Not Reported in F.Supp., 1996 WL 442869 (S.D.N.Y.)
(Cite as: 1996 WL 442869 (S.D.N.Y.))

United States District Court, S.D. New York.
Russel H. BEATIE, Jr., Plaintiff,
v.
NEW YORK CITY, Rudolph Giuliani, Mayor, as Mayor of the City of New York, and Council of the City of New York, Defendants.

No. 95 CIV. 3429 (DLC).
Aug. 6, 1996.

Russel H. Beatie, Jr., Craig M. Deitelzweig, Beatie, King & Abate, New York City, For Plaintiff.

Paul A. Crotty, Corporation Counsel of the State of New York by Deborah Rand, Assistant Corporation Counsel, New York City, for Defendants.

OPINION

DENISE COTE, District Judge:

***1** Russel H. Beatie, Jr. brings this action seeking a declaratory judgment against the City of New York ("City"), Rudolph Giuliani in his official capacity as the Mayor of the City of New York ("Mayor"), and the Council of the City of New York ("City Council"), pursuant to 28 U.S.C. §§ 2201 and 2202, on the ground that the Smoke-Free Air Act ("Act") is unconstitutional as applied to cigars. The plaintiff contends that the Act is unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment because the City Council and the Mayor had no rational basis for including cigars within the reach of the statute. According to the plaintiff, the defendants relied upon the incorrect assumption that the studies relating to the health effects of second-hand cigarette smoke apply to second-hand cigar smoke.

The defendants contend that the Act as applied to cigars is constitutional because it bears a clear and direct relationship to the government's legitimate interest in the health and safety of its citizens and the public in general. According to the defendants, the City's decision to enact a statute which would include all tobacco products in its scope was rational. Before this Court is defendants' motion for summary judgment. For the reasons stated below, the motion is granted.

BACKGROUND

On March 16, 1994, the Act was introduced in the City Council. The City Council conducted three public hearings on the proposed law in June, September and December of 1994. At those hearings, testimony was presented and other material submitted by individuals and organizations both in support and in opposition to the bill. Following amendment, the City Council approved the bill on December 21, 1994. On January 10, 1995, the Mayor signed the Act, which prohibits, among other things, the smoking of any tobacco product in public places, the work-place and in areas frequented by children, except as otherwise noted in the Act. Its restrictions include a ban on smoking in dining areas of restaurants with more than 35 seats. In restaurant bars where smoking is permitted, it limits the number of seats devoted to these bar areas. The Act permits smoking in designated smoking lounges in restaurants and in bars not connected to restaurants. New York City Administrative Code §§ 17-501 et seq. The Act became effective on April 10, 1995.

In its Declaration of legislative findings and intent, the Act refers to the Environmental Protection Agency's ("EPA") conclusion that "the health risks attributable to exposure to environmental tobacco smoke ... are well established." It continues with a finding by the Council that

virtually all Americans, including all citizens of New York City, are likely to be exposed to [environmental tobacco smoke] by virtue of its widespread presence in public places and in the workplace, and that exposure to [environmental tobacco smoke] presents a substantial health risk to nonsmokers. It is the Council's intention to strengthen existing local laws which limit the areas in which smoking is permissible.

***2** The Act defines smoking to mean "inhaling, exhaling, burning or carrying any lighted cigar, cigarette, pipe, or any form of lighted object or device which contains tobacco." New York City Administrative Code § 17-502(v). The Act defines environmental tobacco smoke, or second-hand smoke, as "smoke to which people are involuntarily exposed either through a smoker exhaling smoke from a tobacco product, or through the lighting or burning of any tobacco product." *Id.*

STANDARD

The Court may not grant summary judgment unless the submissions of the parties taken together "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), Fed. R. Civ. P. Resolving a motion for summary judgment involves a two step process. First, in reviewing the factual background, "the court's focus is on issue-finding, not on issue-resolution." *Consarc Corp. v. Marine Midland Bank, N.A.*, 996 F.2d 568, 572 (2d Cir. 1993). In any area in which there are disputed issues of fact, the Court must construe those facts in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Second, the Court must look to the merits of the action, and may grant summary judgment only if the moving party is still entitled to judgment as a matter of law after construing all disputed issues in the non-movant's favor.

"[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Lipton v. Nature Co.*, 71 F.3d 464 (2nd Cir. 1995) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 247-48 (emphasis in original)). "[S]ummary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248. The inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52.

DUE PROCESS CLAIM

The Due Process Clause of the Fourteenth Amendment "embodies a substantive component that protects against 'certain government actions regardless of the fairness of the procedures used to implement them.'" *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 460 (2nd Cir. 1996) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). In examining a governmental regulation, the nature of the right at issue determines the level of scrutiny the court must apply. Where the right infringed is "fundamental," the governmental regulation must be "'narrowly tailored to serve a compelling state interest.'" *Id.* (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)). Where a right is not fundamental, "the governmental regulation need only be reasonably related to a legitimate state objective." *Id.* at 461 (citing *Flores*, 507 U.S. at 303-306; *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986)).

***3** A party challenging a public safety ordinance bears the burden of proving that the ordinance is unconstitutional. *Kelley v. Johnson*, 425 U.S. 238, 247-48 (1976). In this case, to succeed on the claim, the plaintiff must demonstrate that there is no rational connection between the ban on cigar smoking and the promotion of safety of persons effected through this legislation. *See id.* at 247. Plaintiff may prevail if he can show that the statute as applied to cigars is without support in reason because cigars are so different from the other products in the class of prohibited items as to be without reason for the prohibition. *See United States v. Carolene Prods.*, 304 U.S. 144, 153-54 (1938). In making such an assessment, the Court may consider "the administrative difficulty of excluding the article from the regulated class." *Id.* at 154.

Where a legislative judgment is drawn into question,

> the existence of facts supporting the legislative judgment is to be presumed ... unless in the light of facts made known or generally assumed [the legislation] is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.

Id. at 152. If such facts supporting the legislative judgment exist, "[i]t is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955).

According to the plaintiff, no conclusive scientific evidence supports the defendants' decision to place cigar smoking within the requirements of the Act. To advance his position he has submitted various materials. In one study, entitled "Ciliotoxicity of Cigar and Cigarette Smoke," cigar smoke was found to contain significantly lower toxicity than cigarette smoke in an experiment conducted on cats. Dalhamn and Rylander, 20 *Arch Environ Health* 252 (Feb. 1970). In another study, entitled "Comparative Lung Pathology of Rats After Exposure to Cigarette and

Cigar Smoke," exposure to cigar smoke from fermented cigar tobacco on rats in a smoking chamber resulted in relatively no harm to the rats as compared to exposure to cigarette smoke or smoke from air-cured cigar tobacco, both of which greatly shortened the lives of the rats. Betts, et al., 62 *Br. J. exp. Path.* 429 (1981). The plaintiff also submitted the affidavits of Dr. Walter O. Spitzer and Dr. Donald E. Gardner. Dr. Spitzer states that, based upon his review of the scientific literature and his general knowledge on the subject of environmental tobacco smoke, he has concluded that there is no reliable evidence linking second-hand cigar smoke with adverse health effects. Dr. Gardner states that one cannot apply the results of studies from second-hand cigarette smoke to second-hand cigar smoke because the environmental tobacco smoke data derived from cigarette smoke "is not the same for cigar smoke."

***4** In support of the constitutionality of the Act, the defendants submitted materials to show that the inclusion of cigars within the class of tobacco products regulated by the Act was rational. The defendants contend that since research reports often group all forms of tobacco products together and use the term smoke generically, the findings of these reports apply implicitly to cigar smoke. For example, an EPA study, "Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders," includes two charts that equate each cigar smoked to one cigarette when measuring nicotine concentrations and respirable suspended particle mass in homes. U.S. Environmental Protection Agency, 3-33 - 3-34 (December 1992).[FN*] Moreover, the defendants contend that there is evidence that cigars are equally if not more hazardous to health than cigarettes. In one study, entitled "Reducing the Health Consequences of Smoking: 25 Years of Progress," the Surgeon General stated that

> [c]hemical analysis of the smoke from pipes, cigars, and cigarettes indicates that carcinogens are found in similar levels in the smoke of all these tobacco products. Additionally, experimental studies have shown that in a variety of animal models, *smoke condensates from* pipes and *cigars are equally, if not more carcinogenic than* condensates from *cigarettes.*
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> U.S. Department of Health and Human Services, Report of the Surgeon General (1989) (emphasis supplied). In addition, a study entitled "Environmental Tobacco Smoke and Lung Cancer in Nonsmoking Women" found that for non-smoking women whose spouses smoked, there was a greater risk of developing lung cancer if those spouses smoked cigars rather than cigarettes. Fontham, et al., 271 JAMA No. 22 (June 8, 1994). Finally, the defendants cite an article in *The New York Times* that referred to a 1982 study as revealing that carbon monoxide emissions of cigars were 30 times greater than from the average cigarette. Ray, "Science Desk Q & A - Pipes and Cigars," *The New York Times,* November 23, 1993.[FN**] These materials demonstrate that it is rational to conclude that second-hand smoke from all types of tobacco products is hazardous to the health of non-smokers, even if cigarette smoke is the type of tobacco smoke most frequently tested.

In support of the Act, the defendants also refer to other pieces of environmental smoke legislation, including the City's earlier legislation in this area, as evidence that it is rational to regulate cigars when regulating tobacco's effect on the public. Each one of these laws included cigars in their regulation of tobacco smoking. Thus, the City's Clean Indoor Air Act of 1988 included cigars in its definition of objects containing tobacco. At the time the Act was passed, several jurisdictions in addition to New York City had undertaken to prohibit, among other things, cigar smoking in public places. In Texas, the City Council of Austin banned smoking in most public places and work-places, using a definition of smoking which included cigars. In California, Sacramento passed an ordinance in an attempt to provide smoke-free environments and defined smoking to include cigars.

***5** The mere fact that there may be disagreement within the scientific community about the degree of the harmful effect, or even whether the studies done to date have established the existence of any harmful effect, of cigar smoke as compared to cigarette smoke on those who inhale it, does not create a genuine issue of fact as to whether the City Council had a rational basis to include cigars within its ban. Even where evidence can be marshalled in support of two different views, the ultimate legislative choice between the two positions is not irrational or arbitrary. *Vance v. Bradley,* 440 U.S. 93, 112 (1979). On the contrary, it is precisely when the facts may be disputed that courts must defer to legislative judgment. *Id.*

The defendants also argue that a less-inclusive regulation would have been less rational in that it

would have created a ban that would have been much more difficult to enforce. An ordinance restricting cigarette smoking but not cigar smoking -- which the City Council was not asked to and did not consider -- would have placed restaurant owners and employees in the difficult position of having to classify all tobacco products and distinguish cigarettes from cigars, which in the case of certain tobacco products is not an easy task. They would also have to explain to patrons why cigar smoking but not cigarette smoking was permitted. The difficulties of enforcing such a provision provides an additional and independent reason for the decision to classify all tobacco products together in the Act.

Because there is no genuine issue of fact to resolve, the defendants' motion to dismiss the Due Process claim is granted.

EQUAL PROTECTION CLAIM

The Equal Protection Clause of the Fourteenth Amendment guarantees that classifications imposed by law will not be used to burden a group of people arbitrarily. *New York City Transit Auth. v. Beazer,* 440 U.S. 568, 587 (1979). Unless people are classified based on "suspect" criteria such as race or nationality, however, the legislature may create statutory classifications so long as they bear a rational relationship to a legitimate state interest. *Id.* Statutes may create many classifications which do not deny Equal Protection. It is only "invidious discrimination" which offends the Constitution. *Ferguson v. Skrupa,* 372 U.S. 726, 732 (1963).

In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because classifications made by its laws are imperfect. If the classification has some reasonable basis, it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." *See Rye Psychiatric Hosp. Ctr, Inc, v. Shalala,* 52 F.3d 1163, 1172 (2nd Cir. 1995), *cert. denied,* 116 S. Ct. 299 (1995) (citing *Danbridge v. Williams,* 397 U.S. 471, 485 (1970)). The problems of government are practical ones and may justify, if they do not require, rough accommodations, unscientific as they may be. *Danbridge v. Williams,* 397 U.S. at 485.

***6** The essence of plaintiff's Equal Protection claim is that the statute creates an impermissible over-inclusive category. After review of the scientific evidence presented by both plaintiff and defendants, and viewing the evidence in the light most favorable to the plaintiff, the plaintiff has failed to raise a genuine issue of fact regarding the rationality of the Act's system of classification. While the plaintiff no doubt sorely misses the pleasures of cigar smoking in public places, his recourse lies with the legislative and executive bodies charged with safeguarding the public health and not the judicial branch of our government.

CONCLUSION

The Court rejects as a matter of law plaintiff's challenges to New York City's Smoke-Free Air Act under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Accordingly, summary judgment is granted to the defendants.

SO ORDERED.

FN* Of the four items on which the defendants rely for their argument, the EPA study was the only one found in the City Council's files assembled in connection with the passage of the legislation.

FN** The plaintiff argues that the actual study upon which the newspaper article is based states that "more extensive research is necessary to confirm the generality of these results [about cigar smoke]." Repace and Lowry, 88 *Ashrae Transactions, Part I,* 895, 898 (1982)

S.D.N.Y.,1996.
Beatie v. New York City
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