

**City of New York v Land & Bldg. Known as 4203
Hylan Blvd.**

2018 NY Slip Op 30311(U)

January 2, 2017

Supreme Court, Richmond County

Docket Number: 151891/2017

Judge: Kim Dollard

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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

Plaintiff,

-against-

THE LAND AND BUILDING KNOWN AS 4203
HYLAN BOULEVARD, TAX BLOCK 5286, TAX
LOT 33, COUNTY OF RICHMOND, CITY and
STATE OF NEW YORK; STAR 1 EXPRESS CORP.;
ITALIA CICALA; "JOHN DOE" and "JANE DOE",
fictitiously named parties, true names unknown, the
intended being the owners, lessees, operators or
occupants of the commercial establishment operating
as "Star 1 Express Corp." located at 4203 Hylan
Boulevard, Staten Island, New York; and any person
claiming any right, title or interest in the real property
which is the subject of this action,

Defendants,

-----X

DCM Part 4
Present:
Hon. Kim Dollard

DECISION AND ORDER

Index No: 151891/2017

*motions 001
002
003*

The following papers numbered 1, 2, 3 and 4, were fully submitted on this 8th day of November, 2017:

Papers Numbered

Order to Show Cause by plaintiff, City of New York to enjoin defendants from conducting and/or maintaining a criminal nuisance pursuant to Section 240.45(2) of the Penal Law, dated September 6, 2017; Attorneys Affirmation in Support dated August 16, 2017; with Exhibits	1
Notice of Motion and Attorneys Affirmation dated September 19, 2017 to Dismiss the Complaint pursuant to CPLR §3211 and Exhibits.....	2
Notice of Motion dated November 7, 2017 and Attorneys Affirmation dated November 6, 2017 to Dismiss the Amended Complaint pursuant to CPLR §3211.....	3
Affirmation in Opposition to Motion to Dismiss by City of N.Y. with Exhibits dated October 12, 2017.....	4

The underlying facts of the within action as stated in the complaint and amended complaint have not been disputed by the defendant, Star 1 Express Corp. Essentially, the defendant, Star 1

Express Corp., operates an establishment at 4203 Hylan Boulevard, Staten Island, New York. Defendant, Italia Cicala, is the last owner of the subject premises.

On March 27, 2017, Detective Adrian Duncan, from the New York City Department of Finance, Office of the Sheriff, inspected the subject premises and found 10.1 cartons of cigarettes with tax stamps from Virginia. Further, during the inspection a clerk admitted that untaxed cigarettes were sold for \$8:00 per pack. This activity is stated to violate the New York City Administrative Code §11-4012(b) - possession for sale of cigarettes for which required taxes have not been paid to the State of New York.

On May 3, 2017, Police Officer Nicholas Rentas purchased one pack of cigarettes and observed that they were stamped with a Georgia tax stamp and untaxed in New York.

Later on May 3, 2017, at 5:06 p.m., Police Officer Tamar Uster performed a business inspection which recovered 33 packs of cigarettes with a Virginia tax stamp. Further, the pack of cigarettes sold to P.O. Rentas was found to have a counterfeit Georgia tax stamp. Therefore, the individual in control of the premises, Mr. Ali Saleh Nagi Moshen, was arrested and charged with violating NYS Penal Law §170.30-Criminal Possession of a Forged Instrument in the First Degree; NYS Penal Law §170.25-Criminal Possession of a Forged Instrument in the Second Degree. He was also charged with Violating New York State Tax Law Article 37- §1814(b) - Unlawful Possession/Sale of Untaxed Cigarettes, and §1814(g) - Counterfeit Cigarette Tax Stamp.

On the evening on May 3, 2017 at 8:07 p.m., Police Officer Anthony Narvaez conducted a business inspection which recovered 74 packs of cigarettes bearing tax stamps from Virginia and Georgia. As a result, the person in custody and control of the premises, Mr. Jamal Jahmee, was arrested and charged with violating NYS Penal Law §170.30-Criminal Possession of a Forged

Instrument in the First Degree; NYS Penal Law §170.25-Criminal Possession of a Forged Instrument in the Second Degree. He was also charged with Violating New York State Tax Law Article 37- §1814(b) - Unlawful Possession/ Sale of Untaxed Cigarettes; and §1814(g) - Counterfeit Cigarette Tax Stamp.

On August 10, 2017, Police Officer Joseph Ranola observed an underage auxiliary police officer purchase one pack of cigarettes that did not have a tax stamp. Following the underage purchase of untaxed cigarettes and on August 10, 2017, Police Officer Louise SanFilippo conducted a business inspection that found 101 packs of cigarettes that possessed either no tax stamp or fraudulent tax stamps from Virginia. As a result, the individual in control of the premises was arrested and charged with violating NYS Penal Law §170.30-Criminal Possession of a Forged Instrument in the First Degree; and with violating New York State Tax Law Article 37- §1814(b) - Unlawful Possession/ Sale of Untaxed Cigarettes; and §1814(g) - Counterfeit Cigarette Tax Stamp.

On September 7, 2017, Lieutenant Paul Montana purchased one pack of cigarettes with a Virginia tax stamp. Following the sale of untaxed cigarettes and on September 7, 2017, Police Officer Tamar Uster conducted a business inspection that found 241 packs of cigarettes that possessed either no tax stamp or fraudulent tax stamps from Virginia. As a result, the individual in control of the premises was arrested and charged with violating NYS Penal Law §170.30-Criminal Possession of a Forged Instrument in the First Degree; and with violating New York State Tax Law Article 37- §1814(b) - Unlawful Possession/ Sale of Untaxed Cigarettes; and §1814(g) - Counterfeit Cigarette Tax Stamp.

The complaint and amended complaint state one cause of action alleging that the aforementioned violations of the Penal Law and Administrative Code constitutes a nuisance and violates the Nuisance Abatement Statute.

Along with filing the complaint, the plaintiff, City of New York moves for an Order temporarily restraining defendants from maintaining a criminal nuisance pursuant to NYS Penal Law §240.45(2) by selling or possessing for sale, untaxed cigarettes; and for a preliminary injunction. By Notice of Motion, the defendant, Star 1 Express Corp., moves to dismiss the complaint and amended complaint on the ground that they fail to state a cause of action. The defendant, Star 1 Express Corp., asserts that the sale of untaxed cigarettes does fall within the scope of the New York City Nuisance Abatement Statute since it does not constitute a criminal nuisance. The Court will deem the motion of defendant, Star 1 Express Corp., a cross motion.

In determining whether a complaint is sufficient to withstand a motion to dismiss pursuant to CPLR 3211(a)(7), “the sole criterion 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” (Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17; see 1414 Realty Corp. v. G & G Realty Co., 272 A.D.2d 309, 707 N.Y.S.2d 885). “The complaint must be construed liberally, the factual allegations deemed to be true, and the nonmoving party granted the benefit of every possible favorable inference” (Hense v. Baxter, 79 A.D.3d 814, 815, 914 N.Y.S.2d 200; see Leon v. Martinez, 84 N.Y.2d 83, 87, 614 N.Y.S.2d 972, 638 N.E.2d 511; Kopelowitz & Co., Inc. v. Mann, 83 A.D.3d 793, 796–797, 921 N.Y.S.2d 108). In addition, a court may consider any factual submissions made in opposition to a motion to dismiss in order to remedy pleading defects (see CPLR 3211[c]; Ryan v. Cover, 75 A.D.3d

502, 503, 904 N.Y.S.2d 750; *Tarzia v. Brookhaven Natl. Lab.*, 247 A.D.2d 605, 669 N.Y.S.2d 230).

The New York City Administrative Code, § 7-701, also known as the Nuisance Abatement Statute, states that:

“The council of the city of New York finds that public nuisances exist in the city in flagrant violation of the building code, zoning resolution, health laws, multiple dwelling law, penal laws regulating prostitution and related conduct, licensing laws, laws relating to the sale and consumption of alcoholic beverages, laws relating to gambling, controlled substances and dangerous drugs and penal laws relating to the possession of stolen property, all of which interfere with the quality of life, property values and the public health, safety, and welfare; the council further finds that the continued occurrence of such activities and violations is detrimental to the health, safety, and welfare of the people of the city and of the businesses thereof and visitors thereto. It is the purpose of the council to create one standardized procedure for securing legal and equitable remedies relating to the subject matter encompassed by this law, without prejudice to the use of procedures available under existing and subsequently enacted laws, and to strengthen existing laws on the subject.”

New York City Administrative Code §7-703 (l) defines a public nuisance to include “Any building, erection or place, including one- or two-family dwellings, wherein there is occurring a criminal nuisance as defined in section 240.45 of the penal law”.

Section 240.45(2) of the Penal Law states that a person is guilty of criminal nuisance in the second degree when “(2) “He knowingly conducts or maintains any premises, place or resort where persons gather for purposes of engaging in unlawful conduct”.

In the present case, several administrative inspections were conducted which revealed cigarettes that were untaxed and cigarettes that contained counterfeit stamps. Accordingly, those persons in control of the premises were arrested and charged with violating NYS Penal Law §170.30-Criminal Possession of a Forged Instrument in the First Degree; NYS Penal Law §170.25-Criminal Possession of a Forged Instrument in the Second Degree; violation of New York State Tax Law Article 37- §1814(b) - Unlawful Possession/ Sale of Untaxed Cigarettes; and violation of New York State Tax Law Article 37-§1814(g) - Counterfeit Cigarette Tax Stamp.

This Court rejects the contention of defendant, Star 1 Express Corp., that the Nuisance Abatement Statute does not cover the sale of untaxed cigarettes and use of counterfeit stamps. The Nuisance Abatement Statute is broadly written to permit the enjoining of conduct prohibited by Penal Law §240.45.

It is undisputed that the defendant, Star 1 Express Corp., continually obtained and sold untaxed cigarettes and cigarettes with a counterfeit stamp on many occasions. This Court finds that the continued sale of untaxed cigarettes and sale of counterfeit stamped cigarettes constitutes a criminal nuisance by maintaining the subject premises and having persons gather for purposes of engaging in unlawful conduct and illegal activity. Such conduct constitutes a serious threat to public health, safety and welfare and promotes a harmful and undesirable effect on the surrounding community.

Accordingly, based upon the foregoing, it is,

ORDERED, that the plaintiff's motion is granted to the extent that the defendants are enjoined from conducting and/or maintaining a criminal nuisance by selling untaxed cigarettes and counterfeit taxed cigarettes at the location of 4302 Hylan Boulevard, Staten Island, New York; and the defendants are enjoined from removing or interfering with furniture, fixtures and/or removable property used in conducting and/or maintaining the aforesaid nuisance; and it is further,

ORDERED, that motion and/or cross-motion of the defendant, Star 1 Express Corp., is denied.

Dated: January 2, 2017

ENTER



Hon. Kim Dollard
Acting Justice Supreme Court