STATE OF NEW YORK
SUPREME COURT COUNTY OF SENECA

Meadowsweet Dairy, LLC	:	**Index No. 40558**
	:	
and	:	
	:	
Steven and Barbara Smith	:	
	:	
Plaintiffs	:	
	:	
against	:	
	:	
Patrick Hooker, Commissioner Department of Agriculture and Markets of the State of New York	:	**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**
	:	
and	:	
	:	
Will Francis, Director Division of Milk Control and Dairy Services	:	**Assigned Judge: Hon. Dennis F. Bender**
	:	
Defendants	:	

Defendants' motion does not address the merits of this case and goes to lengths to avoid the sole issue presented by Plaintiffs' complaint: do the state's police powers, i.e., New York's Agriculture and Market Laws, apply to the private conduct engaged in by Plaintiffs? In other words is the public's health, safety and welfare injured by Plaintiffs' conduct? That is the sole issue presented by Plaintiffs' complaint for declaratory judgment. Plaintiffs believe their conduct does not injure the public's health, safety and welfare and has asked this Court for a declaration on that issue.

Rather than address this issue, however, Defendants have filed a motion to dismiss arguing that Plaintiffs' complaint fails to state a cause of action and that collateral estoppel applies. For the reasons explained below, Defendants' motion to dismiss is not well taken and it should be denied.

I. This Supreme Court is authorized to entertain a declaratory judgment action and Plaintiffs' complaint states as much, even if the complaint is strictly construed.

Defendants first argue that Plaintiffs' complaint fails to state a cause of action under N.Y. C.P.L.R. 3211(a)(7) and should be dismissed. This argument lacks merit.

It is well settled that on a motion to dismiss for failure to state a cause of action, the pleading is to be liberally construed, all the facts as alleged in the pleading are accepted as being true, and the plaintiff is accorded the benefit of every possible inference. As stated by the Court of Appeals of New York in *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (N.Y. 1994), "On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." Accord: *Chaikovska v. Ernst & Young, LLP*, 2005 NY Slip Op 7093, 1 (N.Y. App. Div., 4th Dept., 2005) ("In assessing a motion under CPLR 3211 (a) (7), . . . a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (citations omitted) and the allegations in the complaint and the affidavits submitted in opposition to the motion to dismiss must be accepted as true and given every favorable inference."). Therefore, Plaintiffs' complaint must be construed liberally and all inferences must be resolved in their favor.

Not only must all allegations in Plaintiffs' complaint be construed in their favor, all that Plaintiffs need to do is state a cause of action, not prove their case. "[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one * * * ." *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (N.Y. 1977). Accord:

Meyer v. Stout, 2007 NY Slip Op 9270, 1 (N.Y. App. Div., 4th Dept., 2007) (The "sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail."). Thus, Plaintiffs' complaint need not be proven, it only needs to state a cause of action. No matter how their complaint is read, whether liberally or strictly, Plaintiffs have pled a claim in declaratory judgment under CPLR 3001 and this Court is authorized to hear it.

The Supreme Court is a court of general jurisdiction and, as noted by the Court of Appeals of New York in the case of *Thrasher v. United States Liability Ins. Co*., 19 N.Y.2d 159, 166 (N.Y. 1967), a Supreme Court "is competent to entertain all causes of actions unless its jurisdiction has been specifically proscribed." This includes the ability to entertain declaratory judgment actions. Specifically, CPLR 3001 provides, in part, that "The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed."

In this case, Plaintiffs' complaint was brought under CPLR 3001. Consequently, Plaintiffs have pled a cause of action and Defendants' motion to dismiss for failing to state a claim must fail.

Defendants argue on page 8 of their motion that Plaintiffs seek to "prohibit the Department * * * from allegedly acting without or in excess of its jurisdiction." That is not true.[1] Defendants can act in accordance with their jurisdiction all they want. Plaintiffs

[1] If that was Plaintiffs' argument then they would have filed a complaint in prohibition. See discussion of distinction between prohibition and declaratory judgment in *Morgenthau v. Erlbaum*, 59 N.Y.2d 143, 149-150 (N.Y. 1983) ("Prohibition, therefore, may be used for collateral review of an error of law "only where the very jurisdiction and power of the [entity] are in issue" (citation omitted). Declaratory relief, on the

are not challenging the validity of New York's Agriculture and Market Laws or the regulations adopted thereunder. What Plaintiffs' seek is a declaration whether New York's Agriculture and Market Laws even apply to their conduct or the conduct of others similarly situated.[2] In other words, does New York's Agriculture and Market Laws give the Defendants the authority to regulate a person's ability to eat the foods of their choice when those persons manufacture and produce their own food and that choice does not impact the public's health, safety or welfare? This is a classic example of the utility of a declaratory judgment action. Unfortunately, Defendants do not address the merits of this issue in their motion to dismiss and skirt the issue entirely.

Declaratory judgment is an appropriate action to determine the application or validity of statutes and regulations to a specific type of conduct. "It is settled law that, where no factual issue is raised, a declaratory judgment action may be maintained to challenge the validity or application of a particular statute * * *." *Westwood Pharms. v. Chu*, 164 A.D.2d 462, 467 (N.Y. App. Div., 4th Dept., 1990). See also: *Morgenthau v. Erlbaum*, 59 N.Y.2d 143, 150 (N.Y. 1983) (declaratory judgment is "available in cases where a constitutional question is involved or the legality or meaning of a statute is in question and no question of fact is involved."); *Banfi Prods. Corp. v O'Cleireacain*, 182 App Div 2d 465 (N.Y. App. Div., 1st Dept., 1992) (taxpayer's action, seeking declaration that enforcement of New York City general corporation tax was unconstitutional, was not premature where agency's action is challenged as unconstitutional or beyond

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other hand, generally seeks a determination of rights before a 'wrong' occurs, rather than collateral review of [an entity's] ruling.").

[2] At page 8 of their motion, Defendants admit that declaratory judgment is proper when "a ruling in the declaratory judgment would *clearly* affect other cases." (Emphasis in original.).

authority granted to agency.). Consequently, it is appropriate for this Court to consider Plaintiffs' claims in the form of a declaratory judgment.

For these reasons, Plaintiffs' complaint states a cause of action and Defendants' motion to dismiss for this reason should be denied.

II. Collateral estoppel does not apply to the facts of this case and cannot form the basis of a dismissal of Plaintiffs' complaint because the issue in this case, i.e., does New York's Agriculture and Market Laws apply to Plaintiffs' conduct, was not an issue at the October 2007 administrative hearing.

As stated by the court in *Jeffreys v. Griffin*, 1 N.Y. 3d 34, 40 (2004), "collateral estoppel is a flexible doctrine." In *Griffin*, the issue was whether the Appellate Division properly "declined to apply the doctrine of collateral estoppel" when three proceedings, administrative, civil and criminal, were pending simulatneously. *Id*. at 42. The *Griffin* court held that it was proper to reject the collateral estoppel argument even though "the formal prerequisites for collateral estoppel were present." *Id*. See also: *Staatsburg Water Co. v. Staatsburg Fire Dist*, 72 N.Y. 2d 147,153 (1988) ("The fundamental inquiry is whether relitigation should be permitted in a particular case in light of what are often competing policy considerations, including fairness to the parties, conservation of the resources of the court and the litigants, and the societal interests in consistent and accurate results."; *Matter of Halyalkar v. Board of Regents of State of N.Y*., 72 N.Y. 2d 261, 268 (1988) ("Further, whether to apply collateral estoppel in a particular case depends upon 'general notions of fairness involving a practical inquiry into the realities of the litigation.'").

Defendants' collateral estoppel argument rests on an administrative hearing that was held in October, 2007. The issue in that hearing was whether Plaintiffs' dairy products that were seized by Defendants in October, 2007 should be destroyed. A

review of the Exhibits attached to Defendants' motion demonstrates conclusively that there was nothing at that hearing which addressed whether New York's Agriculture and Market Laws apply to Plaintiffs' conduct.

For example, Exhibit B attached to Defendants' motion to dismiss is a notice of the October 2007 hearing. The purpose of the hearing was to determine whether 260 pounds of Plaintiffs' dairy products "should not be destroyed or otherwise disposed of." The notice does not indicate that the purpose of the hearing is to determine whether New York's Agriculture and Market Laws apply to Plaintiffs' conduct.

Exhibit C attached to Defendants' motion is a compilation of the Hearing Officer's report at the conclusion of the hearing and the Defendant Commissioner's Final Determination. Nowhere in those two documents is there any finding of how Plaintiff Meadowsweet Dairy LLC (the "Dairy LLC") operates, how it was formed, how it produces dairy products, how equity in the LLC is distributed, what qualifies a person for membership in the LLC, what the rights or duties or obligations of LLC members are, how capital contributions are made to the LLC, etc.. In addition, nowhere in those two documents is there any finding that the milk produced by the Dairy LLC's cows is pasteurized[3] or that it was sold or offered to sale to consumers.[4] Finally, nowhere in these two documents is there any finding of the Smiths' involvement with or their relationship to the LLC.

All of this evidence and all of these issues would have had to have been introduced and raised at the October 2007 in order for the Hearing Officer and

[3] Which is required by 1 NYCRR Section 2.2(y), which defines "milk" as "food that meets the definition for milk provided for in section 17.18 of this Title *which has been pasteurized*." (Emphasis added.).
[4] Which is required by 1 NY CRR Section 2.2 (pp), which defines "raw milk" as milk that "will not be pasteurized prior to being sold or offered for sale to consumers."

Defendant Commissioner to conclude that New York's Agriculture and Market Laws applies to Plaintiffs' conduct. However, this evidence and these issues were not raised at the hearing.

Consequently, the October 2007 administrative hearing cannot serve as collateral estoppel in this case because there was no evidence introduced that dealt with whether New York's Agriculture and Market Laws applies to Plaintiffs' conduct. Therefore, because the issues in this case have not been previously litigated Defendants' motion is not well taken and it should be denied.

Assuming for the sake of argument that Plaintiffs should have participated in an administrative hearing, such participation would have been futile. Exhaustion of administrative remedies is unnecessary when it would be futile. See *Watergate II Apartments v. Buffalo Sewer Authority*, 46 N.Y.2d 52, 57 (N.Y. 1978) (exhaustion not required "when resort to an administrative remedy would be futile."); *Counties of Warren & Washington Industrial Dev. Agency v. Hudson Falls Bd. of Health*, 168 A.D.2d 847, 848 (N.Y. App. Div., 3rd Dept., 1990) ("[E]xhaustion of remedies before the Board would be futile since the Board and its attorney have clearly demonstrated by their prior attempts to halt the project (citations omitted) that petitioners are not likely to receive an unbiased review from the Board."); *Love v. Grand Temple Daughters, I. B. P. O. E. of W.*, 37 A.D.2d 363 (N.Y. App. Div., 1st Dept. 1971); *Fahey v. Perales*, 141 A.D.2d 934 (N.Y. App. Div., 3rd Dept., 1988) ("[T]he exhaustion rule is not inflexible and need not be followed where to do so would be futile."); *Amsterdam Nursing Home Corp. v. Commissioner of N.Y. State Dep't of Health*, 192 A.D.2d 945, 947 (N.Y. App. Div., 3rd

Dept., 1993) ("It is axiomatic that administrative remedies need not be exhausted if resort to them would be futile").

In this case, counsel for Plaintiffs inquired whether the Defendants' position at the hearing would make any difference if Plaintiffs' conduct was private and did not involve the public. Defendants' counsel responded via email as follows: "I understand your position that the creation of the LLC takes the Smiths out of this realm. I disagree." See Attachment G attached to Plaintiffs' complaint. Therefore, before the October 2007 hearing even commenced, Defendants had already taken the position that New York's Agriculture and Markets laws applied to Plaintiffs' conduct. It would have been futile, therefore, for Plaintiffs to show up and argue otherwise.

Consequently, collateral estoppel does not apply and Defendants' motion to dismiss should be denied.

III. Plaintiffs' declaratory judgment action should not be converted to an Article 78 proceeding because legislative, not administrative, action is involved.

Defendant's make the argument at page 9 of their motion that this matter should be converted to an Article 78 proceeding if it is not dismissed. That argument lacks merit.

Article 78 proceedings apply to and refer to actions usually brought in cases involving writs of certiorari, prohibition and mandamus. Indeed, CPLR 7801 clearly provides as follows: "Relief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained in a proceeding under this article. Wherever in any statute reference is made to a writ or order of certiorari, mandamus or prohibition, such reference shall, so far as applicable, be deemed to refer to the proceeding authorized by this article." Plaintiffs are not seeking any such extraordinary writ.

Plaintiffs' issue is whether they are entitled to a declaration that New York's Agriculture and Market Laws do not apply to their conduct.

Moreover, Article 78 proceedings apply only to administrative acts, not legislative acts. See: *Merced v. Fisher*, 38 N.Y.2d 557, 559 (N.Y. 1976) ("An article 78 proceeding does not lie to review a legislative enactment."); *Bashant v. Walter*, 78 Misc. 2d 64, 66 (N.Y. Misc. 1974) ("Article 78 proceedings in the nature of certiorari or mandamus are designed to review administrative, not legislative, conduct."). The proper method of challenging the applicability of a statute or regulation is through declaratory judgment. See: *Calderon v. Buffalo*, 61 A.D.2d 323, 326 (N.Y. App. Div., 4th Dept., 1978).

In this case, Plaintiffs are not contesting any action taken against them by Defendants. Plaintiffs are not challenging any license issued by Defendants, they are not challenging any license revocation action taken by Defendants, they are not challenging any administrative orders or other administrative action taken by Defendants, and they are not challenging whether Defendants have the authority to take these types of actions.

Instead, Plaintiffs seek a declaration whether New York's Agriculture and Market Laws apply to their conduct, i.e, whether the law applies to them. Plaintiffs do not believe the law applies to them in this context and thus is an impermissible exercise of the state's police power. "[A]n enactment which deprives a citizen of his right to use his property as he chooses cannot be sustained under the police power 'if there is no reasonable relation between the end sought to be achieved by the regulation and the means used to achieve that end.'" (citation omitted.). *D'Angelo v. Cole*, 108 A.D.2d 541, 543 (N.Y. App. Div. 1985).

Consequently, Article 78 would not apply to the relief Plaintiffs seek and this matter should not be converted.

IV. Conclusion

As far as Plaintiffs can tell the issue raised by Plaintiffs in their complaint is one of first impression in the State of New York. That issue is whether New York's Agriculture and Market Laws apply to conduct that does not injury the public's health, safety and welfare, i.e., when people choose to produce and consume their own food. Therefore, this Court should hear the matter and decide once and for all, for all others who are similarly situated to the Smiths, the reach of New York's Agriculture and Market Laws.

As alleged in their complaint, Plaintiffs are citizens who have formed a Limited Liability Company so that they themselves can produce and consume milk and other dairy products of their choice. Plaintiffs have no interest in consuming pasteurized milk that comes from cows injected with artificial hormones and antibiotics which is processed and packaged at large industrial facilities and then transported hundreds of miles across the country only to sit on store shelves under artificial lighting. Plaintiffs are not alone, for hundreds of others are in the same situation.

As alleged in their complaint, Plaintiffs are the only citizens who have access to the milk and dairy products that they themselves produce and consume. No one else has access to or consumes these products. Of necessity, these citizens' conduct does not injure the public's health, safety or welfare.

Consequently, Plaintiffs seek a declaration that New York's Agriculture and Market Laws do not apply to them because their conduct is beyond the police power of the State. This issue has far reaching effects throughout the entire State.

For the State to argue that these citizens do not have the right to choose the types of food they can produce and consume themselves is to insist that these citizens are wards of the State who do not have the ability to decide what is best for their private lives. And that defies our fundamental form of government.

That is why this Court should hear this case and decide what the law is on this issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by regular U.S. mail, postage prepaid, on January 11, 2008 to the following:

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