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

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ALEX MORGAN BELL,

Plaintiff,

Index Number: 151001/2016

-against-

HON. NANCY BANNON

UNITED PARCEL SERVICE, INC.

Defendant

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MEMORANDUM OF LAW ON BEHALF OF PLAINTIFF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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Plaintiff

Introduction

Defendant United Parcel Service Inc. ("UPS") moves pursuant to CPLR 3211(a)(3) and (7) before this court for dismissal of plaintiff's complaint for public nuisance and injunctive relief. Assuming the truth of the allegations in plaintiff's verified complaint, as this court must, plaintiff has stated a cause of action for relief for the public nuisance caused by defendant UPS in allowing its delivery vans routinely to park in bicycle lanes, in violation of New York City traffic law. Plaintiff has stated a claim for special injury as a result of defendant's conduct that gives him the right to pursue this claim. Finally, injunctive relief is proper as plaintiff has no adequate remedy at law.

PROCEDURAL STATEMENT

Plaintiff filed a summons and verified complaint on February 7, 2016. Service was made on defendant on February 25, 2016. Defendant's time to answer or move was extended for 30 days by stipulation. Defendant moved to dismiss plaintiff's complaint on March 25, 2016.

STATEMENT OF FACTS

As verified in his complaint, plaintiff Alex Bell states that:

- Since the 19th century the City of New York has installed bicycle lanes in selected thoroughfares throughout New York City. As of 2015, New York City has over one thousand miles of bike lanes. (A true and accurate copy of the Verified Complaint in this action is annexed to the Affirmation of Elisa Barnes, dated May 10, 2016 at Exhibit A, hereafter "Complaint", par. 6);
- New York City doubled bicycle commuting between 2007 and 2011, and aims to triple it by 2017. In New York City, 10% of auto trips are under one-half mile, 22% are under 1 mile and 56% are under 3 miles--distances readily served by

bicycle. The New York City Department of Transportation ("DOT") has completed the City's ambitious goal of building 200 bike-lane miles in all five boroughs in just three years, nearly doubling the citywide on-street bike network while reshaping the city's streets to make them safer for everyone who uses them. (Complaint, par.7);

- The City of New York and the Department of Transportation review and design the infrastructure of each street so as to maintain usability for all people in the community. The inclusion of bicycle lanes and the associated laws protection their operation come after a lengthy process evaluating the needs of all vehicles from cars to delivery vehicles to bicyclists. (Complaint, par.8);
- Bicycle lanes are efficacious for cyclists, pedestrians and motorists. For example on Ninth Avenue, injuries to all street users dropped by 58% after the bike lane was installed--that includes pedestrians, cyclists and motorists (Source DOT "Measuring the Streets" 2012) (http://www.nyc.gov/html/dot/downloads/pdf/2012-10-measuring-the-street.pdf) (Complaint, par.9);
- The City of New York has shown its support for increased bicycle lanes, "We have found when we put protected bike lanes in, it does make the roadway safer for all users--for cyclists, for pedestrians, and for motorists"--DOT Commissioner Polly Trottenberg (http://newyork.cbslocal.com/2015/09/22/nyc-bike-lanes/) (Complaint, par.10) ;

- The blocking of bicycle lanes by vehicles forces slow moving bicyclists to merge into fast flowing traffic at a point where part of the lane is also blocked causing an enhanced likelihood of vehicle and bicycle collision. (Complaint, par. 11);
- Greater than 80% of bicycle fatalities in NYC were due to collisions with vehicles. Over a ten-year period, from 1996-2005, less than 1% of bicycle fatalities occurred is a marked bicycle lane. Fatalities and the risk of serious injury dramatically increase when bicyclists are forced out of marked lanes. (Complaint, par. 12);
- Despite the demonstrated success of bicycle lanes in reducing injuries and fatalities to cyclists, pedestrians and motorists, New York City, through its traffic control department has failed to enforce regulations that make blocking a bicycle lane illegal, specifically, NYC Traffic Regulation, Section 4-08(e), (1) that provides:

> (e) General no stopping zones (stopping, standing and parking prohibited in specified places). No person shall stop, stand or park a vehicle in any of the following places, unless otherwise indicated by posted signs, markings or other traffic control devices, or at the direction of a law enforcement officer, or as otherwise provided in this subdivision:
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> (9) Bicycle lanes: within a designated bicycle lane,

either by failing to issue parking violation tickets or permitting high volume ticketed companies drastically to reduce their fines. (Complaint, par. 13);

- Instead of rigorous enforcement of traffic laws, New York City, through its Department of Finance, has implemented a "Delivery Solutions" Program for delivery vans, including large volume delivery companies like defendant UPS, which permits businesses to pre-pay parking tickets at a fraction of the amount of

the fines actually incurred. As a result, the deterrent effect of the fines is eliminated. Large volume delivery companies have no incentive to obey traffic laws, particularly NYC Traffic Regulation Section 4-08 (e) (1) governing the blockage of bicycle lanes, which are "expugnable" tickets and have no additional financial penalty. (Complaint, par. 14);

- Since September 2015, UPS trucks have intentionally blocked lanes in the Harlem and Greater New York City area. UPS has repeatedly been notified that its practices are unlawful and unreasonably dangerous for bicycle riders and other vehicles on New York City streets but has failed to change its practices and policies regarding bicycle lane parking when there are other, lawful alternatives (Complaint, par. 17);
- Since September 2015, defendant's delivery vehicles intentionally park and block the bicycle lanes from 110th - 125th streets on the avenues of Frederick Douglass Boulevard, Adam Clayton Powell, and St. Nicholas Avenue during all hours but particularly 7 a.m. - 10 a.m. and 5 p.m. - 8 p.m., that is, during regular morning and evening commuting hours. (Complaint, par. 18);
- Since September 2015, plaintiff has attempted via numerous channels to address the situation, these include but are not limited to

  -calling 311 on numerous occasions, documents with no result from law enforcement,

  -requesting defendant's drivers to park other than in cycling lane,

  -notifying defendant at its corporate headquarters that delivery van drivers

have repeatedly, and on documented instances, violated New York City Traffic Regulation 4-08 (e)(1),

-Notifying defendant's Security Division of documented instances of violations of New York City traffic Regulation 4-08 (e)(1) (Complaint, par. 22);

- Plaintiff has suffered specific harm as a result of defendant's practices in that he has been forced either to alter his route to travel on non-bicycle lane streets in order to get to work, which travel is more dangerous and longer, or use public transportation. (Complaint, par. 27);
- Specifically, the bicycle route taken by the plaintiff is 6.3 miles and takes 35 minutes each way from Harlem, down Saint Nicholas Avenue and through Central Park to Midtown Manhattan. It proceeds exclusively on bicycle lanes and offers a zero carbon footprint and healthy commute which promotes cardiovascular health. (Complaint, par. 28);
- New York City Traffic Rules and Regulations, Section 4-12 (p) forbid bicyclists from traveling on any part of the roadway other than a bicycle lane where one has been provided. (Complaint, par. 29)

ARGUMENT

I. Plaintiff Has Stated a Claim for Public Nuisance

A. Legal Standard on a Motion to Dismiss

Our courts consistently hold that in the context of review on a motion to dismiss, "the allegations of a complaint must be taken as true . . . and the plaintiff must be accorded the benefit of every possible favorable inference. A complaint should be read liberally, for if it

'states in some recognizable form, any cause of action known to our law' it cannot be dismissed." Matter of Long Island Power Authority Hurricane Sandy Litigation v. Long Island Power Authority, 134 A.D. 3d 1119, 1120 (2nd Dep't 2015) (citations omitted); see Leo v. General Electric Company, 145 A.D. 2d 291, 294 (2nd Dep't 1989)

In the memorandum of law submitted on its behalf, defendant UPS acknowledges this high standard but argues that the complaint is entitled to no consideration because plaintiff has merely asserted 'bare legal conclusions.' (Defendant's Memorandum at 3) Contrary to defendant's argument, plaintiff has alleged specific facts about vehicular environment in New York City, the use and purpose of bicycle lanes, the regulatory decisions that balanced the needs of all users (pedestrians, motorists, cyclists) in setting up the bicycle lanes, the use and purpose of the traffic laws, the risks to cyclists from illegal parking in bicycle lanes, continuous instances of defendant's violations of traffic laws, a description of the NYC Department of Finance "Delivery Solutions" program that mitigates the deterrent effect of traffic fines, plaintiff's harm in exposing himself to an enhanced risk of serious injury, the lack of options for avoiding that harm, and plaintiff's efforts to change defendant's conduct.

In claiming that plaintiff has relied on 'bare legal conclusions' entitled to no consideration, defendant cites inapposite cases that, in fact, turned on the presence of documentary evidence refuting the claims. In two of the cases cited, the courts state that 'allegations consisting of bare legal conclusions *as well as factual claims flatly contradicted by the documentary evidence* are not entitled to any such consideration [acceptance of the pleading as true]" Simkin v. Blank, 19 N.Y.3d 46, 52 (2012); David v. Hack, 97 A.D.3d 437, 438 (1st Dep't 2012) (emphasis added) Simkin involved a post-settlement litigation arising out of a equitable distribution of assets. The plaintiff husband argued there was a mutual mistake of fact

(due to his having invested with Bernard Madoff). His complaint was properly dismissed because the documentary evidence before the court contradicted husband's claims. In David v. Hack, the court noted that the documentary evidence before the court belied the allegations in the complaint. 97 A.D. 3d at 440 ("the evidentiary submissions refute plaintiff's allegations")

Here, defendant has failed to point to evidentiary submissions refuting the detailed allegations of repeated violations contained the complaint--which must be taken as true. Defendant's response is simply speculation: "if a UPS vehicle obstructed a bicycle lane, it would have been for a very short period of time to deliver a package. Such a brief "interference" does not constitute a public nuisance." (Def. Memo of Law at 7) The argument cries out for a full evidentiary exposition. [1]

B. Plaintiff has Stated a Claim for Public Nuisance

The unlawful obstruction of a public street is a public nuisance that may be challenged by a specially aggrieved plaintiff. See Graceland Corp. v. Consolidated Laundries Corp., 7 A.D.2d 89 (1958) aff'd 6 N.Y. 2d 900 (1959); Wakeman v. Wilbur, 147 N.Y. 657, 661 (1895); Callahan v. Gilman, 107 N.Y. 360 (1887)

Graceland, Wakeman and Callahan involve successful actions by private individuals who suffered special harm. In each case, the defendant argued that though a public right of way had been appropriated, the plaintiff was not substantially or specifically injured. In each case a full factual exposition and trial was required because the issues raised-- the extent of the nuisance created and the extent of the harm suffered by plaintiff-- are factual questions.

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[1] Defendant's claim that in bringing a small claims court case for nominal damages ($60) plaintiff has 'conceded' that his claims are compensable by money damages is not such an example of documentary evidence refuting plaintiff's claims. Plaintiff's initial attempts to get defendant to change its policies by way of a Small Claims Court action were unavailing because what he was seeking was equitable relief--that defendant should stop parking in bicycle lanes. Defendant's argument will be addressed in greater length in Section D below, at 13.

Graceland was an action for injunction as a result of a public nuisance brought by the neighbor of a commercial laundry whose trucks routinely parked on the public sidewalk in front of plaintiff's apartment house. The case proceeded to trial and a permanent injunction and nominal damages were awarded to plaintiff. Defendant commercial laundry appealed and contended before the Second Department that "although it be assumed that its use is illegal (which it denies), and that such use constitutes a public nuisance, nevertheless the adjacent owner is debarred from any private remedy because it cannot satisfy the legal requirements showing special damage." 7 A.D.2d at 90. The court affirmed the judgment for plaintiff but modified the injunction to permit loading and unloading of its commercial vehicles for reasonable periods consistent with the provisions of the Administrative Code of the City of New York. The decision of the appellate court was affirmed by the Court of Appeals.

The evidence presented at trial demonstrated that defendant was a large laundry, and that

> [i]t uses large trucks and the photographs in evidence show that these trucks and some passenger automobiles are parked and stored on the public sidewalk. It is clear that this occurs while the trucks are not being loaded or unloaded. The effect is to block the sidewalk substantially with respect to access to the owner's premises but not to preclude entirely pedestrian traffic. The court found, and it is not seriously disputed, that the practice is a continual one.

7 A.D. 2d at 90

The court held that the defendant's obstruction need not be total in order for it to be a public nuisance but stressed that the plaintiff must be particularly harmed, and that evidentiary issues determine both questions:

> Of course, as already pointed out, the availability of a private remedy depends upon the existence of special damage. *In that frame of reference the extent of the obstruction and the length of time it subsists, as well as the balance of convenience among member of the public, are all relevant factors in determining either the fact of public nuisance or the incidence of special damage arising therefrom.*

7 A.D. 2d at 92 (emphasis added)

In Wakeman v. Wilbur, 147 N.Y. 657 (1895) the Court of Appeals affirmed a judgment for the plaintiff who proved special damage as a result of an obstruction of a public highway. The court found that

> defendants did place obstructions in a public highway, and secondly that this unlawful act resulted in damages to the plaintiff, special and peculiar to him and not of a character common to the whole public.

147 N.Y. at 660. In an exposition of evidence in a lower court, the Court of Appeals found that there was sufficient evidence that defendants had erected a fence on a public road that caused the plaintiff, an adjacent landowner, who was "obliged to use the road in the winter for the purpose of drawing logs, but on account of the obstruction he was for several days compelled to take another and much longer route, to his pecuniary damage, and that at other times he was obliged to clear the road from the drifts of snow that had accumulated in consequence of the fence, which required time and labor, and that in some other respects he was put to expense in the use of the road for his lawful business, by reason of the defendants' acts." 147 N.Y. at 663.

In Callahan v. Gilman, 107 N.Y.360 (1887) the court upheld a judgment for plaintiff against a defendant that had installed an obstructing sidewalk bridge in front of plaintiff's store on Vesey Street, in lower Manhattan. The court affirmed the judgment for plaintiff but found that the order enjoining defendant from obstructing the sidewalk was "too broad and general in its terms". The court re-fashioned the order to require defendants from "unnecessarily and unreasonably" obstructing the southerly sidewalk of Vesey Street in front of the premises Nos. 35 and 37 Vesey street, by any plank-way or bridge . . . or from unnecessarily or unreasonably hindering or preventing plaintiffs or their employees … from having convenient use of and passage along the sidewalk" 107 N.Y. at 371.

Plaintiff's factual assertions, as well as defendant's own concession (see Memo of Law at 7) demonstrate sufficient basis to conclude that defendant has caused and continues to cause a public nuisance. There is no 'reasonable' period of time defense to be made here. Unlike the laws at issue in the foregoing cases, there is no reasonable period permitted for loading and unloading. The parking by one of defendant's vehicles in a bicycle lane for even a minute is a violation of the vehicle and traffic law Section 4-08(e (1), much like the parking in front of a fire hydrant. Would defendant argue that the use of public roadway that prevents a fire truck from accessing a hydrant is "occasional" or *de minimis*?

In the instant case, however, there are many less onerous restrictions available to defendant UPS than were available to the Graceland or Callahan defendants: UPS delivery vehicles can double park, albeit for a reasonable duration, in driving lanes adjacent to bicycle lanes thereby leaving bicycle lanes open.

C. Plaintiff has Alleged Special Harm

Plaintiff has been specially injured by defendant's conduct in that he has been forced endanger his life during his daily commute to work. (Complaint at pars. 11, 12 and 27) He is a committed but cautious cyclist whose daily commute to his job is repeatedly interrupted by being forced to ride into traffic, thereby increasing his risk of serious physical harm, due to defendant's willful and continuous violation of the New York City traffic laws. See Environmental Health Journal 2009, 8:47 (Impact of transportation infrastructure on bicycling injuries and crashes: a review of the literature) As a broad generalization, a rider forced to exit a bike lane and ride in traffic is 99 times more likely to be involved in a fatal accident than one who remains in a bike lane. The evidence from the public record on cyclist accidents and fatalities supports plaintiff's

claim that there is a real harm, that the harm does not exist for the general public, but on his particular route, almost exclusively for him. [2]

The public nuisance cases defendant relies on for support of his motion are all distinguishable from the instant action on the grounds that they each involve a public emergency or public action. Defendant's primary authority, 532 Madison Avenue Gourmet Foods, Inc. v. Finlandia Center Inc. , 96 N.Y.2d 280 (2001) arose out of the New York City Police Department closure of 15 heavily trafficked streets in Midtown Manhattan as a result of a 39 story building collapse. The City directed the closure for public safety. Similarly, in Burns Jackson Miller Summit & Spitzer v. Lindner, 59 N.Y. 2d 314 (1983) the court denied plaintiff's nuisance claim for damages caused by a transit strike. Roundabout Theatre Co. v. Tishman Realty & Construction Co., 302 A.D.2d 272 (1st Dep't 2003) involved a claim arising out of a street closure by the City after the collapse of a tower elevator collapse. Wall Street Parking Garage v. New York Stock Exchange, 10 A.D. 3d 223 (1st Dep't 2004) involved the restrictions imposed on the businesses around the New York Stock Exchange after 9/11. In re Sanitation Garage Brooklyn Districts 3 and 3A, 32 A.D. 3d 1031 (2d Dep't 2006) was a condemnation proceeding in which the neighbors objected to the City's plan to situate a sanitation garage in their neighborhood. Similarly, DeStefano v. Emergency Housing Group, Inc., 281 A.D.2d 449 (2d Dep't 2001) and Bloomberg v, Liu, 43 Misc. 3d 1203A, 990 N.Y.S. 2d 436 (Sup. Ct. N.Y. Co. 2014) were NIMBY ("Not in my backyard") actions concerning the siting of publicly assisted housing by a government agency.

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[2] Plaintiff is not suing under the Vehicle and Traffic law, which admittedly provides for no private right of action. Defendant's reliance on authorities such as Society of Plastics Industry v. Suffolk Co., 77 N.Y. 2d 761 (1991) and Cruz v. T.D. Bank N.A., 22 N.Y. 3d 61 (2013) is unavailing. These cases do not stand for the proposition that a plaintiff has no common law right of action, just that the pleaded action under the particular statute would not stand. Plaintiff has alleged only a common law right of action for public nuisance. Nor is plaintiff precluded from bringing suit under a statutory disability pursuant to CPLR 3211 (a)(3), which claim by defendant has not been detailed, nor supported by any authority that would permit a more detailed refutation.

In contrast, courts have found "special injury" and permitted cases to proceed where the defendant has simply appropriated public property because it was in its interest to do so. Graceland, Wakeman and Callahan demonstrate that courts will countenance claims where a defendant has, for no reason other than his own self-interest (and certainly not in response to a public emergency), taken a right that belongs to everyone.

Leo v. General Electric Company, 145 A.D.2d 291 (2nd Dep't 1989) demonstrates the commitment of our courts to entertaining public nuisance claims. Leo involved the damage caused by General Electric's routine dumping of toxic waste (PCBs) into Hudson River over a number of years. Mr. Leo was a commercial fisherman whose business was harmed. His suit was permitted to proceed, arguably not simply because of his commercial status, but actually because of the flagrant appropriation by defendant of the public waterways for its own corporate purposes. Similarly, Copart Industries Inc. v. Consolidated Edison Co. of New York Inc., 41 N.Y. 2d 564 (1977) involved damages to plaintiff's property due to smoke emitted from defendant's power plant. The case was permitted to proceed to trial and though defendant won, the court entertained the public nuisance claim of one of the many people or businesses affected by defendant's pollution. The appellate decision involved a jury charge wherein the plaintiff objected to a negligence standard inserted into the charge on the nuisance claim.

D. Plaintiff has no adequate remedy at Law

The nature of relief requested presents a question of fact.

At this point, the court must accept plaintiff's statement that the NYC traffic law has been and continues to be violated. Defendant's allusion that its conduct is *de minimis* is a matter of fact to be determined by the trier of fact, after a full and fair opportunity for discovery.

As plead, the facts demonstrate that defendant has, or is able to, insulate itself from the deterrent effect of municipal fines by participating in the NYC Department of Finance's ticket reduction program "Delivery Solutions". (Complaint at par. 14) The City of New York through its Department of Transportation did not go to the extensive effort and expense of establishing bicycle lanes for the use of the UPS Corporation. See Callahan at 365: "The king's highway is not to be used as a stable yard" citing Rex v. Russell, 6 East 420.

Plaintiff's attempts to enlighten UPS about its violations of law have been unavailing. Similarly, as a *pro se* litigant, he attempted to use the Small Claims Court to attempt to change the behavior of UPS through imposition of fines. Plaintiff's verified complaint is based on a review of the facts and law, after consultation with counsel. As he has stated, plaintiff has been specially harmed by defendant's unlawful taking of a public right and the remedy sought is for defendant to stop appropriating that public right.

CONCLUSION

Based on the foregoing, the plaintiff's complaint and affidavit submitted herewith, it is respectfully requested that this court deny defendant's motion in its entirety, and for such other and further relief as this court deems just and proper.

Respectfully submitted,

Elisa Barnes
Attorney for Plaintiff Alex Bell