

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RJR CHARITABLE HOLDINGS, LLC,

Petitioner,

vs.

Case No. 15-6624

DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION,
DIVISION OF ALCOHOLIC BEVERAGES
AND TOBACCO,

Respondent,

and

PARTY LATINO CORP.,

Intervenor.

RECOMMENDED ORDER

On February 19, 2016, Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted the final hearing by videoconference in Tallahassee and Miami, Florida.

APPEARANCES

For Petitioner: Samuel A. Rubert, Esquire
Loren Newman, Esquire
Samuel A. Rubert, P.A.
3225 Franklin Avenue, Suite C-101
Coconut Grove, Florida 33133

For Respondent: Magdalena Ozarowski, Esquire
Jason Douglas Borntreger, Esquire
Department of Business and
Professional Regulation
Division of Alcoholic Beverages and Tobacco
1940 North Monroe Street, Suite 40
Tallahassee, Florida 32399

For Intervenor: Louis J. Terminello, Esquire
Joshua J. Remedios, Esquire
Greenspoon Marder, P.A.
600 Brickell Avenue, 36th Floor
Miami, Florida 33131

STATEMENT OF THE ISSUE

The issue is whether, pursuant to section 561.32(1)(a) and (b), Florida Statutes, Respondent is required to approve the transfer of alcoholic beverage license to Petitioner after its purported purchase of the license at a sheriff's sale.

PRELIMINARY STATEMENT

By application filed on June 6, 2014, Petitioner requested Respondent's approval of a transfer of a quota alcoholic beverage license number BEV23-25971 4COP (License) from L'Boulevard Café Supper Club to Petitioner.

By Notice of Intent to Deny License issued on July 9, 2014, Respondent denied Petitioner's transfer application because Respondent was unable to determine whether Petitioner possessed sufficient title to the License following Respondent's receipt of Intervenor's transfer application on February 20, 2014.

Petitioner timely requested a formal hearing. On January 8, 2016, Intervenor filed a motion to intervene, which the

Administrative Law Judge granted by order entered on January 15, 2016.

On February 11, 2016, the Administrative Law Judge entered an Order Denying Intervenor's Motion to Relinquish Jurisdiction and Requiring Respondent to Supplement Notice of Intent to Deny. On February 15, 2016, Respondent filed a pleading stating that Petitioner's request for a transfer of the License relies on a sheriff's levy upon the License on March 8, 2014, and Respondent's purchase of the seized License at a sheriff's sale on April 30, 2014. Respondent added that Intervenor had filed an application for transfer of the License on February 20, 2014--one month prior to the sheriff's levy. Respondent stated that, pursuant to section 561.181(1)(a), Florida Statutes, it had issued Intervenor a temporary license, and, "on May 21, 2014, [Intervenor's] application was deemed approved per section 120.60(1), Florida Statutes.

At the hearing, Respondent called the lone witness in the case and offered into evidence 13 exhibits: Respondent Exhibits A through M. Petitioner offered into evidence five exhibits: Petitioner Exhibits A through E. Intervenor offered into evidence seven exhibits: Intervenor Exhibits 1 through 7. All exhibits were admitted.¹

The court reporter filed the transcript on April 6, 2016. The parties filed proposed recommended orders by April 19, 2016.

FINDINGS OF FACT

1. Prior to the events set forth below, La Cidra Corporation (La Cidra) owned the License. As issued by Respondent, the License authorized La Cidra to sell alcoholic beverages at a bar known as L'Boulevard Café Supper Club,² which was located in leased premises at 3632-34 Northwest 25th Avenue in Miami (Premises).

2. On October 28, 2013, Steven Beltre (Beltre) obtained a final judgment in the Eleventh Judicial Circuit Court in the amount of about \$3.4 million against La Cidra, doing business as L'Boulevard Cafe Supperclub. Respondent has adopted a form, DBPR ABT-6022, for persons to record liens against alcoholic beverage licenses. However, at no material time did anyone record with Respondent a lien against the License in connection with the Beltre judgment.

3. The record does not disclose when La Cidra ceased operating the bar. However, on January 21, 2014, Intervenor registered "L'Boulevard Café Supperclub" as a fictitious name, and Intervenor and La Cidra signed an "Application for Transfer of Ownership of an Alcoholic Beverage License" concerning the License.

4. On February 13, 2014, Intervenor purchased from La Cidra all of its assets, including the License. At closing, La Cidra assigned the Premises lease by an assignment that was signed by

La Cidra, Intervenor, and the lessor. The assignment acknowledges that Intervenor has paid the lessor a security deposit of \$10,000. A closing statement reflects a purchase price of \$100,000, which is represented by a \$15,000 deposit and \$85,000 promissory note. On February 20, Intervenor filed with Respondent the application described in the preceding paragraph, and Respondent, on the same date, issued to Intervenor a temporary license based on the License.

5. Five days after the closing described in the preceding paragraph, on February 18, 2014, the Clerk of the Eleventh Judicial Circuit Court issued a Writ of Execution directing all sheriffs in the state of Florida "to levy upon property subject to execution of . . . La Cidra . . . to satisfy the sum of [approximately \$3.4 million]." The Miami-Dade County Sheriff's Office levied upon property on March 8, 2014--23 days after the closing of the conveyance of the License from La Cidra to Intervenor. The seized property included alcoholic beverages, bar equipment, computers, televisions, phones, stage lights, radios, smoke machines, and shop equipment, as well as the following intangible personal property: a certificate evidencing La Cidra as the licensee under the License, an \$85,000 "secured" promissory note that is not further identified, and currency totaling \$17,206 in denominations as large as \$100 bills.

6. After the seizure, the sheriff advertised the sale of the property by auction on April 30. The list of property to be sold included the License, but not the promissory note or cash, whose disposition is undisclosed in the record. On April 30, 2014--over two months after the La Cidra/Intervenor conveyance--the sheriff executed a Sheriff's Bill of Sale transferring all "right, title and interest" of La Cidra to all of the advertised property to Respondent for the sum of \$2000 plus \$140 sales tax, which represented the highest bid at the sheriff's sale.

7. Immediately after the sheriff's levy, in March, Respondent was contacted by various parties, including the sheriff's office, which provided Respondent with a copy of the writ of execution and list of seized property.³ On April 7, 2014, Respondent received a letter from Daniel W. Courtney, an attorney whose cover letter states that he represents Intervenor. The letter recites that Respondent properly had issued a temporary license to Intervenor, but later had withheld the issuance of the permanent License to Intervenor due to its receipt of information from the sheriff concerning the purported seizure of the License. The letter asserts that this was an improper seizure because the License was not the property of La Cidra at the time of the seizure and requests that Respondent issue the permanent License to Intervenor without delay.

8. Unmoved by Mr. Courtney's letter, on June 4, 2014, Respondent issued a Notice of Intent to Deny License to Intervenor. The notice cites the writ of execution issued on February 18 and reasons that "neither the putative transferor nor putative transferee possess[es] title for the transfer of the [License]." This reasoning does not account for the simple chronology of events in which the La Cidra/Intervenor conveyance preceded the sheriff's levy and sale.

9. On June 14, 2014, Intervenor requested an administrative hearing on the proposed denial. By Order of Dismissal entered April 30, 2015, Respondent acknowledged that its failure for more than 90 days to issue a decision on Intervenor's transfer application for a permanent License required Respondent to deem that the application had been approved, pursuant to section 120.60(1).⁴ The Order of Dismissal rescinds, without prejudice, the Notice of Intent to Deny License issued on June 4, 2014, and notes that Respondent approved the transfer of the permanent License to Intervenor on January 30, 2015.⁵

10. At about the time that it requested an administrative hearing on Respondent's earlier denial of its transfer application for a permanent License, Intervenor commenced judicial proceedings to obtain relief from Petitioner's claims arising out of the sheriff's sale. Intervenor sought to intervene in supplemental proceedings pertaining to the

underlying tort action between Beltre and La Cidra. Intervenor also commenced a legal action against Beltre. The trial court denied the motion to intervene without prejudice, pending resolution of the separate action against Beltre. Intervenor appealed this order, but the appellate court affirmed the trial court on June 3, 2015. On October 6, 2015, the trial court dismissed Intervenor's action against Beltre for lack of prosecution.

11. At the same time that Intervenor was pursuing judicial and administrative relief, on June 6, 2014, Petitioner filed a transfer application for Respondent's approval of the transfer of the License to Petitioner. The page for the signature of the transferor is blank, but Petitioner attached to the application a copy of the above-described Sheriff's Bill of Sale.

12. On July 9, 2014, Respondent issued the above-described Notice of Intent to Deny License to Petitioner that cites Intervenor's documentation of the La Cidra/Intervenor conveyance as the ground for the denial.

13. The evidentiary record omits any evidence of the fair market value of the License and, more importantly, as noted by Respondent in its proposed recommended order, the fact that, on November 13, 2013, Beltre filed with the Department of State a judgment lien certificate.

CONCLUSIONS OF LAW

14. DOAH has jurisdiction over the subject matter. §§ 120.569 and 120.57(1), Fla. Stat. Sections 561.15, 561.17, 561.27, and 561.29 vest in Respondent specific authority to issue, renew, suspend, revoke, and otherwise regulate alcoholic beverage licenses in accordance with the provisions of law governing such licenses. DOAH's jurisdiction is derived from Respondent's determination of Petitioner's substantial interests when Respondent proposed to deny Petitioner's request for approval of the transfer of the License to Petitioner.

15. The same analysis of substantial interests drives the determination of whether Intervenor has standing. As noted above, Respondent was required to issue the License to Intervenor under the default provisions of section 120.60, but even this "permanent" License is for a term. For standing purposes, even a theoretical prospect of nonrenewal of Intervenor's License suffices to confer standing upon Intervenor to participate in a case in which Petitioner attempts to secure for itself the issuance of the same License.

16. As the applicant, Petitioner bears the burden of proving by a preponderance of the evidence the material facts entitling it to relief. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981); § 120.57(1)(j).

17. An alcoholic beverage license is nontransferable except under two conditions: a) "[w]hen a licensee makes a bona fide sale of the [licensed] business" to a purchaser that meets all applicable licensing requirements and b) "[a] person holding a lien against a license may have his or her rights enforced in a judicial proceeding."⁶ § 561.32(1)(a) and (b).

18. The conveyance from La Cidra to Intervenor reveals two unusual features of section 561.32(1)(a). First, section 561.32(1)(a) authorizes a transfer of an alcoholic beverage license by a bona fide sale, not a bona fide purchase. A seller sells, and a purchaser purchases, so this statutory condition for transferability requires a determination of the good faith of the seller. Respondent misses this point--or, less likely, the meaning of "bona fide"--when it states in paragraph 28 of its proposed recommended order: "Petitioner has failed to introduce any evidence that the sale of the [License] from La Cidra Corporation to Intervenor was anything other than a bona fide sale."

19. From La Cidra's perspective, the sale of the License to Intervenor was not a bona fide sale. A bona fide purchase⁷ is for value and without notice of competing claims. See, e.g., Rabinowitz v. Keefer, 132 So. 297 (Fla. 1931). Applying the same requirements to a sale, the knowledge of the seller is at issue. La Cidra knew of the Beltre judgment by operation of Florida law

governing the service of a summons on a defendant. Ch. 48, Fla. Stat.⁸ A good faith seller does not sell all of its assets without accounting for a substantial judgment that was recently entered against it.

20. The La Cidra/Intervenor conveyance reveals another unusual feature of section 561.32(1)(a). Respondent's determination that a party is entitled to hold and use an alcoholic beverage license is not a determination that a party owns the license, nor does Respondent's determination of who holds and may use a license necessarily track who owns the license. Respondent's transfer of an alcoholic beverage license "neither transfers property rights nor vests title in the purchaser of the license," but "serves only to maintain record continuity in the ownership and management of a liquor business in order that it may be regulated pursuant to Chapter 561."

Howard v. Metcalf, 487 So. 2d 43, 45 (Fla. 2d DCA 1986)

(citations omitted). Courts have long held that a statutory transfer of a license in connection with a lease does not constitute a change in ownership, or property-rights transfer, so a statutory transfer cannot defeat the rights of the owner of the license. See House v. Cotton, 52 So. 2d 340 (Fla. 1952) (per curiam); Rosamond v. Mann, 80 So. 2d 317 (Fla. 1955); Wright v. Cade, 349 So. 2d 833 (Fla. 1st DCA 1977).

21. The above-cited cases involve bar leases featuring in statutory transfers of licenses, but not property-rights transfers, in accordance with the parties' consensual transaction. In Coney v. First State Bank, 405 So. 2d 257 (Fla. 3d DCA 1981), a statutory transfer took place, without a property-rights transfer, following a nonconsensual transaction: a sheriff's levy and sale. In Coney, the owners of an alcoholic beverage license leased a bar and their alcoholic beverage license to a party, against whom a judgment was entered on an unrelated matter. The sheriff levied upon the license. Following the sheriff's sale, Respondent advised the owners/lessors that the purchaser could freely transfer the license, even though, under the lease, the license reverted to the owners/lessors on termination of the lease. The owners/lessors moved to set aside the sheriff's sale, as did the purchaser on discovering that the license was not freely transferable. The court held that an alcoholic beverage license is subject to levy and sale; rejected the purchaser's claim because he could have discovered this restriction in the lease, which was a matter of public record; and dismissed the owners/lessors' claim because the purchaser could acquire nothing more than the judgment debtor's interest in the license. The court reasoned that, if Respondent disregarded the lessor's

reversionary interest, the time for adjudicating competing ownership claims would be after the lease terminated.

22. Respondent should have denied timely the La Cidra/Intervenor conveyance because it was not a good faith sale, as explained above. As discussed in more detail below, the validity of the property-rights transfer in the La Cidra/Intervenor conveyance, although not free from doubt, is a matter outside of administrative jurisdiction. The proper result would have been that Intervenor owned the License, but could not obtain a statutory transfer so as to be able to use the License--a difficult result, but one necessitated by La Cidra's sale of the License without accounting for the Beltre judgment.

23. Turning to Petitioner's transaction, Petitioner claims that Respondent must approve its application for the transfer of the License because Petitioner purchased the License at the sheriff's sale. The parties have not disputed that a sheriff's sale may constitute a bona fide sale by a licensee, so as to fall within section 561.32(1)(a). Clearly, a sheriff's sale of an alcoholic beverage license may qualify as a sale of the licensed business. Less clear is whether a sheriff's sale may qualify as a sale by the licensee.⁹ But, in a case raising a number of difficult legal issues, the Administrative Law Judge will follow the lead of the parties and treat the sheriff as the licensee within the meaning of section 561.32(1)(a).¹⁰

24. As held in Coney, a sheriff can levy upon and sell only the interest of the judgment debtor in property. Accord, Holland v. State, 15 Fla. 455, 519 (1876); Accent Realty of Jacksonville, Inc. v. Crudele, 496 So. 2d 158, 161 (Fla. 3d DCA 1986) (judgment lien attaches only to property for which judgment debtor holds legal title). For this reason, the Sheriff's Bill of Sale warns that the only interest transferred is the interest of La Cidra. Based on the chronology of transactions, Petitioner could not purchase at the sheriff's sale the License of La Cidra because La Cidra had sold the License to Intervenor, and Respondent had canceled the License of La Cidra when Intervenor issued the temporary License to Intervenor: these transactions address, respectively, the property-rights transfer and the statutory transfer.

25. Petitioner counters that Intervenor has tried and failed to obtain judicial relief to set aside the levy and sale and argues that the Administrative Law Judge and Respondent must thus disregard the La Cidra/Intervenor conveyance. This argument is unpersuasive. First, it addresses only the property-rights transfer, not the statutory transfer. The seized certificate became obsolete at the moment that Respondent issued a temporary certificate on the same License to Intervenor. At that moment, the certificate signified nothing and its seizure was meaningless, regardless of who owned it.

26. Second, Petitioner's argument does not justify ignoring the plain chronology of transactions. Prior to the seizure, a purchase and sale of the License had already taken place, so that no property rights continued to attach to a certificate of La Cidra's License. It is far from clear that Intervenor is required to take any action to set aside the sheriff's sale to Petitioner; it is at least as likely that Petitioner is required to take action to invalidate as a fraudulent transfer the conveyance from La Cidra to Intervenor.¹¹ Even if Intervenor were required to take action, Intervenor may not have exhausted its judicial remedies. For these reasons, the Administrative Law Judge declines to treat Intervenor's failure to obtain judicial relief setting aside the sheriff's sale as a judicial invalidation of the La Cidra conveyance to Intervenor.

27. Citing Intervenor's failure to obtain judicial relief, Petitioner also argues that the Administrative Law Judge and Respondent may not provide such judicial relief to Intervenor by determining that it possesses legal title to the License. This argument represents an extension of the principle that the Administrative Law Judge and Respondent lack the authority to determine legal title to the License.

28. Petitioner fails to acknowledge, though, that lawful agency action may require that an agency make subordinate factual determinations of matters whose legal determinations are reserved

to circuit court. See, e.g., Fla. Admin. Code R. 18-21.004(3) (a) and (b) (in exercising its lawful jurisdiction of whether to issue a dock permit, agency makes factual determinations of riparian lines and ownership of adjacent upland). In the cited rule, the agency's factual determinations of riparian lines and ownership of adjacent uplands do not legally settle these matters, but drive the agency's ultimate determination of whether to issue a dock permit. In the present case, Respondent's factual determination of whether the sheriff levied upon and sold La Cidra's License does not settle the property rights to the License, but drives Respondent's ultimate determination of whether to approve an application for a statutory transfer of the License.

29. Another distinction between the judicial and agency determinations of the same issue is the level of analytical complexity in each exercise. As compared to the circuit court's legal determination of these property-rights issues between two nonagency parties with competing ownership claims, the agency's factual determination of these issues may be more generalized or approximate because the real-world determination of this matter is reserved to circuit court and the agency's factual determination of this matter is subordinate to the ultimate issue in the administrative proceeding.

30. Thus, in making factual determinations in the present case, the Administrative Law Judge and Respondent give effect to the plain chronology of transactions, but not to the prospect of a judicial invalidation of Intervenor's ownership claim. The result is that Respondent must deny Petitioner's claim for a statutory transfer under section 561.32(1)(a).

31. The question remains of whether Petitioner's claim for a statutory transfer qualifies under section 561.32(1)(b), which applies to a transfer resulting from the enforcement of a lien against an alcoholic beverage license. This statutory subsection authorizes a statutory transfer due to the enforcement of a lien against a license.

32. The first question is whether a lien ever attached to the License. A judgment is not a lien. Even the recording of an original judgment fails to establish a lien against the real property of the county in whose records the judgment is recorded: as required by statute, only a certified copy of the judgment establishes a judgment lien. § 55.10(1); Smith v. Venus Condominium Ass'n, Inc., 352 So. 2d 1169 (Fla. 1977; Steinbrecher v. Cannon, 501 So. 2d 659 (Fla. 1st DCA 1987).

33. Historically, a judgment became a lien against nonexempt personal property located in the county within the jurisdiction of the sheriff when he or she received the writ of execution.¹² Steinbrecher, supra; Accent Realty, supra; Smith v. Purdy,

272 So. 2d 545 (Fla. 3d DCA 1973). The priority of the lien was based on when the writ of execution was delivered to the sheriff. Flagship State Bank v. Carantzas, 352 So. 2d 1259, 1262 (Fla. 1st DCA 1977). An execution lien attached to all of the debtor's nonexempt property and meant that a sale of nonexempt property after the delivery of a writ of execution to the sheriff did not destroy the execution lien against property within the sheriff's jurisdiction not yet levied upon. Accent Realty, supra at 161; Carantzas, supra at 1261.

34. Since 2001, a judgment becomes a lien against nonexempt personal property in Florida, other than "fixtures, money, negotiable instruments, and mortgages," when the judgment creditor files a judgment lien certificate with the Department of State. § 55.202(2)(a), Fla. Stat.; § 55.203; In re Stembridge, 2007 Bankr. LEXIS 4672 (S.D. Fla. 2007). A judgment creditor not obtaining a lien through sections 55.202 and 55.203 or whose lien has expired may proceed against a judgment debtor's property by any available judicial process; if the creditor proceeds by writ of execution, the lien attaches at the time of levy and only upon the property levied upon. § 55.205(1).

35. On the present record, no lien attached to the License. Beltre never filed a judgment lien certificate with the Department of State, and the lien under section 55.205(1) could not attach to the License because the sheriff's seizure of an

obsolete certificate was meaningless. For these reasons, Respondent could not approve a statutory transfer to Petitioner under section 561.32(1)(b).

36. Consideration of Beltre's filing of a judgment lien certificate on November 13, 2013, explains the timing of the La Cidra/Intervenor conveyance on February 13, 2014--93 days after the filing of the judgment lien certificate, but does not compel a different result. Section 561.65(4) provides:

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

37. The statutory directive of how to "perfect" a lien that is "enforceable against the license" raises a problem in interpretation due to the difference between the attaching and perfecting of a lien. Compare chapter 679, part II, Florida Statutes (attachment), with chapter 679, part III, Florida Statutes (perfection). Typically,¹³ a lien attaches to or is created against specific property "when it becomes enforceable against the debtor with respect to the collateral." § 679.2031(1). Without perfecting the lien, pursuant to the provisions of the security agreement and note, a lienholder may

enforce its lien against the collateral as long as the debtor continues to own the property and without regard to any liens not in existence when the lienholder's lien attached, unless other liens have been perfected in the meantime. However, the lienholder must perfect its lien for the lien to remain enforceable against the property after the owner conveys the property or after subsequent liens--consensual or nonconsensual--attach to and are perfected against the property. § 679.3171. See generally Commer. Credit Counseling Servs. v. W. W. Grainger, Inc., 840 N.E. 2d 843, 848 (Ind. App. 2006) ("The term 'attachment' encompasses creation of a security interest by execution of a security agreement between the parties, while 'perfection' is an additional step that makes the security interest effective against third parties.") (cited with approval in HSBC Bank USA, NA v. Perez, 165 So. 3d 696, 700 (Fla. 4th DCA 2015) (perfection is important because it "determin[es] matters of priority" and "provide[s] third parties with notice of the transaction").

38. Section 561.65(4) in no way addresses the attachment or creation of liens in alcoholic beverage licenses. Section 561.65(4) does not govern the term and conditions of the attachment of such liens against licenses or the enforceability of such liens when the only parties involved are the debtor and the lienholder. Simply put, section 561.65(4) does not disturb

the contractual undertakings of the debtor and creditor in the absence of third parties becoming involved with the collateral.

39. Section 561.65(4) is a notice statute for third parties subsequently doing business with the debtor and taking actions with respect to the collateral. Obviously, the debtor and original lienholder do not require recordings under section 561.65(4) for notice of their original transaction. As a notice statute, section 561.65(4) provides the exclusive means for a lienholder to enforce its lien against an alcoholic beverage license, if the debtor conveys the license or to the extent that subsequent liens have been perfected against the license.

40. A careless reading of section 561.65(4) gives precedence to the enforceability language over the reference to perfecting a lien. The effect of such a reading is needlessly to release an alcoholic beverage license from a security agreement, even in the absence of third parties subsequently having taken any action regarding the collateral. Three opinions supporting this misinterpretation of section 561.65(4) to varying degrees would confer windfalls upon debtors at the expense of creditors--an unlikely legislative intent.

41. The earliest source of confusion on this point is dictum In re Seville Entertainment Complex, Inc., 79 B.R. 491 (Bankr. N.D. Fla. 1987):

This statute is clear and unambiguous. In order to perfect a lien in a liquor license which is enforceable against the license, a lienholder must file the appropriate forms with the Division of Alcoholic Beverages. The penalty for the failure to do so is that the lien is unenforceable against the license.

79 B.R. at 492.¹⁴

42. The next of these three cases involves implied dictum. In Splash Entertainment, Inc. v. Sons of Ireland, Inc., 867 So. 2d 423 (Fla. 3d DCA 2004), a license owner purchased a bar and secured the purchase-money loan with its alcoholic beverage license. The purchase-money note went into default, and the lienholder commenced a legal action to foreclose its lien against the license. There were no subsequent conveyances by the license owner or additional liens attaching to or perfected in the license. The absence of third parties meant that the court should have allowed the lienholder to enforce its rights against the purchase-money debtor without regard to section 561.65(4) or the perfection of the lien. Instead, citing the broad language of Seville, above, the Splash court subscribed to the debtor-windfall construction of section 561.65(4), believing that the lienholder's failure timely to record its lien with Respondent would liberate the license from the security agreement between the parties. Fortunately, this part of the opinion was

dictum because the court held that the lienholder had complied timely with section 561.65(4).

43. But two cases of dictum begot a holding in VMI Entertainment, LLC v. Westwood Plaza, LLC, 152 So. 3d 617 (Fla. 1st DCA 2014), where the court failed to distinguish between the attachment and perfection of a lien. A lessor leased a bar to a lessee that owned an alcoholic beverage license, but no security agreement covered the license. The lessee defaulted, and the lessor obtained an ex-parte, prejudgment writ of attachment against the license. As noted by the court, by law, an attachment creates a lien in any property that may be subject to postjudgment execution. Reading broadly the "enforceability" clause of section 561.65(4), the court reversed the trial court's order denying a motion to dissolve the attachment writ against the license. Even in the absence of third parties, the VMI court held that the attachment lien had never been perfected under section 561.65(4), so the lien could not be enforced against the license.¹⁵

44. Even if the Beltre judgment lien attached to the License, the present case should not be susceptible to the debtor-windfall misreading of section 561.65(4). Intervenor is a third party for which the notice statute is designed, so the Beltre judgment is not enforceable, under section 561.32(1)(b), against the License as owned by Intervenor, as at least one of

the parties correctly calculated when La Cidra conveyed the License to Intervenor three days after the closing of Beltre's 90-day window for recording his judgment lien.¹⁶ For the purpose of determining whether Respondent should approve a statutory transfer under section 561.32(1)(b), the La Cidra/Intervenor conveyance effectively precludes such approval.

RECOMMENDATION

It is

RECOMMENDED that Respondent deny the application of Petitioner for a statutory transfer of the License.

DONE AND ENTERED this 31st day of May, 2016, in Tallahassee, Leon County, Florida.



ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of May, 2016.

ENDNOTES

^{1/} On March 3, 2016, with the leave of the Administrative Law Judge, Petitioner filed an affidavit to rebut testimony of Respondent's witness contending that Respondent's policy

prohibits the issuance of certain alcoholic beverage licenses to purchasers at sheriffs' sales. Four days later, the affidavit, which claimed to identify several such approvals, spawned a motion to strike from Intervenor, which contended that the cited approvals were factually distinguishable. Three days later, Petitioner responded to Intervenor's motion to strike. Four days later, Intervenor filed a reply to the response. The Administrative Law Judge strikes the affidavit and ensuing filings on the ground of relevance.

^{2/} The different spellings of "Supper Club" are inconsequential.

^{3/} March 10, 2014, was a particularly busy day for the License file in Respondent's Miami office. In addition to the fax from the sheriff's office described in the accompanying text, Tanya Garcia Vega, an attorney who did not disclose her client, requesting a lien search on the License, which she identified as in the name of La Cidra Corporation, pending transfer by a temporary certificate to Intervenor, and Stuart R. Kalb, an attorney who also did not disclose a client, providing Respondent with copies of the above-described Beltre judgment; instructions for levy, which identify the License; and License information showing the holder as La Cidra Corporation, but a current transfer pending.

One week later, on March 17, 2014, Respondent accurately advised Ms. Vega that its records did not indicate the presence of any liens against the License. Two weeks later, on March 31, 2014, Respondent's Miami office received a second request for a lien search on the License from Mark Johnson, whose interest in the License is undisclosed. On April 8, 2014, Respondent accurately advised Mr. Johnson that its records did not indicate the presence of any liens against the License.

^{4/} The deadline was not monitored when Respondent transferred Intervenor's file from its licensing department to its legal department.

^{5/} The rescission may be without prejudice pending the prospect of judicial resolution of the ownership claims in the License of Intervenor and Petitioner.

^{6/} The sole issue in this case is whether Petitioner is entitled to a transfer of the License under the above-cited language of section 561.32(1)(a) or (b). The parties have not addressed other statutory requirements, such as those specifying the fitness of a proposed licensee and requiring the payment of

license-transfer fees, so this recommended order does not address these issues.

^{7/} The requirement of a bona fide purchaser or purchase, rather than a bona fide seller or sale, is much more common in the law. See, e.g., § 695.01 (unrecorded conveyance or mortgage is ineffective against creditor or subsequent purchaser for a valuable consideration and without notice); § 679.3171 ("licensee of a general intangible or a buyer, other than a secured party, of collateral other than tangible chattel paper, tangible documents, goods, instruments, or a certificated security takes free of a security interest if the licensee or buyer gives value without knowledge of the security interest and before it is perfected"); § 379.321(1) ("a person who becomes a licensee of a general intangible in good faith, without knowledge that the license violates the rights of another person in the general intangible, and in the ordinary course from a person in the business of licensing general intangibles of that kind" takes free of even a perfected security interest); § 726.109 ("transfer is not voidable under s. 726.105(1) (a) against a person who took in good faith and for a reasonably equivalent value").

The law governing notice recognizes constructive notice, as of recorded documents, and actual notice. See, e.g., Hagan v. Sabal Palms, Inc., 186 So. 2d 302 (Fla. 2d DCA 1966). Typically, given their greater familiarity with the subject of the purchase and sale, especially as to the property's potential vulnerability to liens due to the liabilities of the owner, ignorant sellers, who are the focus of section 561.32(1) (a), would seem much rarer than ignorant purchasers. But it is always a perilous task to delineate the boundaries of parties' ignorance, especially when such claims are self-serving.

^{8/} The omission from the record of the fair market value of the License at the time of the La Cidra/Intervenor conveyance is material because courts may consider the adequacy of the consideration, not for determining whether a purchase is for value, but for determining whether the purchaser bought the property in good faith, see, e.g., Byrom v. Gallagher, 609 So. 2d 24 (Fla. 1992), and whether a conveyance was a fraudulent transfer to defeat a creditor. § 726.105(1) (a).

In reality, as discussed below, La Cidra, as well as Intervenor, also had constructive notice of the Beltre judgment lien that had attached when a judgment lien certificate was filed with the Department of State. Even though the lien was not timely perfected, so as to be effective against Intervenor, its

creation—and the constructive notice of the attached lien imputed to La Cidra and Intervenor--deprived the La Cidra/Intervenor conveyance of its good faith, regardless from which party's perspective it is examined.

^{9/} Admittedly, the statutory prohibition against transferring alcoholic beverage licenses is subject to a wide range of exceptions by operation of section 561.32(1)(a) and (b). Section 561.32(5) implies as much by relieving the parties of certain fees when a license transfer "occurs by operation of law because of a death, judicial proceedings, court appointment of a fiduciary, foreclosure or forced judicial sale, bankruptcy proceedings, or seizure of a license by a government agency." An unanswered question is whether such transfers by operation of law may occur under section 561.32(1)(a) or must occur under section 561.32(1)(b).

^{10/} As discussed in more detail below, the better practice for judgment lienholders is to file a judgment lien certificate with the Department of State to create a lien, as provided by sections 55.202(2)(a) and 55.203; to record the lien with Respondent to perfect the lien, as provided by section 561.65(4); and then to foreclose the lien through judicial process, within the meaning of section 561.32(1)(b).

^{11/} See sections 726.105, 726.106, 726.108, and 726.110.

^{12/} This is the law to which, during the hearing, the Administrative Law Judge mistakenly referred as current law. The Administrative Law Judge regrets the inconvenience.

^{13/} Some liens are perfected when they attach to property. See, e.g., § 679.3091.

^{14/} The court's holding is that a creditor's filing of a security interest in an alcoholic beverage license with the Secretary of State, but not Respondent, failed to perfect a lien in the license. The opinion notes that the lienholder had filed with the Secretary promissory notes, security agreements, and mortgages, suggesting that the lienholder had lent money to the license owner and taken the license as collateral. However, the license owner was in bankruptcy, and the trustee in bankruptcy had objected to the lienholder's claim, so the dispute likely involved the claims of competing lienholders and was not limited to a claim by the purchase-money lienholder against the debtor without third parties. Accord Dery v. Occhiuzzo & Occhiuzzo Enters., Inc., 771 So. 2d 1276 (Fla. 4th DCA 2000) (lienholder

that failed timely to record lien against license with Respondent subordinated to lienholder that timely filed subsequent lien with Respondent).

See also U.S. v. McGurn, 596 So. 2d 1038 (Fla. 1992), which posed the opposite filing or recording situation of that in Seville. In McGurn, lessors of real property used as a bar obtained a security interest in an alcoholic beverage license owned by the lessees. The lessors recorded the lien with Respondent within 90 days of the execution of the security agreement, but not with the Secretary of State. The bar failed, and the lessors brought an action in circuit court to foreclose their lien in the license. The United States filed notices of liens for unpaid taxes and contended that the lessors had not perfected their lien in the license. The court held that the sole filing necessary to perfect a lien in an alcoholic beverage license is set forth in section 561.65(4).

^{15/} The question of whether a lien must be perfected implicitly recognizes at least the distinction between the attachment and perfection of a lien. In another case involving a third party, Mathias v. Walling Enters., 609 So. 2d 1323 (Fla. 5th DCA 1992), the trial court determined that an unperfected landlord's lien in an alcoholic beverage license had priority over a lien in the same license that had been perfected pursuant to section 561.65(4). The appellate court noted that the Uniform Commercial Code, as enacted in Florida, recognized the priority of certain unrecorded possessory liens over recorded security interests, but noted that the security interest had been perfected before the landlord's lien had arisen. The court concluded that the landlord's lien attached to the license and the lessor did not have to perfect its lien under section 561.65(4) or any other statute, but the perfected security interest was superior to the landlord's lien. The court certified two questions to the supreme court.

In Walling Enters. V. Mathias, 636 So. 2d 1294 (Fla. 1994), the supreme court declined to answer the certified question of whether a landlord's lien had to be perfected under section 561.65(4), but answered in the negative the question of whether a landlord's lien may attach to an alcoholic beverage license, reasoning that a license, as a general intangible, did not constitute the kind of property to which a landlord's lien may attach.

^{16/} Based on the principles of administrative law discussed above, the Administrative Law Judge and Respondent may not

determine the validity of the La Cidra/Intervenor conveyance under the fraudulent-transfer statutes, §§ 726.105, 726.106 and 726.109, essentially undertaking the task of forecasting the outcome of complicated judicial labors were Petitioner timely to commence a legal action to invalidate the La Cidra/Intervenor conveyance.

COPIES FURNISHED:

Samuel A. Rubert, Esquire
Loren Newman, Esquire
Samuel A. Rubert, P.A.
3225 Franklin Avenue, Suite C-101
Coconut Grove, Florida 33133
(eServed)

Magdalena Ozarowski, Esquire
Jason Douglas Borntreger, Esquire
Division of Alcoholic Beverages and Tobacco
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 40
Tallahassee, Florida 32399
(eServed)

Louis J. Terminello, Esquire
Joshua J. Remedios, Esquire
Greenspoon Marder, P.A.
600 Brickell Avenue, 36th Floor
Miami, Florida 33131
(eServed)

Thomas Philpot, Director
Division of Alcoholic Beverages and Tobacco
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399
(eServed)

Jason Maine, General Counsel
Department of Business and
Professional Regulation
Capital Commerce Center
2601 Blair Stone Road
Tallahassee, Florida 32309
(eServed)

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.