## IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

### CIVIL ACTION

DAVID PEREIRA, Appellant	:	
v.	: : NO	0. 08-2547
PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT, Appellee	: : : :	
Steven J. Hartz, Esquire Craig A. Strong, Esquire		ounsel for Appellant ounsel for Appellee

- Civil Law Liquor License Revocation Criteria for Nunc Pro Tunc Appeal
- An untimely appeal from the revocation of a liquor license is excusable nunc pro tunc if (1) the untimely filing was caused by extraordinary circumstances involving fraud or breakdown in the court's operation or non-negligent conduct of the appellant, appellant's attorney, or his/her staff; (2) the untimely appeal is filed within a short time after appellant or his/her counsel learns of and has the opportunity to address the untimeliness; and (3) appellee is not prejudiced by the delay.
- 2. The burden of proving these factors is upon the appellant. Having failed to do so, the appeal must be denied.

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

# CIVIL ACTION

DAVID PEREIRA,	:	
Appellant	:	
	:	
V.	:	NO. 08-2547
	:	
PENNSYLVANIA STATE POLICE,	:	
BUREAU OF LIQUOR CONTROL	:	

ENFORCEMENT,	:			
Appellee	:			
Steven J. Hartz, Esc	uire	Counsel	for	Appellant

Craig A. Strong, Esquire Counsel for Appellee

MEMORANDUM OPINION

Nanovic, P.J. - December 29, 2009

David Pereira (hereinafter "Pereira"), appeals from the Pennsylvania Liquor Control Board's (hereinafter "the Board") denial of his *nunc pro tunc* appeal to reinstate Liquor License No. R-4968 (hereinafter "Liquor License"), subject to payment of all outstanding fines and costs and to permit Pereira to renew and to transfer the subject License conditioned on the payment of said fines, costs, and other related expenses. The primary issue before us is whether Pereira's *nunc pro tunc* appeal satisfies the factors established by the Pennsylvania Supreme Court for *nunc pro tunc* appeals in <u>Cook v. Unemployment</u> Compensation Bd. Of Review, 671 A.2d 1130, 1131 (Pa. 1996).

#### FACTUAL AND PROCEDURAL BACKGROUND $^{1}$

Pereira is an adult individual who resides at 556 Lehigh Avenue, Palmerton, Carbon County, Pennsylvania. On or about August 15, 2005, the Board approved the person-to-person

<sup>&</sup>lt;sup>1</sup> These facts are taken in part from the jointly stipulated facts of the parties and from the Board's Opinion dated August 7, 2008; we were advised by counsel that a *de novo* hearing was not necessary and that a joint stipulation of facts and respective briefs would suffice, reflected by our Order dated May 21, 2009. We have been provided with no copies of any of the documents referenced in the parties' filings and submissions.

transfer of the Liquor License from Pereira's corporation to a Pennsylvania business corporation known as Paxson Entertainment, Inc. (hereinafter "Paxson"). As part of the transaction transferring the Liquor License and other assets owned by Pereira to Paxson, Paxson became indebted to Pereira in the amount of \$125,000.00. This debt was secured, *inter alia*, by a perfected security interest in the Liquor License as evidenced by a Financing Statement (Form UCC-1) filed with the Pennsylvania Department of State on August 29, 2005, to File No. 2005083001546.<sup>2</sup> As further security for Paxson's indebtedness to Pereira, Paxson executed a limited power of attorney authorizing Pereira's attorney to transfer the Liquor License in the event of Paxson's default.

On May 22, 2006, the Appellee, Pennsylvania State Police, Bureau of Liquor Control Enforcement, issued Citation No. 06-1216 (hereinafter "Citation") against Paxson containing two counts.<sup>3</sup> On December 15, 2006, an administrative hearing was held before an administrative law judge (hereinafter "ALJ"), at which Paxson failed to appear. The ALJ dismissed the first

 $<sup>^2</sup>$  The Liquor Code recognizes that a security interest in a liquor license is a property right as between the licensee and the third party. See 47 P.S. § 4-468(d).

<sup>&</sup>lt;sup>3</sup> The first count charged that on October 18, November 19 and 26, and December 30, 2005, Paxson violated section 471 of the Liquor Code by operating in a noisy and/or disorderly manner. 47 P.S. § 4-471. The second count charged that on February 11, 12, and 19, and March 26, 2006, Paxson violated section 499(a) of the Liquor Code by failing to require patrons to vacate that part of the premises habitually used for the service of alcoholic beverages not later than one-half hour after the required time for the cessation of the service of alcoholic beverages. 47 P.S. § 4-499(a).

<sup>3</sup> 

count and sustained the second count of the Citation. A \$1,000.00 fine was imposed to be paid within twenty days of the mailing date of the ALJ's Order. (Board Opinion, p. 2).

When the fine was not paid, the ALJ mailed an Opinion and Order dated March 21, 2007, imposing a one-day suspension (which was deferred pending renewal of the Liquor License) and stating that if the fine was not paid within sixty days, the one-day suspension would be reevaluated and revocation of the Liquor License would be considered. (Board Opinion, p. 3). On June 8, 2007, the ALJ mailed a Supplemental Opinion and Order, acknowledging that Paxson failed to pay the fine and thereby revoking the Liquor License, effective July 30, 2007. (Board Opinion, p. 3).

At some point, Paxson defaulted on its loan obligation to Pereira.<sup>4</sup> At the time of the loan default, Pereira contacted the Board and was orally advised that the Liquor License was in safekeeping.<sup>5</sup> Subsequently, on June 16, 2008, while attempting to transfer the Liquor License pursuant to the aforementioned limited power of attorney, Pereira learned that the Liquor License had been revoked.

Upon learning of the revocation, Pereira, on June 19, 2008, filed a Petition for Appeal *nunc pro tunc*, seeking

<sup>&</sup>lt;sup>4</sup> We have not been informed as to exactly when the loan default occurred.

<sup>&</sup>lt;sup>5</sup> We have also not been informed as to exactly when Pereira contacted the Board or who he spoke with.

reinstatement of the Liquor License and an opportunity to pay all outstanding fines assessed against Paxson. The thirty-day filing deadline for an appeal from the ALJ's Supplemental Opinion and Order, pursuant to section 471 of the Liquor Code, 47 P.S. § 4-471(b), was July 8, 2007. (Board Opinion, p. 4). On August 7, 2008, the Board denied Pereira's appeal as untimely and affirmed the revocation of the Liquor License, whereupon the instant appeal was timely filed on September 5, 2008.<sup>6</sup> The parties have stipulated that Pereira has standing to pursue the appeal presently before us.

#### DISCUSSION

When an appeal is taken from a Board decision, under Section 464 of the Liquor Code, the trial court hears the matter de novo and renders its own findings of fact and conclusions of law. The trial court must record of the proceedings below, receive the if offered, and may hear new evidence. The trial court has the authority to sustain, alter, change, modify or amend a decision of the Board, even if the court does not make findings of fact that are materially different from those found by the Board.

 $<sup>^6</sup>$  Pereira asserts in this appeal that the Board violated his due process rights under federal and state law by failing to conduct an evidentiary hearing. (Petition for Appeal,  $\P$  14). For purposes of this appeal, Pereira stands in the shoes of Paxson. Paxson had no right to any such hearing under Pennsylvania law.

In the event the bureau or the person who was fined or whose license was suspended or revoked shall feel aggrieved by the adjudication of the administrative law judge, there shall be a right to appeal to the board. The appeal shall be based solely on the record before the administrative law judge. The board shall only reverse the decision of the administrative law judge if the administrative law judge committed an error of law, abused its discretion or if its decision is not based on substantial evidence.

<sup>47</sup> P.S. § 4-471(b) (emphasis ours). Pereira has failed to provide us with any authority evidencing such a right or that it was in fact violated.

<u>Goodfellas, Inc. v. Pennsylvania Liquor Control Board</u>, 921 A.2d 559, 565 (Pa.Cmwlth. 2007) (citations omitted), *appeal denied*, 934 A.2d 1279 (Pa. 2007). The trial court enjoys broad discretion in conducting its *de novo* review of the Board's decision. *See* <u>id</u>. at 566. In exercising its judgment, the court has the authority "to sustain or over-rule the board, without regard to whether the same or different findings of fact or conclusions of law are made." <u>Pennsylvania State Police</u>, <u>Bureau of Liquor Control Enforcement v. Cantina Gloria's Lounge</u>, Inc., 639 A.2d 14, 19 (Pa. 1994).

The Pennsylvania Supreme Court has established the criteria by which to evaluate the merits of a *nunc pro tunc* appeal. See <u>Cook</u>, 671 A.2d at 1131. In <u>Cook</u>, the Court held that a delay in filing an appeal is excusable *nunc pro tunc* if the following factors are met:

(1) the untimely filing was caused by extraordinary circumstances involving fraud or breakdown in the court's operation or non-negligent conduct of the appellant, appellant's attorney, or his/her staff; (2) the untimely appeal is filed within a short time after appellant or his/her counsel learns of and has the opportunity to address the untimeliness; and (3) appellee is not prejudiced by the delay.

<u>Cook</u>, 671 A.2d at 1131. The burden of proving these factors is upon the appellant. *See* id. at 1132.

## Basis for Untimely Filing

In applying the <u>Cook</u> standards, it appears to us that Pereira has failed to satisfy the first factor. Specifically, he has failed to allege any facts that would tend to show fraud or a breakdown in the operation of the office of the ALJ, or that his own conduct was non-negligent. Pereira offers no explanation for why his failure to act for almost an entire year after the effective date of the ALJ's Supplemental Opinion and Order does not constitute negligence on his part.

Pereira contends that "The Board has no procedures for notifying holders of security interests in liquor licenses of disciplinary proceedings against licenses, including revocation proceedings, and in practice it does not notify secured creditors of such proceedings." (Stipulation of Facts, p. 2). He argues that because he was not notified of the pending proceedings and revocation of the Liquor License, and because he only discovered the revocation on June 16, 2008, while attempting to transfer the Liquor License, that we should grant him *nunc pro tunc* relief. Although this may well be true, by itself it does not prove that Pereira was not negligent in monitoring the status of the Liquor License and protecting his security interest therein."

<sup>&</sup>lt;sup>7</sup> The issue of the reasonableness of Pereira's conduct as argued by him in this appeal is different from that of whether the Liquor Control Board can constitutionally deprive him of a property interest without notice and a hearing, an issue not raised by Pereria. See e.g., <u>First Pennsylvania Bank,</u> N.A. v. Lancaster County Tax Claim Bureau, 470 A.2d 938, 939 (Pa. 1983)

We assess an individual's negligence on the basis of the "reasonable person" standard. Thus, we must evaluate Pereira's failure to actively monitor the status of his security interest in the Liquor License in light of the accepted definition of negligence: "the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or . . . the absence of care according to the circumstances . . . " <u>Berreski v. Philadelphia Elec. Co.</u>, 1916 WL 4358 (Pa.Super. 1916).

We believe that a reasonably prudent person in Pereira's position would periodically seek assurance as to the good standing of the Liquor License from Paxson or the Board, and not simply rely on the statement of the Board that the Liquor License was in safekeeping without further investigation. Moreover, a period of more than one year lapsed between when the Citation was first issued to Paxson (May 22, 2006) and when the time to appeal the revocation of the Liquor License expired (July 8, 2007). Under these circumstances, "[t]here is no indication in the record that the late filing here was caused by

(statutory provision "which does not require either personal service or notice by mail to a record mortgagee of an impending tax sale, violates the due process rights conferred on such a mortgagee under the Pennsylvania and United States Constitutions"). It is also significant that Pereira took his security interest in the Liquor License subject to the risk that as between the Liquor Control Board and the licensee, the issuance of a license is a privilege and that that privilege could be lost. See 47 P.S. § 4-468(d) ("The license shall constitute a privilege between the board and the licensee.").

8

non-negligent happenstance." State Farm Mut. Auto. Ins. Co. v. Schultz, 421 A.2d 1224, 1227 n7 (Pa.Super. 1980).

# Promptness of Filing

Whenever extraordinary circumstances are alleged as the reason for the late filing of an appeal, a petition to file the appeal nunc pro tunc must be filed within a reasonable time after the occurrence of the extraordinary circumstances. See Cook, 671 A.2d at 1132. In Bass v. Commonwealth Bureau of Corrections, et al., the Pennsylvania Supreme Court stated, "[w]ithout doubt the passage of any but the briefest period of time during which an appeal is not timely filed would make it most difficult to arrive at a conclusion that the failure to file was non-negligent." 401 A.2d 1133, 1135 (Pa. 1979).

In this case, the absence of evidence to support this factor reinforces and overlaps with that which augurs against Pereira on the first factor. First, the record is silent as to exactly when Pereira discovered Paxson's default on its loan or initially contacted the Board. Pereira only contends that "when Paxson defaulted in its loan obligations, Pereira contacted the [Board] to inquire about the status of the [Liquor License] and was advised that it was in safekeeping." (Pereira Brief, p. 3). We are not told whether Paxson defaulted on the loan or Pereira contacted the Board before or after the Citation resulting in the Liquor License's revocation was issued.

> [FN-52-09] 9

Second, we are also not told exactly how long after Pereira was told the Liquor License was in safekeeping he discovered that it had been revoked. Lastly, we are not told what, if any, efforts Pereira made to determine why the Liquor License was in safekeeping, meaning we are unable to determine whether it was reasonable for Pereira to rely upon this assertion as one not necessitating further action.

In this matter, although Pereira's appeal with the Board was filed within a few days after he learned of the revocation of the Liquor License, the appeal was nevertheless one year after the issuance of the filed almost ALJ's Supplemental Opinion and Order. Pereira has failed to allege or prove any facts that prevented him from investigating what the Board meant when it told him that the Liquor License was in safekeeping, or from timely determining the status of the Liquor License, including its revocation. Further, as stated in the Board's Opinion, "[t]he license expired on August 31, 2006, and [Pereira] failed to determine the status of the license until twenty-two months later." (Board Opinion, p. 6). No evidence exists of any unavoidable, unforeseeable, or extraordinary events, or of fraud or a breakdown of the court system, which has prevented Pereira from filing his appeal in a more timely manner.

### Prejudice

Finally, with respect to the third <u>Cook</u> factor, we are in agreement with the Board that no harm or prejudice to the Pennsylvania State Police would result if this appeal is granted *nunc pro tunc*. (Board Opinion, p. 8). Nonetheless, Pereira has failed to satisfy the first two prongs of the <u>Cook</u> test and therefore can not be granted *nunc pro tunc* relief.

# CONCLUSION

We are mindful of Pereira's plight and find credible his desire to satisfy all outstanding fines and to operate a reputable establishment that would benefit his community. However, our sympathy cannot be the basis under which to grant relief from a party's own oversight and resulting severe consequences. "Untimely appeals present a jurisdictional issue and must be quashed." <u>Moring v. Dunne</u>, 493 A.2d 89, 93 (Pa.Super. 1985). Under the circumstances, Pereira's appeal will be denied.

BY THE COURT:

P.J.

# IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

## CIVIL ACTION

DAVID PEREIRA, Appellant	: :	
V.	:	NO. 08-2547
PENNSYLVANIA STATE POLICE,	:	
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT,	:	
Appellee	:	
Steven J. Hartz, Esquire Craig A. Strong, Esquire		Counsel for Appellant Counsel for Appellee

## ORDER OF COURT

AND NOW, this 29<sup>th</sup> day of December, 2009, upon consideration of the Appellant's Petition for Appeal from an Order of the Pennsylvania Liquor Control Board, and counsels' submissions thereon, and in accordance with our Memorandum Opinion of this same date, it is hereby

ORDERED and DECREED that the appeal is DENIED. The Order of the Pennsylvania Liquor Control Board dated August 7, 2008, is AFFIRMED.

BY THE COURT:

P.J.