



STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
LIQUOR CONTROL COMMISSION

IN RE: CORY'S RESTAURANT, INC.
D/B/A JIMMY'S ROADHOUSE
8574 S MASON DR.
NEWAYGO, MI 49337
BROOKS TOWNSHIP

HEARING: DECEMBER 4, 2020
PLACE: ZOOM PLATFORM
COMPLAINT NO. CV-508758
BUSINESS ID NO. 128662

NEWAYGO COUNTY

CLASSC SDM SS (PM)
DANCE OD-SERV SPECIFIC
PURPOSE PERMIT (FOOD)

CHARGES – NOVEMBER 18, 2020

- (1) Cory's Restaurant, Inc. and/or James Cory, stockholder of the licensed establishment and/or employees of the licensee engaged in an illegal occupation or illegal act upon the licensed premises, contrary to Rule 436.1011(1), specifically: allowing indoor gatherings at a food service establishment, contrary to Section 2(a)(2) and 3(b)(1) of the Michigan Department of Health and Human Services Gatherings and Face Mask Order dated November 15, 2020.
- (2) Cory's Restaurant, Inc. and/or James Cory, and/or employees of the licensee engaged in an illegal occupation or illegal act upon the licensed premises, contrary to Rule 436.1011(1), specifically: allowing persons to participate in indoor gatherings at the licensed premises without requiring them to wear face masks, contrary to section 7(c) of the Michigan Department of Health and Human Services Gatherings and Face Mask Order dated November 15, 2020.

PROCEDURAL HISTORY

On December 4, 2020, a hearing was held virtually on the zoom platform in the above-entitled case before a duly authorized agent of the Commission, Administrative Law Judge Michael J. St. John.

Petitioner, Michigan Liquor Control Commission (Petitioner, Commission, or MLCC), was represented by Jason Geissler, Assistant Attorney General. The Respondent Licensee (Respondent or Licensee) was represented by Stephen Kallman, attorney at law.

EXHIBITS

The Petitioner Commission offered the following exhibits which were admitted without objection:

1. Violation Report
2. November 18, 2020 Video
3. November 20, 2020 Photograph

The Respondent Licensee offered the following exhibit which was admitted over the Petitioner Commission's foundation and relevance objections:

- A. *ABC, et. al. v Whitmer, et. al.* Decision

FINDINGS OF FACT

Based on the testimony presented and the exhibits admitted at the hearing, the following facts are found:

1. Licensee allowed indoor gatherings at their licensed food service establishment on November 18, 2020.
2. Licensee allowed customers and staff to participate in indoor gatherings at their licensed establishment without requiring them to wear face masks on November 18, 2020.
3. Licensee continues to allow indoor gatherings and allow customers and staff to not wear masks.

The following represents a summary of the testimony of the witness. Any opinion is that of the witness:

██████████, Regulation Agent (Investigator) for Petitioner Commission

4. Investigator ██████████ has been an Investigator for the Commission for the past 10 years.
5. On November 18, 2020, Investigator ██████████ investigated the Licensee because there was a complaint that the establishment was continuing to operate despite the Department of Health and Human Services Order shutting down indoor dining. Pursuant to that Order, restaurants could operate for takeout but not for indoor dining.
6. The Order was in effect on November 18, 2020 at 5:00 p.m. when Investigator ██████████ investigated the Licensee.
7. Investigator ██████████ observed the establishment and patrons entering the restaurant without masks. She observed that the individuals who were entering were not leaving in the 20 minutes that she observed the restaurant. The parking lot was also packed.
8. Investigator ██████████ entered the restaurant, sat at the bar, and ordered an alcoholic beverage which she was served, consumed, and paid for.
9. Investigator ██████████ took photographs of the establishment and observed patrons eating and drinking inside the establishment, on plates and with silverware.
10. Investigator ██████████ observed that the restaurant was not serving food to go.
11. More than 50% of the tables were occupied.

12. There were approximately eight staff members plus the owner present. Staff and the owner were not wearing masks inside the restaurant.
13. None of the patrons in the restaurant were wearing masks inside the restaurant.
14. Investigator [REDACTED] was at the establishment from approximately 4:00 p.m. to 5:00 p.m. and again at 6:00 p.m.
15. When Investigator [REDACTED] returned, the establishment was even busier, and more tables were occupied by patrons. Patrons and staff were again not wearing masks.
16. Investigator [REDACTED] spoke with the establishment's owner, Mr. Cory. Mr. Cory indicated that he was aware that he was supposed to be closed to indoor dining but stated that he was standing up for his freedoms. Mr. Cory never indicated that he was going to shut down his business. He stated that he was going to continue to operate the establishment for indoor dining.
17. Investigator [REDACTED] asked Mr. Cory whether a planned event, "Stand Up Michigan" was going to be held inside or outside and whether staff were going to wear masks. Mr. Cory said that the event would be held outside, and staff would wear masks "if medically able to do so."
18. Investigator [REDACTED] delivered the summary suspension to the Licensee on Wednesday November 25, 2020. She removed the liquor license from the wall and placed an orange placard on the door indicating that the license had been suspended. Investigator [REDACTED] told a staff member of the Licensee not to remove the sign which the staff member acknowledged was understood.
19. On November 25, 2020, there was a waitress and two cooks in the establishment; they were not wearing masks.
20. Investigator [REDACTED] spoke with Mr. Cory and told him that she was serving the suspension order to the establishment.
21. In subsequent conversations, Mr. Cory told Investigator [REDACTED] that he was going to stay open offering in person dining but that he was not going to serve alcohol.
22. Investigator [REDACTED] went to the establishment on December 3, 2020. There were patrons in the restaurant and the establishment was continuing to serve food indoors. None of the patrons were wearing masks. None of the staff were wearing masks.
23. The video that Investigator [REDACTED] took on November 18, 2020 (Exhibit 2) shows staff members without masks and patrons eating and drinking also without masks.
24. The photograph that Investigator [REDACTED] took on November 20, 2020 (Exhibit 3) shows staff members without masks, patrons eating and drinking without masks, and a lack of social distancing.
25. The Director's Order was issued under the Michigan Public Health Code rather than the Liquor Control Commission Code.
26. During her investigation, the only violations observed were the violations of the Public Health Order; no violations of the Liquor Control Code were observed.

27. Mr. Cory did not tell her that he or any staff member had any medical conditions that would prevent them from wearing masks.

CONCLUSIONS OF LAW

The basic facts of this case are not in dispute. The Licensee allowed indoor dining on November 18, 2020 after the November 15, 2020 Public Health Order prohibited in person indoor dining. Neither the customers nor the staff wore masks. The credible and un rebutted testimony of the Investigator was supported by a video (Exhibit 2) and a photograph (Exhibit 3) which both show customers eating and drinking indoors and staff attending to customers; none are wearing masks.

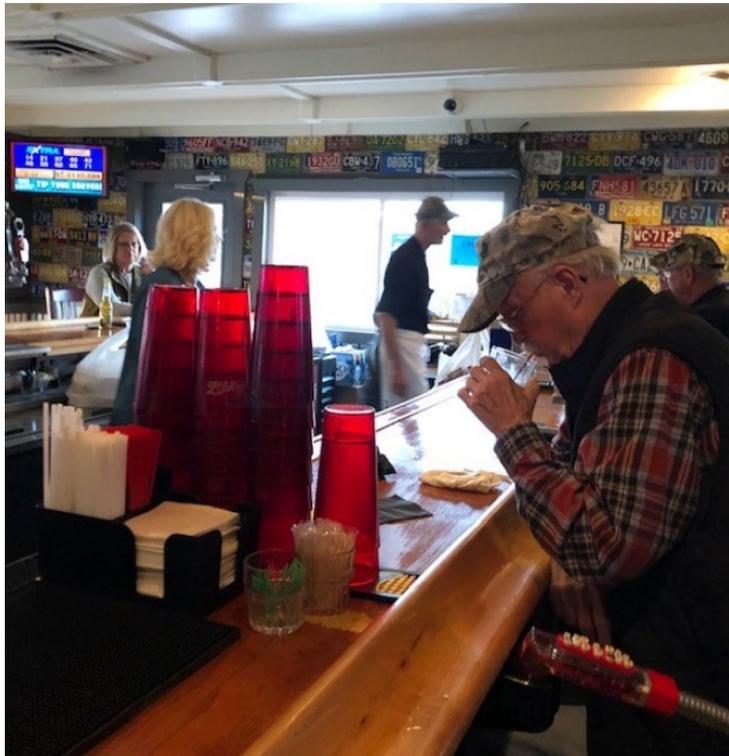


Exhibit 3

Allowing in person dining is contrary to the November 15, 2020 Public Health Order and therefore contrary to MCL 333.2226(d) and therefore contrary to MLCC Rule 436.1101(1). The primary question raised at the hearing is whether the Commission has the authority to sanction a licensee for violating a non-liquor-related order or statute. They do.

ABC v Whitmer is distinguishable from this case.

The Licensee argued that the Commission lacks the authority to sanction the Licensee for a violation of a non-liquor-related order or statute and cited *ABC v Whitmer* (Exhibit A) as the primary authority for that position. In *ABC*, the Court of Claims ruled that it was not permitted to

add penalties found in another statute into an executive order. That is not what occurred here. Unlike Executive Order 2020-97 which references a MIOSHA statute, the November 15, 2020 Public Health Order does not reference the Michigan Liquor Control Code. Had the Public Health Order made a violation of that order a *per se* violation of the Liquor Control Code, that would have been impermissible. The November 15, 2020 Order did not do so.

ABC explicitly contemplates overlap between violating an executive order and another statute noting that "any violation under MIOSHA will be subject to the penalties available under that separate statutory scheme." (Page 7). Here the Commission alleges that there was a violation of the LCC Rules by the Licensee when the Licensee committed an illegal act by violating the November 15, 2020 Order. The Commission is correct in that assertion.

The Licensee is in violation of the November 15, 2020 Public Health Emergency Order and MCL 333.2253(1).

If the director determines that control of an epidemic is necessary to protect the public health, the director by emergency order may prohibit the gathering of people for any purpose and may establish procedures to be followed during the epidemic to insure continuation of essential public health services and enforcement of health laws. Emergency procedures shall not be limited to this code.
MCL 333.2253(1)

On November 15, 2020, the Michigan Department of Health and Human Services Director determined that control of the COVID-19 epidemic was necessary to protect the public health and issued an emergency order prohibiting the gathering of people and establishing procedures to be followed. That Order specifically prohibited indoor gatherings at food establishments with certain exceptions that are not applicable here (Order 3(b)(1)) and required face masks (Order 7(a)). By allowing indoor dining and not requiring either patrons or staff to wear masks, the Licensee is in violation of the November 15, 2020 Order.

The MLCC Rules prohibit any illegal acts on the licensed premises.

The clerk, servant, agent, or employee of a licensee shall not engage in an illegal occupation or illegal act on the licensed premises. ...
Rule 436.1101(1)

The Licensee engaged in illegal acts on the licensed premises by remaining open for in person dining despite the Public Health Emergency Order not to do so. By committing this illegal act, the Licensee is in violation of Rule 436.1101(1) and subject to discipline.

The Licensee's actions constitute an imminent threat to the public's health, safety, and welfare. The Commission's summary suspension under the Administrative Procedures Act was appropriate. There need not be proof of an actual injury to support a threat to public health, safety, or welfare. The Licensee is not free to do as they please until a case of COVID-19 transmission is confirmed to the Licensee's establishment. To adopt this line of reasoning would

allow a licensed establishment flout any rule until there is a negative consequence including to serve alcohol to intoxicated persons until a patron goes out and harms a member of the public; licensees are always prohibited from overserving customers from day one of their licensure, not from some arbitrary point after a customer kills another person while driving drunk.

Circumstances for restaurants are dire but this does not allow the Licensee to pick and choose which orders, rules, and statutes to follow.

There is no dispute that the COVID-19 pandemic has hit some industries and groups harder than others. Restaurant owners and employees have been hit especially hard. Many restaurants have been forced to close; some of these restaurants will not reopen. Restaurant employees have lost wages and jobs.

The Licensee argues (but offered no evidence in support of their contention) that they cannot survive without continuing to offer in person dining. Economic necessity does not allow the Licensee to pick and choose which laws to comply with. Almost all restaurants in the state have complied with the Order despite the hardship that has resulted; only a very select few restaurants have deemed themselves above the law.

Further, this Licensee made no attempt to implement even the most basic and essential safety measure to combat this deadly disease: requiring wearing masks. It is necessarily difficult to have customers wear masks while eating and drinking, but it is entirely possible, reasonable, and essential to have staff wear masks while serving their customers. The Licensee did not require staff to wear masks, completely undermining restaurants' best argument that they should be allowed to remain open: that they can and will operate safely.

ORDER

With the issuance of this Order, the summary suspension is dissolved.

In determining penalty, the Administrative Law Judge considered the Licensee's total record, which shows two previous violations (NSF check and sale to a minor) since being licensed on June 8, 1999, at the above-named location under the current ownership.

The Administrative Law Judge also considers the Licensee's disregard for the health and safety of their staff and patrons by not requiring staff to wear masks while working. Finally, the Licensee has, to date, not complied with the Public Health Emergency Order and continues to dangerously operate indoor dining.

Because of the extremely serious nature of the violations, the failure to operate safely, and the continued and ongoing failure to comply with the Public Health Emergency Order, as a penalty, the Administrative Law Judge Orders the following fines and suspensions:

Count 1: a fine of \$300 and a suspension of the license for sixty (60) continuous days from the date of the entry of this Order; and,

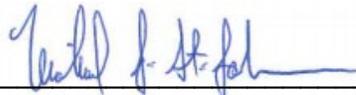
Count 2: a \$300 fine and a suspension of the license for sixty (60) continuous days from the date of the entry of this Order.

The two fines are consecutive: the total fine is \$600. The two sixty (60) day suspensions shall be served concurrently, not consecutively, for a total suspension of the license for sixty (60) continuous days from the date of the entry of this Order

Further, if the fine is not paid within forty-five (45) days from the mailing date of this Order, the Administrative Law Judge Orders that an additional suspension of thirty (30) continuous days, with this suspension to run consecutively and not concurrently with the 60 day suspension or any other suspension Ordered by the Commission.

The Licensee is warned that further fines, suspensions, or a revocation of the Licensee's liquor license could result if the Licensee continues to operate in violation of the law or violates the Order of the Commission.

MICHIGAN LIQUOR CONTROL COMMISSION



Michael J. St. John, Administrative Law Judge

Date Signed: December 7, 2020

Date Mailed: _____

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