

**177 Christie, Inc. v Environmental Control Bd. of the
City of N.Y.**

2010 NY Slip Op 30009(U)

January 5, 2010

Supreme Court, New York County

Docket Number: 109536/08

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON Justice

PART 55

177 Christie & Nine Stores

Environmental Control Board of City of N.Y.

INDEX NO. 109536/08
MOTION DATE 8/31/09
MOTION SEC. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to 10 were read on this motion to/for Act 78 relief

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Noticed x-motion +
Answering Affidavits — Exhibits _____
Replying Affidavits _____

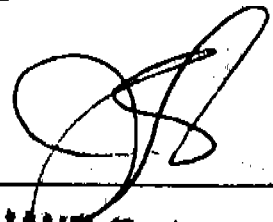
PAPERS NUMBERED	
1-3	_____
4-9	_____
10	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that ~~this motion~~ the cross-motion having been decided by order of Justice A. Abdus-Salam dated 12/15/08, the petition is decided in accordance with the memorandum decision, order and judgment annexed hereto.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1418).

Dated: 1/5/10



J.S.C.

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: PART 55

----- X

177 CHRISTIE, INC., on behalf of itself, and all others
similarly situated and NINE STORIES CORP.,

Index No. 109536/08

Petitioners,

DECISION, ORDER and
JUDGMENT

- against -

ENVIRONMENTAL CONTROL BOARD of the
CITY of NEW YORK, and John Does 1 through 20

UNFILED JUDGMENT

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obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).~~

JANE S. SOLOMON, J.:

Petitioners 177 Christie, Inc. (177 Christie) and Nine Stories Corp. (Nine Stories)

seek an order (1) setting aside the decision of an administrative judge and respondent, the Environmental Control Board of the City of New York (ECB), affecting petitioners, and ordering that the fines that the petitioners previously paid be returned with statutory interest, (2) issuing an injunction enjoining ECB and its summons issuing agency, the Department of Environmental Protection (DEP), from issuing any summons alleging violations of Administrative Code of the City of New York (Administrative Code) §§ 24-220 (b) or 24-244 (b)¹ to the class of New York State businesses that legally provide food and drink, and (3) awarding petitioners their reasonable attorney's fees.²

¹ The papers refer to § 24-220 (b), which was in effect at the time that the summonses were issued. Section 24-244 (b), which is substantially the same, replaced § 24-220 (b), effective July 1, 2007.

² Previously, ECB sought dismissal of the petition on the ground that the proceeding was time-barred. That motion was denied by decision dated December 15, 2008 (Abdus-Salaam, J.).

ECB opposes the petition on the grounds that (1) the class that petitioners purport to represent will be adequately protected by the doctrine of stare decisis, (2) petitioners fail to satisfy the requirements of CPLR Article 9 for class certification, (3) the proposed class should be modified to exclude those individuals whose claims would otherwise be time-barred or not ripe for judicial review, (4) the court should transfer this proceeding to the Appellate Division for review of substantial evidence, (5) the ECB determinations are rational and not arbitrary, capricious or an abuse of discretion, (6) the NOV's are facially sufficient, (7) Administrative Code § 24-220 (b) is constitutional, (8) the penalty imposed by ECB is not excessive, and (9) petitioners are not entitled to injunctive relief.

Background

At the relevant time period, petitioner 177 Christie operated a restaurant named "Esperanto," located at 145 Avenue C, New York, New York. Petitioner Nine Stories operated a restaurant named "Louis," located at 649 East 9th Street, New York, New York.

On May 1, 2002, petitioners each were issued a Notice of Violation (NOV) alleging that it had violated Administrative Code § 24-220 (b), which purports, among other things, to prohibit noise emanating from commercial establishments. The summonses were issued by the same ECB officers on virtually identical facts. Both cases were heard by the same Administrative Law Judge (ALJ) who sustained the charges. Administrative Code § 24-220 (b) provides:

"(b) No person shall operate or use or cause to be operated or used any sound reproduction device for commercial or business advertising purposes or for the purpose of attracting attention to any performance, show, or sale or display of merchandise, in connection with any commercial or business enterprise including those engaged in the sale of radios, television sets, phonographs, tape recorders, phonograph records or

government witnesses.

The petition seeks class action status, and it designates 177 Christie as the representative of a class of operators of establishments in that serve food and drink and which routinely receive summonses from respondents and their agents for violations of Administrative Code § 24-220 (b).

Discussion

The standard of review for an Article 78 proceeding is whether the agency determination was arbitrary or capricious or affected by an error of law (*Matter of Colton v Berman*, 21 NY2d 322 [1967]). The court's function, essentially, is to determine rationality (*Matter of Pell v Board of Educ. of Union Free School Dist. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 [1974]). Petitioners have not shown that the agency's determination was arbitrary or capricious or affected by an error of law.

The Administrative Code section has five requirements for a violation: (1) the sound must emanate from a reproduction device, (2) it must be for commercial or business advertising purposes, (3) the sound must be in connection with a commercial or business enterprise, (4) the sound reproduction device must be in front or outside of a building or in or through any aperture of such building, and (5) the sound must be heard on any public street (*Matter of GH Ville v New York City Envtl. Control Bd.*, 194 Misc 2d 503 [Sup. Ct. NY County 2002]). As discussed below, the record establishes that ECB's determination that all of the elements of this statute were met was rational, and the process afforded petitioners to dispute the charge was fair.

The NOV that DEP issued to 177 Christie adequately informed it of the charge

against it., stating that the owner of the premises used or caused to be used a sound reproduction device for commercial purposes so that the sound could be heard on a public street. It also identified the source of the "sound reproduction device" (live band, guitar, accordion, drums, and two speakers). Similarly, the NOV issued to Nine Stories stated that the owner used or caused to be used a sound reproduction device for commercial purposes so that the sound could be heard on a public street. It also identified the source of the "sound reproduction device" (bass guitar, drum set, and piano).

At each of the two hearings, the ALJ found that the summons was properly issued, because it met all five requirements. In the ALJ's "Decision and Order" regarding 177 Christie, the ALJ stated that the instruments that the inspector identified in his testimony at the hearing and in his written report qualified as a sound reproduction device, and that, based on the testimony of a representative of 177 Christie, the music was used in connection with a commercial purpose. The "Decision and Order" pertaining to Nine Stories is substantially the same.

The ALJ's determinations were affirmed on appeal within ECB by decisions dated February 28, 2008. The ECB appeals board determined that, although the statute has no presumption that music emanating from a commercial premises is being played for a commercial purpose, based on the administrative record, the agency "established facts from which the Board draws the reasonable inference that the music was projected onto the street for a commercial or business advertising purpose."

In Matter of GH Ville v New York City Env'tl. Control Bd. (194 Misc 2d 503, *supra*), which has similar facts, an inspector had issued a summons to a restaurant because he

[* 6]

could hear music emanating from the restaurant while standing outside on the sidewalk. The court granted the Article 78 petition, vacated the determination of the ECB appeals board, set aside the ALJ's ruling, and ordered the return of the \$700 penalty, because it found that ECB's determination was not supported by adequate proof, and, therefore, the agency's decision was arbitrary and capricious. The court's decision was based in part on the testimony of the inspector that the door to the restaurant was closed when he heard the music, and there was no testimony of any open doors, windows or other apertures. Moreover, the owner of the restaurant testified that, at the time in question, a birthday party was taking place, and the purpose for the music was for the enjoyment of the patrons, and not to attract customers. The court determined, therefore, that the music was not of a commercial nature, and neither the ALJ nor the ECB appeals board determined that there was a device "in front of or outside of any building" or that it was heard "in or through any aperture of such building."

Here, in contrast, the inspector testified that he heard loud music emanating from the premises through an open door while 15-30 feet away, and saw people dancing on the sidewalk. Although, at the hearing, 177 Christie's representative testified that he was advised by the restaurant's manager that the door was closed on the night of the offense, the ALJ and the ECB appeals board credited the contrary testimony of the inspector. It is the agency's function to make credibility findings and to draw reasonable inferences (*Matter of 25-24 Café Concerto Ltd. v New York State Liq. Auth.*, 65 AD3d 260, 271 [1st Dept 2009]), and the court will not substitute its credibility determinations (assuming that they differed) for those of the agency (*Matter of Rodriguez-Rivera v Kelly*, 2 NY3d 776, rearg denied 3 NY3d 656 [2004]).

As for Nine Stories, ECB determined that the musical instruments came within

the ambit of the statute because Administrative Code § 24-203 (54) defines "sound reproduction device" as "a device intended primarily for the production or reproduction of sound, including but not limited to any musical instrument" The construction given to statutes by the agency must be upheld unless unreasonable (*Matter of Johnson v Joy*, 48 NY2d 689 [1979]; *Matter of 902 Assoc. v New York City Loft Bd.*, 229 AD2d 351, 352 [1st Dept 1996]). Here, the construction of the statute is reasonable, because the purpose of the regulation is to regulate sound itself, rather than the means of producing the sound.

Contrary to petitioners' assertion, the statute at issue is not unconstitutional. That music is deemed speech does not mean that a municipality may not restrict the manner in which it is disseminated.

Music is a form of speech that is subject to First Amendment protection (*Ward v Rock Against Racism*, 491 US 781, 790, *reh denied* 492 US 937 [1989]), but is also subject to reasonable regulation (*see Kovacs v Cooper*, 336 US 77, 86-89, *reh denied* 336 US 921 [1949], cited by *Members of City Council of City of Los Angeles v Taxpayers for Vincent*, 466 US 789, 806 [1984]). The regulation here is reasonable, because it does not prevent restaurants from providing music to their patrons for their enjoyment. In so doing, however, the restaurant must take steps to ensure that the music "stays" within the restaurant. The State is given more latitude in restricting the time, place, and manner of speech than it is given when it attempts to restrict content (*City of New York v American School Publs.*, 119 AD2d 13 [1st Dept 1986], *affd* 69 NY2d 576 [1987]), which it is not doing here. The State's time, place, and manner restrictions are valid if reasonable, and rationally related to legitimate State interests (*id.* at 17-18). Aside from the commercial or business purpose distinction, Administrative Code §§ 24-220 (b) and

244 (b) do not discriminate based on content, and they were designed to further a legitimate interest (*cf. Morris v 702 E. Fifth St. HDFC*, 8 AD3d 27 [1st Dept 2004] [the preliminary injunction that restricted any performance of live music to string instruments and piano deprived the musicians of their right to freedom of expression as well as economic opportunities without furthering a legitimate state interest]). Obviously, if the inspector testified that he was standing on the street, and could only hear the music when someone entered or left the restaurant, then, the issuance of a summons would be problematic. Such is not the case here.

Since the ECB's final determination is upheld as against 177 Christie, it is not an appropriate representative of a class under CPLR Article 9. Determinations as to whether particular violations were reasonably and lawfully issued are better made on a case by case basis, as illustrated by this decision and that in *Matter of GH Ville* (194 Misc 2d 503, and *see* CPLR 901[2]). Moreover, the petition does not adequately describe a proposed class.

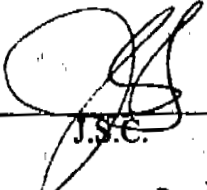
Accordingly, it is

ORDERED and ADJUDGED that the amended petition is denied, and the proceeding is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: January 5, 2010

ENTER:


J.S.C.

JANE S. SOLOMON

UNFILED JUDGMENT

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