

Mailing Date: June 10, 2015

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	
BUREAU OF LIQUOR CONTROL	:	Citation No. 13-1634
ENFORCEMENT	:	
	:	
	:	
v.	:	
	:	
LAVDAS, INC.	:	License No. R-11351
t/a Prive	:	
246 Market Street	:	LID 60016
Philadelphia, PA 19106-2817	:	

Counsel for
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OPINION

Cary Mogell petitions for leave to appeal *nunc pro tunc* from the Second Supplemental Order of Administrative Law Judge (“ALJ”) Tania E. Wright mailed January 23, 2015, wherein the ALJ revoked Restaurant Liquor License No. R-11351, held by Lavdas, Inc. t/a Prive (“Licensee”). Because the Pennsylvania Liquor Control Board

("Board") has no authority to accept the untimely appeal, and because the petition fails to show *nunc pro tunc* relief is warranted, the Board dismisses Mr. Mogell's petition.

The license was revoked due to Licensee's prolonged failure to pay the fine imposed by the ALJ in the adjudication of Citation No. 13-1634. The Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") issued the Citation to Licensee on August 20, 2013, charging three (3) counts. The first count alleged a violation of section 493(10) of the Liquor Code [47 P.S. § 4-493(10)] in that on April 6 and 7, 2013, Licensee, by its servants, agents, or employees, permitted dancing to a disc jockey without an amusement permit. The second count alleged a violation of section 404 of the Liquor Code [47 P.S. 4-404] in that on April 6 and 7 and May 31, 2013, Licensee, by its servants, agents, or employees, failed to adhere to the conditions of the agreement entered into with the Board placing additional restrictions on the license. The third count alleged a violation of section 474.1(a) of the Liquor Code [47 P.S. § 4-474.1(a)] and section 7.31(a) of the Board's Regulations [40 Pa. Code § 7.31(a)] in that on June 5 and 24, 2013, Licensee, by its servants, agents, or employees, failed to return the license and wholesale liquor purchase permit card to the Board after the licensed establishment had not been in

operation for a period of fifteen (15) consecutive days. An *ex parte* hearing¹ was held on May 13, 2014, and by Adjudication and Order mailed September 19, 2014, the ALJ sustained the charge and ordered Licensee to pay a fine of five hundred dollars (\$500.00). The Order further provided that the fine was due within twenty (20) days of the mailing date.

Licensee failed to pay the fine, and on October 30, 2014, well after the twenty (20)-day deadline, the ALJ issued a Supplemental Order suspending the license for one (1) day and continuing thereafter until the fine was paid. The ALJ took notice that the license had expired on October 31, 2013, and thus deferred the suspension period pending reactivation of the license. The Order stated that if after sixty (60) days the fine remained unpaid, the ALJ would impose further sanctions including possible revocation of the license.

After continued nonpayment of the fine, the ALJ, by Second Supplemental Order mailed January 23, 2015, revoked the license effective March 2, 2015.² Mr. Mogell filed the instant petition for leave

¹ The Citation and the Citation Hearing Notice were mailed to Licensee at the licensed premises by first class and certified mail, in compliance with section 471(a) of the Liquor Code [47 P.S. § 4-471(a)]. The Bureau's counsel represented at the hearing that he had spoken with a representative of Licensee. [N.T. 4].

² It must be noted that the license had already been revoked by the ALJ, effective November 3, 2014, due to Licensee's failure to pay the fine ordered in connection with

to appeal *nunc pro tunc* with the Board on May 7, 2015.

Mr. Mogell asserts that, as the owner of the licensed premises, he obtained a judgment against Licensee in the Philadelphia Municipal Court on August 24, 2010, for various defaults under the lease. [Petition paras. 1-4]. Licensee was subsequently evicted, and Mr. Mogell filed a Complaint in Confession of Judgment for Money against Licensee for additional monies still due under the lease. [Petition paras. 5-6]. A settlement agreement was reached on or about July 11, 2012, wherein Mr. Mogell was granted a security interest in the license to secure payment due from the proceeds of a contemplated sale of the license. [Petition para. 7; Ex. A].

After the planned sale failed to occur, Mr. Mogell filed a Writ of Execution in the Philadelphia Court of Common Pleas and ultimately purchased "the rights in and to the [l]icense" at a Sheriff's Sale held February 24, 2014. [Petition paras. 9-10; Exs. B, C].

By letter dated March 16, 2015, Mr. Mogell, through his counsel, notified the Board's Bureau of Licensing of the foregoing and requested any documents necessary to renew the license. [Petition para. 12; Ex. D]. By letter dated April 14, 2015, the Bureau of Licensing informed

Citation No. 13-0657. Because Mr. Mogell's petition was untimely with respect to both revocation orders, there is no need to discuss what effect, if any, the second revocation order of January 23, 2015, had on the status of the license, which was revoked effective November 3, 2014.

Mr. Mogell that the license had been revoked by the ALJ effective November 3, 2014. [Petition para. 13; Ex. E]. The instant petition followed on May 7.

In the event a party³ is aggrieved by a decision of an ALJ, there is a right of appeal to the Board. [47 P.S. § 4-471(b); 40 Pa. Code § 17.21(a)]. The Board's Regulations provide that failure to file or have the appeal postmarked within thirty (30) calendar days of the mailing date of the ALJ's order will result in dismissal of the appeal. [40 Pa. Code § 17.21(b)(2)].

The filing of a timely appeal is a jurisdictional prerequisite; if an appeal is filed outside the statutory period from the time the determination is made, it becomes final, and the appeal may not be considered. Hessou v. Unemployment Comp. Board of Review, 942 A.2d 194, 197-198 (Pa. Cmwlth. 2008) (internal citations omitted).

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). Thus, the heavy burden of establishing the right to have an untimely

³ Although there is some question as to whether Mr. Mogell, a third-party creditor, has standing to file an appeal in this matter, it will be assumed for purposes of this opinion that Mr. Mogell indeed has standing.

appeal considered rests with the moving party. Blast Intermediate Unit No. 17 v. Unemployment Comp. Bd. of Review, 645 A.2d 447 (Pa. Cmwlth. 1994). Extension of a statutory period for filing an appeal is generally limited to cases where “there is fraud or some breakdown in the court’s operation.” West Penn Power Co., 460 Pa. at 556, 333 A.2d at 912. The Court later recognized another exception to the general prohibition against late appeals for the non-negligent conduct of an appellant’s attorney or the attorney’s staff. Bass v. Commonwealth Bureau of Corrections, 485 Pa. 256, 401 A.2d 1133 (1979).

The Court further clarified the holding in Bass and applied it in the context of an untimely administrative appeal in Cook v. Unemployment Compensation Board of Review, 543 Pa. 381, 671 A.2d 1130 (1996). Specifically, the Court ruled that an untimely 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 or the appellant’s counsel; (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.

In light of the foregoing, the Board does not have authority to entertain Mr. Mogell's untimely appeal. The mailing date of the revocation order is January 23, 2015, and thus a timely appeal was due to the Board by February 23, 2015. Mr. Mogell's petition was not filed until May 7, 2015, over ten (10) weeks later.

Nonetheless, Mr. Mogell argues that he is entitled to *nunc pro tunc* relief under the Cook standard because his failure to meet the appeal deadline was due to non-negligent circumstances. [Petition para. 20]. Specifically, Mr. Mogell argues that because he filed a financing statement with the Pennsylvania Department of State, he should have received notice from the Board, the Bureau, or the Office of Administrative Law Judge ("OALJ") regarding any hearings or adjudications, or any renewals, nonrenewals, or revocations of the license. [Petition paras. 21-22].

However, no such obligation is placed on the Board by the Liquor Code or the Board's Regulations, nor is the Board aware of any such duty on the part of the Bureau or the OALJ to identify and notify a licensee's creditors of the status of enforcement matters. Although a license may constitute property as between a licensee and its creditors, it remains a privilege between the Board and the licensee. [47 P.S. § 4-468(d)]. Accordingly, the named licensee retains any and

all privileges of the license unless and until the Board receives either a Court Order or a Writ of Execution accompanied by a Sheriff's Bill of Sale directing or stating otherwise.⁴

Here, Mr. Mogell's letter of March 16, 2015, and accompanying Writ of Execution and Sheriff's Bill of Sale would have indeed served to notify the Board that he had the right to control the license; however, Mr. Mogell inexplicably waited over thirteen (13) months after the Sheriff's Sale before notifying the Board of his interest in the license. In the meantime, the license was revoked by the ALJ.

It appears, therefore, that Mr. Mogell failed to take sufficient steps to protect his security interest. While he points the finger at the Board and the Bureau for failing to keep any and all creditors apprised of the status of Licensee's license, Mr. Mogell failed to receive notifications related to the license because he failed to notify the Board of the Sheriff's Sale until over a year after it occurred. Moreover, Mr. Mogell's petition makes no mention of any attempts to obtain information from the OALJ, an autonomous office created by the Legislature in Act 14 of 1987 to preside over enforcement matters brought by the Bureau. OALJ adjudications and orders may be

⁴ The Board may also accept a sworn affidavit executed by counsel, representing that the licensee is in default of an agreement that authorizes a third party to control the license in the event of such default and that all necessary and required procedures have been followed pursuant to any underlying agreements and applicable laws.

obtained by members of the public, including creditors, by contacting the OALJ. Neither the OALJ nor the Board would have had any reason to know that notices regarding the Citation or the license should have been sent to Mr. Mogell.

The Board cannot find an administrative breakdown, or that the failure to meet the appeal deadline was caused by non-negligent circumstances, when Mr. Mogell failed to take the proper measures to ensure he would be notified of the status of the license. At a minimum, such measures would certainly include contacting the Board regarding the Sheriff's Sale as well as contacting the OALJ to inquire as to any pending fines against Licensee and to ensure he would receive any notices pertaining to the Citation. Therefore, Mr. Mogell has failed to meet his burden with respect to the first Cook factor.

The petition also fails to satisfy the second factor. In applying Cook, the courts require that a petitioner seeking *nunc pro tunc* relief act with reasonable diligence upon learning of the necessity to take action. Here, Mr. Mogell argues that he filed his petition for leave to appeal *nunc pro tunc* within a short time after learning of the revocation, yet the record does not support that assertion. From the time Mr. Mogell learned of the revocation until the time he filed his petition with the Board on May 7, 2015, approximately twenty-three

(23) days had elapsed. The petition provides no explanation for this delay. While there is no established time period for what constitutes a “short duration” after learning of a missed appeal deadline, the lengthy and unexplained delay in this case does not show that Mr. Mogell acted with reasonable diligence, especially given that shorter periods have been found to be insufficient by the courts.⁵

Having failed to meet the first two (2) Cook factors, there is no need for the Board to assess the third or fourth factors, i.e., the overall time period which elapsed, and prejudice. Because Mr. Mogell failed to satisfy his heavy burden of justifying this rare relief by establishing all of the Cook factors, the Board is unable to consider the untimely appeal *nunc pro tunc*.

Accordingly, for the foregoing reasons, Mr. Mogell’s petition for leave to appeal *nunc pro tunc* is dismissed.

⁵ See, e.g., Stanton v. Department of Transp., Bureau of Driver Licensing, 623 A.2d 925 (Pa. Cmwlth. 1993) (licensee’s delay of eleven days, upon becoming aware of the necessity to petition for leave to appeal *nunc pro tunc*, failed to show reasonable diligence).

ORDER

The petition for leave to appeal *nunc pro tunc* of Cary Mogell is dismissed.

The Second Supplemental Order of Administrative Law Judge Tania E. Wright, mailed January 23, 2015, remains in effect.

It is hereby ordered that Restaurant Liquor License No. R-11351 remains revoked as of March 2, 2015.

Board Secretary