2001

West Gallery Corporation, a Utah Corporation dba Gallery I Theatre, Don Walls and Linda Tolliver v. Salt Lake City Board of Commissioners : Brief of Appellant

Utah Supreme Court

Roger Cutler; City Attorney; Ray L. Montgomery; Assistant Salt Lake City Attorney; Attorneys for Appellant.
Bruce C. Lubeck; Attorneys for Respondents.

IN THE SUPREME COURT OF THE STATE OF UTAH

WEST GALLERY CORPORATION, a Utah corporation, d-b-a GALLERY I THEATRE, DON WALLS and LINDA TOLLIVER,

Plaintiffs-Respondents,

vs.

SALT LAKE CITY BOARD OF COMMISSIONERS,

Defendant-Appellant.

Case No. 13963

BRIEF OF APPELLANT SALT LAKE CITY BOARD OF COMMISSIONERS

Appeal from the judgment of the Third Judicial District Court for Salt Lake County, Utah, the Honorable Stewart M. Hanson Jr., Judge.

ROGER CUTLER,
City Attorney
RAY L. MONTGOMERY
Assistant Salt Lake City Attorney
Attorney for Appellant
Room 101, City & County Building
Salt Lake City, Utah 84111

BRUCE LUBECK
Attorney for Respondents Gallery et al.
12 Exchange Place
Salt Lake City, Utah 84111

TABLE OF CONTENTS

AUTHORITIES CITED

CASES

STATUTES

IN THE SUPREME COURT OF THE STATE OF UTAH

WEST GALLERY CORPORATION, a Utah corporation, d-b-a GALLERY I THEATRE, DON WALLS and LINDA TOLLIVER,

Plaintiffs-Respondents,

vs.

SALT LAKE CITY BOARD OF COMMISSIONERS,

Defendant-Appellant.

Case No. 13963

BRIEF OF APPELLANT SALT LAKE CITY BOARD OF COMMISSIONERS

NATURE OF THE CASE

The plaintiffs-respondents commenced this action by filing their Motion for and obtaining a Restraining Order, which prevented defendant-appellant from having a hearing it had called to determine whether plaintiffs-respondents' business and regulatory licenses should be revoked. The Restraining Order was granted giving rise to this appeal.

For convenience of reference, the plaintiffs-respondents will hereinafter be referred to as "Gallery", and the defendant-appellant will hereinafter be referred to as "City".

DISPOSITION OF CASE BY LOWER COURT

The lower court granted Gallery's injunction permanently restraining the Board of City Commissioners from holding a hearing to determine whether Gallery's City granted regulatory and business licenses should be revoked until subsequent to the result of a criminal proceeding before the City Court.

As stated in the Notice of Appeal, paragraph No. 1 of the Order of the lower court is no longer applicable because Sections 20-20-18.2 through 20-20-18.12 have been repealed as evidenced by the certified copy of the Repeal of Ordinance attached to City's Notice of Appeal. Nevertheless, the same arguments apply to all three findings of the court.

RELIEF SOUGHT ON APPEAL

City seeks to have the lower court's Judgment reversed, and a determination made that City has the right to proceed administratively with a license hearing without prior interference from the Court, and for City's costs.

STATEMENT OF FACTS

The undisputed facts as shown by the pleadings and the record in this case are as follows:

1. On the 20th day of November, 1974, City, after receiving complaints from citizens and law enforcement officers, served upon Gallery its Order to answer the allegations contained in the Petition attached thereto, and if found true, to show cause why the business licenses granted should not be revoked. (Record on appeal pp. 18, 19, 20)

2. On the 25th day of November, 1974, Gallery filed its Motion seeking a Preliminary Restraining Order and Order to Show Cause, which were granted, enjoining City from proceeding with its administrative hearing until hearing set by the court. (Record on appeal pp. 31, 32)

3. On the 25th day of November, 1974, at the hour of 9:00 a.m., the court heard arguments from both parties and made its findings reflected in its Order of December 17, 1974. (Record on appeal pp. 35, 36)

4. On the 14th day of January, 1975, City repealed sections 20-20-18.2 through 20-20-18.12, Revised Ordinances of Salt Lake City.

5. On January 16, 1975, City's Notice of Appeal was filed in this case.

ISSUES TO BE RESOLVED ON APPEAL

1. Did the lower court exceed its jurisdiction and/or abuse its discretion, prior to any hearing on the

matter by City, by taking premature jurisdiction and making a conclusive and final determination that the Board of City Commissioners could not make an executive or administrative determination of whether a film was obscene as grounds for revoking a license or licenses and that City had to wait for such a determination to be made by the court in a pending criminal proceeding, thus violating separation of governmental powers.

2. Was the lower court ultra vires its jurisdiction in concluding in its Order of December 17, 1974, before any City hearing, that the Board of City Commissioners could not proceed with its Hearing to determine whether a movie was obscene for possible license revocation purposes, when criminal charges had been filed against Gallery for the same acts and the basic question to be determined in the criminal action was whether the film in question was obscene.

3. Did the lower court exceed and/or abuse its discretion or act ultra vires its jurisdiction in enjoining the City from further proceedings until criminal actions pending aganist the Gallery in the City Court had been concluded.

ARGUMENT

POINT I

THE LOWER COURT ABUSED ITS DISCRETION BY PROHIBITING THE CITY FROM HOLDING AN ADMINISTRATIVE

HEARING CONCERNING POSSIBLE LICENSE REVOCATION.

City contends that the District Court did not have jurisdiction to entertain or enter its Order of December 17, 1974, and that its action in doing so was an abuse of the jurisdiction and discretion of the District Court. In entering its Order the lower court held that the City had no right, administratively, to set up and hold an Evidentiary Hearing and make a determination of whether it should or should not revoke licenses it has granted.

A municipal governing body in this State has the administrative and legislative power to license and regulate businesses, *Section* 10-8-39, *Utah Code Annotated* 1953, which fairly implies that it also has the inherent right to withdraw licenses it may issue. See ***Riggins v. District Court,*** 89 Utah 183, 51 P. 2d 645, *Monamotor Oil Co. v. Johnson* (DC) 3 F. Supp. 189, affd. 292 U. S. 86, 78 L. Ed. 1141, 54 S. Ct. 575; *State ex rel First Presby. Church v. Fuller*, 136 Fla. 788, 187 So. 148; *Hibbard S. B. & Co. v. Chicago,* 173 Ill. 91, 50 N. E. 256; *Medias v. Indianapolis,* 216 Ind. 155, 23 N. E. 2d 590, 125 A.L.R. 590; *Simmons v. State,* 12 Mo. 268; *Wallace v. Reno,* 27 Nev. 71, 73 P. 528; *Garford Trucking Inc. v. Hoffman*, 114 N.J.L. 522, 177 A. 882; *People ex rel. Lodes v. Department of Health,* 189 N. Y. 187, 82 N. E. 187; *Hutchins v. Durham,* 118 N. C. 457, 24 S. E. 723; *La Plante v. State Bd. of Pub-*

lic Roads, 47 R. I. 258, 131 A. 641; *Heslep v. State Highway Dept.,* 171 S. C. 186, 171 S. E. 913; *Sherman v. State Dental Examiners* (Tex. Civ. App.) 116 S. W. 2d 843; *State ex rel Nowotny v. Milwaukee,* 140 Wis. 28, 121 N. W. 658; *State ex rel Morris v. West Virginia Racing Comm.* 133 W. Va. 179, 55 S. E. 2d 263; *Wiggins v. Chicago,* 68 Ill. 372.

It has been held that to confer or attempt to confer upon a court of record the power to have hearings on license revocations was an unconstitutional invasion of the exclusive function of the legislative departments of government. See *State v. Huber,* 129 W. Va. 198, 40 S. E. 2d 11, 168 A.L.R. 808, Anno. at p. 826.

It is the general rule that an administrative action which is not final, or, as in this case, has not even progressed to the hearing stage, cannot be attacked in an injunction proceeding by reason of the fact that absent a final order or decision, power has not been fully and finally exercised, there can be no irreparable harm, the administrative intention is not known, and therefore, the controversy is not ripe for equitable intervention. *Thomas v. Ramberg,* 240 Minn. 1, 60 N. W. 2d 18; *Florentine v. Darien,* 142 Conn. 415, 115 A. 2d 328; *Eccles v. Peoples Bank,* 333 U. S. 426, 92 L. Ed. 784, 68 S. Ct. 691, reh den 33 U. S. 877, 92 L. Ed. 1153, 68 S. Ct. 900. Gallery should have exhausted its administrative procedures before resorting to the courts.

The mere fact that Gallery alleged City's acts were

unconstitutional (Record on Appeal p. 2) was not and should not have been grounds to prevent the doctrine of exhaustion of administrative remedies from operating. *Public Utilities Com. v. United States,* 355 U. S. 534, 2 L. Ed. 2d 470, 78 S. Ct. 446, reh den, 356 U. S. 925, 2 L. Ed. 2d 760, 78 S. Ct. 713; *Illinois Commerce Com. v. Thomson,* 318 U. S. 675, 87 L. Ed. 1075, 63 S. Ct. 834; *Highland Farms Dairy v. Agnew,* 300 U. S. 608, 81 L. Ed. 835, 57 S. Ct. 549; *First Nat. Bank v. Weld County,* 264 U. S. 450, 68 L. Ed. 784, 44 S. Ct. 385; *People v. Calvar Corp.,* 286 N. Y. 419, 36 N. E. 2d 644, 136 A.L.R. 1376; *State ex rel. Employment Secur. Com. v. Kermon,* 232 N. C. 342, 60 S. E. 2d 580. Neither could the doctrine be circumvented by the assertion that the charge was improper or groundless and would result in irreparable damage (Record on Appeal p. 3). See *Myers v. Bethlehem Shipbuilding Corp.,* 303 U. S. 41, 82 L. Ed. 638, 58 S. Ct. 459; *Smith v. Highway Board,* 117 Vt. 343, 91 A. 2d 805.

In a case in point, an employer charged with violation of the wage stabilization provisions of the Defense Production Act of 1960, sought to enjoin, as Gallery did in the lower court, the holding of a hearing on grounds that the Statute did not authorize the procedure contemplated, and that if it did, the Statute was unconstitutional. The Court held that it would be premature for it to rule on questions concerning the interpretation or constitutionality of a Statute until after the administrative procedures were completed. *Allen v.*

Grand Central Aircraft Co., 347 U. S. 535, 98 L. Ed. 933, 75 S. Ct. 745.

In another case the Court found that the very fact constitutional issues were put forward established a strong reason for not taking jurisdiction of the suit, in order for the Court to attempt to determine, prior to such an actual determination by the administrative body, what the administrative body's final act and decision would be, because the Court found, when the administrative body's procedure was finished it may be possible that nothing would be left for which the plaintiff could complain. *Aircraft and D Equipment Corporation v. Hirsch*, 331 U. S. 752, 91 L. Ed. 1796, 67 S. Ct. 1493.

In still another case, the Tennessee Supreme Court refused to grant a motion for injunction asserting unconstitutionality of a Statute prior to administrative hearing, even when the complaint contended it would be idle ceremony to follow the procedures outlined because the administrative officers would not admit the section of the act under attack was unconstitutional. *Tennessee Emmanual Manufacturing v. Hake*, 183 Tenn. 615, 194 S. W. 2d 468.

In another case in point, *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 82 L. Ed. 648, 58 S. Ct. 459, the U. S. Supreme Court declared that enjoining the National Labor Relations Board from holding a hearing on grounds that it had no jurisdiction would

substitute the District Court for the Board as the tribunal to hear and determine what Congress declared the Board should exclusively hear and determine in the first instance.

In *Lorance v. Colorado, State Board of Examiners of Architect* (1972), Colo., App., 505 P. 2d 47, in an action seeking a Writ of Prohibition to prevent the Board of Examiners of Architects from conducting a hearing or further proceeding on a Complaint filed against the architect, the Colorado Court of Appeals held that the fact that disciplinary proceedings pending before the Board was based on alleged violation of the Board's regulation, which was assertedly void on its face, did not give the courts authority to determine whether the Board had jurisdiction to proceed. The court asked whether the District Court had jurisdiction to prohibit a branch of the executive government from carrying out its functions, and it specifically held:

> "The Colorado Supreme Court has consistently held that the district court does not have jurisdiction to restrain an administrative agency from performing its statutory function." (See also *Colorado State Board of Medical Examiners v. District Court*, 138 Colo. 227, 331 P. 2d 502.)

The City had the right in the first instance to hear any matter concerning licenses issued by the Board of City Commissioners under authorization of State Law. The District Court violated the rule of separation of powers by improperly taking jurisdiction prior to hear-

ing and final determination by the City. The Utah Supreme Court has not ruled on this issue, however as the foregoing cases indicate, the United States Supreme Court and many of our sister states have so ruled.

POINT II

THE DISTRICT COURT HAS NO POWER TO REVIEW THE ACTION OF THE CITY BOARD OF COMMISSIONERS UNTIL AFTER THE ACTION HAS BEEN TAKEN.

The District Court has power to review the decision after a hearing and has no power to anticipate what the decision of the Board of Commissioners may be with regard to revocation of a license. Perhaps the case that best states the City's position with regard to this matter is the case of *Sabes v. Minneapolis* (1963), 120 N. W. 2d 871, which was a liquor license case but the findings apply in this case:

> "Basically it is the counsels duty to decide whether the licensee has been guilty of such unlawful conduct in the operation of its business and its continuance is detrimental to the public good. (citing cases) In reviewing the proceedings of the municipality, it is not the court's function to pass on the wisdom of the revocation but only to determine whether the counsel exercised an honest and reliable discretion or whether it acted capriciously, arbitrarily or impulsively. (citing cases) For us to assume greater responsibility would constitute an unconstitutional usurpation of non-judicial powers. (citing cases)."

It is the City's position that the District Court has by its Order usurped the non-judicial powers of the City. The court should not intervene in an administrative procedure of this type until the hearing has been held and final action taken.

There are numerous cases, which state the correct procedure. In these cases the court has reviewed decisions of administrative bodies after the administrative body has conducted its hearing. The court was then called upon to determine, as the law allows and requires, whether or not the administrative board had functioned properly.

One such case is *Ciampa v. City of Chicago* (1973), 12 Ill. App. 3d 368, 299 N. E. 2d 53. In this case the plaintiff, Ciampa, instituted a suit seeking Mandamus to compel reinstatement of its Food Purveyors License. The Food Purveyors License was revoked *without* hearing by the Mayor on his finding that the licensee had sold an obscene magazine at his business establishment. The plaintiff contended, as Gallery did in the court below, that this action was a prior restraint on freedom of speech. The lower court held that the license revocation was proper and specifically held:

> "Plaintiff's authorities stand for the general proposition that prior restraint on freedom of expression, such as mass seizure of books or impounding of films, are illegal unless a prior adversary hearing is provided. The defendants do not take exception to this general proposition.

> The action of the Mayor in the present case however, was not one of seizure or suppression of the publication, but rather one of revoking a license for cause. We are of the opinion that there is no requirement shown under the law which would necessitate the Mayor having a prior judicial determination before he can revoke a food purveyors license for a violation involving the sale of obscene material."

In the case at bar, the City was prevented from even having the hearing it believes the law required and which it intended to provide the plaintiff.

For a very recent case where an administrative body found that a broadcast over the radio was obscene, without a prior judicial determination, see *Illinois Citizens Committee for Broadcasting v. F.C.C.* (11-20-74) 43 L. W. 2237. Other cases which support the City's view of this case are the following:

1. In the case of the *City of Chicago v. Curtland,* 79 F. 2d 963, the Federal Court stated:

> "In the United States Court, it is an established rule that whether established facts, found by the administrative body, amounts to a violation, becomes a question of law for the Court. The legal question is whether there was sufficient evidence before the administrative officer could justify finding a violation. *Stated otherwise, the limited question submitted to the Court was whether the administrative officer acted arbitrarily and therefore illegally."* (Emphasis added)

2. *Weinstein v. Daley* (1967), 85 Ill. App. 2d 470, 229 N. E. 2d 357, in Chicago case where the defendant requested the Court review an Order of the Liquor Commission revoking his retail liquor license. The Court held:

> "The Courts consideration of appeal of the license revocation brought before it from the right and appeal commission is limited to matters of record and the Court may consider only whether the local commission acted arbitrarily or in clear abuse of its discretion and whether the Order entered by the Commission was contrary to the manifest weight of the evidence."

3. In *D. C. Rydd v. State Board of Health* (1969), 202 Kan. 721, 451 P. 2d 239, a Kansas case, the defendant appealed from an Order of the Board of Health denying the license to operate a Child Care Home, the Court stated:

> "The District Court may not, on appeal, substitute its judgment for that of the administrative tribunal but is restricted to considering, whether as a matter of law, the tribunal acted fraudulently, arbitrarily or capriciously, the administrative order was substantially supported by the evidence in this case, the tribunal's action was within the scope of its authority."

4. In *Dubato v. Board of Trustees of the Corporate Village of Bayville*, 166 N. Y. S. 2d 917. The Court held:

> "Upon a review of the decision of the Board

of Trustees, the Court would not substitute its judgment for facts and make a determination and decision de novo. This Court will not and cannot substitute its own judgment of the facts and make a determination and decision of its own de novo. It is limited to the question whether the action of the Board was an abuse of discretion and whether it was arbitrary, malicious and unreasonable. This Court concludes that there was sufficient evidence to sustain the Board's finding, determination and decision."

5. In *Nevada Tax Commission v. Hicks,* 73 Nev. 115 (1959), 310 P. 2d 852. The Court carefully delineated the area within which Courts may act on judicial review of Commission action.

> ". . . *it is not the province of the courts to decide what shall be reasonable cause for revocation of license; that such determination is an administrative one to be made by the Commission* in the exercise of its judgment based upon its specialized experience and knowledge. The only reviewable question is whether the cause for revocation is reasonable." (emphasis added)

6. The Utah Supreme Court also support the foregoing decisions in the following case which City believes to be controlling in the case at bar. In the case of *Skelton v. Lees* (1958), 8 Utah 2d 88, 329 P. 2d 389, a civil engineer instituted proceedings in the District Court to review and reverse the action of the Director of the Department of Registration refusing to register and license him as a civil engineer, the Third Judicial District Court entered judgment adverse to the Direc-

tor and others and they appealed to the Supreme Court. The Utah Supreme Court upheld the decision of the Department of Registration and in so doing stated:

> "It is our conclusion that the District Court should be limited to the review of the record made before the Department of Registration, and is thus bound by established rules, applicable to such reviews, and determination of an administrative agency should not be reversed merely because the District Court will interfere only if the Department of Registration acted capriciously, arbitrarily, or outside the scope of its authirity." (See also *Peterson v. Industrial Commission* [1942] 102 U. 175, 129 P. 2d 563; *Woodburn v. Industrial Commission* [1947], 111 U. 393, 181 P. 2d 209; *Union Pacific R. Co. v. Public Service Commission* [1956], 5 U. 2d 230, 300 P. 2d 600.)

POINT III

THE EFFECT OF THE LOWER COURT'S RULING IS TO IMPROPERLY CHANGE THE BURDEN OF PROOF FROM A CIVIL, PREPONDERENCE, TO THE CRIMINAL, BEYOND REASONABLE DOUBT, WITH THE ADDED BURDEN AND REQUIREMENT THAT THE COURT MUST MAKE THE DETERMINATION FIRST, NOT THE CITY.

In any administrative hearing the burden of proof is the preponderance of the evidence, and in making

such determinations, the administrative body cannot be arbitrary or capricious.

By the Court's Order, the Civil burden of Proof the City has for license revocation hearings was eliminated and in its place the Court improperly created a new animal in the law. The requirement that the burden of proof be criminal, beyond reasonable doubt, with the added requirement that the City cannot make this determination administratively, it must be made prior to any such administrative hearing by the criminal court. For this reason alone, the lower court should be reversed.

CONCLUSION

The Decision and Order of the District Court should be reversed as exceeding its jurisdiction, and that its action was a clear abuse of the equitable discretion of the District Court.

Respectfully submitted,

ROGER CUTLER
City Attorney

RAY L. MONTGOMERY
Assistant City Attorney

Attorney for Appellant
Room 101, City and County Bldg.
Salt Lake City, Utah 84111