Touro Law Review

Volume 12
Number 3 *New York State constitutional Decisions: 1995 Compilation*

Article 27

1996

Freedom of Speech and Press

Constitution goes no further than the constitutional minimum provided under federal precedent.

SUPREME COURT, APPELLATE DIVISION

FIRST DEPARTMENT

Jay-Jay Cabaret, Inc. v. State[76]
(decided April 4, 1995)

Plaintiff, Jay-Jay Cabaret, Inc., brought this action seeking a declaratory judgment that one of the rules promulgated by the New York State Liquor Authority (hereinafter "SLA") was unconstitutional either on its face or as it was being applied to the plaintiff.[77] Plaintiff contend[ed] that the "six-foot" provision of SLA Rule 36.1(s)[78] "violate[d] the freedom of expression of dancers employed by plaintiff"[79] and was, therefore, violative of both the United States[80] and the New York State Constitutions.[81]

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76. 164 Misc. 2d 673, 629 N.Y.S.2d 937 (1st Dep't 1995).

77. *Id.* at 675, 629 N.Y.S.2d at 939. Plaintiff also raised another claim in its original complaint, seeking a declaratory judgment that Alcoholic Beverage Law section 106(6) was unconstitutional, or in the alternative, a declaration that "table dancing" did "not constitute a 'disorderly' condition" for the purposes of section 106(6). *Id.* Plaintiff also sought a declaration that the use of "liquid latex bras" did not violate SLA Rule 36.1(s). *Id.* In its proposed amended complaint, plaintiff raised two additional theories: 1) "that Rule 36.1(s) was promulgated by the SLA without . . . or in excess of its authorized power," and 2) "that Rule 36.1(s) violated Article III, [section] 1 of the New York State Constitution." *Id.* at 676, 629 N.Y.S.2d at 939. The court granted plaintiff's motion to amend. *Id.* at 676, 629 N.Y.S.2d at 940.

78. *See* N.Y. COMP. CODES R. & REGS. tit. 9, § 53.1(s) (McKinney 1987). The "six-foot" provision provides that topless performers must be on a platform eighteen inches above the floor level or higher and no less than six feet from the nearest patron. *Id.*

79. *Jay-Jay Cabaret*, 164 Misc. 2d at 680, 629 N.Y.S.2d at 942.

80. U.S. CONST. amend I. The First Amendment states: "Congress shall make no law . . . abridging the freedom of speech . . . ." *Id.*

81. N.Y. CONST. art. I, § 8. This provision provides in pertinent part: "[N]o law shall be passed to restrain or abridge the liberty of speech . . . ." *Id.*

Defendants cross-moved for summary judgment.[82] Finding that a determination of the constitutional question was unnecessary to the resolution of the case,[83] the court denied defendants' motion for summary judgment and declared SLA Rule 36.1(s) "null and void" on the ground that the statutory authority for the rule was lacking.[84]

Plaintiff, Jay-Jay Cabaret, operates an establishment known as "Flashdancers," located in New York, where the principal business is topless entertainment.[85] Because Jay-Jay Cabaret also serves alcoholic beverages on the premises, it is required to have an alcoholic beverages license. All rules promulgated by the SLA, such as the one in controversy in this case, apply to all holders of alcoholic beverages licenses in New York State, including plaintiff.

The specific rule in question in this case involves SLA Rule 36.1(s). This rule provides for the revocation or suspension of the beverage license:

> For suffering or permitting any female to appear on licensed premises in such manner or attire as to expose to view any portion of the breast below the top of the areola, or any simulation thereof. The provisions of this subdivision shall not apply to any female entertainer performing on a stage or platform which is at least 18 inches above the immediate floor level and which is removed at least six feet from the nearest patron.[86]

Plaintiff asserted that the practice of "table dancing," where the dancers wear "liquid latex bras" and where the dancers are closer to patrons than the six foot provision of SLA 36.1(s) would permit, subjects them to liability, including potential revocation of the liquor license.[87] Plaintiff, therefore, sought a declaration in order to determine their prospective obligations in conforming

82. *Jay-Jay Cabaret*, 164 Misc. 2d at 674, 629 N.Y.S.2d at 939.

83. *Id.* at 680, 629 N.Y.S.2d at 942.

84. *Id.*

85. *Id.* at 674, 629 N.Y.S.2d at 939.

86. N.Y. COMP. CODES R. & REGS. tit. 9, § 53.1(s) (McKinney 1987). The language of section 53 is identical to the language of SLA Rule 36.

87. *Jay-Jay Cabaret*, 164 Misc. 2d at 675, 629 N.Y.S.2d at 939.

with this rule.[88] Jay-Jay Cabaret contended that the rule must be struck down because SLA 36.1(s) was unconstitutionally applied to plaintiff, or in the alternative the SLA was without the authority to promulgate the Rule.[89]

The court first looked to the United States Supreme Court's decision in *Doran v. Salem Inn*,[90] which held that topless dancing was a form of expression and was to be afforded at least limited protection under the First Amendment of the United States Constitution.[91] In *Doran*, three corporations, engaged in the business of topless entertainment, challenged a local ordinance banning topless dancing in the town of North Hempstead, New York.[92] The corporations argued that the ordinance violated the First and Fourteenth Amendments.[93] The Supreme Court looked to its earlier decision, *California v. LaRue*,[94] which held that the States could regulate topless dancing through their regulation of the sale of liquor, which is provided for by the Twenty-First Amendment.[95] However, because the ordinance in *Doran* applied to *all* establishments, not merely those which serve liquor, the State could not rely upon the power of the Twenty-first Amendment to limit the freedom of expression conferred by the First Amendment.[96] In distinguishing *Doran* from *LaRue*, the Court found that while "the broad powers of the States to regulate the sale of liquor . . . outweighed any First Amendment interest in nude

88. *Id.* at 676, 629 N.Y.S.2d at 940.

89. *Id.* at 675-76, 629 N.Y.S.2d at 939.

90. 422 U.S. 922 (1975).

91. *Jay-Jay Cabaret,* 164 Misc. 2d at 677, 629 N.Y.S.2d at 940 (citing *Doran*, 422 U.S. at 932).

92. *Doran,* 422 U.S. at 924.

93. *Id.*

94. 409 U.S. 109 (1972).

95. *Id.* at 114. *See* U.S. CONST. amend. XXI. The Twenty First Amendment provides for the repeal of the Eighteenth Amendment. *Id.* It has been interpreted as conferring upon the States the broad power to regulate "intoxicants destined for use, distribution, or consumption within its borders." *LaRue*, 409 U.S. at 114.

96. *Doran*, 422 U.S. at 932-33.

dancing,"[97] the ordinance in *Doran* was not limited to only those establishments serving alcohol, and thus was constitutionally overbroad.[98] Furthermore, the petitioner could not raise any other "legitimate state interest that would counterbalance" the respondents' constitutional claim.[99] Thus, the *Jay-Jay Cabaret* court agreed with plaintiff's counsel and concluded that "[i]n light of the *Salem Inn* opinion . . . we would be precluded from banning topless dancing *unless hearings were held or a record made establishing a clear and direct relationship between such entertainment and Bacchanalian revelries and other sordid behavior.*"[100]

The court then considered whether such constitutional protection would invalidate the SLA's proximity rule prohibiting table dancing.[101] In *Bellanca v. New York State Liquor Authority,*[102] the court of appeals addressed the question of whether a state statute was "constitutional to the extent that it absolutely prohibits liquor licensees from presenting nonobscene topless dancing performances to willing customers under all circumstances."[103] The *Bellanca* court held that neither the legislature nor the SLA may ban such activity unless a sufficient functional relationship is present.[104] That is, topless dancing "may be regulated, even to the extent of its prohibition, in circumstances so functionally related to the exercise of the State's authority to regulate the sale and consumption of alcoholic beverages as to overcome [New York State's] constitutional guarantee of freedom of expression."[105] The end result of *Bellanca* was the striking down of section 106(6)(a) of the

97. *Id.* at 932.

98. *Id.* at 933-34.

99. *Id.* at 934.

100. *Jay-Jay Cabaret*, 164 Misc. 2d at 679, 629 N.Y.S.2d at 942 (citation omitted).

101. *Id.* at 680, 629 N.Y.S.2d at 942.

102. 54 N.Y.2d 228, 429 N.E.2d 765, 445 N.Y.S.2d 87 (1981).

103. *Id.* at 231, 429 N.E.2d at 766, 445 N.Y.S.2d at 88 (citation omitted).

104. *Id.* at 236, 429 N.E.2d at 769, 445 N.Y.S.2d at 91.

105. *Id.* at 231, 429 N.E.2d at 766, 445 N.Y.S.2d at 88.

Alcoholic Beverage Control Law, "the statutory counterpart of subdivision (s)" of the rule challenged here.[106]

Prior New York State cases,[107] on the subject of alcoholic beverage laws regulating topless dancing, have held that the fundamental distinction between freedom of expression under the United States Constitution and the New York State Constitution is the impact of the Twenty-First Amendment on the Federal Constitutional claim. While both constitutions provide for freedom of expression (including forms of expression such as topless dancing), the First Amendment protections may be modified or curtailed by the provisions of the Twenty-First Amendment where alcohol is being regulated.[108] Since the SLA has the power under the Twenty-First Amendment to regulate the conditions of the sale of alcoholic beverages, any resultant regulation and/or prohibition of topless dancing in connection with the sale of alcohol would probably be deemed constitutional under the Federal Constitution.[109] Because the Twenty-first Amendment does not apply to the New York State Constitution, and there is no similar provision that infringes on freedom of expression existing within the New York State Constitution, a rule may be struck down as violative of the State Constitution, even though it passes scrutiny under the United States Constitution.[110]

Here the court was able resolve the issues before it without directly addressing the constitutionality of this particular statute restricting topless dancing. Instead, it relied solely upon the determination that the New York State Legislature did not grant the SLA authority to promulgate a categorical rule such as Rule 36.1(s), thereby making it unnecessary to disturb prior holdings

106. 92-07 Restaurant, Inc. v. New York State Liquor Authority, 80 A.D.2d 603, 604, 435 N.Y.S.2d 989, 992 (1981).

107. *See, e.g.*, *Bellanca*, 54 N.Y.2d at 234-235, 429 N.E.2d at 768, 445 N.Y.S.2d at 90.

108. *Id.*

109. *Doran*, 422 U.S. at 932.

110. *Bellanca*, 54 N.Y.2d at 234-35, 429 N.E.2d at 768, 445 N.Y.S.2d at 90.

regarding the constitutionality of topless dancing.[111] As Justice Lowe stated, "although plaintiff has squarely raised the constitutional issue of whether the SLA's six foot rule violates the freedom of expression of dancers employed by plaintiff, it is unnecessary for this Court to reach the merits of this constitutional claim," since the SLA's rule was declared null and void for lack of authority to promulgate it.[112] As such, the court enjoined the SLA's enforcement of Rule 36.1(s).

People v. Tolia[113]
(decided September 14, 1995)

Defendant appealed from a judgment convicting him of inciting to riot[114] during a concert[115] being held in Thompkins Square

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111. *Jay-Jay Cabaret*, 164 Misc. 2d at 680, 629 N.Y.S.2d at 942. The court discussed in great detail that the instant case was very similar to Beer Garden v. State Liquor Authority, 79 N.Y.2d 266, 590 N.E.2d 1193, 582 N.Y.S.2d 65 (1992), where the court struck down SLA Rule 36.1(q). *Id.* at 276, 590 N.E.2d at 1197, 582 N.Y.S.2d at 69. In striking down that rule, the *Beer Garden* court found that "agencies are possessed of only those powers expressly delegated by the Legislature, together with those powers required by necessary implication." *Id.* Since the legislative history of subsections (q) and (s) were the same, a determination that there was no authority to promulgate subsection (q) should also apply to subsection (s). *Id.* Hence the "six-foot" rule should also be declared null and void. *Jay-Jay Cabaret,* 164 Misc. 2d at 680, 629 N.Y.S.2d at 942. The *Jay-Jay Cabaret* court took this approach in resolving this case but noted that its declaration was "without prejudice to re-promulgation of said rule upon a showing of the requisite grant of appropriate statutory authority and compliance with the relevant statutory provision." *Id.*

112. *Id.*

113. 631 N.Y.S.2d 632 (App. Div. 1st Dep't 1995).

114. *See* PENAL LAW § 240.08 (McKinney 1992). This section provides in pertinent part: "A person is guilty of inciting to riot when he urges ten or more persons to engage in tumultuous and violent conduct of a kind likely to create public alarm. Inciting to riot is a class A misdemeanor." *Id.* The grand jury charged defendant with riot in the first degree, which states:

> A person is guilty of riot in the first degree when (a) simultaneously with ten or more other persons he engages in tumultuous [sic] and violent conduct and thereby intentionally or recklessly causes or creates a grave risk of causing public alarm, and (b) in the course of and as a