Attorney Number 46996

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

JAMES NUCCIO, GABRIEL WIESEN, and AFTER HOURS PIZZA, LLC, an Illinois Limited Liability Company, d/b/a BEAVERS DONUTS,	)	
Plaintiffs,	)	
v.	)	Court No: 12 CH 30062
CITY OF EVANSTON, a municipal corporation,	)	
Defendant.	)	

EVANSTON'S § 2-615 MOTION TO DISMISS PLAINTIFF'S COMPLAINT

NOW COMES the City of Evanston, an Illinois home rule municipal corporation (hereinafter referred to as "Defendant" or "Evanston"), by and through its attorneys, the City of Evanston Law Department, and moves pursuant to § 2-615 of the Code of Civil Procedure that Plaintiff's Complaint be dismissed with prejudice, and in support of this motion, states:

1. A motion to dismiss brought pursuant to § 2-615 attacks the legal sufficiency of a complaint on the grounds that the complaint fails to state a cause of action. *Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, 227 Ill.2d 381, 392 (2008); *Newman, Riaz and Shelmadine, LLC v. Brown*, 394 Ill. App. 3d 602, 605 (1st Dist. 2009).

2. A plaintiff may not merely rely on conclusions of law or fact, which are unsupported by specific factual allegations, when stating a cause of action. *Pooh-Bah Enterprises, Inc.*, 232 Ill.2d 463, 473 (2009).

3. Illinois is a fact-pleading jurisdiction and conclusions of law or fact which are unsupported by facts are to be disregarded when deciding whether a complaint has stated a cause

of action. *Napleton v. Village of Hinsdale*, 229 Ill.2d 296, 305 (2008); *Capitol Indem. Corp. v. Stewart Smith Intermediaries, Inc.*, 229 Ill. App. 3d 119, 123 (1st Dist. 1992).

4. As demonstrated below, Plaintiff's Complaint is riddled with numerous factual and legal defects, all of which provide separate and independent grounds to dismiss the Complaint with prejudice. Plaintiff's Complaint is not ripe, the purported causes of action are trumped by Evanston's home rule authority conferred upon it by the Illinois Constitution, Evanston's mobile food vendor ordinance is presumptively valid, and Evanston's police power extends to the subject matter of the ordinance.

ARGUMENT

I. The "Introduction" to Plaintiff's Complaint should be stricken.

5. Pursuant to 735 ILCS 5/2-603(a) and (b), ¶ 1 of the Complaint should be stricken for its failure to "contain a plain and concise statement of the pleader's cause of action"; and its failure to be limited to a "separate allegation". This paragraph instead consists of a long-winded narrative purporting to contain multiple conclusory allegations, none of which have any basis in law or fact. Should this Complaint not be dismissed, this paragraph should at minimum be stricken.

II. Plaintiff's Complaint is not ripe, it fails to allege an actual controversy, and should be dismissed with prejudice.

6. Nowhere in Plaintiff's Complaint is there any averment which sets forth when, where, and how Plaintiff sought a mobile food vendor license and was denied. The reason for this is that Plaintiff refused to even apply for a mobile food vendor license.

7. Plaintiff contends it wants to do business in the City of Evanston. Pursuant to Evanston City Code § 8-26-2, a prospective applicant submits a written application for a license. There is no allegation that Plaintiff applied for a mobile food vendor license, and was then

denied. There is no recitation of well-pled facts that they took any step to seek to do business as a licensed mobile food vendor in Evanston. Of course, Plaintiffs cannot state that they were denied a license, as in fact they refused to even apply for one. In the absence of such denial of a license, this case is not ripe for adjudication, and therefore, the Plaintiff's precipitous rush to the courthouse is premature.

8. This precise issue was considered by the Supreme Court in *Triple A Services, Inc., v. Rice*, 131 Ill.2d 217, 233 (1989). In *Rice*, a mobile food vendor's complaint was dismissed because the plaintiffs in that case failed to allege a ripe cause of action. A party may not question the constitutional validity of a statutory provision unless he has sustained, or is in immediate danger of sustaining some direct injury as a result of enforcement of the provisions. *Id.*

9. Furthermore, a complaint for declaratory judgment must allege an actual controversy between the parties. *State Farm Mutual Automobile Insurance Company v. City of Chicago*, 398 Ill.App.3d 832, 834 (1st Dist. 2010) citing *Best v. Taylor Machine Works*, 179 Ill.2d 367, 382-383 (1997). Plaintiff's complaint fails to properly allege "an actual controversy", which is mandatory under 735 ILCS 5/2-701.

10. An actual controversy exists if:

> .. the underlying facts and issues of the case are not moot or premature, so as to require the court to pass judgment on mere abstract propositions of law, render an advisory opinion, or give legal advice as to future events.

Id. citing *Underground Contractors Ass'n v. City of Chicago*, 66 Ill.2d 371, 375 (1977).

11. Clearly, there is no justiciable issue implicated by Plaintiff's conclusory complaint. Nowhere is there a plain and concise statement establishing an actual controversy exists. Plaintiff concedes, through its silence, that it never applied for a mobile food vendor

license from Evanston. Rather, Plaintiff burdens this Court with a Complaint seeking purely an advisory opinion on an abstract proposition of law as to an event which has not taken place yet.

12. An unripe complaint was also dismissed in *LaSalle Bank National Association v. City of Oakbrook Terrace,* 393 Ill.App.3d 905 (2nd Dist. 2009). In that case, which involved a purported violation of Article I, § 2 of the Illinois Constitution, the court reiterated that before a party may initiate litigation, its claim must first be ripe. The ripeness doctrine is applied to avoid "premature adjudication or review of administrative action." *Id.* at 911.

13. To the extent that this Plaintiff will argue in opposition to this motion that even the act of applying for a mobile food vendor license is futile, the Oakbrook Terrace court determined that such an argument must fail, as it is a property owners' burden of: "...establishing, by more than mere allegations, that pursuing a final decision would be futile." *Id.* at 912. There are no factual allegations showing this Plaintiff submitted an application, much less that the City rejected an application. And, the Complaint is deficient as it failed to plead that an actual controversy existed. Plaintiff's claims are premature. This case must be dismissed with prejudice.

III. The City of Evanston's Home Rule powers are liberally construed and Plaintiff's purported allegations fail in light of home rule authority.

14. Article VII, § 6 of the Illinois Constitution sets forth the powers of home rule units of government, and the City of Evanston is a home rule unit of government. Namely, a home rule unit may:

> ... exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals, and welfare; to license; to tax; and to incur debt.

15. The powers of a home rule unit such as the City are to be construed liberally pursuant to Article VII, § 6(m) of the Illinois Constitution, and the City's powers as a home rule

authority are: "...to be given the broadest powers possible" *Scadron v. City of Des Plaines*, 153 Ill.2d 164 (1992).

16. Plaintiff's Complaint ignores over 40 years of legal precedent explaining and upholding the broadly conceived precepts of home rule. Home rule municipalities are constitutionally conferred with tremendous authority and latitude to address local issues and concerns. A city's power to regulate and license for the protection of public health and safety is drawn directly from the Constitution, and any such power must be expressly limited by the General Assembly. Article VII, § 6(i) of the Illinois Constitution; 131 Ill.2d at 230.

17. The Supreme Court affirmed in numerous cases a municipality's power and right to license occupations. The expansive grant of the home rule mandate in Article VII of the Illinois Constitution is: "broad and imprecise in order to allow for great flexibility..." *City of Evanston v. Create, Inc.*, 85 Ill.2d 101 (1981)(Evanston's broadly construed home rule powers confirmed that Evanston's residential landlord tenant ordinance was constitutional).

18. Indeed, the Supreme Court opined:

> The city of Evanston is a densely populated and highly urbanized community... In accordance with the goals attempted to be achieved by the creation of home rule, the local governing body can create an ordinance specifically suited for the unique needs of its residents and is keenly and uniquely aware of the needs of the community it serves.

Id. at 113.

19. Thus it is clear, Evanston's home rule mandate conclusively trumps Plaintiff's purported constitutional claims, and the complaint should be dismissed with prejudice. There is no way Plaintiff can legitimately challenge, let alone overcome, the Evanston City Council's "keen and unique awareness of the needs of the community it serves".

20. In the *Rice* case, the Supreme Court established a city's presumptive right to regulate and license mobile food vendors. It is squarely on all fours with the facts as alleged in Plaintiff's Complaint. The broad authority of a home rule municipality to license activities such as the Plaintiff's is uncontroverted. This Complaint should be dismissed.

IV. The City's ordinance is presumptively valid and Plaintiff fails to meets its high burden of overcoming this presumption.

21. Plaintiff's Complaint at ¶'s 21 and 25 admit that the City of Evanston's ordinance is to be viewed under the "rational basis test". For purposes of this motion to dismiss, Evanston agrees that this is the applicable standard of review of Evanston's ordinance.

22. In construing the validity of a municipal ordinance, the same rules are applied as those which govern the construction of statutes, namely, that statutes are presumed constitutional and the burden of rebutting that presumption is on the party challenging the validity of the statute to clearly demonstrate a constitutional violation. *Napleton v. Village of Hinsdale*, 229 Ill.2d 296, 306 (2008).

23. The court has a duty to uphold the constitutionality of a statute/ordinance when reasonably possible, and if a statute's/ordinance's construction is doubtful, the court will resolve the doubt in favor the statute's/ordinance's validity. *Id.* citing to *People ex rel. Sherman v. Cryns,* 203 Ill.2d 264, 291 (2003).

24. An ordinance will be upheld if it bears a rational relationship to a legitimate legislative purpose and is neither arbitrary nor unreasonable. *Id.* citing to *Village of Lake Villa v. Stokovich*, 211 Ill.2d 106, 122 (2004).

25. The rational basis standard of review encumbers the Plaintiff with a very high burden of production and persuasion. Plaintiff's conclusory allegations purport to allege a "class-of-one" equal protection violation. To state a cause of action under this theory, Plaintiff

must allege that it was treated differently from others who were similarly situated and that there is no rational basis for the difference in treatment. *Village of Willowbrook v. Olech,* 528 U.S. 562, 564, (2000); *In re Adoption of K.L.P.,* 198 Ill.2d 448, 466, (2002) (the essential test of equal protection is whether the government deals with similarly situated individuals in a similar manner without a rational basis); *Jacobson v. Department of Public Aid,* 171 Ill.2d 314, 322, (1996) (equal protection analysis is identical under the United States and Illinois Constitutions).

26. Plaintiff, as the party attacking the mobile food vendor ordinance, bears the burden of overcoming that presumption by means of clear and convincing evidence. *Village of Niles v. City of Chicago*, 82 Ill.App.3d 60 (1st Dist. 1990) citing *City of Evanston v. Ridgeview House, Inc.* 64 Ill.2d 40 (1976). If the fundamental challenge is that Plaintiff was unfairly discriminated against in terms of its classification under the law, the standard of reviewing the legislation is whether any set of facts may reasonably be conceived which would justify the classification. *Id.*

27. In sum, an ordinance is not rational if it is arbitrary and capricious. *Napleton* at 315. Yet, courts cannot:

> ....sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines; in the local economic sphere, it is only the invidious discrimination which cannot state consistently with the Fourteenth Amendment.

131 Ill.2d at 234, citing 427 U.S. 303-304.

28. In *Napleton*, a plaintiff challenged the constitutionality of an as-applied zoning ordinance. After concluding that the rational basis standard of legislative review applied, the Court granted the Village of Hinsdale's § 2-615 motion to dismiss plaintiff's complaint. Here, as in the *Napleton* case, Plaintiff's purported right to drive their donut truck and sell coffee is not a fundamental right. The *Napleton* court linked a municipality's right to zone in line with its

police powers to regulate for the common good and for public safety. The *Napleton* plaintiff's conclusory allegations in that case failed to survive the village's motion to dismiss.

29. There, the court highlighted allegations such as "...no community need for amendments..", as just one example of mere conclusions which could not survive the village's motion to dismiss.. *Id.* at 320. Similar deficiencies in Plaintiff's complaint at bar exist, such as the allegations that: "...[the ordinance] serves only to protect Evanston restaurant owners from competition..."; or, "Any law that exists only for that protectionist purpose cannot survive the rational basis test". Plaintiff's Complaint, ¶s 21 and 25. These types of conclusory allegations befit a press release, not fact pleading required under Illinois law.

30. The Supreme Court in *Dean Milk Co. v. City of Chicago*, 385 Ill. 565, 578 (1944) stated:

> It is well settled that when a city exercises its power of regulation upon a subject, courts will not declare the regulatory provisions void unless they are palpably unreasonable and arbitrary, and that courts are without power to inquire into the wisdom of an ordinance and have nothing to do with the mere policy of legislation. A court will not hold an ordinance void as being unreasonable where there is room for a fair difference of opinion on the question, even though the correctness of the legislative judgment may be doubtful and the court may regard the ordinance as not the best which might be adopted for the purpose.

citing *Booth v. Illinois*, 184 U.S. 425, 432 (1902). Indeed, no one has an inherent right to use the streets or highways for business purposes. 131 Ill.2d at 237.

31. Numerous Supreme Court decisions enunciate the principle that the necessity and wisdom of an ordinance is committed to discretion of the council, and that a court may only consider whether it is reasonable.

32. Plaintiff fails to meet their burden of overcoming the presumptively valid Evanston ordinance, and they cannot muster clear and convincing evidence to survive the

rational basis standard of review. Viewing Plaintiff's premature and conclusory allegations through this prism, the Complaint should be dismissed.

V. Alternatively, the Illinois Municipal Code vests the City with broad authority to regulate and license mobile food vendors, and the City's police powers to regulate in this legislative realm are proper.

33. The Illinois Municipal Code provides: that a municipality may license, tax, regulate or prohibit....transient vendors of merchandise...and may license, tax, and regulate all places of eating or amusement. 65 ILCS 5/11-42-5.

34. The corporate authorities of each municipality may pass and enforce all necessary police ordinances. 65 ILCS 5/11-1-1.

35. The City of Evanston's police power authorizes it to adopt ordinances and to promulgate rules and regulations that pertain to its government and affairs and that protect the public health, safety, and welfare of its citizens.

36. The City's police powers and its authority under the Municipal Code to regulate Plaintiff's business is an alternate source of authority for the City's regulations. This authority is independent and complementary to the City's home rule authority.

37. Evanston has the power to regulate or prohibit the use of its streets for private gain. *Triple A Services v. Rice*, 131 Ill.2d 217, 299 (1989). The Supreme Court in *Rice* reviewed and approved of decades of Supreme Court decisions upholding a city's rights to prohibit mobile food vendors on the city's rights of way. The *Rice* court further linked a city's presumptive rights in this sphere to the concept of home rule regulation.

38. Rational restrictions on mobile food vendors can be related to legitimate public safety concerns. *Id.* citing to *Vaden v. Village of Maywood*, 809 F.2d 361 (7th Cir. 1987).

39. It is well settled that police power must be liberally construed in favor of the City, as:

> Whether there exists any connection between a given ordinance and any police power claimed to be exercised thereby, and whether such ordinance is a proper exercise of such power or whether the ordinance is unreasonable and arbitrary, are primarily questions for legislative determination. The city council is the judge in the first instance, of those matters, and unless the exercise of its judgment and discretion is manifestly unreasonable, the courts will not declare the ordinance invalid.

Father Basil's Lodge, Inc. v. City of Chicago, 393 Ill.246, 257 (1946). See also *Humphrey Chevrolet v. City of Evanston,* 7 Ill.2d 402 (1956)(challenge to an ordinance prohibiting sales of commodities on Sundays failed to survive Evanston's motion to dismiss); *Opyt's Amoco, Inc. v. Village of South Holland,* 149 Ill.2d 265 (1992)(restricting certain food sales accords with village's police power); *Village of Schaumburg v. Franberg,* 99 Ill.App.3d 1, (1st Dist. 1981)(regulation of non-resident taxicab drivers was a valid exercise of police power and a legitimate means to regulate safety of streets).

CONCLUSION

40. As a matter of law, Plaintiff's cause of action is not ripe and it should be dismissed with prejudice.

41. If this Court determines the complaint is ripe, it still must be dismissed for any and all of the arguments set forth above. Plaintiff seeks this Court to act a super-legislature and overturn an ordinance which as a matter of law is presumed valid and accorded great deference. The conclusory allegations are not well-taken under Illinois law.

WHEREFORE, Defendant, City of Evanston, respectfully requests that this Court dismiss and strike the Complaint with prejudice for lack of ripeness, or, in the alternative, to

dismiss the Complaint with prejudice for the other reasons set forth, or alternatively, to strike ¶ 1, and award Defendant its costs and other such relief as this Court deems proper.

Respectfully Submitted,
CITY OF EVANSTON

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