

New York Skyline, Inc. v City of New York

2011 NY Slip Op 32548(U)

September 20, 2011

Supreme Court, New York County

Docket Number: 106840/11

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS
Justice

PART 58

NEW YORK SKYLINE, INC.

Plaintiff,

-v-

CITY OF NEW YORK, et al.,

Defendant.

INDEX No. 106840/11

MOTION DATE _____

MOTION SEQ. No. 001

MOTION CAL No. _____

The following papers, numbered 1 to _____ were read on this motion for _____.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits... 1-9

Answering Affidavits- Exhibits 10-12

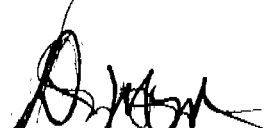
Replying Affidavits 13-14

CROSS-MOTION: YES NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 9/20/11



J.S.C.

DONNA M. MILLS, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

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 141B).

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

-----X

In the Matter of the Application of,
NEW YORK SKYLINE, INC., and CALAIF
PARKS,

Petitioners,

For Judgment Pursuant to CPLR Article 78

- against -

Index No. 106840/2011

CITY OF NEW YORK; MICHAEL R.
BLOOMBERG, in his Official Capacity as Mayor
of the City of New York; NEW YORK CITY
POLICE DEPARTMENT; RAYMOND W.
KELLY, in his Official Capacity as Commissioner
of the New York City Police Department; NEW
YORK CITY ENVIRONMENTAL CONTROL
BOARD; and MEREDITH A. FEINMAN, in her
Official Capacity as Executive Director of the New
York City Environmental Control Board,

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
141B).

Respondents.

-----X

DONNA MILLS, J.:

The petitioners New York Skyline, Inc. (Skyline) and Calaiif Parks (Parks) bring this Article 78 proceeding for a judgment pursuant to CPLR 6001, 6301-13, 7801-06, and 42 USC 55 1983 & 1988: (1) declaring that the determination of the City of New York (the City) and the New York City Police Department (Police Department) that a person engaged on the street in the sale of Skyride admission tickets is a "general vendor" and requires a "general vendor" license was made in violation of lawful procedure, was affected by errors of law, was arbitrary and capricious, and/or was an abuse of discretion; (2) declaring that sales and offers to sell admission tickets on the streets of New York City associated with Skyline's business model do not meet the definition of a "general vendor" under § 20-452 of the Administrative Code; (3) declaring that petitioners and their ticket agents do not require a "general vendor" license under § 20-453 of the Administrative Code to engage in sales and

offers to sell admission tickets on the streets of New York City; (4) declaring that the determination of the City of New York and the Police Department resulted from the improper influence of a private party; (5) annulling and vacating the City and the Police Department's determination; (6) declaring that the City and the Police Department's application of §§ 20-452 and 20-453 of the Administrative Code to petitioners violated their rights under the First and Fourteenth Amendments to the U.S. Constitution; (7) declaring that the City and the Police Department's application of §§ 20-452 and 20-453 of the Administrative Code to petitioners violated their rights under Article I, Section 8 of the New York State Constitution; (8) granting and issuing a temporary restraining order and preliminary injunction ordering the City and the Police Department to refrain from any enforcement actions, including arresting Skyline ticket agents, issuing criminal or civil summonses or notices of violation, or otherwise prosecuting violations of § 20-453 against Skyline and any of its ticket agents during the pendency of this action; (9) granting and issuing a temporary restraining order and preliminary injunction ordering the City and the Police Department either to obtain a stay of the proceedings currently pending against Skyline ticket agents before Respondent Environmental Control Board (ECB) and the Criminal Courts of the City of New York, respectively, or to dismiss the proceedings; (10) granting and issuing a temporary restraining order and preliminary injunction ordering ECB to refrain from holding any further proceedings relating to the currently pending notices of violation issued to Skyline ticket agents; (11) ordering the return of petitioners' property confiscated by respondents in connection with the application of §§ 20-452 and 20-453 to the Skyline petitioners and Skyline's other ticket agents; (12) awarding petitioners damages and attorneys' fees under 42 USC §§ 1983 and 1988; and (13) awarding petitioners their costs, fees and disbursements incurred in connection with these proceedings.

Since 1994, the petitioner Skyline has been a tenant in the Empire State building, operating an amusement ride, consisting of a virtual helicopter tour of New York City. The petitioner Parks is one

of many individuals working on the sidewalk, as ticket sellers for Skyline. The ticket sellers are promoters who roam a several-block radius in the vicinity of the Empire State Building. The petitioner Skyline alleges that the respondent Police Department, at the behest of Skyline's landlord, is improperly ticketing and arresting Skyline's ticket sellers for being unlicensed. The waiting list for licenses is currently closed.

In support, the petitioners make the following arguments. The Police Department's determination that Skyline's activity violates Administrative Code § 20-453 is arbitrary, capricious, and affected by errors of law inasmuch as Skyline is not a "general vendor." A ticket to an entertainment event is a license and the general vending statute never applied to the sale of tickets. The Police Department's application of Administrative Code § 20-453 to Skyline's activity is an impermissible restriction of Skyline's Constitutional rights to free expression. The amusement ride tickets do not fit the statutory language of "goods or services." Finally, the Police Department's acquiescence to the improper influence of Skyline's landlord is an abuse of its own discretionary decision-making and enforcement authority.

In opposition, the respondents argue that: Skyline's ticket vendors are "general vendors" pursuant to Administrative Code § 20-453; that the Police Department's determination to enforce the licensing requirement is proper; and that the petitioners' civil rights under the Federal and State Constitutions have not been violated.

Judicial review of the determination of a body or officer is limited to whether the determination was made "in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803 [3]). Therefore, a court may not substitute its judgment for that of an administrative agency when there is a rational basis for the agency's determination (*Matter of Nehorayoff v Mills*, 95 NY2d 671 [2001]). Moreover, it is well settled "that the interpretation given a statute by the agency charged with its enforcement will be

respected by the courts if not irrational or unreasonable” (*Matter of Fineway Supermarkets v State Liq. Auth.*, 48 NY2d 464, 468 [1979]; see also *Matter of Raritan Dev. Corp. v Silva*, 91 NY2d 98 [1997]). Although when “the question is one of pure statutory reading and analysis, dependent only on an accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations are therefore to be accorded much less weight [citation omitted]” (*Matter of Moran Towing & Transp. Co. v New York State Tax Commn.*, 72 NY2d 166 [1988]).

The Administrative Code of the City of NY § 20-453 provides that:

It shall be unlawful for any individual to act as a general vendor without having first obtained a license in accordance with the provisions of this subchapter, except that it shall be lawful for a general vendor who hawks, peddles, sells or offers to sell, at retail, only newspapers, periodicals, books, pamphlets or other similar written matter, but no other items required to be licensed by any other provision of this code, to vend such without obtaining a license therefor.

The Administrative Code of the City of NY § 20-452 (b) defines a general vendor as a:

person who hawks, peddles, sells, leases or offers to sell or lease, at retail, goods or services, including newspapers, periodicals, books, pamphlets or other similar written matter in a public space. This definition shall not include a food vendor as defined in subdivision c of section 17-306 of chapter three of title seventeen of this code, or a person required to be licensed under section 20-229 of subchapter seven of chapter two of this title of this code. This definition also shall not include persons who use stands or booths in a public space for the shining of shoes. This definition shall not include a pedicab driver licensed in accordance with subchapter nine of this chapter, who is operating a pedicab registered pursuant to subchapter nine and shall not include a pedicab owner licensed pursuant to such subchapter.

The respondents’ determination that Skyline’s ticket vendors are general vendors pursuant to the Administrative Code of the City of NY § 20-452 (b), and need a license to operate, is rational, reasonable and is not affected by an error of law. Contrary to the petitioners’ assertion, the sale of tickets to an amusement ride is the type of conduct that the Administrative Code seeks to regulate through the vending laws. It must be noted that as found by the City Council in its findings in support of the amendments in Section 1 of Local Law 50 of 1979, vendors on congested streets can constitute a

serious and immediate threat to the health, safety, and well being of the public.

The cases most heavily leaned upon by the petitioners, have little relevance to the law applicable in this case. *Aaron v Ward* (203 NY 351, 354-355 [1911]), relied upon by the petitioners for the proposition that a ticket to an amusement ride is a revocable license, was a breach of contract action, to recover damages for the indignity inflicted upon the plaintiff by the revocation of her ticket for admission to a Coney Island bath house after a dispute arose between her and the defendant's employees as to the right of another person not in the line to have a locker key given to him in advance of the plaintiff. Contrary to the petitioners' assertion, this does not resolve the issue of whether or not an amusement ride ticket is either a "good" or a "service."

Similarly in *People v Bissinger* (163 Misc 2d 667 [Crim Ct, NY County 1994]), the court held that Administrative Code § 20-453 did not apply to defendant's sale of photographs because he sold memorializations of performances rather than "goods" or "wares," effectively foreclosing defendant from communicating his ideas, and thus that defendant did not fit the definition of a "general vendor." Here, unlike *Bissinger*, the sale of a ticket to an amusement park ride is neither a protected expression, nor the communication of ideas on public sidewalks.

People ex rel. Zvirin v Roxy Theatre, Inc. (8 NYS2d 92 [Magistrate's Ct. 7th Dist 1938]), involved a prosecution under then Penal Law § 421 for making an untrue and misleading advertisement as to the cost of admission to a movie theatre. The Court held that when the theatre was full, it was free to stop selling tickets at the low advertised price. Despite stating in dicta that "a theatre does not sell merchandise nor render service," the holding actually analyzes the theater's activities in terms of both rendering a service and selling articles:

It would introduce the assumption that he had from the moment of advertising relinquished his rights over his property, bound it over at a stated price to the public which, at its whim, might or might not buy, and prevented himself even from disposing of his business as a going whole to another or had similarly relinquished his freedom to decline to render service, all at the peril of the penal law for a refusal to sell or serve. The mischiefs of such a law would be infinite. Again, would it rest with

the customer alone to say how many of the advertised articles the advertiser would be compelled to sell to him?

(*id. at 97-98*)

In proving an equal protection violation there is a two-step process of showing selective treatment based upon impermissible considerations such as race religion, the exercise of constitutional rights or malicious intent to injure (*Staatsburg Water Co. v Dutchess County*, 291 AD2d 552, 554 [2d Dept 2002] *lv denied* 98 NY2d 609 [2002]). The petitioners failed to demonstrate that they were treated in a selective manner based upon such impermissible considerations. Furthermore, the allegations do not raise an issue of fact as to the existence of an impermissible motive and are pure conjecture and speculation. The petitioners are unable to show improper motive. There are no facts pled in support of the allegation of improper influence by the petitioners' landlord over the Police Department. Merely asking for a law to be enforced is every citizens' right. That the Police Department gave consideration to the complaints that it received, and came to its own conclusions based on the law, and the conditions on the sidewalk around the Empire State Building.

Finally, there is no merit to the petitioners due process claims. In determining whether due process standards have been met the court must balance three factors.

First, the private interest that will be affected by the official action; second the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and [the City's] interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail [citations omitted] (*Morgenthau v Citisource, Inc.*, 68 NY2d 211, 221 [1986]).

The procedures employed by the Police Department for enforcing the vendor laws satisfy this test. They adequately safeguard the private interests of the petitioners and minimize the risk of erroneous deprivation while serving the substantial government interest in safeguarding the public.

Accordingly, it is

ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: 9/20/11

Accordingly, it is

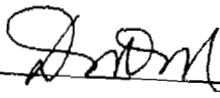
ADJUDGED that the petition is denied and the proceeding is dismissed. This constitutes the decision and order of this court.

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 141B).

Dated: 9/20/11

ENTER:



J.S.C.