it could be abused, but held it had not been abused in that case. The Board's language is instructive:

> The arguments of appellants as to the arbitrariness of the conditions are unpersuasive. The condition clearly states the noise restriction. While penalizing noise heard a few feet from the premises could be arbitrary, music and lyrics heard from 100 to 150 feet from the premises is a clear violation of the condition.
> ...
> We are of the opinion that the condition is clear on its face and the enforcement one of extreme importance to the quiet enjoyment of the residents. Thus, appellants' contention that the condition is ambiguous and unreasonable is rejected.

The authority of the Department to impose conditions on a license is set forth in Business and Professions Code Section 23800, subdivision (a): "If grounds exist for the denial of an application...and if the department finds that those grounds may be removed by the imposition of those conditions..." the Department may grant the license subject to those conditions. Section 23801 states, further, that the conditions "...may cover any matter...which will protect the public welfare and morals...."

The petition for conditional license, which sets forth the condition in question, recites that a protest had been filed in 1988 (presumably against the initial license application) dealing with the proposed operation of the premises. Appellant's acceptance of the conditions set forth in the petition was in exchange for the immediate issuance of the license. Appellant could have litigated the question whether the condition was justified, but that would undoubtedly have delayed issuance of the license, regardless of outcome.

We are satisfied that the condition was violated and the Department's enforcement of the condition has not been arbitrary and has not denied appellant its

constitutional right to have live music. Bass sounds and vibrations that travel 200-300 feet and interfere with nearby residents' quiet enjoyment and ability to sleep do not warrant First Amendment protection.

The condition in question is content-neutral, written to serve a substantial public interest. Language in the decision of the United States Supreme Court in the First Amendment case of *Ward v. Rock Against Racism* (1989) 491 U.S. 781, 796 [109 S. Ct. 2746], a case involving restrictions on concerts in Central Park, is instructive:

> It can no longer be doubted that government "ha[s] a substantial interest in protecting its citizens against unwelcome noise." ... This interest is perhaps at its greatest when government seeks to protect "the well-being, tranquility, and privacy of the home," ... but it is by no means limited to that context, for the government may act to protect even such traditional public forums as city streets and parks from excessive noise. [Citations omitted.]

ORDER

The decision of the Department is affirmed.[4]

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, 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.