

Matter of Lalile, Inc. v New York State Liq. Auth.

2017 NY Slip Op 31914(U)

March 20, 2017

Supreme Court, Queens County

Docket Number: 9359/16

Judge: Darrell L. Gavrin

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This opinion is uncorrected and not selected for official publication.

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN**
Justice

IA PART 27

IN THE MATTER OF THE APPLICATION OF
LALILE, INC.

Petitioner,

For a Review Pursuant to Article 78 of the Civil
Practice Law and Rules

- against -

NEW YORK STATE LIQUOR AUTHORITY,

Respondent.

Index No. 9359/16

Motion
Date October 13, 2016

Motion
Cal. No. 104

Motion
Seq. No. 1

FILED & RECORDED
MAR 29 2017
COUNTY CLERK
QUEENS COUNTY

The following papers numbered read on this Article 78 proceeding by petitioner for a judgment vacating and annulling respondent's ("SLA") determination, dated July 26, 2016, which denied petitioner's application for an on-premises liquor license, and for an order directing the SLA to issue an on-premises liquor license for petitioner's restaurant located at 91-01/05 Astoria Boulevard, East Elmhurst, New York 11369.

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Upon the foregoing papers, it is ordered that petitioner's application is determined as follows:

On March 5, 2014, petitioner, Lalile Inc. entered into a lease agreement with landlord, Cadore Holding Corp. to operate a restaurant and bar at the premises located at 91-01/05 Astoria Boulevard, East Elmhurst, New York 11369. The agreement provided that the lease term would commence on March 15, 2014, that the tenant would not pay rent for the first two

months during which time it would perform renovations, and that monthly rent payments would commence on May 15, 2014. The agreement was executed on behalf of petitioner, Lalile, Inc., by Domingo Thomas ("Thomas"), in his personal and corporate capacity, and by Dominick Iocco, president of Cadore Holding Corp.¹

An on-premises liquor license was issued in June 2008 to Angel's Party Place Corp. (Angel's), the prior occupant of said premises. Other than being cited for violating local regulations in 2009 and 2012, the licensee operated its business without any liquor law violations. In June 2013, the licensed premises became the subject of three separate disciplinary proceedings before the SLA, alleging seventeen violations, including numerous after hours sales and consumption of alcoholic beverages. It was also alleged that due to a continuing pattern of disorder, the business had become the focal point of police attention. On January 3, 2014, the SLA issued an emergency order, suspending Angel's liquor license, until the disciplinary proceedings were complete. On March 25, 2014, the SLA accepted Angel's proposal to resolve the disciplinary proceedings with the cancellation of its liquor license.

Cadore Holding Corp. commenced a summary proceeding against Angel's in Civil Court, Queens County, Landlord-Tenant Part, to recover possession of the premises and for a money judgment. That matter was settled and the parties executed a release of claims on March 6, 2014 in that court.

On May 22, 2014, Lalile Inc. filed an application with the SLA for an on-premises liquor license for the subject premises, which the SLA denied. On November 20, 2015, Lalile Inc. submitted a second application for an on-premises liquor license for the subject premises, which the SLA again denied. The SLA further denied Lalile Inc.'s request for reconsideration of its second application. In a written determination, dated July 26, 2016, the SLA adhered to its prior determination, on the ground that no new evidence had been presented to support a re-examination.

The SLA noted that Thomas apparently was an "owner/operator" of a restaurant in the Dominican Republic since 2010 and had never held a license to sell alcoholic beverages in New York State. The SLA further noted that the community board opposed the issuance of a liquor license at the subject premises. In addition, the SLA was concerned that Thomas would operate the establishment as a bar, rather than a restaurant. The SLA stated that given Thomas's lack of experience in working in, or supervising, a business that sells alcoholic beverages, Thomas failed to show that he would be able to prevent the problems that led to the cancellation of the prior license at the same location. The SLA was also troubled by the fact that Thomas started the application process while Angel's was still in possession of the premises.

¹ It is noted that Thomas printed his name on the lease as Domingo A. Thomas Valerio, and that in the proceedings before the SLA, he is referred to as Domingo Valerio.

Lalile Inc. commenced the instant Article 78 proceeding, seeking to annul the SLA's July 26, 2016 determination, and for an order granting petitioner an on-premises liquor license for the subject premises.

The ability to engage in the business of selling alcoholic beverages is a privilege, as there is no inherent right to a liquor license (*Wager v State Liquor Authority*, 4 NY2d 465 [1958]). The discretion to grant that privilege lies with the SLA (*see* Alcoholic Beverage Control Law § 2, 17). The SLA "has broader discretion in denying a new application for a license than in the revocation of an existing one, although its discretion must rest upon a rational basis" (*Stanwood Pub, Inc. v New York State Liquor Authority*, 82 AD2d 865 [2nd Dept 1981]). Alcoholic Beverage Control Law § 64 concerns licenses to sell liquor for on-premises consumption. As part of the license application process, Alcoholic Beverage Control Law § 64 (6-a) provides that the SLA "may consider any or all" of six enumerated subsections when determining "whether public convenience and advantage and the public interest will be promoted by the granting of licenses and permits for the sale of alcoholic beverages at a particular unlicensed location." As relevant here, the SLA may consider "[t]he history of liquor violations and reported criminal activity at the proposed premises" and "[a]ny other factors specified by law or regulation that are relevant to determine the public convenience and advantage and public interest of the community" (Alcoholic Beverage and Control Law § 64 [6-a]; [e-f]). In addition, the SLA is required to "carefully evaluate the character, fitness, experience, maturity and financial responsibility of each applicant in determining whether public convenience and advantage would be served by approval of the application" (9 NYCRR 48.7).

In reviewing the SLA's determination of whether the public convenience and advantage would be served by granting or denying an application for an on-premises liquor license, the inquiry of the court is strictly limited to whether the SLA acted arbitrarily and capriciously (*see Matter of Costco Wholesale Corp. v New York State Liq. Auth.*, 125 AD3d 775 [2d Dept 2015]). The burden of establishing that the SLA acted arbitrarily or capriciously rests on the petitioner (*Blue Baby Cocktail Lounge, Inc. v New York State Liquor Authority*, 33 AD2d 521 [2d Dept 1969]). A determination is "arbitrary and capricious when it is taken without sound basis in reason or regard to the facts" (*Matter of Peckham v Calogero*, 12 NY3d 424 [2009]; *see Matter of Murphy v New York State Div. of Hous. & Community Renewal*, 21 NY3d 649 [2013]). Furthermore, reliance upon an improper basis for the determination requires that the determination be annulled, regardless of whether the SLA also relied, in part, upon valid considerations (*see P.G.P. Entertainment Corp. v State Liquor Authority*, 52 NY2d 886 [1981]; *see also Matter of Fairchild Corp. v Boardman*, 56 AD3d 778 [2d Dept 2008]).

In the case at bar, the SLA correctly relied on Thomas's perceived lack of experience in supervising the operation of a licensed establishment with a prior history of violations and police involvement. However, the SLA's reliance and conclusion that Thomas had misrepresented his relationship with Angel's, was improper. There was no evidence that Angel's was still in possession of the premises when Lalile, Inc. started the application process.

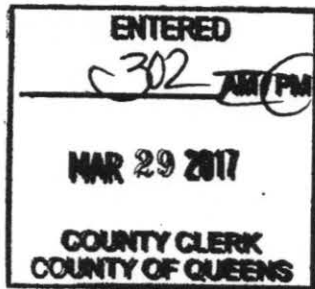
Lalile Inc. filed its first application with the SLA on May 22, 2014, well after the prior tenant's liquor license was cancelled. There is no indication that Angel's remained in possession of the subject premises at this time. The fact that Lalile Inc. and Cadore Holding Corp. entered into a lease agreement for the subject premises close in time to the resolution of the court proceeding to obtain possession of the premises, does not constitute evidence of a prior existing relationship between Lalile Inc./Thomas and Angel's. Therefore, the SLA's conclusion was based upon impermissible speculation, not supported by the facts, and as a result, was arbitrary and capricious. In addition, the SLA improperly relied on the alleged misrepresentation of Thomas's interest in a restaurant in the Dominican Republic. Moreover, the SLA improperly considered the adverse sentiment in the community. Community opposition is not a sufficient legal reason to deny a license (*see P.G.P. Entertainment Corp. v State Liquor SLA*, 52 NY2d at 887-888; *Circus Disco, Ltd. v New York State Liquor SLA*, 51 NY2d 24 [1980]).

Therefore, although the SLA validly considered Thomas's expertise and ability to operate the establishment, the SLA's reliance on improper factors as well, requires that its determination be annulled (*see P.G.P. Entertainment Corp. v State Liquor SLA*, 52 NY2d at 888). Nonetheless, because Thomas's potential lack of expertise would be a valid ground for denial of the license, this matter is remitted to the SLA for reconsideration of petitioner's application on that basis and other appropriate criteria, with an opportunity to both sides to address the issues (*id.*). Accordingly, it is hereby

ORDERED that petitioner's application is granted to the extent that the SLA's July 26, 2016 determination is annulled and the matter is remanded for further proceeding consistent with this Order.

A copy of this Order is being faxed to the attorney for petitioner.

Dated: March 20, 2017



DARBELL L. GAVRIN, J.S.C.

Qudney T. Stepper
CLERK

FILED & RECORDED
MAR 29 2017
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QUEENS COUNTY