STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

JOSEPH DALTON, et al.,

Plaintiffs,

-against-

DECISION and ORDER
INDEX NO. 719-02
RJI NO. 0102069534

HON. GEORGE PATAKI, et al.,

Defendants,

-and-

PARK PLACE ENTERTAINMENT,

Intervenor-Defendant.

MRS. LEE KARR,

Plaintiff,

-against-

INDEX NO. 718-02
RJI NO. 0102069535

HON. GEORGE PATAKI, et al.,

Defendants,

-and-

PARK PLACE ENTERTAINMENT,

Intervenor-Defendant.

Supreme Court Albany County All Purpose Term, March 3, 2003
Assigned to Justice Joseph C. Teresi

APPEARANCES:

O'Connell & Aronowitz
Cornelius D. Murray, Esq.
Attorneys for Plaintiffs in Dalton, et al v. Pataki, et.
100 State Street
Albany, NY 12207-1885

Jay Goldberg, P.C.
Jay Goldberg, Esq.
Attorney for Plaintiff in Karr v. Pataki, et al.
250 Park Avenue Suite 2020
New York, NY 10177

Robert A. Siegfried, Esq.
Assistant Attorney General
Attorneys for the State Defendants
The Office of the Attorney General
Of the State of New York
The Capitol
Albany, NY 12224

Bleakley, Platt & Schmidt
Frederick J. Martin, Esq.
Attorneys for Defendant Yonkers Racing Corp.
1 N. Lexington Avenue
P.O. Box 5056
White Plains, NY 10601-5056

Hodgson Russ, LLP
Kevin M. Kearney, Esq., of Counsel
Attorneys for Defendant Finger Lakes Racing Association, Inc.
One M&T Plaza, Suite 2000
Buffalo, NY 14203

Wilson, Elser, Moskowitz,
Edelman & Dicker, LLP
William Y. Crowell, III, Esq.
Attorney for Defendant New York Racing Ass'n
3 Gannett Drive
White Plains, NY 10604

Marvin Newberg, Esq.
Attorney for Defendant Monticello Raceway Management, Inc.

33 North Street
Monticello, NY 12701

Harris Beach, LLP
Heidi Schult Gregory, Esq.
Attorneys for Defendant Mid-State Raceway, Inc.
99 Garnsey Road
Pittsford, NY 14534

Gibson, Dunn & Crutcher, LLP
Randy M. Mastro, Esq.
Attorneys for Intervenor-Defendant
Park Place Entertainment Corporation
200 Park Avenue
New York, NY 10166-0193

TERESI, J.:

Plaintiffs' complaints challenge Parts B, C and D of Chapter 383 of the Laws of 2001. Plaintiffs move separately and each defendant or intervenor defendant cross-move for summary judgment. Plaintiffs seek a declaration that Chapter 383 is unconstitutional. Defendants and intervenor defendants seek dismissal of the plaintiffs' complaint.

Initially plaintiffs claim that the Governor's Message of Necessity failed to satisfy the requirements of Article III, §14 of the New York Constitution. Article III §14 of the New York Constitution states:

> "§14. [Manner of passing bills; message of necessity for immediate vote]
>
> No bill shall be passed or become a law unless it shall have been printed and upon the desks of the members, in its final form, at least three calendar legislative days prior to its final passage, unless the governor, or the acting governor, shall have certified, under his hand and the seal of the state, the facts which in his opinion necessitate an immediate vote

thereon, in which case it must nevertheless be upon the desks of the members in final form, not necessarily printed, before its final passage; nor shall any bill be passed or become a law, except by the assent of a majority of the members elected to each branch of the legislature; and upon the last reading of a bill, no amendment thereof shall be allowed, and the question upon its final passage shall be taken immediately thereafter, and the ayes and nays entered on the journal."

In Finger Lakes Racing Assn. v. New York State off-Track Pari-Mutuel Betting Comm's, 30 NY2d 207, 219 (1972), the Court of Appeals held:

"That time lapse may be cut down, and consideration advanced, if the Governor certifies to the Legislature "the facts which in his opinion necessitate an immediate vote thereon". The governor's certificate of April 19 described the general purposes of the bill to establish a system of off-track pari-mutuel betting and certified that because the bill had not been on the legislative desks three days "the Leaders of your Honorable bodies have requested this message to permit immediate consideration of the bill prior to your anticipated final adjournment".

Although the proposal had been introduced in the Senate April 18 and adjournment actually occurred on April 22, the bill could not reasonably have been in final printed form for three days before adjournment and the imminence of adjournment on April 19, when the message was sent, was sufficient to justify the certificate for the reasons stated by the Governor It was passed by the Senate on April 19, the date of the certificate, and by the Assembly the following day.

The time sequence shows the bill could not have been considered by the Legislature unless the certificate had been given and the public interest in its consideration is made conclusive by the fact the Legislature decided not only to consider it but to pass it. The request by the leaders of both houses to the Governor for a certificate shortening the time to permit consideration of the bill before adjournment was to make legislative action possible.

> This is a compliance in terms and in spirit with article III (§14). It is the Governor who must express the opinion that an immediate vote is desirable. The facts on which he forms that opinion must satisfy him. The facts supporting his opinion of April 19, are rational and reasonable. If the proposal is to be considered a certificate must be given. This on its face is a sufficient compliance with the Constitution.
>
> The Legislature could still say the time for consideration was too short. It did not say that, but accepting the Governor's certificate and considering the proposal in the time available, it passed it.
>
> Normally a court should not intervene to nullify an act of the Governor addressed to legislative action which literally and reasonably conform with constitutional requirements (*ef. People ex rel. Hatch v. Reardon, 184 N.Y. 431; People ex rel, Broderick v. Morton, 156 N.Y. 136)*".

Here the subject bill was approved by both the Senate and the Assembly after their leaders requested and the Governor provided a message certifying to the necessity of an immediate vote on the bill. While the Governor's message of necessity only stated "these bills are necessary to enact certain provisions of law" the Senate and the Assembly accepted his certification and this Court declines to nullify Chapter 383 as his action literally and reasonably conforms with the constitutional requirements of Article III, §14 of the State Constitution.

Next, the Court will address Part B of Chapter 383 which authorizes the Governor to enter into compacts with indian tribes to allow them to operate Class III commercial gambling casinos. Plaintiffs claim that Part B of Chapter 383 violates the prohibition against commercial gambling set forth in Article 1, §9 of the New York State Constitution. The Court of Appeals has provided two recently written opinions regarding the constitutionality of Class III commercial gambling. See, Saratoga County

Chamber of Commerce v. Pataki, ___ NY2d ___ (decided June 12, 2003) (2003 WL 21357342).

After careful consideration this Court chooses to be guided by Saratoga County Chamber of Commerce v. Pataki, ___ NY2d ___ (decided June 12, 2003) (2003 WL 21357342) in which, after a lengthy examination of pre and post IGRA (Federal Indian Gaming Regulatory Act) Judge Reed (joined by Judges Wesley and Graffeo) stated:

> "In summary, IGRA mandates that, if a state allows any class III gaming by any person, a tribe may seek to conduct the same games on their lands. Moreover, the Second Circuit has firmly rejected the notion (unsuccessfully advanced by the State of Connecticut) that a state that allows only charities to engage in regulated casino-type gambling prohibits class III gaming activities for purposes of IGRA (id. At 1031-1032). States that allow charities to conduct class III gaming must negotiate in good faith with a Tribe wishing to do the same.
>
> New York has not outlawed all gambling for more than six decades. For better or worse, New Yorkers have adopted a public policy that permits considerable gambling, although regulated."

Judge Reed went on to conclude that:

> "When Congress enacted IGRA pursuant to its plenary authority over Indian affairs, it legislated for all 50 states to allow sovereign nations (Indian tribes) to conduct class III gaming activities within States' borders. In this situation, the "critical policy decision" challenged by plaintiffs – to authorize on-reservation class III Indian gaming – derives from the unique interplay between IGRA and our State's Constitution and statutes. The Governor's recognition that class III Indian gaming is mandated in New York by federal law, given policy choices embodied in the New York Constitution and State law, did not constitute policy making. In executing the 1993 Compact, which regulates the Tribe's conduct of class III gaming at its on-reservation casino, the Governor was merely implementing pre-existing federal and State policy choices."

This Court will rely on that decision in finding that Chapter 383, Part B authorizing the Governor to enter into compacts with Indian tribes to operate gaming facilities is consistent with the Federal Courts' holdings in Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024 (2nd Circuit 1990) and California v. Cabazon Board of Mission Indians, 480 US 202 (1987) and must be upheld.

Next, the Court will address the plaintiffs' challenge to Part C of Chapter 383 which authorizes video lottery terminals (VLT) at certain racetracks. Plaintiffs allege that the VLT's do not fall within the constitutional "lottery" exception and that Part C is unconstitutional as it requires the use of VLT proceeds for non-educational purposes. Defendants assert these are constitutionally permitted video lotteries and that the "net" proceeds from video lottery gaming will be used for educational purposes as required by the constitution.

Initially, the Court notes the well established principles that:

> "Legislative enactments enjoy a strong presumption of constitutionality (*see Paterson v. University of State of N.Y.*, 14 NY2d 432, 438 [1964]). While the presumption is not irrefutable, parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity "beyond a reasonable doubt" (*People v. Tichenor*, 89 NY2d 769, 773 [1997]; *see also People v. Pagnotta*, 25 NY2d 333, 337 [1969]). Moreover, courts must avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional (*see Alliance of Am. Insurers v. Chu*, 77 NY2d 573 [1991]). These well-established principles guide our analysis."
> [*See, Lavalle v. Hayden*, 98 NY2d 155, 161 (2002)]

Despite plaintiffs' protestations that VLT's do not fall within the lottery exception of Article 1, §9 and their concern with the State's history of limiting the frequency of

lottery drawings, the record before this Court demonstrates that the VLT's are indeed true video lotteries and therefore are a constitutionally permissible lottery game.

The definitions of VLT's in the request for proposal issued by the Division of the Lottery on June 28 defines a VLT as a:

> "video display terminal in which paper currency or credits are deposited or an account card is swiped and a selection is made by the player in order to purchase video lottery tickets in which the results are randomly and immediately drawn from the video lottery central system. A video lottery terminal may not dispense coins directly to winning players. A terminal shall be considered a video lottery terminal notwithstanding the use of an electronic credit system making the deposit of paper currency or coins. Video lottery terminals shall be linked electronically to allow players to compete against other players for a chance to purchase winning video lottery tickets. Prizes shall be awarded on the basis of random selection and not on the basis of skill."
> (Emphasis supplied)
> June 28, 2002 RFP, §1.7

While the outward appearance of a VLT vis-a-vis slot machine is similar, the internal workings, method and limit of draw/payout and link up of competitive players distinguish the VLT. The Court finds this to be within the definition of "lottery" and substantially similar to the instant scratch off tickets available daily 24/7 throughout New York.

The Court also notes that in Trump v. Pertee, 228 AD2d 367 (1st Dept., 1996) the First Department in a brief decision stated:

> "The motion court properly found that petitioner was not entitled to a preliminary injunction as he failed to demonstrate a likelihood of success on the merits (*see, Grant Co. V. Srogi*, 52 NY2d 496, 517). The statute and regulations creating the lottery game (L 1995, ch 2, §§94-a--94-g; 21 NYCRR part 2835) are presumed constitutional, which presumption was not rebutted by petitioner beyond a

> reasonable doubt (*see, Matter of Klein [Hartnett], 78 NY2d 662, 666, cert denied 504 US 912).*
>
> As the court found, Quick Draw contains all the essential features of a lottery, since a player tenders money for numerical selection, the winning numbers are randomly drawn, and the player receives a prize if the numbers match (*see,* Penal Law §225.00[10]; *Harris v. Economic Opportunity Commn.,* 171 AD2d 223). The court did not err in its analysis of the enabling legislation or in rejecting petitioner's contention that the game goes beyond the type of lottery contemplated by New York Constitution, article I, §9(1)."

This decision seems to also support the defendants' position regarding lotteries allowed under State Constitution, Article 1, §9. The Court also notes that the Keno games authorized are no different than the already authorized lotteries such as Lotto and Quick Draw and therefore are also constitutionally permissible.

Lastly, the question of whether the use of proceeds from the VLT's for non-educational purposes under the act is unconstitutional must be addressed. Article 1, §9(1) states that the "net proceeds" of all lotteries shall be applied exclusively to or in aid or support of education in this state. The Court also notes that Part C of Chapter 383 requires the "net proceeds" to be used for education purposes as required by the constitution.

This Court agrees with the defendants that the State Constitution leaves to the discretion of the Legislature the determination of what constitutes "net proceeds" and after a full review of this record, this Court does not conclude that it was irrational for the legislature to authorize a vendor fee to be paid and that determination as to what is "net proceeds" will not be disturbed.

Finally, this Court examines the constitutionality of the multi-state lottery authorized by Part D of Chapter 383. Once again the Court notes that:

> "Legislative enactments enjoy a strong presumption of constitutionality (*see Paterson v. University of State of N.Y.*, 14 NY2d 432, 438 [1964]). While the presumption is not irrefutable, parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity "beyond a reasonable doubt" (*People v. Tichenor,* 89 NY2d 769, 773 [1997]; *see also People v. Pagnotta*, 25 NY2d 333, 337 [1969]). Moreover, courts must avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional (*see Alliance of Am. Insurers v. Chu,* 77 NY2d 573, 585 [1991]). These well-established principles guide our analysis."
> Lavalle v. Hayden, 98 NY2d 155, 161 [2002].

Plaintiffs argue that this legislation authorizes a lottery that is not operated by the State as required by Article 1, §9 of the State Constitution and that the "net proceeds" from the operation of this lottery cannot be dedicated exclusively to education within the state.

However, the record establishes that the State of New York indeed operates the multi-state lottery within this state and retains sufficient control of all aspects under the Mega Millions Agreement to make this agreement consistent with Article 1, §9 of the State Constitution and the Court again declines to invalidate the act of the legislature, in determining what constitutes "net proceeds".

With regard to Chapter 383, the Court has examined plaintiffs' remaining contentions and finds them to be without merit and will therefore for all of the reasons stated grant defendants' and intervenor defendants' cross-motions for summary judgment and declares Chapter 383 constitutional. Plaintiffs' complaints are dismissed without costs.

All papers, including this Decision and Order are being returned to the attorneys for the State Defendants. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: July 17, 2003
Albany, New York

Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion dated December 23, 2002 with Attached Affirmation of Cornelius D. Murray, Esq. also dated December 23, 2002, with Attached Exhibits A - SS.
2. Notice of Motion dated December 20, 2002 with Affirmation of Jay Goldberg, Esq. dated February 7, 2003, with Attached Exhibits A - C.
3. Notice of Cross-Motion for Summary Judgment dated January 23, 2003 with Affirmation of Robert A. Siegfried, Esq. dated January 21, 2003, with Attached Exhibits A - M; Affidavits of Robert T. Williams dated January 22, 2002, with Attached Exhibits A - G; and Susan E. Beaudoin, Esq. dated January 23, 2003, with Attached Exhibits A - C.
4. Notice of Cross-Motion dated January 22, 2003 with Affirmation of Kevin M. Kearney, Esq. also dated January 22, 2003 with Attached Exhibits A and B; and Reply Affirmation of Christian Riegle dated February 26, 2003.
5. Notice of Cross-Motion dated January 21, 2003 with Affidavits of James R. Wise dated January 20, 2003 and Heidi Schult Gregory, Esq. dated January 21, 2003.
6. Affirmation of Marvin Newberg, Esq. dated January 22, 2003.
7. Notice of Cross-Motion dated January 22, 2003 with Affidavit of Robert J. Galterio dated January 21, 2003, with Attached Exhibits A - C.
8. Notice of Cross-Motion dated January 23, 2003 with Affirmation of Randy M. Mastro, Esq. also dated January 23, 2003, with Attached Exhiblts A - S.
9. Supplemental Affirmation of Randy M. Mastro in Opposition to Plaintiffs' Motions dated February 28, 2003, with Attached Exhibits.