Matter of Prime Six, Inc., d/b/a Woodland v New York State Liq. Auth.

2019 NY Slip Op 33330(U)

October 30, 2019

Supreme Court, Kings County

Docket Number: 512697/2019

Judge: Peter P. Sweeney

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Index No.: 512697/2019

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In the Matter of the Application of

PRIME SIX, INC. d/b/a WOODLAND,

Petitioner,

For Judgment Pursuant to CPLR Article 78

-against-

THE NEW YORK STATE LIQUOR AUTHORITY and VINCENT G. BRADLEY, in his official capacity as Chairman of the New York State Liquor Authority,

Respondents,

--x

DECISION/ORDER

The following papers numbered 1 to 8 were read on this petition:

Papers:	**Numbered:**
Order to Show Cause	1
Petition	2
Petitioner's Supporting Papers Affidavits/Affirmations/Exhibits/ Memos of Law	3
Respondents' Answer	4
Respondents' Answering Papers Affidavits/Affirmations/Exhibits/ Memos of Law	5
Petitioner's Repl Papers Affidavits/Affirmations/Exhibits/ Memos of Law	6
Respondent's Emergency Affirmation in Opposition with Affidavits/Affirmations/Exhibits	7
Sur-Reply to Respondent's Emergency Affirmation in Opposition with Affirmations/Affidavits/Exhibits/Memos of Law	8

2019 NOV -8 AM 10:31
KINGS COUNTY CLERK
FILED

Upon the foregoing papers, the petition is decided as follows:

MS #01-XMD

In this proceeding commenced pursuant to Article 78 of the CPLR, brought by order to show cause, the petitioner, PRIME SIX, INC. d/b/a WOODLAND seeks to vacate and annul a determination by respondent, the NEW YORK STATE LIQUOR AUTHORITY ("SLA") dated June 6, 2019, which summarily suspended its on-premises liquor license in accordance with New York State Administrative Procedure Act (SAPA) § 401(3). Petitioner also seeks an order staying and restraining respondent from enforcement of said summary suspension pending the final determination of this proceeding.

The petitioner operates a restaurant, bar and lounge in the Park Slope neighborhood in Brooklyn located at 242 Flatbush Avenue a/k/a 76-78 6th Street, Brooklyn, New York. On June 6, 2009, the SLA issued an "Emergency Summary Order of Suspension", summarily suspending petitioner's liquor license, without providing petitioner with advanced notice or an opportunity to be heard. Respondent SLA claims that it took such action because the "public health, safety, or welfare imperatively require[d] emergency action..." (New York State Administrative Procedure Act § 401[3]).[1] The Order indicated that such action was necessary as 39 separate violations of the Rules of the State Liquor Authority were found. Under normal circumstances, the SLA is

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[1]The New York State Administrative Procedure Act § 401(3) provides that:

"If the agency finds that public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered, effective on the date specified in such order or upon service of a certified copy of such order on the licensee, whichever shall be later, pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined."

without authority to revoke, cancel or suspend a liquor license without providing the licensee with notice of the revocation and an opportunity to be heard. Alcohol Beverage Control Law § 119(2) and (3) provides:

> 2. The liquor authority may on its own initiative or on complaint of any person institute proceedings to revoke, cancel or suspend any retail license and may impose a civil penalty against the licensee after a hearing at which the licensee shall be given an opportunity to be heard. Such hearing shall be held in such manner and upon such notice as may be prescribed by the rules of the liquor authority.
>
> 3. All other licenses or permits issued under this chapter may be revoked, cancelled, suspended and/or made subject to the imposition of a civil penalty by the liquor authority after a hearing to be held in the manner to be determined by the rules of the liquor authority.

There are no such procedural requirements under SAPA § 401(3).

The petitioner claims, in sum and substance, that the SLA's determination that public health, safety, and/or welfare imperatively required emergency action was arbitrary and capricious and that the SLA abused its discretion in suspending its liquor license without giving it advanced notice and an opportunity to be heard. Respondents contend that since the summary suspension of petitioner's liquor license was not a final determination, the Court lacks authority to review the determination. Respondents further contend the summary suspension was warranted under the circumstances.

The Court agrees that since the SLA's determination to summarily suspend petitioner's liquor license was not a final determination, this Court is without authority to review the determination. An article 78 proceeding can only be brought "after the determination to be reviewed becomes final and binding upon the petitioner" (CPLR 217[1]). In *Matter of Essex*

County v Zagata, 91 NY2d 447, 453 [1998], The Court of Appeals held that an agency action is final when the decision maker arrives at a "definitive position on the issue that inflicts an actual, concrete injury." The Court further held that "[a] determination will not be deemed final because it stands as the agency's last word on a discrete legal issue that arises during an administrative proceeding. There must additionally be a finding that the injury purportedly inflicted by the agency may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party. If further agency proceedings might render the disputed issue moot or academic, then the agency position cannot be considered definitive or the injury actual or concrete" (*id.* at 453-454 [internal quotation marks and citations omitted]; *see also Matter of Gordon v Rush*, 100 NY2d 236, 242-243 [2003]).

Here, the petitioner is legally entitled to contest the summary suspension and seek other ameliorative relief at an evidentiary hearing before the SLA. Accordingly, since administrative proceedings might render the disputed issue moot or academic, the SLA's position cannot be considered definitive or the injury to the petitioner actual or concrete.

The case of *Bracco's Clam & Oyster Bar Inc. v. New York State Liquor Auth.*, 52 Misc. 3d 1225(A), 43 N.Y.S.3d 766 [2016], which respondents cite in support of their position that the Court lacks authority to hear this case is almost factually identical to this case and fully supports the Court's holding. Recognizing that an agency action must be final and binding before an aggrieved party may seek judicial review under Article 78[2], and that one who objects to the act of

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[2] Citing *Boxers Enters. LLC v. The New York State Liquor Auth.*, 2012 N.Y. Slip Op 32482(U), 2012 WL 4752441 [Sup Ct, N.Y. County 2012] [citing CPLR 7801[1]].

an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law[3], the Court held that the summary suspension of the petitioner's liquor license pursuant to SAPA § 401(3) could not not reviewed by the Court (*id.)*. As here, the Court concluded that the determinatin to summarily suspend petitioner's liquor license was not final because the petitioner would have the opportunity to contest the summary suspension at an evidentiary hearing before the SLA (*id., citing 150 RFT Varick Corp. v. New York State Liquor Auth.,* 117 A.D.3d 575, 576, 986 N.Y.S.2d 102 [1st Dept 2014]).

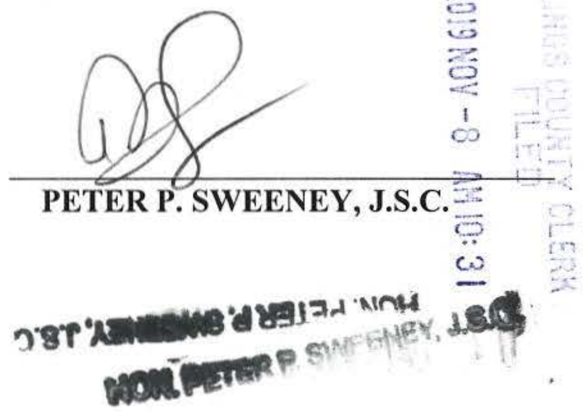
The Court has reviewed the cases cited by the petitioner in support of its contention that this matter is properly reviewable and finds them to be unpersuasive and/or not on point.

For the above reasons, it is hereby

ORDERED and **ADJUDGED** that the petition is **DISMISSED** and it is further

ORDERED that petitioner's request for a preliminary injunction is **DENIED.**

Dated: October 30, 2019



PETER P. SWEENEY, J.S.C.

[3]Citing *Lehigh Portland Cement Co. v. New York State Dept. of Envtl. Conservation,* 87 N.Y.2d 136, 141, 638 N.Y.S.2d 388 [1995] [internal quotations and citation omitted].