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

AB-8520
File: 20-376082 Reg: 05061511

7-ELEVEN, INC., and WILLIAM P. OTT, JR. dba 7-Eleven #16070
394 West Chase Avenue, El Cajon, CA 92020,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: None

Appeals Board Hearing: November 2, 2006
Los Angeles, CA

Redeliberation: January 11, 2007; February 1, 2007

ISSUED MARCH 28, 2007

The Department of Alcoholic Beverage Control[1] on February 7, 2006, entered an order suspending, for 10 days, the off-sale beer and wine license held jointly as co-licensees by 7-Eleven, Inc., and William P. Ott, Jr., its franchisee, doing business as 7-Eleven #16070 (appellants), for Ott's employee, Darlene Mahann, having sold an alcoholic beverage (beer) to Scott Henton, a minor, a violation of Business and Professions Code section 25658, subdivision (a). The suspension was stayed, subject to a one-year probationary period.

Appearances on appeal include appellants 7-Eleven, Inc., and William P. Ott, Jr., appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, John R. Peirce.

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[1]The decision of the Department, dated February 7, 2006, is set forth in the appendix, together with copies of the documents pertinent to this appeal.

The Department has moved to dismiss the appeal as untimely. We agree that the appeal must be dismissed.

FACTS AND PROCEDURAL HISTORY

This case began with an accusation charging appellants with the sale of an alcoholic beverage to a minor. The accusation was filed on December 29, 2005. On February 1, 2006, co-licensee Ott executed a document entitled Stipulation and Waiver. The document provided, among other things, "that disciplinary action may be taken ... on the basis of the facts contained in the investigative reports on file with the Department," and waived "all rights to a hearing, reconsideration, and appeal." On February 7, 2006, the Department adopted a "Decision," finding, on the basis of the Stipulation and Waver, that appellants "violated or permitted the violation of Business and Professions Code section 25658(a)," and ordered a suspension of appellants' license. A portion of the Decision entitled "Certificate of Decision" certified that the Department adopted the preceding recitals and order as its decision in the proceeding, and that it was to be effective immediately. The Decision was accompanied by a Declaration of Service by Mail, reciting service of copies of a "Decision After Waiver of Hearing" on the parties and their counsel on February 7, 2006. Ordinarily, this would have ended the proceeding. In this case, however, appellants sought to withdraw the Stipulation and Waiver, contending that appellant Ott did not intend to stipulate that he waived his right to a hearing, and, in addition, lacked the authority to bind his co-licensee, 7-Eleven. Thus, argue appellants, the Department's motion to dismiss their appeal as untimely is not well taken, given the nature of their appeal..

Business and Professions Code section 23081 provides that an appeal must be filed "on or before the tenth day after the last day on which reconsideration of a final

decision of the department can be ordered." Under Government Code section 11521, the "power to order a reconsideration shall expire 30 days after the delivery or mailing of a decision to the respondent, *or on the date set by the agency itself as the effective date of the decision if that date occurs prior to the expiration of the 30-day period."* [2] Thus, the appeal period for the decision based upon the stipulation commenced on February 8, 2006, and expired on February 17, 2006.

Appellants (in their Response to Department's Motion to Dismiss, page 11) concede that the appeal period for the February 7 decision was exhausted, blaming the Department's failure to respond in a timely manner to their request to withdraw the Stipulation and Waiver:

> By failing to timely respond to Appellants' request to withdraw the Stipulation and Waiver, the Department impermissibly exhausted the appeals period on the first decision. Thus, appellants appeal from the Department's second decision provided on or about February 16, 2006 that addresses Appellants' withdrawal request.

Appellants filed this appeal on February 22, 2006. Although the Notice of Appeal recites that appellants are appealing "the Decision of the Department dated February 6, 2006," they explain in their papers filed in opposition to the Department's motion to dismiss the appeal that it was their intention to appeal the February 16, 2006, "decision" of the Department denying their request to withdraw the Stipulation and Waiver. The "decision" to which appellants refer is an undated letter from the Department stating that appellants' request to withdraw the Stipulation and Waiver "was received in our office after the Stipulation and Waiver Decision was sent out, and is therefore too late." That letter appears to have been mailed to appellants with a Declaration of Service by

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[2] Italics added.

Mail of an "Order" dated February 6, 2006. But, as appellants point out, the February 6 date is probably a typographical error, since it arrived in an envelope postmarked February 16, 2006. Appellants expressly state that "the instant appeal is *not*[3] taken from the 'decision' dated February 7, 2006,"[4] and assert that their appeal is taken from the "decision" of February 16, 2006, and, therefore, timely.

We believe the controlling consideration is the fact that no appeal was taken from the decision of the Department dated February 7, 2006. Appellants have been emphatically clear that they have *not* appealed that decision.[5] Thus, the decision became final by operation of law when February 17, 2006, passed without it having been appealed. Appellants could have filed an appeal from that decision, but, for reasons not satisfactorily explained to this Board, did not do so. Any objections appellants had to the soundness of that decision were lost because of the absence of a timely appeal.

What, then, of the purported appeal of the request to withdraw the stipulation and waiver? It appears to this Board that it is little more than a back-door attempt to seek relief from a decision which could have been appealed but was not.

On February 8, one day following the issuance of the February 7, 2006, decision, appellants dispatched a letter requesting the withdrawal of the Stipulation and Waiver. The next day, February 9, they filed a Notice of Defense, an omnibus Special Notice of

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[3] Italics added.

[4] Citing *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Safeway)* (1987), appellants contend that the undated letter mailed on February 16, 2006, is a decision affecting a license, and so appealable under the holding in that case. In view of our disposition of this matter, we do not reach that issue.

[5] See Appellant's Response to Department's Motion to Dismiss, pages 2 and 4.

Defense raising a variety of theoretical defenses (none of which asserts 7-Eleven was not served with the accusation), and a Request for Discovery. These filings were followed by the now-challenged notice of appeal filed on February 22, 2006.

Even were we to assume, as appellants assert, that the undated letter was an order from which an appeal could be taken, any relief to be gained by its being granted would be illusory, in the face of a final decision from which no appeal was taken.

In any event, 7-Eleven's claim that its co-licensee lacked the authority to bind it is without merit. The Board has addressed similar arguments in an earlier case. In *The Southland Corporation (Sukhija*) (April 10, 1998) AB-6930, the Board discussed at considerable length the power possessed by the Department when dealing with a franchisor-franchisee relationship, where the franchisor and franchisee are co-licensees. It there said, in part:

> The Department argues that it is the relationship of Southland and the Sukhijas as co-licensees that is critical, and not whether they are partners or are in an independent contractor relationship. "It is that relationship . . . that determines to whom the Department looks for the responsibility of the operation of a licensed premises, and where it derives its authority to discipline." (Dept.Br. at 3).
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> While Southland's relationship with its franchisee may be in the nature of an independent contractor relationship, that is a function of the contract between them. The Department is not a party to that agreement, and is not bound by it. The cases cited by Southland all involve, one way or another, either the relationship between the two parties to the agreement, or the relationship with a third party who dealt with only one of the parties to the agreement.
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> Here, the Department issued its license to Southland and the franchisees. It is entitled to look to either or both for compliance with the obligations assumed by the acceptance of that license. Whether they be considered partners or joint venturers or something else, the clear fact is that they jointly obligated themselves to comply with all the laws applicable to one who holds a license to sell alcoholic beverages. That a separate agreement between the co-licensees allocates those responsibilities to one or the other has no binding force insofar as the Department is concerned.

ORDER

The appeal is dismissed.[6]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[6] 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.