

**Big Apple Ice Cream, Inc. v City of New York**

2003 NY Slip Op 30174(U)

May 7, 2003

Supreme Court, New York County

Docket Number: 112273/00

Judge: Louis B. York

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

LOUIS B. YORK

PRESENT: \_\_\_\_\_  
Justice

PART 2

Big Apple Ice Cream, INC.,

INDEX NO. 112273/00

MOTION DATE \_\_\_\_\_

- v -

MOTION SEQ. NO. 002

MOTION CAL. NO. \_\_\_\_\_

The City of New York

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

**SCANNED**

MAY 15 2003

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance  
with accompanying memorandum ~~decision~~.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 5/7/03

Lly LOUIS B. YORK  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: 1A PART 2

-----X  
BIG APPLE ICE CREAM, INC.,

Plaintiff,

Index No. 112273/00

-against-

**DECISION/ORDER**

THE CITY OF NEW YORK,

Defendant.

-----X  
**Louis B. York, J.S.C.:**

Plaintiff, Big Apple Ice Cream, commenced the instant lawsuit alleging that defendant, the City of New York, violated plaintiffs constitutional rights to equal protection and substantive due process by enacting New York City Local Law 27 of 1997 (“LL 27-97”), and Local Law 23 of 1999 (“LL 23-99”). Plaintiff further alleged that LL 27-97 and LL 23-99, which the City characterized as amendments to Local Law 15 of 1995 (“LL 15-95”), actually repeal LL 15-95 by implication. By Order to Show Cause on August 24, 2000, plaintiff asked that this court to grant a preliminary injunction to prevent defendant from enforcing LL 27-97 and LL 23-99 based on their alleged unconstitutionality -- or, alternatively, on the basis of their alleged repealed by implication. Finally, plaintiff asked that the court enjoin the City from accepting bids and awarding food vendor contracts for the city’s parks.

This court denied the motion on March 7,2001 on all grounds, but did not dismiss the case. Birr Apple Ice Cream, Inc. v. Citv of New York, Index No. 112273/2000 (Mar. 21, 2001). Accordingly, the parties proceeded with discovery; and, on May 10,2001 plaintiff served defendant with the Note of Issue. Defendant now moves for summary judgment pursuant to Rule 3212 of the

Civil Practice Law and Rules ("CPLR"). Defendant states that summary judgment is appropriate because there are no existing material issues of fact. Plaintiff opposes the motion as it relates to its equal protection and repeal by implication arguments. However, it concedes that its substantive due process claims should be dismissed.

Summary judgment is proper under CPLR § 3212(b) if, upon the papers and other evidence submitted to the court, the case is sufficiently established to warrant judgment in favor of any party. Where no material issue of fact exists and the undisputed facts establish that a party is entitled to judgment as a matter of law, summary judgment is proper. Town of Newburgh v. Pekar, 298 A.D.2d 451, 452, 748 N.Y.S.2d 279, 280 (2<sup>nd</sup> Dept. 2002). For the reasons below, this court finds that summary judgment in plaintiffs behalf is appropriate.

### **BACKGROUND**

Prior to the enactment of LL 15-95, there was no limit on the number of permits a single vendor could hold. After LL 15-95's enactment, all permit holders, including multiple permit holders, were prohibited from renewing more than one permit. The stated purpose of the law was to make permits available to a broader spectrum of vendors, to prevent vendors from obtaining monopolies on permits, and to decrease the ability of permit holders to illegally lease their permits and/or to charge excessive fees for the use of their carts. Big Apple Ice Cream, Inc. v. The City of New York, Index No. 112273/2000, Decision/Order at 2 (Sup. Ct. N.Y. County, Mar. 12, 2001)(quoting Big Apple Food Vendors' Ass'n v. The City of New York, 168 Misc. 2d 483,486, 638 N.Y.S.2d 540,542 (Sup. Ct. N.Y. County 1995)("Big Apple Food Vendors"), aff'd, 228 A.S.2d 282, 644 N.Y.S.2d 216 (1<sup>st</sup> Dept. 1996), lv dismissed, 88 N.Y.2d 1064, 651 N.Y.S.2d 407 (1996), lv denied, 89 N.Y.2d 807, 655 N.Y.S.2d 887 (1997)).

In Big Apple Food Vendors, the plaintiffs challenged the constitutionality of LL 15-95. The court stated that because mobile food vendors with multiple permits did not constitute a suspect class under federal or state constitutional law, LL 15-95 only violated the Equal Protection Clause if it had no rational basis. The court found that the legislature's decision to make permits available to a wider range of individuals and entities, decreasing the likelihood and ability of permit holders to illegally lease permits and/or charge excessive fees for the use of carts, was rationally related to a legitimate state purpose. Big Apple Food Vendors, 168 Misc. 2d at 488, 638 N.Y.S.2d at 546-47. The court noted that the City Council had broad powers to regulate the use of the city's streets and to preserve and promote the health, safety and general welfare of its inhabitants. The court stated that there is a presumption that the City Council's enactments are constitutional. Furthermore, the court noted that these enactments also carry a presumption that the legislation is adequately supported by the facts, and that these presumptions are only upset by proof beyond a reasonable doubt. See id. at 488, 638 N.Y.S.2d at 543-44. In light of the above, the court held that LL 15-95 was constitutional. See id. at 488-89, 638 N.Y.S.2d at 544.

Subsequently, the legislature enacted LL 27-97 and LL 23-99. In its preface, LL 27-97 explains that LL 15-95 was overbroad in reach with negative effects. In pertinent part, LL 27-97 states:

[T]he unintended effect of...local law [15] was the difficulty this [multiple permit] limitation created for...small business owners who held multiple temporary permits and who are exclusive distributors or manufacturers of food such as ice cream sold on a seasonal basis on the streets of the City. These [vendors] must rely on their ability to maintain a certain number of pushcarts or vehicle that can legally purvey their food products on the City's streets during a limited season, and such pushcarts or vehicles each need a valid temporary food vendor permit...Without more than one temporary permit, these

exclusive [vendors] cannot...stay in business and...keep their product available to the City's residents, work force and visiting tourists.

Thus, the City Council created a grandfathering provision which allowed "exclusive distributors or manufacturers who held multiple temporary food vendor permits" in 1995, before the local law divested them of their additional permits, to "again hold their multiple temporary food vendor permits up to a maximum of...sixty temporary food vendor permits," in order to remedy this unintended harm. Big Apple Ice Cream, Inc., Index No. 112273/2000, Decision/Order at 4-5. These vendors also were allowed to hold one full-time permit.

The second of the local laws at issue, LL 23-99, states in pertinent part:

Notwithstanding [the multiple permit restrictions], a person may be issued more than one full-term or temporary food vendor permit to vend in any area under the jurisdiction of the department of parks and recreations pursuant to an agreement entered into in accordance with [other provisions of the law]. Such person shall be exempt from...restrict[ions on] the number of full-term or temporary food vendor permits that may be issued to any one person and the ...permits issued...also shall be exempt from any provisions...restricting the total number of full-term and temporary food vendor permits that may be issued.

While LL 27-99 does not contain a preface setting forth its justification, in a press conference Commissioner Moss stated that the bill resulted from the clear distinctions between street pushcarts and Parks Department pushcarts. See Big Apple Ice Cream, Inc., Index No. 112273/ 2000, Decision/Order at 6 (quoting Trans., Public Hearing on Local Laws, Wed. May 26, 1999, at 23-24). The Mayor also explained that "since the Parks Department can control the number and placement of food vendors in the parks, the parks concessions do not present the saturation problem that the cap on the total number of food vendor permits was intended to cure." Big Apple Ice Cream, Inc., Index No. 112273/2000, Decision/ Order at 6 (quoting Trans., Public Hearing on Local Laws, Wed. May

26, 1999, at 21-22).

Plaintiff in this action is an ice cream vendor which held 82 year-round full-time permits and which alleges that LL 15-95 drove it into bankruptcy. In its original Order to Show Cause, plaintiff sought a preliminary injunction that would enjoin the enforcement of LL 27-97 and LL 23-99. Essentially, plaintiff argued that both LL 27-97 and 23-99 were unconstitutional because the distinctions made in the laws irrationally favored certain classes of permit holders over a similarly situated class of permit holders including the plaintiff. In addition to equal protection arguments, plaintiff asserted that the laws violate substantive due process by irrationally depriving vendors of their rights to earn their livelihoods----

### ANALYSIS

When "a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage," heightened scrutiny of the classification is required. City of New Orleans v. Duke, 427 U.S. 297,303 (1974). Otherwise, the statute involved is subject to a rational basis scrutiny and "is presumed to be constitutional." D'Amico v. Crosson, 93 N.Y.2d 29, 32, 686 N.Y.S.2d 756,758 (1999). Moreover, "the party challenging the statute bears the heavy burden of proving that there is no reasonably conceivable state of facts which rationally supports the distinction." Id.; see Duke, 427 U.S. at 303. State legislative bodies must be accorded wide latitude in regulating their local economies; and accordingly, they may draw rational distinctions with "substantially less than mathematical exactitude." Duke, 427 U.S. at 303. The judiciary must not limit this latitude, for it is not a "super-legislature" and does not have the right to second guess legislative policy determinations when they are made in areas that do not affect fundamental rights or proceed on suspect lines. Id.

Plaintiff has not shown that there is any basis to require heightened scrutiny for purposes of an equal protection analysis. Thus, the laws in question are subject to a rational basis standard of review. See People v. Lewis, 95 N.Y.2d 539, 547, 720 N.Y.S.2d 87, 92 (2000), rearg't denied, 96 N.Y.2d 755, 725 N.Y.S.2d 281, cert. denied, 534 U.S. 833 (2001). This court has already indicated that LL 27-97 appears to have a rational basis. See Big Apple Ice Cream, Inc. v. City of New York, Index No. 112273/2000, Decision/Order (Sup. Ct. N.Y. County, Mar. 12, 2001). It refers the parties to its 2001 decision for elaboration. Defendant urges this court to adhere to its earlier reasoning; and the court finds defendant's arguments persuasive.

In arguing that the court ~~should not dismiss the~~ case, plaintiff has the burden of showing that every basis the City has for enacting LL 27-97 is irrational. Plaintiff has failed in this task both on evidentiary and analytical grounds. One of plaintiff's assertions is that the law is irrational because "only five of the fifty-six holders of multiple, temporary permits sell ice cream and only one of the fifty-six is an exclusive distributor of ice cream and frozen desserts." Pl. Opp. to Motion, at 13. Thus, plaintiff suggests, the law does not succeed in achieving its purpose -- to protect ice cream vendors from the harshness of LL 15-95. This argument has no merit. First, defendant's purpose is to protect seasonal vendors, not simply ice cream vendors. Thus, plaintiff's statement is not entirely accurate. Second, regardless, as defendant notes, in an equal protection analysis a court must not evaluate the rationality of the law in a general sense; instead, it must determine whether there is "a rational basis for the disparities of which [the plaintiffs] complain." Forti v. New York State Ethics Commission, 75 N.Y.2d 596, 611-12, 555 N.Y.S.2d 235 (year and history). When a court determines that there is some rational basis for the disparities, then judicial review must end. People v. Quarles, 168 Misc.2d 638, 643-44, 639 N.Y.S.2d 661, 639 N.Y.S.2d 661, 665 (City Ct.

Rochester County 1996). Here, the purpose for the disparities is rational. Third, defendant explains, the city enacted the supplemental law to moderate the negative effect of the original law on seasonal permit holders -- not ice cream sellers in particular, To the extent that ice cream vendors are included in the group of grandfathered seasonal permit holders, defendant explains, they are now protected from the harm of the original law and can continue to hold multiple seasonal permits. To the extent that some ice cream vendors operated under full time permits, defendant explains, the law is not for their protection.

Next, plaintiff argues that “the fact that the City does not keep track of the type of food that a vendor sells is evidence that the legislation cannot be based upon a legitimate purpose because the City has no way of knowing that seasonal food vendors are being hurt.” Pl. Opp. to Motion, at 13. However, plaintiffs argument is speculative and does not alter this court’s presumption that the legislature based the law on sufficient factual findings. See Lana v. Pataki, 176 Misc. 2d 676,674 N.Y.S.2d 903 (Sup. Ct. N.Y. County **1998**). Moreover, this argument is also based on the incorrect assumption that the law’s purpose is to help vendors which sell particular products rather than to protect vendors which are limited by seasonal permits. Regardless of the type of product a full-time permit holder sells during the summer, defendant reasons, a full time vendor can sell other products during the off season and thus maintain a successful business.

Plaintiffs argument that plaintiff is not guilty of the types of abuses that the legislation is intended to curb is also unavailing, as is the statement that plaintiff and others have been harmed by LL 15-95, and yet have not been helped by the challenged legislation. Though the court is sympathetic to plaintiffs plight, these are not valid bases for overturning the legislation. “[T]he alleged underinclusiveness or overinclusiveness of the classification is not dispositive unless it

cannot be said that the classification rationally furthers the posited State interest.” Brothers of Mercy Nursing and Rehabilitation Center v. DeBuono, 292 A.D.2d 775, 777, 740 N.Y.S.2d 170, 174 (4<sup>th</sup> Dept.), lvdismissed, 98 N.Y.2d 692, 747 N.Y.S.2d 409, lvdenied 99 N.Y.2d 502, 752 N.Y.S.2d 589 (2002).

Plaintiffs challenges to LL 23-99 are similarly unpersuasive. This court accepts the government’s conclusion that permits for park-based vendors do not create the same types of problems as permits for vending on the city streets. See Big Apple Ice Cream, Inc. v. City of New York, Index No. 112273/2000, Decision/Order, at 10 (Sup. Ct. N.Y. County, Mar. 12, 2001). The signatories to the law explained that because the permits are negotiated differently, the Department of Parks can more closely monitor the licensing process to prevent abuses from arising. Id. On these bases, the court stated that the limitations necessary in the issuance of street vending permits are unnecessary with respect to park vending permits. Id. In enacting the challenging local laws, then, the legislature presented solid rationales that this court has steadfastly refused to second-guess. Plaintiff has not raised any facts that cause the court to alter its earlier determination that LL 23-99 is constitutional on all challenged bases.

For example, plaintiff claims that “according to the Printout [attached as an exhibit to Defendant’s Submission in Opposition to ~~Motion~~ for Summary **Judgment**], most of the individuals that hold multiple permits do not operate in the City Parks but, rather, private property.” Plaintiffs Mem. of Law in Opp, at p. 15. However, from the printout the court cannot discern to what property Plaintiff is referring. Moreover, plaintiff does not successfully explain the relevance of these facts to its argument.

Plaintiff also states that the City Council failed to proffer any justification for LL 23-99. The

court agrees that optimally the legislation itself should have included some statement of purpose. See Big Apple Ice Cream, Inc. v. City of New York, Index No. 112273/2000, Decision/Order at 10 (Sup. Ct. N.Y. County, Mar. 12, 2001). However, as this court already found in the 2001 Order, its absence is not a fatal defect -- particularly as the Mayor and the City Council discussed the purpose publicly at the bill signing ceremony. Id. Plaintiffs argument is identical to the one it made in its Order to Show Cause. Plaintiff does not put forward any new facts or analysis here which motivates the court to alter its prior opinion.

In addition, plaintiff argues that no legitimate purpose can be inferred from the legislation because the City Council's purpose was improper. In part, plaintiff alleges that the City Council enacted the laws to legalize its unlawful practice of allowing certain vendors to operate multiple carts in the City Parks under contracts with the Department of Parks. Nowhere in its opposition papers does plaintiff support this allegation. Moreover, as set forth above and as stated in this court's 2001 Order, the government concluded that permits for park-based vendors have not created the same types of problems as permits for vending on the city streets. Big Apple Ice Cream, Inc. v. City of New York, Index No. 112273/2000, Decision/Order at 10 (Sup. Ct. N.Y. County, Mar. 12, 2001). Plaintiff speculates that multiple permit holders could be guilty of the same abuses which occurred outside the park; but, this speculation is insufficient to satisfy plaintiff's high burden of proof and overcome the factually based findings of the legislature.

Plaintiff argues in the alternative that the two local laws effectively repeal LL 15-95 by implication. Specifically, plaintiff argues that both LL 27-97 and LL 23-99 have carved such large exceptions to LL 15-95 that they render it meaningless. Before addressing this issue, the court stresses that the law strongly disfavors repeal by implication. National Resources Defense Council,

Inc. v. New York City Dept. of Sanitation, 83 N.Y.2d 215, 222-23, 608 N.Y.S.2d 957, 960 (1994). Accordingly, it must not find that LL-15-95 has been repealed by implication unless there is no contrary conclusion possible, see Konviser v. State of New York, 180 Misc. 2d 174, 180, 687 N.Y.S.2d 877, 881 (1999), “as when repugnancy between the statutes involved is plain.” Iazzetti v. The City of New York, 94 N.Y.2d 183, 189, 701 N.Y.S.2d 332, 336 (1999). Furthermore, unless there is an express provision in a later statute or in its legislative history that calls for the repeal of the earlier law, a court will presume that there was no intention to repeal that law. New York Public Interest Research Group v. Dinkins, 83 N.Y.2d 377, 386, 610 N.Y.S.2d 932, 936 (1994). Here, as there is not an explicit statement by the Legislature to the contrary, settled jurisprudence requires that this court read the statutes, if at all possible, in a manner which gives effect to all three. Town of Brookhaven v. New York State Bd. Of Equalization and Assessment, 88 N.Y.2d 354, 361, 645 N.Y.S.2d 436, 441 (1996).

As this court already stated, the two local laws before the court do not implicitly repeal LL 15-95. Instead, they evince an intent to keep the law in effect, and to carve out two limited exceptions. Bin Apple Ice Cream, Inc. v. City of New York, Index No. 112273/2000, Decision/Order at 11 (Sup. Ct. N.Y. County, Mar. 12, 2001). There is no provision in either LL 27-97 or LL 23-99 that expressly states that LL 15-95 is being repealed. On the contrary, both LL 27-97 and LL 23-99 state that these enactments are intended to “amend the administrative code of the city of New York, in relation to the food vending business.” In addition, nothing in these three laws prevents them from operating together effectively.

Plaintiff is correct that “in determining whether a governing body has repealed a statute by implication, a court is permitted to and should consider the legislative intent behind the legislation.

Def. Mem. of Law in Opp., at 16 (quoting American Motor Sales Corp. v. Brown, 152 A.D.2d 343, 349, 548 N.Y.S.2d 791, 795 (2<sup>nd</sup> Dept. 1989)). The court has already considered the legislative intent behind each of these amendments above and concludes that there is no reason to find that LL 15-95 has been repealed.

Next, the court turns to plaintiffs discovery-related arguments. Plaintiff argues that defendant failed to provide certain documents and interrogatory answers, and that these failures affect plaintiffs ability to support its case. The court rejects these arguments. The court held a preliminary conference in July of 2001; and, it called the parties to court for a status conference in February and then June of 2002 because the parties failed to meet their Note of Issue deadlines – which were December 15, 2001; and May 10, 2002, respectively – but did not contact the court with any discovery issues or make any discovery motions. Even the final, extended discovery deadline for this case has long since passed. In addition, although plaintiffs Note of Issue is not currently listed in the court computer, plaintiff apparently did attempt to file and serve one. Under the rules set forth in the preliminary conference and status conference orders – and, based upon the certification of readiness in the Note of Issue – plaintiff has waived its right to seek this allegedly outstanding discovery.

Nor has plaintiff shown that defendant has failed to provide crucial discovery or has violated any orders. Plaintiffs request for a list of every seasonal vendor in 1995 and a description of every product vended by current vendors is overburdensome and plaintiff does not adequately explain their significance. Moreover, defendant attested that it does not have these records as it does not keep records for more than four years; and, as plaintiff has not shown that defendant's statement is inaccurate, plaintiff is bound to accept this answer.

To the extent that plaintiff relies on the City's discovery responses to allege triable issues, plaintiff is incorrect. First, as set forth above, the legislature enacted the first of the challenged laws, LL 27-97 due to its articulated concern about the difficulty the multiple permit limitation created for small business owners who held multiple temporary permits and served as the exclusive distributors or manufacturers of seasonal foods such as ice cream. The legislature explained its reasoning thoroughly, and set forth a valid basis for LL 27-97. The need for further materials on legislative intent is therefore unnecessary. See Stringfellow's of New York, Ltd. v. City of New York, 171 Misc.2d 376, 395, 653 N.Y.S.2d 801, 813 (Sup. Ct. N.Y. County 1996), aff'd, 241 A.D.2d 360, 663 N.Y.S.2d 812 (1<sup>st</sup> Dept. 1997), aff'd, 91 N.Y.2d 382, 671 N.Y.S.2d 406 (1998). Second, as to defendant's failure to answer interrogatories 11-16, defendant correctly objected on the basis that the interrogatories impermissibly ask it for legal conclusions rather than factual information.

### Conclusion

The court notes that it has considered all of the parties' arguments, even those not specifically addressed in this decision. And, for the reasons set forth above, it is

ORDERED that the motion for *summary* judgment is granted and the action is dismissed.

—ENTER: —

Dated: 5/7/03




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Louis B. York, J.S.C.

LOUIS B. YORK