Showntail the Legend, LLC v. Dep't of Bus. And Prof'l Regulation, No. 1D20-2147, 2020 WL 5509716 (Fla. 1st DCA Sept. 14, 2020)

First DCA Denies Motion to Stay Alcohol License Suspension Due to Non-Compliance With COVID Emergency Orders; Dissent Argues That the Agency Did Not Provide Enough Evidence to Support Suspension of License

In June 2020, the Department of Business and Professional Regulation ("DBPR") issued Emergency Order 2020-09 ("Order") requiring businesses that make fifty percent or more of gross revenue from alcohol sales to halt on-site sales. Show-N-Tail ("Plaintiff"), a gentlemen's club in Panama City Beach that derived significant revenue from alcohol sales, continued operating in July despite the Order requiring it to stay closed. In an attempt to circumvent the Order, the Plaintiff charged an entry-fee at the door of the club and served "free" alcoholic drinks inside.

Upon inspection, DBPR found the Plaintiff in violation of the Order and proceeded to suspend its alcoholic beverage license. DBPR noted that the Plaintiff was not only in violation of the Order, but also was not allowed to be open because the Plaintiff was classified as a "club" which was not allowed to be open under other related COVID emergency orders. In response to the suspension, the Plaintiff filed a motion to stay the order suspending its alcohol license. The Plaintiff argued that the suspension would cause "serious economic hardship" to the business and that the suspension had been issued without sufficient facts to support the suspension.

The First District Court of Appeal ("Court"), through a writs and motions panel, denied the motion to stay in an unpublished order. However, one member of the panel issued a dissent, released six weeks after the original denial of the motion to stay. The dissent argued that the suspension of the alcoholic beverage license implicated a property interest that is protected by the Florida Constitution. Specifically, the dissent noted that the license was critical for the Plaintiff's operation and that DBPR had suspended the licenses for businesses that sold alcohol as fifty percent of their revenue "based entirely on conjecture and suspicion about the public health effects of COVID-19," but did not suspend the licenses of restaurants who also sell alcohol.

The dissent stated that in order for the Court to deny the stay, DBPR was required to show through sufficient documentation that the stay would pose "a probable danger to the state." The dissent asserted that even in the middle of a public health emergency, agencies are not excused from their duty to provide specific facts that support the need to deny a stay. "Simply put, DBPR offered nothing from which [the Court] logically could infer that bars and other non-restaurant licensees selling alcohol on premises—that is, staying open for business at all—posed a probable danger, while restaurant licensees selling alcohol on premises did not." Thus, the dissent concluded that the stay should be granted.

The majority opinion briefly addressed the dissent, noting that they did not agree with the dissent's reasoning and that the arguments in the dissent had not been brought before the Court in the original motion to stay. Additionally, the majority cited to section 252.34(8), Florida Statutes, which states that a pandemic constitutes a natural emergency, and thus the Governor had the authority to issue emergency orders closing bars, clubs, and restaurants.