

**Hossain v City of New York**

2008 NY Slip Op 32395(U)

August 27, 2008

Supreme Court, New York County

Docket Number: 0406889/2007

Judge: Karen Smith

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

PRESENT: KAREN SMITH  
J.S.C.

PART 62

Index Number : 406889/2007  
**HOSSAIN, KAZI**  
vs.  
**CITY OF NEW YORK**  
SEQUENCE NUMBER : 002  
ORDER MAINTAIN CLASS ACTION

INDEX NO. \_\_\_\_\_

MOTION DATE 7/10/08

MOTION SEQ. NO. \_\_\_\_\_

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

this motion to/for \_\_\_\_\_

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

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

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

PAPERS NUMBERED

1

2

3

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is granted in accordance with the attached memorandum decision and order.

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

**FILED**  
AUG 29 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 8/27/08

KAREN SMITH J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check If appropriate:  DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 62

-----X  
KAZI HOSSAIN, MOHAMMED AKHAND, and  
MOHAMMED ALI,

Plaintiffs,

-against-

Index no.: 406889/07  
Motion seq.: 002  
Motion date: July 10, 2008

**DECISION AND ORDER**

CITY OF NEW YORK, and THOMAS R. FRIEDEN,  
Commissioner of the Department of Health and  
Mental Hygiene,

Defendants.

-----X  
**PRESENT: KAREN S. SMITH, J.S.C.:**

Plaintiffs' motion for an order certifying the action as a **COUNTY CLERK'S OFFICE** action pursuant to CPLR  
§ 901 et seq., is granted for the reasons stated more fully below.

Plaintiffs, licensed food vendors who sell boiled hot dogs from mobile carts in the City of New York, brought this action seeking declaratory and injunctive relief, in addition to damages, alleging that defendants City of New York and Thomas R. Frieden, Commissioner of the Department of Health and Mental Hygiene (collectively "the City"), violated the City Administrative Procedure Act ("CAPA") and the plaintiffs' Fourteenth Amendment right to due process when they allegedly failed to notify plaintiffs and other vendors of a change in policy. Specifically, plaintiffs allege that some time in 2004 or 2005, defendants began issuing Notices of Violation ("NOV") to vendors who boil their hot dogs and warm condiment trays in the same bin of water (referred to as the "single bin method"), claiming the practice violates New York

City Health Code § 81-07(a) which requires that hot dogs and condiment trays must be kept in two separate bins of water (referred to as the “double bin method”). Citing this provision of the Code, defendants also began declining to pass for inspection those carts only equipped with one bin for water, rather than two. The named plaintiffs here were each issued NOVs for violating § 81-07(a) by using the single bin method. According to the complaint, it was the longstanding practice of vendors, prior to this alleged change in enforcement policy, to use the single bin method without reprisal from defendants, and that this change in interpretation and enforcement constitutes a “rule change” under CAPA subject to the notice requirements of that statute. As plaintiffs had no notice and opportunity to be heard, such change also allegedly violated plaintiffs’ right to due process.

Defendants filed a motion to dismiss the action, which was denied after oral argument on March 27, 2008. Issue was thereafter joined by answer of the defendants on or about April 25, 2008. Defendants deny that there was any “rule change” and, therefore, dispute plaintiffs’ contention that they were entitled to notice and an opportunity to be heard.

Plaintiffs now bring this motion pursuant to CPLR § 901 et seq., seeking certification of a class of plaintiffs in this action. Section 901(a) states:

One or more members of a class may sue or be sued as representative parties on behalf of all if:

1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;
3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;
4. the representative parties will fairly and adequately protect the interests of the class; and
5. a class action is superior to other available methods for the fair and efficient

adjudication of the controversy.

In addition to the prerequisites listed in § 901(a), the Court must also consider the factors listed in CPLR § 902:

1. the interests of members of the class in individually controlling the prosecution or defense of separate actions;
2. the impracticability or inefficiency of prosecuting or defending separate actions;
3. the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
4. the desirability or undesirability of concentrating the litigation of the claim in the particular forum;
5. the difficulties likely to be encountered in the management of a class.

There is no real dispute that the named plaintiffs here, as representative parties, would share the claims and/or defenses of the class<sup>1</sup> and protect the interests of the class. Defendants argue, however, that plaintiffs cannot meet the numerosity requirement, that the questions of law or fact common to the class do not predominate individual questions of law or fact, and that a class action is not the superior method of prosecuting this action.

Defendants do not dispute plaintiffs' claims that as of 2003 there were approximately 9200 mobile food vendors, a significant number of them believed to be selling hot dogs. However, it is unclear 1) the exact number of mobile food vendors selling boiled hot dogs, and 2) of those vendors, how many are using the "single bin method" of preparing those boiled hot dogs. Plaintiffs submit, however, that since the single bin method has been the standard method in the past, the majority of vendors selling boiled hot dogs are using - or were using, prior to defendants' allegedly new policy being implemented - the single bin method. Defendants

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<sup>1</sup> Defendants' only argument in this regard is actually opposition to plaintiffs' description of the class, which the Court addresses separately below.

provide no data regarding how many vendors sell hot dogs or even how many NOV's have been issued for using the single bin method.

“There is no ‘mechanical test’ to determine whether the first requirement - numerosity - has been met, nor is there a set rule for the number of prospective class members which must exist before a class is certified.” (*Gawez v Inter-Connection Electric, Inc.*, 2005 NY Slip Op 51443U [Sup Ct, Kings Cty. 2005], *aff'd in part*, 2007 NY App Div LEXIS 11250 [2<sup>nd</sup> Dept, Oct 23, 2007] [internal citations omitted]). Where precise numbers are unavailable, the Court must “consider the reasonable inferences and common sense assumptions from the facts before it.” (*Id.*) Classes as few as 40 members have been deemed appropriate to certify, and courts may consider other factors such as the amount of damages each proposed plaintiff can claim as damages, when exercising its discretion. (*See 3-9 New York Civil Practice: CPLR P 901.22* [Weinstein, Korn & Miller 2008]).

Although the exact number of potential plaintiffs cannot be determined at this time, plaintiffs have provided ample evidence to show that the number will likely be in the hundreds, if not thousands. Further, the amount of damages each member of the class can claim is likely to be minimal, which could discourage many plaintiffs from commencing individual actions to seek recompense. Accordingly, the Court finds that the plaintiffs have satisfied the numerosity requirement of § 901(a)(1).

Defendants also contend that the questions of law or fact common to all potential class members do not predominate over questions affecting individual class members' claims. Specifically, defendants point out that there will be differing amounts of damages for some members. However, defendants fail to articulate how proving individual damages - which would

be based, ostensibly, on fines imposed by them and well documented through NOV's and/or hearing determinations - would so predominate over the more substantive legal and factual issues common to all proposed class members, that it renders class certification unwise. Nor does defendant cite to any case in which different damages defeats plaintiffs' application for class status where, as here, the factual and legal issues are virtually identical to all plaintiffs. Likewise, defendants' argument that, even if the Court found in favor of the plaintiffs, it would still have to be determined that each member of the proposed class did, in fact, fully comply with § 81-07(a), is unavailing. Plaintiffs are not challenging individual administrative determinations, such as would be found in an Article 78 proceeding; rather, plaintiffs are challenging the legality of the statutory scheme itself, as applied to this class of proposed plaintiffs. Although defendants' papers are not entirely clear, it seems to the Court they are arguing that some of the proposed class members may not have complied with § 81-07(a) in some way *other than* using the single bin method. Defendants, however, have presented no evidence that any such proposed plaintiffs exist - information that would be within their control - nor have they shown the Court how this possible issue of fact would so predominate over those common issues of law and fact that a class action would be a poor method for adjudication in this action.

Defendants also claim that a class action is not the superior method for the fair and efficient adjudication of this controversy. Specifically, defendants contend that a class action is inappropriate where the action challenges governmental operations, known as the "governmental operations rule." This general rule of law is based on the theory that any judgment favorable to plaintiffs would be binding on the government entity by virtue of the doctrine of *stare decisis*, thus providing adequate protection to both present and future members of the proposed class, and

therefore a class action may be unnecessarily burdensome to the government entity. (*Tindell v Koch*, 164 AD2d 689 [1<sup>st</sup> Dept 1991]; *see also Ammon v Suffolk County*, 67 AD2d 959 [2d Dept 1979]).

However, “[t]he governmental operations rule is no bar to class certification.” (*New York City Coalition to End Lead Poisoning v Giuliani*, 245 AD2d 49 [1<sup>st</sup> Dept 1997]). Several exceptions to the rule have been recognized in granting class status even where governmental operations have been involved, including where the government entity has repeatedly failed to comply with court orders (*Matter of Lamboy v Gross*, 126 AD2d 265 [1<sup>st</sup> Dept 1987 ]), where the entity has failed to propose any form of relief that purports to protect the plaintiffs (*Seitelman v Sabol*, 217 AD2d 523 [1<sup>st</sup> Dept 1995 ]), where the plaintiffs’ ability to commence individual suits is compromised, due to indigency or otherwise (*Tindell v Koch*, 164 AD2d 698 [1<sup>st</sup> Dept 1991]), where the condition sought to be remedied by the plaintiffs poses an immediate threat that cannot await individual determinations (*Matter of Lamboy v Gross*, 126 AD2d 265 [1<sup>st</sup> Dept 1987 ]), or where the purported class consists of a large number of identifiable individuals seeking monetary damages (*Beekman v City of New York*, 65 AD2d 317 [1<sup>st</sup> Dept 1979]). “Class certification does not cease to be a matter within the Court’s discretion simply because governmental operations are at issue, though it should be used cautiously in such cases.” (*Ousmane v City of New York*, 2005 NY Slip Op 50634U [Sup Ct New York Cty, Apr. 13, 2005], *appeal withdrawn*, 820 NYS2d 803 [1<sup>st</sup> Dept, Sept. 21, 2006]).

The Court is persuaded by the reasoning of Justice Edmead in *Ousmane v City of New York* (*id.*), who granted class status to street vendors of both food and merchandise, in their action challenging the City of New York’s increased penalty schedule for violations of laws and

rules regulating the street vendors' work. There, despite the governmental operations rule, the court found that a class action was the superior method of adjudicating the action because it would have been "impracticable and inefficient for each individual in the proposed class . . . to institute litigation in order to obtain reimbursement." (*Ousmane v City of New York*, *id.* at \*11). Further, *stare decisis* was found to be insufficient to protect all the allegedly injured vendors because without class status, "[any] directives concerning entitlement to reimbursement will only apply to the individual named street vendors." (*Id.*). Judge Edmead relied on *Beekman v City of New York* (65AD2d 317 [1<sup>st</sup> Dept 1979]), which exempts from the governmental operations rule those actions seeking monetary damages, with a large, readily defensible class of plaintiffs, and virtually identical questions of law and fact for each class member. Finally, the court explained that "[t]he class action is a tool which, among other benefits, allows individuals who would otherwise be without the resources to do so, to seek justice," and declined to "burden this largely disadvantaged and disenfranchised sector of society" with seeking such justice individually in a large and complex bureaucracy. (*Ousmane v City of New York*, 2005 NY Slip Op 50634U, \* 13). Although defendants argue that plaintiffs are "presumably all successful vendors operating in the New York metropolitan area," and contrasts them with poor and indigent plaintiffs in other cases, plaintiffs have submitted documents showing that in 2006, on average, a mobile vendor makes approximately \$14,000 per year, whether "successful" or not.

Each of the factors present in *Ousmane* are also present here. Defendants object to the application of the *Ousmane* factors here, pointing out that in *Ousmane*, the rule change increasing the penalties leveled in NOVs was in writing and could be documented; here, the defendants point out, there is no written rule change, only plaintiffs' allegation that interpretation

and enforcement of § 81-07(a) has changed. However, on this motion seeking class certification, the Court is not concerned with the merits of plaintiffs' case. Whether there was or was not, in fact, a rule change subject to the provision of CAPA or impacting on plaintiffs' due process rights is not before the Court and, therefore, defendants' objection has no bearing on the issues presented on this motion.

Finally, defendants strenuously object to the manner in which plaintiffs have fashioned the proposed class. Specifically, defendants point out that plaintiffs' description would include hot dog vendors who use the double bin method of preparation as well as those using the single bin method. In their reply papers, plaintiffs concede that its original characterization of the class was too broad, and has no objection to a more narrow tailoring of the class.


Accordingly, it is

ORDERED that plaintiffs' motion for an order permitting this action against defendants to proceed as a class action pursuant to CPLR Article 9, is granted so as to include those mobile food cart vendors licensed by the City of New York, who have been issued a Notice of Violation for preparing and/or selling boiled hot dogs or frankfurters kept in a bin of water also containing condiment trays, and those mobile food cart vendors whose food carts failed to pass inspection because they were equipped with only one tray for water, rather than two or more.

The foregoing constitutes the decision and order of this court.

Dated: August 27, 2008  
New York, New York

ENTER:

  
Hon. Karen S. Smith, J.S.C.

**FILED**

AUG 29 2008

COUNTY CLERK'S OFFICE  
NEW YORK