2013 IL App (1st) 122258-U

FOURTH DIVISION
November 14, 2013

No. 1-12-2258

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

RAHM EMANUEL, Mayor of the City of Chicago; GREGORY J. STEADMAN, Director of the Local Liquor Control commission of the City of Chicago; and ROSEMARY KRIMBEL, Commissioner of the Department of Business Affairs and Consumer Protection of the City of Chicago, Plaintiffs-Appellees, v. LAWREL LIQUORS, INC., Defendant-Appellant, and MICHAEL CALDERONE, president of Lawrel Liquors, Inc.; LICENSE APPEAL COMMISSION OF THE CITY OF CHICAGO; DENNIS M. FLEMING, its chairman; and DONALD O'CONNELL and STEPHEN SCHNORF, its others members, Defendants.	)	Appeal from the Circuit Court of Cook County. No. 11 CH 1236 Honorable Franklin Ulyses Valderrama, Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Howse Justice Fitzgerald Smith concurred in the judgment.

O R D E R

¶ 1 *Held*: Local Liquor Control Commission decision, fining defendant and suspending its licenses for violating municipal ordinances regarding public place of amusement licenses, was not clearly erroneous.

¶ 2 This case concerns a decision of the Local Liquor Control Commission (Liquor Commission) of the City of Chicago (City) imposing on defendant Lawrel Liquors, Inc., a $1,000 fine and 10 days' suspension of its liquor and other City licenses for violating City ordinances. Defendant appeals from an order of the circuit court reversing a decision by the City's License Appeal Commission (Appeal Commission) that reversed the Liquor Commission decision. On appeal, defendant contends that the Liquor Commission decision was against the manifest weight of the evidence and the Appeal Commission decision should be affirmed. For the reasons stated below, we affirm the judgment of the circuit court confirming the decision of the Liquor Commission.

¶ 3 In March 2009, the City's Local Liquor Control Commissioner (Commissioner) commenced proceedings to revoke defendant's liquor license and other City licenses. The Commissioner alleged that, on or about October 21, 2008, in violation of specified City ordinances (Chicago Municipal Code §§ 4-4-210 (adopted May 9, 2012), 4-156-230 (amend. July 2, 1997)), defendant "operated or permitted the operation of an arcade, without having a valid Public Place of Amusement license," and "failed to display a valid Public Place of Amusement license in a conspicuous place on the licensed premises."

¶ 4 A hearing was held before a City hearing officer.

¶ 5 City police officer David Drell testified that, at about 6:30 p.m. on the day in question, he and another officer went to the liquor store and tavern licensed by defendant. In the tavern portion, Drell saw three "automatic amusement devices." He explained that an automatic amusement device is a gambling device into which a customer deposits money and which

accumulates or loses points as the customer presses a button on the device. These devices have various names or themes, and the three in defendant's tavern were a Crazy Bugs, Western Venture, and Fruit Bonus. All three machines were activated and had stickers indicating that they paid a certain City tax. Drell also saw a pool table in the tavern, also bearing a City tax sticker. It had a slot to deposit money, which would cause a pool ball to be dispensed so that one could play pool. Drell testified that one could not "play the pool table without inserting money," based upon the payment slot on the pool table. Drell testified that he had seen machines that could be played or used for free, and other machines with a coin or money slot that "you have to deposit money into the slot to pay."[1] Drell did not see anyone deposit money in or otherwise use the pool table or other devices, nor did he attempt to do so himself. He saw no sign in the tavern indicating "free play." Drell saw no public place of amusement license on display on the premises, and he confirmed that the City had not issued defendant such a license.

¶ 6 Richard Gora testified that he worked for the vending-machine company that owned the devices in defendant's tavern and had kept such devices there for about 15 years in his experience. Gora would, for his employer, install, maintain, collect the revenue from, and place any tax stickers on the devices. He did not work for defendant or have any interest in defendant, and he was not on defendant's premises on October 21, 2008. At that time, defendant's tavern had a jukebox, a free-play game machine, three poker machines that charge for play, and a free-play pool table. While the pool table had a coin slot, it was "blocked" with stays or pins so that one cannot insert a coin "no matter what you do," and Gora had never emptied any money from the pool table. He denied that the pool table could be modified to accept payment without his knowledge because he had the keys to do so. He could not recall if the pool table had a tax

[1]Defendant tried to ask Drell whether a device with a coin or money slot could be modified to play or operate for free, but the hearing officer sustained the City's objections.

sticker as is required on a for-pay device, but he explained that the presence of a tax sticker "doesn't necessarily mean they are taking gain or profit." The free-play game machine and the pool table both had signs indicating free play. The free-play machine had been a for-pay machine while sited elsewhere, but never while on defendant's premises.

¶ 7 Lisa Schultz, bartender at defendant's tavern, testified that she was working on October 21, 2008, when the police inspected the tavern. She did not see the officers play any of the machines or inspect the pool table. The pool table did not take money, and she did not see anyone put money into the pool table. The pool table had a free-play sign "right by" the coin slot, and the sign was on display on the day in question.

¶ 8 Mike Calderone, defendant's owner, testified that his tavern had a pool table, a game machine, three poker machines, and a juke box as of October 21, 2008. The pool table and game machine were free play devices. Calderone took photographs of the pool table and game machine, showing a "free play" sign on the latter and a "free pool" sign next to the coin slot on the pool table, and testified that the photographs were an accurate depiction of the devices on October 21, 2008. All five game devices, both free-play and for-pay, had tax stickers. On cross-examination, Calderone testified that the coin slots on the pool table as depicted in his photograph are not visibly blocked but empty; on redirect examination, he added that the slots are blocked "inside the mechanism."

¶ 9 The hearing officer issued written findings that the City met its burden in proving both alleged ordinance violations. She noted that, under the relevant ordinance, "the critical question is whether this establishment had less than four automatic amusement devices requiring payment for operation. Based on the evidence presented, I do find it is more likely than not that the establishment offered at least four devices which are operated through payment of U.S. currency." The hearing officer summarized the hearing testimony and found that Drell's

testimony was credible while the testimony of Gora, Schultz, and Calderone was "less credible." The hearing officer noted that defendant had a disciplinary history of several voluntary fines: $500 on a 2001 charge of selling alcohol to a minor, $1,000 on a 2002 charge of selling alcohol to a minor, $2,000 on a 2004 charge of gambling, and $2,500 on a 2008 charge of failing to notify the police. She recommended a $5,000 fine as an appropriate penalty here. The Liquor Commission adopted her findings and, in March 2010, issued an order imposing a $5,000 fine.

¶ 10 Defendant timely appealed to the Appeal Commission. Following arguments, the Appeal Commission reversed the Liquor Commission decision in November 2010. After reciting the relevant ordinances and the hearing evidence, the Appeal Commission framed the issue before it:

> "There is no dispute the three poker machines took money. If the pool table took money, the Public Place of Amusement License is needed. If the pool table did not take money, no such license would have been needed."

The Appeal Commission found that, accepting the credibility determinations of the Liquor Commission, there was no substantial evidence in the record that the pool table was operated for gain or profit. In particular, there was "no credible evidence on whether this particular pool table required money to be played on October 21, 2008," as Drell's testimony regarding the pool table "was not specific to this machine" but "cased in generalities about billiard amusement devices." The Commissioner petitioned for rehearing, which the Appeal Commission denied in December 2010.

¶ 11 The City[2] timely filed an administrative review action. Following briefing and argument by the parties, the circuit court in December 2011 reversed the Appeal Commission decision and

[2]Specifically, the mayor, the Commissioner, and the Commissioner of the Department of Business Affairs and Consumer Protection. Two of those offices are now held by different persons, who have been substituted as parties.

affirmed the "findings and conclusions" of the Liquor Commission while remanding "for reconsideration of the sanction and the imposition of a revocation, suspension, and/or fine as authorized by the Municipal Code." After summarizing the procedural history, hearing testimony, and applicable law, the court found that the issue before it was a factual issue reviewed on the manifest weight of the evidence and found that "this Court cannot say that no trier of fact could have agreed with the" Liquor Commission. The court noted Drell's testimony that he did not see a free-play sign on the pool table and found that it could not reweigh Drell's credibility based on Schultz's testimony to the contrary.

¶ 12 Also in December 2011, the Liquor Commission issued an order upon remand, imposing a 10-day suspension of defendant's liquor license and other City licenses and a $1,000 fine. The order noted that the Commission "has reviewed the administrative record, considered any mitigating factors, and taken into account [defendant's] prior disciplinary history" as recited above.

¶ 13 In the circuit court, defendant timely filed a motion for reconsideration. In June 2012, following briefing and argument, the court denied reconsideration and sustained the Liquor Commission order upon remand as "not arbitrary or unreasonable." Defendant timely appealed.

¶ 14 On appeal, defendant contends that the Liquor Commission decision was against the manifest weight of the evidence and that the Appeal Commission decision should be affirmed.

¶ 15 The City's Municipal Code prohibits the operation of an arcade without a public place of amusement license (Chicago Municipal Code § 4-156-230 (amend. July 2, 1997)) and requires "every business for which a license is required" to conspicuously post the license on its premises. Chicago Municipal Code § 4-4-210(a) (adopted May 9, 2012). An arcade is a place of amusement having four or more automatic amusement devices (Chicago Municipal Code § 4-156-010 (amend. Feb. 11, 2009)), and an automatic amusement device is:

> "any machine, which, upon the insertion of a coin, slug, token, card or similar object, or upon any other payment method, may be operated by the public generally for use as a game, entertainment or amusement, whether or not registering a score, and includes but is not limited to such devices as jukeboxes, marble machines, pinball machines, movie and video booths or stands and all games, operations or transactions similar thereto under whatever name by which they may be indicated." Chicago Municipal Code § 4-156-150 (amend. July 25, 2001).

While jukeboxes are not included, a "pool or billiard table shall be included when calculating the number of automatic amusement devices for purposes of this subsection if players must pay to use the pool or billiard table." Chicago Municipal Code § 4-156-305(b) (amend. Nov. 19, 2008).

¶ 16 Pursuant to Section 7–5 of the Liquor Control Act (Act) (235 ILCS 5/7–5 (West 2010)), the Commissioner "may revoke or suspend any license issued by him if he determines that the licensee has violated any of the provisions of this Act or of any valid ordinance or resolution enacted by the particular city council," and also may impose a fine that:

> "shall not exceed $1,000 for a first violation within a 12-month period, $1,500 for a second violation within a 12-month period, and $2,500 for a third or subsequent violation within a 12-month period. Each day on which a violation continues shall constitute a separate violation. Not more than $15,000 in fines under this Section may be imposed against any licensee during the period of his license." 235 ILCS 5/7–5 (West 2010).

¶ 17 The Commissioner must first hold a public hearing – open to the public and with a record of all proceedings – with three days' written notice to the licensee, and the Commission may impose a revocation, suspension, or fine only in a written order stating the reasons therefor. 235 ILCS 5/7–5 (West 2010). In the City, the licensee may "within a period of 20 days after the receipt of such order of fine, suspension or revocation," appeal to the Appeal Commission, which "shall determine the appeal upon certified record of proceedings of the" Commissioner. 235 ILCS 5/7–5 (West 2010). The review by the Appeal Commission is limited to the issues of:

> "(a) whether the [C]ommissioner has proceeded in the manner provided by law;
>
> (b) whether the order is supported by the findings; [and]
>
> (c) whether the findings are supported by substantial evidence in the light of the whole record." 235 ILCS 5/7–9 (West 2010).

"No new or additional evidence in support of or in opposition to such order or action under appeal shall be received other than that contained in such record of the proceedings." 235 ILCS 5/7–9 (West 2010). Rehearing of the Appeal Commission decision may be sought within 20 days of the service of the decision upon the party seeking rehearing. 235 ILCS 5/7–10 (West 2010). Decisions of the Appeal Commission reviewing decisions of the Commissioner are subject to judicial review pursuant to the Administrative Review Law (Law) (735 ILCS 5/3–101 *et seq*. (West 2010)). 235 ILCS 5/7–11 (West 2010); *Vino Fino Liquors, Inc. v. License Appeal Comm'n*, 394 Ill. App. 3d 516, 523 (2009).

¶ 18 We review the decision of the Liquor Commission, not the circuit court. *Id.* The Liquor Commission is the trier of fact in cases under the Act, and under the Law its findings of fact are considered *prima facie* true and correct. 735 ILCS 5/3-110 (West 2010); *Daley v. El Flanboyan Corp*., 321 Ill. App. 3d 68, 71 (2001). We shall not reweigh the evidence or substitute our judgment for that of the Liquor Commission. *Id.* The Liquor Commission's decision on the legal

effect of a given set of facts – such as whether the Act or an ordinance was violated – presents a mixed question of law and fact reviewed for clear error. *Bailey v. Illinois Liquor Control Comm'n*, 405 Ill. App. 3d 550, 553-54 (2010). The decision of the Liquor Commission is clearly erroneous only if, after reviewing the entire record, we definitely and firmly believe that a mistake has occurred. *Id.*

¶ 19 Here, under the ordinances in question, the allegations of the Commissioner presented the Liquor Commission with the issue of whether defendant was operating on October 21, 2008, at least four automatic amusement devices, with the key point of the definition of such a device being that it is operated or played on payment or deposit of money. As the Appeal Commission correctly noted, it is undisputed that the three poker machines accepted payment for play and thus were automatic amusement devices.

¶ 20 Thus, the question of whether the pool table was free-play or for-pay is the heart of this case. Drell testified that it was a for-pay device because it had a payment slot, and he saw no "free play" sign on display. While defendant's witnesses testified squarely to the contrary – that the pool table was a free-play machine, bearing a sign to that effect and being modified so that it would not accept payment despite the slot – the Liquor Commission found Drell more credible than defendant's witnesses. On this record, we see no basis for setting aside that assessment. While Drell did not see anyone using the pool table, either for free or after paying, his conclusion that it was a for-pay device is corroborated. Firstly, while defendant's witnesses testified that the pool table had a free-play sign right next to its coin slots on the day in question, Drell testified to not seeing such a sign. Secondly, it is undisputed that the pool table had a tax stamp that is required on for-pay devices; while this is not conclusive, it tends to support a conclusion that the pool table was for-pay despite the denials of defendant's witnesses. After reviewing the evidence, we are not left with a firm or definite belief that the Liquor Commission made a

mistake in finding that defendant violated the ordinances in question. We conclude that the Liquor Commission decision as modified on remand – that defendant violated the ordinances and shall pay a $1,000 fine with its licenses suspended for 10 days – was not clearly erroneous.

¶ 21 Accordingly, we affirm the judgment of the circuit court.

¶ 22 Affirm.