

**Monticello Raceway Mgt., Inc. v Suffolk
Regional Off-Track Betting Corp.**

2007 NY Slip Op 32004(U)

June 29, 2007

Supreme Court, Suffolk County

Docket Number: 0018959/2006

Judge: John J.J. Jones

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 SUFFOLK COUNTY

Present:

HON. JOHN J.J. JONES, JR.
Justice

MOTION DATE: 1/5/2007
MOTION NO.: 003 - MG
004 - XMD

-----X	
MONTICELLO RACEWAY MANAGEMENT, INC.,	MARVIN NEWBERG, ESQ.
	Atty. for Plaintiff
Plaintiff,	33 North Street
	Monticelli, NY 12701
	:
-against-	NEIL H. TIGER, ESQ.
	Atty. for Defendant
SUFFOLK REGIONAL OFF-TRACK BETTING	5 Davids Drive
CORPORATION,	Hauppauge, NY 11788
	:
Defendant.	:
-----X	

ORDERED that, following oral argument before this Court on June 13, 2007, this motion by plaintiff, Monticello Raceway Management, Inc. (Monticello Raceway), for an order striking the defendant's affirmative defenses and awarding partial summary judgment on the issue of liability is granted; and it is further

ORDERED that, upon service of a copy of this order upon the Calendar Clerk of this Court, this matter shall be placed on the trial calendar for a trial on the issue of damages; and it is further

ORDERED that the cross-motion by defendant, Suffolk Regional Off-Track Betting Corporation (Suffolk OTB), for an order granting summary judgment on the first affirmative defense of unjust enrichment is denied.

Plaintiff commenced this action to recover payment of off-track betting revenues pursuant to Racing, Pari-Mutuel Wagering and Breeding Law (Racing Law) § 1016 (3) (b)

(3) and (4). The statute, which addresses the payment of commissions for licensed harness tracks in connection with the simulcasting of races run by out-of-state harness tracks, provides as follows:

- b. For off-track betting facilities, (1) of the sums so retained, the applicable tax rate shall be one percent of all such wagers;
- (2) of the sum so retained, one percent of all wagers shall be paid to the New York state agricultural and horse breeding and development fund;
- (3) of the sum so retained, five percent shall be paid to the regional licensed harness track to be distributed in the same manner as though such payments were on races conducted at such track;
- (4) of the sum so retained, an additional one percent of all wagers shall be paid to the regional licensed harness track for the purpose of increasing purses.

The complaint alleges that from 1994 until approximately June 2005, Suffolk OTB paid Monticello Raceway, a regional race track, five percent (5%) of the total handle of bets taken by defendant on out-of-state harness races in accordance with the statute and the practice of other state OTB corporations. In or about June 2005, however, Suffolk OTB unilaterally changed its practice by paying five percent (5%) of its retained commissions, a significantly smaller amount than the same percentage of the total handle of bets. Plaintiff claims that, as of the date of commencement of the action, defendant had wrongfully withheld the sum of \$773,636.44 by underpaying the amount due pursuant to Racing Law § 1016 (3) (b) (3) and (4).

In its answer to the complaint, Suffolk OTB admitted that throughout New York State, OTB corporations have been paying six percent (6%) of the total wagers, instead of five percent (5%) of “the sum so retained” to the regional track plus one percent (1%) of the total wagers to the track for the purpose of increasing purses on all simulcast out-of-state harness races. According to Suffolk OTB, “the sum so retained” is the amount of each wager that is not returned to the bettors as winnings, and is also referred to as the “take-out” or the “retained commissions.” In its first affirmative defense and counterclaim, defendant asserts that such practice resulted in an overpayment of the difference between 5% of the total wagers and 5% of “the sum so retained,” and it claims that payment should be calculated as 5% of the sums retained plus 1% of the total wagers, or handle. Defendant also asserted as an affirmative defense that plaintiff failed to exhaust its administrative remedies. In addition, defendant asserted as a third affirmative defense that it has retained approximately \$231,000.00 in a segregated bank account “pending a determination in an Article 78 proceeding in Albany County Supreme Court (J. Kavanagh)” for the difference in payments made for the months of March, April

and May 2006 between 5% of the handle and 5% of the “sums retained.” As a fourth affirmative defense, defendant noted that the aforementioned Article 78 proceeding was instituted by the six New York State OTB Corporations against the New York State Racing and Wagering Board, Monticello Raceway and Yonkers Raceway to consider the issue of the proper interpretation of Racing Law § 1016 (3) (b) (3) and (4), and that “any determination by Justice Kavanagh will have a collateral estoppel effect on the two parties to this proceeding.” A fifth affirmative defense is also asserted that the New York State Racing and Wagering Board is a necessary party to this action.

Plaintiff now moves for partial summary judgment upon the application of the principle of collateral estoppel, as a Decision, Order and Judgment was entered on September 7, 2006 in the aforementioned Article 78 proceeding (Kavanagh, J.) dismissing the petitions of the regional OTB corporations. The petition filed by Suffolk OTB in the proceeding raised the issue regarding the calculation of payments made under Racing Law § 1016 (3) (b) (3) and (4) and specifically asserted that “the OTBs have been overpaying their respective “regional harness track” by an amount equal to the difference between five (5%) percent of the total wagers and five (5%) percent of the “sums so retained.” It was also argued that “such overpayment of six (6%) percent of the total wagers as opposed to five (5%) percent of sums retained plus one (1%) percent of total wagers . . . is contrary to statute and arbitrary and capricious. . .” Addressing other payments to be made to licensed harness tracks on “dark days” under Racing Law § 1016 (3) (b) (3), the Court considered the usage and custom in the industry in order to discern the intent of the statute, and determined that the established practice over years of making payments for “dark days” to the regional harness tracks demonstrated harmony with the intent of the Legislature. In a footnote on page 13 of the Court’s decision, the following is set forth:

For this same reason this Court rejects the argument advanced by petitioner Suffolk Regional OTB Corporation that the “dark day” commissions have been calculated and paid for years on percent of total wagers as opposed to percent of “sums so retained” of those wagers. This particular argument is beyond the scope of the February 23, 2005 determination [of the New York State Racing and Wagering Board] at issue here; it also contravenes the accepted practice, in place for years, of the entire OTB industry.

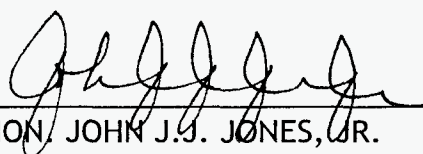
Plaintiff argues that in view of the aforementioned determination, defendant, Suffolk OTB, is collaterally estopped from re-litigating the issue of the proper calculation of payments made under Racing Law § 1016 (3) (b) (3) and (4). The defendant opposes the motion, however, on the ground that the Court in the Article 78 proceeding provided judicial review of particular determinations made by the New York State Racing and Wagering Board, which did not include the calculations at issue in this case. For the

reasons set forth herein, the Court finds that summary judgment in favor of the plaintiff on the issue of liability is warranted, and that the first affirmative defense and counterclaim and remaining affirmative defenses must be stricken.

Collateral estoppel, an equitable doctrine, is based upon the general notion that a party should not be permitted to re-litigate an issue decided against it (*D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664, 564 NE2d 634, 563 NYS2d 24 [1990]). As this doctrine has evolved, two requirements must be satisfied: first, the party seeking the benefit of collateral estoppel must prove that the identical issue was necessarily decided in the prior action and is decisive in the present action; and second, the party to be precluded from re-litigating an issue must have had a full and fair opportunity to contest the prior determination (see *D'Arata v New York Cent. Mut. Fire Ins. Co.*, *supra* at 76 NY2d 664). Preclusive effect may be given to an issue considered in the alternative only when it is clear that the issue was actually litigated, squarely addressed, and specifically decided (*Matter of Atlantic Mut. Ins. Co. v Lauria*, 291 AD2d 491, 739 NYS2d 394 [2d Dept 2002]).

In the prior proceeding, Suffolk OTB raised the issue that is the subject of this action, addressed it fully in litigation, and received a determination in which its argument was specifically rejected. For the reasons underlying the principle of collateral estoppel, it may not re-litigate the issue. Even if this Court were not to apply the principle of collateral estoppel in this case, however, partial summary judgment in favor of the plaintiff would still be warranted. The unilateral change by defendant in the calculation of payments under Racing Law § 1016 is not supported by a reasonable interpretation of the statute. Subsections (1), (2) and (4) of Racing Law § 1016 (3) (b) specifically set forth that the percentage payment should be calculated against "all wagers" and there is no basis on which to infer that the absence of such language in subsection (3) requires a different method of calculation. Furthermore, the inclusion of the phrase, "an additional one percent of all wagers" immediately following subsection (3) in subsection (4) is consistent with the interpretation that the percentage of payment in the preceding subsection (3) was to be calculated from the same figures as the additional percentage required under subsection (4). The clear language of the statute, coupled with the accepted statewide OTB practice of making payments under Racing Law § 1016 (3) (b) (3) calculated upon all wagers, compels this Court to grant the motion and to deny the defendant's cross-motion.

DATED: 29 June '07



HON. JOHN J. JONES, JR.
J.S.C.

CHECK ONE: FINAL DISPOSITION

NON-FINAL DISPOSITION