
Rosenkranz v. Div. of Alcoholic Beverage Control
Cite as 9 *N.J.A.R.* 297

**SIDNEY ROSENKRANZ and
RICHARD FERNANDEZ,**
Appellants,
v.
**JOHN F. VASSALLO, JR.,
DIRECTOR OF THE STATE DIVISION
OF ALCOHOLIC BEVERAGE CONTROL,**
Defendant.

Decided: February 21, 1984

Approved for Publication by the Director of the Division of Alcoholic
Beverage Control, John F. Vassallo, Jr.: October 20, 1986

SYNOPSIS

Pursuant to an order of the New Jersey Superior Court, Appellate Division [*Rosenkranz v. Vassallo*, 193 *N.J. Super.* 319 (App. Div. 1984)], the Director of the Division of Alcoholic Beverage Control held a hearing to determine if the appellant's gaming video machines were the type of equipment banned from licensed premises pursuant to *N.J.A.C.* 13:2-23.7(a)4 as articulated in a Division policy interpretation contained in *A.B.C. Bulletin No.* 2430, Item No. 3 (March 31, 1983). That policy states that video machines simulating gaming operations (blackjack, poker, slot machines, etc.) which can be easily utilized or adapted to actual gambling, cannot be placed upon liquor licensed premises.

The Director concluded that the first of the machines presented to him was no different from any other video game which was designed for gambling, and thus the machines would violate the regulation. Functions of that machine included the ability to insert an unlimited number of coins to build up "credits," recognizing winning play by showing accumulated "credits" which stayed displayed; and the ability to quickly erase (*i.e.*, pay off) the credits by utilizing a rapid credit-elimination device (either a double or nothing feature or "knock-off" switch on the rear of the machine.) While the second machine bore many similarities to another manufacturer's machine which had been exempted from the ban, the Director continued his ban on the second machine until such time as the device's electronic program could be readily identified. Without such an identification, the Director determined that a danger existed that the program might be modified or changed to facilitate actual gambling.

In addition, the Director observed that, to date, only two exceptions to the ban of *N.J.A.C.* 13:2-23.7(a)4 had been issued. Those exceptions had been issued directly to the manufacturer, and had two conditions. First, copies of the exception were to be maintained on the retailer's licensed premises and second, the Division was to be notified within 48 hours of a machine's placement at each particular retailer's licensed premises.

Richard L. Gruber, Esq., for appellants (Mayer and Mayer, attorneys)

By the Director, John F. Vassallo:

On February 15, 1984 a "hearing" was held by the Director of the Division of Alcoholic Beverage Control pursuant to an Order of the Appellate Division of the Superior Court of New Jersey embodied in its opinion of January 25, 1984 in the above captioned matter bearing Appellate Division Docket No. A-392582 T1. In that opinion, the Appellate Division affirmed my ban of video poker, dice, blackjack, hi-lo and similar gaming type video machines on licensed premises as being violative of *N.J.A.C.* 13:223.7(a)4. The court, however, because of claim made by the plaintiffs that their machines were different in design and manufacture from the type of machines on which the said ban was based, and since they claim they were not afforded the opportunity to present evidence to that effect to me, deemed that the interest of justice and administrative due process would best be served by affording the appellants an opportunity to present proofs to me in an effort to show that their machines do not fall within the said proscription which I had promulgated in *A.B.C. Bulletin No. 2430*, Item No. 3, (March 31, 1983). The Appellate Division remanded the matter to me to determine the appropriate type of hearing to be conducted and, pending those further proceedings, the Appellate Division continued the stay of the implementation and enforcement of the order contained in *A.B.C. Bulletin No. 2430*, Item No. 3 (March 31, 1983), as previously imposed by the court.

Promptly upon receipt of the opinion of the Appellate Division, I was in contact with Richard L. Gruber, attorney for the appellants, and I advised that the type of "hearing" appropriate to this matter would be for the appellants to exhibit their video card game machines and any pertinent literature and specifications to the undersigned. Since the appellants' devices were allegedly placed in liquor licensed premises in various locations, and recognizing that it might be impractical for them to bring their machines to the offices of the Division

of Alcoholic Beverage Control, I offered to review the machines in the locations where they were placed. Mr. Gruber, however, advised that his clients did not want me to do this, but would bring the machines to the offices of the Division. I pointed out to him that it would be necessary for each kind of machine to be reviewed, and he assured me that that would take place. Because of commitments that Mr. Gruber had, the "hearing" was not able to be scheduled until February 15, 1984, which was a date selected to fit in with the schedule of Mr. Gruber.

Shortly before February 15, 1984, Mr. Gruber advised that his clients wished to postpone the "hearing," but because of the stay still being in effect prior to the review of the machines, I determined that in the interest of justice, and without compelling reason having been presented, the "hearing" could not be postponed.

Accordingly, the "hearing" was held at the offices of the Division of Alcoholic Beverage Control in Trenton on February 15, 1984. At that time neither of the appellants, Sidney Rosenkranz nor Richard Fernandez, appeared; but only Richard L. Gruber, Esq., appeared with Henry J. Fernandez, the brother of Richard Fernandez, who represented that he has nothing to do with the machines and only appeared because he has a station wagon which his brother asked him to utilize to transport the machines to the offices of the Division.

Mr. Gruber and Mr. Henry J. Fernandez brought two upright cabinet video card game devices to the offices of the Division. Both of the machines were in almost identical cabinets and the face plates on each read "Hi-Lo Double-Up Joker Poker". The electronic boards in the two machines, which are the "brains" of the machines, however, were different.

It should be noted that neither of the machines came with any literature, specifications, nor contained any identification whatsoever as to the manufacturer of the circuitry or program which was in the cabinets. There was also nothing whatsoever to give any clue as to the original manufacturer of the games, and appellants could not provide any such information.

The first of the two video game devices brought for examination by the appellants is undoubtedly a gambling device within the proscription of the ban as contained in *A.B.C. Bulletin No. 2430*, Item No. 3 (March 31, 1983), as aforesaid. An unlimited number of quarters can be inserted into the machine, with each quarter registering one credit that can be played either singly or in any multiple. If a "bet" of four or more credits is made, there are then two wild card

jokers in the pack. It is also noteworthy that the only pair of cards that provides a "win" is a pair of aces. Other pairs do not provide a "win," unless there are two pairs.

Since there was no literature, it was not possible to ascertain with any certainty that there was any certain Win frequency, and we were not able to ascertain the program adjustments that may or may not be available in the program. It was noted, however, that the wins were not too frequent, but they were frequent enough so that a moderate amount of credits would be built up. Of course, there was a double or nothing feature on the games so that even when credits were built up by a winning hand, they could be quickly lost with the double or nothing feature. The noteworthy problem with the game, however, in addition to the acceptance of an unlimited number of coins, is that the machine contained a "knock-down" button on the rear of the machine. Depressing this button would erase the number of credits shown on the machine and bring it back to zero. Although the number of credits erased was not metered, it would still be possible for a record to be manually maintained as to the number of credits erased. There was also a meter in the machine that monitored the intake of coins.

Based on the examination of the machine, I could not conclude that it was any different from the video games which are so intrinsically designed that they cannot realistically be expected to be utilized for any other purpose than gambling. I therefore find that the first of the two games brought to the Division's offices by the appellants falls within the ban as contained in *A.B.C. Bulletin No. 2430*, Item No. 3 (March 31, 1983), and cannot be excepted from that ban. Such machine and any similar to it are therefore banned from liquor licensed premises, and maintaining of such on premises will be a violation of *N.J.A.C. 13:2-23.7(a)4*.

The second of the machines had a board which we recognized as being similar to the board in the "Grand Prix" video card game machine manufactured by SMS Manufacturing Corporation of Point Pleasant Beach, New Jersey, which game has been examined by the Director and excepted from the ban contained in *A.B.C. Bulletin No. 2430*, Item No. 3 (March 31, 1983). The device brought in by the appellants, however, did not have the manufacturer information contained in the program, nor did it display any identifying or copyright information. It was only through familiarity with the board from having recently examined the "Grand Prix" that the similarity was noted.

The initial display which appeared on the program read "Be a high roller with JOKER POKER with Hi-Lo double up." A very similar wording appears on SMS Manufacturing Corporation's "Grand Prix" program, except that the copyright information and name of the manufacturer also appear on the SMS game.

The device of the appellants, although bearing two coin slots, apparently only accepts one 25 cent coin for a game. Insertion of that coin activates the machine with 10,000 points which then can be played in multiples of 100 points over 5 hands of Poker. At the conclusion of the fifth hand, the number of points remaining, plus any number of points won in each hand, is displayed on the screen. If the total score is 25,000 or more, the player is given the opportunity to insert 3 initials in the "high roller's" list which will then show approximately the ten highest scores, together with the initials.

We were unable to activate the control program on the machine in the "operator's mode" because there was apparently something defective either in the program or the switches. Also, no literature whatsoever was furnished with the machine.

Up to the insertion of initials into the "high roller's club" the program in this device remains strikingly similar to the program of the "Grand Prix" by SMS Manufacturing Corporation, which has a list of "card sharks" as opposed to "high rollers." At that point, the similarity ends, and there is not the reaction game that follows with the SMS device, and which was one of the features noted in issuing the exception to the ban for that machine.

Based on the examination of appellants' device with the program similar to that of the "Grand Prix," it would appear that such machine might be excepted from the ban. The problem, however, is that there is no way of identifying the program of this device and, without such means of identification, there remains a danger of either modification or change to the program. This was explained to Mr. Gruber and he readily recognized that an approval of this machine could not be given without some positive manufacturer identification of the game and/or program. Mr. Gruber was advised that if that could be furnished, the issuance of an exception to the proscription of video game devices as contained in *A.B.C. Bulletin No. 2430*, Item No. 3 (March 31, 1983), would be considered for this machine. Until that time, however, it must of necessity be included in the ban because of the inability to identify the game.

It is also noteworthy that the appellants have failed to provide the Division of Alcoholic Beverage Control with a list of the licensed

premises in which their video game devices have been placed. Such list has been repeatedly requested so that there is no confusion and so that the Division would not unwittingly violate the terms of the stay imposed by the Appellate Division of the Superior Court of New Jersey on April 28, 1983, and as continued pending the further proceedings which I have now held.

Because the terms of the order of the Appellate Division have now been complied with and a "hearing" has been afforded to the appellants, and since they have not satisfactorily demonstrated that their video card game devices are different from those at which the ban in *ABC Bulletin No. 2430*, Item No. 3 (March 31, 1983), was directed, and since the Appellate Division did not retain jurisdiction, and since the appellants have failed to advise the Division as to the location of their video card game devices, the Division can do nothing other than consider any devices found on liquor licensed premises, wherever located in New Jersey, to be violations of *ABC Bulletin No. 2430*, Item No. 3 (March 31, 1983), and *N.J.A.C. 13:2-23.7(a)4*, unless exceptions to the proscription have been issued for the machine. To date, only two such exceptions have been issued, one for the SMS Manufacturing Corporation's "Grand Prix" machine, previously discussed in this opinion, and the other for the "Pit Boss" and "Pit Boss, Jr." manufactured by Merit Industries of Cheltenham, Pennsylvania, and specifically meeting the specifications as noted in the written exceptions. It should also be noted that all such exceptions will be issued to the manufacturer or distributor of the machine with the condition that if placed on liquor licensed premises, a copy of the exception will be available on the premises and the Division of Alcoholic Beverage Control will be advised of the name of the licensed premises on which the machine is placed, as well as an identification of the game within 48 hours of its placement.

Mr. Gruber has been advised that if the appellants wish to submit anything further, appropriate consideration will be given. At this point, however, the hearing has been completed and neither of the two games, which it must be assumed are representative of all of the games of the appellants, since nothing to the contrary was presented nor represented, can be approved.

You must check the New Jersey Citation Tracker in the companion looseleaf volume to determine the history of this case in the New Jersey courts.