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PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT	: : : : : : :	Citation No. 10-0574
v.		
P&DM, LLC t/a Dominque's Bistro 233 East Drinker Street Dunmore, PA 18512-2433	: : : :	License No. R-8307 LID 61222

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O P I N I O N

Donald Sabatell and Judith Sabatell (together, "the Sabatells") appeal *nunc pro tunc* from the October 25, 2010 Adjudication and Order of Administrative Law Judge Daniel T. Flaherty, Jr. ("ALJ Flaherty"), which sustained Citation No. 10-0574 and revoked Restaurant Liquor License No. R-8307 ("the license") held by P&DM, LLC, t/a Dominque's Bistro ("Licensee").

On March 26, 2010, the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("BLCE") issued Citation No. 10-0574, charging Licensee with violating section 15.62(a) of the Pennsylvania Liquor Control Board's ("Board") Regulations [40 Pa. Code § 15.62(a)], in that, on March 1, 2010, Licensee, by its servants, agents, or employees, failed to post in a conspicuous place on the outside of its licensed premises, or in a window plainly visible from the outside of the premises, a Notice of Suspension. [Citation No. 10-0574, dated March 26, 2010].

On September 21, 2010, Licensee, through its owner, Patrick Martino, submitted an Admission, Waiver, and Authorization admitting to the charge set forth in Citation No. 10-0574, admitting that the applicable notice requirements were met, waiving its right to a hearing, waiving its right to appeal the adjudication to be issued, and authorizing ALJ Flaherty to adjudicate the matter based on a summary of facts and Licensee's prior adjudication history. [Admission, Waiver, and Authorization, filed September 21, 2010].

On October 25, 2010, ALJ Flaherty issued an Adjudication and Order, which sustained the charge set forth in Citation No. 10-0574 and revoked the license effective at 7:00 a.m., on Monday, November 1, 2010. [Adjudication and Order, mailed October 25, 2010]. In his Adjudication and Order, ALJ Flaherty

took administrative notice that the license had already been revoked effective August 30, 2010 with regard to Citation No. 10-0077X[1], and he directed the Bureau of Licensing to mark its records to reflect that the license had been revoked. [Id.].

On March 29, 2011, the Sabatells filed a *Nunc Pro Tunc* Application for Reconsideration ("Application for Reconsideration") with regard to Citation No.10-0574, as well as Citation Nos. 10-0077X and 10-1977.[2] [Application for

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[1] Citation No. 10-0077X charged Licensee with violating section 493(26) of the Liquor Code [47 P.S. § 4-493(26)], in that Licensee, by its servants, agents or employees, issued checks or drafts dated November 25, 2009, in payment for purchases of malt or brewed beverages, when it had insufficient funds in, or credit with, the institution upon which drawn for the payment of such checks. [Admin. Notice]. Licensee, through its owner, Patrick Martino, submitted an Admission, Waiver, and Authorization admitting to the charge set forth in Citation No. 10-0077X, admitting that the applicable notice requirements were met, waiving its right to a hearing, waiving its right to appeal the adjudication to be issued, and authorizing Administrative Law Judge Felix Thau ("ALJ Thau") to adjudicate the matter based on a summary of facts and Licensee's prior adjudication history. [Admin. Notice]. On March 15, 2010, ALJ Thau issued an Adjudication and Order sustaining the charge set forth in Citation No. 10-0077X and imposing a fine of two hundred dollars ($200.00). [Admin. Notice]. Thereafter, Licensee failed to pay the fine, and, on May 5, 2010, ALJ Thau issued an Opinion and Order Upon Licensee's Failure to Pay a Fine, which suspended the license for a period of one (1) day, beginning at 7:00 a.m. on Monday, June 21, 2010, and continuing until the fine was paid. [Admin. Notice]. Licensee again failed to pay the fine, and, on July 19, 2010, ALJ Thau issued a Supplemental Opinion and Order revoking the license, effective at 7:00 a.m., on Monday, August 30, 2010. [Admin. Notice].

[2] Citation No. 10-1977 charged Licensee with violating section 15.62(a) of the Board's Regulations [40 Pa. Code § 15.62(a)], in that, on June 21, June 22, June 23, June 24, June 25, July 3, July 5, July 8, July 11, July 26, July 28, August 2, August 5, August 8, August 16, August 21, and August 29, 2010, Licensee, by its servants, agents, or employees, failed to post in a conspicuous place on the outside of its licensed premises, or in a window plainly visible from outside of the premises, a Notice of Suspension. [Admin. Notice]. Following an evidentiary hearing, ALJ Thau issued an Adjudication and Order, on March 23, 2011, sustaining the charge

Reconsideration, filed March 29, 2011]. In their Application for Reconsideration, the Sabatells asserted the following. The Sabatells are the record owners of the real property located at 233 East Drinker Street, Dunmore Borough, Lackawanna County, Pennsylvania ("the licensed premises"). [Id.]. The Sabatells leased a portion of the licensed premises to Licensee's owner, Mr. Martino, for the operation of Dominque's Bistro. [Id.]. The lease agreement that was entered into between the Sabatells and Mr. Martino provided that, if Mr. Martino no longer desired to operate Dominque's Bistro, Mr. Martino agreed to either transfer all of his rights, title and interest in the license or transfer all of his interest as a member of Licensee and execute all necessary documents to evidence the transfer. [Id.].

After Mr. Martino failed to timely pay certain amounts due and owing under the lease, on or about October 1, 2009, the Sabatells confessed judgment against Mr. Martino in the Court of Common Pleas of Lackawanna County. [Id.]. Thereafter, Mr. Martino filed a petition to open the confessed judgment. [Id.].

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set forth in Citation No. 10-1977 and revoking the license, effective at 7:00 a.m., on Monday, May 2, 2011. [Admin. Notice].

On or about February 4, 2010, the Sabatells initiated a cause of action in Magisterial District No. 45-1-07, Dunmore Borough, Lackawanna County, for possession of the premises ("possession action"). [Id.]. A judgment for possession was entered against Mr. Martino on February 22, 2010. [Id.]. Mr. Martino appealed the order for possession to the Court of Common Pleas of Lackawanna County, docketed to Civil Docket No. 2010-1947. [Id.]. After Mr. Martino failed to pay monthly rents due during the pendency of the appeal, the supersedeas of the appeal was terminated. [Id.].

After Mr. Martino and Licensee evidenced their desire to no longer operate Dominique's Bistro at the premises, the Sabatells requested that Mr. Martino execute the necessary paperwork to initiate a transfer of the license to the Sabatells. [Id.]. The Sabatells subsequently pursued injunctive relief against Mr. Martino, and by order dated February 15, 2011, the Court of Common Pleas of Lackawanna County directed Mr. Martino to execute the necessary documents to transfer the license. [Id.].

The Sabatells were unaware that enforcement actions had been initiated against Licensee prior to the issuance of the orders revoking the license. [Id.]. Accordingly, the Sabatells requested that the license be reinstated to Licensee so as to allow for a transfer of the license. [Id.].

On April 7, 2011, ALJ Thau issued an Opinion and Order upon Licensee's Application for Reconsideration, which denied reconsideration. [Opinion and Order Upon Licensee's Application for Reconsideration, mailed April 7, 2011]. ALJ Thau explained that the Sabatell's Application for Reconsideration was untimely and that the Sabatells lacked standing.[3] [Id.].

On May 31, 2011, the Sabatells filed an appeal *nunc pro tunc* of the orders revoking the license in Citation Nos. 10-0574 and 10-0077X. [Appeal of Administrative Law Judge Adjudication, filed May 31, 2011]. In their appeal, the Sabatells reiterated the information set forth in their Application for Reconsideration and asserted the following. After ALJ Thau denied the Application for Reconsideration, the Sabatells moved for additional relief in their possession action and requested that the Court of Common Pleas of Lackawanna County enter an order permitting them to appear on behalf of Mr. Martino to challenge the revocations of the license and to execute any additional documents necessary to apply for the transfer of the license. [Id.]. On April 8, 2011, the Court of Common Pleas of Lackawanna County issued an order granting the Sabatells their requested relief. [Id.]. On April 22, 2011, ALJ

[3] Pursuant to section 15.56 of the Board's Regulations [40 Pa. Code § 15.56] and section 35.241 of the General Rules of Administrative Practice and Procedure [1 Pa. Code § 35.241], an application for reconsideration may be filed by a party to a proceeding within fifteen (15) days after the issuance of an adjudication.

Thau issued an Opinion and Order in Response to Licensee's Application for Reconsideration in Citation No. 10-1977, in which he vacated the penalty of revocation and imposed a one (1)-day suspension that was deferred pending reactivation of the license.[4] [Id.]. The Sabatells lacked standing to intervene in the administrative actions prior to the issuance of the additional relief by the Court of Common Pleas of Lackawanna County set forth in the April 8, 2011 Order. [Id.]. The Sabatells are committed to complying with all reasonable sanctions ordered with respect to the license should it be reactivated and transferred to them. [Id.]. Accordingly, the Sabatells request that their *nunc pro tunc* appeal be granted, that the penalty of revocation of the license be vacated, and that the license be reactivated. [Id.].

Section 471 of the Liquor Code establishes a thirty (30)-day filing deadline for appeals from an adjudication of an administrative law judge. [47 P.S. § 4-471(b)]. Further, section 17.21 of the Board's Regulations provides that failure to file or have the appeal postmarked within thirty (30) calendar days will result in dismissal of the appeal. [40 Pa. Code § 17.21(b)(2)]. The Supreme Court of Pennsylvania has held that the time for taking an appeal cannot be extended as

[4] Notably, ALJ Thau's Adjudication and Order revoking the license in Citation No. 10-1977 was issued on March 23, 2011, and the Sabatell's Application for Reconsideration was filed on March 29, 2011. Thus, the Sabatell's Application for Reconsideration was timely with regard to Citation No. 10-1977.

a matter of grace or mere indulgence. West Penn Power Co. v. Goddard, 460 Pa. 551, 333 A.2d 909 (1975); In re: Dixon's Estate, 443 Pa. 303, 279 A.2d 39 (1971). Extension of the time for filing an appeal should be limited to cases where "there is fraud [or] some breakdown in the court's operation" caused by extraordinary circumstances. West Penn Power Co., 333 A.2d at 912. The negligence of an appellant, or an appellant's counsel, or an agent of appellant's counsel, has not been considered a sufficient excuse for the failure to file a timely appeal. Bass v. Commonwealth, 485 Pa. 256, 401 A.2d 1133 (1979).

The rule set forth in Bass was further clarified in Cook v. Unemployment Compensation Board of Review, 671 A.2d 1130 (Pa. 1996). Specifically, a delay in filing an appeal is only excusable if: (1) it was caused by extraordinary circumstances involving fraud or breakdown in the court's operation or non-negligent conduct of the appellant, appellant's attorney or his/her staff; (2) the appeal is filed within a short time after appellant or his counsel learns of and has the opportunity to address the untimeliness; (3) the time period which elapses is of very short duration; and (4) appellee is not prejudiced by the delay. Id. at 1131.

The heavy burden of establishing the right to have an untimely appeal considered rests with the moving party. Hessou v. Unemployment

Compensation Board of Review, 942 A.2d 194 (Pa. Cmwlth. 2008). Additionally, the filing of a timely appeal is a jurisdictional requirement that must be met before any appeal may be considered. Criss v. Wise, 781 A.2d 1156 (Pa. 2001); Morrisons Cove Home v. Blair County Bd. of Assessment Appeals, 764 A.2d 90 (Pa. Cmwlth. 2000).

Here, the Sabatells seek to appeal ALJ Flaherty's October 25, 2010 Adjudication and Order revoking the license. The thirty (30)-day deadline for filing an appeal of the October 25, 2010 Adjudication and Order was November 24, 2010. However, the Sabatells did not file their appeal until May 31, 2011, which was more than six (6) months past the appeal deadline.[5]

While the Sabatells explained the steps that they have taken to attempt to secure a transfer of the license and acknowledged that they did not obtain standing to challenge the revocations of the license until April 8, 2011, this does not justify the late filing of the present appeal. The status of the Sabatells as third parties who are attempting to secure a transfer of the license pursuant to their lease agreement with Licensee and who did not initially have standing to challenge the revocations, provides justification for why the Sabatells did not file their appeal prior to April 8, 2011. However, the Sabatells have offered no

[5] The filing of a request for reconsideration by the Sabatells did not toll the time period for filing an appeal with the Board. [See 40 Pa. Code § 17.21(c)].

explanation as to why they waited almost two (2) months after April 8, 2011, to file their appeal. This additional delay, without further explanation, cannot be deemed to be the result of extraordinary circumstances involving fraud, an administrative or judicial breakdown, or non-negligent conduct beyond the control of the Sabatells or their counsel. Once the Sabatells secured standing to challenge the revocations of the license, they should have been more diligent in preserving their appeal rights; however, they did not exercise the necessary level of diligence. Therefore, the Sabatells failed to satisfy the requirements for allowing an appeal *nunc pro tunc.*

Even assuming that the Sabatells had satisfied the requirements for allowing an appeal *nunc pro tunc*, the Board would conclude that the Sabatell's appeal challenging the revocation of the license is without merit. Significantly, Licensee submitted an Admission, Waiver, and Authorization regarding the charge set forth in Citation No. 10-0574. In submitting that document, Licensee authorized ALJ Flaherty to enter an adjudication based on a summary of facts and Licensee's prior adjudication history, and Licensee waived the right to appeal that adjudication. Thus, the right to appeal was expressly waived by Licensee. See Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Wilner, 687 A.2d 1216 (Pa. Cmwlth. 1997); Pennsylvania Liquor Control Bd. v.

Dentici, 117 Pa. Cmwlth. 70, 542 A.2d 229 (1988). The Sabatells cannot now undo Licensee's waiver and challenge ALJ Flaherty's October 25, 2010 Adjudication and Order.

Further, even assuming that the right to challenge ALJ Flaherty's October 25, 2010 Adjudication and Order had not been waived, the Board would conclude that imposition of the penalty of revocation was not an abuse of discretion. Section 471 of the Liquor Code [47 P.S. § 4-471] authorizes administrative law judges to impose a fine, or suspend or revoke a license upon determining that a violation of the Liquor Code or the Board's Regulations has occurred. The imposition of penalties is the exclusive prerogative of the administrative law judge. The Board may not disturb penalties imposed by an administrative law judge if they are within the parameters set forth in section 471 of the Liquor Code [47 P.S. § 4-471].

Here, ALJ Flaherty imposed the penalty of revocation with regard to Citation No. 10-0574. In doing so, ALJ Flaherty took administrative notice that the license had already been revoked effective August 30, 3010 for failure to pay the fine imposed with regard to Citation No. 10-0077X. Section 471 of the Liquor Code [47 P.S. § 4-471] authorizes an administrative law judge to revoke or suspend a license if a licensee does not pay the previously imposed fine

within twenty (20) days of its imposition. As to Citation No. 10-0077X, ALJ Thau's Adjudication and Order imposing a fine of two hundred dollars ($200.00) clearly stated that the fine had to be paid within twenty (20) days of the mailing date of the Order, March 15, 2010. When Licensee failed to pay the fine, ALJ Thau suspended the license and warned Licensee that its continued failure to pay the fine could result in revocation of the license. Despite the imposition of a suspension and the above-mentioned warning, Licensee still failed to pay the fine. As a result, ALJ Thau issued a Supplemental Opinion and Order revoking the license, effective at 7:00 a.m., on Monday, August 30, 2010. Because the penalty of revocation was within the parameters of section 471 of the Liquor Code, there was no abuse of discretion.

Any rights that the Sabatells have with regard to the license would be subject to the penalties incurred by Licensee as a result of its improper conduct. The Board cannot overlook the conduct of Licensee which led to the revocations simply because the Sabatells wish to acquire the license and continue the operation of the licensed premises.

Nevertheless, under the circumstances of this case, the Board is without authority to entertain the Sabatell's appeal because it was not filed within the statutorily prescribed time limit of thirty (30) days, and the Sabatells failed to

establish adequate justification for the late filing. Therefore, the Sabtaell's appeal *nunc pro tunc* is dismissed.

ORDER

The Sabatell's appeal *nunc pro tunc* is dismissed.

The October 25, 2010 Adjudication and Order is affirmed.

It is hereby ordered that Restaurant Liquor License No. R-8307 remains revoked as of November 1, 2010.

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Board Secretary