STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

JENNIFER WHITE, KATHERINE WEST, CHARLOTTE WELLINS and ANNE REMINGTON,
Plaintiffs,

-against-

HON. ANDREW CUOMO, as Governor of the State of New York, and the NEW YORK STATE GAMING COMMISSION,
Defendants.

DECISION AND ORDER
Index No. 5861-16

(Supreme Court, Albany County)

APPEARANCES: Cornelius D. Murray, Esq.
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Connolly, J.:

Plaintiffs in the instant action seek a declaration that Section 237 of the Laws of 2016 is unconstitutional and injunctive relief enjoining defendants from implementing such statute, which, *inter alia*, purports to legalize and regulate "interactive fantasy sports" contests and to allow such to be operated by commercial for-profit business enterprises that register with and are approved by the New York State Gaming Commission. Plaintiffs allege that Article I, §9 of the New York State Constitution prohibits the referenced activities and that the Legislature's exception of interactive fantasy sports from the prohibition against gambling is unconstitutional. Before the Court is

defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(7).

Article I, §9 of the New York State Constitution provides, in pertinent part, as follows:

> No law shall be passed abridging the rights of the people peaceably to assemble and to petition the government, or any department thereof; ... ; except as hereinafter provided, no lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature, the net proceeds of which shall be applied exclusively to or in aid or support of education in this state as the legislature may prescribe, except pari-mutuel betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government, and except casino gambling at no more than seven facilities as authorized and prescribed by the legislature shall hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section.

Penal Law §225 defines "gambling" as follows: "[a] person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome."

Chapter 237 of the Laws of 2016 of the State of New York as codified in Article 14 of the Racing, Pari-Mutuel Wagering and Breeding Law provides in §1400(1) and (2) as follows:

> 1. The legislature hereby finds and declares that:
>
> (a) Interactive fantasy sports are not games of chance because they consist of fantasy or simulation sports games or contests in which the fantasy or simulation sports teams are selected based upon the skill and knowledge of the participants and not based on the current membership of an actual team that is a member of an amateur or professional sports organization;
>
> (b) Interactive fantasy sports contests are not wagers on future contingent event not under the contestants' control or influence because contestants have control over which players they choose and the outcome of each contest is not dependent upon the performance of any one player or any one actual team. The outcome of any fantasy sports contest does not correspond to the outcome of any one sporting event. Instead, the outcome depends on how the performances of participants' fantasy roster choices compare to the performance of others' roster choices.

2. Based on the findings in subdivision one of this section, the legislature declares that interactive fantasy sports do not constitute gambling in New York state as defined in article two hundred twenty-five of the penal law.

Plaintiffs allege, *inter alia*, that "interactive fantasy sports" constitute gambling that falls within the express prohibition of Article I, section 9 and that the Legislature is directed to pass laws to prevent offenses against such section yet in enacting Chapter 237 the Legislature has done the opposite. Plaintiffs further allege that prior to the enactment of Chapter 237, the Attorney General of the State of New York has declared in other court filings that daily fantasy sports violate Article I, Section 9 of the Constitution and has obtained an injunction to prevent such activity prior to the adoption of Chapter 237. Plaintiffs allege that the Legislature cannot amend the Constitution under the guise of legislating and cannot define "gambling" to deviate from its ordinary meaning by excluding interactive fantasy sports, and, in particular, daily fantasy sports.

Defendants' application

Defendants assert that the Legislature has been granted the authority to enact appropriate laws to effectuate the constitutional prohibition against "gambling" - a term the Constitution leaves undefined - and consistent with such authority the Legislature has enacted Chapter 237 of the Laws of 2016 (now codified as Article 14 of the Racing, Pari-Mutuel Wagering and Breeding Law) which provides that "interactive fantasy sports" fall outside of the definition of gambling in New York as defined in the Penal Law. Defendants argue that unless plaintiffs can establish beyond a reasonable doubt that the Legislature's decision is irrational, the Legislature's judgment controls. Defendants asset that Chapter 237 was a rational exercise of the Legislature's authority to "pass appropriate" laws to prevent gambling offenses and accordingly, plaintiffs cannot meet their burden of

establishing the unconstitutionality of Chapter 238 beyond a reasonable doubt.

Motion to Dismiss

"In the context of a motion to dismiss pursuant to CPLR §3211, the Court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; *see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Berry v Ambulance Serv. of Fulton County, Inc.*, 39 AD3d 1123, 1124 [3d Dept 2007]; *Matter of Manupella v Troy City Zoning Bd. of Appeals*, 272 AD2d 761, 762 [3d Dept 2000]). On such a motion, the court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (*see Leon*, 84 NY2d at 87-88; *Brooks v Key Trust Co. Natl. Assn.*, 26 AD3d 628, 630 [3d Dept 2006], lv dismissed 6 NY3d 891). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss. When the motion to dismiss is premised upon documentary evidence, such motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Crepin v Fogarty*, 59 AD3d 837, 838 [3d Dept 2009] [internal citations and quotations omitted]).

While defendants argue that the legislation is presumed to be constitutional, such presumption alone does not itself bar plaintiffs' action herein and while plaintiffs ultimately bear the burden of proof in this action, the Court's analysis upon the instant motion is limited. Plaintiffs complaint challenges the constitutionality of Chapter 237 of the Laws of 2016. Accepting the facts alleged as true, plaintiffs have alleged that daily fantasy sports constitutes "gambling" and that such activities violate Article I, Section 9 of the Constitution.

Defendants also assert that the Legislature has the authority to make rational decisions to determine what conduct constitutes prohibited gambling. Defendants acknowledge that the New York State Constitution prohibits gambling in New York apart from certain enumerated exceptions and authorizes the Legislature to "pass appropriate laws to prevent offenses against any of the provisions of this section". Defendants argue that although Article I, Section 9 does not define gambling, such authorization gives the Legislature latitude to determine what does and does not constitute gambling in the State. Defendants also argue that the Legislature's discretion to determine what conduct constitutes gambling within the meaning of the Constitution is not unfettered and were the Legislature to enact an irrational law authorizing gambling activity, a person challenging such statute could demonstrate that the Constitution's general gambling prohibition would constrain such a law. Based upon a review of the complaint, plaintiffs are alleging that the Legislature enacted an improper law authorizing gambling activity and has alleged facts attempting to demonstrate that the Constitution's general gambling prohibition would constrain such a law. Based upon the record, plaintiffs have stated a cause of action.

Defendants assert that the courts have accorded the Legislature substantial latitude in determining what conduct constitutes prohibited gambling, however, such assertion does not mandate dismissal of plaintiffs' complaint at this juncture (*see generally, Dalton v Pataki*, 5 NY3d 243 [2005]) and while defendants conclude that the Legislature rationally determined that interactive fantasy sports contest do not constitute gambling and discuss evidence before the Legislature (i.e. the transcript of the public hearing conducted by the Assembly Standing Committees on Racing and Wagering and Consumer Affairs and Protection and the Legislative Commission on Administrative Regulations Review), such argument is more appropriate on a motion for summary judgment and not the instant motion to dismiss for failure to state a cause of action.

Based upon the record, defendants' motion to dismiss the complaint is denied.

Otherwise, the Court has reviewed the parties' remaining arguments and finds them either unpersuasive or unnecessary to consider given the Court's determination.

Accordingly, based upon a review of the record, it is hereby

ORDERED that Defendants' motion to dismiss is in all respects denied.

This Memorandum constitutes the Decision and Order of the Court. This original Decision and Order is being returned to the attorney for the plaintiffs. A copy of the decision and order and the supporting papers are being delivered to the County Clerk for placement in the file. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the provision of that rule regarding filing, entry or notice of entry.

Dated: Albany, New York
August 31, 2017

Gerald W. Connolly
Acting Justice of the Supreme Court

Papers Considered:

1. Notice of Motion dated January 11, 2017; Affirmation of Richard Lombardo, Esq. dated January 11, 2017 with exhibits A-N; Memorandum of Law in Support of Motion to Dismiss;
2. Affirmation on Behalf of Plaintiffs in Opposition to Defendants' Motion to Dismiss of Cornelius D. Murray, Esq. dated April 6, 2017 with accompanying exhibits A-Q; Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss dated April 7, 2017;
3. Memorandum of Law in Reply to Plaintiffs' Response to Defendants' Motion to Dismiss.