

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL DIVISION

B & G V REALTY, INC, :
T/A VENTO' S, :
 :
Appellant :
 :
v. : No. 10-2246
 :
PENNSYLVANIA STATE POLICE, :
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT, :
 :
Appellee :

Konrad B. Jarzyna, Esquire Counsel for Appellant
Craig A. Strong, Esquire Counsel for Appellee

Civil Law - Liquor License - Revocation - Criteria for *Nunc Pro*
Tunc Appeal - Cook factors

1. 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; (3) the time period which elapses is of very short duration; and (4) the appellee is not prejudiced by the delay.
2. The heavy burden of proving these factors is upon the appellant.
3. Absent sufficient evidence to the contrary, the failure to regularly check one's business-related mail constitutes negligent conduct which fails to satisfy the first Cook factor.
4. Absent sufficient evidence to the contrary, the filing of an appeal almost two and one-half (2 ½) months late does not satisfy the second and third Cook factors.

5. Since Appellant has failed to present evidence which is sufficient to warrant granting Appellant *nunc pro tunc* relief, the appeal must be denied.

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PENNSYLVANIA STATE POLICE,	:	
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Appellee	:	
Konrad B. Jarzyna, Esquire		Counsel for Appellant
Craig A. Strong, Esquire		Counsel for Appellee

MEMORANDUM OPINION

Serfass, J. - November 12, 2010

B & G V Realty, Inc., t/a Vento's (hereinafter "Vento's"), appeals from the Pennsylvania Liquor Control Board's (hereinafter "the Board") denial of its *nunc pro tunc* appeal to reinstate Liquor License No. R-13088 (hereinafter "Liquor License"), for the limited purpose of completing a transfer of the subject Liquor License to a prospective purchaser. For the reasons that follow, we affirm the Board's decision.

FACTUAL AND PROCEDURAL BACKGROUND¹

Vento's is a Pennsylvania corporation with a registered address of 231 Carbon Street, Weatherly, Pennsylvania

¹ These facts are taken in part from the jointly stipulated facts of the parties, the record before the Board, and the Board's Opinion dated July 22, 2010.

18225, and the holder of the liquor license at issue in this appeal. On March 27, 2009, the Appellee, Pennsylvania State Police, Bureau of Liquor Control Enforcement (hereinafter "Bureau"), issued Citation No. 09-0657 (hereinafter "Citation") against Vento's containing two counts.² On July 27, 2009, Vento's submitted an "Admission, Waiver and Authorization" (hereinafter "Waiver"), in which Vento's admitted to all the violations charged in the Citation; admitted that the Bureau complied with the applicable notice requirements; waived their right to a hearing; waived their right to appeal the adjudication; and authorized the administrative law judge (hereinafter "ALJ") to enter an adjudication based on a summary of facts and prior adjudication history. On July 31, 2009, the ALJ issued an Adjudication sustaining the counts charged in the Citation. The ALJ imposed a total fine of two hundred dollars (\$200.00), which was to be paid within twenty (20) days of the mailing date³ of the Adjudication. (Board Opinion, p. 2). The Adjudication further provided that, if the fine was not paid

² The first count charged that on January 3 and 4, and February 1 and 28, 2009, Vento's violated Section 471 of the Liquor Code, 47 P.S. § 4-471, and Section 637.6(a)(2) of the Clean Indoor Air Act, 35 P.S. § 637.6(a)(2), by permitting smoking in a public place where smoking is prohibited. The second count charged that on February 1 and 28, 2009, Vento's violated Section 471 of the Liquor Code, 47 P.S. § 4-471, and Section 637.6(a)(1) of the Clean Indoor Air Act, 35 P.S. § 637.6(a)(1), by failing to post signage as required by the Clean Indoor Air Act.

³ The Adjudication has a mailing date of August 11, 2009.

within twenty (20) days, Vento's liquor license would be suspended or revoked. (Adjudication of July 31, 2009, p. 2).

When the fine was not paid, the ALJ mailed an Opinion and Order dated September 14, 2009, 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 (60) days of the mailing date⁴ of the Opinion and Order, the one-day suspension would be reevaluated and revocation of the Liquor License would be considered. (Board Opinion, pp. 2-3). On December 7, 2009, the ALJ mailed a Supplemental Opinion and Order, acknowledging that the sixty (60) day period had elapsed, and that Vento's had failed to pay the fine. (Board Opinion, p. 3). Accordingly, the ALJ vacated the September 14, 2009, Order and revoked the Liquor License, effective January 25, 2010. (Board Opinion, p. 3).

On February 19, 2010, Vento's filed an untimely appeal to the Board, which stated that the ALJ's decision to revoke the Liquor License was too harsh; that Vento's failure to pay the fine was inadvertent and unintentional; and that they have since paid the fine. (Board Opinion, p. 3). The appeal also stated that the Liquor License has remained in safekeeping throughout the relevant time period, and that Vento's intends to continue actively seeking a buyer for the Liquor License. (Board

⁴ The Opinion and Order has a mailing date of September 21, 2009.

Opinion, p. 3). 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 January 6, 2010. (Board Opinion, pp. 4-5). On July 22, 2010, the Board dismissed Vento's appeal as untimely and affirmed the revocation of the Liquor License, whereupon the instant "Appeal and/or Appeal Nunc Pro Tunc" (hereinafter "Appeal") was timely filed on August 9, 2010.

On September 20, 2010, the Bureau filed a Brief in Opposition to Vento's Appeal. In the Brief, the Bureau essentially argues that Vento's waived its right to appeal the Adjudication by executing the Waiver and that the Appeal does not set forth extraordinary circumstances which warrant granting a *nunc pro tunc* appeal.

On September 23, 2010, this Court held a hearing on Vento's Appeal. At the hearing, the Bureau submitted into evidence the official record of this matter before the Board, without objection from Vento's counsel. On *de novo* review, the court of common pleas "has the duty of receiving the record of the proceedings below, if introduced in evidence, together with any other evidence that is properly received, and then [to] make its own findings of fact, conclusions of law and assess the appropriate penalty, if any." Pennsylvania State Police, Bureau of Liquor Enforcement v. Kelly's Bar, Inc. t/a Kelly's Bar, 639

A.2d 440, 442 (Pa. 1994). Additionally, the parties stipulated that Filomena Vento, Vento's corporate president, would testify as to the contents of the Appeal Petition; that the Liquor License was in safekeeping in Harrisburg while the case was pending; and that Vento's was unable to pay the fine until after revocation of the liquor license due to financial circumstances. In the Appeal, Vento's avers that the business was closed at the time of the July 31, 2009, Adjudication. (Appeal, p. 2). While Vento's does not dispute that the Adjudication was mailed to them, or the factual allegations contained in the Board's Opinion, the Appeal states that "they omitted to check all of the business related mail, as they worked and struggled to support their family." (Appeal, pp. 2, 3).

The Appeal also states that, on February 17, 2010, Vento's discovered all of the above-cited ALJ decisions while going through the business-related mail. (Appeal, p. 2). It further states that Vento's immediately paid the fine, which was received by the Board on February 19, 2010. (Appeal, p. 2). The Appeal avers that the ALJ abused his discretion by revoking the Liquor License, and that Vento's was deprived of its due process rights⁵ when the Liquor License was revoked without a

⁵ Vento's asserts in this appeal that the Board violated its due process rights by failing to conduct an evidentiary hearing. (Appeal, ¶ 16). However, Vento's had no right to any such hearing under Pennsylvania law.

hearing. (Appeal, p. 3). The Appeal further avers that the prospective purchaser, Timothy Williams, paid all but one thousand dollars (\$1,000) of the purchase price of the Liquor License, and that the money received from the transfer of the Liquor License was used for college education expenses. (Appeal, p. 3).

DISCUSSION

When an appeal is taken from a Board decision, under Section 471 of the Liquor Code, the trial court is "required to conduct a *de novo* review and, in the exercise of its statutory discretion, to make its own findings and conclusions." Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Cantina Gloria's Lounge, Inc., 639 A.2d 14, 19 (Pa. 1994). In exercising its judgment, the court has the authority "to sustain, alter, change, modify or amend the board's action whether or not it makes findings which are materially different from those found by the board...." Id., at 19-20.

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.

47 P.S. § 4-471(b). Vento's has failed to provide us with any authority evidencing such a right or that it was in fact violated.

The issue raised by this case is whether the *nunc pro tunc* appeal filed by Vento's satisfies the four (4) factors established by the Pennsylvania Supreme Court for *nunc pro tunc* appeals in Cook v. Unemployment Compensation Board of Review, 671 A.2d 1130, 1131 (Pa. 1996). The Supreme Court held in Cook that a delay in the filing of an appeal 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 staff; (2) the untimely appeal is filed within a short time after appellant or his counsel learns of and has the opportunity to address the untimeliness; (3) the time period which elapses is of very short duration; and (4) appellee is not prejudiced by the delay.

Cook, 671 A.2d at 1131. The heavy burden of proving an adequate excuse for failing to file a timely appeal in accordance with the Cook factors is on the appellant. See Id. at 1132.

The facts in Cook illustrate the extraordinary nature of the circumstances which must exist in order for the Court to allow an appeal *nunc pro tunc*. In that case, appellant Cook worked for Hussey Copper Corporation from April 1984 until April 1992 when he was terminated. Having been denied unemployment compensation benefits, he was given notice that he had fifteen (15) days, or until May 8, 1992, to appeal the denial of benefits to a referee.

Cook contacted an attorney and scheduled an appointment for May 5, 1992 but on May 3, 1992, he collapsed and was hospitalized. He was placed in the cardiac care unit for two (2) days. After his release from cardiac care, he remained in the hospital until May 9, 1992, one (1) day after his time for appeal had expired. Three (3) days after his release, Cook filed an appeal to the referee who dismissed the appeal as untimely. The Unemployment Compensation Board of Review affirmed the denial, holding that when Cook was hospitalized but not in the cardiac care unit, he was alert, able to read, write and receive visitors and should, therefore, have pursued his appeal during that time. See Id. at 1130, 1131.

In reversing the Commonwealth Court's affirmance of the Board's decision, the Supreme Court found no substantial evidence of record to support the Board's conclusion that Cook was able to conduct an appeal from his hospital bed. Holding that Cook had met his heavy burden based upon the extended hospitalization, the Court granted his appeal *nunc pro tunc*.

**VENTO'S FAILURE TO FILE A TIMELY APPEAL WAS NOT CAUSED BY
EXTRAORDINARY CIRCUMSTANCES INVOLVING FRAUD OR BREAKDOWN IN THE
PLCB'S OPERATION OR BY NON-NEGLIGENT CONDUCT OF VENTO'S, ITS
COUNSEL OR STAFF**

A review of the record in this matter reveals that Vento's has not met its burden of proof pursuant to the first Cook factor in that no facts have been alleged that would

indicate fraud or breakdown in the operation of the Pennsylvania Liquor Control Board - Office of Administrative Law Judge, that the non-negligent conduct of appellant's attorney or his staff caused the filing of an untimely appeal or that appellant's own conduct was non-negligent.

Vento's proffered justification for granting the instant appeal *nunc pro tunc* is that its business-related mail was not opened until February 17, 2010, well after the filing deadline for an appeal had passed. Vento's only explanation for why its officers/owners did not open the business-related mail for an extended period of time was because they were working and struggling to support their family. This Court finds that a reasonably prudent business owner in the Ventos' position would regularly check their business-related mail, even when the business was closed, or when he or she was struggling with adverse economic circumstances. Although the Court is mindful of the Vento family's financial difficulties, no evidence was presented to enable this Court to conclude that their failure to open the business-related mail for a period of several months was not negligent because of those difficulties. Moreover, no evidence was presented to this Court to suggest that the Ventos were unable to check or receive their business or personal mail. Therefore, Petitioner has failed to provide any explanation

sufficient to rise to the level of non-negligent circumstances as described in the Cook case.

VENTO'S UNTIMELY APPEAL TO THE PLCB WAS NOT FILED WITHIN A SHORT TIME AFTER VENTO'S OR ITS COUNSEL LEARNED OF AND HAD THE OPPORTUNITY TO ADDRESS THE UNTIMELINESS AND THE TIME PERIOD WHICH ELAPSED WAS NOT OF VERY SHORT DURATION

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. Cook, 671 A.2d at 1132. In Bass v. Commonwealth Bureau of Corrections, et al., the Pennsylvania Supreme Court, in allowing the filing of an appeal four (4) days late due to the illness of the secretary of appellant's counsel, 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 matter, although Vento's appeal with the Board was filed within a few days after learning of the revocation of the Liquor License, the *nunc pro tunc* appeal was nevertheless filed almost two and one-half (2 ½) months after the issuance of the ALJ's Supplemental Opinion and Order on December 7, 2009. Vento's has failed to allege or prove any facts, other than its own negligence, that prevented it from timely determining the

status of the Liquor License, including its revocation. Therefore, Vento's has failed to satisfy the second and third Cook factors.

THE PLCB HAS NOT BEEN PREJUDICED BY THE DELAY

With respect to the fourth and final Cook factor, we find that granting Vento's appeal *nunc pro tunc* would not be prejudicial to the Bureau. However, because Vento's has failed to satisfy the first, second and third Cook factors, *nunc pro tunc* relief cannot be granted by this Court.

CONCLUSION

While the Court is sympathetic to Vento's apparent financial difficulties and desire to alleviate an economic strain by reinstating the Liquor License for the limited purpose of completing a transfer thereof to Mr. Williams, "the time for taking an appeal cannot be extended as a result of grace or mere indulgence." West Penn. Power Co. vs. Goddard, 333 A.2d 909, 912 (Pa. 1975). Moreover, there is simply no evidence in the record to indicate that Vento's late filing was caused by "non-negligent happenstance" as set forth in Bass. The mere neglect or mistake of the appellant or his counsel is not considered a sufficient excuse for failure to file a timely appeal. State Farm Mut. Auto. Ins. Co. vs. Schultz, 421 A.2d 1224, 1227 (Pa. Super. 1980). Here, the negligence of Vento's in failing to open the business-related mail for a period of several months is

in no way sufficient to ignore the law mandating the timely filing of appeals. Accordingly, Vento's appeal will be denied.⁶

BY THE COURT:

Steven R. Serfass, J.

⁶ Given that Vento's has failed to establish sufficient facts meriting the grant of an appeal *nunc pro tunc*, this Court declines to address the Bureau's wavier argument as moot.

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Konrad B. Jarzyna, Esquire	Counsel for Appellant
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ORDER OF COURT

AND NOW, to wit, this 12th day of November, 2010, upon consideration of the Appellant's Appeal from the Order of the Pennsylvania Liquor Control Board dated July 22, 2010, the submissions of the parties' counsel, and after hearing held 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 July 22, 2010, is AFFIRMED and this case is remanded to the Pennsylvania Liquor Control Board, Office of Administrative Law Judge for implementation of said Order.

BY THE COURT:

Steven R. Serfass, J.