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Preemption

Scott Sorel

NEW YORK CITY CRIMINAL COURT
QUEENS COUNTY

People v. Santoriello[1]
(decided December 30, 1999)

Defendant, Alex Santoriello, sailed an advertising banner over the Hudson River and was charged with violating Section 10-126(d)(1) of the New York City Administrative Code[2] ("1999 Code"), a misdemeanor.[3] Due to the rare invocation of this regulation, this was a novel issue for the New York City Criminal Court.[4] Defendant argues that the Federal Aviation Administration's ("FAA") regulations[5] preempt[6] the New York City ordinance, thus rendering the ordinance unconstitutional. The Criminal Court found the ordinance to be unconstitutional on its face because it entirely prohibited that which is permitted by federal law.[7]

Alex Santoriello is an officer and employee of ParaSail NYC, Ltd. ("ParaSail"), in the business of flying aerial banners from boats. ParaSail is permitted to tow banners in the navigable

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[1] 702 N.Y.S.2d 539 (N.Y. City Crim. Ct. 1999).

[2] NEW YORK CITY ADMINISTRATIVE CODE § 10-126(d)(1) (1985). This statute provides in pertinent part: "It shall be unlawful for any person to use, suffer or permit to be used advertising in the form of towing banners from or upon an aircraft over the limits of the city." *Id.*

[3] NEW YORK CITY ADMINISTRATIVE CODE § 10-126(I) (1985) This statute provides in pertinent part: "Any person who violates any of the provisions of this section shall be guilty of a misdemeanor." *Id.*

[4] *Santoriello*, 702 N.Y.S.2d at 540.

[5] 49 U.S.C.A. § 40103(a)(1) (1994). This statute provides in pertinent part: "The United States Government has exclusive sovereignty of airspace of the United States." *Id.*

[6] *Santoriello*, 702 N.Y.S.2d at 542. "Preemption occurs when state or local law actually conflicts with federal law, such as where 'compliance with both federal and state regulations is a physical impossibility' or where state and local law stands as an obstacle to the accomplishment and execution of the purposes and objectives of Congress." *Id.*

[7] *Id.* (noting that "[t]his court sees no escape from the conclusion that however salutary and well-intentioned the Code may be, it does in fact entirely prohibit, not regulate, what the Federal government has authorized. Therefore, Administrative Code § 10-126(d)(1) is unconstitutional on its face.").

airspace[8] under the authority of a "Certificate of Waiver or Authorization" issued by the United States Department of Transportation, FAA.[9] However, Section 10-126(d)(1) of the 1999 Code was in conflict with the Federal Waiver received by the defendant.[10] On August 5, 1999, defendant corporation towed via para-sail an advertising banner in the navigable airspace over the Hudson River.[11] The defendant was issued a summons for violation of the New York City ordinance.[12] Santoriello argued that the city ordinance proscribing the towing of banners over New York City is preempted by Federal law.[13]

The court began its analysis with a discussion of the Queens County Magistrates' Court's decision in *People v. Coffrin*,[14] the central case supporting the court's decision in the case at bar.[15] In 1953, Coffrin was charged with violation of a provision of the then Administrative Code of New York City ("1953 Code") which was identical to the 1999 Code provision under which *Santoriello* was charged.[16]

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[8] 49 U.S.C.A. § 40102(30) (1994). This statute provides in pertinent part: "[N]avigable airspace means airspace above the minimum altitude of flight prescribed by regulations . . . to ensure the safety and landing of aircraft." *Id.*

[9] *Id.*

[10] *See supra* note 2 and accompanying text.

[11] *Santoriello*, 702 N.Y.S.2d at 541.

[12] *Id.*

[13] *Id.*

[14] 126 N.Y.S.2d 329 (Magis. Ct., Queens Co. 1953).

[15] *Id.*

[16] ADMINISTRATIVE CODE OF THE CITY OF NEW YORK § 435-16.0(d)(1). The statute provides in pertinent part:

> Advertising.--1. It shall be unlawful for any person to use, suffer or permit to be used advertising in the form of towing banners from or upon an aircraft over the limits of the city, or to drop advertising matter in the form of pamphlets, circulars, or other objects from an aircraft over the limits of the city, or to use a loud speaker or other sound device for advertising from an aircraft over the limits of the city. Any person who employs another to avigate an aircraft for advertising in violation of this subdivision shall be guilty of a violation hereof.

Id. See also, NEW YORK CITY ADMINISTRATIVE CODE § 10-126(d)(1) (1985).

In that case, Coffrin's plane took-off from Key Port in New Jersey, and proceeded over the Atlantic Ocean to a point one-half mile off-shore, giving rise to the dispositive question of whether that particular place is "over the limits of the city."[17] Coffrin argued that the towing was not in fact done "over the limits" of New York City as required by the ordinance.[18] Coffrin additionally challenged the constitutionality of the 1953 Code provision.

The Magistrates' Court analyzed Coffrin's initial contention by first consulting the 1953 Code which specifically set out the geographic limits of New York City with respect to Queens County.[19] The court found it to be clear from this reference that the

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[17] *Id.* at 331.

[18] *Id.*

[19] ADMISTRATIVE CODE OF THE CITY OF NEW YORK § 2-1.0(4). This statute provides in pertinent part:

> [T]hence southerly on a line parallel to the westerly line of Beach Second street and distant 100 feet westerly therefrom to the northerly side of Seagirt avenue; thence easterly along the northerly side of Seagirt avenue until it intersects the former village boundary at Bannister creek; thence south 10 <<degrees>> 21'10"' east, a distance of 291.20 feet; thence south 4 << degrees>> 51'30"' east, a distance of 780 feet to approximately the center line of Far Rockaway bay or inlet as it existed the fifth day of April, nineteen hundred twenty-eight; thence westerly along this approximate center line of Far Rockaway bay or inlet to the Atlantic ocean the following courses and distances: South 85 <<degrees>> 22'25"' west, a distance of 1805.50 feet to the easterly boundary of Beach Ninth street (Jarvis lane) prolonged southerly in a straight line; thence south 84 <<degrees>> 44'44"' west, a distance of 504.52 feet; thence south 61 <<degrees>> 35'04"' west, a distance of 1106.22 feet; thence south 68 <<degrees>> 45'10"' west, a distance of 1150.00 feet; thence south 18 <<degrees>> 45'10"' west, a distance of 500 feet; thencebounded on the south by the southerly boundary of the state, beginning at a point where the easterly boundary of the borough and county or prolongation thereof intersects such southerly boundary of the state; thence westerly along such line to a point where it intersects the boundary of the borough of Brooklyn and county of Kings or prolongation thereof.

city limit extended only to the portion of the Atlantic Ocean which is at low-water mark.[20] The court next addressed the boundaries of Queens County, concluding that it was bound to the south by the Atlantic Ocean.[21] The People, in an effort to sustain their allegation that the violation occurred within the "limits of the city," cited two New York cases in which jurisdiction of the New York City courts were extended beyond the limits of the city.[22] However, the Magistrates' Court distinguished these cases from *Coffrin*, finding that those cases' respective laws expressly provided for a territorial extension, thus explicitly conferring the authority by which the courts could extend the bounds of their jurisdiction.[23] The Magistrates' Court pointed out that no such territorial extension was provided for in the 1953 Code. Additionally, the court found that Section 11(A) of the Code of Criminal Procedure which provided for an extension of courts' jurisdiction two nautical miles into the Atlantic Ocean was inapplicable, stating that in order for this provision to be invoked, there must be an invasion or breaking of the law within the

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Id. See Coffrin, 126 N.Y.S.2d at 332 (analyzing the limits of New York City with respect to Queens County because Queens is the county over which defendant was charged with the violation).

[20] *Id.*

[21] *Id.* The court consulted the Consolidated Notes of State Law, McKinney's Consolidated Laws of New York in determining Queens County's boundaries. The Notes state in pertinent part:

> The County of Queens shall contain all that part of this state, bounded easterly, by Suffolk county; southerly, by the Atlantic ocean; northerly, by the Long Island Sound; and westerly, by the west bounds of the townships of Newtown and Jamaica; including Lloyd's Neck, or Queens village, and the islands called the Two Brothers, and Hallet's Island, and all the islands in the sound opposite to the said bounds, and southward of the main channel.

Id.

[22] *People v. Reilly*, 14 N.Y.S.2d 589, 590 (Magis. Ct., Kings Co. 1939) (finding that defendant, *inter alia*, navigated a boat within one thousand feet of a bathing beach and advertised by sign on the boat) and *People v. Harrow*, 191 Misc. 216, 76 N.Y.S.2d 891, 892 (Magis. Ct., Queens Co. 1948) (charging defendant with unlawfully towing a pilotless balloon from a motor boat for purposes of advertising within 1,000 feet of a beach).

[23] *Coffrin*, 126 N.Y.S.2d at 333.

Atlantic.[24] The Magistrates' Court found that the action is only a violation if it occurs "over the city limits," therefore no law was violated over the Atlantic Ocean.[25] Thus, the court held that the alleged violation did not take place "over the limits of the city" as required by the1953 Code, therefore the court lacked jurisdiction over the constitutional issue.

Although the Magistrates' Court in *Coffrin* dismissed the case due to lack of jurisdiction, the court still addressed the constitutionality of the 1953 Code provision. Evidently, the *Coffrin* court determined the fate of the statute in 1953. However, the *Coffrin* court did not have jurisdiction to enforce its determination, so it required another alleged violation of the provision to invoke the *Coffrin* court's determination.

In analyzing the constitutionality of the statute, the Magistrates' Court applied the rule of preemption set out in *Quaker Oats Co. v. City of New York.*[26] In *Quaker Oats*, a New York City statute governing and regulating the sale of horse meat intended for animal feed, required companies engaged in the preparation of horse meat which was to be sold in New York City to decharacterize the product in an effort to prevent the distribution of animal food as human food.[27] The applicable federal statute

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[24] *Id.* The court makes reference to CRIM. PROC. CODE § 11-A of the Code of Criminal Procedure which states in pertinent part: "Wherever the territorial limit of jurisdiction of any of the courts specified in section eleven of this chapter is the Atlantic ocean, the criminal jurisdiction of such court shall extend into the Atlantic ocean to a line two nautical miles distant from the short at high water mark." *Id.*

[25] *Id.*

[26] 295 N.Y. 527, 534, 68 N.E.2d 593, 595 (1946). The court stated the rule of preemption as follows:

> Equally settled is the rule that, even if the Federal government has legislated in a particular field, local regulation in that field is not necessarily prohibited unless national uniformity is essential. The State or municipal statute will be stricken only if in terms or in practical administration it conflicts with the Federal law or infringes on its policy.

Id

[27] *Id.* at 533, 68 N.E.2d at 594. The statute states in pertinent part:

> Horseflesh, whether alone or combined with other ingredients, intended for animal feed shall not be brought into the City of New York, transported, or held, kept, stored, or offered for

mandates that such products distributed in hermetically sealed containers are only required to affix labeling on the containers identifying the nature of the product, while products that are not packaged in these containers must be decharacterized by means such as artificial coloring.[28] Quaker Oats packaged its product in hermetically sealed containers affixed with labels proclaiming that the product was made with horsemeat.[29] Since the local law required Quaker Oats to decharacterize its product while the federal law simply required appropriate labeling, the court held that the local law was preempted because it was in direct conflict with the federal law.[30]

Regarding the case at bar, the Criminal Court adopted verbatim the dicta of the *Coffrin* court pertaining to the issue of constitutionality with regard to the 1999 Code. In *Coffrin*, the magistrates' court acknowledged that state law allows aircrafts to tow banners provided that they obtain permission to do so from the Administrator of Civil Aeronautics.[31] The court found that the

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> sale or sold unless decharacterized by harmless coloring or otherwise in a manner and with materials satisfactory to the Department of Health.

Id.

[28] *Id.* at 536, 68 N.E.2d at 596-7. The statute provides in pertinent part:

> Dog food or other animal food prepared in whole or in part, from materials derived from cattle, sheep, swine, goats, or horses, shall be distinguished from articles of human food, so as to avoid the distribution of such animal food as human food. To accomplish this, labeling of hermetically sealed, conventional retail size containers as, for example, 'dog food' will be considered sufficient. If not in such containers, the product must not only be properly identified, but it must be of such character or so treated (denatured or decharacterized) as to be readily distinguishable from an article of human food. Dog food shall not be represented as being a human food.' (Emphasis supplied.)

Id.

[29] *Id.* at 533, 68 N.E.2d at 595.

[30] *Id.* at 537, 68 N.E.2d at 597.

[31] *Coffrin*, 126 N.Y.S.2d at 334. This case make reference to the N.Y. GEN. BUS. LAW § 245(12). This statute provides in pertinent part: "No pilot shall tow anything by aircraft unless authority for such operation has been issued by the administrator of civil aeronautics." *Id.*

local ordinance did not provide a provision allowing a person seeking to tow a banner the opportunity to obtain permission.[32] The court even posed an amendment to the statute, which would allow the statute to pass constitutional muster.[33] Since a provision of this nature is absent, the court held that "the City, by local ordinance has completely prohibited that which the state and Federal authorities permit."[34] The court went on to explain the potential ramifications if this statute were found to be constitutional.[35]

After adopting the *Coffrin* court's determination that the statute was preempted by federal law, the *Santoriello* court analyzed the Federal government's authority to preempt local law in the area of aviation. The court turned first to *Blue Sky Entertainment, Inc. v. Town of Gardiner*[36] which seemed to establish local control over the area of aviation. In *Blue Sky*, the town attempted to defend the constitutionality of a town law which sought to regulate many facets of small airports and parachute jumping centers.[37] In attempting to sustain the constitutionality of the town law, the town relied on a New Jersey Superior Court decision in *Parachutes*

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[32] *Id.*

[33] *Id.* at 335. The court stated:

> If the local ordinance provided for safeguards before issuing permission for airplane banner towing over the limits of the City of New York by reason of the congested nature of this great metropolitan area, or for other cogent reasons, it would not then be in conflict with either the State statutes or Federal regulations, but would be in consonance therewith.

Id.

[34] *Id.*

[35] *Id.* The court states that:

> If this ordinance is constitutional, there is nothing to stop every hamlet, town, village and municipality in the state from passing a similar ordinance, thereby prohibiting throughout the state that which the state itself and the Federal government expressly permit. By a parity, and extension of reasoning, the same kind of an ordinance could be locally enacted throughout the entire United States.

Id.

[36] 711 F.Supp. 678 (N.D.N.Y. 1989).

[37] *Id.* at 681.

Inc. v. Township of Lakewood[38] in which plaintiff sought to invalidate the Township's noise ordinance.[39] The Superior Court upheld the constitutionality of the local ordinance, holding that a municipality "may regulate noise from airplanes hovering or cruising at low levels for sport parachuting."[40] However, the *Santoriello* court found a United States Supreme Court decision, decided subsequent to *Parachute Inc.*, to be controlling.

In *City of Burbank v. Lockheed Air Terminal, Inc.*,[41] the Supreme Court held that a city ordinance prohibiting jet aircraft from taking off between the hours of 11 p.m. and 7 a.m. was invalid because Congress, by its enactment of the Federal Aviation Act and Noise Control Act, preempted state and local control over aircraft noise.[42] In support of their holding, the *Santoriello* court cited the Federal Aviation Act, 49 U.S.C. § 40103(b)(2).[43] The *Santoriello* court went on to distinguish the present case from *Blue Sky*, holding that Santoriello's action did not constitute a nuisance as is evoked by *Blue Sky*.[44]

The *Santoriello* court further discussed a Second Circuit case, decided prior to *City of Burbank*, which established local authority to invoke noise ordinances in extreme circumstances.[45] In *American Airlines, Inc. v. Town of Hempstead*, plaintiffs sued to enjoin the enforcement against them of the Town of Hempstead's noise ordinance.[46] The court, relying on credible evidence that the aircraft noise negatively affected the community in nearly every

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[38] 296 A.2d 271 (N.J. Super. 1972).

[39] *Id.*

[40] *Santoriello*, 702 N.Y.S.2d at 542-43.

[41] 493 U.S. 624 (1973).

[42] *Id.* at 625-26.

[43] 49 U.S.C.A. § 40103(b)(2) (1994). This statute states in pertinent part: "The Administrator [of the FAA] shall prescribe air traffic regulations on the flight of aircraft for (A) navigating, protecting and identifying aircraft and (B) protecting individuals and property on the ground." *Id.*

[44] *Santoriello*, 702 N.Y.S.2d at 543.

[45] *American Airlines, Inc. v. Town of Hempstead*, 398 F.2d 369 (2d Cir. 1968).

[46] *Id.* at 370. The Town Unnecessary Noise Ordinance "forbid[s] anyone from operating a mechanism or device (including airplanes) which creates a noise within the Town exceeding either of two 'limiting noise spectra.' " *Id.*

aspect of community life,[47] held that the noise ordinance regulation is necessary in some cases, and found Hempstead to be one of those cases.[48]

After analyzing the applicable case law, the *Santoriello* court concluded that aircraft regulation is governed by the federal arm of the government.[49] In support of this holding, the court cites various provisions of the Federal Aviation Act which essentially establish that the Federal government has exclusive sovereignty of United States airspace and that the Administrator of the FAA has broad authority to regulate in this area.[50]

Despite noting that a para-sail is not by definition an aircraft as interpreted by the FAA, the Criminal Court concluded that Santoriello's receipt of a "Certificate of Waiver or Authorization" to operate his para-sail was in direct conflict with the local ordinance.[51] Since the local ordinance entirely prohibits that which

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[47] *Id.* The court set out its findings concerning aircraft noise in the Town of Hempstead as follows:

> There is credible evidence that the noise of an aircraft overflight in Hempstead is frequently intense enough to interrupt sleep, conversation and the conduct of religious services, and to submerge for the duration of the maximum noise part of the overflight the sound of radio, phonograph and television. There is credible evidence that the noise of an aircraft overflight in Hempstead is frequently intense enough to interrupt classroom activities in schools and to be a source of discomfort to the ill and distraction to the well. It is a fair inference from the affidavits, the demonstration (in the courtroom) of the sound levels recorded in the Town and the evidence of frequency of overflights that airplane noise is a factor of moment affecting the decisions of people to acquire or dispose of interests in real property in the areas within the Town affected by the sound of airplane overflights.

Id.

[48] *Id.* at 376.

[49] *Satoriello*, 702 N.Y.S.2d at 543.

[50] 49 U.S.C.A. § 40103(2) (1994). This statute states in pertinent part: "a citizen of the United States . . . has a public right of transit through the navigable airspace." *Id. See supra* notes 5 and 8 and accompanying text.

[51] *Santoriello*, 702 N.Y.S.2d at 544.

the Federal government has authorized, the 1999 Code provision was held to be unconstitutional.[52]

Scott Sorel

[52] *Id.*