Filed 5/29/18 Midtown Spa, Inc. v. County of Los Angeles CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MIDTOWNE SPA, INC., Plaintiff and Appellant, v. COUNTY OF LOS ANGELES et al., Defendants and Respondents.	B282279 (Los Angeles County Super. Ct. No. BS158020)

APPEAL from a judgment of the Superior Court of Los Angeles County. James C. Chalfant, Judge. Affirmed.

Law Offices of Joshua Kaplan and Joshua Kaplan for Plaintiff and Appellant.

Pollak, Vida & Barer, Daniel P. Barer and Anna L. Birenbaum for Defendants and Respondents.

Plaintiff and appellant Midtowne Spa, Inc. (Midtowne), a lawful commercial sex venue (CSV), was cited for violating CSV Regulations, Item 7 (Rule 7), which prohibits a CSV from "permit[ting] a person to enter, be or remain in any part of a CSV while in possession of, or consuming, using or clearly under the influence of, any alcoholic beverage or illegal drug." Midtowne challenged the citation, and both the administrative law judge and trial court affirmed the citation. Midtowne now appeals the trial court judgment denying its petition for writ of administrative mandate. Because substantial evidence supports the citation, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. *CSV Regulations*

A CSV is defined as "any establishment that charges patrons or members a fee for admission or membership and which as one of its primary purposes, allows, facilitates, and/or provides facilities for it patrons or members to engage in any high risk sexual contact while on the premises." (L.A. Mun. Code, § 11.04.310.) A Los Angeles County health officer may inspect a CSV to enforce the Municipal Code as often as necessary. (L.A. Mun. Code, § 11.04.370.) If a health officer finds that a CSV is not in compliance with CSV regulations, or with any law affecting public health or safety, the County of Los Angeles (County) may issue a notice of noncompliance to the CSV. The notice must include a statement of all deficiencies found and any mandatory corrective measures. (L.A. Mun. Code, § 11.04.350(B).)

The County may suspend or revoke a public health facility permit at any time for failure to comply with CSV regulations, the Los Angeles County Municipal Code, or the California Health and Safety Code. (L.A. Mun. Code, § 11.04.350(A).) That said,

the County may only issue a notice of revocation of a CSV license when the facility "in the past 12 months has been issued notices of suspension and/or notices of non-compliance" and the multiple violations over the past 12 months "constitute a pattern of violations" supporting the license revocation.

Pursuant to Rule 7, the use or sale of alcohol and illegal drugs at CSV's is prohibited. In a letter dated July 11, 2014, the County advised CSV owners that during a code inspection by the County health officer, "Discovery on premises of empty containers of alcohol or of used drug paraphernalia will be considered as evidence of non-compliance."

II. *Factual Background*

Midtowne operates as a CSV, lawfully permitted pursuant to Los Angeles Municipal Code section 11.04.320. Scott Campbell (Campbell) has continuously operated Midtowne since the 1980's, including when the CSV regulations went into effect. Sergio Pacheco (Pacheco) was the manager on duty at the relevant time.

In an effort to comply with Rule 7, Midtowne maintains rules and protocols intended to preclude patrons from entering in possession of alcohol and from consuming it while at the venue. Management is trained to detect patrons who have consumed alcohol. Designated employees monitor patrons' conduct at regular intervals. The premises are monitored. When Pacheco inspects the premises, if he finds an alcohol container, he throws it out.

Approximately six to 10 times per month, Midtowne excludes patrons from the premises because they are either attempting to bring alcohol into the premises, consuming alcohol on the premises, or under the influence of alcohol.

On July 10, 2015, County health inspectors Christian Sten (Sten) and Ray Samonte (Samonte) inspected Midtowne. Pacheco accompanied them during the inspection.

During the inspection, Sten noticed an empty cardboard container labeled "Liberty Creek," "Cabernet Sauvignon," and "500 milliliters" inside a trashcan in the second floor bathroom of the premises. But he did not find any liquid contents at the time of his inspection. Sten also did not identify any person enter, be, or remain on the premises while in the possession of, consuming, using, or clearly under the influence of any alcoholic beverage.

Neither Campbell nor Pacheco allowed a patron to enter with alcohol that day (or any day). Regarding the recovered cardboard container, Campbell stated that he would not have recognized it as being an alcohol container; he would have thought it was a protein or sports drink.

At the end of the inspection, the County issued a notice of noncompliance to Midtowne. The notice set a compliance date of August 14, 2015, and set forth the violation as: "Inspector Sten saw 1 500Ml container of Cabernet Sauvignon in 2nd floor bathroom trash can. Mgr Pacheco retrieved container. No alcohol is allowed in premises. Bags should be thoroughly checked before allowing entry."

At no time during or since Sten's inspection was any laboratory analysis conducted to determine whether the box contained any liquid comprised of "one-half of 1 percent or more of alcohol by volume." (Bus. & Prof. Code, § 23004 [defining alcoholic beverage].)

III. *Procedural Background*

On August 4, 2015, at Midtowne's demand, the County held an administrative hearing to review Midtowne's notice of

noncompliance. Dr. Dawn Terashita served as the hearing officer. Various documents were admitted into evidence; Campbell, Pacheco, and Sten testified.

On August 11, 2015, Dr. Terashita issued a written statement of decision. She summarized the testimony at the hearing: The County's inspectors observed an empty 500 milliliter container of Liberty Creek Cabernet Sauvignon in a second floor bathroom trashcan; Sten identified himself as having experience in detecting alcoholic beverages; based on the observation of the Cabernet Sauvignon container and the conclusion that the container is evidence that a person at the venue possessed an alcoholic beverage, the inspectors issued a notice of noncompliance to Midtowne; and in the July 11, 2014, letter from the County to all CSV owners, the officer notified all CSV owners that empty containers of alcohol would be considered as evidence of noncompliance with CSV regulations.

Dr. Terashita also summarized Midtowne's legal arguments: (1) finding an empty container is not proof of permitting a person to enter the facility while in possession of alcohol; and (2) the Department of Public Health could not prove that an alcoholic beverage was found at Midtowne because there was no seizure or testing of the containers found. Ultimately, Dr. Terashita found: "After reviewing all exhibits, documentation, and notes on testimony given during the hearing, I have concluded, based on the preponderance of evidence, that Midtowne Spa violated Part 7, Control of Alcohol and Illegal Drugs, of the CSV Regulations. The Notice of Non-Compliance is upheld."

Midtowne then filed a petition for writ of administrative mandate against defendant and respondent County. Midtowne and the County submitted trial briefs.

After considering the evidence and the parties' arguments, the trial court ruled in favor of the County. It found that, given the informal nature of the administrative hearing and the relatively "straightforward" allegations in the citation, Dr. Terashita's decision contained "minimally sufficient findings" to satisfy the requirement of *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506 (*Topanga*). Applying substantial evidence review, the trial court found that the notice of noncompliance should be upheld. While the evidence was "thin," Midtowne had not shown that it was incorrect. The trial court rejected Midtowne's argument that the County had an obligation to prove that the Cabernet Sauvignon container contained alcohol because the evidence was that Sten was qualified to determine that the container was an alcohol container and that the reasonable inference was that someone brought the container in and consumed alcohol on the premises. It was not a reasonable inference that someone brought in an empty container.

As for the steps that Midtowne took to prevent alcohol possession and consumption at the facility, the trial court noted that the facility's procedures were inadequate, because clearly a container of Cabernet Sauvignon entered the premises unbeknownst to the staff and in a container that Campbell could not identify as a wine container.

The trial court also found that the evidence suggested that Midtowne was insufficiently informing its patrons of its alcohol policy.

In so ruling, the trial court distinguished *Pereyda v. State Personnel Board* (1971) 15 Cal.App.3d 47 (*Pereyda*).

Finally, the trial court noted that Midtowne had received only one notice of noncompliance and suspension of its license was only a possibility when three notices had been issued.

Judgment was entered in favor of the County, and Midtowne timely appealed.

DISCUSSION

I. Standard of review

Just as in the trial court, we review the administrative decision for substantial evidence. (*Desmond v. County of Contra Costa* (1993) 21 Cal.App.4th 330, 334–335.) Any conflicts in the evidence are resolved in favor of the administrative decision. (*Committee to Save the Hollywoodland Specific Plan v. City of Los Angeles* (2008) 161 Cal.App.4th 1168, 1182.) All reasonable inferences are drawn in favor of that decision. (*Doe v. Regents of University of California* (2016) 5 Cal.App.5th 1055, 1074.)

We review the trial court's determination that the administrative decision was sufficient de novo. (*Topanga*, *supra*, 11 Cal.3d at p. 515.)

II. The citation for noncompliance issued to Midtowne is supported by substantial evidence

At issue here is whether the citation issued to Midtowne is supported by substantial evidence.

As set forth above, Rule 7 provides: "The business owner or the on-site manager shall not permit a person to enter, be or remain in any part of a CSV while in possession of, or consuming, using or clearly under the influence of, any alcoholic beverage or illegal drug."

Here, ample evidence supports the notice of noncompliance with Rule 7. Sten found an empty container of Cabernet Sauvignon in a second floor bathroom trashcan at the facility. The reasonable inference is that a patron brought a container of alcohol onto Midtowne's premises. This evidence is sufficient for the notice of noncompliance to have been issued.

In urging reversal, Midtowne directs us to California Business and Professions Code section 23004, which defines an "alcoholic beverage" as "every liquid . . . which contains one-half of 1 percent or more of alcohol by volume and which is fit for beverage purposes." According to Midtowne, "[u]nless there is an alleged liquid which has been tested by a licensed laboratory chemist or determined by an expert to contain one-half of one percent or more of alcohol by volume, there can be no proof sufficient to establish that any alleged 'alcoholic beverage' was present" at Midtowne. In other words, the County had to prove "by expert taste, smell or laboratory analysis" that Midtowne permitted some person to enter the premises with an alcoholic beverage. In support, Midtowne relies upon *People v. Rosseau* (1929) 100 Cal.App. 245 (*Rosseau*).

Rosseau does not apply for at least two reasons. First, this is not a criminal case. Midtowne was not convicted of violating a criminal statute or levied a fine. It was merely given a citation that by itself carries no penalty. Midtowne directs us to no legal authority that supports its supposition that the standard of proof required in a criminal case should be applied here. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852 ["When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived"].) Second, nothing in *Rosseau* supports

Midtowne's suggestion that scientific testing is required to prove that a container labeled as holding alcohol did in fact carry alcohol. Contrariwise, *Rosseau* recognized that witnesses familiar with liquor have testified as to the quality and character of liquors, "and such evidence ha[s] been upheld as sufficient to support the [judgments of] convictions." (*Rosseau, supra,* 100 Cal.App. at p. 247.) Given the reasonable inference that can be drawn from an empty wine container being found in the trashcan, *Rosseau* does not preclude a finding that the container did in fact contain alcohol while it was on the premises.

Midtowne further asserts that a violation of Rule 7 requires that the owner or manager have knowledge that some person was in possession of, consuming, or under the influence of an alcoholic beverage. Because Campbell and Pacheco did not know that anyone was consuming alcohol on July 10, 2015, the citation was wrongly issued. But Rule 7 says nothing of the owner or manager's knowledge. Thus, Midtowne's interpretation of Rule 7 does not apply.

Midtowne argues that there was no evidence that it permitted any person to enter the premises with an alcoholic beverage—neither Campbell nor Pacheco had any knowledge that someone possessed alcohol on the premises and they would not have allowed anyone with alcohol to enter. And, Midtowne takes steps to prevent persons from entering the premises with alcohol. According to Midtowne, because it has done everything reasonably possible to prevent alcohol on its premises, the citation should not have been issued. In support, Midtowne relies heavily upon *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 377 (*Laube*), which held "that a licensee must have knowledge, either actual or constructive, before he or she can be found to have

'permitted' unacceptable conduct on a licensed premises." The *Laube* court explained that even if a bar owner fails to take all reasonable preventative steps (the "*McFaddin* defense," from *McFaddin San Diego 1130 v. Stroh* (1989) 208 Cal.App.3d 1384), knowledge is required and strict liability may not be imposed. (*Laube*, *supra*, at pp. 378–379.)

Assuming without deciding that *Laube* applies, substantial evidence supports the trial court's determination that *Laube*'s requirement of constructive knowledge has been established. Campbell's testimony that he removes around six to 10 people per month from the premises for alcohol consumption or intoxication coupled with his testimony that he would not have identified the container in question as containing wine (even though it was labeled as such) calls into question the thoroughness of the searches performed at Midtowne. Pacheco also testified that he occasionally finds alcohol bottles while working and would throw them away. As the trial court found, "these facts suggest that Midtowne is insufficiently informing patrons of its alcohol policy and inadequately enforcing that policy." And, from these facts, Midtowne had constructive knowledge of a potential alcohol problem.

We also note that the procedural posture of the instant case is far different from that in *Laube*. The petitioners in *Laube* were "liquor licensees who suffered suspension or revocation of their liquor licenses because they allegedly 'permitted' drug sales in their establishments [even though] [n]either licensee knew or had reason to know of the drug trafficking." (*Laube*, *supra*, 2 Cal.App.4th at p. 366.) Here, the only possible consequence from the citation was that Midtowne received one of several warnings that could have occurred in a calendar year, and which could

have led to a license suspension only if the conduct continued in that calendar year. There is no evidence that it did.

Midtowne further objects to the County's July 11, 2014, letter to the extent it "purports to assert an irrefutable presumption that 'discovery on premises of empty containers of alcohol . . . will be considered as evidence of non-compliance.'" This argument is flawed for the simple reason that the letter does not set forth any irrefutable presumption; it states that the discovery of empty containers of alcohol will be considered as evidence of noncompliance. That evidence, along with all of the other evidence, was considered by Sten before he issued the notice of noncompliance; and that evidence, along with evidence of Midtowne's steps to prevent alcohol consumption on the premises, was presented to Dr. Terashita and the trial court, both of whom found that the citation was appropriate.

Midtowne's reliance upon *Pereyda* is misplaced. In *Pereyda*, a correctional officer was dismissed from his employment after he allegedly brought alcoholic beverages into a restricted area. (*Pereyda*, *supra*, 15 Cal.App.3d at p. 49.) In so ruling, the administrative body rejected the petitioner's explanation that he was simply hauling the washed-clean empty alcohol containers to the dump as a favor for a friend as "weird" and likely untrue. (*Id*. at p. 51.) The trial court granted a petition for administrative mandamus on the ground that the administrative decision was not supported by evidence, and the Court of Appeal agreed. (*Id*. at p. 53.) Although the petitioner's explanation could be viewed with suspicion, the Court of Appeal found that suspicion was not a substitute for proof. (*Ibid*.) And, absent proof that the containers had once held alcohol while in

the area where alcohol was forbidden, insufficient grounds existed for terminating the petitioner's employment.

Unlike the situation in *Pereyda*, Midtowne offered no explanation[1] (weird or otherwise) for the empty wine container found in the trashcan.[2] And unlike *Pereyda*, we have more than just an empty wine container here. There is evidence that other patrons have successfully sneaked alcohol into Midtowne premises. That evidence, coupled with the empty wine container found by Sten, supports both Dr. Terashita's and the trial court's finding that someone impermissibly brought alcohol onto the premises, "in which case [Midtowne] is subject to the citation."

Finally, we reject Midtowne's contention that Dr. Terashita's statement of decision is legally insufficient. Midtowne has not shown, with a developed legal argument, why the statement of decision is deficient. (*Benach v. County of Los Angeles*, *supra*, 149 Cal.App.4th at p. 852.) Regardless, as found by the trial court, Dr. Terashita's statement of decision satisfies *Topanga*. She summarized the evidence and the legal arguments raised by Midtowne. She then concluded, based upon her review

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[1] In its opening brief, Midtowne suggests that the container may have been repurposed; what it contained before it was emptied and discovered at the premises "is a mystery." Midtowne's counsel's speculation that the container may have been repurposed to hold water or any other nonalcoholic beverage is not evidence.

[2] To the extent Campbell's testimony that the container looked like one that carries protein drinks could be construed as an explanation, we conclude that the trial court implicitly (and rightly) rejected that "explanation" as not credible.

of "all exhibits, documentation, and notes on testimony given during the hearing," that Midtowne violated Rule 7, thereby upholding the notice of noncompliance. We agree with the trial court that nothing more was required.

It follows that we reject Midtowne's "post-hoc rationalization" argument. There is no evidence of a post-hoc rationalization. (Contra, *Bam, Inc. v. Board of Police Comrs.* (1992) 7 Cal.App.4th 1343, 1346 [rejecting a board's process of presenting findings after suspending a permit].) The parties participated in an administrative hearing. After the hearing, the hearing officer made a decision. The decision was provided to the parties. No further action resulted from the administrative decision.

DISPOSITION

The judgment is affirmed. The County is entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT