

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

AB-9420

File: 41-533014 Reg: 13079502

RUSTIC BAKERY, INC., dba Rustic Bakery
1407 Grant Avenue, Novato, CA 94945-3168,
Appellant/Applicant

v.

MICHELLE DERVISS,
Respondent/Protestant

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: July 10, 2014
San Francisco, CA

ISSUED AUGUST 1, 2014

Rustic Bakery, Inc., doing business as Rustic Bakery (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which denied its application for an on-sale beer and wine license.

Appearances on appeal include appellant Rustic Bakery, Inc., appearing through its counsel, Glenn D. Kabanuck, respondent/protestant Michelle Derviss, appearing in propria persona, and the Department of Alcoholic Beverage Control, appearing through its counsel, Sean Klein.

¹The decision of the Department, dated March 21, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant owns three bakery/cafes in Marin County, one of which is the subject of this appeal. The other two bakeries have on-sale beer and wine licenses issued by the Department of Alcoholic Beverage Control (ABC) in February, 2012 and August, 2013 respectively. Neither of these locations has any history of disciplinary action. Appellant applied for an on-sale beer and wine license for the third premises on May 8, 2013. Subsequently, on May 18, 2013, a protest was filed by Michelle Derviss, a nearby resident.

An administrative hearing was scheduled for February 27, 2014. The protestant and ABC attorney were present, but no one appeared on behalf of the applicant/appellant. The Department then issued its decision which determined that the burden of proof was on the applicant to establish that it was entitled to the license. Since no one appeared on behalf of the applicant, the burden of proof was not met and the matter was decided in favor of the protestant by default.

Appellant then filed a timely appeal asking this Board to remand the matter to the Department for an evidentiary hearing, arguing that its failure to appear at the administrative hearing was due to inadvertence.

DISCUSSION

Appellant contends the only reason it did not appear at the administrative hearing was because the owner, Carol LeValley, was unavoidably detained on the day of the hearing due to a malfunctioning oven at the Novato bakery. As a result, she inadvertently failed to appear on behalf of Rustic Bakery.

LeValley alleges that she meant to ask for reconsideration when she submitted her letter of March 24, 2014, but because she was a layperson, and not yet represented

by legal counsel, she used the word “appeal” rather than “reconsideration.” She also sent the letter to the Appeals Board rather than to the Department. Appellant requests that the matter be remanded to the Department for a hearing on the merits.

The ALJ made the following findings in his Determination of Issues:

¶ 1. In protest matters the burden of proof in establishing that they are entitled to the license that they seek is on the applicant. *Coffin v. Alcoholic Beverage Control Appeals Bd.* (2006) 139 Cal.App.4th 471 [43 Cal.Rptr.3d 420].

¶ 2. This is a unique situation, probably of first impression. In situations where the protestant fails to appear at the designated hearing the matter is disposed of pursuant to Business & Professions [Code] Section 24015(g).^[2] Fairness dictates that the same must also be true for the applicant, especially when the protestant, the Department attorney, the Department licensing representative, the court reporter and the administrative law judge all appear but the applicant does not.

¶ 3. The burden of proof is on the applicant, not the Department. The applicant failed to prove that it is entitled to the license it was seeking.

While the ALJ had no choice but to come to these conclusions in light of the applicant/appellant’s failure to appear, Code of Civil Procedure Section 473, subdivision (b) states: “The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. . . .” Appellant claims such relief is appropriate in this matter and we agree.

“A trial court has a wide discretion to grant relief under section 473 of the Code of Civil Procedure . . . unless discretion has been palpably and manifestly abused. The policy of the law is that controversies should be heard and disposed of on their merits. [Citations.]” (*Berman v. Klassman* (1971) 17 Cal.App.3d 900 [95 Cal.Rptr. 417].)

² “(g) If the person filing the request for a hearing fails to appear at the hearing, the protest shall be deemed withdrawn.”

“Since section 473, Code of Civil Procedure, allowing a motion to be relieved from a default, is a remedial measure to be liberally construed, any doubts existing as to the propriety of the trial court's action will be resolved in favor of a hearing on the merits. [Citations.]” (*Ibid.*)

Because the law strongly favors trial and disposition on the merits, any doubts in applying section 473 (relief from judgment taken by mistake, inadvertence, surprise, or excusable neglect), must be resolved in favor of the party seeking relief from default. (*Parage v. Couedel* (1997) 60 Cal.App.4th 1037 [70 Cal.Rptr.2d 671]; see also Code Civ. Proc. § 473.) However, if a party fails to show that a judgment has been taken against him or her through mistake, inadvertence, surprise, or excusable neglect, the court may not grant relief. It has no discretion.

In her Declaration, LeValley states under penalty of perjury that she missed the administrative hearing because of a malfunctioning oven at her Novato bakery location and that because it was such a critical piece of equipment, the problem had to be addressed without delay — thereby causing her inadvertent absence at the hearing. (See Declaration of Carol LeValley, May 7, 2014, at ¶ 7.)

Neither the Department nor the respondent/protestant address section 473, but both suggest the applicant failed to meet her burden at the administrative hearing, and therefore the ALJ made the correct decision to deny the license. We do not disagree on that point, but believe section 473 mandates relief in spite of the correctness of the decision at the time it was made.

We believe appellant has adequately satisfied the requirements of section 473, subdivision (b), of the Code of Civil Procedure. Since any doubts must be resolved in favor of appellant, and the law favors disposition on the merits, we believe an

evidentiary hearing must be held and the matter considered on the merits.

ORDER

This matter is remanded to the Department for an evidentiary hearing.³

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.