

Fleischer v New York State Liq. Auth.

2012 NY Slip Op 30864(U)

March 21, 2012

Sup Ct, NY County

Docket Number: 110410/2011

Judge: Michael D. Stallman

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 21

GEORGETTE FLEISCHER, Individually and as Founder of
FRIENDS OF PETROSINO SQUARE,

INDEX NO. 110410/11

MOTION DATE 12/8/11

Petitioner,

- v -

MOTION SEQ. NO. 001

THE NEW YORK STATE LIQUOR AUTHORITY, KERRI J.
O'BRIEN in her capacity as Deputy Commissioner of
Licensing, and DANA E. CHRISTIAN in his capacity as Acting
Director of Licensing,

Respondents.

The following papers, numbered 1 to 8, and memoranda of law were read on this Article 78 petition

Notice of Petition— Verified Petition — Exhibits A-S; **No(s).** 1-2; 3
Affidavit in Support— Exhibits 1-4

Verified Answer — Exhibits 1-5, 6 [Affidavit], 7-8; Affirmation—Exhibits A-D; **No(s).** 4-6
Verified Answer*

Verified Reply—Exhibits A-D; Verified Reply—Exhibits A-C **No(s).** 7; 8

*The Verified Answer of Intervenor 114 Kenmare Associates was annexed as Exhibit A to a prior motion for leave to intervene; it is not separately numbered here but was also read

Upon the foregoing papers, it is ADJUDGED that this Article 78 petition is denied and the proceeding is dismissed.

In this Article 78 proceeding, petitioner challenges the determination of respondent New York State Liquor Authority (SLA) to renew a liquor license issued to intervenor respondent 114 Kenmare Associates, LLC, doing business as La Esquina Restaurant (La Esquina).

The relevant provisions of the Alcohol Beverage Control Law concerning renewal of liquor licenses were amended and effective as of September 23, 2011, and therefore have changed since La Esquina's liquor license was renewed. At the time of the renewal of La Esquina's liquor license, Alcohol Beverage Control Law §§ 64 (2-a) and 109 (2) required a licensee in the City of New York to notify the community board with jurisdiction over the area where the licensed premises is located, not less than 30 days prior to submission of its renewal application to the SLA. Alcohol Beverage Control Law § 64 (2-a) then provided that the community board " may express an opinion for or against the granting of such

UNFILED JUDGMENT

(Continued . . .)

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 41B).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

license. Any such opinion shall be deemed part of the record upon which the liquor board makes its determination to grant or deny such license.”

Here, it is not disputed that La Esquina notified Community Board 2 (CB2) of its intent to renew its liquor license less than 30 days prior to submitting its renewal application to the SLA. (Verified Answer, Ex 5.) However, by letter dated May 27, 2011 to the SLA, CB2's chair, Jo Hamilton, wrote, in pertinent part:

“The notice was received too late for the applicant to be placed on the May agenda of CB2's SLA Licensing Committee. However, the applicant has agreed to appear before the committee in June to address any concerns voiced by the community. Therefore, we agree to waive the 30 day period and allow the applicant to proceed to file their application for an on-premise liquor license.”

(*Id.*) Hamilton also signed a second letter dated May 27, 2011, nearly identical to the other letter, except that it stated, in pertinent part:

“We agree to waive the 30-day period and allow the applicant to proceed to file its renewal application for an on-premise liquor license. *However we respectfully request that the NY State Liquor Authority considers the CB2 resolution, which may include stipulations regarding community concerns, before making a final determination on this renewal application.*”

(Verified Petition, Ex B [petitioner's emphasis].)

By letter dated June 1, 2011 to La Esquina, the SLA stated, “Please take notice that the above listed licensee has filed a renewal application in a timely fashion with the New York State Liquor Authority. This letter will grant permission for the licensee to operate the premises under the Alcohol Beverage Control Law. A formal license will be issued by computer from the State Liquor Authority Renewal Unit.” (Verified Petition, Ex B.) It is not disputed that the SLA renewed La Esquina's liquor license, effective 5/31/2011 until 5/31/2013. (*Id.*)

On June 14, 2011, CB2's SLA Licensing Committee recommended denial of the renewal of La Esquina's liquor license. (Verified Petition, Ex C.) On June 23, 2011, the full board of CB2 also recommended denial of La Esquina's liquor license.

Petitioner argues that the SLA should not have renewed La Esquina's liquor license because CB2 was not timely notified of its renewal application, because CB2 ultimately recommended that La Esquina's license should not be renewed, and because the SLA did not take into account CB2's disapproval before it decided to renew La Esquina's license. Petitioner disputes SLA's statement in the June 1, 2011 letter that La Esquina filed a renewal application in a timely fashion with the SLA, in that timely notice was not given to CB2.

(Continued . . .)

Petitioner also recounts the history of petitioner's complaints and opposition to the continued operation of La Esquina. For example, petitioner wrote a letter in 2007 to the 5th Police Precinct and to the SLA complaining of noise, overcrowding, and illegal parking (Verified Petition, Ex I), and noise complaints to 311 about La Esquina were purportedly made in September and November 2009, April, May, and October 2010, and March and May 2011 (See Verified Petition, Ex C.) Petitioner submits a 2008 resolution from CB2 unanimously opposing La Esquina's application to operate a sidewalk café (Verified Petition, Ex J). Petitioner also submits a letter dated November 30, 2009 from petitioner to the SLA, requesting the SLA to revoke La Esquina's liquor license (Verified Petitioner, Ex P), for overcrowding and noise that petitioner complained of previously, for alleged building code violations, and other reasons. For example, the letter mentions the 2008 conviction of Cordell Lochin, who was reportedly one of La Esquina's original four principals, for felony drug smuggling. Petitioner also mentions that SLA previously renewed La Esquina's license in 2009, notwithstanding pending disciplinary charges against La Esquina that could have resulted in revocation or cancellation of its license. (Verified Petition, Ex O.)

"The discretion of the Authority in denying a new application for a license, or a renewal application, is broader than in revoking or suspending a license, and this court is limited to a determination 'whether the record discloses circumstances which leave no possible scope for the reasonable exercise of that discretion.' However, even this broad discretion must rest on a foundation of rationality."

(*Sled Hill Café, Inc. v Hostetter*, 22 NY2d 607, 612 [1968] [internal citations omitted].)

To the extent that petitioner argues that Alcohol Beverage Control Law § 64 (7) (f) required the SLA to conduct a public hearing as to the renewal of La Esquina's liquor license, this argument fails. By way of background, Alcohol Beverage Control Law § 64 (7) (f) permits the SLA to issue a liquor license to premises that would be located within five hundred feet of three or more existing licensed premises only if, after consultation with the municipality or community board, the SLA determined that granting such a license would be in the public interest. Alcohol Beverage Control Law § 64 (7) (f) requires the SLA to conduct a hearing, on notice to the applicant and the community board.

In *Cleveland Place Neighborhood Association v New York State Liquor Authority* (268 AD2d 6 [1st Dept 2000]), the Appellate Division ruled that a hearing was also required pursuant to Alcohol Beverage Control Law § 64 (7) (f) before determining whether to grant an application for transfer of a liquor license. Contrary to petitioner's contention, *Cleveland Place Neighborhood Association* did not hold that a hearing was required before the SLA determined whether to grant renewal of a liquor license. On the contrary, Alcohol Beverage Control Law § 64 (7) (f) specifically states, "No premises having been granted a license pursuant to this section shall be denied a renewal of such license upon the grounds that such premises are within five hundred feet of a building or buildings

(Continued . . .)

wherein three or more premises are licensed and operating pursuant to this section and sections sixty-four-a, sixty-four-b, sixty-four-c, and/or sixty-four-d of this article.” The language that petitioner quotes from *Cleveland Place Neighborhood Association* for the proposition that hearing was required is taken out of context.

To the extent that petitioner argues that SLA should have waited for CB2's recommendation as to whether La Esquina's liquor license should be renewed, this argument is unavailing. CB2 unequivocally waived its right to object to the renewal on the ground of untimely notice to the community board. It was not an abuse of discretion for SLA not to honor CB2's request that the SLA defer its decision to renew La Esquina's liquor license until after CB2's resolution. Petitioner's reliance upon Alcohol Beverage Control Law § 110-b (5) is misplaced. Alcohol Beverage Control Law § 110-b (5) became effective on September 23, 2011, after the SLA decided to renew La Esquina's liquor license.

Even if the SLA had considered CB2 disapproval of the renewal, the Court of Appeals held that the SLA may not deny an application for an initial liquor license based only on vigorous protests and objections voiced by local civic groups, religious organizations, community residents and their elected officials. (*Matter of Circus Disco Ltd. v New York State Liquor Auth.*, 51 NY2d 24, 38 [1980].) Petitioner must therefore demonstrate more than community opposition to demonstrate that the SLA's decision to renew La Esquina's liquor license was arbitrary and capricious, or lacking a rational basis.

Petitioner's submissions include newspaper articles, blog excerpts and petitioner's own submissions, which the SLA considered as “lack[ing] even a minimal standard of reliability” to warrant denial of La Esquina's renewal application. Under the circumstances presented, petitioner has not demonstrated that SLA's refusal to consider her submissions was arbitrary or irrational. Although Alcohol Beverage Control Law § 106 (6) prohibits a licensee selling alcoholic beverages to “suffer or permit such premises to become disorderly,” “[c]onduct is not ‘suffered or permitted’ unless ‘the licensee or his manager knew or should have known’ of the asserted disorderly condition on the premises and tolerated its existence.” (*Playboy Club of New York, Inc. v State Liquor Auth.*, 23 NY2d 544, 550 [1969].) Petitioner's submissions fall short of this standard.

The SLA's decision to renew the liquor license notwithstanding La Esquina's prior adjudicated adverse history—i.e., SLA's record of adjudicated offenses that a licensee accumulates over time—was not an abuse of discretion. According to the SLA, La Esquina's record is “neither exemplary nor egregious. It is in the broad middle.” (*Martin Affirm.* ¶ 107.) Petitioner disagrees that La Esquina should fall “in the broad middle,” and contends that “[i]f La Esquina's renewal cannot be denied, no renewal can be denied.” However, “the Court may not substitute its own judgment for that of the agency, particularly with respect to matters within its expertise.” (*City Services, Inc. v Neiman* 77 AD3d 505, 507 [1st Dept 2010]; see also *330 Restaurant Corp. v State Liquor Auth.*, 26 NY2d 375, 378 [1970]) [“A reviewing court will not substitute its judgment for the considered judgment of an

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administrative tribunal if there is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion'").)

The gravamen of the petition is that SLA's history of dealing with petitioner's complaints about La Esquina "demonstrates a pattern of conduct with respect to the LLC [La Esquina] that is arbitrary and capricious, an abuse of discretion, and in legal error." (Verified Reply ¶ 8.) However, petitioner's complaints about the pace of SLA's investigations into complaints or its alleged abandonment of enforcement duties are beyond the scope of this Article 78 proceeding.

Petitioner's remaining arguments are without merit. SLA's alleged conduct with respect to petitioner's Freedom of Information Law requests are irrelevant to this Article 78 petition.

Dated: 3/21/12
New York, New York

[Signature], J.S.C.

- 1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
- 2. Check if appropriate:..... PETITION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. Check if appropriate:..... SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

HON. MICHAEL D. STALLMAN

UNFILED JUDGMENT

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