Alliance to End Chickens as Kaporos v New York City Police Dept.
2015 NY Slip Op 32708(U)
September 14, 2015
Supreme Court, New York County
Docket Number: 156730/2015
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES **PART 59**
Justice

The Alliance to End Chickens as Kaporos, RINA DEYCH, individually, and RINA DEYCH, as member of The Alliance to End Chickens as Kaporos, LISA RENZ, individually and LISA RENZ, as member of the Alliance to End Chickens as Kaporos, MICHAL ARIEH, JOY ASKEW, ALEKSANDRA SAHA BROMBERG, STEVEN DAWSON, VANESSA DAWSON, RACHEL DENT, JULIAN DEYCH, DINA DICENSO, FRANCES EMERIC, KRYSTLE KAPLAN, CYNTHIA KING, MORDECHAI LERER, CHRISTOPHER MARK MOSS, DAVID ROSENFELD, KEITH SANDERS, LUCY SARNI, LOUISE SILNIK, DANIEL TUDOR,

Plaintiffs,

- against -

THE NEW YORK CITY POLICE DEPARTMENT, COMMISSIONER WILLIAM BRATTON, in his official Capacity as Commissioner of the New York City Police Department, THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE, CENTRAL YESHIVA TOMCHEI TMIMIM LUBAVITZ, INC., SHLOMIE ZARCHI, ABRAHAM ROSENFELD, NATIONAL COMMITTEE FOR THE FURTHERANCE OF JEWISH EDUCATION AND AFFILIATES, RABBI SHEA HECHT, RABBI SHALOM BER HECHT, RABBI SHLOMA L. ABROMOVITZ, YESHIVA OF MAZCHZIKAI HADAS, INC., MARTIN GOLD, CONGREGATION BEIS KOSOV MIRIAM LANYNSKI, LMM GROUP, LLC, ISAAC DEUTCH, LEV TOV CHALLENGE, INC., ANTHONY BERKOWITZ, YESHIVA SHEARETH HAPLETAH SANZ BNEI, BEREK INSTITUTE, MOR MARKOWITZ, NELLIE MARKOWITZ and BOBOVER YESHIVA BNEI ZION, INC. d/b/a KEDUSHAT ZION, RABBI HESHIE DEMBITZER,

Defendants.

Index No.: 156730/2015

Motion Date: 08/25/2015

Motion Seq. No.: 001

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

1. **CHECK ONE:** ..... ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE: MOTION IS:** ☐ **GRANTED** ☒ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

The following papers, numbered 1 to ___ were read on this show cause order for a preliminary injunction_____ .

Order to Show Cause -Affidavits -Exhibits _____	No(s).	
Notice of Motion/Answering Affidavits - Exhibits _____	No(s).	
Replying Affidavits - Exhibits _____	No(s).	

Cross-Motion: ☒ **Yes** ☐ **No**

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached Memorandum Decision and Order.

Dated: September 14, 2015 **ENTER:**

DEBRA A. JAMES J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: PART 59

The Alliance to End Chickens as Kaporos, RINA DEYCH, individually, and RINA DEYCH, as member of The Alliance to End Chickens as Kaporos, LISA RENZ, Individually, and LISA RENZ, as member of the Alliance to End Chickens as Kaporos, MICHAL ARIEH, JOY ASKEW, ALEKSANDRA SAHA BROMBERG, STEVEN DAWSON, VANESSA DAWSON, RACHEL DENT, JULIAN DEYCH, DINA DICENSO, FRANCES EMERIC, KRYSTLE KAPLAN, CYNTHIA KING, MORDECHAI LERER, CHRISTOPHER MARK MOSS, DAVID ROSENFELD, KEITH SANDERS, LUCY SARNI, LOUISE SILNIK, DANIEL TUDOR,

Plaintiffs,

- against-

THE NEW YORK CITY POLICE DEPARTMENT, COMMISSIONER WILLIAM BRATTON, In his official Capacity as Commissioner of the New York City Police Department, THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE, CENTRAL YESHIVA TOMCHEI TMIMIM LUBAVITZ, INC., SHLOMIEZARCHI, ABRAHAM ROSENFELD, NATIONAL COMMITTEE FOR THE FURTHERANCE OF JEWISH EDUCATION AND AFFILIATES, RABBI SHEA HECHT, RABBI SHALOM BER HECHT, RABBI SHLOMA L. ABROMOVITZ, YESHIVA OF MAZCHZIKAI HADAS, INC., MARTIN GOLD, CONGREGATION BEIS KOSOV MIRIAM LANYNSKI, LMM GROUP, LLC, ISAAC DEUTCH, LEV TOV CHALLENGE, INC., ANTHONY BERKOWITZ, YESHIVA SHEARETH HAPLETAH SANZ BNEI, BEREK INSTITUTE, MOR MARKOWITZ, NELLIE MARKOWITZ and BOBOVER YESHIVA BNEI ZION, INC. d/b/a KEDUSHAT ZION, RABBI HESHIE DEMBITZER,

Defendants.

Index No. 156730/2015

DECISION and ORDER

DEBRA A. JAMES, J.:

Plaintiffs commenced this plenary action seeking mandamus to compel defendants City of New York, by its agencies the Police and Mental Health and Hygiene Departments, and the Police Commissioner (City Defendants), to enforce and prohibit their "aiding and abetting " violations of a myriad of state and local statutes and regulations related to public sanitation and health. Plaintiffs seek injunctive relief from irreparable injuries they allegedly will suffer (and have suffered in the past) as the result of the City Defendants' failure to enforce such laws and their "aiding and abetting" of violations thereof by the individual defendants, who are Orthodox Jewish rabbis or members of Yeshivas or other

Orthodox Jewish religious institutions (Non-City Defendants), in the course of the performance of an annual religious ritual known as Kaporos on the advent of Yom Kippur observances.

Plaintiffs also claim that the Non-City Defendants have created and will create a public nuisance in carrying out Kaporos, and now seek a preliminary injunction to restrain such defendants from violating various state and local sanitary and health statutes and codes. Upon final disposition of this action, plaintiffs seek to permanently enjoin the Non-City Defendants from creating such public nuisance.[1]

The Kaporos ritual, as allegedly practiced by the Non-City Defendants, involves the practitioners' grasping of live chickens by their wings and swinging them above their heads three times and reciting prayers. The purpose of this act is to transfer the practitioner's sins to the birds. After swinging the bird, the adherents slit the chickens' throats with a sharp knife. The meat is then donated to the poor.

Plaintiffs allege that the upcoming Kaporos activities to be carried out by the Non-City Defendants on the public streets of Brooklyn will violate many laws, including but not limited to:

- Article 7 of New York State Agriculture and Markets Law § 96-b, which makes it illegal for any person, firm or corporation to operate any place or establishment where animals or fowls are slaughtered or butchered for food unless licensed by the state commissioner of agriculture;

- Article 26 of New York State Agriculture and Markets Law § 353, which defines as a class A misdemeanor the torturing, or cruelly beating or unjustifiably maiming, mutilating or killing any animal, whether wild or tame, and whether belonging to such person or another, or depriving any animal of necessary sustenance, food or drink, or engaging in any acts of cruelty to any animal;

- New York State Rules and Regulations 45.4 that requires any persons entering premises containing live poultry within the State of New York to take sanitary precaution to prevent the introduction or spread of avian influenza into or within the State, including

[1] In their Show Cause Order submitted to the court, plaintiffs sought a permanent injunction only but upon oral argument on August 25, 2015, plaintiffs' counsel moved to amend the Order to Show Cause to seek a preliminary injunction. The court deems the Show Cause Order as seeking such provisional remedy.

disinfecting of all footwear before entering and after leaving any premises containing live poultry);

- New York City Administrative Code § 18-122 (d) that makes it unlawful to erect, establish or carry on, in any manner whatsoever, upon any lot fronting on Eastern Parkway of any slaughter-house, or other trade or business, which may be in any way dangerous, obnoxious or offensive to the neighboring inhabitants);

- New York City Health Code § 153.09 that prohibits any person from throwing, dropping, or putting any blood, swill, brine, offensive animal matter, noxious liquid, dead animals, putrid or stinking vegetable or animal matter or allowing any such matter to run or fall into any street, public sewer, or standing or running water;

- New York City Health Code § 161.09 that requires a permit to sell or keep live poultry on the same lot as a multiple dwelling and prohibiting the issuance of such a permit unless the coops are more than twenty five feet from inhabited building other than a one-family home occupied by the applicant.

THE PARTIES

United Poultry Concerns, according to the affidavit of its founder and president Karen Davis, is a nonprofit organization that "promotes the compassionate and respectful treatment of domestic fowl including a sanctuary for chickens in Virginia." Davis alleges that United Poultry Concerns has approximately 15,000 members. She also alleges that she is the founder and head of plaintiff The Alliance (Alliance) to End Chickens as Kaporos, which is an "informal" subsidiary of United Poultry Concerns. Davis states that since 2010 she has attended protests against the use of chickens in rituals in Crown Heights and other neighborhoods in Brooklyn.

According to their Amended Verified Complaint and affidavits, the individual plaintiffs Rina Deych, Joy Askew, Sasha Bromberg Steven Dawson, Vanessa Dawson, Rachel Dent, Julian Deych, Francis Emeric, Cynthia King, Dawn Ladd, Lucy Sarni, are persons who reside or work or travel to work, within the neighborhoods of Crown Heights, Boro Park and Williamsburg in Brooklyn, where the Non-City Defendants carry out the Kaporos ritual every year before Yom Kippur. They complain that in past years for days before the ritual, the Non-City Defendants have left truckloads of living and sometimes several

dead chickens crowded in crates stacked without food or water or shelter from the elements. They claim the Non City Defendants erect make-shift slaughterhouses on the public streets of their neighborhoods, where they slaughter chickens. They contend that in many instances, the practitioners have injured the birds in the course of swinging them, and that they have seen dead birds and the by-products of the slaughter thrown into the streets. They dispute that the chickens are donated to the needy and allege that after the slaughtering has ended, they observed chickens carcasses dumped into big metal dumpsters in the alleyways where they remain for a few days. According to plaintiffs, there is no oversight for clean-up of the accumulation of bacteria-filled debris. Many of the affiants complain that they have suffered illness and mental anguish from the stench and sights of maimed, mutilated or dead poultry on the public streets. Several of the plaintiffs assert that the activity has grown exponentially over the years creating a carnival-like and chaotic public nuisance.[2]

The City Defendants oppose plaintiffs' motion for a preliminary injunction and affirmatively move to dismiss.

In opposition, the attorney for defendants National Committee for the Furtherance of Jewish Education and Affiliates, Rabbi Shea Hect, Rabbi Shalom Ber Hect, Rabbi Shloma L. Abramovitz, Bobover Yeshiva Beni Zion Inc. and Rabbi Heshie Dembitzer argues that the hearing on plaintiffs' application should be adjourned until after Yom Kippur to allow more time for the Non-City Defendants to submit opposition papers. Arguing that plaintiffs deliberately engaged in brinkmanship by bringing the application in the middle of the summer with responsive papers due on the eve of Yom Kippur, defense counsel points out that plaintiffs fail to inform the court that plaintiffs made a similar application to restrain the Non-City Defendants from carrying out the Kaporos chicken slaughtering religious rite in the

[2] At the hearing, defense counsel represented that the Non-City Defendants have already purchased 50,000 live chickens for Kaporos, which is to take place the weekend of September 18, 2015.

Supreme Court, Kings County, in September 2014, and that plaintiffs have failed to prosecute such action, which is still pending. Attached to the opposition papers is a copy of the Show Cause Order dated September 29, 2014, and entered as "declined to sign" on October 8, 2014[1], by the judge (Martin, J.) of Supreme Court, County of Kings.

Defense counsel contends that in any event, the application of plaintiffs must be denied, as plaintiffs make no demonstration that they are likely to succeed on the merits of their public nuisance claim. Defendants Schect and Abramovitz, each by his affirmation, states that he is an ordained rabbi and member of the Executive Committee of the defendant National Committee for the Furtherance of Jewish Education and Affiliates (Affiliates). Each states that the custom of using chickens for the purpose of atonement in the Kaporos ritual before Yom Kippur has been practiced for at least two thousand years. Each acknowledges that some rabbis authorize the use of coins, instead of chickens, but that they and Affiliates' members are compelled to follow their own custom. Each argues that plaintiffs who are vegetarians or animal rights activists and disapprove of their use of chickens should not be allowed to interfere with their religious practices. Each further points out that the Affiliates operate only one site in Brooklyn on Eastern Parkway, and that there are numerous unknown vendors, who sell chickens for the Kaporos ritual who have nothing to do with Affiliates.

Counsel for defendant Abraham Rosenfeld states that Rosenfeld was not served with process, and joins in the application to adjourn the hearing of Show Cause Order for further papers. By affidavit, defendant Schlomie Zarchi raises an issue of fact with respect to whether he was served properly with process. Counsel for Zarchi also argues that plaintiff Alliance has no standing or authority to prosecute a lawsuit in New York pursuant to Not-for-Profit Corporation Law § 1314, as Alliance has no independent

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[1]Yom Kippur began on October 3 and ended on October 4, 2014; any provisional remedy was rendered moot at the time the Kings County Supreme Court Justice declined to sign the show cause order.

legal existence in the State of New York and its affiliate United Poultry Concerns exists only under the laws of the State of Maryland, and that defendant Zarchi is immune from liability pursuant to CPLR § 3211(a) [see Not-for-Profit Corporation Law § 720-a].

DISCUSSION

On August 25, 2015, the court denied defendants' application to adjourn the hearing of the instant Show Cause Order. The Show Cause Order required that the papers be personally served upon the defendants on or before July 27, 2015, with responsive papers directed to be served by defendants on or before August 17, 2015. Upon a telephone conference with the court, plaintiffs' counsel consented to extend the deadline for one week to August 21, three days before the hearing. The court found such extension adequate.

Defendants are correct that on September 29, 2014, in Decht v The New York City Police Department (Kings County Supreme Court Index No. 14065/2014), two of the plaintiffs sought the identical relief against the City and three of the individual defendants, as plaintiffs seek here. As the plaintiffs in the Kings County action, which is still pending, were represented by the same attorney as represents the plaintiffs now before this court, the "ex parte motion (should have been) accompanied by an affidavit stating the result of any prior motion for similar relief and specifying the new facts, if any, that were not previously shown." CPLR 2217(b). However, ancient law holds that such omission is an irregularity that the court may disregard. See Terry v. Green, 53 Misc. 10 (Supreme Court, Herkimer County 1907). Nor does this court find that the instant application constitutes a motion for leave to renew, stay, vacate or modify a prior order. As plaintiffs point out, there are a multiplicity of parties on both sides in the matter at bar that are not before the Kings County Supreme Court, and in any event plaintiffs do not seek to affect the declination made by the Kings County Justice in 2014. Nor have

defendants moved either to stay the instant action pending resolution of the other action pending in Kings County Supreme Court or to transfer and consolidate the instant action.[3]

Nevertheless, the court shall deny the motion of plaintiffs for a preliminary injunction and dismiss the action against the City Defendants.

It is axiomatic that "[to] be entitled to a preliminary injunction, the [movant] was required to demonstrate a likelihood of success on the merits, irreparable injury in the absence of provisional relief, and a balancing of the equities in its favor" (City of New York v 330 Continental LLC, 50 AD3d 226, 230 [1st Dep.t 2009]). The City Defendants are correct that plaintiffs have failed to make the requisite showing.

As argued by the City Defendants, this plenary action brought by plaintiffs is improper. Plaintiffs were required to commence an Article 78 special proceeding to seek mandamus relief against the City of New York. See CPLR 7803(1).

Nonetheless, pursuant to CPLR 103(c), the court sua sponte converts the action into an article 78 proceeding. See Manshul Constr. Corp. v Board of Education of City of New York, 154 AD2d 38 (1st Dept. 1990).

Treating the instant Show Cause Order and the City Defendants' motions as made in a special proceeding pursuant to CPLR § 103 (b) and § 404, respectively, this court concurs with the City Defendants that the plaintiffs (now petitioners) are unable to demonstrate a likelihood of success on merits of their mandamus claim, since such relief lies "only to enforce a clear legal right where the public official has failed to perform a duty enjoined by law" (NY Civil Liberties Union v State of New York,

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[3] As to venue, although all of the individual parties reside and the factual allegations all took place in Kings County, this action must be heard in New York County since it would be an abuse of discretion for this court to sua sponte transfer this action to Kings County. See Kelson v Nedicks Stores, Inc., 104 AD2d 315 (1st Dept. 1984).

4 NY3d 175, 184 [2005]). Mandamus does not lie to compel the enforcement of a duty that is discretionary, as opposed to ministerial.

"A discretionary act 'involve[s] the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result" (NY Civil Liberties, 53 NY2d at 184). Mandamus is not available to compel government officers to perform discretionary acts such as the general enforcement of laws and regulations. See Walsh v LaGuardia, 269 NY 437 (1936) (petitioner had no right to relief to compel Mayor and Police Commissioner to "perform their duty" and prohibit operators of non-franchised bus routes); Perazzo v Lindsay, 30 AD2d 179, 180 (1st Dept. 1968) (petitioners did not have general right to maintain an Article 78 proceeding to secure broad mandamus relief directed to the enforcement of specified laws and ordinances).

The City Defendants (now City Respondents) are correct, that whether and in what instances police power should be exercised in connection with the enforcement of the statutory and regulatory provisions that petitioners contend will be violated with the Kaporos practice of the Non-City Defendants (with the exception of Article 26 of the New York State Agriculture & Markets Law (see [infra]) are not ministerial or mandatory in any way. Enforcement of such provisions implicates the discretionary function of the executive branch comprised by the City Defendants, which executive branch is permitted to allocate its resources and prioritize police enforcement action as a matter of its discretion.

The court concedes that one of the laws referenced by petitioners is mandatory. New York State Agriculture and Markets Law §371 mandates police officers to issue an appearance ticket pursuant to section 150.20 of the criminal procedure law, summon or arrest and bring before a magistrate any person offending against any of the provisions of Article 26 of the New York State Agriculture and

Markets Law. In their Amended Verified Complaint, plaintiffs reference Article 26 of New York State Agriculture and Markets Law, specifically, § 353, which classifies cruelty to animals as a misdemeanor. However, petitioners do not claim, or offer even one instance, specific or otherwise, where any petitioner ever tried to file, let alone, where the New York City Police Department ever refused to accept, any complaint with respect to any violations of Agriculture and Markets Law § 353 by the Non-City defendants that they allegedly witnessed.

One of the petitioners in her affidavit states that she personally visited the precinct in one of the neighborhoods where Kaporos was taking place and requested to see permits for the rituals. Another asserts that she telephoned "311". Neither alleges that either ever telephoned "911" to report a misdemeanor. In her affidavit, Davis states she personally attended protests for the past four years at various Kaporos sites, in which many of her members participated. Neither in the Amended Verified Complaint nor any of the supporting affidavits is there any claim that the Police Department refused a 911 call about the alleged unlawful activity. Nor are the assertions that the police department placed barricades and blocked off public streets and sidewalks to "aid and abet" violations of Agriculture and Markets Law § 353 by the Non-City Defendant tantamount to an assertion by any of the petitioners that any one of them ever made a 911 call to the New York City police department about any alleged illegal activity. On that basis, the matter at bar is distinguishable from the facts of Jurnove v Lawrence, 38 AD3d 895 (2d Dept. 2007).

For their failure to state a cognizable mandamus cause of action, the petition against the City Defendants must be dismissed.

The Non-City Defendants' argument that the Alliance lacks standing is inconsequential, since individual members of that association are participating as named plaintiffs in this action. Compare New York State Association of Nurse Anesthetists v Novello, 2 NY3d 207 (2004). Nor are disputes as to

personal jurisdiction dispositive of the instant motion for a preliminary injunction, as resolution of such issue awaits either a motion to dismiss or interposition of such affirmative defense in such defendants' answers. See Glikiad v Cherney, 97 AD3d 401 (1st Dept. 2012).

However, he court is persuaded by the arguments of counsel for the Non-City Defendants that plaintiffs have failed to demonstrate a likelihood of success on the merits of their public nuisance claim.

"A public nuisance is actionable by a private party only if it is shown that the person suffered special injury beyond that suffered by the community at large" (532 Madison Avenue Gourmet Foods, Inc. V Finlandia Center, Inc., 96 NY2d 280, 292 (2001).

In that regard, Wheeler v Lebanon Valley Auto Racing, 303 AD2d 791 (3d Dept. 2003) is instructive.

> A public nuisance "consists of conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all ... in a manner such as to offend public morals, interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of persons" Copart Indus. v Consolidated Edison Co. of N.Y., 41 NY2d 564, 568 [1977]; see 532 Madison Ave. Gourmet Foods v Finlandia Ctr., 96 NY2d 280, 292 [2001]; Restatement [Second] of Torts § 821B; R. Abrams and V. Washington, The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After Boomer, 54 Albany L Rev 359, 374). Racetracks are among the sources of "[n]oise and other disturbances of the peace in a neighborhood" that have been found to be public nuisances (Hoover v Durkee, 212 AD2d 839, 840 [1995]; see State of New York v Waterloo Stock Car Raceway, 96 Misc. 2d 350 [1978]; cf. State of New York v Bridgehampton Rd. Races Corp., 54 AD2d 929 [1976]).
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> It has long been settled, however, that "[a] public nuisance is actionable by a private persons only if it is shown that the person suffered special injury beyond that suffered by the community at large" (532 Madison Ave. Gourmet Foods v Finlandia Ctr., supra at 292; see Burns Jackson Miller Summit & Spitzer v Lindner, 59 NY2d 314, 334 [1983]; Copart Indus. v Consolidated Edison Co. of N.Y., supra at 568; People v Brooklyn & Queens Tr. Corp., 283 NY 484 [1940]; Francis v Schoellkopf, 53 NY 152; Hoover v Durkee, supra at 840; Leo v General Elec. Co., 145 AD2d 291, 294 [1989]). As a result, where the claimed injury is "common to the entire community," a private right of action is barred (Burns Jackson Miller Summit & Spitzer v Lindner, supra at 334-335; compare Hoover v Durkee, supra [where record on appeal indicates that raceway noise levels caused the plaintiffs to suffer special damages consisting of decreased property values], with

> Queens County Bus. Alliance v New York Racing Assn., 98 AD2d 743 [1983] [neighboring racetrack caused the plaintiffs to suffer no damages different from Queens County's other residents]). In addition, the Court of Appeals has recently confirmed that the requisite "special" or "peculiar" injury suffered by private persons must be different in kind, and not just degree, from that sustained by the community surrounding the source of the public nuisance (532 Madison Ave. Gourmet Foods v Finlandia Ctr., supra at 294).
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> (Wheeler, 303 AD3d at 792-793.)

Here, as in Wheeler, plaintiffs and their experts fail to demonstrate a likelihood that all of the plaintiffs and other persons in community were not and will not be "similarly impacted" by exposure to the stench and debris of the slaughter-house conditions created during the Kaporos rituals in their Brooklyn neighborhoods. Plaintiffs' claims of undifferentiated medical conditions are insufficient to demonstrate a likelihood of success on their claims for special injury, i.e. that they are affected by Kaporos in a fundamentally different manner than members of their community at large.

It is likely that plaintiffs will establish no more than a public nuisance with respect to the activities of the Non-City Defendants.

> A public nuisance exists for conduct that amounts to a substantial interference with the exercise of a common right of the public, thereby offending public morals, interfering with the use by the public of a public place or endangering or injuring the property, health, safety or comfort of a considerable number of persons. A public nuisance is a violation against the State and is subject to abatement or prosecution by the proper governmental authority (Copart Indus. v Consolidated Edison Co., 41 NY2d 564, 568).

(532 Madison Ave. Gourmet Foods v Finlandia Ctr., supra at 292).

Based on the foregoing, this court need not yet reach the constitutional question of whether a restraint on the Non-City Defendants against violating certain statutory and regulatory provisions would interfere with their rights to free exercise of religion under the Free Exercise Clause of the United States Constitution Bill of Rights. See Nussenweig v Dicorica, 38 AD3d 339 (1st Dept. 2007).[2]

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[2]The history and import of the statutes and regulations at bar do not resemble the law banning religious animal sacrifice enacted by city of Hialeah, which the United States Supreme Court struck down in Church of the Lukum Babalu Aye v City of Hialeah, 508

Accordingly, it is hereby

ORDERED that the motion of plaintiffs for a preliminary injunction is denied in its entirety; and it is further

ORDERED that pursuant to CPLR 103 (c), the herein plenary action as against the City of New York is converted to a CPLR Article 78 proceeding, and the plaintiffs, now deemed petitioners, and the defendants, now deemed respondents, and such proceeding is dismissed; and it is further

ORDERED that the remaining parties are directed to appear for a preliminary conference in IAS Part 59, 71 Thomas Street, Room 103, on October 27, 2015, 2:30 PM; and it is further

ORDERED that defendants shall serve an answer within twenty (20) days of service of this order with notice of entry pursuant to CPLR 3012(d).

This is the decision and order of the court.

Dated: September 14, 2015

ENTER:

J.S.C.

DEBRA A. JAMES

U.S. 520 (1993). In its holding, the Supreme Court found that the history of the Hialeah enactment show that the law specifically targeted the African Cuban Santeria practice of animal sacrifice, while providing numerous exemptions for other instances of animal slaughter, including kosher slaughter. On that basis the Court held that the law violated the First Amendment Free Exercise clause of the United States Constitution. The Non-City Defendants do not dispute at this juncture that the New York State and New York City laws and regulations cited by plaintiffs were enacted to promote the prevention of animal cruelty and public health, and are neutral in their application to all secular or religious conduct.