Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY **PART 35**
Justice

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SAMUEL DE ASIS,

Plaintiff,

-against-

NEW YORK STATE DIVISION OF LOTTERY and YONKERS RACING CORPORATION, d/b/a EMPIRE CITY AT YONKERS RACEWAY,

Defendants.

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Index No. 13319/12
Motion Date: 1/24/13
Motion Cal. No.
Mot. Seq. 1

The following papers numbered 1 to 12 read on this motion by defendant **NEW YORK STATE DIVISION OF LOTTERY** (Lottery) for an order pursuant to CPLR 3211 (a)(2) and (7) dismissing the complaint on the grounds of lack of standing and, in the alternative, granting defendant 30 days to serve an answer from the date of service of Notice of Entry. Defendant **YONKERS RACING CORPORATION, D/B/A EMPIRE CITY AT YONKERS RACEWAY** (Empire) cross- moves for an order pursuant to CPLR 3211(a)(2) dismissing the complaint on the grounds of lack of standing.

	Papers Numbered
Notice of Motion-Exhibit.....	1-3
Notice of Cross Motion-Affirmation-Exhibits.....	4-8
Notice of Motion-Exhibits.....	9-10
Supporting Affidavit.....	11-12

Upon the foregoing papers the motion and cross motion are determined as follows:

Self represented plaintiff Samuel De Asis, a self-professed gambler, alleges that on July 31, 2011 he won $7,776.00 while playing an electronic video roulette game at a New York "racino" operated by Empire, a licensee of Lottery. Empire withheld from Mr. DeAsis' winnings $2,942.91 in federal, state and local income taxes and reported the same on a W-G2 Statement for Certain Gambling Winnings. Said tax form lists the payee as the New York State Lottery.

Mr. De Asis objects to the withholding of these taxes, and commenced the within action against Lottery and Empire for declaratory judgment and injunctive relief on June 26, 2012. Plaintiff, in a rambling complaint, seeks a declaration as to whether his July 31, 2011 winnings are exempt from federal and state tax reporting and withholding requirements. Plaintiff alleges that New York Constitution, Article I §9 [1] prohibits gambling, other than certain lotteries, and does not permit certain "casino" games, such as roulette, blackjack and baccarat; that the roulette game he played and won at Empire's electronic gaming terminal (EGT) is unconstitutional under the State Constitution; that the IRS specifies one set of rules for withholding and reporting with regard to gambling, and that New York "lottery" winnings have withholding and reporting requirements different from those established by the IRS for other forms of gambling. Plaintiff further alleges, hypothetically, if the video roulette EGT at Yonkers is unconstitutional, then New York law as it applies to those winnings would be "preempted" by federal law, and only IRS tax rules relating to withholding and reporting apply.

Plaintiff also seeks a declaration that certain EGTs at New York racinos are Class III games under the Indian Gaming Regulatory Act (IGRA) (25 USC §2701, *et seq*.) and that defendant Lottery has no authority to operate such "Class III" games under the State Constitution, and that withholding taxes on these games is improper. Plaintiff further seeks a declaration to the effect that calling these EGT games "casino" games is misleading; an injunction enjoining the use of the word "casino"; the removal of all such electronic terminals from racinos; and a refund of "all amounts deducted or withheld [from plaintiff's winnings] as tax".

Plaintiff alleges in his complaint that he has standing to challenge the constitutionality of the video gaming at Empire, " because he suffered monetary damages as a result of the unnecessary or illegal withholding/deductions from his winnings".

Defendant Lottery, in a pre-answer motion, seeks an order dismissing the complaint on the grounds of lack of standing and lack of subject matter jurisdiction. Defendant Empire in a pre-answer cross motion seeks an order dismissing the complaint on the grounds of lack of subject matter jurisdiction and lack of standing.

To the extent that self represented plaintiff Samuel De Asis is attempting to submit a "Notice of Motion" for an order denying the "defendant [sic] motion to dismiss" and summary judgment in his favor, said motion is rejected. The purported motion is not on the court's calendar, and there is no proof that plaintiff filed a request for judicial intervention and paid the required motion fee (*see* 22 NYCRR §202.6; CPLR 8020[a]). In addition, as plaintiff has not provided proof that he paid the required cross motion fee, the purported motion will not be considered as a cross motion (CPLR 8020[a]). Plaintiff's papers, therefore, will only be considered as opposition to the defendants' motion and cross motion.

It is well settled that standing is a threshold determination (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 769 [1991]). The test for determining a litigant's standing is twofold. "First, a plaintiff must show 'injury in fact,' meaning that plaintiff will actually be harmed by the challenged . . . action. As the term itself implies, the injury must be more than conjectural. Second, the injury a plaintiff asserts must fall within the zone of interests or concerns sought to be promoted or protected by the statutory provisions under which the agency has acted" (*New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004]; *see also Society of Plastics Indus. v County of Suffolk*, 77 NY2d at 772-773).

Here, plaintiff has failed to demonstrate that he sustained an injury in fact. Plaintiff claims that would have been able to "pocket" his winnings, and not have had taxes reported or withheld from his winnings if the EGTs were treated as something other than a "lottery" under New York law. Plaintiff, however, is legally obligated to pay federal, state and local taxes on gambling winnings, whether in a lottery or otherwise (*see* Internal Revenue Code §61; Tax Law §612; *US v Maginnis*, 356 F3d 1179 [United States Court of Appeals, 9th Circuit 2004]). Therefore, regardless of whether the EGTs at Empire are lotteries, and regardless of whether the taxes on winnings are withheld by the defendants, plaintiff is required to pay the exact amount of federal, state and local tax on his video roulette winnings.

The Court of Appeals in *Dalton v Pataki* (5 NY3d 243, 263-272 [2005]) determined that the operation of video lottery gaming at certain racetracks is constitutional. The fact that the court in Dalton did not discuss video lottery roulette games does not state any grounds for a new constitutional challenge. The true gravamen of plaintiff's complaint is not that the electronic roulette game at Empire is somehow "unconstitutional", but that Empire

and Lottery withheld taxes on his winnings as a lottery game, as opposed to what plaintiff characterizes as a traditional live casino game. While plaintiff goes to great length to construct a substantively mangled constitutional claim to evade $2,942.91 in income taxes, neither the IRS Tax Code, nor the State Constitution, nor the Tax Law support his claim that his video lottery winnings were "exempt" from income taxation. His gambling winnings constituted taxable income under federal and state law. Plaintiff's reliance on certain withholding and reporting rules, and charts pertaining to federal withholding on gambling, is misplaced. These withholding and reporting rules and charts do not constitute an exemption from taxation.

Plaintiff's lengthy discussion of the Indian Gaming Regulatory Act of 1988 (IGRA)(25 USC §2701) has no relevance to the instant action, as Empire is not an IGRA casino, and nothing in the IGRA impacts the Lottery's or Empire's ability to conduct video lottery gambling at Yonkers Raceway under New York State law.

To the extent that plaintiff alleges that he has not received a refund with respect to the taxes withheld by the defendants, this does not constitute an injury in fact. Plaintiff does not allege that he paid more income tax in 2011 than required, was otherwise prevented from lawfully filing and deducting his 2011 gambling losses against his gambling income, or otherwise failed to receive a 2011 tax refund to which he was otherwise entitled. Plaintiff concedes that he could have listed his gambling losses in his 2011 income tax filings. To the extent that plaintiff claims that it would be difficult to document these losses, it is noted that plaintiff was a member of Empire's "Player's Club' and could have requested an annual report of his gambling activity prior to filing his 2011 income taxes.

Plaintiff also argues that "as a gambler, he no doubt belongs to the 'zone of interest' or group of people that law intended to protect" and refers to the IRS regulations pertaining to tax withholdings. Plaintiff's claims in this regard are preposterous. Plaintiff's desire to evade taxes of $2,942.91 on his taxable gambling winnings is not within the zone of interest of any federal, state or local statute or regulation, and is insufficient to confer standing to challenge the withholding and payment of taxes on his lottery winnings.

Accordingly, defendants' motion and cross motion to dismiss the complaint on the grounds of lack of standing, is granted.

Dated: May 13, 2013

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TIMOTHY J. DUFFICY, J.S.C.