

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 1:17-cv-23958-UU

BEACH BLITZ CO., a Florida corporation
d/b/a OCEAN 9 LIQUOR, and
d/b/a as OCEAN 11 MARKET,

Plaintiff,

v.

CITY OF MIAMI BEACH, FLORIDA, *et al.*,

Defendants.

ORDER AFFIRMING MAGISTRATE JUDGE'S REPORT

THIS CAUSE is before the Court upon Plaintiff's Emergency Motion for Preliminary Injunction (the "Emergency Motion"). D.E. 4. On December 1, 2017, the Honorable John O'Sullivan, United States Magistrate Judge, issued a Report and Recommendation (the "Report") (D.E. 43) recommending that Plaintiff's Emergency Motion be DENIED. Both parties filed objections to the Report (the "Objections"). D.E. 51 and 52.

THE COURT has reviewed the Emergency Motion, the Objections, the record herein, and is otherwise fully advised in the premises.

Upon *de novo* review, the Court agrees with Magistrate Judge O'Sullivan's Report and concurs in all of his findings. Plaintiff's objections (D.E. 51) to the Report are without merit, are identical to the arguments that were previously raised in the Emergency Motion, and are specifically and properly addressed in Magistrate O'Sullivan's analysis of the claims. Defendant, however, raises specific objections to a number of the Report's findings of fact. D.E. 52. The Court addresses each objection in turn.

First, Defendant objects to the Report's finding that Plaintiff's store, Ocean 9 Liquors ("Ocean 9"), was closed on October 6, 2007 for failing to timely obtain a Business Tax Receipt ("BTR"). D.E. 43 at *3. Defendants assert that the evidence shows that Ocean 9 was closed because it continued to operate without a BTR for more than a year. D.E. 52 at *2. According to Defendants, "[t]he distinction is important because, given the amount of time Beach Blitz was without a BTR license, under the City's procedures, Beach Blitz would be required to file a new application for a new BTR license". *Id.* at *2-3. However, the testimony Defendants cite in support of their argument only confirms the Report's finding of fact. When asked to describe the violation Ocean 9 received on October 6, 2017, Defendants' witness Hernan Cardeno testified as follows: "This is a notice of violation, issued on October 6, 2017, for failing to obtain a business tax receipt as required by ordinance." D.E. 51-1, p. 35, L. 22-25. Moreover, the October 6, 2017 "Notice of Violation" issued to Plaintiff states that the violation was issued for "Failing to obtain Business Tax Receipt. 2nd Offense". D.E. 39-14. Accordingly, Defendants' first objection is overruled.

Defendants' second objection is to the Report's description and consideration of the testimony of Dorian Doar, Plaintiff Beach Blitz Co.'s principal. According to Defendants, Mr. Doar's testimony was self-serving and contrary to the record. Therefore, Defendants "object[] to them being considered findings of fact." D.E. 52 at *3. A review of the hearing transcript shows that Mr. Doar's testimony was not controverted by the record. Mr. Doar testified regarding his experience dealing with an employee of the City of Miami Beach's Finance Department. Defendants did not call that employee to testify at the hearing to controvert Mr. Doar's testimony nor did they present sufficient evidence to show that Mr. Doar's account of his interaction with such employee was inaccurate. Defendants' argument that Mr. Doar's account is false is solely

based on what they would expect an employee of the Finance Department to say, not what such employee actually did say to Mr. Doar. As such, Defendants' claim that Mr. Doar's testimony is "contrary to the undisputed record" is a gross overstatement and unsupported by the record. Defendants' second objection is, therefore, overruled.

Defendants also object to the Report's finding that the earlier violation issued to Ocean 9 was for failing to timely renew a BTR. D.E. 43 at *5-6. Defendants point out that the violation was for "operating a business without the requisite BTR license, not for 'failing to timely renew.'" D.E. 52 at *4. A review of the actual citation shows that the violation was for "Failure to obtain a Business Tax Receipt." D.E. 39-12. Accordingly, the Court sustains Defendants' third objection in that the violation was for failure to obtain a BTR, rather than for failure to "renew" the BTR.

Defendants' fourth "objection" does not amount to an objection. Defendants again take issue with Mr. Doar's testimony, this time arguing that if Mr. Doar had given the Finance Department employee "correct" information, the employee would have responded to his BTR inquiry differently. Accordingly, there is no objection, just speculation. As such, Defendants' fourth objection is overruled.

Defendants' last objection to the Report's finding of fact is a simple clarification. The Report states that "[h]ad the plaintiff made an online payment for a BTR, the BTR for [Beach Blitz] would have been issued once the plaintiff paid its outstanding violations, even if those violations were not paid until October 2017." D.E. 43 at *10. Defendants would like the record to reflect that had Plaintiff "paid for its 2016 fiscal year BTR at any point before September 30, 2017, Plaintiff's account would have remained open and the BTR would have been issued once Plaintiff paid its outstanding violations, even if those violations were paid October 1, 2017 or

thereafter”, in accordance with Manuel Marquez’s testimony. D.E. 51-1 at *129, 99-100, 103-04. The Court sustains this objection for the purposes of clarity.

Finally, Defendants object to the Magistrate’s conclusions that: (i) the harm that plaintiff would suffer if an injunction is not issued outweighs any harm Defendants may suffer; and (ii) that denying the injunction would neither serve nor disserve the public interest. Defendants’ objections to these two conclusions are based on the same arguments that were previously raised in their Response to the Emergency Motion (D.E. 22), and are specifically and properly addressed in the Report. Consequently, Defendants’ objections to the Magistrate’s conclusions of law are overruled. Accordingly, it is hereby

ORDERED AND ADJUDGED that the Report of the Magistrate Judge, D.E. 43, is RATIFIED, ADOPTED, and AFFIRMED. It is further

ORDERED AND ADJUDGED that Plaintiff’s Objections, D.E. 51, are OVERRULED. It is further

ORDERED AND ADJUGDED that Defendant’s Objections, D.E. 52, are GRANTED IN PART and OVERRULED IN PART as follows:

- I. Defendants’ Third and Fifth objections to the Report’s findings of fact are SUSTAINED;
- II. Defendants’ First, Second, and Fourth objections to the Report’s findings of fact are OVERRULED; and
- III. Defendants’ objections to the Report’s conclusions of law are OVERRULED.

It is further

ORDERED AND ADJUGDED that Plaintiff’s Emergency Motion, D.E. 4, is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 22d day December, 2017.



URSULA UNGARO
UNITED STATES DISTRICT JUDGE

cc:
counsel of record via cm/ecf