



STATE OF MICHIGAN

DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
LIQUOR CONTROL COMMISSION

IN RE: J & S HOSPITALITY INC.
D/B/A PLYMOUTH ROC RESTAURANT
1020 W ANN ARBOR TRL
PLYMOUTH, MI 48170

HEARING: DECEMBER 30, 2020
PLACE: ZOOM PLATFORM
COMPLAINT NO. CV-508837
BUSINESS ID NO. 219719

WAYNE COUNTY

CLASSC SS (AM & PM)
DANC-ENT OD-SERV-1

CHARGE –

- (1) On December 15 and December 17, 2020, J & S Hospitality Inc., 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 sections 2(a)(2) and 3(b)(1) of the Michigan Department of Health and Human Services Gatherings and Face Mask Order dated December 7, 2020.

PROCEDURAL HISTORY

On December 30, 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 Mark Sands, Assistant Attorney General. The Respondent Licensee (Respondent or Licensee) was represented by Robert Mullen, attorney at law.

EXHIBITS

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

1. MLCC Violation Report
2. Photograph of the Licensed Establishment
3. Photograph of the Licensed Establishment

4. Photograph of the Licensed Establishment
5. Photograph of the Licensed Establishment
6. Photograph of the Licensed Establishment
7. Photograph of the Licensed Establishment

The Respondent offered the following exhibit which was admitted over the noted objections:

- A. COVID-19 Compliance Investigation Report¹

FINDINGS OF FACT

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

1. Licensee allowed gatherings at their licensed food service establishment's outdoor patio from December 3, 2020 and continuing through the date of the hearing.
2. On December 3, 2020, Officer Hiemstra of the City of Plymouth Police Department warned the Licensee that they were operating in violation of the November 20, 2020 Emergency Order. Subsequently, Inspector Venn gave instructions to the Licensee about how to fix the violations (by removing either the roofing or two of the walls).
3. On December 7, 2020, the November 15, 2020 Order was revised and included that:
"Indoors" means within a space that is fully or partially enclosed on the top, and fully or partially enclosed on two or more contiguous sides. Additionally, in a space that is fully or partially enclosed on the top, and fully or partially enclosed on two non-contiguous sides, any part of that space that is more than 8 feet from an open side is indoors.
4. On December 11, 2020, seven days after the Licensee agreed to make the necessary changes, Sara Westerman came to the licensed establishment for a spot visit/inspection for COVID-19 protocols and indicated that there were no issues.
5. A few days after the December 11, 2020 inspection, the Licensee received Ms. Westerman's report indicating that the Licensee's premises was in compliance.
6. The Licensee never made the corrections to the outdoor dining area of their establishment and it remained not in compliance with the December 7, 2020 Emergency Order.

¹ Exhibit A was admitted over the Petitioner's foundation and hearsay objections.

7. Licensee allowed customers and staff to participate in indoor gatherings at their licensed establishment without requiring them to wear face masks on December 15 and 17, 2020.
8. The Licensee acknowledges that the establishment is not in compliance with the December 7, 2020 Emergency Order and has indicated that they will make the necessary changes to come into compliance with that Order.

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

Jonathan Hiemstra, Officer for City of Plymouth Police Department

9. Officer Hiemstra has been a police officer for 8.5 years, the last 7.5 years with Plymouth.
10. Officer Hiemstra conducted an inspection of the licensed premises on December 3, 2020. There were five or six people in the area eating or drinking. The patio was fully enclosed which is not in compliance with the Emergency Order.
11. Officer Hiemstra spoke with the Licensee's executive chef and told him what the violations were and what corrections needed to be made. The Licensee indicated that the appropriate changes would be made in a few days.
12. This was a routine monthly liquor inspection. Only the indoor/outdoor dining violation was observed; no other liquor control violations were observed.

Thomas Venn, Inspector for the Wayne County Health Department

13. Inspector Venn has been a health inspector for 25 years.
14. On December 4, 2020, Inspector Venn spoke with the Licensee about how to correct the enclosure to keep it open.
15. Inspector Venn went to the establishment on December 7, 2020. The outdoor enclosure did not meet the Emergency Order requirements because it was totally enclosed. Inspector Venn told the Licensee verbally that to comply with the Order that they would need to remove the plastic from one wall and the temporary roof.
16. The Licensee said that it might take him a few days to make the corrections.
17. Inspector Venn returned to the licensed establishment on December 17, 2020 and the necessary changes had not been made.
18. If the Licensee removes the plastic from the roof and one wall it will meet the requirements of the Emergency Order as extended.

19. Some of the Licensee's outdoor seating (the west side) does comply with the Emergency Order.

20. The Licensee did not call Inspector Venn after December 11, 2020 (when the COVID-19 Compliance Investigator Report was issued and received) from the Licensee.

David Cowell, Officer for City of Plymouth Police Department

21. Officer Cowell has been a police officer for the City of Plymouth for five years.

22. On December 15, 2020, Officer Cowell responded to a noise complaint and observed an outside dining patio that was surrounded on four sides and a roof with plastic. There were patrons drinking in the area.

23. The outside patio area did not comply with the December 7, 2020 Emergency Order. The patio needs to be open on three sides.

John Buzuvis, Director of Community Development, City of Plymouth

24. Director Buzuvis has been the Director for the last almost eight years.

25. Director Buzuvis received a complaint about the licensed establishment having a fully enclosed patio.

26. The Licensee was instructed on how to bring the patio into compliance with the Emergency Order.

27. Director Buzuvis observed the outdoor patio on December 15, and 17, 2020 and observed patrons in the enclosed area eating and drinking on each date.

28. Director Buzuvis returned to the licensed establishment on December 17, 2020 and took some photographs (Exhibits 2 through 7).

29. Director Buzuvis does not believe that the Licensee's outdoor dining area complied with the Emergency Order because it had a roof and four walls.

30. Director Buzuvis does not believe that the west side of the area is compliant because, although it doesn't have a roof, it is enclosed on all four sides with walls.

Allen Cox, Director of Public Safety and Chief of Plymouth Police Department

31. Chief Cox has been a police officer for almost 23 years and has been Chief of Police in Plymouth for just over 10 years.

32. Chief Cox asked Director Buzuvis to take photographs of the outdoor service area of the licensed establishment because there had been a video showing that the area was not compliant.

33. Chief Cox authored the Violation Report (Exhibit 1).
34. Officer Hiemstra did not issue a citation for a violation of the public health code on December 3, 2020.
35. Chief Cox believes that the licensed establishment's enclosed outdoor dining area was and is not in compliance with the Emergency Order.

Eric Alderton, Executive Chef for the Licensee

36. Mr. Alderton has been Executive Chef for almost two years.
37. On December 11, 2020, Sara Westerman came to the licensed establishment for a spot visit/inspection for COVID-19 protocols.
38. After the inspection, Ms. Westerman asked some questions of Mr. Alderton but noted no violations. She emailed a copy of her investigation report (Exhibit A). There were no citations or recommendations for changes or improvement.
39. Employees wear masks while working.
40. The licensed establishment has one outdoor patio area. Part of the patio has a roof and part of it does not. The entire area is enclosed with either the walls of the restaurant or plastic walls.

CONCLUSIONS OF LAW

The facts of this matter are relatively straightforward. The Licensee was not in compliance with either the November 15, 2020 or December 7, 2020 Emergency Orders because the Licensee's outdoor area where they were serving food had a covered roof and four walls and was therefore indoors as defined by those Emergency Orders. The Licensee acknowledges that they were not in compliance but notes that the December 11, 2020 Inspection Report created confusion and therefore is a defense to the violation.

One of the most well established maxims in law is that ignorance of the law is no excuse. Although the November 15, 2020 Emergency Order did not define indoor dining, the FAQ section noted exactly what was required. The Licensee argues that because this definition was not in the Order itself, they cannot be held accountable for knowing the definition of indoor dining. This argument falls flat. To include everything in an Emergency Order that could possibly be questioned by interested parties would make the Order so unwieldy as to be confusing by virtue of its length. It is entirely reasonable to require and expect the Licensee to seek further information if there was confusion; that information was available on the State of Michigan website. Further, the subsequent December 7, 2020 Order sets forth the definition of indoors in

the Order. There is also an infographic on the website which further makes the requirements for indoor dining clear. There should have been no confusion about what was required of the Licensee.

Starting on December 3, 2020, the Plymouth Police Department and subsequently the Wayne County Health Inspector's office issued the Licensee a warning and expressly indicated what was required to comply with the Order: remove the roof or two specific walls. The Licensee received this information, noted that it would take some time (a few days) to comply, and indicated that they would comply. Several days later, they had still not complied.

On December 11, 2020, another inspector indicated that the Licensee had complied with the outdoor dining requirements by noting in her report, "Outdoor patio in use is fully compliant with definitions under EO." Why this subsequent inspector (incorrectly) believed this is unknown. It is understandable why the Licensee could be confused by this subsequent report. However, the Licensee had an affirmative obligation to resolve this confusion either by seeking legal counsel or by re-contacting the Plymouth Police Department or Wayne County Health Department. Had the Licensee done either of those things (or looked on the state's website), they would no longer have been confused and quickly realized that, as the Plymouth Police Department and Wayne County Health Department had previously warned them, they were not in compliance with the Emergency Order.

The Licensee argues that Rule 436.1011(1), allowing an illegal act, requires knowledge of the illegal act. It does not. Similarly, violation of the Michigan Public Health Code does not require knowledge or intent. MCL 333.2261 notes that "... a person who violates a rule or order of the department is guilty of a misdemeanor ..."; it does not require a knowing violation.

The Licensee also argues that they should be able to rely upon the December 11, 2020 Inspection Report as an affirmative defense to the violation. This is most akin to the affirmative defense of entrapment by estoppel. However, this defense requires each of the following:

1. Government announcing the criminal act was legal;
2. Defendant relying upon the government announcement;
3. Defendant's reliance was reasonable; and
4. Given the defendant's reliance, prosecution would be unfair.

United States v Levin, 973 F.2d 463, at 468 (6th Circuit 1992).

Here, there were announcements both for and against the legality of the Licensee's outdoor enclosure. Further, the Licensee could not have relied upon the December 11, 2020 Inspection Report for the first roughly week that they failed to remove the walls despite promises to do so. It is not clear that Elements #1 and #2 are met. However, it is clear that Elements #3 and #4 are not met.

It was not reasonable for the Licensee to have relied upon the December 11, 2020 Inspection Report given the prior warning and explicit instructions from the Plymouth Police Department and Wayne County Health Department to remove the roof or two walls. The Licensee had an obligation to follow up and seek clarification in the face of conflicting information. Although they tried to do so, calling the Plymouth Police Chief and leaving a message, they did not return his call back.

If the Licensee had received no warning, the Licensee's reliance upon the December 11, 2020 Inspection Report may have been reasonable and prosecution certainly could have been unfair. However, given the warning that they received but did not act upon for several days and then their unreasonable reliance on a subsequent report that was more favorable to their business model, it cannot be said that prosecution of the Licensee is unfair.

However, given the December 11, 2020 Inspection Report, harsh penalties would be unfair. The Licensee has already served a summary suspension for their choice to ignore the initial warning and continue to serve in an indoor structure as defined by the Emergency Order. So long as the Licensee complies with the December 7, 2020 Emergency Order by removing the roof or two walls, a fine is an appropriate sanction.

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 four previous violations (a 2011 failure to provide proof of server training, a 2012 sale to intoxicated persons (2), a 2012 consumption of alcohol between 2:30 a.m. and 12 noon on a Sunday, and a 2016 sale to an intoxicated person) since being licensed on April 26, 2010, at the above-named location under the current ownership.

The Administrative Law Judge also considers the Licensee's strict enforcement of their requirement for staff to wear masks while working and customers to wear masks when possible and appropriate.

Because of the nature of the violation, the (mostly successful) attempt to operate safely, and the extended (but thankfully no longer continuing) failure to comply with the Public Health Emergency Order, as a penalty, the Administrative Law Judge Orders a \$100 fine but no further suspension.

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 ten (10) continuous days, with this suspension to run consecutively and not concurrently with any other suspension Ordered by the Commission.

The Licensee is held to their commitment that they will come into compliance with the December 7, 2020 Order and remove either the roof or the two appropriate walls of their establishment. The Licensee should not serve food or alcohol in their outdoor dining area until it complies with the December 7, 2020 Emergency Order. The Licensee is warned that further fines, suspensions, or a revocation of the Licensee's liquor license could result if the Licensee operates 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: January 4, 2021

Date Mailed: _____

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