

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

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CARL E. PERSON,

Plaintiff,

**NOTICE OF CROSS-
MOTION TO DISMISS**

-against-

Index No. 112563/05

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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PLEASE TAKE NOTICE that upon the annexed affirmation of Assistant Corporation Counsel, Nicholas R. Ciappetta, dated December 12, 2005, the undersigned will move before this Court in Room 130 of the Courthouse located at 60 Centre Street, New York, New York on the 8th of February, 2005 at 9:30 a.m., or as soon thereafter as counsel can be heard, for an order pursuant to Civil Practice Law and Rules § 3211(a)(7) dismissing the instant proceeding on the grounds that the complaint fails to state a cause of action against the City of New York, Mayor Michael Bloomberg, New York City Regional Off-Track Betting Corporation, and the Business Integrity Commission;

PLEASE TAKE FURTHER NOTICE that in the event the Court issues an order denying this motion, the undersigned requests thirty (30) days from service of notice of entry thereof to serve the answer.

Dated: New York, New York
December 12, 2005

MICHAL A. CARDOZO
Corporation Counsel of the
City of New York
Attorney for Respondent
100 Church Street
New York, New York 10007
(212) 788-0708

By: 

Nicholas R. Ciappetta
Assistant Corporation Counsel

TO:

Carl E. Person
Plaintiff *Pro Se*
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Assistant Attorney General
120 Broadway, 24th Floor
New York, New York 10271

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

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CARL E. PERSON,

Plaintiff,

-against-

**AFFIRMATION IN
SUPPORT OF MOTION TO
DISMISS**

Index No. 112563/05

STATE OF NEW YORK,
GOVERNOR GEORGE E. PATAKI,
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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, New York City Regional Off-Track Betting Corporation and Business Integrity Commission (hereinafter known as "the City defendants").

2. I submit this affirmation in 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. As plaintiff seeks relief which is beyond the purview of the City defendants, the complaint should be dismissed as it fails to state a cause of action against the City defendants.

RELEVANT STATUTORY PROVISIONS

5. Article I, section 9(1) of the New York State Constitution provides a general prohibition against gambling in the state of New York. This provision provides, in relevant part:

§ 9. [Right to assemble and petition; divorce; lotteries; pool-selling and gambling; laws to prevent]

...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, and 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, 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.

6. Rule 3211 of the CPLR enumerates the grounds for dismissing a cause of action. It states in pertinent part:

R. 3211. Motion to Dismiss.

(a) Motion to dismiss a cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

...

7. the pleading fails to state a cause of action....

ARGUMENT

THIS ACTION MUST BE DISMISSED AS THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION AGAINST THE CITY DEFENDANTS

7. The City defendants move to dismiss the complaint because it fails to state a cause of action against them. CPLR 3211 (a)(7) provides that a party may move for a judgment dismissing an action when the pleading fails to state a cause of action. In determining if a cause of action exists, the Court examines “whether there can be fairly gathered from all the averments the requisite allegations of a valid cause of action, cognizable by the courts of this State.” Cohn v. Lionel Corp., 21 N.Y.2d 559 (1968). See also Leo v. Mt. St. Michael Academy, 272 A.D.2d 145 (1st Dept. 2000).

8. At the heart of the plaintiff’s complaint is an assertion that Article I, section 9(1) of the New York State Constitution and various laws enacted by the State of New York pursuant to this provision are “irrational, anti-competitive, unconstitutional, null and void.” See Complaint ¶ 50. Similarly, plaintiff maintains that the developments listed in paragraph 13(iii) of the Complaint render the Constitution’s general prohibition on gambling meaningless. Plaintiff therefore argues that Article I, section 9(1) of the Constitution cannot, or should not, prevent him from purchasing video slot machines and organizing lotteries or other types of gambling.

9. Plaintiff's complaint amounts to little more than a policy argument that New York State's general prohibition against lotteries and gambling is outdated and in need of revision to permit gambling on a more widespread basis. That plaintiff's complaint is largely steeped in policy is evident from Exhibit "A", a nineteen page analysis written by plaintiff and from plaintiff's website located at www.lawmall.com/legalizeNYgambling.

10. However, as set forth below, plaintiff has no basis for naming any of the City defendants as a party to this action, and for this reason the complaint should be dismissed against them.

11. In fact, the complaint sets forth no allegations against any of the City defendants. Plaintiff's complaint refers exclusively to state law and the New York State Constitution which is understandable given that gambling policy and laws permitting various types of gambling are squarely in the province of the state government. The City of New York simply has no authority to change the state gambling law which is the ultimate goal sought by plaintiff.

12. Plaintiff identifies only two tangential connections between New York City and gambling. First, plaintiff discusses the fact that New York City has off-track betting parlors enabling adults to bet the outcome of a horse race without actually attending the racetrack. While such parlors are established and administered by the New York City Off-Track Betting Corporation ("NYCOTB"), a special purpose public benefit corporation, NYCOTB has only those powers conferred upon it by the New York State legislature pursuant to the statutory scheme creating off-track pari-mutuel betting. Thus, NYCOTB is not an independent entity of

the City of New York and would not exist but for state statute.¹ Second, plaintiff notes that New York City licenses casino cruise lines through the Business Integrity Commission (“BIC”). 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.²

13. Plaintiff’s demand for relief does not include the ability to open an off-track betting parlor or run a casino cruise line. Rather, plaintiff mentions off-track betting and licensed casino cruise lines solely to illustrate that “New York has failed to enforce its anti-lottery and other anti-gambling laws....” See Complaint ¶ 49. Apparently, plaintiff is attempting to show that New York State’s general prohibition against gambling is outdated in

¹ Section 502(1) of New York Racing, Pari-Mutuel Wagering and Breeding Law states that “[a] regional off-track betting corporation is hereby established for each region, except the New York city region for which the New York city off-track betting corporation established pursuant to and subject to article six of this chapter shall constitute the regional corporation and such article six shall govern such New York city off-track betting corporation.” Section 601(3) of the New York Racing Pari-Mutuel Wagering and Breeding Law states that “the operation of an off-track pari-mutuel betting system by a public benefit corporation in New York city, in accordance with the provision of the New York state off-track pari-mutuel betting law, is deemed to be a matter of state concern....” Finally, Section 603 of that same law created “[a] corporation to be known as the ‘New York city off-track betting corporation.’”

² 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....”

light of the numerous exceptions to that general prohibition, exceptions which were crafted by the State legislature, and not the City defendants.

14. Insofar as plaintiff's complaint seeks a change in gambling policy through either an amendment to the New York State Constitution or a declaration that Article I, section 9(1) of the New York State Constitution is null and void, it fails to state a cause of action against the City defendants which have no power to amend the Constitution.

CONCLUSION

15. For all of the above reasons, the City defendants' motion to dismiss should be granted.

Dated: December 12, 2005
New York, New York



NICHOLAS R. CIAPPETTA

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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.

**NOTICE OF MOTION TO DISMISS AND
AFFIRMATION IN SUPPORT OF MOTION TO
DISMISS**

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NYCLIS No. 05AL101082