

**City of New York v 2465 Grand Concourse Prop.,  
Inc.**

2016 NY Slip Op 33198(U)

April 25, 2016

Supreme Court, Bronx County

Docket Number: Index No. 251331/15

Judge: Howard H. Sherman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

C

NEW YORK SUPREME COURT - COUNTY OF BRONX  
**PART 4**

-----X  
THE CITY OF NEW YORK,

Index No. 251331/15

Plaintiff,

**DECISION/ORDER**

-against-

Present:

2465 GRAND CONCOURSE PROPERTY, INC., THE  
LAND AND BUILDING KNOWN AS 2465 GRAND  
CONCOURSE, TAX BLOCK #3166, TAX LOT #85,  
County of Bronx, State of New York; "JOHN DOE" and  
"JANE DOE", fictitiously named parties true names unknown,  
the parties intended being the owners, lessees, operators or  
occupants of the ground floor commercial establishment  
d/b/a "DELI" located at 2465 GRAND CONCOURSE, Bronx,  
New York, and any person claiming any right title or interest  
in the real property which is the subject of this action,

Hon. Howard H. Sherman  
J.S.C.

Defendants.  
-----X

Plaintiff City of New York moves for an order temporarily restraining defendants from the sale of untaxed cigarettes, in addition to a temporary closing order, and preliminary injunction. Defendant Concourse Deli ("deli") opposes the motion and cross moves by Notice of Motion pursuant to CPLR 3211(a)(7) seeking an order dismissing the complaint on the ground that it fails to state a cause of action.

Plaintiff commenced this action by service of a summons and complaint seeking a judgment permanently enjoining all defendants from creating or continuing to create a public nuisance at the subject property, allowing the seizure of the contraband and related items at the subject property, fines of all defendants along with the costs and disbursements incurred by plaintiff in instituting this action. The contraband and actions which form the basis of this action are the alleged sale at the subject property of untaxed cigarettes. The action has been brought pursuant to General City Law

Section 20; New York City Charter Section 394; and Administrative Code of the City of New York Section 7-701-7-706.

The factual allegations in the complaint are as follows: On October 2, 2014, October 24, 2014, October 29, 2014 and November 6, 2014 confidential informants purchased four (4) separate packs of cigarettes at the "deli" none of which contained the required tax stamp of the City or State of New York. On November 19, 2014 an undercover police officer purchased an additional pack of cigarettes which again did not contain the stamp. On November 19, 2014 a search warrant was executed at the subject premises which resulted in the recovery of 84 additional packs of cigarettes all of which did not contain a tax stamp. In addition, one person was arrested and charged with violation of New York State Tax Law Sec. 1814 - possession with intent to sell untaxed cigarettes.

The complaint goes on to allege as a first cause of action that the above conduct violates Sec. 7-703 of the Administrative Code in that the conduct constitutes a public nuisance insofar as the actions violate Penal Law Sec. 240.45 and Article 37, Sec. 1814 of the N.Y.S. Tax Law.

In conjunction with the commencement of this action plaintiffs moved for an order preliminarily enjoining defendants from the use of the property; removing anything from the property; and the sale or storage of untaxed cigarettes at the property as mentioned above. Defendants, upon presentation of the Order to Show Cause for the injunction, requested a temporary restraining order for the same relief. The court did not close the property but did grant the balance of the temporary relief including but not limited to enjoining the use for sale of untaxed cigarettes.

Defendant deli, by counsel, moved by notice of motion in response to the Order to Show Cause, to dismiss the action. While not being denominated as such it will be treated as a cross motion.

At the outset the court notes that the "cross" motion to dismiss does not contain any denial of any factual allegation. Additionally, the court takes note of well settled law that on a motion to

dismiss for failure to state a cause of action the court must accept the allegation in the complaint as true. The established "sole" criteria for the court's consideration of a motion to dismiss a complaint pursuant to CPLR 3211 (a)(7), "is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail (see *Foley v D'Agostino*, 21 AD2d 60, 64-65; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3211:24, p 31; 4 Weinstein-Korn-Miller, NY Civ Prac, par 3211.36) with that the court must liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion. *Sokoloff v Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414[2001].

The question then for the court is do these allegations present a viable cause of action and further do they provide a basis for the relief petitioner seeks at this time.

Defendant argues that the sale of untaxed cigarettes, as alleged in this case, in violation of Section 1814 of the Tax Law does not constitute a criminal nuisance under CPL 240.45 and thus can not be considered a public nuisance under Section 7-703 of the NYC Administrative Code.

Defendant relies on two cases in particular to bolster his argument. In *City of New York v 283 Ralph Ave.*, 17 Misc. 3 1004 (Sup. Ct. Kings County 2007) Justice Jack Battaglia denied a request for a temporary closing order and temporary restraining order finding that 2 sales of untaxed cigarettes and confiscation of twelve additional packs would not constitute "unlawful conduct" under CPL 240.45(2)). In *City of New York v B250 Holding, et. al.*, 32 Mis. 3 1202, Justice Martin Schoenfeld found similarly. There the court granted defendants' motion to dismiss in a case in which police found, incidental to a search pursuant to a warrant for drug paraphernalia, three cartons plus thirty-five packs of cigarettes not containing the requisite tax stamp. In that case, after denying the motion to dismiss on the drug paraphernalia claim, the court, citing the holding in *City of New York v 283 Ralph Avenue*, dismissed the untaxed cigarette claim.

The holding in City of New York v B250 Holding is distinguishable on its facts in one critical way. In light of the fact that the discovery of the cigarettes was incidental to a narcotics search warrant there was no allegation of sales of cigarettes only possession, which the court found in and of itself does not constitute a violation of the tax statute.

City of New York v 283 Ralph Avenue did involve two sales and twelve additional packs on the premises. The court found the statute did not apply. Apart from the fact that the instant case involved five (5) sales and eighty-four (84) additional packs the court respectfully disagrees with the court in Ralph Avenue.

Again defendant "deli" does not dispute the factual allegation in the complaint. With that the court finds that the complaint's allegation of multiple sales of untaxed cigarettes combined with the seizure pursuant to a warrant of 87 additional packs of untaxed cigarettes does state a cause of action and further does support plaintiff's entitlement to the relief it requests. City of New York v Michael Ruiz, 34 AD 3d 218 (A.D. 1<sup>st</sup> Dept. 2006); City of New York v 272 Sherman Ave., unreported, NY County Supreme Court, Nov. 25, 2015, D'Auguste, J., Index No. 100845/15.

Defendant's argument that the facts do not support a finding of criminal nuisance under Penal Law 240.45(2) because, among other reasons, it is not an ongoing condition, is without merit. Five separate sales over a two month period, followed by execution of a search warrant, does constitute a continuing and ongoing condition.

A review of the legislative history of both the New York State Tax Law and the New York City Administrative Code Article 7 leads to no rational conclusion other than this offense was clearly of the nature that the legislature intended to address by implementation of both statutes. While implementing the Tax Law the legislature noted that not only does the sale of cigarettes involve a serious threat to public health, safety and welfare, (emphasis added), it further recognized that the

existing penalties for “cigarette bootlegging” were inadequate and the bill would enhance existing penalties for possession of unstamped cigarettes. NYCLS Tax Sec. 1814, Laws 2000 Ch 262 sec 1. NYC Administrative Code Title 7 Chapter 7 Sec 701 contains the legislative declaration which while describing numerous general and specific public nuisances deems them such because they interfere with the interest of the public in the quality of life and total community environment, the tone of commerce in the city, values, and the public health safety and welfare (emphasis added).

Clearly the State Legislature and city Council intended to address quality of life, health and safety and the needs of the community in implementing both statutes. To argue that the legislature did not intend that the sale of untaxed cigarettes be deemed an illegal activity, in this context enforceable by Article 7 is an argument with no basis. City of New York v 272 Sherman Avenue, *supra*.

As held in City of New York v Ruiz, *supra*, which addressed a preliminary injunction pending an action for a permanent injunction pursuant to the nuisance abatement law, the court may grant a preliminary injunction enjoining the person or entity from conducting, promoting or permitting a public nuisance (Administrative Code Sec. 7-70). That case involved the sale of counterfeit goods which defendants had removed from the premises one month before the action was commenced. Surely the sale of counterfeit goods provides no more or less of a basis than the sale of untaxed cigarettes.

The broad provisions of the Nuisance Abatement Statute clearly permit the enjoining of conduct prohibited by RPL 240.45 including conduct within premises where persons gather for the purpose of enjoying the unlawful conduct. Defendants’ efforts to distinguish the sale of untaxed cigarettes is a distinction without difference. City of New York v 272 Sherman Avenue, *supra*.

Accordingly, the motion for a temporary restraining order and preliminary injunction is

granted in all respects except as to the application to close the subject property, which will be the subject of a conference on the adjourn date below.

The cross motion is denied in all respects.

The case is restored to the calendar of Part 4, Room 413 on Monday, May 23, 2016.

This constitutes the decision and order of this court.

Dated: April 26, 2016  
Bronx, New York



---

Howard H. Sherman  
J.S.C.