

Smith v Palone

2007 NY Slip Op 30225(U)

February 13, 2007

Supreme Court, Ontario County

Docket Number: 0079047

Judge: John J. Ark

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SUPREME COURT STATE OF NEW YORK
COUNTY OF ONTARIO

LEWIS F. SMITH and SHIRLEY A. SMITH, et. al.

Plaintiffs,

Index No. 79047

v

DECISION

GARY J. PALONE and EILEEN E. PALONE, and
PARADISE PROMOTIONS, INC.,
Defendants.

Plaintiffs move, by Order to Show Cause, for an Order holding the defendants in contempt for their failure to comply with an Order signed by Judge James R. Harvey on July 17, 1995.

The Order, which pertained to the use of a motorcycle and go-cart track, ordered that the racing activities, including parking, be "limited solely to the property originally purchased from Swanson." Plaintiffs state that the Order has been violated in that customers of the track are parking in areas beyond the permissive use areas.

Defendants respond by stating that the parking along Hayes Road, a public highway, is used by racetrack patrons and members of the general public, and is not part of the racing activities. Defendants argue that "public participation is not necessary for the racing activities to be conducted: Racing activities would continue even if members of the public did not attend." Defendants argue that the only parking regulated by the Decision and Order of the Court dated July 17, 1995 is the parking by racetrack personnel and participants.

This Court rejects defendants' argument that the parking along Hayes Road is unrelated to racing activities. Simply because attendance by the general public at the race track is not necessary to the continuation of racing activities does not mean that parking by those attending the races as spectators is unrelated to racing activities. The order pertains to all racing activities, not to necessary racing activities.

Defendants also state that they have no control over the parking that occurs on a public highway and cannot control customers who park there. At oral argument the issue was raised as to whether the cars that are parked along Hayes Road are parked on the Town's right-of-way or are parked on defendants' private property. Plaintiffs were given the opportunity to produce maps or other information showing that the cars being parked along Hayes were parked on private property. Plaintiffs have not produced such information.

With respect to defendants' argument that they have no control over the parking along a public highway, plaintiffs concede that the Town Board has the authority to control parking on its roadways (Bersani Affidavit dated September 6, 2006). However, plaintiffs also contend that defendants have the right and the obligation to prohibit parking "in the area around and on the roadway itself."

The Town's easement is 49.5 feet wide. Plaintiffs have failed to show that the vehicles depicted in the photographs that are parked alongside Hayes Road are parked on defendants' private property rather than on the Town's easement. Defendants are without authority to control if and where cars are parked on that portion of the property within the Town's easement. Defendants cannot be held in contempt of the Court's prior order for parking that occurs on property within the Town's easement. It is not in the public's interest to have private individuals control parking on public roads.

In support of their motion to hold defendants in contempt, plaintiffs have failed to come forward with sufficient proof that defendants are in contempt of court for allowing cars to park along Hayes Road; plaintiffs have not showed that cars are parked on property over which defendants have control.

Finally, plaintiffs contend that regardless of any parking violations on Hayes road, defendants have conceded that they violated this Court's prior Order with respect to parking to the north of the racetrack. Defendant Gary Palone does state, in his September 18, 2006 affidavit, that the parking to the north of the racetrack was in violation of this Court's prior Order. He has taken steps to comply with the Court's prior Order. Defendant Gary Palone also states that he erected a fence on the property and no one has parked on that portion of the property since that time. Plaintiffs have not come forward with any information or allegations to the contrary.

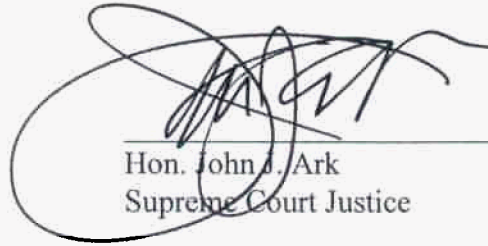
Judiciary Law § 753(A)(3) provides

A court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, in any of the following cases: * * * A party to the action or special proceeding, an attorney, counselor, or other person, for the non-payment of a sum of money, ordered or adjudged by the court to be paid, in a case where by law execution can not be awarded for the collection of such sum except as otherwise specifically provided by the civil practice law and rules; or for any other disobedience to a lawful mandate of the court.

“A contemnor is generally allowed an opportunity to purge the contempt by performing the act required or apologizing for the act leading to a finding [citation omitted]” (*Pronti v Allen*, 13 AD3d 1034, 1036).

In as much as the defendants purged themselves of the contempt shortly after being made aware that the Order dated July 17, 1995 was being violated, this Court does not fine or otherwise impose any sanction upon the defendants.

This constitutes the Decision of the Court. Submit Order accordingly.



Hon. John J. Ark
Supreme Court Justice

Dated at Canandaigua, New York
this 13th day of ~~January~~, 2007
February