

City of New York v Dorrian
2006 NY Slip Op 30650(U)
October 19, 2006
Sup Ct, NY County
Docket Number: 402161/06
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

JANE S. SOLOMON

PART 55

Index Number : 402161/2006

CITY OF NEW YORK

vs

DORRIAN, MICHAEL J.

Sequence Number : 002

DISMISS ACTION

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

9/19/06

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

1-3

4-5

6

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided, together with the motion filed under motion seq. 03, in accordance with the enclosed memorandum decision and order.

Dated:

10/19/06

J. S. C.

JANE S. SOLOMON

Check one: ☐ FINAL DISPOSITION

☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----x
THE CITY OF NEW YORK,

DECISION AND ORDER

Plaintiff,

Index No. 402161/06

-against-

MICHAEL J. DORRIAN, 218 LAFAYETTE
STREET RESTAURANT CORP., et al.,

Defendants.
-----x

Jane S. Solomon, J.:

Motion sequence nos. 002 and 003 are consolidated for disposition. In motion sequence no. 002, defendants Michael J. Dorrian and 218 Lafayette Street Restaurant Corp. (Restaurant) move, pursuant to CPLR 3211 (a), or in the alternative, CPLR 3212 (a), for an order dismissing the complaint. In motion sequence no. 003, defendants J&G Family Limited Partnership (J&G) and The Land and Building Known as 218 Lafayette Street, Tax Block #482, Tax Lot #27 (Building) similarly move for an order dismissing the complaint.

This is an action to abate a public nuisance, brought pursuant to New York City Administrative Code (Administrative Code) §§ 7-704 and 7-716. The City seeks a permanent injunction and civil penalties. J&G is the landlord of the Building, in which Dorrian and Restaurant operated The Falls, a licensed bar.

Administrative Code § 7-703 provides that:

[t]he following are declared to be public nuisances:

...
(h) Any building, erection or place ... used for any of the unlawful activities described in section one hundred twenty-three of the alcoholic beverage control law.

Alcoholic Beverage Control Law (ABCL) § 123 refers to "traffic[ing] in liquor, wine or beer contrary to any provision of this chapter." ABCL § 65 prohibits, among other things, the sale of alcohol to persons under the age of 21. ABCL § 106 (5) (b) prohibits the sale of alcoholic beverages, for on-site consumption, on days other than Sundays, between the hours of 4:00 a.m. and 8:00 a.m.¹

The City's complaint, as limited by its subsequent papers, rests upon the affidavits of three New York City police officers, one of whom avers that, on May 20, 2006, he purchased a beer and a mixed drink at The Falls, at "approximately 4:01 a.m." and another beer at approximately 4:14 a.m. The other two officers allege that, on January 4, 2006, and on May 9 and 10, 2006, respectively, they entered The Falls with, respectively, an underage police cadet and, first one, and then another underage auxiliary police officer, and that they observed each of those individuals purchase a beer. Each of the bartenders targeted in these undercover investigations was issued a summons. Dorrian's counsel represented to this court, at oral argument on June 14, 2006, that the January 4, 2006 summons has been dismissed. In addition, counsel for the City acknowledged, in a September 14, 2006 letter to the court, that another of the four summonses has been dismissed. That summons is identified, in an affidavit from

¹ Defendants do not argue that ABCL § 123 is a procedural provision, and that it does not "describe" any "unlawful activities."

[*4]
counsel for Restaurant, as the May 20, 2006 summons for after-hours service of alcohol.

It would appear to the court that one of the principal issues to be decided on these motions is whether the two remaining violations, of which the police officers' affidavits are prima facie evidence (City of New York v Mor, 261 AD2d 185 [1st Dept 1999]), or even the initial four, suffice, as a matter of law, to constitute "use" of the Building within the meaning of Administrative Code § 7-703 (h). The question arises because certain subdivisions of section 7-703 provide that a public nuisance arises only after a certain number of violations have occurred (subdivision [g]: three or more violations in the year preceding commencement of an action; subdivision [m]: two or more violations). Other subdivisions of Administrative Code § 7-703 specify that one violation, or the existence of a certain condition, suffices to constitute a public nuisance (subdivisions [e], [i], [j], [k], and [l]). Yet other subdivisions of section 7-703, each of which defines a particular use of a building as a public nuisance, specify indicia on the basis of which such use may be presumed. Thus, subdivisions (a), (b), and (c), which pertain to buildings used, respectively, for prostitution, obscene performances, and the promotion of obscene material (as those terms are defined in the Penal Law), provide that it may be presumed that the building is a public nuisance where there have been two or more convictions for prostitution, obscene performances, or promotion of obscene material in the building,

within the year preceding an action by the City. Similarly, subdivision (d) provides that the same presumption arises where there has been one criminal conviction for the violation proscribed in that subdivision. Only subdivisions (h) and (f), the latter of which pertains to use of a space for the purpose of an activity that is not licensed, as required by law, fail to specify the extent of forbidden activity that is required in order for a public nuisance to have arisen, or to be presumed to have done so. To begin with, it would have appeared anomalous to this court that the City Council could have intended that the penalties provided for in Title 7 of the Administrative Code be imposed for one instance in which a bar served a beer to a 19-year-old patron, but that if the bar sold narcotics to a patron, those same penalties could be imposed only after three convictions for such sales in a one-year period. See Administrative Code § 7-703 (g).

However, the court will not venture to answer the question posed above, because, in a case involving the alleged use of a building for the purpose of prostitution, the Appellate Division, First Department, has held that affidavits from three police officers, each of which stated that the officer had been offered sex in exchange for money, in a bar, and that, in each case, the offeror had been arrested, "establish, at a minimum, triable issues of fact as to whether [the bar] was used for the purpose of prostitution." City of New York v The Land and Building Known as 355 West 41st Street, 23 AD3d 183, 185 (1st

Dept 2005). Accordingly, here, the police officers' affidavits, at least as to those summonses that have not been dismissed, suffice to raise triable issues of fact as to whether The Falls was "used for any of the unlawful activities described in [ABCL § 123]." Administrative Code § 7-703 (h).²

Defendants contend that, in any event, a permanent injunction should not be issued because, on July 3, 2006, J&G served upon Dorrian a 15-day notice of termination of lease. In an affidavit, sworn to on July 12, 2006, Dorrian avers that The Falls was closed on June 5, 2006, Restaurant has surrendered its liquor license, and he expects to terminate the lease on July 18, 2006. However, even if Dorrian has in fact terminated the lease, there is no guaranty that he will not reappear in the same place "under another guise." City of New York v. Mor, 261 AD2d at 187, quoting City of New York v. 924 Columbus Assocs., L.P., 219 AD2d 19, 22 (1st Dept 1996). Accordingly, the complaint, as whole, will not be dismissed.

However, the complaint will be dismissed insofar as it seeks civil damages against J&G. Administrative Code § 7-716 (a) provides that,

with respect to the public nuisances defined
in subdivisions ... (h) of section 7-703 ...
the corporation counsel may bring ... a civil

² In the above-mentioned September 14, 2006 letter to the court, counsel for the City asserts that the City has not abandoned its second and third causes of action. However, defendants argued that those causes of action fail to state a cause of action, and the City did not respond to those arguments, in its opposition to defendants' motions.

[*7]
proceeding in the name of the city ... to recover a civil penalty against any person conducting, maintaining or permitting a public nuisance within the scope of this subchapter.

The complaint does not allege a single fact to support its conclusory allegation that "[t]he owners knew of the alleged activity being conducted in the subject premises and have intentionally conducted, maintained, or permitted the aforementioned public nuisance." Complaint, ¶ 29.

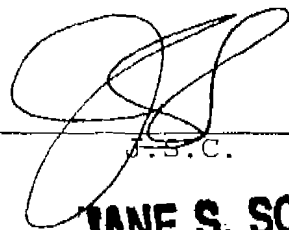
Accordingly, it hereby is

ORDERED that the motion of Michael Dorrian and 218 Lafayette Street Restaurant Corp. is denied; and it is further

ORDERED that the motion of defendants J&G Family Limited Partnership and the Building is granted to the extent that plaintiff's claim for civil damages against said defendants is dismissed.

Dated: October 19, 2006

ENTER:


J.S.C.

JANE S. SOLOMON

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