

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

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GABRIEL SUMNER,

Plaintiff,

Index No. 103326/99

-against-

AFFIDAVIT IN SUPPORT  
OF MOTION TO DISMISS

BATTERY PARK CITY AUTHORITY and  
BATTERY PARK CITY PARKS CORPORATION,

Defendants.  
-----X

STATE OF NEW YORK )

ss.:

COUNTY OF NEW YORK )

TESSA HUXLEY, being duly sworn, deposes and says:

1. I am the Executive Director of BATTERY PARK CITY PARKS  
CONSERVANCY CORPORATION<sup>1</sup> ("BPCPC"), sued herein as BATTERY PARK CITY  
PARKS CORPORATION, and submit this affidavit in support of the instant motion by  
defendants BATTERY PARK CITY AUTHORITY ("BPCA") and BPCPC for an order

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<sup>1</sup> The name of Battery Park City Parks Corporation was changed to Battery Park City  
Parks Conservancy Corporation, pursuant to approval by the State Legislature, in February 1999,  
to enforce the public awareness of the non-profit nature of the organization. The various non-  
profit parks corporations that operate and manage the public parkland throughout the City of  
New York likewise include the designation "Conservancy" in their names.

The official name of BPCA was recently changed by the State Legislature to the "Hugh  
L. Carey Battery Park City Authority," but continues to be known as Battery Park City Authority.

dismissing the complaint in this action on the grounds that the complaint fails to state a cause of action. A copy of the Complaint is annexed hereto as Exhibit "A".

2. Defendant BPCA is a state public benefit corporation created in 1968 by the New York State Legislature enactment (Public Authorities Act 1970 *et seq.*) responsible for the planning, operation, control and development of the mixed commercial and residential community project of Battery Park City located along the Hudson River at the lower west end of Manhattan. BPCA is a corporate governmental agency created by Public Authorities Law §1973, which states, in pertinent part:

There is hereby created the battery park city authority which shall be a body corporate and politic, constituting a public benefit corporation.

3. Battery Park City extends for over a mile along the Hudson River, from Chambers Street south to the Battery. The master plan adopted by BPCA allocates approximately thirty (30%) percent of the land to open space, in which BPCA has created a carefully planned sequence of parks and gardens, linked by an open pedestrian Esplanade. The parks constitute New York City parkland under the auspices of the New York City Department of Parks & Recreation. The Department of Parks & Recreation was established pursuant to Chapter 21 of the New York City Charter to, *inter alia*, manage and care for all parks, squares and public places within New York City.

4. BPCPC, a private non-profit organization, manages, cares for and operates the parks of Battery Park City for the New York City Department of Parks & Recreation, pursuant to a management agreement with BPCA.

5. Park Enforcement Patrol ("PEP") officers are employees of the City of New York Department of Parks and Recreation, under contract to BPCA, whose duties are to patrol the parks of Battery Park City and enforce the rules and regulations promulgated by BPCA and BPCPC, to the extent these rules are consistent with the Rules and Regulations of the New York City Department of Parks & Recreation. A copy of the BPCPC Rules and Regulations is annexed hereto as Exhibit "B".

6. Enforcement of the BPCPC Parks Rules is set forth in Section 9003.47, which states:

**Any violation of these Rules, but only to the extent these Rules are consistent with the rules and regulations in effect for all the parks of the City of New York, shall be a misdemeanor triable in a court with competent jurisdiction and punishable by not more than ninety (90) days imprisonment or by a fine of not more than one thousand (\$1,000) dollars, or by both in accordance with Section 533(a)(9) of Chapter 21 of the New York City Charter, and the violator of these Rules shall also be subject to criminal prosecution and civil penalties as permitted by law and the penalties imposed pursuant to Section 202(d) and (e) of the New York Not-For-Profit Corporation Law.**

7. Section 533(a)(9) of Chapter 21 of the New York City Charter, as amended in 1996, provides as follows:

**§533. Powers and duties of the commissioner.** Except with respect to the functions of the board of education and except as otherwise provided by law, the commissioner shall have the power and it shall be his or her duty:

a. Parks

\* \* \*

9. To establish and enforce rules and regulations for the use, government and protection of public parks and of all property under the charge or control of the department, which rules and regulations so far as practicable shall be uniform in all boroughs and shall have the force and effect of law. (i) any violation of such rules or regulations, except any violation of subparagraph (ii) of this paragraph, shall be a misdemeanor triable by a judge of the criminal court of the city of New York and punishable by not more than ninety days imprisonment or by a fine of not more than one thousand dollars or by both. Any violation of such rules and regulations shall also subject the violator to a civil penalty of not more than ten thousand dollars for each violation which may be recovered in a proceeding before the environmental control board. Such proceeding shall be commenced by the service of a notice of violation returnable to the environmental control board.

8. The plaintiff herein, Gabriel Sumner ("Sumner") is a resident of Battery Park City, and seeks a mandatory injunction from the Court to compel BPCA and BPCPC to enforce their Rules and Regulations as they pertain to control and removal of animal waste, with particular reference to Section 9003.15, which states:

a. No person shall allow any animal which he owns or which is in his custody or control to discharge any urine or fecal matter in any Park, except curbed in Park streets.

b. Notwithstanding (a) above, it shall be the further duty of each dog owner to immediately remove any fecal matter left by his dog in any Park, including Park Street, and to assure that his dog does not urinate on or otherwise damage any tree or other plant in any Park, or Park Street, including such trees or plants on the sidewalks and any area between the sidewalks and curbs of Park Streets.

9. Sumner's complaint is that BPCA and BPCPC do not adequately enforce the BPCPC Rules and Regulations which require dog owners to assure that their dogs do not urinate on or otherwise damage trees or plants. He claims that dog urine damages trees and plants and creates a potential health hazard.

10. The PEP officers who patrol the parks of Battery Park City issue summonses when they observe persons violating the Rules and Regulations. However, such summonses may only be issued to the extent that BPCPC Rules and Regulations are consistent with the Rules and Regulations of the City of New York Department of Parks & Recreation. (See Section 9003.47, quoted above)

11. Section 104(j) of the New York City Department of Parks & Recreation Rules and Regulations provides as follows:

No person shall allow any dog in his custody or control to discharge any fecal matter in any park unless he promptly removes and disposes of same. This provision shall not apply to a guide dog accompanying a person with a disability.

A copy of the New York City Department of Parks & Recreation Rules and Regulations are annexed hereto as Exhibit "C".

12. As can be seen, the New York City Department of Parks and Recreation regulation with regard to the control and removal of animal waste is not consistent with the BPCPC Rules and Regulations, and does not say anything about prohibiting dogs from urinating in the parks. Therefore, the PEP officers are authorized only to issue summonses in accordance with the New York City Department of Parks & Recreation regulation requiring removal and disposal of dog fecal matter, but have no authority to issue summonses with regard to dogs urinating on trees or plants, or otherwise in the parks. The BPCPC regulation with regard to dog urine is therefore unenforceable under the law and the New York City regulations governing the care and maintenance of the parks.

13. However, BPCPC seeks to educate all dog owners who use the Battery Park City parks as to its rules and regulations and attempts to obtain compliance by various means. BPCPC holds an orientation for new PEP officers annually. The PEP officers are advised, among other things, to watch for dog owners, to make sure that the dogs are curbed and leashed, that the fecal matter is removed, and, to the extent possible, to warn dog owners not to let their dogs urinate on the trees and plants. The PEP officers have also been given information sheets prepared by BPCPC to hand out to dog owners to educate them as to the damage dog urine can do to trees and plants, and to advise dog owners of the rules and regulations pertaining to dogs in the parks. A copy of this information sheet is annexed hereto as Exhibit "D". Dog

owners are advised not to let their dogs urinate in tree pits and plant beds or on the granite areas at park entrances, not to let their dog off the leash unless it is within the dog run area, to curb and pick up after their dog and to observe dog-free zones. The vast majority of dog owners at Battery Park are considerate and comply with these rules.

14. There are approximately 26 acres of parkland at Battery Park City.

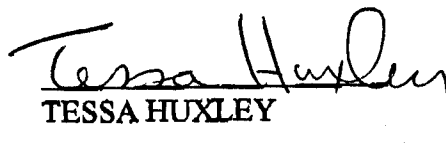
According to the contract between BPCA and the City of New York, the City is to provide a total of 21 PEP officers to patrol the parks, divided over three tour periods. Despite the seemingly small number of PEP officers, in actuality BPCA has a very high percentage of the total number of PEP officers relative to the size of its parkland. In New York City there are a total of approximately 26,000 acres of parkland, and a total of 180 PEP officers employed by the City to patrol all the parks. Of this number, BPCA is allocated a total of 21. Clearly, BPCA has done all it can to maximize the number of patrolling officers to enforce the Rules and Regulations.

15. In addition, there are signs posted throughout the parks warning that dog urine damages trees, and there is a sign at every entrance to the park requesting that dogs be curbed to Park streets and advising dog owners of the location of the dog run. BPCA has created a dog run, for the benefit of dog owners at Battery Park City, so that the dogs may use the dog run, rather than the streets and parks, and is working on building a second dog run. BPCPC has a regular maintenance policy which requires all hard surface park paths to be hosed down regularly, a minimum of once a week, in order to maintain the cleanliness of the park.

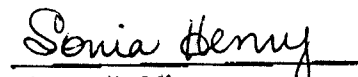
16. It will be obvious to the Court that there is nothing humanly possible that can be done to prevent a dog from lifting his leg whenever, and wherever it wants, and a lawsuit to enforce such a rule is patently ridiculous. Other than banning dogs from the parks entirely (which would be vigorously opposed by the many dog owners who have bought homes and are resident at Battery Park City), BPCA and BPCPC are making their best efforts, within the allocation of resources and personnel provided, to keep the parks clean.

17. BPCA is a municipal authority, created by the State. BPCPC is a private non-profit corporation created to manage and operate the parks at Battery Park City on behalf of the New York City Department of Parks and Recreation. Neither BPCA nor BPCPC have made any special promises to plaintiff Sumner with regard to enforcement of the Park Rules and Regulations. I am advised by counsel that where there is no special relationship, a Court should not examine the "reasonableness" of the municipal authority's actions, nor interfere in the internal management or operation of the authority.

18. It is therefore respectfully requested that the complaint in this action be dismissed in all respects, together with costs, disbursements and such other and further relief as the Court deems just and proper.

  
TESSA HUXLEY

Sworn to before me this  
10<sup>th</sup> day of June, 1999

  
Notary Public  
Huxley affidavit revised (BRB0293.WPD;1)

SONIA HENRY  
Notary Public, State of New York  
No. 01HE6016520  
Qualified in Bronx County  
Commission Expires Nov. 23, 2000