

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MOISHES STEAKHOUSE & SEAFOOD,)
INC., d/b/a PICCOLO MONDO)
CONTINENTAL CUISINE,)
)
Petitioner,)
)
vs.) Case No. 01-3764
)
DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF ALCOHOLIC BEVERAGES)
AND TOBACCO,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on December 14, 2001, in Miami, Florida, before J. D. Parrish, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Louis J. Terminello, Esquire
Terminello & Terminello, P.A.
2700 Southwest 37th Avenue
Miami, Florida 33133-2728

For Respondent: Sherrie J. Barnes, Esquire
Assistant General Counsel
Department of Business and
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1940 North Monroe Street
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STATEMENT OF THE ISSUE

Whether the Petitioner, Moishes Steakhouse & Seafood, Inc., timely submitted an application to record a lien for license number 23-02731 4COP.

PRELIMINARY STATEMENT

On October 11, 1999, the Respondent, Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco (Department), issued a letter to the Petitioner that acknowledged receipt of a request to record a lien against an alcoholic beverage license. The request was denied; that is, the Department declined to record the lien. The basis for the denial was the Department's interpretation of Section 561.65, Florida Statutes. It is the Department's position that such section requires a lien to be submitted for recording within 90 days of its creation and that Petitioner had failed to timely submit the instant lien.

On October 28, 1999, the Petitioner filed a request for a formal hearing in order to challenge the Department's decision. For reasons not established by this record, the Petitioner submitted a second request for hearing that was dated September 20, 2001, and the matter was forwarded to the Division of Administrative Hearings for formal proceedings on September 25, 2001.

At the hearing, the Petitioner presented testimony from Sy Chadroff, an attorney with 46 years of specialized experience related to the spirituous beverage laws. Additionally, the Petitioner filed the deposition testimony of Daysi Tejera. Four Exhibits were received in evidence by stipulation of the parties: a copy of the security agreement and note recorded in the public records of Dade County, Florida, by and between Armar, Inc., Arnaldo Bou, and Martha Pinango, as debtors, and Petitioner; a copy of the UCC-1 Financing Statement recorded with the Florida Secretary of State on September 10, 1999, between the debtors and Petitioner, as the secured party; a copy of the escrow agreement dated March 3, 1999, between the debtors and the Petitioner; and a copy of the October 11, 1999, letter from the Department denying the Petitioner's request to record the security interest. All of the foregoing exhibits were filed with the Division of Administrative Hearings with a stipulation of counsel on or about November 29, 2001.

The transcript of the proceeding was filed with the Division of Administrative Hearings on January 14, 2002. The parties submitted Proposed Recommended Orders that have been considered in the preparation of this order.

FINDINGS OF FACT

1. On or about March 3, 1999, Armar Inc., Arnaldo Bou, individually, and Martha Pinango, individually, as debtors, and

the Petitioner, by Eugenio D'Arpino, as president of the company, the secured party, executed a security agreement (chattel mortgage) related to beverage license 23-02731, series 4COP. Such security agreement recognized a priority lien for the Petitioner, Moishes Steakhouse & Seafood, Inc., and included a promissory note executed by the debtors.

2. The promissory note, dated March 3, 1999 (presumably executed on or about that date), provided:

THIS NOTE IS NOTE ASSIGNABLE AND NON-ASSUMABLE WITHOUT THE EXPRESS WRITTEN APPROVAL OF THE SECURED PARTY. THIS NOTE IS SECURED BY A SECURITY AGREEMENT (CHATTEL MORTGAGE) AND UCC-1 WHICH SHALL CREATE A PRIORITY LIEN (1ST PLACE LIEN) ON STATE OF FLORIDA ALCOHOLIC BEVERAGE LICENSE NO: 23-01686, series 4 COP quota.

3. The security agreement and promissory note were not provided to the Department within 90 days of March 3, 1999. Apparently, the fact that the note and security agreement make reference to different alcoholic beverage license numbers is not an issue. Neither party has raised that issue.

4. The Petitioner forwarded the note and security agreement to the Department for recordation on or about September 21, 1999. At that time the Department received an application to record a lien for license no. 23-02731, series 4COP.

5. On October 11, 1999, the Department sent Petitioner a letter declining the application because it was not made within 90 days after the creation of the lien. The Department requested a newly executed security agreement so that the dates would show the request for recording within 90 days of the application.

6. It is the Department's position that the lien application should have been submitted within 90 days of its creation in order to comply with the mandatory guidelines of the statute. For purposes of this case, the Department argued that the "creation of the lien" was on or about March 3, 1999, or, at the latest, March 15, 1999 (a date noted in the escrow agreement).

7. The Petitioner timely sought an administrative review of the Department's decision.

8. It is the Petitioner's position that the lien did not "break escrow" until August of 1999, and that, as a matter of law, that is the point in time from which the 90 day period should run. From the Petitioner's perspective, the "creation of the lien" as used by the statute dates from when the transaction broke escrow.

9. All parties agree that the statute does not specifically address escrow transactions.

CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings. Section 120.57, Florida Statutes.

11. In this case the Petitioner bears the burden of proof to establish it is entitled to have the lien recorded by the Department. As is more fully explained below, it has met that burden.

12. Chapter 561, Florida Statutes, addresses the myriad of issues that relate to alcoholic beverage licensees. For example, under Section 561.32, Florida Statutes, a person holding a lien against an alcoholic beverage license is deemed to be interested indirectly in the license. Therefore, any person holding such interest must be disclosed to the Department. The section specifically recognizes, however, that the lien interest is enforceable in a judicial proceeding. In Florida, secured transactions are governed by the Uniform Commercial Code (UCC) which is adopted by statute. Thus, the "perfection" of the lien interest pursuant to the UCC, is separate from the disclosure and recording requirements of the beverage laws. Arguably, a lien is not "created" until fully executed and in effect. Documents held in escrow have no legal effect until released for the purposes expressed by their terms.

13. Section 561.65(4), Florida Statutes, provides:

(4) In order to perfect a lien or security interest in a spirituous alcoholic beverage license which may be enforceable against the license, the party which holds the lien or security interest, within 90 days of the date of creation of the lien or security interest, shall record the same with the division on or with forms authorized by the division, which forms shall require the names of the parties and the terms of the obligation. The division, upon the request of any person or entity, shall conduct a lien search and shall provide to the requester copies of all recorded liens and security interests in the division's records under the name searched, all for the fee set forth in this subsection. The fee for recording a lien or security interest shall be \$10; the fee for recording an assignment of a recorded lien or security interest shall be \$10; the fee for recording a satisfaction of a lien or security interest shall be \$10; and the fee for a lien search shall be \$20. The division shall promulgate forms to be used under this subsection. All liens and security interests filed on or after July 1, 1995, shall expire 5 years after recordation unless renewed by the lienholder within 6 months prior to its expiration date. All liens and security interests filed prior to July 1, 1995, shall expire on July 1, 2000, unless renewed by the lienholder within 6 months prior to that date. Renewals of liens and security interests shall be subject to a \$10 renewal fee.

14. In this case, it has been represented that the Petitioner presented the documents to the Department for recording of its lien within 90 days of the date such records were released from escrow. The record in this cause technically

does not establish exactly when the documents were released from escrow, but all parties have apparently presumed such release was on or about August 19, 1999 (the date the security agreement was recorded in the public records in and for Dade County, Florida). Subsequent to that time, but within 90 days, the Petitioner submitted the entire application for recording to the Department. Therefore, the Petitioner has complied with the statutory guidelines to file its application within 90 days of the creation of the security interest.

15. As a matter of law, the transaction described in this record did not establish or "create" a security interest until the documents were released from escrow. Until the conditions of the escrow occurred, the escrow agent would not have been authorized to release the documents. Thus, the security interest did not exist until the transaction closed.

16. Although all documents necessary to complete the transaction were fully executed on March 3, 1999, the transaction technically did not close as long as the terms of the escrow were unfulfilled. If the parties allowed the license to transfer (unsecured), that is a legal issue unrelated to the time the lien interest was created. If the debtors and Petitioner violated regulations related to alcoholic beverages, such violations are not related to when the secured interest was created.

17. Had the conditions of the escrow never been satisfied, remedies for a default of the escrow agreement have not been disclosed. Moreover, why the parties extended the time for the conditions of escrow to be completed is not known. All of the unknowns in this case may point to policy questions regarding the closing of transactions dealing with alcoholic beverage licenses and/or the procedures governing the escrow of documents but thus far neither the Legislature (by statute) nor the Department (by rule) has addressed the matter. Nevertheless, for purposes of this case, it is established that the Petitioner presented the application for recording its secured interest no later than 90 days from the date such documents were released from escrow (and thus the lien was created) such that it is entitled to have the lien recorded by the Department.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco, enter a final order approving the Petitioner's application to record a lien on the subject alcoholic beverage license.

DONE AND ENTERED this 1st day of March, 2002, in
Tallahassee, Leon County, Florida.

J. D. PARRISH
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of March, 2002.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.