

**CRIMINAL COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

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THE PEOPLE OF THE STATE OF NEW YORK

**Docket Nos. 2002 CN 009163
2002 NY 079547**

-against-

ZIVILE KAMINSKAITE
-----X

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

INTRODUCTION

This is a case about the freedom of artistic expression and the City of New York's attempt to censor and criminalize the public sale of art that is not contained on a two-dimensional surface within a frame. Defendant Zivile Kaminskaite, a folk artist, sells her hand-crafted, individually painted and culturally significant Russian nesting dolls on the sidewalks of New York. The Second Circuit has clearly stated that the City cannot constitutionally require a license to sell art on the streets; to do so would stifle First Amendment expression. Yet the City has twice arrested Ms. Kaminskaite and charged her with a crime – making her a criminal -- because her art apparently doesn't look like what the City is used to. She moves to dismiss the charges on the grounds that the City's licensing requirement is in violation of her rights under the United States and New York Constitutions.

THE FACTS

Zivile Kaminskaite (“Defendant”) is a twenty-four year old artist who sells her hand-painted folk art, known as Matreshka¹ dolls, on the streets of New York. She was born in the former Soviet Union and immigrated to the United States in 2001. The sale of her art constitutes her livelihood and sole source of income. See Affidavit of Zivile Kaminskaite ¶ 2,3.

On October 17, 2002, Defendant was arrested and charged with unlicensed general vending in violation of New York City Administrative Code § 20-453 (“the General Vendor Law”). According to the misdemeanor complaint, Officer Michael Albergo of the New York Police Department observed Defendant standing for approximately two minutes behind a table on which was displayed “more than 10 dolls.” According to the complaint, Defendant was not displaying a Department of Consumer Affairs license and could not produce one when asked.

On November 7, 2002, Defendant was again arrested and charged with violating the General Vendor Law. The complaint states that Police Officer Stephen Soldano observed Defendant standing for approximately two minutes behind a table on which was displayed “more than 10 wooden dolls.” According to officer Soldano, Defendant was not displaying a license and could not produce one when asked.

¹ Also spelled “Matroishka” and “Matryoshka”.

The General Vendor Law makes it unlawful for individuals to sell goods or services in the streets, sidewalks and public spaces of New York City without a license from the Department of Consumer Affairs. See N.Y.C. Admin. Code § 20-453.

In 1996, the Second Circuit Court of Appeals declared the General Vendor Law, as applied to visual artists, unconstitutional because it impermissibly infringes on their First and Fourteenth Amendment rights. See Bery v. City of New York, 97 F. 3d 689 (2d Cir. 1996), *cert. denied*, 520 U.S. 1251 (1997).

The wooden dolls Defendant is alleged to have been vending in each case were her own hand-painted, original-design creations of Russian folk art known as Matreshkas. See Affidavit ¶ 5. Matreshkas are wooden articles hand crafted and hand painted in various regions of the former Soviet Union. See Wregg Imports v. United States, 10 C.I.T. 679, 680 (Ct. Int'l Trade 1986) (describing Matreshkas). Matreshkas are comprised of wooden components, each “nested” inside the next larger component. *Id.* Each Matreshka is individually crafted with a painted human face and peasant-style clothing indicative of the region in the former Soviet Union where it was crafted. *Id.*

SUMMARY OF ARGUMENT

The charges against Defendant must be dismissed because the General Vendor Law she is alleged to have violated is unconstitutional as applied. First, the sale of the hand-painted folk art Defendant allegedly sold is protected by the First Amendment. Second, the General Vendor Law is not a reasonable time, place and manner restriction because it is not narrowly tailored to protect the city’s interests, and because it does not offer Defendant an alternative forum for exercising her First Amendment rights. Finally, the General Vendor Law also violates the more expansive free speech provision of the New York Constitution.

ARGUMENT

Defendant Zivile Kaminskaite is entitled to dismissal of these charges pursuant to NY CLS CPL §§ 170.30(1)(a) and 170.35(1)(c) because the General Vendor Law, as applied, violates her federal and state constitutional rights.

I. Defendant’s activities are protected by the First Amendment

The fundamental purpose of the First Amendment is to protect all forms of peaceful expression in their myriad manifestations. See Abood v. Detroit Board of Education, 431 U.S.

209, 231 (1977). It is a fundamental precept of the First Amendment that all expression, whether it is written, pictorial or by way of performance, is presumptively protected against government interference. See Doran v. Salem Inn, Inc., 422 U.S. 922 (1975). Artwork, a quintessential form of expression, is firmly within the sphere of material that receives First Amendment protection. See Serra v. U.S. General Services Administration, 847 F.2d 1045, 1048 (2d Cir. 1988); Piarowski v. Illinois Community College District 515, 759 F.2d 625 (7th Cir. 1985), *cert. denied*.

In Bery v. City of New York, a case involving the right of street vendors to sell their art without a license, the Second Circuit declared that visual art is protected by the First Amendment because it communicates ideas. See Bery 97 F.3d at 696. First Amendment protection is not limited to political speech and verbal expression; rather, “visual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing,” Bery held. Id. at 695. Reversing the district court, Bery struck down as unconstitutional the General Vendor Law’s requirement that visual artists be licensed to display and sell their work in public. The court also held that the General Vendor Law violates the Equal Protection Clause of the U.S. Constitution.

A. The presence of a communicative element, not the medium of the art, determines whether there is First Amendment protection

While the Bery plaintiffs sold traditional visual art such as paintings, photographs and sculpture, the court held that the presence of a communicative element, not the particular artistic medium used, determines whether there is First Amendment protection. Id. at 696 (noting that the work of the jeweler, the potter, and the silversmith are sometimes entitled to protection). Bery roundly rejected the analysis of the district court, and others, which drew a constitutional distinction between “fine art” and “applied or decorative art.” Cf. Bery v. City of New York, 906 F.Supp.163 (S.D.N.Y. 1995) (finding “applied art” too far from the heartland of First Amendment protected speech to merit protection); San Francisco Street Artists Guild v. Scott, 37 Cal. App. 3d 667, 672 (Cal. Ct. App. 1974) (distinguishing between the “followers of Mercury” and the “true artists illuminated by the aura of Apollo”).

As Bery recognized, First Amendment doctrine does not disfavor non-traditional media of expression. See also Hoepker v. Kruger, 200 F.Supp. 2d 340, 352 (S.D.N.Y. 2002) (“mannequins and pencil sharpeners and other such products can also qualify as art, and museums sometimes collect and display them as such”); People for the Ethical Treatment of

Animals v. Giuliani, 105 F.Supp.2d 294 (S.D.N.Y. 2000) (life-size decorated fiberglass cows clearly deserve First Amendment protection); Cardtoons v. Major League Baseball Players Association, 95 F.3d 959 (10th Cir. 1996) (trading cards containing caricatures of baseball players are entitled to First Amendment protection).

To determine whether there is First Amendment protection, the courts look beyond the particular medium to examine whether the activity communicates thoughts, ideas or beliefs. Compare Barnes v. Glen Theater, Inc., 501 U.S. 560 (1991) with Dallas v. Stanglin, 490 U.S. 19 (1989) (nude dancing is protected because it communicates an erotic message, but mere recreational dance is not protected). Since constitutional protection does not turn upon the truth, popularity, or social utility of the ideas and beliefs offered, “high” and “low” forms of art cannot be rationally distinguished. See N.A.A.C.P. v. Button, 371 U.S. 415, 445 (1963); Salem Inn, Inc. v. Frank, 501 F.2d 18, 21 (2d Cir. 1974) (“While the entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may differ vastly in content . . . it may not differ in substance from the dance viewed by the person who . . . wants some ‘entertainment’ with his beer or shot of rye.”). As Judge Posner stated in the case of a defendant who sold T-shirts advocating the legalization of marijuana, the “T-shirts are to [the seller] what the New York Times is to the Sulzbergers and the Ochs – the vehicle of her ideas.” Ayres v. City of Chicago, 125 F.3d 1010, 1017 (7th Cir. 1997).

No matter the medium chosen, the presence of a communicative element determines whether a particular means of expression is entitled to First Amendment protection.

B. Defendant’s Matreshkas are communicative artwork through which she expresses her individuality and cultural heritage

Defendant’s sale of her Matreshkas is First Amendment protected because it is the means through which she expresses her creativity and communicates her cultural heritage.

Defendant’s Matreshkas, each hand painted by her with her own original designs, express her individuality and creativity in the same manner as traditional visual art such as paintings, sculptures and photographs. Matreshka dolls are widely recognized as folk art -- traditional, cultural art usually created by artists without formal training. Folk art is notable for the way it blends the *creative experiences of individual artists* with the traditions and values of their communities. See Alison Hilton, Russian Folk Art, xiii (1995) (emphasis added). While some visual images and patterns in folk art are based on traditions and beliefs from the past, other

designs convey individual responses to the surrounding world. See *id.* “Russian folk art, like the art of many cultures in which the written word is not the primary means of communication, is often unsigned, but it is by no means impersonal.” *Id.* at xiv. Many works can be ascribed to a particular artist known by name and reputation. *Id.*

Despite their use of traditional forms, Matreshka designs “continue to be individualistic with each artist’s imagination, adding historical, ethnic, fairy tale or animal patterns to the dolls creation.” Joan Bramsch, Russian Matryushka Nesting Dolls, *4 (visited December 5, 2002) <<http://www.empoweredparent.com/collect/russian.shtml>>. This form of individualistic self-expression, which Defendant displays through the painting of her own creative designs, is certainly at the heart of the First Amendment.²

Additionally, Defendant’s sale of Matreshkas is a means through which she expresses and communicates her cultural heritage. Defendant’s parents taught her to paint Matreshkas when she was fifteen years old, and she grew up painting Matreshkas and exchanging them within her family. Typical of folk art, which is generally nationalistic in character and expresses the values and aspirations of a culturally united group, Matreshkas have been called the “image and soul” of Russia. L.N. Soloviova, Matryoshka, 94 (1997). Their name itself is derived from the word “mother,” and they represent both the national motherland and the actual fertility alluded to by their rounded, feminine shape. See Bramsch at *1.

Defendant chooses to create, display and sell her Matreshkas because of their cultural meaning to her.³ Her display and sale of them on the street not only prompts discussions about her culture; the display and sale of the dolls *is itself* the communication of her cultural heritage. Such an expression of cultural heritage is exactly the type of dissemination of information and ideas the First Amendment seeks to foster. See, e.g. Salem Inn, Inc. v. Frank, 381 F. Supp. 859, 863 (E.D.N.Y. 1974) (“few could reasonably deny that . . . certain ethnic folk dances communicate stories and ideas”); Irish Lesbian & Gay Org. v. Bratton, 882 F.Supp. 315, 319 (S.D.N.Y. 1995) (“there is no question that [plaintiff] has a First Amendment right to proclaim its message of pride in its Irish cultural heritage and in its homosexuality”); Michini v. Rizzo,

² While Defendant’s Matreshkas must convey or express some idea or belief, they needn’t convey a particularized message. See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 569 (1995) (A work of art is protected even if it conveys no discernable message: otherwise First Amendment protection “would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll”).

379 F.Supp.837 (E.D. Pa. 1974) (as hair can be communicative, a man who wears his beard as an expression of his heritage, culture and racial pride as an African-American man is entitled to First Amendment protection).

Defendant's individually crafted Matreshkas are communicative artwork through which she both expresses her creativity and displays her cultural heritage; they are therefore protected by the First Amendment.

II. The General Vendor Law is not a reasonable time, place and manner restriction

The General Vendor Law is not a reasonable time place and manner restriction because it is not narrowly tailored, and because it does not leave open ample alternative channels of communication.

First Amendment rights are not absolute; the government may impose restrictions, even in a traditional public forum, so long as they are reasonable restrictions on the time, place, and manner of the speech which (1) are content neutral; (2) are narrowly tailored to serve a significant government interest, and (3) leave open alternative channels of communication. See Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984). The government bears the burden of demonstrating that a time, place, and manner restriction is lawful. See Eastern Conn. Citizens Action Group v. Powers, 723 F.2d 1050, 1052 (2d Cir. 1983).

In Bery v. New York, the court held that the General Vendor Law is not a reasonable time, place and manner restriction on speech because it is not narrowly tailored and because it does not leave open ample alternative channels of communication. First, Bery held that the General Vendor Law is not narrowly tailored because the city's licensing system amounted to a citywide *de facto* ban on vending which is not narrowly tailored to meet the city's interest in maintaining public safety. While the city may permissibly restrict visual and written expression "to particular areas of the city where public congestion might create physical hazards and public chaos," the General Vendor Law serves as a complete ban on expressive activity and is therefore impermissible, the court held. Bery at 697.

Next, Bery held that the General Vendor Law does not leave open ample alternative channels of communication. Whether a restriction leaves open ample alternatives for communication is not a formulaic inquiry, but depends on the nature of the forum sought, the

³ Of course, it is irrelevant that Defendant would not be engaging in her expressive activity if she did not receive money in return. See Bery at 696.

nature of alternative fora, and the impact of the regulation on the ability of the regulated person to get his message out. See Beal v. Stern, 184 F.3d 117, 130 (2d Cir. 1999).

Bery held that the General Vendor Law does not leave open ample alternative channels of communication. The court noted that gallery and museum space is not available to many artists, and furthermore that the public expression of art has a different purpose in communicating with people who may not attend galleries or museums. “The sidewalks must be available for [artists] to reach their public audience,” the court held. Since the General Vendor Law banned plaintiffs from every sidewalk and public space in the city, it did not leave open alternative channels of communication.

As Bery held, the General Vendor Law is not a reasonable time, place and manner restriction on speech. Just as it served as a complete city-wide ban on the Bery plaintiffs, so it prevents Defendant from displaying and selling her Matreshkas in a manner that is not narrowly tailored to achieving the city’s interests. Just as the Bery plaintiffs were left with no alternative public fora to sell their art, Defendant has none to sell hers. The General Vendor Law is not a reasonable time, place, and manner restriction, and its application in this case is therefore unconstitutional.

III. Defendant’s activities are protected under the New York State Constitution

Even if they *were not* protected under the U.S. Constitution, Defendant’s activities would be entitled to protection under the New York Constitution.

Article 1, § 8 of the New York Constitution states that “every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.” N.Y. Const., Art. I, § 8. Those words reflect a deliberate choice not to follow the language of the First Amendment, but instead to set forth our basic democratic ideal of liberty in strong affirmative terms. See Immuno AG v. Moor-Jankowski, 77 N.Y.2d 235, 249 (1991). The protection afforded by the guarantees in the New York Constitution is therefore often broader than the minimum required by the federal Constitution. See O’Neill v. Oakgrove Constr., Inc., 71 NY2d 521, 529 (1988). Courts may interpret the state constitution to include such considerations as whether the right claimed is “of peculiar State and local concern,” and whether the citizens of New York have a distinct attitude toward the right. See People v. Vilardi, 76 N.Y.2d 67, 80 (1990) [Simmons, J., concurring].

The General Vendor Law, as applied to Defendant, is unconstitutional under the New York Constitution, because of the city and state's strong tradition for encouraging artistic expression.⁴ New York State, the "cultural center for the nation," has long provided a hospitable climate for the free exchange of ideas. Matter of Beach v. Shanley, 62 N.Y.2d 241, 255-6 (1984) [Wachtler, J., concurring]. New York is a state where freedom of expression and experimentation have not only been tolerated, but encouraged. See People v. P. J. Video, Inc., 68 N.Y.2d 296, 309 (1986) (dismissing obscenity charge where warrant made out no showing that material violated community standards or lacked intrinsic worth).

The United States Supreme Court has held that freedom of expression in the arts in an area governed by community standards. See Miller v. California, 413 U.S. 15, 33 (1973). New York City has a long history and rich tradition of fostering freedom of expression in the arts and vindicating those rights. See People v. Balmuth, 178 Misc. 2d 958, 971 (Crim. Ct. N.Y. 1998) (striking down as unconstitutional a city park regulation requiring licenses for artists to display and sell their work). New York City may support or at least tolerate freedom of expression where other cities have not. See id.

The General Vendor Law as applied to Defendant would therefore violate the New York Constitution *even if* it didn't also violate the federal Constitution, because New York State provides greater protection for the kind of expressive activity Defendant is alleged to have engaged in, and because New York state and city are artistic and cultural centers which would tolerate Defendant's activities even if other states and cities did not.

CONCLUSION

"It is largely because government cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual," wrote Justice Harlan, questioning how the government can distinguish one offensive word from another. Cohen v. California, 403 U.S. 15, 25 (1971).

⁴ Indeed, both the New York City Department of Cultural Affairs and the New York State Council on the Arts recognize and fund folk art. See Bery at 696 n.6 (suggesting the New York City Multiple Dwelling Law definition of "artist" as an alternative legislative solution for determining which art is protected). The Multiple Dwelling Law § 276 defines an artist as "a person who is regularly engaged in the fine arts, such as painting and sculpture or in the performing or creative arts, including choreography and filmmaking, or in the composition of music on a professional basis, and is so certified by the city department of cultural affairs and/or state council on the arts."

So too with art. For the foregoing reasons, Defendant Zivile Kaminskaite respectfully requests that the court dismiss the charges pursuant to NY CLS CPL §§ 170.30(1)(a) and 170.35(1)(c) because the General Vendor Law, as applied, violates her federal and state constitutions rights.

Dated: December 17, 2002

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* Admission pending