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

ALEX MORGAN BELL, Plaintiff, - against - UNITED PARCEL SERVICE, INC., Defendant.	Index No.: 151001/2016

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANT UNITED PARCEL SERVICE, INC.'S MOTION TO DISMISS

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Defendant United Parcel Service, Inc. ("UPS"), by its attorneys, Ansa Assuncao, LLP, submits this memorandum of law in further support of its motion to dismiss Plaintiff Alex Morgan Bell's Complaint, dated February 3, 2016 (the "Complaint"), pursuant to CPLR 3211(a)(3) and (7).

PRELIMINARY STATEMENT

New York does not permit individuals like Plaintiff to pursue public nuisance claims absent special circumstances. Like most states, New York recognizes that state agencies are in the best position and have the responsibility to enforce existing law and pursue nuisance suits on behalf of the public they serve. This preference promotes consistency and fairness of enforcement while cutting down "busybody" suits driven more by ideology or petty grievance than by a desire to remedy a substantial individualized harm. Accordingly, New York Courts require plaintiffs wishing to pursue public nuisance claims to establish their standing to do so. The bar to establish standing is high. Plaintiff does not meet it and the Complaint should be dismissed.

Plaintiff's complaint is that UPS drivers sometimes park in the bicycle lanes he uses to cycle to work and that the New York City Police Department (the "NYPD") does not do enough to fix the alleged problem. He concedes that he does not have a private right of action to enforce the New York City Traffic Rules and Regulations ("NYC Rules") or the Vehicle and Traffic Law ("VTL"). Since he cannot assume the NYPD's responsibilities, he attempts to transform his traffic enforcement complaint into a public nuisance claim. However, he lacks standing to pursue such a claim.

Plaintiff has not alleged and cannot show that he sustained a special injury as a result of UPS's alleged practices. Standing requires a harm that is different in kind; one that is unique to the plaintiff and not widespread in the community. Here, Plaintiff's injury is not to his real

property or livelihood. It is to his alleged convenience and safety. But UPS's alleged practices do not affect him uniquely. Any bicyclist encountering a UPS vehicle (or any delivery vehicle, taxi cab, police car or other vehicle) in the bicycle lane would experience the same inconvenience, hassle and enhanced risks that Plaintiff alleges in the Complaint. Plaintiff's claim that he is somehow affected more than others in his community is irrelevant. Plaintiff's alleged harm must be different in kind; not merely in severity or degree. Plaintiff's claims in this case are unexceptional – no different than anyone else in the community.

Plaintiff also ignores that a public nuisance must substantially interfere with a common right. An interference of brief duration, like a vehicle temporarily stopped in a bicycle lane, does not satisfy this requirement. Public nuisance requires more than a transitory inconvenience. It must be extensive, pervasive and substantial. The Complaint does not allege any such substantial interference.

New York Courts routinely dismiss public nuisance actions like Plaintiff's for lack of standing for good reason. If Plaintiff is allowed to maintain this action, anyone dissatisfied with traffic enforcement by the NYPD could also sue for the alleged violations of the VTL or NYC Rules, flooding the court with private litigation over purported public harms. The volume of suits would yield inconsistent results, disparate rulings and the uneven private enforcement of the public law.

Plaintiff lacks standing to bring this action. This Court should dismiss the Complaint.

LEGAL ARGUMENT

I.

PLAINTIFF'S LACK OF STANDING REQUIRES THE DISMISSAL OF THIS ACTION.

Plaintiff does not have standing to maintain this action.[1] First, Plaintiff concedes that the VTL does not provide a private right of action but claims that he is not suing under it.[2] He also concedes that the NYC Rules do not provide a private right of action because he does not address UPS's argument to that effect. *See, e.g., McNamee Constr. Corp. v. City of New Rochelle*, 29 A.D.3d 544, 545, 817 N.Y.S.2d 295, 297 (2d Dep't 2006); *Weldon v. Rivera*, 301 A.D.2d 934, 935, 754 N.Y.S.2d 698, 699 (3d Dep't 2003); *Hajderlli v. Wiljohn 59 LLC*, 24 Misc.3d 1242(A), 901 N.Y.S.2d 899, 2009 WL 2710263, at *6 (Supreme Ct. Bronx Co. 2009).

Plaintiff's concessions are fatal. He alleges that UPS's vehicles are being parked in the bicycle lane in violation of the NYC Rules and seeks an injunction to prevent future violations. The NYPD, not Plaintiff, has the authority to enforce the traffic laws. New York City Charter § 435(b). Otherwise, anyone could sue under the NYC Rules and usurp the NYPD's role. The result would be an endless flood of litigation for damages and injunctions any time a person believes that the NYC Rules have been violated.

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[1] Plaintiff contends that UPS argues that the Complaint is entitled to no consideration because it asserts bare legal conclusions. However, the section in UPS's papers to which Plaintiff refers is simply the motion to dismiss standard. (*See* UPS's Memorandum of Law, dated April 25, 2016 ("UPS Memo."), at p. 3.) Plaintiff's attempt to distinguish the cases cited for this general principle is without merit. It is well-settled law that a complaint's conclusory allegations will not defeat a motion to dismiss. *DRMAK Realty LLC v. Progressive Credit Union*, 133 A.D.3d 401, 404, 18 N.Y.S.3d 618, 621 (1st Dep't 2015); *Phillips v. Trommel Constr.*, 101 A.D.3d 1097, 1098, 957 N.Y.S.2d 359, 361 (2d Dep't 2012).

[2] Plaintiff argues that he is not precluded from bringing suit under a statutory disability pursuant to CPLR 3211(a)(3). CPLR 3211(a)(3) is applicable when the party does not have "legal capacity to sue." *Id*. This includes the party's lack of standing to maintain a cause of action. *Midland Mortgage Co. v. Imtiaz*, 110 A.D.3d 773, 774-75, 973 N.Y.S.2d 257, 259 (2d Dep't 2013).

Second, Plaintiff has not alleged a special injury different in kind from the rest of the community. In the Complaint, he alleges that he (1) "has had his life continuously endangered and been forced to stop commuting via bicycle on some days in favor of more expensive and longer commutes"; and (2) "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." (Affirmation of Stephen P. McLaughlin, dated April 25, 2016 ("McLaughlin Aff."), Exhibit A at ¶¶ 26-27.) He argues that there is a real harm when a bicyclist is forced to exit the bicycle lane and ride in traffic due to an increased likelihood of getting into an accident. He claims that "the harm does not exist for the general public, but on his particular route, almost exclusively for him." (Plaintiff's Memorandum of Law, filed May 11, 2016 ("Pl. Memo."), at p. 11.)

Bicycle lanes were not installed for Plaintiff's exclusive use. Even he alleges that they were installed to encourage bicycle commuting. (*See, e.g.*, McLaughlin Aff., Exhibit A at ¶¶ 6-10.) He has no particular injury. But if he did and he were the only one facing inconvenience in his "personal" bicycle lanes, no public nuisance can exist because a common right of the public is not involved. *See, e.g., 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, 96 N.Y.2d 280, 292, 727 N.Y.S.2d 49, 56 (2001).

Plaintiff is just one of many New York City's bicyclists who periodically face impediments as they ride in the City. Bicyclists, as well as motorists, have to navigate around vehicles parked in the bicycle lane or bicyclists who are passing them. As one of many, Plaintiff's alleged damages are the same as the public at large. They are not different in kind. He does not have standing to maintain this action. *See, e.g., 532 Madison Ave. Gourmet Foods, Inc.*, 96 N.Y.2d at 294, 727 N.Y.S.2d at 57.

The cases cited by Plaintiff are inapposite. Unlike here, they involved plaintiffs whose real property or livelihood was uniquely harmed by a substantial and permanent or lengthy obstruction created by defendant. In *Graceland Corp. v. Consolidated Laundries Corp.*, 7 A.D.2d 89, 180 N.Y.S.2d 644 (1st Dep't 1958), defendant continuously parked and stored its trucks on the pedestrian sidewalk adjacent to plaintiff's apartment buildings, which persistently and substantially blocked access to them. *Id*. at 89-90, 180 N.Y.S.2d at 645. The trucks were not being loaded or unloaded while on the sidewalk. *Id*. at 90, 180 N.Y.S.2d at 646. Plaintiff contended that its buildings suffered depreciated rentals thereby reducing their values due to the obstruction. *Id*. at 93, 180 N.Y.S.2d at 648. The court held that plaintiff had standing to sue because it had a special injury. *Id*.

In *Wakeman v. Wilbur*, 147 N.Y. 657 (1895), defendants had constructed fences on a public highway which obstructed it and sometimes made it impassable. *Id*. at 663. The court held that plaintiff, an adjoining property owner, had standing to sue because he had a special injury due to his need to use the road for his business. *Id*. at 664.

In *Callanan v. Gilman*, 107 N.Y. 360 (1887), defendant erected a bridge over the sidewalk to deliver goods to his store, which entirely obstructed the sidewalk for four to five hours per business day. *Id*. at 368-69. The court held that plaintiff had standing to sue because his nearby store lost customers due to the obstruction. *Id*. at 370-71.

In *Leo v. General Electric Co.*, 145 A.D.2d 291, 538 N.Y.S.2d 844 (2d Dep't 1989), commercial fishermen sued after defendant discharged pollutants into the public waters where they fished. *Id*. at 292, 538 N.Y.S.2d at 845. The court held that they had suffered a special harm of diminution or loss of livelihood. *Id*. at 294, 538 N.Y.S.2d at 847.

Here, Plaintiff did not sustain any special injury to his real property or livelihood. He does not allege that he owns the property where the alleged violations occurred, the violations occurred at a specific location, or the violations prevented him from making a living. Instead, he alleges that he sometimes encounters UPS vehicles parked in the bicycle lane somewhere along his 6.3 mile bicycle route to work from Harlem to midtown Manhattan. (McLaughlin Aff., Exhibit A at ¶¶ 18, 27-28.) These alleged damages are no different than the public at large who also encounter UPS vehicles and any other vehicles that may obstruct the bicycle lane. Plaintiff's requested permanent injunction also seeks to prohibit UPS vehicles from being parked in any bicycle lane in the City of New York, not just the ones he allegedly uses.

Plaintiff improperly tries to expand the holdings of *Graceland Corp.*, *Wakeman*, *Callanan* and *Leo* by arguing that the courts allowed actions to proceed because defendants had appropriated a public right for their own purposes. However, these decisions were expressly based upon a finding that plaintiffs had standing because they suffered a special injury. *Graceland*, 7 A.D.2d at 93, 180 N.Y.S.2d at 648; *Wakeman*, 147 N.Y. at 664; *Callanan*, 107 N.Y. at 370-71; *Leo*, 145 A.D.2d at 294, 538 N.Y.S.2d at 847.

Finally, Plaintiff claims that *Graceland Corp.*, *Wakeman* and *Callanan* required "a full factual exposition and trial" because the extent of the nuisance and plaintiff's harm were factual questions. (Pl. Memo. at p. 7.) None of the cases indicate whether any motion practice occurred prior to trial or why the case went to trial.

Standing can be determined on a motion to dismiss if the plaintiff fails to allege the requisite special injury. *532 Madison Ave. Gourmet Foods, Inc.*, 96 N.Y.2d at 294, 727 N.Y.S.2d at 57; *In re Sanitation Garage Brooklyn Districts 3 and 3A*, 32 A.D.3d 1031, 1036, 822

N.Y.S.2d 97, 102 (2d Dep't 2006). Plaintiff has none. The Complaint should be dismissed for Plaintiff's lack of standing.

II.

UPS'S ALLEGED ACTIONS DO NOT SUBSTANTIALLY INTERFERE WITH A PUBLIC RIGHT.

Plaintiff argues that he states a public nuisance claim because parking in the bicycle lane for even a minute violates the NYC Rules.[3] Plaintiff is wrong.

A public nuisance involves a "substantial interference with the exercise of a common right of the public." *532 Madison Ave. Gourmet Foods, Inc.*, 96 N.Y.2d at 292, 727 N.Y.S.2d at 56. A public nuisance does not exist if the interference is of a short duration. *Harnik v. Levine*, 281 A.D. 878, 879, 120 N.Y.S.2d 62, 62 (1st Dep't 1953).

Plaintiff ignores *Harnik*, which held that defendant's double parked car which blocked plaintiff's car did not constitute a nuisance. *Id.* Plaintiff fails to recognize that having to navigate around a vehicle in the bicycle lane is, at most, a brief interference with the free use the bicycle lane. Plaintiff attempts to distinguish other cases cited by UPS by arguing that they involve a public emergency or public action. These cases simply explain New York's long-established requirements of a public nuisance.

Plaintiff's reliance on *Graceland Corp.*, *Wakeman* and *Callanan* is misplaced. Defendants in those cases each created a substantial and permanent or lengthy obstruction. *Graceland Corp.*, 7 A.D.2d at 89-90, 180 N.Y.S.2d at 645-46; *Wakeman*, 147 N.Y. at 663; *Callanan*, 107 N.Y. at 368-69.

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[3] Plaintiff argues that UPS made a concession in its Memorandum of Law, which demonstrates a sufficient basis to conclude that it has caused and continues to cause a public nuisance. UPS did not make any such concession. It simply stated that if a UPS vehicle obstructed a bicycle lane, it would have been for a very short period of time to deliver a package. (*See* UPS Memo. at p. 7.)

Plaintiff's alleged obstruction by a UPS vehicle is not substantial because Plaintiff could use the traffic lane or walk on the sidewalk to go around the vehicle. *See* NYC Rules § 4-12(p)(1). It would be temporary, allegedly existing insofar as necessary to pick up or deliver a package. This brief "interference" does not constitute a public nuisance.

Under Plaintiff's argument, a person could sue for a public nuisance every time someone violates the NYC Rules or VTL by illegally parking his vehicle, running a red light, failing to stop at a stop sign, speeding or violating any other traffic law. The solution is to call the NYPD, not file a lawsuit.

III.

PLAINTIFF IS NOT ENTITLED TO A PERMANENT INJUNCTION.

In order to state a claim for a permanent injunction, Plaintiff must allege that (1) he has no adequate remedy at law; (2) serious and irreparable harm will result absent the injunction; (3) there was a violation of a right presently occurring, or threatened and imminent; and (4) the equities are balanced in his favor. *In re Long Island Power Authority Hurricane Sandy Litigation*, 134 A.D.3d 1119, 1120, 24 N.Y.S.3d 313, 316 (2d Dep't 2015).

Plaintiff does not address and, therefore, concedes that (1) an injunction will not alleviate his alleged damages because non-UPS vehicles obstruct the bicycle lane; and (2) the alleged obstruction of the bicycle lane does not prevent him from traveling by bicycle along New York City streets. *See, e.g., McNamee Constr. Corp.*, 29 A.D.3d at 545, 817 N.Y.S.2d at 297; *Weldon*, 301 A.D.2d at 935, 754 N.Y.S.2d at 699; *Hajderlli*, 2009 WL 2710263, at *6.

Plaintiff also ignores all of the cases cited by UPS, including *Fieldston Property Owners Ass'n, Inc. v. Bianchi*, 13 N.Y.2d 699, 241 N.Y.S.2d 175 (1963), which denied plaintiff's requested injunction to prevent defendants from parking on private streets because parking was

exclusively controlled by regulations of the police department and the commissioner of traffic. *Id*. at 699, 241 N.Y.S.2d at 175.

Instead, Plaintiff asserts, in a conclusory fashion, that he has no adequate remedy at law. He tries to escape the impact of his prior small claims actions by claiming that they were his attempt to change UPS's behavior through the imposition of fines and he was really seeking equitable relief. However, his Notices of Claim state that he sought to "recover monies arising out of loss of use of property" due to UPS vehicles allegedly being parked in the bicycle lane. (McLaughlin Aff., Exhibits B, D-F.) He, therefore, concedes that money damages are sufficient to compensate him. He cannot claim that he really did not mean to seek that relief now that it hurts his claim for an injunction. *See, e.g., McDermott v. City of Albany*, 309 A.D.2d 1004, 1005, 765 N.Y.S.2d 903, 905 (3d Dep't 2003). In addition, his alleged damages herein (*e.g.*, being "forced to stop commuting via bicycle on some days in favor of more expensive and longer commutes" and "use public transportation") would be compensable with money damages, if recoverable and proven. (McLaughlin Aff., Exhibit A at ¶¶ 26-27.)

Plaintiff claims that UPS has or is able to insulate itself from the deterrent effect of municipal fines by participating in the New York City Department of Finance's "Delivery Solutions" program. If Plaintiff has an issue with this program, he should be directing his efforts to the City of New York to end it rather than trying to obtain an injunction against UPS.

Plaintiff also misrepresents the program. He claims that it "permits businesses to pre-pay parking tickets at a fraction of the amount of the fines actually incurred," implying that the businesses pre-pay a set amount no matter how many tickets they receive. (McLaughlin Aff., Exhibit A at ¶ 14.) However, the program requires businesses to pay a pre-set, reduced fine amount for <u>each</u> offense. (Reply Affirmation of Stephen P. McLaughlin, dated May 17, 2016,

Exhibit A.) Plaintiff fails to mention that businesses also waive their right to challenge the validity of parking tickets by participating in this program. (*Id*.) The City of New York receives a benefit from the program due to the reduced administrative and court costs associated with businesses challenging the tickets.

CONCLUSION

For the foregoing reasons and the reasons set forth in its moving papers, UPS respectfully requests that this Court issue an Order dismissing the Complaint pursuant to CPLR 3211(a)(3) and (7).

Dated: White Plains, New York
May 17, 2016

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