Mailing Date: FEB 09 2015

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ADMINISTRATIVE LAW JUDGE
FOR THE
PENNSYLVANIA LIQUOR CONTROL BOARD

PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT	:	In Re: Citation No. 13-0753
v.	:	BLCE Incident No. W01-456887
SOMETHIN SOMETHIN LLC 1718 SANSOM ST. PHILADELPHIA PA 19103-5207	:	PLCB LID - 54273
	:	PLCB License No. R-AP-SS-EHF-4149
PHILADELPHIA COUNTY	:	

APPEARANCES:

FOR THE BUREAU OF ENFORCEMENT:

ERIK S. SHMUKLER, ESQ.

FOR THE LICENSEE:

EDWARD B. McHUGH, ESQ.

BEFORE: JUDGE WRIGHT

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on April 16, 2013, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau") against Somethin Somethin, LLC, License Number R-AP-EHF-4149 (hereinafter "Licensee").

An Administrative hearing was held on Wednesday, January 8, 2014, pursuant to requisite and appropriate hearing notice. The parties stipulated to the service and receipt of the notice letter and the citation.

The citation contains two counts.

The first count charges Licensee with violation of Section 493(34) of the Liquor Code, 47 P.S. §4-493(34), in that on February 15, 16, 17, 20, 21, 22, 23, 24, 27, March 1 and 2, 2013, Licensee, by its servants, agents or employes, used, or permitted to be used on the inside of the licensed premises, a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, could be heard beyond the licensee's property line.

The second count charges Licensee with violation of Section 471 of the Liquor Code, 47 P.S. §4-471, in that on February 15, 16, 17, 20, 21, 22, 23, 24, 27, March 1 and 2, 2013, the licensed establishment was operated in a noisy and/or disorderly manner.

COUNT NOS. 1 AND 2

FINDINGS OF FACT:

1. On Monday, February 11, 2013 at 10:00 a.m., an officer from the Bureau of Enforcement conducted an investigation of the licensed premises based on a complaint of loud music. In conjunction with that investigation, the officer contacted Nicholas Berardi by telephone and subsequently supplied him with the Bureau's blank noise log, which he was to complete (N.T. 8-10).

2. On February 15, 2013 at approximately 9:45 p.m., the officer visited the licensed premises in an undercover capacity and parked approximately thirty feet from the front door. The officer heard no music coming from the licensed premises. He indicated he was in full view of the premises and witnessed patrons entering and exiting. The premises appeared to be open and operating, but he heard no music (N.T. 10-11).

3. The officer returned to the premises on February 16, 2013 at 12:05 a.m. and remained until 12:40 a.m., again with the front door in full view with patrons entering and exiting. He heard no noise or witnessed any violations (N.T. 11).

4. The officer received a noise log from Mr. Berardi by email. The officer then completed the top portion entering identifying information which includes the establishment's name, the address and telephone number and LID number. The main part was otherwise filled out and it was received by the officer (N.T. 12-13 and Exhibit B-3).

5. The officer never entered Mr. Berardi's property which was said to be adjacent to the licensed premises (N.T. 10 and 14).

6. The officer contacted Mr. Berardi to verify that he had in fact received the noise log (N.T. 14).

7. When the officer spoke to Mr. Berardi on February 11, 2013, he indicated that he owns a hair salon immediately adjacent to the licensed premises. He further indicated that the hair salon is on the first level of the premises. He stated that he has apartments on the second and third floor of the building (N.T. 15-16).

8. The officer again spoke to Mr. Berardi on March 5, 2013, when he further confirmed that his address was an apartment adjacent to the licensed premises (N.T. 18).

9. No complaints were received from any other residences or business owners (N.T. 19).

10. Mr. Berardi has owned the building adjacent to the licensed premises for some time and indicated that the licensed premises has been next door for five or six years. The building owned by Mr. Berardi contains a beauty salon and four rental units. Mr. Berardi has never been a resident in the building, but does utilize the salon and office (N.T. 20-24).

11. Mr. Berardi did not make entries on the noise log simultaneous to the events. The log ranges from February 15, 2013 to March 2, 2013. The noise log further indicates that the noise was heard from 1716 Samson Street, the building next door to the licensed premises. Mr. Berardi testified that there were times in the entry log when he was there and immediately logged the noise. Other times, he received information from his son or a tenant in the building. He indicated that he did not recall which of the entries were his own, in that he did not recall the times when he was actually there and the events had been over a year ago. Regarding Wednesday, February 20, 2013, he stated, "I think I remember being there that day" (N.T. 27-30).

CONCLUSIONS OF LAW:

Count No. 1 - There is insufficient evidence to conclude that on February 15, 16, 17, 20, 21, 22, 23, 24, 27, March 1 and 2, 2013, Licensee, by its servants, agents or employes, used, or permitted to be used on the inside of the licensed premises, a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, could be heard beyond the licensee's property line, in violation of Section 493(34) of the Liquor Code, 47 P.S. §4-493(34).

Count No. 2 - There is insufficient evidence to conclude that on February 15, 16, 17, 20, 21, 22, 23, 24, 27, March 1 and 2, 2013, the licensed establishment was operated in a noisy and/or disorderly manner, in violation of Section 471 of the Liquor Code, 47 P.S. §4-471.

DISCUSSION:

It is well established that the Bureau must prove its case by a fair preponderance of evidence. ***PLCB v. Leggens***, 542 A.2d 653 (Pa.Cmwlth.1988); ***Omicron Enterprises***, 449 A.2d 857 (Pa.Cmwlth. 1982); ***Commonwealth v. Murano***, 14 A.3d 133 (Pa.supra.2011). It is further established that it is for this Court to decide the credibility of the witnesses and the weight to be given to their testimony. ***State Correctional Institute vs. Robinson***, 561 A.2d 82 (Pa.Cmwlth.1989). Further, this Court may accept or reject in whole or in part the testimony of any witness. ***Kublar vs. Yeagar***, 150 A.2d 383 (Pa.supra.1959).

The Bureau officer visited the licensed premises and was approximately thirty feet from the premises and observed patrons coming in and out of the premises. He heard no music, whether the door was opened or closed. The officer left the premises and came back after midnight and again spent a period of time observing the premises. He heard no music and saw nothing that would constitute noisy or disorderly conduct. However, the officer did not go into the adjacent property.

The other witness was the owner of the real estate adjacent to the property who testified that he thought the music was continuous but could not verify that he had heard the music on the dates that he listed on the log. The dates were clearly not made simultaneous to the events, and the owner testified that some of the information came from other people. The only date which he specified was February 20, 2013. He testified that he "thought" he had been there on that date, but did not testify with any degree of certainty.

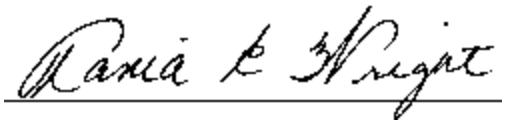
The Court gave very little weight to the witness's testimony and none to the noise log. The investigating officer heard no noise outside the premises and neither saw nor heard anything which could in any way be described as disorderly. Under the circumstances, this matter shall be dismissed.

Accordingly, we issue the following

ORDER:

THEREFORE, it is hereby Ordered that Citation Number 13-0753 is DISMISSED.

Dated this ___23RD____ day of _____January_____, 2015.



Tania E. Wright, J.

NOTE: MOTIONS FOR RECONSIDERATION MUST BE RECEIVED WITHIN 15 DAYS OF THE MAILING DATE OF THIS ORDER TO THE OFFICE OF ADMINISTRATIVE LAW JUDGE AND REQUIRE A $25.00 FILING FEE. A WRITTEN REQUEST FOR RECONSIDERATION MUST BE SUBMITTED WITH THE FILING FEE.

If you wish to appeal the decision of the Administrative Law Judge's Order, the appeal must be filed within 30 days of the mailing date of the Order. Please contact the Office of the Chief Counsel of the Pennsylvania Liquor Control Board at 717-783-9454.

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