150 RFT Varick Corp. v City of New York
2014 NY Slip Op 30343(U)
February 5, 2014
Supreme Court, New York County
Docket Number: 103079/12
Judge: Geoffrey D. Wright
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SCANNED ON 2/7/2014

[* 1]

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

PRESENT: GEOFFREY D.S. WRIGHT PART 47
Justice

150 RFT VARICK CORP., d/b/a Greenhouse,

Plaintiff

- v -

CITY OF NEW YORK,

Defendants

INDEX NO. 103079/12

MOTION DATE _____

MOTION SEQ. NO. 02

MOTION CAL. NO. _____

The following papers, numbered 1 to 1 were read on this motion to/for vacate order of closure

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion by Plaintiff 150 RFT VArick Corp., d/b/a Greenhouse., for an order vacating the order closing its business, is granted after a hearing on the motion, a/p/o.

Dated: February 5, 2014

GEOFFREY D. WRIGHT
A.J.S.C.

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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NEW YORK
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 47

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150 RFT VARICK CORP., d/b/a Greenhouse,

Plaintiff-Petitioner(s),

-against-

THE CITY OF NEW YORK

Defendant-Respondent(s),

----------X

Index #103079/12
Motion Cal. #
Motion Seq. #
DECISION/ORDER
Pursuant To Present:
Hon. Geoffrey Wright
Judge, Supreme Court

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion to: set aside order of closure

PAPERS	NUMBERED
Notice of Petition/Motion, Affidavits & Exhibits Annexed	1
Order to Show Cause, Affidavits & Exhibits	
Answering Affidavits & Exhibits Annex	
Replying Affidavits & Exhibits Annexed	
Other (Cross-motion) & Exhibits Annexed	
Supporting Affirmation	

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Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

The Plaintiff operates a late night club, known as "Greenhouse," located at the southeastern corner of Varick and Van Dam Streets. It has been the subject of much oversight and litigation in the past two plus years. This is the result of allegations of under age patrons being served liquor, boisterous behavior by patrons disturbing others in the neighborhood, sales of illegal drugs, consumption of illegal drugs on the premises, the inability to control the behavior of patrons who get into fights. All of this culminated, in 2012, in a lengthy stipulation between the Plaintiff and the City of New York, under which the Plaintiff agreed to undertake certain measures to assure that its patrons stayed within prescribed limits of conduct.

In the early morning hours of September 6, 2013, a time that coincided with the conclusion of a televised awards ceremony elsewhere in the City, the police department summarily issued an order of closure due to the creation of a public nuisance. The specific claims are:

On August 26, 2013, inside of 150 Varick Street, at approximately 1:10 in the morning, the Plaintiff permitted a disorderly premise [sic] to exist. The specification on the summons states: "At t/p/o the management (Fiore, John) failed to maintain a controlled crowd environment at the above listed location causing public alarm and annoyance."

At a preliminary hearing on the Plaintiff's application for a temporary restraining order vacating the order of closure, I found that the summons, at least for the purpose of a Criminal Court proceeding, was facially defective, in that it did not cite an existing statute. The statute listed on the summons (there has been no application to amend), was 106-6 of the Alcohol Beverage Control Law. No such section exists. The closest law actually on the books, is 106(6), of said law.

In any event, there are problems with the proof, as well as the charging instrument. Much was made at the hearing before me, of the alleged failure to control patrons seeking entry to the night club. Surveillance cameras facing Van Dam Street, seemed to belie the testimony of the defense witness. Contrary to the defense claims, I could not see that traffic on either Van Dam Street or Varick Street was impeded. Only the changing traffic signals were responsible to slowing or stopping traffic. Potential patrons were corralled behind wood saw horses, and had their identification checked before entering the club. Allegations that the Plaintiff allowed its clientele to enter and linger on Van Dam Street or across the street on the north side of the block were also unconfirmed by video. Although some people could be seen standing in what would be the parking lane of Van Dam Street, there was no interference with traffic, as there was a truck parked in that lane, thus dissuading passing vehicles from entering the lane. The few people standing by the truck did not seem to be interfering with passersby.

The video submitted into evidence showed entrants being screened before entering the club. The line was orderly. Inevitably, some people strayed beyond the barriers outside the club onto the sidewalk. However, considering the time of day, there was no evidence of interference with pedestrian traffic.

No arrests were made on the night in question. The two strongest complaints against the Plaintiff were: (1) anonymous staff members, in answer to an inquiry from an under cover officer, pointed to area where one could smoke a cigaret; (2) there was an aroma of marijuana in one section of the club. This section was unoccupied by smokers when the officer checked, and she was late directed to smoke outside the club. The under cover later saw one man smoking a cigar, and later still saw several people passing a blunt around, with no apparent action taken by the club, although she did not identify any club personnel in the area.

At some point, the police directed club personnel to stop admitting patrons. There was a resultant build up of people outside that I cannot attribute to the Plaintiff. Indeed, there was testimony the club was not as well attended as anticipate directly as the result of compliance

with police directives that limited access to the club, and discouraged others from trying to enter.

As noted in an earlier decision on the application for a temporary restraining order, the summons issued in this matter cited violation of 106-6 of the Alcohol Beverage Control Law. No such section exists. The section of the law that comes closest to the one in the summons is 106(6), which reads as follows " No person licensed to sell alcoholic beverages shall suffer or permit any gambling on the licensed premises, or suffer or permit such premises to become disorderly. The use of the licensed premises, or any part thereof, for the sale of lottery tickets, playing of bingo or games of chance, or as a simulcast facility or simulcast theater pursuant to the racing, pari-mutuel wagering and breeding law, when duly authorized and lawfully conducted thereon, shall not constitute gambling within the meaning of this subdivision." Although the word "disorderly" is used in the statute, all of its factual references are to gaming and wagering. There was no evidence of any such activity on the night in question.

The term "disorderly" as used in ABC 106(6), does not have as limited a definition as the Plaintiff would have it [***PEOPLE v. BART'S RESTAURANT CORP.***, 1964, 42 Misc.2d 1093, 249 N.Y.S.2d 344, "term disorderly is not, as Plaintiff argues, limited to the activities listed in the statute [The word "disorderly" in provisions in this section making it misdemeanor for licensee to permit licensed premises to become disorderly means contrary to public order or morality, disreputable, or that which constitutes a nuisance."] That being said, in order to sustain the charge, "it must be demonstrated that the licensee had knowledge or the opportunity through reasonable diligence to acquire knowledge of the alleged acts" [***ISLAND MERMAID REST. CORP. v. Matter of Leake v. Sarafan,*** 35 N.Y.2d 83, 86, 358 N.Y.S.2d 749, 315 N.E.2d 796; see ***Matter of Beer Garden v. New York State Liq. Auth.,* 79 N.Y.2d 266, 276, 582 N.Y.S.2d 65, 590 N.E.2d 1193; *MATTER OF CITYWORLD ENTERS. v. NEW YORK STATE LIQUOR AUTHORITY,*** 183 A.D.2d 402, 583 N.Y.S.2d 259].

There was no evidence of over crowding, or boisterousness in the streets. The club presented evidence as to the number of security personnel on duty, as well as their stations. There is also evidence, from the City's own witness, that when smoking inside the club was detected, the smoker was directed to smoke out of doors. This is at odds with the claim that there was no response to the aroma of marijuana smoke. There was also an alleged attempted sale of a drug known as MDNA or Molly. Upon chemical analysis, it was determined that the sale was fraudulent, and at the time of the alleged sale, the drug was not illegal.

In an earlier installment of this serial contest between the club and the state and city, the Appellate Division held "Respondent's [City's] determination that petitioner suffered or permitted the possession, use, or sale of drugs by a nightclub patron as alleged in charge 2, was not supported by substantial evidence...Respondent failed to establish that petitioner knew or should have known of the alleged disorderly conditions asserted in these charges and tolerated its existence (Matter of Playboy Club of N.Y. v. State Liq. Auth., 23 N.Y.2d 544, 550, 297 N.Y.S.2d 926, 245 N.E.2d 697 [1969]." [***150 RFT VARICK CORP. v. NEW YORK***

STATE LIQUOR AUTHORITY, 107 A.D.3d 524, 967 N.Y.S.2d 353, 2013 N.Y. Slip Op. 04543] By the standard set in the prior round of this dispute, the Plaintiff's application must be, and is granted. The order of closure is hereby vacated. This constitutes the decision and order of the court.

Dated: February 5, 2014

GEOFFREY D. WRIGHT
AJSC

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