J.M. Hollister, LLC v City of New York
2011 NY Slip Op 31486(U)
June 3, 2011
Sup Ct, NY County
Docket Number: 112361/10
Judge: Cynthia S. Kern
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SCANNED ON 6/7/2011

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN J.S.C.

PART 52

Index Number : 112361/2010

J.M. HOLLISTER, LLC

vs

CITY OF NEW YORK

Sequence Number : 001

ARTICLE 78

INDEX NO. 112361/10

MOTION DATE

MOTION SEQ. NO. 01

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

JUN 07 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/3/11

CYNTHIA S. KERN J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

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J.M. HOLLISTER, LLC,

Petitioner-Plaintiff,

Index No. 112361/10

-v-

CITY OF NEW YORK, THE CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD,

Respondents-Defendants.

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FILED

JUN 07 2011

NEW YORK
COUNTY CLERK'S OFFICE

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	_____
Answering Affidavits and Cross Motion.....	_____
Replying Affidavits.....	_____
Exhibits.....	_____

In this Article 78 proceeding, petitioner J.M. Hollister, LLC ("petitioner" or "Hollister") seeks a declaration that section 24-244(b) of the City of New York's Administrative Code (the "Code") is unconstitutional, invalid, null and void; a preliminary and permanent injunction enjoining the City of New York (the "City") from enforcing section 24-244(b) of the Code and a reversal of the decision of the City's Environmental Control Board ("ECB") dated August 19, 2010 declaring Hollister to be in violation of section 24-244(b)(i) of the Code.

As a preliminary matter, as the portion of this petition seeking reversal of the decision of ECB requires the determination of questions related to the sufficiency of the evidence presented

at a hearing mandated by law, that portion of the petition is transferred to the Appellate Division pursuant to C.P.L.R. §7804(g). With respect to that portion of the petition requesting that this court declare section 24-244(b) to be unconstitutional and for preliminary and permanent injunctions enjoining the City from enforcing this section of the Code, the court denies petitioner's request for the reasons set forth below.

The relevant facts are as follows. Hollister owns a chain of retail stores that sell clothing, swimwear, perfume, bodycare items and accessories. Hollister operates such a store at 600 Broadway in New York City. Hollister's marketing scheme includes playing a rotation of preapproved list of songs inside the retail store in order to "enhance customers' in store experience." Hollister played these songs at the store on 600 Broadway with the doors to the store left open. On January 14, 2010 at approximately 4:30 p.m., ECB issued Hollister a Notice of Violation ("NOV"). The description of the violation provided on the NOV stated, "music heard in front of store exceed [sic] pedestrian plus vehicle noise. Doors were propped open." The NOV stated that Hollister violated section 24-244(b) of the Code. Hollister challenged the NOV at a hearing before an Administrative Law Judge ("ALJ") on February 23, 2010. The ALJ upheld the NOV and ECB affirmed the ALJ"s decision on August 19, 2010. Section 24-244(b) states:

> No person shall operate or use or cause to be operated or used any sound reproduction device, for commercial or business advertising purposes or for the purpose of attracting attention to any performance, show, sale or display of merchandise, in connection with any commercial or business enterprise (including those engaged in the sale of radios, television sets, compact discs or tapes, (i) outside or in front of any building, place or premises or in or through any aperture of such building, place or premises, abutting on or adjacent to a public street, park or place; (ii) in or upon any vehicle operated, standing or being in or

> on any public street, park or place; (iii) from any stand, platform or other structure; (iv) from any airplane or other device used for flying, flying over the city; (v) from any boat on the waters within the jurisdiction of the city; or (vi) anywhere on the public streets, public sidewalks, parks or places where sound from such sound reproduction device may be heard upon any public street, sidewalk, park or place. Nothing in this section is intended to prohibit incidental sounds emenating from a sporting or an entertainment or a public event for which a permit under section 10-108 of the code has been issued.

On or around September 20, 2010, Hollister commenced the instant proceeding seeking a reversal of ECB's determination and a declaration that section 24-244(b) is unconstitutional because it impermissibly restricts commercial speech and is void for vagueness. Hollister also requested that this court issue a preliminary and permanent injunction enjoining the City from enforcing this code.

The court finds that section 24-244(b) does not impermissibly restrict commercial speech in violation of Article I, Section 8 the New York State Constitution and the First Amendment of the United States Constitution. "In commercial speech cases, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it must at least concern lawful activity and cannot be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest." *Central Hudson Gas & Elec. Corp. v Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980). In *177 Christie, Inc. v Environmental Control Bd. of the City of N.Y.*, 83 A.Dd3d 561 (1st Dept 2011), the First Department found that music played inside eateries that could be heard outside with the doors open was commercial speech because "the music was

played for advertising purposes, drew potential customers to a specific establishment, and was economically motivated." The First Department further found that since section 24-220(b)[the equivalent of the current section 24-244(b)] "merely required that the [eateries] keep the doors closed when music is played, it was narrowly tailored to the important governmental interest of protecting the peace and quiet of the public." *See id.*

In light of the First Department's decision in *177 Christie*, the court finds that section 24-244(b) does not violate the First Amendment. As Hollister does not dispute that the music played in its store constitutes commercial speech, that it kept its doors propped open while music was played inside the store, and the regulation at issue in the instant action is the same regulation addressed by the First Department in *177 Christie,* the court adheres to the decision of the First Department and finds that section 24-244(b) does not violate the First Amendment.

The court also finds that section 24-244(b) is not void for vagueness in violation of the Due Process Clause of the Fourteenth Amendment and Article I, Section 6 of the New York State Constitution. "Due process requires only a reasonable degree of certainty so that individuals of ordinary intelligence are not forced to guess at the meaning of statutory terms." *Foss v City of Rochester*, 65 N.Y.2d 247, 253 (1985)(internal citations omitted). "[S]tatutes are not automatically invalidated on the ground of vagueness simply because of difficulty in determining whether certain marginal activities fall within the scope of the statutory regulations. An interpretation which supports the constitutionality of the legislation is preferred." *Wegman Food Mkts, Inc. v State of New York*, 76 A.D.2d 95, 101 (4th Dept 1980). The court finds that Section 24-244(b) is not void for vagueness because it is reasonably precise so that individuals of ordinary intelligence are not forced to guess at the meaning of statutory terms.

Finally, in light of the court's decision finding section 24-244(b) to be constitutional, the court denies petitioner's request for preliminary and permanent injunctions enjoining the City from enforcing section 24-244(b).

Accordingly, that portion of petitioner's petition seeking a declaration that section 24-244(b) of the Administrative Code of the City of New York is unconstitutional is denied, petitioner's request for a preliminary and permanent injunction enjoining the City from enforcing Section 24-244(b) of the Code is denied and petitioner's petition seeking reversal of ECB's decision is transferred to the Appellate Division pursuant to C.P.L.R. §7804(g) for the reasons set forth above. This constitutes the decision and order of the court.

Dated: 6/3/11

Enter: _____
J.S.C.
CYNTHIA S. KERN
J.S.C.

FILED

JUN 07 2011

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