

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CIVIL DIVISION

MALLARD MARKETS, INC. and :  
SHRIKKBK, LLC, :  
                    Petitioners :  
                    Vs. :       No. 19-3686  
PENNSYLVANIA LIQUOR CONTROL :  
BOARD, :  
                    Respondent :

John P. Rodgers, Esquire                      Counsel for Petitioners  
John Fraker, Esquire                         Counsel for Respondent

MEMORANDUM OPINION

Matika, J. - October 19, 2020

When the Pennsylvania Liquor Control Board (hereinafter "Board") renders a decision and issues an opinion on the proposed transference of a liquor license, and the aggrieved party files a petition to appeal that decision, the Court of Common Pleas, pursuant to 47 P.S. §4-464 is tasked with either sustaining or overruling that action. Such is the case here. For the reasons stated herein we sustain the action of the board and deny the petition.

FACTUAL AND PROCEDURAL BACKGROUND

At some point in time prior to March 30, 2017, Petitioner, Shrikbk, Inc. (hereinafter "Shrikbk") applied for a double transfer of restaurant liquor license No. R-18965 involving

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licensed premises located at 577 Delaware Avenue, Palmerton, Pennsylvania. By letter dated March 30, 2017, Shrikbk was notified that the Board approved its Prior Approval Application subject to the following conditions:<sup>1</sup>

PLCB-1854TP, Certification of Completion, affirming all financial arrangements except the costs of construction/renovations to the licensed premises were completed as originally reported. Both parties must sign and date the Certification of Completion. The Certification of Completion must be returned to the PLCB within 15 days of the formal completion date (settlement). Failure to conclude settlement within 30 days of the date of this letter may result in the approval being rescinded.

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Completion of the premises and compliance with the requirements shall be accomplished within 6 months from the date of this letter. Failure to comply with these requirements shall be considered cause for revocation of the license.

Until such time as the condition would be met by Shrikbk, the license would remain in safekeeping with the Board.

On or about March 4, 2019, Shrikbk was notified that the license's safekeeping period would expire on April 3, 2019 and that unless an application for transfer or a request to release the license from safekeeping were received, the license would be revoked. Thereafter, on April 2, 2019, Shrikbk filed an application for an intermunicipal double transfer of the subject

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<sup>1</sup> "Under a prior approval application, affirmation of the application guarantees the applicant issuance or transference of his license after his premises are brought into conformance with existing statutory requirements." *Centrum Prime Meats, Inc. v. Com. Pennsylvania Liquor Control Bd.*, 455 A.2d 742, FN 3 (Pa. Cmwlth. 1983) (citation omitted).

license from 577 Delaware Avenue, Palmerton, to 161 South 2<sup>nd</sup> Street, Lehighton, the physical location of Mallard Markets, Inc., (hereinafter "Mallard") the entity to whom Shrikbk was attempting to transfer the license.<sup>2</sup>

On or about October 7, 2019, the Board's Bureau of Licensing (hereinafter "Licensing") notified Shrikbk's counsel that a hearing was being scheduled on October 23, 2019 before a hearing examiner to take testimony and receive evidence pertaining to four (4) specific objections relative to the prior approval application and construction concerns at 577 Delaware Avenue, Palmerton along with the double transfer application itself to Mallard. The specific objections were spelled out as follows:

1. The Board shall take evidence concerning [Licensee's] failure to construct the licensed premises in accordance with the plans submitted to the Board and to reactivate restaurant Liquor License [No.] R-18965 at the approved location within a reasonable period of time in conformance with Section 403(a) of the Liquor Code.
2. The Board shall take evidence concerning [Applicant's] attempt to transfer the license from the approved person and premises to another person and premises between the time prior approval was granted and the completion of

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<sup>2</sup> Similar to how Shrikbk obtained this license, they are attempting to convey it to Mallard via a prior approval application.

construction, which may violate Section 403(a) of the Liquor Code.

3. The Board shall take evidence to determine if it should permit interior connections with the unlicensed grocery store, in accordance with Section 3.52(b) of the Board's Regulations.
4. The Board shall take evidence to determine that the approval of this application will not adversely affect the health, welfare, peace[,] and morals of the neighborhood within a radius of 500 feet of the proposed license premises.

At this hearing held before Hearing Officer Thomas R. Miller, Licensing called Frank Brewer (hereinafter "Brewer"). Brewer is a Licensing Analyst with the Pennsylvania Liquor Control Board. Brewer testified that he was tasked with investigating the transfer of this license to Mallard at 161 South 2<sup>nd</sup> Street, Lehigh, Pennsylvania. Further, Breiner ultimately testified that if the proposed licensed premises were completed as set forth in Mallard's plans, the application would meet the requirements of the Liquor Code as those plans related to objections 3 and 4 noted above.

Next, Karan Patel (hereinafter "Patel") testified for Mallard. Patel testified that he purchased Mallard Markets on September 26, 2016 and is the sole shareholder. Patel also testified that he is the sole member of KPPF, LLC, which owns the

building situated at 161 South 2<sup>nd</sup> Street, Lehighton and where the proposed licensed premises would be located. Nothing in Patel's testimony suggested that this proposed licensed premises would not be a suitable location to operate the subject license.

Ketan Shah (hereinafter "Shah") also testified. Shah is the sole member and officer of Shrikbk. In addition, Shah is a partner in BKK Enterprises, LLC which operates a convenience store/gas station at 577 Delaware Avenue, Palmerton, the same location where the prior approval was given by the Board to operate at those premises subject to the conditions set forth above regarding construction.

Prior to purchasing the subject license from a local pizzeria, Shah testified that he did not investigate whether he would be permitted to operate a board-licensed business at 577 Delaware Avenue. He did testify, however, that prior to purchasing the license, he engaged the services of Roger Soler (hereinafter "Soler") to create plans for the proposed construction/renovations at 577 Delaware Avenue in order to operate the alcoholic beverage sales business there. The costs of the construction/renovations would be about \$100,00.00.

Shah further testified that he sought financing from only one financial institution, that being Manasquan Bank, in order to finance the costs of the construction/renovations and to purchase inventory. Shah provided no more than a range for the amount he

was seeking to finance as somewhere between \$150,000.00 and \$170,000.00. Shah stated he only applied to that one banking institution as he was comfortable with that bank. According to Shah, Manasquan Bank denied his loan application.<sup>3</sup> Shah never asked why the loan was denied; he only speculated that it might have been because he did not own the premises where the business would be operated.

Shah also testified that in the course of investigating the prospects of operating this business at the Palmerton location, he learned of a potential problem involving compliance with the Palmerton Borough Zoning Ordinance. Shah claimed that while he did not have any direct contact with a representative of the borough to inquire or discuss this issue, he did represent that he relied upon the opinions of both his attorney and Soler as to what they believed to be a problem with construction *vis-à-vis* zoning, specifically parking. As a result, Shah stopped communicating with the bank regarding his loan application.

Lastly, Shah indicated that towards the end of 2017, he decided to scrap this project and sought others interested in buying the liquor license. Ultimately, on April 2, 2019, the day before the safekeeping period was set to expire, he executed an

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<sup>3</sup> At the proceeding before the hearing officer, "Mallard Exhibit L-5" was admitted. This was an email dated October 17, 2019 from a representative of Manasquan Bank to Shah simply stating "[P]lease be advised that Manasquan Bank is unable to offer financing for the expansion of your beer store located at 577 Delaware Ave, Palmerton, Pa. 18071."



agreement to transfer the license to Mallard.

Soler next testified on behalf of Shrikbk. Soler is in the business of designing plans for the building of convenience stores, gas stations and grocery stores including those involving liquor licenses. He was engaged by Shah to create plans for this business venture. Initially, and without the benefit of inquiring of borough officials or anyone else, Soler believed that there were sufficient parking spaces around this store to accommodate what would be needed to add the sale of alcoholic beverages to the business already existing at this site.

Sometime in the Summer or Fall of 2017, Soler claimed he discovered an issue within the Palmerton Borough Zoning Ordinance with regard to parking. At that time, pursuant to his interpretation of the ordinance, the business proposed by Shrikbk would be classified as a "tavern" requiring sixty (60) parking spaces versus a "restaurant" where the ordinance would only require eighteen (18) parking spaces. This led Soler to conclude that as a tavern, Shrikbk's proposed business could not comply with the parking requirements of the zoning ordinance, but it would, if it were considered a "restaurant."

Soler also testified that at no time did he, on behalf of Shrikbk, apply for a permit to operate this business based upon his beliefs that the parking problem would prohibit the grant of such a permit. Soler also testified that he did not feel Shrikbk

would be successful in seeking a variance nor any possible special exception that could be authorized by the zoning ordinance. Soler was also of the belief that Shrikbk would not qualify for an exemption from the off-street parking requirements nor would any type of "grandfathering" be applicable.<sup>4</sup>

After the hearing on October 23, 2019, the hearing officer authored a recommended opinion on Mallard's application for intermunicipal double transfer of restaurant liquor license No. R-18965. This recommended opinion denied the transfer and found that Shrikbk did not comply with conditions set forth in its prior approval granted by the Board. Thereafter, the Board, by order dated December 4, 2019 refused the application of Mallard for this transfer.

On December 23, 2019, Mallard and Shrikbk jointly filed the instant "Petition for Appeal from Denial of Application for Liquor License Transfer" pursuant to 47 P.S. §4-464. On January 30, 2020, the Board filed its opinion in support of its refusal to grant the transfer.<sup>5</sup> On January 31, 2020, the Board filed an answer to that

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<sup>4</sup> Nothing in the record suggests that Soler ever considered pursuing action under the zoning ordinance to obtain an interpretation as to how this business would be classified so that the required number of parking spaces can be determined.

<sup>5</sup> This opinion was almost verbatim that opinion recommended by the hearing officer, and concluded, in pertinent part that:

- o Licensee failed to construct the licensed premises in accordance with the plans submitted to the Board and to reactivate Restaurant Liquor License No. R-18965 within a reasonable period of time, as required by section 403(a) of the Liquor Code, 47 P.S. §4-403(a).



petition. A hearing/argument was held on July 6, 2020. At this proceeding, no additional testimony nor evidence was presented by either party.<sup>6</sup> The matter is now ripe for disposition.

### LEGAL DISCUSSION

An appeal to the Court of Common Pleas from a decision of the Pennsylvania Liquor Control Board is authorized by 47 P.S. §4-464. When such an appeal is filed, a *de novo* review of the decision is conducted by the court. *Domusimplicis, LLC v. Pennsylvania Liquor Control Board*, 202 A.3d 836 (Pa. Cmwlth. 2019); 47 P.S. §4-464. Upon review of that decision, the court is obligated to accept into evidence the record created before the hearing examiner where offered by the Board. *Two Sophia's Inc. v. Pennsylvania Liquor Control Board*, 799 A.2d 917 (Pa. Cmwlth. 2002). Further, if no new facts or evidence are presented at the *de novo* hearing, the reviewing court is not permitted to substitute its findings of fact for those of the Board or its discretion and the court must

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- o Applicant's attempt to transfer the license from Licensee's 577 Delaware location to Applicant's proposed licensed premises between the time prior approval was granted and the completion of construction, is in violation of section 403(a) of the Liquor Code, 47 P.S. § 4-403(a).
  - o Applicant's interior connections to the unlicensed grocery store are acceptable, in accordance with section 3.52(b) of the Board's Regulations, 40 Pa. Code §3.52(b).
  - o The approval of Applicant's application will not adversely affect the health, welfare, peace, and morals of the neighborhood within a radius of 500 feet of the proposed licensed premises.
  - o Applicant's application for intermunicipal double transfer of Restaurant Liquor License No. R-18965 is denied.

<sup>6</sup> The parties agreed that the record created before the Hearing Officer would serve as the record for this Court to consider.

accept the decision of the Board unless there is a clear abuse of discretion. *Arrington v. Pennsylvania Liquor Control Board*, 667 A.2d 439 (Pa. Cmwlth. 1995); *Pennsylvania Liquor Control Board v. Can, Inc.*, 664 A.2d 695 (Pa. Cmwlth. 1995), appeal granted in part, 671 A.2d 1135; *Darlene Bar, Inc. v. Pennsylvania Liquor Control Board*, 414 A.2d 721 (Pa. Cmwlth. 1980).

47 P.S. §4-403 governs applications for or transfers of liquor licenses like the one at issue here. Under certain situations construction/renovations of the premises to be licensed are necessary. This same statute governs those situations as well. When such construction/renovations are required, approval of the application may be conditionally granted by the Board with those construction/renovation requirements occurring after the approval and as a condition thereof. Section 4-403 reads in pertinent part:

"After approval of the application, the licensee shall make the physical alterations, improvements and changes to the licensed premises, or shall construct the new building in the manner specified by the board at the time of approval, and the licensee shall not transact any business under the license until the board has approved the completed physical alterations, improvements and changes to the licensed premises, or the completed construction of the new building as conforming to the specifications required by the board at the time of issuance or transfer of the license, and is satisfied that the establishment is a restaurant, hotel or club as defined by this act. The board may require that all such alterations or construction or conformity to definition be completed within six months from the time of issuance or transfer of the license. Failure to comply with these requirements shall be considered cause for revocation of the license. **No such license shall be transferable between the time of**

issuance or transfer of the license and the approval of the completed alterations or construction by the board and full compliance by the licensee with the requirements of this act, except in the case of death of the licensee prior to full compliance with all of the aforementioned requirements or unless full compliance is impossible for reasons beyond the licensee's control, in which event, the license may be transferred by the board as provided in this act." (emphasis ours).

In the case at bar, Shrikbk received the approval of the Board to obtain the license at issue upon the condition that it make certain construction/renovations to the subject premise where the license would be operational. Shrikbk claims, that, for reasons beyond its control which made it impossible to complete construction/renovation conditions it was necessary to attempt to transfer this license to Mallard. The testimony presented before the hearing officer as it pertains to this appeal, centers on two points: 1) the inability to satisfy the zoning ordinance of Palmerton Borough; and 2) the inability to obtain the financing from the one and only funding source it contacted, Manasquan Bank. Shrikbk claims that these two issues created the impossibility of performing the conditions of the prior approval and thus should suffice to allow it to transfer liquor license R-18965 to Mallard.

The seminal case in this area of liquor license law and the case upon which the parties rely is *Pennsylvania Liquor Control Board v. Rauwolf*, 281 A.2d 205 (Pa. Cmwlth. 1971). In *Rauwolf*, the court held that because it was impossible for Rauwolf to complete the alterations and repairs to the subject premises

pursuant to the prior approval, the Board abused its discretion in refusing to allow Rauwolf to transfer the license to a new owner at a new location. *Id*

In *Rauwolf*, the licensee received prior approval from the Board subject to making certain alterations and repairs. The licensee took the necessary steps to secure the building and zoning permits. After the zoning board of adjustment refused the permits, *Rauwolf* appealed that decision to the Court of Common Pleas which sustained the actions of the zoning board. As a result, the licensee, being unable to complete the necessary repairs/alterations within the time allotted, sought to transfer the license. Six months prior to the expiration of the license, *Rauwolf* entered into an agreement of sale to transfer the license to Restaurant Systems, Inc. Pursuant to *Rauwolf*,

"Section 403(a) prohibits the transfer of a license to a new owner or a new location, at any time during the interval between two specified events. The First event is the Board's prior approval of a transfer to a particular location and the Second event is the completion of the alterations or construction at the approved new location. Section 403(a) assumes that the two events are going to happen and that an owner wishes to transfer a license to a new owner between the two events. If the Second event, mainly the completion of alterations or construction at the approved location is impossible or has been abandoned by the owner, Section 403(a) does not apply." *Id.* at 207-208.

However, the *Rauwolf* court found that it was impossible for the licensee to perform the repairs because of the inability to secure the permits. Finding that the "second event", i.e. the

completion of the alterations and repairs, was an impossibility and something beyond the licensee's control, the court found that the board abused its discretion and that the trial court was correct in allowing *Rauwolf's* attempt to transfer the license.

"To interpret Section 403(a) as prohibiting the Board from approving *Rauwolf's* transfer would certainly be an absurd or unreasonable result. It would mean that the whole purpose of obtaining prior approval could be frustrated so far as an owner is concerned. In this case, *Rauwolf* was confronted with a situation which prevented the completion of his original plan and he may not now be precluded from further activity with regard to his license.

The Board's failure to renew *Rauwolf's* license after it had refused to allow a transfer to a new owner at a new location was also in error." *Id* at 208.

Additionally, in *Phelan v. Com., Liquor Control Bd.*, 373 A.2d 794, 795 (Pa. Cmwlth. 1977), the court found that the licensee was not entitled to a renewal and transfer of his license because his duty to construct the proposed restaurant was not because of impossibility. In *Phelan*, the licensee simply desired to change the location of where the license would be operated and failed to establish factually an impossibility of performance of construction. Where impossibility is not proven, the transfer cannot proceed.

In the case at bar, Shrikbk claims that, based only upon Mr. Soler's and his attorney's opinions that he would not be able to obtain zoning permits or financing from Manasquan Bank, he was faced with the same impossibility as *Rauwolf* and that in accordance

with Section 4-403 should be permitted to transfer this license to Mallard. Unfortunately, Shrikbk is factually distinguishable to that of the *Rauwolf* case. Shrikbk claimed that since Soler himself opined that the use in question was a "tavern" and not a "restaurant", the Palmerton Zoning Ordinance would require more parking spaces than Shrikbk could obtain. However, at no time did Shrikbk ever reach out to the zoning officer for an interpretation of a label designation of his proposed use nor file for a permit which in all likelihood would have been denied. Since no permit application was ever filed by Shrikbk, no appeal of an adverse ruling by a zoning officer would have occurred to seek a variance or an interpretation. Likewise, in failing to seek a permit and assuming an adverse ruling by both the zoning officer and the zoning hearing board, Shrikbk waived any right to challenge those rulings to the Court of Common Pleas as prescribed by the Pennsylvania Municipalities Planning Code.<sup>7</sup> Therefore, unlike in *Rauwolf*, Shrikbk did not pursue any available avenues to seek any type of legal determination *vis-à-vis* the parking issues raised by Soler; no permit applications, no appeals to the Palmerton Zoning Hearing Board and obviously no appeal to the Court of Common Pleas. Without an exhaustion of these available possible remedies to the parking issue, it cannot be said that Shrikbk's failure to make

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<sup>7</sup> 53 P.S. §10101 et. seq.



the alterations and repairs to 577 Delaware Avenue was an impossibility, or at least one beyond its control, and thus is not one that would allow relief under *Rauwolf*.

Shrikbk also argues that the construction was rendered impossible by virtue of Manasquan Bank being "unable to offer financing." This claim centers on a single email<sup>8</sup> from a representative of Manasquan Bank dated October 17, 2019, which reads: "[P]lease be advised that Manasquan Bank is unable to offer financing for the expansion of your beer store located at 577 Delaware Ave, Palmerton, PA 18071." Shrikbk testified that this is the only financial institution it attempted to obtain financing from as it was a bank it had dealt with in the past and "was comfortable with." No other evidence surrounding this "denial" was ever presented including the reasoning for the denial.

Further, we do not believe Shrikbk has established, by this single one line email, the element of impossibility. While Shrikbk might have felt comfortable with Manasquan Bank and assuming Shah was correct in his assumption, no further inquiries of other financial institutions for financing ever occurred to see if financing can be obtained elsewhere.<sup>9</sup> Nor did Shah, on behalf of Shrikbk, ever inquire of Manasquan Bank why it was unable to offer

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<sup>8</sup> It is noteworthy that the date on this email was October 17, 2019, six days before the hearing.

<sup>9</sup> Shah testified that he personally believes it was due to the fact that he did not own the building.

financing. As Shrikbk never presented testimony as to why Manasquan Bank was unable to provide this financing, it follows that Shrikbk failed to exercise due diligence in an attempt to rectify any possible deficiencies found by Manasquan Bank which may have allowed for financing. Without more, we cannot say that the lack of financing under the circumstances presented here were tantamount to an impossibility preventing the construction/renovation required by the prior approval Shrikbk received from the Board. We would also note that had Shrikbk exercised due diligence as to financing prior to the initial transfer application, it may not find itself in the position it has now placed itself. As noted by the Board in its opinion, "Licensee cannot look to the Board to bail it out because of its own poor decisions."

#### CONCLUSION

For the reasons stated in this opinion, this Court enters the following Order:

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BOARD,	:	
	:	
Respondent	:	

John P. Rodgers, Esquire	Counsel for Petitioners
John Fraker, Esquire	Counsel for Respondent

ORDER OF COURT

AND NOW, this 19<sup>TH</sup> day of October, 2020, upon consideration of the "Petition for Appeal from Denial of Application for Liquor License Transfer" filed by Mallard Markets, Inc. and Shrikkbk, Inc., and after a thorough review of the decision and opinion of the Pennsylvania Liquor Control Board and the record created in this matter, it is hereby **ORDERED and DECREED** that the decision of the Pennsylvania Liquor Control Board denying the intermunicipal double transfer of restaurant liquor license No. R-18965 is **SUSTAINED**.<sup>1</sup>

BY THE COURT:

  
\_\_\_\_\_  
Joseph J. Matika, J.

<sup>1</sup> This Court agrees with all of the conclusions of the Board as outlined in its opinion. Had Shrikkbk and Mallard been able to establish that the cause of the inability to meet the construction/renovation requirements were beyond their control, this result would be different.