

People v Vera & Magda Realty Corp.

2019 NY Slip Op 32650(U)

August 29, 2019

City Court of Rye, Westchester County

Docket Number: 03574/2018

Judge: Joseph L. Latwin

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This opinion is uncorrected and not selected for official publication.

CITY COURT : CITY OF RYE
WESTCHESTER COUNTY

PEOPLE OF THE STATE OF NEW YORK,

CR 03574-18

Plaintiff,

-against-

DECISION AND ORDER

VERA & MAGDA REALTY CORP.,

Defendant.

Appearances:

Plaintiff by *Kristen K. Wilson*, Corporation Counsel, White Plains, NY

Defendant by *Donald S. Mazin*, Esq., Larchmont, New York

This is a criminal proceeding¹ brought by the City of Rye claiming defendant violated Rye City Code section 165-2A by permitting a sign to be erected or maintained on its property without first obtaining a required permit.

The Assistant Building Inspector as complainant filed an information quoting Rye City Code 165-2A verbatim. It provides,

Signs requiring a sign permit shall be erected, constructed, reconstructed, altered or maintained only after approval by the Board of Architectural Review as to design, colors, materials, illumination, location and size and:

- (1) When granted a sign permit from the Building Inspector.*
- (2) Upon payment of the required fee as established by the City Council.*

¹ Under Rye City Code §165-3(d)(1) “Any person who violates any provision in this chapter shall, upon conviction thereof, be guilty of a violation and shall be punished, for each offense, by a fine of not more than \$250 or by imprisonment for not more than 15 days, or both.”

Defendant owns property on Forest Avenue. On defendant's property are a food market (that operates a gas station), and a small restaurant. There is no other gas station within two miles of defendant's property. The property is separated from Playland Parkway by a strip of parking spaces and a narrow greenway. Playland Parkway is a parkway that runs from I-95 to Playland Park. There are only three intersecting streets on Playland Parkway; each carries local traffic. The property is across Forest Avenue from the entrance to Playland Park. Playland is a 280+ acre amusement park with a beach and pool, an indoor ice-skating rink, and is adjacent to a large nature sanctuary. Playland draws a significant amount of car traffic. Much of that traffic is not local. Travelers to Playland unfamiliar with the Rye area and in need of gas would be ready customers of the gas station if they knew it was there. Signage seems to be a wise business decision, but allegedly ran afoul of Rye's Code.

Defendant moves to dismiss the information claiming the People failed to allege a good and valid cause of action, and that there is a defense based upon documentary evidence consisting of the sign code itself. Defendant also claims that it is not responsible since its tenant is the operator of the gas station on the property and installed the signs, not defendant.

This is a criminal matter is governed by the Criminal Procedure Law ("CPL") and not the Civil Practice Law and Rules ("CPLR"). While a motion to dismiss in civil cases is permitted if "the pleading fails to state a cause of action" under CPLR §3211(a)(7), and is permitted on "a defense is founded upon documentary evidence" under CPLR §3211(a)(1), no similar provisions are present for criminal proceedings in the CPL. Instead, under the CPL §170.30(1), a motion to dismiss is permitted if: (a) the information "is defective, within the meaning of section 170.35; or . . . (f) there exists some other jurisdictional or legal impediment to conviction of the defendant for the offense charged. Under CPL §170.35(1) an information . . . is defective within the meaning of paragraph (a) of subdivision one of section 170.30 when:

(a) It is not sufficient on its face pursuant to the requirements of section 100.40; provided that such an instrument or count may not be dismissed as defective, but must instead be amended, where the defect or irregularity is of a kind that may be cured by amendment and where the people move to so amend; or

(b) The allegations demonstrate that the court does not have jurisdiction of the offense charged; or

(c) The statute defining the offense charged is unconstitutional or otherwise invalid.

Defendant makes no specific claim that this Court lacks jurisdiction over the offense. *But see* discussion of sufficiency below. No claim of unconstitutionality or invalidity is raised. *But see, e.g., People v Durham*, 98 Misc2d 927, 415 NYS2d 183 [Suffolk County District Court 1979] & *People v. Braun*, 69 Misc.2d 682, 330 N.Y.S.2d 937 [Nassau County District Court 1972] (gas price sign laws held unconstitutional).

There is no specific claim that the information is insufficient on its face. However, since a new information may be filed, the Court will discuss sufficiency for the sake of judicial and attorney economy. A valid and sufficient accusatory instrument is a nonwaivable jurisdictional prerequisite to a criminal prosecution, *People v Case*, 42 NY2d 98, 396 NYS2d 841 [1977], and may be raised on appeal. *People v. Alejandro*, 70 NY2d 133, 517 NYS2d 927 [1987].

Under CPL §100.40(1),

An information, or a count thereof, is sufficient on its face when:

(a) It substantially conforms to the requirements prescribed in section 100.15; and

(b) The allegations of the factual part of the information, together with those of any supporting depositions which may accompany it, provide reasonable cause to believe that the defendant committed the offense charged in the accusatory part of the information; and

(c) Non-hearsay allegations of the factual part of the information and/or of any supporting depositions establish, if true, every element of the offense charged and the defendant's commission thereof.

“In order for an information to be facially sufficient, the factual part of the information (along with any supporting depositions accompanying it) must allege nonhearsay allegations of fact of an evidentiary character that establish, if true, every element of the offense charged (*see* CPL 100.15 [3]; 100.40 [1] [c]; *People v Dumas*, 68 NY2d 729, 731 [1986]). These requirements are jurisdictional (*see People v Kalin*, 12 NY3d 225 [2009]; *People v Casey*, 95 NY2d 354 [2000]; *People v Alejandro*, 70 NY2d 133 [1987]; *People v Dumas*, 68 NY2d at 731), and the failure to satisfy them may be asserted at any time, with the exception of a claim of hearsay, which is waived if it is not timely raised by motion in the trial court (*see People v Casey*, 95 NY2d at 365-367). An information must provide the defendant with sufficient notice of the offense charged so that he can prepare for trial, and the factual allegations must be adequately detailed so that the defendant

cannot be tried again for the same offense (*see People v Sedlock*, 8 NY3d 535, 538 [2007]; *People v Konieczny*, 2 NY3d 569, 575 [2004]; *People v Casey*, 95 NY2d at 360). An “information that is facially insufficient is jurisdictionally defective and must be dismissed” (*People v Sumter*, 151 AD3d 556, 557 [2017]; *see also People v Jones*, 9 NY3d 259, 263 [2007]).” *People v. Jianjun Li*, 64 Misc3d 33, 101 NYS3d 817 [App Term, 2nd, 9th & 10th Jud Dists 2019].

To establish the elements of a violation of Rye City Code §165-8, the information must allege:

- (1) *A sign was erected, constructed, reconstructed, altered or maintained on defendant’s property in the City of Rye; &*
- (2) *The sign did not have a sign permit.*

The factual part of the information alleges upon information and belief, that defendant: (1) is the owner/tenant of the property; (2) is responsible for the condition of the property; (3) on October 5, 2018, did willfully commit a[n unspecified] violation at the property; (4) that the violation is continuing and was observed on October 18, 2019; and (5) defendant failed to abate or remedy the violation despite being served a Notice of Violation on November 28, 2018 and during a follow up inspection on December 21, 2018. The information does **not** specify how the defendant is responsible, what violation was committed, or how the defendant committed a violation. The bald, conclusory allegation that the defendant committed a violation does not suffice. The information does **not** specify the offending signs, nor how the illuminated gas price signs at the gas pumps or the freestanding sign are in violation of the law. It does **not** assert there was no permit for either sign. Accordingly, the information is facially insufficient and must be dismissed.

We turn to whether or not some other jurisdictional or legal impediment to conviction of the defendant for the offense charged exists. Defendant claims the Code itself, in section 165-8A, permits informational signs as exempt and they may be maintained without a sign permit. Section 165-8A says, “the following signs are exempt from the sign permit requirements under this chapter: . . . (3) Informational signs.” Section 165-5 describes information signs and limits them to the owner's name, phone number and/or hours of operation and located: (a) only on a window or a door; (b) with a Maximum coverage: 5% percent of window glass size or overall door size; & (c) with a Maximum height of lettering of two inches. From the pictures annexed to the answering papers, the signs involved concern the illuminated gas price signs above the gas pumps and a free-standing pole with a Sunoco arrow and quadrangle with illuminated gas prices

below. These signs do not provide the owner's name, phone number or hours of operation, nor are they on a window or door. They are not by definition informational signs exempted by the Code. In Neighborhood Business Districts, such as the district where defendant's property is located, any sign other than signs permitted without a sign permit in Residential Districts, Temporary signs, and informational signs require approval by the Board of Architectural Review and must have a sign permit from the Building Department. Rye City Code §165-8. Accordingly, a sign permit appears to be required for the signs on defendant's property and there is no impediment to conviction based on the language of the Code.

Defendant claims that as owner, it is not responsible for the signs. Rye City Code §165-3(B) provides, "The property owner is responsible for all signs displayed or erected on his or her property, is responsible for properly maintaining such signs and is responsible for removal of signs if no sign permit has been obtained." The owner cannot escape responsibility except by compliance with the Code. It is likely that the defendant's lease with its tenant gas station contains a clause requiring prior approval of any signs installed by the tenant. The defendant likely has and had the contractual right and ability to prevent the signs from being installed without a permit in the first place and likely retains the ability to have it removed under the terms of the lease.

Defendant also claims that gas stations are required by law to post price signs on their pumps. Defendant claims that Agricultural and Markets Law §197-b requires posting of prices. That section nowhere mentions gas price signs and appears to be inapposite. However, Ag & Markets Law §192(5) does apply and says,

- a. It shall be unlawful for any person, firm or corporation to sell or offer for sale at retail for use in internal combustion engines in motor vehicles or motorboats any motor fuel unless such seller shall:*
- (i) post and keep posted on the dispensing device from which such motor fuel is sold or offered for sale a sign or placard, at least twelve inches in height and at least twelve inches in width, stating clearly and legibly with the whole cent numerals at least nine inches in height and at least two inches in width, the selling price per gallon of such motor fuel; or*
 - (ii) where such individual pump or dispensing device dispenses more than two differently priced grades of motor fuel, only the highest and*

lowest selling price per gallon of such motor fuel dispensed therefrom must be posted thereon in conformance with all other provisions of this subdivision; or

(iii) where a multiple product dispensing device is capable of dispensing multiple products at multiple prices, then the selling price per gallon may be posted thereon with numerals at least one-half that height and one-half that width required by subparagraph (i) of this paragraph, although numerals representing tenths of a cent may be displayed at no less than one-half those dimensions which disclose the selling price per gallon of such motor fuel dispensed therefrom.

The signs and selling prices shall be posted so as to be clearly visible to the driver of an approaching motor vehicle or motorboat. The name, trade name, brand, mark or symbol, and grade of quality classification, if any of such motor fuel shall be permanently imprinted on said motor fuel dispensing device.

Thus, Rye City Code §165 to the extent it would prohibit gas price signs on pumps may be inconsistent with and may be pre-empted by Ag & Markets Law §192 to the extent gas price sign placed on the dispensing devices are in compliance with the State Law.

The defendant also claims that the signs were erected before the enactment of the sign Code in 1999.² The Court is aware of the history of the gas station on this property as, before taking the bench, the Judge Latwin represented two of the prior operators of the gas station. The Court is also well aware of the enactment of the sign code, as then Councilman Latwin previously served on Rye's Board of Architectural Review, and its City Council (1994-1997) and was involved in its adoption.

Beginning on March 18, 1996, the Board of Architectural Review began hearing public comment on the proposed sign law. *See* Rye City Council Meeting Minutes March 6, 1996 at 14. On July 17, 1996, the Chair of the BAR requested \$10,000 to hire a consultant to advise the BAR on sign legislation. Councilman Latwin generously offered his assistance in developing the new law. Minutes of July 17, 1996 at 24. On October 19, 1998, Mr. Latwin wrote to the Mayor and City Council commenting on the proposed sign law, raising potential 1st Amendment issues and criticizing the lack of standards upon which a sign may be

² No evidence of when the signs were installed was offered.

approved or disapproved. Those comments were received. See minutes of November 4, 1998 at 1.

Armed with this background and knowledge, the Court suggested to the parties to seek resolution of this matter by having the City Council amend the sign law to cure some of its potential infirmities and give the defendant the opportunity to obtain a sign permit. For instance, the apparent problem with the price signs on the gas pumps is due to them appearing illuminated in red where Code section §165-4(H)(3) restricts illumination to appear white when illuminated. This restriction makes little sense³ as a matter of optics since white contains red within its spectrum and red light is less visible than white light⁴. It seems more likely the enacting City Council was concerned with the intensity of the lighting rather than its color. Perhaps, the City Council might consider regulating light intensity rather than color, thus legalizing the gas pump signs. Unfortunately, the parties let that opportunity to resolve this case pass. Instead, now it is foreseeable the City will remedy the deficiencies in the information, file new charges against the defendant, and we will be back soon to deal with the issues.

Accordingly, the information is dismissed as facially insufficient.

Dated: August 29, 2019
Rye, New York

JOSEPH L. LATWIN, JCC

Papers

- Affidavit of James Nadel sworn to January 28, 2019 and the exhibits thereto;
- Affidavit of Guy Carpenito sworn to February 6, 2019 and the exhibits annexed thereto;
- Affirmation of Kristen K. Wilson dated February 7, 2019;
- Affidavit of James L. Virga sworn to February 7, 2019; &

³ The City Council, not the Court, has the power to enact local legislation, sensible or not. The Court cannot negate or modify a law simply because it seems unwise to the Court. However, when presented with a proper controversy, the Court may offer its insight to the legislators.

⁴ The eye responds with maximum sensitivity to light at the middle of the visible color spectrum—specifically, green light with a wavelength of about 555 nm. The optimal wavelength for maximum sensitivity in dim light is around 510 nm, on the blue end. It is difficult for the eye to recognize red light, at the far end of the spectrum, against a dark background. However, this can be an advantage in situations of relative darkness, which is why red light is often used to maintain vision for sailors, amateur astronomers, and the military on night maneuvers. Because there is not much difference between the darkness and the red light, the eye adjusts and is able to see beyond the red light into the darkness. A bright yellow or white light in such situations, on the other hand, would minimize visibility in areas beyond the light. See, <http://www.scienceclarified.com/everyday/Real-Life-Physics-Vol-3-Biology-Vol-1/Light-Real-life-applications.html#ixzz5wgnzmW9A>

-Reply Affirmation of Donsal S. Mazin dated March 20, 2019 and the exhibits annexed thereto.