No. 17

Union Square Park Community Coalition, Inc., et al.,
Appellants,
v.
New York City Department of Parks and Recreation, et al.,
Respondents.

Sanford I. Weisburst, for appellants.
Deborah A. Brenner, for respondents.
Liz Krueger et al.; Union Square Partnership et al.; New Yorkers for Parks; Raritan Baykeeper, Inc. et al., amici curiae.

GRAFFEO, J.:

Plaintiffs challenge an agreement by the New York City Department of Parks and Recreation to allow the operation of a restaurant in Union Square Park. We conclude that plaintiffs fail to state a claim for a violation of the public trust

doctrine and therefore affirm the Appellate Division order dismissing the complaint.

Union Square Park occupies approximately 3.6 acres in lower Manhattan. Dating back to the early 1800s, the park has been the site of various public gatherings, protests and marches, and was designated as a national historic landmark by the United States Department of the Interior. A colonnaded pavilion, the structure at issue on this appeal, stands in the paved plaza at the northern end of the park. In 2008, as part of a citywide restoration initiative, the New York City Department of Parks and Recreation (the Department) renovated portions of the park, including the pavilion area. The project included the future use of the pavilion as a restaurant to replace Luna Park, a café that had operated in a space adjacent to the pavilion from 1994 until 2007.

In 2012, the Department executed a written "License Agreement" with Chef Driven Market, LLC (CDM), which permitted CDM to operate a seasonal restaurant in the pavilion for a term of 15 years. The restaurant would be open from mid-April to mid-October each year, from 7:00 a.m. until midnight on a daily basis. In return, CDM agreed to pay the City an annual license fee of $300,000 in the first year (increasing to about $450,000 in the final year) or 10% of annual gross receipts, whichever amount was greater. The agreement further obligated CDM to outlay at least $700,000 in specified capital improvements.

The Department retained extensive control over the daily operations of the restaurant under the terms of the agreement. For example, the Department "must approve in advance and in writing all plans, schedules, services, hours of operation, menu items and prices as well as all changes in services, menu items, merchandise, and any increase in fees and prices." The preapproved menu must include breakfast items ranging from $1.95 to $15.95; brunch options costing $2.95 to $19.95; and lunch and dinner sandwiches and entrees at prices of $8.95 to $33.95. Outdoor seating would remain open to the public as well as paying customers. The agreement also required CDM to use Union Square Park Greenmarket vendors as suppliers and to offer a number of community programs, including free weekly educational programs; at least 10 annual charity fundraising events; and culinary internships for local students. Finally, the agreement contains a broad termination clause in favor of the Department:

> "[T]his License is terminable at will upon written notice by the Commissioner at any time; however, such termination shall not be arbitrary and capricious. Such termination shall be effective twenty-five (25) days after the date of such written notice . . . In addition, in the event this License Agreement is terminated, [the Department] will not reimburse Licensee's unamortized capital improvement cost."

Plaintiffs Union Square Park Community Coalition, Inc. and several individuals brought this action against the Department, its Commissioner, the City of New York and CDM

(collectively, the Department) seeking a declaratory judgment and injunctive relief restraining the Department from altering the park pavilion to accommodate the restaurant under the public trust doctrine. As relevant to this appeal, plaintiffs asserted two claims: (1) the restaurant constituted a non-park purpose and was unlawful absent legislative approval and (2) the agreement between the Department and CDM constituted a lease, not a license, thereby amounting to an improper alienation of parkland.[1] Plaintiffs moved for a preliminary injunction and the City cross-moved to dismiss the complaint under CPLR 3211 (a) (1) and (7). The City contended that the restaurant served a valid park purpose by providing a unique, reasonably-priced dining experience that would promote park safety during evening hours when the park would otherwise be less heavily trafficked, and that the documentary evidence demonstrated that the agreement was a valid license.

Supreme Court granted plaintiffs' request for a preliminary injunction and denied the City's cross motion to dismiss. The Appellate Division reversed, denied the motion for a preliminary injunction and granted dismissal of the complaint, concluding that the seasonal restaurant did not violate the

[1] Plaintiffs brought a third claim against the Department and Urban Space Holdings, Inc. relating to the use of another section of Union Square Park for a holiday market. Plaintiffs do not press this claim on appeal and we therefore do not address it.

public trust doctrine and that the concession agreement was a revocable license terminable at will, not a lease (107 AD3d 525 [1st Dept 2013]). We granted plaintiffs leave to appeal (21 NY3d 1070 [2013]).

Under the public trust doctrine, dedicated parkland cannot be converted to a non-park purpose for an extended period of time absent the approval of the State Legislature (see Friends of Van Cortlandt Park v City of New York, 95 NY2d 623, 630 [2001]).[2] Plaintiffs, supported by various amici curiae, acknowledge that it is possible for a restaurant to serve a park purpose, but assert that each food establishment must be assessed on a case-by-case basis under a flexible, multi-factor analysis. They contend that the relevant factors in this case indicate that the pavilion restaurant proposed by the Department would not serve valid park purposes because Union Square Park is too small to host a restaurant; there are already a number of restaurants in the immediate vicinity; the menu offerings are too expensive; and the pavilion area could be put to better neighborhood use, e.g., as a site for public speaking and discourse, or dance and yoga classes.

Plaintiffs' position, however, is inconsistent with 795 Fifth Ave. Corp. v City of New York (15 NY2d 221 [1965]), our most recent precedent involving a challenge to the placement of a

[2] It is undisputed that the Department did not obtain legislative authorization for the restaurant.

restaurant in a city park under the public trust doctrine. In that case, plaintiffs brought suit to enjoin construction of a restaurant in Central Park, asserting that the public trust doctrine would be violated because the new structure would result in the destruction of 22,000 acres of rural area; there were numerous eating and drinking establishments in the vicinity; the corner was already heavily congested; and the proposed restaurant would principally serve pedestrians entering from the adjacent street rather than park patrons. Following a bench trial, the trial court rejected plaintiffs' claims and concluded that the restaurant served a legitimate park purpose. In reaching its decision, the trial court relied on a number of considerations, including that the undeveloped area was unused and unsightly; the menu prices were reasonable; and the restaurant would be housed in an attractive glass-enclosed pavilion, which would "enhance the beauty and natural appeal of the southeast corner of Central Park" (40 Misc 2d 183, 190 [Sup Ct, NY County 1963]).

When 795 Fifth Ave. reached us on appeal, we affirmed, but on broader grounds. We began by acknowledging that the "Park Commissioner is vested by law with broad powers for the maintenance and improvement of the city's parks" and that judicial interference would be "justified only when a total lack of power is shown" (15 NY2d at 225 [internal quotation marks and citation omitted]). In other words, although it is for the courts to determine what is and is not a park purpose, we

recognized that the Commissioner enjoys broad discretion to choose among alternative valid park purposes. Observing that restaurants have long been operated in public parks, we rejected plaintiffs' public trust claim, holding that they could show only a "difference of opinion" as to the best way to use the park space and that this "mere difference of opinion [was] not a demonstration of illegality" (id.). Without showing the "type and location of the restaurant to be unlawful," we concluded, plaintiffs could not prevail (id. at 226). We therefore found it unnecessary to consider the myriad factors the trial court had relied upon, including whether the building was well-designed and would replace a neglected area of the park.

Although there are significant differences in the size, characteristics and uses of Central Park and Union Square Park, we perceive no meaningful distinction between 795 Fifth Ave. and the case before us in the application of the public trust doctrine. Plaintiffs ask us to apply a flexible standard that takes into consideration a number of fact-specific criteria in deciding whether a given restaurant serves a park purpose, yet we eschewed that approach in 795 Fifth Ave. Even accepting as true the allegations in plaintiffs' complaint, their claims are substantially similar to the ones we found insufficient in 795 Fifth Ave. Plaintiffs have a different view of the best use of Union Square Park and its pavilion in particular, but this difference of opinion, without more, does not demonstrate the

illegality of the Department's plan. Put differently, plaintiffs have not demonstrated that the "type and location" of the restaurant are unlawful. While we leave open the possibility that a particular restaurant might not serve a park purpose in a future case, we conclude that the restaurant here does not run afoul of the public trust doctrine for lack of a park purpose.

Alternatively, plaintiffs argue that the restaurant plan is unlawful even if it serves a park purpose because the agreement between the Department and CDM is a lease rather than a license. They assert that the document in question, though denominated a license, is in reality a lease -- an illegal alienation of parkland. The Department responds that, read as a whole, and particularly in light of the broad termination clause, the agreement evinces a valid license, not a lease.

We have stated that parkland cannot be leased, even for a park purpose, absent legislative approval (see Van Cortlandt Park, 95 NY2d at 630; see also General City Law § 20 [2] [providing that "the rights of a city in and to its . . . parks . . . are hereby declared to be inalienable"]). The Department may, however, execute a license or permit for a park purpose without violating the public trust doctrine (see Miller v City of New York, 15 NY2d 34, 37 [1964] ["Since the property was as a park impressed with a trust for the public it could not without legislative sanction be alienated or subjected to anything beyond a revocable permit."]). The decisive question on plaintiffs'

second claim, therefore, is whether the agreement between the Department and CDM constitutes a lease or a license.

A document is a lease "if it grants not merely a revocable right to be exercised over the grantor's land without possessing any interest therein but the exclusive right to use and occupy that land" (id. at 38). It is the conveyance of "absolute control and possession of property at an agreed rental which differentiates a lease from other arrangements dealing with property rights" (Feder v Caliguira, 8 NY2d 400, 404 [1960]). A license, on the other hand, is a revocable privilege given "to one, without interest in the lands of another, to do one or more acts of a temporary nature upon such lands" (Trustees of Town of Southampton v Jessup, 162 NY 122, 126 [1900]; see also Lordi v County of Nassau, 20 AD2d 658, 659 [2d Dept 1964], affd without opn 14 NY2d 699 [1964] ["Generally, contracts permitting a party to render services within an enterprise conducted on premises owned or operated by another, who has supervisory power over the method of rendition of the services, are construed to be licenses."]). That a writing refers to itself as a license or lease is not determinative; rather, the true nature of the transaction must be gleaned from the rights and obligations set forth therein. Finally, a broad termination clause reserving to the grantor "the right to cancel whenever it decides in good faith to do so" is strongly indicative of a license as opposed to a lease (Miller, 15 NY2d at 38).

Here, the language of the agreement confirms that it is what it purports to be -- a revocable license. The Department retained significant control over the daily operations of the restaurant, including the months and hours of operation, staffing plan, work schedules and menu prices. Moreover, CDM's use of the premises is only seasonal, and is not exclusive even in the summer, as outdoor seating is required to be available to the general public (with the exception of an area reserved for the service of alcoholic beverages) and CDM is obligated to open the pavilion to the public for community events on a weekly basis. The agreement also contains numerous environmental and community-based provisions. Aside from complying with extensive environmental standards, CDM is required, for example, to use Greenmarket vendors, offer culinary internships and host charitable events. More importantly, the agreement broadly allows the Department to terminate the license at will so long as the termination is not arbitrary and capricious. Consequently, despite the 15-year term and payment structure, we agree with the Department that it entered into a valid license arrangement with CDM.

In sum, the Department's grant of a license to CDM to operate a seasonal restaurant in the Union Square Park pavilion, without legislative approval, was lawful under our precedents.

Accordingly, the order of the Appellate Division, insofar as appealed from, should be affirmed, with costs.

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Order, insofar as appealed from, affirmed, with costs. Opinion by Judge Graffeo. Chief Judge Lippman and Judges Read, Smith, Pigott, Rivera and Abdus-Salaam concur.

Decided February 20, 2014