

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF MONROE : CIVIL TERM

MIDVALE GOLF & COUNTRY CLUB, INC.,

Index No. 2009/07443

Petitioner,

- vs -

NEW YORK STATE LIQUOR AUTHORITY,

Respondent.

APPEARANCES: Culley, Marks, Tanenbaum & Pezzulo, LLP
36 West Main Street, Suite 500
Rochester, New York 14614
Appearing on behalf of the petitioner
By: Glenn E. Pezzulo, Esq., of Counsel

Andrew M. Cuomo, Attorney General
144 Exchange Blvd., Suite 200
Rochester, New York 14614
Appearing on behalf of the respondent
By: J. Richard Benitez, Esq., of Counsel

DECISION

FRAZEE, J.

On October 28, 2006, a charity casino night was held at Midvale Golf & Country Club, Inc. (Midvale) to raise money for the Southeast Family YMCA. A member of Midvale sponsored the event. An investigator for the respondent New York State Liquor Authority (Liquor Authority) paid a \$40 fee, went to the event, and was given a packet which included a coupon for a free drink, some raffle tickets, and some play money. The investigator, who is not a member of Midvale, redeemed the

free drink coupon for a glass of wine at Midvale's bar.

Thereafter, the Liquor Authority charged Midvale with violations of subdivisions 3, 6 and 8 of §106 of the Alcohol Beverage Control Law. On August 30, 2007, a hearing was held before an administrative law judge of the hearing bureau of the Liquor Authority. By written decision dated April 30, 2008, the administrative law judge found that none of the charges were sustained. By letter dated February 20, 2009, the respondent Liquor Authority stated that it was contemplating reversing the administrative law judge's findings and attached proposed new findings which sustained dismissal of Charges 1 and 3, but reversed Charge 2, stating the administrative law judge's finding was "incorrect as a matter of law, Sec. 106.8 of the A.B.C. Law." Charge 2 alleged that on October 28, 2006, Midvale sold alcoholic beverages to persons who were neither members nor guests accompanying them in violation of subdivision 8 of §106 of the Alcohol Beverage Control Law. The proposed new findings further stated in relevant part:

That section is very precise. "A club or luncheon club license to sell alcoholic beverages for on premises consumption shall be permitted to sell such beverages only to its members and to their guests accompanying them."

There are no exceptions or bases for any waivers.

The event was advertised as a casino style charity event open to both country club members and non members who registered with the country club and the YMCA and paid a \$40 registration fee. Inv. Connors-Rizzo testified that she was not a member of Midvale Country Club and was not directly known by a sponsoring member.

I therefore disagree with the ALJ and find that the charge of sale to non-members was supported by substantial evidence.

By letter dated March 3, 2009, counsel for Midvale responded to the February 20, 2009 letter and proposed findings of the Liquor Authority asserting that Midvale did not violate Alcohol Beverage Law §106(8).

On March 18, 2009, the Liquor Authority held a full board meeting and voted to sustain Charge 2 and imposed a civil penalty of \$2,000. Thereafter, Midvale commenced this Article 78 petition to challenge the decision of the Liquor Authority finding a violation of Alcohol Beverage Law §106(8) and imposing a \$2,000 civil penalty. Midvale asserts in Paragraph 16 of its petition that the Liquor Authority's decision should be reversed "as arbitrary, capricious and an abuse of discretion, as it was not supported by the substantial evidence . . ."

In its answer, the Liquor Authority asserts that the determination was not affected by error of law and was not arbitrary and capricious. The Liquor Authority also asserts that because the challenged determination was made after an administrative hearing pursuant to direction of law and because resolution of petitioner's claim will require consideration of the quality and quantity of evidence presented at the hearing, the matter must be transferred to the Appellate Division, Fourth Department for substantial evidence review by that court pursuant to CPLR §7804(g).

In its reply papers and at oral argument, petitioner asserted that while its petition included the allegation that the Liquor Authority decision was not supported by substantial evidence, the issue presented was really whether the decision was arbitrary and capricious and affected by error of law under CPLR §7803(3).

DISCUSSION

Initially, the Court notes that this matter does not involve a substantial evidence question, but rather a question of whether the Liquor Authority's determination was affected by error of law.¹ In fact, when the Liquor Authority reversed the administrative law judge's decision with regard to Charge 2, it stated the administrative law judge's findings were incorrect as a matter of law. The facts of the case are not disputed. Therefore, this Court can determine the matter and transfer to the Appellate Division is not required (*see* CPLR §7804[g]; *see Matter of Buffalo Police Benevolent Association v New York State Public Relations Board*, 8 AD3d 958 [4th Dept 2004]; *Taher v Novello*, 278 AD2d 809 [4th Dept 2000] lv app denied 96 NY2d 712 [2001]; *Matter of Captains, Inc. v New York State Liquor Authority*, 220 AD2d 662 [2nd Dept 1995]; *Matter of CVS Discount Liquor, Inc. v New York State Liquor Authority*, 207 AD2d 891 [2nd Dept 1994]; *Dubb Enterprises, Inc. v New York State Liquor Authority*, 187 AD2d 831 [3rd Dept 1992]).

The Liquor Authority based its determination to sustain Charge 2 upon the finding that Investigator Connors-Rizzo "was not a member of Midvale Country Club and was not directly known by a sponsoring member." There is no dispute that the investigator was not a member of the club. The operative language of the statute (Alcohol and Beverage Law §106.8) is whether alcohol was served to a member or guest (emphasis added) accompanying a member, not whether a nonmember is

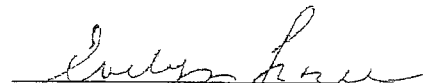
¹The fact that the petition may have included an allegation of lack of substantial evidence together with allegations under CPLR §7803(3) does not trigger the transfer requirements (*see Bonded Concrete, Inc. v Town Board of the Town of Rotterdam*, 176 AD2d 1137 [3rd Dept 1991]).

directly known by a sponsoring member. The Liquor Authority analysis is devoid of any assessment as to whether Investigator Connors-Rizzo was a guest of the Midvale member who sponsored the event on behalf of the Southeast Family YMCA. The Liquor Authority inappropriately read into the statute a requirement that the nonmember be directly known by the member. As the administrative law judge astutely observed,

Certainly if this was a wedding reception or other catered affair at the Club, some guests could attend who were not directly known by or to the sponsoring member. In that event those non-members could rightfully be served alcohol as a guest of the member. It cannot be shown that this catered event is any different and accordingly, I find that Charge #2 has not been sustained.

The Liquor Authority has misapplied the statute and its decision is affected by an error of law (CPLR §7803(3)). Petition is granted and the decision of the respondent dated February 20, 2009, and approved March 18, 2009, is reversed.

Dated at Rochester, New York
this 27th day of July, 2009.


Honorable Evelyn Frazee
Justice Supreme Court