

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

AB-9818

File: 21-514285; Reg: 19088633

SBM VENTURE, INC.,
dba Moreno Valley Fastrip
23991 Sunnymead Boulevard
Moreno Valley, CA 92553-7717,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: n/a

Appeals Board Hearing: November 7, 2019
Los Angeles, CA

ISSUED NOVEMBER 19, 2019

Appearances: *Appellant:* Adam N. Koslin, of Solomon, Saltsman & Jamieson as
counsel for SBM Venture, Inc.,

Respondent: Joseph J. Scoleri, III, as counsel for the Department
of Alcoholic Beverage Control.

OPINION

SBM Venture, Inc., doing business as Moreno Valley Fastrip, appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending its license for 25 days because its clerk sold an alcoholic beverage to a minor, in violation of Business and Professions Code section 25658(a).

¹The Decision Following Default of the Department, dated May 15, 2019, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on July 11, 2012. Appellant has two prior records of disciplinary action, both involving violations of section 25658(a) (sale to a minor).

On March 18, 2019, the Department instituted a single-count accusation against appellant, charging that on January 8, 2019, appellant's clerk, Brandon Wayne McKinny, sold an alcoholic beverage to 17-year-old Arian O. (the decoy). Although not noted in the investigation, the decoy was working for the Department at the time.

The accusation was served on appellant by certified mail on March 18, 2019, along with the Notice of Defense, copies of Government Code sections 11507.5, 11507.6, and 11507.7, and the Department's Request for Discovery.² Pursuant to Government Code section 11506(a) and section 1013(a) of the Code of Civil Procedure, Appellant's Notice of Defense was due on or before April 7, 2019.

However, appellant did not submit a Notice of Defense until May 8, 2019, the same day it retained legal counsel. An employee for appellant's legal counsel noted that the Notice of Defense was late and asked the Department whether it was pursuing a default. An employee for the Department responded that a default was pending but was unsure of the case status.

The Department issued and served its Decision Following Default on May 15, 2019. Appellant did not request that the Department set aside the default. Instead,

² Appellant makes note that the accusation was sent to its corporate address rather than its business address. However, since appellant does not explain the significance of this distinction in its brief, the Board finds it irrelevant to the instant appeal.

appellant filed a timely appeal contending that the Board should set aside the default because: 1) the Department failed to notify appellant of its default; 2) appellant filed its Notice of Defense and Request for Discovery prior to entry of the Decision Following Default, and; 3) the Board should follow public policy favoring adjudication via hearing over default. The issues will be discussed together.

DISCUSSION

The Board's scope of review is limited; it may only review a Department's decision based upon "insufficiency of the evidence, excess of jurisdiction, errors of law, or abuse of discretion." (*Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 95, [84 Cal.Rptr. 113].)

Appellant contends the Department erred by issuing a Decision After Default because it: 1) failed to give appellant notice that it was in default, and; 2) issued its Decision after appellant filed a Notice of Defense. (AOB, at pp. 4-5.) However, appellant failed to cite any legal authority requiring the Department to either give notice of default or prohibit it from issuing a default once a notice of defense was filed.

Instead, appellant cites *Berman v. Klassman* (1971) 17 Cal.App.3d 900, 909 [95 Cal.Rptr. 417] for the broad proposition that "controversies should be heard and disposed of on their merits." While the Board generally agrees that controversies should be disposed of on the merits, this proposition is not dispositive. In fact, "the policy of disposing of litigation on the merits does not prevail unless the plaintiff makes some showing of excusable delay." (*Putnam v. Clague* (1992) 3 Cal.App.4th 542, 549 [5 Cal.Rptr.2d 25, 29].)

In harmony with both *Berman* and *Putnam*, Government Code section 11520(c) allows a recipient of a Decision Following Default to serve a written motion on the Department, requesting that the decision be vacated. The Department then has discretion to vacate the decision and grant a hearing — provided the respondent has demonstrated good cause. "Good cause" includes (but is not limited to): failure to receive notice, mistake, inadvertence, surprise, or excusable neglect. (See *Ray Kizer Constr. Co. v. Young* (1968) 257 Cal.App.2d 766, 65 [Cal.Rptr. 267] ["[A] default may not be set aside unless the moving party fulfills the burden of showing its entry through mistake, inadvertence, surprise, or excusable neglect."].)

Here, appellant never requested the Department to vacate the default decision, and thus, failed to make the requisite showing of good cause.³ As such, the Board cannot determine whether the Department erred in failing to set aside the default when appellant never asked it to. After appellant failed to file its Notice of Defense on or before April 7, 2019, the Department was authorized to issue a Decision after Default. (Gov. Code, § 11506(a); Code Civ. Proc., § 1013(a).) There is no requirement that the Department notify appellant of its default or rescind its default after appellant filed an untimely Notice of Defense. Further, the broad proposition that disputes should be adjudicated on the merits is not dispositive where appellant failed to make a showing of good cause to the Department. As such, the Department's decision must stand.

³ Similarly, appellant has failed to make a showing of good cause on appeal. Even if it had, it was required to first make a showing of good cause to the Department vis-à-vis a Motion to Vacate the Default to the Department, not to this Board.

ORDER

The decision of the Department is affirmed.⁴

SUSAN A. BONILLA, CHAIR
MEGAN McGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴ 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.

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.*

APPENDIX

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

RECEIVED

IN THE MATTER OF THE ACCUSATION
AGAINST:

MAY 16 2019

Alcoholic Beverage Control
Office of Legal Services

SBM VENTURE INC
DBA: MORENO VALLEY FASTRIP
PREMISES: 23991 SUNNYMEAD BLVD
MORENO VALLEY, CA 92553-7717

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}
} FILE: 21-514285
}
} REG: 19088633
}

**DECISION FOLLOWING
DEFAULT**

under the Alcoholic Beverage Control Act.

This proceeding is conducted pursuant to Government Code section 11520. An Accusation against the above-referenced Respondent-licensee was registered by the Department March 15, 2019.

According to Department records the Accusation, Notice of Defense, Statement re Discovery and Department's Request for Discovery were served on Respondent-licensee on March 18, 2019.

According to Department records, no timely Notice of Defense has been filed. Accordingly, it is hereby found that Respondent licensee is in default and the Department makes the following Findings of Fact, Conclusions of Law, and Order:

Exhibits:

1. A true and correct copy of the Accusation registered in this matter is identified and admitted into evidence as Exhibit 1. Official Notice is taken of the license history as outlined in said Accusation.
2. A true and correct copy of the Proof of Service of Notice of Defense, Accusation, Department's Request for Discovery and Statement re Discovery, establishing service on Respondent-licensee, is identified and admitted into evidence as Exhibit 2.
3. A true and correct copy of the Department form ABC-333, Report of Investigation, and related documents are identified and admitted into evidence as Exhibit 3.

Findings of Fact:

1. Pursuant to Exhibit 2 as well as Government Code section 11505 and Miller Family Home, Inc. v. Department of Social Services (1997) 57 Cal.App.4th 488, it is found that Respondent-licensee was properly served with the Accusation, Notice of Defense, Statement re Discovery and Department's Request for Discovery in this matter. No timely Notice of Defense has been received.

2. Pursuant to Exhibits 1 and 3 it is found that Respondent-licensee did violate the Alcoholic Beverage Control Act.

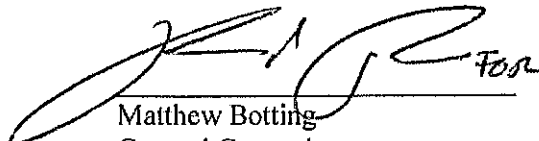
Conclusions of Law:

1. Pursuant to Finding 1 above, Respondent-licensee has defaulted in this matter and the Department is authorized pursuant to Government Code section 11520 to conduct this default proceeding.
2. Pursuant to Finding 2 above, Respondent-licensee did violate the Alcoholic Beverage Control Act as alleged in said Accusation.
3. That by reason of the foregoing Findings of Fact and Conclusions of Law, grounds for suspension or revocation of such license(s) exist and the continuance of such license(s) would be contrary to public welfare and morals, as set forth in Article XX, Section 22, State Constitution, and Section(s) 24200(a) and (b) of the Business and Professions Code.

Order:

WHEREFORE, it is hereby ordered that Respondent-licensee's license be, and hereby is, suspended for a period of **25** days. This decision is hereby adopted and is effective immediately. A representative of the Department will call on Respondent-licensee on or after MAY 27 2019 to pick up the license certificate.

Dated: 5/15/19


Matthew Botting
General Counsel

Should you have any questions regarding the penalty imposed herein contact your local Alcoholic Beverage Control office.

Any Motion to Vacate this default decision must be made in accordance with Government Code section 11520, subdiv. (c), which states:

(c) 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:

- (1) Failure of the person to receive notice served pursuant to Section 11505.
- (2) Mistake, inadvertence, surprise, or excusable neglect.

If you wish to file a Motion to Vacate this default decision, it must be directed to the General Counsel. In addition, any other parties in the matter, including the Department's Office of Legal Services, must be served. The Motion must be sent by mail, but you may also e-mail it. The addresses for filing and service are:

ABC General Counsel
c/o Administrative Records Secretary
3927 Lennane Drive, Suite 100
Sacramento, CA 95834

Department of Alcoholic Beverage Control
Office of Legal Services
3927 Lennane Drive, Suite 100
Sacramento, CA 95834

Mark.Kinyon@abc.ca.gov

Beth.Matulich@abc.ca.gov

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814.