

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

AB-8628

File: 20-369400 Reg: 06063698

ASHLEY QUYNH NGUYEN dba West Fremont AM PM
860 Fremont Avenue, Sunnyvale, CA 94087,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: None

Appeals Board Hearing: April 5, 2007
San Francisco, CA

ISSUED MAY 30, 2007

Ashley Quynh Nguyen, doing business as West Fremont AM PM (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended his license for 25 days for having sold or permitted the sale of an alcoholic beverage to a minor, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Ashley Quynh Nguyen, appearing through his counsel, Ralph B. Saltsman, Stephen W. Solomon, and Julia H. Sullivan, and the Department of Alcoholic Beverage Control, appearing through its counsel, John Peirce.

¹The decision of the Department, dated September 22, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on November 3, 2000. The Department instituted an accusation against appellant on August 15, 2006, charging the sale of beer to a minor. On September 11, 2006, appellant executed a Stipulation and Waiver in which he waived his right to a hearing, reconsideration and appeal,² consented to the imposition of a 25-day suspension of his license, and checked a box on the Department form indicating he wished to pay a fine in lieu of serving a suspension. On September 22, 2006, the Department issued a decision referring to the terms of the stipulation and imposing the 25-day suspension. Although the decision provided that it was to be effective immediately, it also provided that the beginning date of the suspension would be held in abeyance while it considered appellant's request to pay a fine in lieu of the suspension. For reasons not disclosed in the record, the matter was not resolved by payment of a fine.

On October 25, 2006, the Department received a letter from appellant's newly

² The Department's Stipulation and Waiver in this case provided that the captioned respondent licensee:

- (1) Acknowledge[s] receipt of the accusation (with printed statement to respondent) and forms for notice of defense and stipulation and waiver in the above action.
- (2) Stipulate[s] that disciplinary action may be taken on the accusation and that such discipline may be determined on the basis of the facts contained in the investigative reports on file with the Department.
- (3) Waive[s] all rights to a hearing, reconsideration and appeal and any and all other rights which may be accorded pursuant to the Alcoholic Beverage Control Act or the Administrative Procedure Act.
- (4) Acknowledge[s] that the licensee(s) understand(s) that by waiving said rights the Director of the Department of Alcoholic Beverage Control may, without further notice, enter an order suspending the **Off-Sale Beer & Wine** license(s) at the above-mentioned premises for a period of **25** days, the effective date to be set by further order of the Director of the Department of Alcoholic Beverage Control.

retained attorney requesting that the stipulation and waiver be withdrawn. The Department responded by letter dated October 26, 2006, stating that the request to withdraw was untimely because the Department's decision had issued and the licensee had waived all rights to a hearing, reconsideration, and appeal.³

Appellant's notice of appeal, filed October 30, 2006, set forth the statutory grounds for appeal contained in Business and Professions Code section 23084, and stated that appellant was appealing a decision entered October 26, 2006.

On January 31, 2007, the appeal was dismissed without prejudice after the Appeals Board was informed that the Department had agreed to permit the withdrawal of the stipulation and waiver. The appeal was reinstated by order dated February 26, 2007, after the Board was informed the Department had not so agreed.

The Appeals Board, in a letter to the parties dated January 25, 2007, suggested the possibility of the appeal having been untimely filed, and invited the filing of supplemental briefs on that issue. Although the Department did not address that issue in its brief, we do not construe its silence as an admission that the appeal was timely. We can, however, view it as a concession that, as appellant's brief contends, a decision of the Department was made on October 26, 2006, when it refused to permit the withdrawal of the stipulation and waiver. That being so, we are able, albeit with a degree of skepticism, to view the appeal as timely.

³ Although copies of this exchange of correspondence are not included in the record or in the Board's file, the parties appear to be in agreement that the statements in the text are accurate.

DISCUSSION

I

This case smacks of gamesmanship. The stipulation and waiver recites, in plain language, that appellant “waive[s] all rights to a hearing, reconsideration, and appeal.” Nevertheless, the Board has been provided no information bearing on why it was an abuse of discretion on the part of the Department to refuse to permit the withdrawal of the stipulation and waiver and vacate a decision which was entered on the basis of that document, and which went unchallenged for more than a month.

Appellant relies on Code of Civil Procedure section 473, subdivision (b), which permits a **court** to 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.” Nowhere in appellant’s brief is there any claim that appellant executed the stipulation and waiver as a result of “mistake, inadvertence, surprise, or excusable neglect.” Nor is there any declaration of appellant claiming he executed the stipulation and waiver for any of those reasons.

Appellant’s reliance on the decision of the California Supreme Court in *Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249 [121 Cal.Rptr.2d 187] (“Zamora”) is misplaced. In *Zamora*, an attorney’s assistant had mistakenly typed the word “against” instead of the phrase “in favor of” in a Code of Civil Procedure section 998 offer of settlement. Upon discovery of the mistake, the plaintiff in the civil action, Zamora, moved within two days to set aside the offer of settlement. While the court ruled that relief was available in that case, its closing remarks made it clear that

voluntary settlements were not lightly to be set aside:

In any event, we are confident trial courts will exercise this discretionary power to vacate judgments entered pursuant to settlement agreement both carefully and sparingly. We suspect most, if not all courts will see through claims of buyer's remorse or breach of contract. ... Indeed, courts have been exercising this power for over a century with no ill effects. ... Most cases still settle, and courts rarely set aside settlement agreements. Our holding today should not change that.

(*Zamora, supra*, 28 Cal.4th at 261).

This case involves nothing more than a settlement agreement that should not be set aside. There was no abuse of discretion.

II

The briefs filed on behalf of appellant also assert that the Appeals Board has usurped appellant's right to determine the issues he wishes to present on appeal, and that appellant has not been provided copies of the administrative record. Both arguments lack merit.

Appellant's claim that the record is incomplete assumes that the same documents are generated when a case is resolved by stipulation and waiver as when a case goes to an administrative hearing where exhibits are placed in evidence and a transcript is prepared setting out the testimony and arguments made at the hearing. This is simply not the case. The stipulation and waiver practice is a summary procedure for resolving without a formal hearing the charges contained in a Department accusation, and does not generate a record like that described in Appeals Board Rule 183. The documents provided to appellant in this matter gave him everything he needed to effect an appeal.

Appellant's claim that the Appeals Board acted improperly in advising the parties that the issues on appeal would be limited to those relating to the stipulation and waiver

is frivolous. Since there was no hearing, the only issues which could be considered by the Board would be those relating to the stipulation and waiver, and the jurisdictional issue raised by the Board itself. Therefore, we do not see how appellant was prejudiced by the Board's suggestion that the issues should be limited to those relating to the stipulation and waiver.

Finally, we see only the unsupported assertions of appellant's counsel that grounds exist for the withdrawal of the stipulation.

ORDER

The decision of the Department is affirmed.⁴

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
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.