

Dua v New York City Dept. of Parks & Recreation

2010 NY Slip Op 33666(U)

December 8, 2010

Sup Ct, New York County

Docket Number: 110344/2010

Judge: Milton A. Tingling

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

PRESENT: HON. MILTON A. TINGLING
J.S.C.

PART 44

Dua

INDEX NO. 110344/10

MOTION DATE 8/30/10

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

- v -

NYC

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance
with annexed decision.

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

FILED

DEC 15 2010

NEW YORK
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Dated: 12/8/10

met

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

HON. MILTON A. TINGLING
J.S.C.

Index No.: 110344/2010

Diane I. Dua, Joel Kaye, Bryan Close, Tenzin Wangdu,
Jack Diamond, Bayo Iribhogbe, Robyn Wohl, George
Moran and Artists United,

Plaintiffs,

Decision & Order

vs.

New York City Department of Parks and Recreation
(as a Municipal agency); Adrien Benepe (in his Official
Capacity as the Parks Commissioner); City of New York
(as a municipality); and Honorable Michael Bloomberg
(in his Official Capacity as the Mayor),

Defendants.

FILED
DEC 15 2010
NEW YORK
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-----X
The Plaintiffs move by order to show cause for a temporary restraining order and preliminary injunction denying enforcement by the defendants of the provisions of the Revision of §§ 1-02 and 1-05(b) of Title 56 of the Official Compilation of the Rules of The City of New York.

The defendants cross-move to vacate the temporary restraining order issued by this Court on August 2, 2010.

The temporary restraining order was granted by the Honorable Martin Schoenfeld and continued by this Court pending hearing and decision.

The issue presented to the Court is whether the Revised Rules of the New York City Parks Department ("Parks Dept."), §§ 1-02 ("Definition") and 1-05 (b) ("Unlawful Vending") of Title 56 of the Official Compilation of the Rules of the City of New York ("Revised Rules") violate the plaintiffs' rights under New York State law and New York City ordinance and if plaintiffs are entitled to an injunction prohibiting their enforcement.

As revised, Title 56 § 102 of the Rules of the City of New York defines “expressive matter” as materials or objects with expressive content such as newspapers, books, writings or visual art such as paintings, prints, photography or sculpture.

As revised, § 1-05 (b) in pertinent reads:

“1. No person in or on any property under the jurisdiction of the Department shall sell, offer for sale; hire, lease or let anything whatsoever, or provide or offer to provide services or items in exchange for a donation (hereinafter “vend”) except under and within the terms of a permit or except as otherwise provided by law. For the purposes of this entire section, persons who vend as defined herein may be referred to as “vendor” or “vendors.”

2. Persons may vend expressive matter, as defined in section 1-02 of this title, on property under jurisdiction of the Department without a permit; but must comply with all applicable provisions of these rules. However, in the specific locations enumerated in paragraph (3) expressive matter vendors may only vend expressive matter at the specifically designated spots identified by the Commissioner’s in the accompanying maps and as marked by a Department decal, medallion, or other forms of marking, on the specific location of the approved vending spot, unless they are only vending expressive matter without using a cart, display stand or other device and without occupancy a specific location for longer than necessary to conduct a transaction and are otherwise in compliance with Department rules. These spots shall be alleviated upon a first come first serve basis except as otherwise provided by and any expressive matter centered directly behind the Department decal, medallion, or other form of marking. Only one expressive matter vendor is authorized to vend directly behind the Department decal, medallion, or other form of marking and if multiple expressive matter vendors attempt to vend expressive matter at any one Department decal, medallion, or other form of marking and if it cannot be determined which expressive matter vendor arrived first, then all such expressive matter vendors at such spot will be in violation of this section and may be directed to leave the area of that Department decal, medallion, or other marking immediately.

Any such expressive matter vendor failing to leave the area of the Department, decal, medallion as form of marking immediately upon direction as required under the preceding sentence will be in violation of these rules. Expressive matter vendors can only occupy the designated spots for the purpose of vending expressive matter and only during posted times, which will be consistent with the hours of operation for the park where such designated are located in or adjacent to. The designated spots may deviate from the restrictions in subsection 5(I), (iv), (v), or (vi), if such spots are determined to be appropriate by the Commissioner’s given the specific features of the park.

3. Expressive matter vendors may not vend in the following general areas unless they vend at the specifically designated spots for such vending on the accompanying map and in compliance with all other applicable Department rules.

1. Central Park at the following locations:

- (A) the perimeter of the park between East 85th Street and East 60th Street, including all sidewalks and plazas (B) the perimeter of the park between West 86th Street and West 60th Street, including all sidewalks and plazas (C) all of Central Park South, including all sidewalks and plazas (D) Wien Walk and Wallach Walk, (E) pedestrian pathways parallel to East Drive between Grand Army Plaza and the Center Drive, (F) Grand Army Plaza, (G) Pulitzer Plaza and (H) Columbus Circle.
- ii. Battery Park, including all perimeter sidewalks
 - iii. Union Square Park, including all perimeter sidewalks
 - iv. Elevated portions of High Line Park

Translated, it means under the Revised Rules, there are 100 designated spots among the four Restricted Parks on a daily basis.

There are 68 designated spots in Central Park [including the Metropolitan Museum of Art ("The Met"), Grand Army Plaza, Central Park South, Columbus Circle and Central Park West]; 18 designated spots for Union Square Park; 9 for Battery Park; and 5 for the High Line. Eighty-two (82) of the designated spots are located in plazas, or sidewalks adjacent to the Restricted Parks. Designated Spots may not be shared. The occupying expressive matter vendors of such designated spots are determined on a first come first served basis."

A request for a preliminary injunction subjects itself to a three prong test; (1) a likelihood of success on the merits; (2) the prospect of irreparable injury; and (3) a balance of equities weighing in the movant's favor. Doe v Axelrod 73NY2d748.

This decision must note the fact that contemporaneous with the filing of this complaint the several plaintiffs herein pursued preliminary injunctive relief to stop enforcement of the Revised Rules in Federal Court. Dua et al v New York City Department of Parks and Recreation, et al., Docket No. 10, 5185 (RJS). On July 16, 2010, the Federal Court denied plaintiffs' motion to enjoin the Revised Rules from taking effect on July 19, 2010, by Memorandum and Order of United States District Judge Richard J. Sullivan. The Court notes that the Federal proceeding was brought solely on alleged infringements of the Constitution of the United States. This proceeding is brought pursuant to an alleged infringement of rights under Article I, § 8 of the Constitution of the State of New York.

Plaintiffs argue that rights afforded to parties thereunder are stronger than those engaged under the Federal Constitution. "The courts of this State have emphasized that the Federal Constitution fixes only minimum standards and that "matters of free expression in books, movies and the arts are particularly suited to resolution as a matter of State common law and State Constitutional law" ". . . the Federal Constitution only guarantees minimum protections, leaving to the States the task of affording additional or greater rights under their Constitutions tailored to the special needs and traditions of the various States. People v Adams 53NY2d241; 250. "There is probably no area in which State attitudes are more diverse, and thus where independent State constitutional rights serve their intended purposes, than in the area dealing with freedom of expression. Miller v California; 413 U. S. 15; Matter of Beach v Shanley, 62 NY2d, 241, 255.

The defendants oppose the motion for a preliminary injunction and cross move to vacate the temporary restraining order on several grounds. They argue the plaintiffs are not entitled to any greater protection in this instance than they are under the Federal Constitution and for the reasons articulated in the federal case the motion for a preliminary injunction should likewise fail.

Plaintiffs also raise additional claims which are (1) the first come first serve method of allocation of space is unconstitutionally vague; (2) the designated vending spots are licenses, permits or other prior authorizations prohibited by New York City Administrative Code Section 20-473; and (3) the Revised Rules violate State and City Human Rights Laws.

It is uncontested that for City parks, vending is generally prohibited without a permit. 56 RCNY § 1-05(b). [City parks also include the side walks that adjoin parkland. City Charter § 533(a) (5).] Artists and other expressive matter vendors have been and continue

to be exempt from this prohibition. New York City Administrative Code § 20-473.

They are subject to restrictions governing size and placement of vending tables. NYC Adm. Code §§ 20-465 (A-F) (K-Q) and § 473.

Plaintiffs also allege the Revised Rules violate the equal protection clause under Article 1 § 11 of the New York State Constitution. Contrary to Plaintiffs' assertion that the Revised Rules divide expressive vendors into two classes (those who obtain Designated spots and those who don't) this Court finds that the Revised Rules do not divide expressive matters vendors into two classes because ALL expressive matter vendors are similarly situated and treated alike under the Revised Rules. When no suspect classification is found then no critical examination of state interest must be had. Zablarkj v. Redhall, 434 U.S. 374, 383 (1978).

Legislative acts that do not interfere with fundamental rights or single out suspect classifications carry with them a strong presumption of constitutionality and must be upheld if "rationally related to a legitimate state interest." Beatie vs City of New York 123 F3d 707 quoting City of Cleburne vs Cleburne City Center, 473 US 432. The City avers that the standard of review should be whether or not there is a rational relativity between the regulatory scheme and a legitimate legislative purpose. Keller v Doe 509 US 312.

There is no question that the Revised Rules themselves are content neutral. "Regulations which do not discriminate among speakers or ideas are content-neutral." Bery vs City of New York 97 F3d 697. The Revised Rules, although addressed to expressive matter vendors, are part of a more comprehensive regulating scheme which governs time, place and manner rules for all vendors under the Parks Department jurisdiction.

Content neutral regulation may limit time, place and manner of expression ... so long as the restrictions are narrowly tailored to serve a governmental interest and leave open

alternative channels for communication of the information. Mastrovincenzo v City of New York 435 F 3d 78.

The City alleges that the Revised Rules are in response to congestion, addressing aesthetic concerns and maintaining the integrity of the overall designs of the park while insuring that the parks are available for a wide range of activities. In support they set forth the testimony of Parks Department Assistant Commissioner Jack Linn asserting same.

The City's allegations concerning congestion, aesthetic concerns and maintenance of the integrity of the parks appear somewhat specious in that the testimony of Parks Dept. Assistant Commissioner Linn appear to be more personal observation than documented recordings or studies. However; it has already been ruled that the City has a significant interest in keeping its public spaces safe and free of congestion (Bery, supra) as well as preserving and promoting the scenic beauty of its parks and providing sufficient areas for recreational uses. Lederman v. Guliani, 98 Civ. Ct. 2024, 1998 WL 186753; Ward v. Rock Against Racism, 491 US 781. Therefore, to put it simply, in order to uphold this legislation, this court need only find some "reasonably conceivable state of facts that could provide a rational basis for the legislative action." Heller, supra at 320.

While Plaintiffs claim that the Revised Rules are merely pretextual, there is insufficient evidence adduced at this time to confirm or deny said allegation. While more evidence may eventually be produced, the City at this time has set forth a rational relationship between the regulatory scheme and a legitimate legislative purpose to forego the basis of a preliminary injunction.

In a review of the record, there is no dispute that selling expressive matter material is entitled to First Amendment Protection and that infringement of same constitutes irreparable injury. However, as detailed, the expressive matter vendors are not a suspect class, and the Revised Rules are found to be a reasonable content-neutral restriction on time, place and manner that

are narrowly tailored to support a rational basis for the Legislative action.

The next argument addressed by Plaintiffs is that under due process jurisprudence, local laws and regulations must be of sufficient clarity to give people a reasonable opportunity to know what is prohibited so that same are free to steer between lawful and unlawful conduct. Grayned v. City of Rockford, 408 U. S. 10U. Plaintiffs allege the language of the Revised Rules are vague. The aforementioned call for a First come, First serve method of space allocation.

“There are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the [challenged] prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.” Broderick v. Oklahoma, 413 US 601 quoting Civil Svc Comm. v. National Association of Letter Carriers, 413 U.S. 548.

First come, First serve is simple and means, by the City’s own interpretation, that the first person to be physically present in a designated spot is entitled to occupy said spot. The simplicity of the First Come, First Serve system is apparent and it is easily understood by the ordinary person of ordinary intelligence. It is said that a one eyed man is king in the land of the blind. Certainly the Revised Rules may make the two-eyed two-legged tri-athlete king or queen of certain allotted spots under the Revised Rules, but that does not render same vague. The remaining arguments in support of finding the Revised Rules to be vague are considered and found to be unpersuasive and unavailing.

The plaintiffs further assert that the Revised Rules violate New York City statutes, specifically Local Law 33. (Local laws 1982, No. 33 of the City of New York §1.) Plaintiffs cite to the case People v. Balmulk, 178 Misc.2d 958 (N.Y. Crim.Ct. 1998, aff’d 189 Misc.2d 243 (App. Term. 1st dept., lv denied 97 N.Y.2d 678 (2001) which states “that general vendors who **exclusively vend**

written matter with the aid of small portable stands should be exempted from restrictions of the time place and manner of their vending activity insofar as such exemption does not constitute a threat to the public health safety or welfare.” (Local law 1982, No. 33, supra.) That case is distinguishable from the case at bar in that the aforementioned dealt with licenses or permits to vendors, something not present herein. No license or permit is required under the Revised Rules to vend expressive materials nor are the Plaintiffs general vendors who **exclusively vend written material**. Accordingly the plaintiffs’ arguments concerning the Revised Rules’ alleged violation of the City’s local laws are rejected.

Finally, the plaintiffs allege the revised Rules are violative of New York State Human Rights Laws [N.Y. Exec. L. §296(2)] and City of New York Human Rights Laws [Administrative Code of the City of New York §§ 8-107(4) and 8-107(9)]. Plaintiffs set forth the affidavits of Dua, Exhibit A, B, pp. 3-7; Diamond pp.5,6 &10; Wangdu, pp. 3-7; Iribhogbe pp. 3-6; Wohl pp. 3-5; and Moran pp. 3-4 to evidence discriminatory effect of the Revised Rules due to gender, age or disability.

The City states the aforementioned affiants have had limited problems, but more urgently argue that any right to sell expressive matter under the Art. 1 § 8 of the New York State Constitution is not a public accommodation within the meaning of the State and City Human Rights Law. Even were the court were to determine that it is a public accommodation, the record has not been sufficiently developed for this court to rule the plaintiff enjoys a likelihood of success on the merits justifying the continuation of the preliminary injunction.


In conclusion the court holds that the plaintiffs do not enjoy a likelihood of success on the merits or a balance of the equities in their favor at this time. Accordingly there is no justification for the continuation of a preliminary injunction in this matter.

Therefore, the plaintiffs’ order to show cause for a temporary restraining order and

preliminary injunction denying enforcement by the defendants of the provisions of the Revision of §§ 1-02 and 1-05(b) of Title 56 of the Official Compilation of the Rules of The City of New York is hereby denied. The defendants' cross-motion to vacate the temporary restraining order issued by this Court on August 2, 2010 is granted.

The parties are to appear for a conference in this matter on February 7, 2011.

DATED: December 8, 2010



HON. MILTON A. TINGLING
JSC

FILED

DEC 15 2010

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