

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

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CARL E. PERSON,

Plaintiff,

-against-

STATE OF NEW YORK,
GOVERNOR GEORGE E. PATAKI,
ATTORNEY GENERAL ELIOT SPITZER,
NEW YORK STATE RACING AND WAGERING
BOARD, NEW YORK LOTTERY, CITY OF NEW
YORK, MAYOR MICHAEL R. BLOOMBERG,
NEW YORK CITY REGIONAL OFF-TRACK BETTING
CORPORATION, and BUSINESS INTEGRITY
COMMISSION,

Defendants.

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**AFFIRMATION IN
OPPOSITION TO
PLAINTIFF'S CROSS-
MOTION FOR SUMMARY
JUDGMENT AND IN
FURTHER SUPPORT OF
CITY DEFENDANTS'
MOTION TO
DISMISS**

Index No. 112563/05

NICHOLAS R. CIAPPETTA, an attorney duly admitted to practice before the Courts of the State of New York, hereby affirms under the penalties of perjury, pursuant to Rule 2106 of the New York Civil Practice Law and Rules (hereinafter "CPLR"), as follows:

1. I am an Assistant Corporation Counsel, in the Office of **MICHAEL A. CARDOZO**, Corporation Counsel of the City of New York, attorney for the City of New York, Mayor Michael R. Bloomberg, Business Integrity Commission ("BIC"), and New York City Regional Off-Track Betting Corporation (hereinafter known as "the City defendants").

2. I submit this affirmation in opposition to plaintiff's cross-motion for summary judgment pursuant to CPLR § 3212 and in further support of the City defendants' motion for an order dismissing the action pursuant to CPLR § 3211(a)(7) on the grounds that plaintiff fails to state a cause of action against the City defendants.

3. This action is brought by pro se plaintiff Carl E. Person seeking declaratory relief pursuant to CPLR 3017(b). Specifically, plaintiff seeks a declaration that “[he] may lawfully purchase and own one or more current-model video slot machines,...may lawfully set up local poker tournaments, bingo, keno and other types of lottery games in New York while charging an entrance fee and obtaining a profit therefrom....and [that] the laws in New York prohibiting gambling are irrational and anti-competitive, and are null and void....”

4. In response to defendants’ motion to dismiss, plaintiff has cross-moved for a “declaratory summary judgment” under CPLR §§ 3212 and 3001. Plaintiff is not entitled to summary judgment against the City defendants as such motion is premature. Furthermore, he seeks relief which is beyond the purview of the City defendants. Therefore, the cross-motion for summary judgment against the City defendants should be denied and the plaintiff’s complaint should be dismissed as it fails to state a cause of action against the City defendants.

ARGUMENT

POINT I

**PLAINTIFF’S CROSS-MOTION FOR
SUMMARY JUDGMENT MUST BE DENIED
AS IT IS PREMATURE**

5. CPLR § 3212(a) provides that a motion for summary judgment may be made “in any action, after issue has been joined.”

6. The City defendants have not yet answered the complaint, or even moved to dismiss based on legal insufficiency or plaintiff’s pleading. Rather, City defendants moved to dismiss under CPLR 3211(a)(7) because, on its face, the complaint seeks no relief against them. Since, City defendants moved to dismiss in lieu of answering, issue has not been joined. See Rochester v. Chiarella, 65 N.Y.2d 92, 101 (1985) (defendant joins issue for purpose of CPLR

3212(a) by answering complaint). Thus, this Court cannot entertain plaintiff's cross-motion, which should be denied as premature.

7. The Court of Appeals has held that the requirement of joining issue must be strictly adhered to. See Rochester, 65 N.Y. 2d at 101. "The requirement that issue be joined before a motion for summary judgment is granted is intended to show the court precisely what the plaintiff's claims and defendant's position as to them, and his defenses, are." Rine v. Higgins, 244 A.D.2d 963, 964 (4th Dept. 1997). As the First Department held in reversing a trial court's grant of plaintiff's cross-motion for summary judgment: "By granting plaintiff summary judgment, the court precluded defendants from adducing facts in their answer controverting those alleged in the complaint and from otherwise making a record." Four Seasons Hotels Ltd. v. Vinnik, 127 A.D.2d 310, 319 (1st Dept. 1986).

POINT II

CITY DEFENDANTS CANNOT GRANT THE RELIEF SOUGHT BY PLAINTIFF IN THE COMPLAINT, OR IN HIS CROSS-MOTION FOR SUMMARY JUDGMENT, AS IT IS BEYOND THEIR PURVIEW

8. The issues on which the plaintiff seeks summary judgment are not directed to City defendants. Plaintiff's motion for a "declaratory summary judgment" under CPLR §§ 3212 and 3001 seeks an order declaring that his intended activities (possession of video lottery terminals and establishment of neighborhood locations where video lottery terminals are installed for non-gambling use and where poker games/tournaments take place) are legal under New York law.

9. Plaintiff seeks a judgment regarding the legality of his proposed actions under state law and the New York State Constitution. The City defendants play no role with

respect to these issues. The City of New York simply has no authority to change the state gambling law which is the ultimate goal sought by plaintiff.

10. Plaintiff's cross-motion for summary judgment is emblematic of his complaint which sets forth no allegations against any of the City defendants. For that reason, City defendants moved to dismiss the complaint on the grounds that it failed to state a cause of action against them.

11. In his memorandum of law in support of his cross-motion for a "declaratory summary judgment," and in opposition to the two motions to dismiss (by State defendants and City defendants), plaintiff attempts to establish a nexus between the City defendants and this lawsuit by noting that BIC issues shipboard gambling licenses. However, plaintiff misapprehends the true nature of BIC's role with respect to shipboard gambling. While BIC does issue shipboard gambling licenses, it does not regulate gambling on these casino cruise lines. The shipboard gambling license is not a license to gamble, but rather a license allowing a company engaging in shipboard gambling to dock in New York City. In fact, the gambling itself occurs outside of New York City, New York State, and the territory of the United States. BIC's involvement is triggered solely as a result of the docking of the cruise line within the boundary of New York City.


12. Neither BIC nor the City of New York made the determination that gambling is permissible in international waters. Nor does BIC or the City of New York attempt to either stimulate or suppress the market for shipboard gambling. In fact, there are currently no such gambling ships. Furthermore, there have been no applications for shipboard gambling

licenses in over five years. Section 20-953(a)¹ of the New York City Administrative Code does not enact or change any law regarding the permissibility of gambling. Nor does this provision in any way regulate gambling. Rather, this section was adopted with the understanding that gambling in international waters was permissible and that a market for shipboard gambling existed. In this context, BIC's role is limited to evaluating the character of applicants for shipboard gambling licenses and vetting vendors who supply services such as food and drink to passengers on the ships.

CONCLUSION

13. For all of the above reasons, the plaintiff's cross-motion for summary judgment must be denied and City defendants' motion to dismiss should be granted.

Dated: February 22, 2005
New York, New York



NICHOLAS R. CIAPPETTA

¹ Section 20-953(a) of the New York City Administrative Code states that "it shall be unlawful to operate a shipboard gambling business unless such business has first obtained a shipboard gambling license from the [New York City gambling control commission]." "Shipboard gambling license" is in turn defined by section 20-950(o) of the New York City Administrative Code as a "business in which passengers are transported for the purpose of participating in gambling outside the territorial waters of the United States from a location within New York city and returned to a location within such city...."

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YORK LOTTERY, CITY OF NEW YORK, MAYOR
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