

Mailing Date: March 20, 2013

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	
BUREAU OF LIQUOR CONTROL	:	Citation No. 10-2644
ENFORCEMENT	:	
	:	
v.	:	
	:	
CADEN, INC.	:	License No. R-4865
t/a Caden's Irish Pub	:	
6053-55 Castor Avenue	:	LID 55581
Philadelphia, PA 19149-3208	:	

Counsel for Licensee: No appearance

Counsel for Third-Party
Creditor: John J. McCreesh, IV, Esquire
McCreesh, McCreesh, McCreesh & Cannon
7053 Terminal Square
Upper Darby, PA 19082

Counsel for Bureau: Erik S. Shmukler, Esquire
Pennsylvania State Police,
Bureau of Liquor Control Enforcement
6901 Woodland Avenue
Philadelphia, PA 19142

OPINION

Plymouth Finance, Inc. ("Plymouth"), appeals *nunc pro tunc* from the
June 23, 2011, Adjudication and Order of Administrative Law Judge ("ALJ")

David L. Shenkle which revoked Restaurant Liquor License No. R-4865 held by Caden, Inc., t/a Caden's Irish Pub ("Licensee").

On December 21, 2010, the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") issued Citation No. 10-2644 ("the Citation")¹ to Licensee, charging it with violating 493(12) of the Liquor Code [47 P.S. § 4-493(12)] in that on October 25 and 30, 2010, Licensee, by its servants, agents, or employees, failed to keep on the licensed premises, and/or provide an authorized employee of the Bureau access to or the opportunity to copy, complete and truthful records covering the operation of the licensed business. The Citation was mailed to 6053-55 Castor Avenue, Philadelphia, Pennsylvania ("the licensed premises"), via certified mail, return receipt requested, postmarked December 21, 2010. (N.T. 4/27/11, Ex. B-2). The return receipt was signed as received, although it was not dated. (Id.).

On March 11, 2011, a Citation Hearing Notice was mailed by the Office of the Administrative Law Judge ("OALJ") to the licensed premises via first-class mail and certified mail, return receipt requested. The Citation Hearing Notice advised Licensee that a hearing on the Citation, to show cause why the license

¹ While the first paragraph of the Petition for Leave to Appeal *Nunc Pro Tunc* filed in this matter identifies the petitioner as Licensee, it is clear from the entirety of the petition and the exhibits attached thereto that the petitioner is actually Plymouth, a third-party creditor who filed a Confession of Judgment and Writ of Execution against Licensee in the Court of Common Pleas of Philadelphia County.

issued by the Pennsylvania Liquor Control Board (“Board”) should not be suspended or revoked or a fine imposed, or both, would be held on April 27, 2011, at 10:30 a.m., at the Meetinghouse Business Center, 140 West Germantown Pike, Suite 100, Plymouth Meeting, Pennsylvania. (Id.). Board records indicate the certified mailing was returned on April 13, 2011, marked as unclaimed; the first-class mailing was not returned.

The hearing was held on April 27, 2011. Erik Shmukler, Esquire, appeared at the hearing as counsel for the Bureau. No one appeared on behalf of Licensee. By Adjudication and Order mailed June 23, 2011, the ALJ sustained the Citation and, taking notice that the license had been revoked on February 28, 2011, as a result of Citation No. 09-2448, revoked the license effective immediately.² (Adjudication and Order, p. 2). The OALJ sent the Adjudication and Order to Licensee at the licensed premises via first-class and certified mail, return receipt requested; however, the mailing was returned on August 1, 2011, marked as unclaimed. The first-class mailing was not returned.

² The Board approved Licensee’s applications for renewal for the renewal periods effective November 1, 2008 and November 1, 2010, subject to a conditional licensing agreement (“CLA”), on February 9, 2011. (Admin. Notice). Pursuant to the CLA, Licensee agreed that it would place the license into safekeeping within sixty (60) days of the Board’s approval of the CLA and keep it there until such time that the license could be transferred to a bona fide purchaser meeting Board requirements for use at another location. (Admin. Notice).

Plymouth filed the instant Petition for Leave to Appeal *Nunc Pro Tunc* on January 11, 2013.³ It does not dispute the underlying facts of the Citation. Instead, Plymouth seeks to have the license reinstated and the case remanded to the ALJ for the setting of an appropriate penalty. Plymouth asserts that it filed a Confession of Judgment and Writ of Execution in the Court of Common Pleas of Philadelphia County against Licensee in connection with a loan without notice that the license had been revoked for failure to pay the fine. (Petition, para. 5). The Confession of Judgment was filed on April 13, 2011, and the Writ of Execution was filed on July 26, 2011. (Plymouth's Ex. C). Plymouth further contends that:

- a) [Plymouth] is filing this appeal timely after learning of the revocation of the license;
- b) the Board will not be prejudiced by permitting this appeal;
- c) [Plymouth] is agreeable to paying the fine; [and]
- d) the revocation will serve as an undue hardship on the licensee and the lien holder.

(Petition, para. 10).

Section 471 of the Liquor Code establishes a thirty (30)-day filing deadline for taking an appeal 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

³ Licensee appealed Licensee's Citation No. 10-1380, which is also pending before the Board at the present time, in the same petition.

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 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 a statutory period for filing an appeal should be limited to cases where “there is fraud [or] some breakdown in the court’s operation.” 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 Pennsylvania Supreme Court established a four (4)-part test that, if met, may allow an appellant to appeal *nunc pro tunc*. 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, the appellant’s attorney, or his/her staff; (2) the appeal is filed within a short time after the appellant or the appellant’s counsel learns of and has the opportunity to address the untimeliness; (3) the

time period which elapses is of very short duration; and (4) the 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, Plymouth seeks to appeal the ALJ's Adjudication and Order mailed June 23, 2011, revoking the license.⁴ The thirty (30)-day deadline for filing an appeal of that Order was July 25, 2011. Plymouth did not file its petition to appeal until January 11, 2013, which was more than seventeen (17) months past the appeal deadline and, hence, clearly untimely. Acknowledging that its appeal was untimely, Plymouth presents in support of its position the Order of the Philadelphia County Court of Common Pleas dated October 3, 2012, which

⁴ There is some question as to whether Plymouth has standing to file an appeal in this matter. The Board recognizes only the named licensee as having an interest in a license unless and until the Board receives a court order or a writ of execution together with a sheriff's bill of sale directing or stating otherwise or a sworn affidavit executed by counsel, representing that the licensee is in default and that all necessary and required procedures have been followed pursuant to any underlying agreements as well as all applicable laws. Here, Plymouth has not presented any such documentation to the Board, apart from its court filings, nor does it purport to have obtained any such documentation. Nonetheless, it will be assumed, for purposes of this opinion, that Plymouth has standing to bring the instant appeal.

reversed the Board's decision in the matter of Citation No. 09-2448. In that case, the ALJ revoked the license effective February 28, 2011, for Licensee's failure to pay a fine of one thousand four hundred dollars (\$1,400.00). (Plymouth's Ex. D). Plymouth submitted an appeal *nunc pro tunc*, which the Board denied on February 8, 2012. In reversing the Board's decision, the Court stated that Licensee's failure to pay the fine was "an oversight caused by circumstances not within Licensee's control" and that "the failure to pay was unintentional and harmless." (Plymouth's Ex. D, p. 2). On December 11, 2012, the Board sent notice to Plymouth, through Plymouth's attorney, that the Court's Order relative to Citation No. 09-2448 did not entitle Plymouth to have the license reinstated because the license had been revoked by the OALJ pursuant to this Citation, as well as Citation No. 10-2644. (Plymouth's Ex. E).

Although the Philadelphia County Court of Common Pleas conducted what appears to be an equitable analysis in deciding to grant Plymouth's untimely appeal in Citation No. 09-2448, as discussed, *supra*, section 471 of the Liquor Code and section 17.21 of the Board's Regulations [47 P.S. 4-471; 40 Pa. Code § 17.21] require that the Board dismiss an appeal if not postmarked within thirty (30) days of the decision of the ALJ, and pursuant to the first Cook factor, an untimely appeal should only be allowed in extraordinary

circumstances, which do not include the negligence of an appellant or its counsel.

Plymouth's delay in this case is even more acute and inexplicable than it was in its appeal of Citation No. 09-2448. At the time Plymouth appealed Citation No. 09-2448, in January 2012, Licensee had two (2) other citations that had been adjudicated. This Citation was adjudicated on June 23, 2011, resulting in a revocation Order on that same date, and Citation No. 10-1380 was adjudicated on September 16, 2011, resulting in a revocation Order of October 28, 2011. It is not clear why Plymouth only appealed the Second Supplemental Order of Citation No. 09-2448 *nunc pro tunc* on January 10, 2012, rather than all three (3) revocation Orders. Plymouth has not explained when or how it became aware of Citation No. 09-2448, so it is not clear from Plymouth's petition when it actually was put on notice that the license was in jeopardy. Clearly it was put on notice at some point prior to January 10, 2012.

Thus, Plymouth has not provided any explanation for why it delayed in appealing the revocation Orders for this Citation and Citation No. 10-1380, nor has it alleged any non-negligent reasons for failing to apprise itself of the status of the license and submit its appeals in a timely fashion.

Evidently there was a breakdown in communication between Licensee and Plymouth.⁵ Nonetheless, it is not the responsibility of the Board or the OALJ to ensure that a licensee's creditors are informed about the status of a license. It must be expected that a creditor will take the steps necessary to protect its own interests. In this case, a phone call or letter to either the Board's Bureau of Licensing or the OALJ would have notified Plymouth of all outstanding citations and fines relating to the license. In addition, adjudications of the OALJ are freely accessible to the public on the OALJ's website and may be searched by licensee name.

As the appellant, Plymouth bears the heavy burden to produce evidence showing its failure to meet the statutory appeal deadline was the result of extraordinary circumstances and not its own negligence or that of its counsel. Here it produced no such evidence. Plymouth's burden notwithstanding, the Board takes administrative notice of the absence in its records of any communications from Plymouth inquiring about the steps needed to bring the license current, prior to the letter from its attorney dated November 6, 2012.

Moreover, although Plymouth asserts that it was not aware of the revocation of the license at the time of filing its Confession of Judgment and

⁵ It should be noted that Plymouth is not the licensee in this matter, and notice in citation matters is not typically sent to non-licensees.

Writ of Execution and that the revocation will cause it to suffer undue hardship, this does not suffice to establish that the late-filed appeal was the result of extraordinary circumstances beyond Plymouth's control. Notably, Plymouth's Confession of Judgment indicated that Licensee failed to make any of the required installment payments beginning on January 10, 2010. Yet, Plymouth waited until April 13, 2011, over one (1) year and four (4) months later, to file its Confession of Judgment and until July 26, 2011, over one (1) year and seven (7) months later, to file its Writ of Execution.

Therefore, in the absence of any evidence from Plymouth indicating a non-negligent reason for its untimely appeal, the Board is unable to find that Plymouth met its burden with respect to the first Cook factor. While the Board is sympathetic to Plymouth's position as Licensee's creditor, it simply cannot bend the rules to allow an untimely appeal under lamentable circumstances. The Court of Common Pleas may again favor an equitable approach if it has occasion to hear this case; however, the Board is bound to follow the Liquor Code, the Board's Regulations, as well as the case law pertaining to *nunc pro tunc* appeals, such as Cook and Bass.

Turning to the second and third Cook factors, as discussed, the appeal should have been filed within a short time after Plymouth or its counsel learned

of and had the opportunity to address the untimeliness issue. The petition alleges that Plymouth became aware that the license had been revoked, pursuant to this Citation, on December 11, 2012. (Petition, para. 8). It filed its Petition for Leave to Appeal *Nunc Pro Tunc* thirty-one (31) days later on January 11, 2013. Although there is no defined period of time which satisfies the Cook standard, Plymouth's delay of thirty-one (31) days is troublesome considering the Supreme Court's statement in Bass that "[w]ithout doubt the passage of any but the briefest period of time during which an appeal is not timely filed would make it most difficult to arrive at a conclusion that the failure to file was non-negligent." Bass, 401 A.2d at 1135. Thus, even if the first Cook factor had been met, Plymouth failed to meet its burden in showing it filed its petition within a short time after learning of the revocation.

Having failed to meet the first three (3) Cook factors, there is no need for the Board to consider whether the appellee will be prejudiced by the delay. Based on the foregoing, the Board is without authority to entertain Plymouth's appeal because it was not filed within the statutorily-prescribed time limit of thirty (30) days and because Plymouth failed to establish adequate justification for the late filing. Therefore, Plymouth's petition to appeal *nunc pro tunc* is dismissed.

ORDER

The appeal *nunc pro tunc* of Plymouth Finance, Inc. is dismissed.

The Adjudication and Order of Administrative Law Judge David Shenkle, mailed June 23, 2011, is affirmed.

It is hereby ordered that Restaurant Liquor License No. R-4865 remains revoked as of June 23, 2011.

Board Secretary