

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

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JAMES NUCCIO; GABRIEL WIESEN)
and AFTER HOURS PIZZA LLC, an Illinois)
limited liability company, d/b/a)
BEAVERS DONUTS,)

CIRCUIT COURT OF COOK
Case No. 12 CH 30062
CHANCERY DIV.

Plaintiffs,)

In Chancery CLERK

Injunction/Temporary Restraining Order

v.)

Judge Mason

CITY OF EVANSTON, a municipal)
corporation,)

Defendant.)

AMENDED VERIFIED COMPLAINT

Introduction

1. This civil rights lawsuit seeks to vindicate entrepreneurs' rights to earn an honest living free from anticompetitive, arbitrary, and irrational government regulation. Plaintiffs James Nuccio, Gabriel Wiesen, and After Hours Pizza LLC (d/b/a Beavers Coffee & Donuts) want to serve coffee and gourmet donuts to the public from their food truck in the City of Evanston. Plaintiffs are legally barred from doing so, however, for just one reason: Evanston City Code § 8-23-1 prohibits anyone who does not own a brick-and-mortar restaurant in Evanston from operating a food truck there.

2. Section 8-23-1 of the City's mobile food vehicle ordinance serves no health or safety concern; rather, it is a special law that exists only to protect established restaurants from competition.

3. The City's unequal treatment of people who are not licensed food establishment owners deprives Plaintiffs of their rights to equal protection and due process of law.

Parties

4. Plaintiff James Nuccio is a resident of Cook County, Illinois.

5. Plaintiff Gabriel Wiesen is a resident of Cook County, Illinois.

6. Plaintiff After Hours Pizza LLC d/b/a Beavers Donuts is an Illinois limited-liability company co-owned by Plaintiffs Nuccio and Wiesen, based in Cook County, Illinois.

7. Defendant City of Evanston (the "City") is an Illinois municipal corporation.

Factual Allegations

Evanston's Mobile Food Vendor Ordinance

8. The Evanston City Code (the "Code") regulates the operation of a mobile food vehicle, defined as a "commercially manufactured, motorized mobile food unit in which ready-to-eat food is cooked, wrapped, packaged, processed, or portioned for service, sale or distribution." Evanston City Code § 8-23-1.

9. The Code requires that anyone who seeks to operate a mobile food vehicle in Evanston obtain a license from the City. Evanston City Code § 8-23-2.

10. The Code imposes numerous requirements on mobile-food-vehicle operators, some of which are related to health and safety.

11. For example, applicants for a mobile-food-vehicle license must describe their food-preparation methods. Evanston City Code § 8-23-2.

12. The Code also requires food vehicle operators to submit to "such inspections as may be necessary to ensure all mobile food vehicles are kept in a safe and sanitary condition." Evanston City Code § 8-23-5.

13. The Code also requires that all “food storage, preparation and distribution of food, and vehicle equipment . . . meet applicable Illinois Department of Health Standards and requirements, as well as standards to be determined by the City Manager or his/her designee,” and it includes detailed requirements regarding handling of waste liquids, garbage, litter, and refuse. Evanston City Code § 8-23-5.

14. In addition to those regulations related to health and safety – which are not the subject of this Complaint – the Code also restricts who can own and operate a food truck: It decrees that a “mobile food vehicle must be owned and operated by the owner or agent of a licensed food establishment in the City, and must be affiliated with that establishment.” Evanston City Code § 8-23-1.

15. The Code also restricts where a food truck may operate: It prohibits a food truck from operating within 100 feet of a licensed food establishment unless (1) the food truck is “affiliated” with the licensed food establishment, or (2) the food truck has the consent of the food establishment’s owner but did not pay to receive such consent. Evanston City Code § 8-23-3(C).

Beavers Coffee & Donuts

16. Plaintiffs James Nuccio and Gabriel Wiesen (through their company, Plaintiff After Hours Pizza LLC) operate Beavers Coffee & Donuts, a food truck that serves gourmet donuts and coffee, which are prepared on board the truck.

17. Plaintiffs operate their business legally outside of Evanston. For example, they became the first food truck licensed to operate in Glenview, Illinois on December 9, 2011, at that village’s invitation.

18. Plaintiffs have also operated their business legally within Evanston on a limited, temporary basis. For example, they received a temporary food vending license to operate their food truck at Northwestern University's "Dillo Day," held on Memorial Day weekend in 2012.

19. Plaintiffs also prepare and sell coffee and donuts legally at a fixed location in Chicago's French Market, which has been licensed and inspected by the City of Chicago Department of Public Health.

20. Plaintiffs' preparation, storage and distribution of their coffee and donuts meet or exceed applicable Illinois Department of Health Standards and Requirements, and Plaintiffs are willing to submit to an inspection of their food truck by the Evanston City Manager at any time.

21. Plaintiffs have never been the subject of any complaints or citations for violations of state or local laws or regulations, either in their food truck or at their French Market location.

22. On March 22, 2013, Plaintiffs submitted an application to the City of Evanston for a mobile food vehicle license, using an application form provided by the City.

23. In support of their application, Plaintiffs submitted, among other information, detailed diagrams and photographs of Plaintiffs' food truck, specifications for Plaintiffs' equipment, information regarding the food Plaintiffs would sell, and proof that Plaintiffs satisfy the Code's insurance requirements.

24. Where the City's application form requested "Name and License Number of Evanston Food Establishment that Operates the Vehicle," Plaintiffs entered "N/A" because Plaintiffs are not the owners or agents of an "Evanston Food Establishment."

25. On or about April 29, 2013, Carl Caneva, Assistant Director of the City of Evanston Department of Public Health, issued a letter to Plaintiffs stating that the Health Department had "performed a review" of their application, and the application "cannot be

approved” because Plaintiffs did not “list any affiliations with a Food Establishment licensed by the City of Evanston.” The letter stated that “[u]ntil [that] information is received the Health Department will be unable to approve the application.”

26. As the City’s letter indicates, Plaintiffs satisfy all City requirements to be licensed to operate in Evanston except that they are not owners or agents of a licensed food establishment in Evanston.

27. Plaintiffs want to operate their food truck in the City of Evanston, as they requested in their license application, and, if granted a license, would do so.

Harm to Plaintiffs

28. But for the provision of Evanston City Code § 8-23-1 restricting ownership and operation of food trucks to owners and agents of “licensed food establishment[s],” Plaintiffs are ready, willing, and able to operate their food truck in full compliance with the law.

29. The City’s mobile-food-vehicle ordinance therefore harms Plaintiff by preventing them from engaging in their occupation and operating their business in Evanston.

**COUNT I – VIOLATION OF EQUAL PROTECTION
(ILLINOIS CONSTITUTION ARTICLE I, SECTION 2)**

30. Plaintiffs reallege Paragraphs 1 through 29 of this Complaint as though fully set forth herein.

31. The City’s discrimination against people who are not owners or agents of a “licensed food establishment” in Evanston City Code § 8-23-1 is not rationally related to serving the public’s health, safety or welfare; rather, it serves only to protect Evanston restaurant owners from competition, which is not a legitimate governmental purpose and cannot survive the rational-basis test.

32. This requirement therefore violates the right to equal protection of the law guaranteed by Article I, Section 2 of the Illinois Constitution on its face and as applied to Plaintiffs.

COUNT II – SPECIAL LEGISLATION
(ILLINOIS CONSTITUTION ARTICLE IV, SECTION 13)

33. Plaintiffs reallege Paragraphs 1 through 32 of this Complaint as though fully set forth herein.

34. Evanston City Code § 8-23-1 constitutes special legislation prohibited by Article IV, Section 13, of the Illinois Constitution because it grants agents and owners of Evanston “licensed food establishment[s]” the exclusive right to operate food trucks in Evanston without any rational relationship to public’s health, safety or welfare. Instead, it serves only to protect licensed food establishments from competition, which is not a legitimate governmental purpose and cannot survive the rational-basis test.

COUNT III – VIOLATION OF SUBSTANTIVE DUE PROCESS
(ILLINOIS CONSTITUTION ARTICLE I, SECTION 2)

35. Plaintiffs reallege Paragraphs 1 through 34 of this Complaint as though fully set forth herein.

36. The Due Process Clause of the Illinois Constitution protects every citizen’s right to pursue a legitimate occupation, subject only to regulations that are rationally related to a legitimate governmental purpose.

37. Protecting a discrete interest group from economic competition is not a legitimate governmental purpose. Any law that exists only for that protectionist purpose cannot survive the rational-basis test.

38. Because Evanston's ordinance restricting ownership and operation of food trucks to owners or agents of "licensed food establishment[s]" is intended and operates only to protect restaurant owners from competition, it violates the guarantee of substantive due process of law of Article I, Section 2 of the Illinois Constitution on its face and as applied to Plaintiffs.

Relief Requested

WHEREFORE, Plaintiffs request that this Court:

A. Enter a declaratory judgment that the Evanston City Code's requirement that a mobile food vehicle "must be owned and operated by the owner or agent of a licensed food establishment in the City" is unconstitutional on its face and as applied to Plaintiffs because it violates the equal protection guarantee of Article I, Section 2 of the Illinois Constitution;

B. Enter a declaratory judgment that the Evanston City Code's requirement that a mobile food vehicle "must be owned and operated by the owner or agent of a licensed food establishment in the City" is unconstitutional special legislation in violation of Article IV, Section 13 of the Illinois Constitution;

C. Enter a declaratory judgment that the Evanston City Code's requirement that a mobile food vehicle "must be owned and operated by the owner or agent of a licensed food establishment in the City" is unconstitutional on its face and as applied to Plaintiffs because it violates the due process guarantee of Article I, Section 2 of the Illinois Constitution;

D. Enter a permanent injunction against Defendant prohibiting enforcement of the Evanston City Code's requirement that a mobile food vehicle "must be owned and operated by the owner or agent of a licensed food establishment in the City";

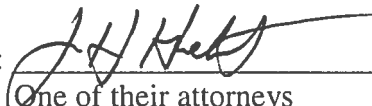
E. Award Plaintiffs their reasonable costs and attorneys fees; and

F. Award Plaintiffs any additional relief it deems just and proper.

Dated: May 13, 2013.

Respectfully submitted,

**JAMES NUCCIO
GABRIEL WIESEN
AFTER HOURS PIZZA LLC**


By: 

One of their attorneys
Diane S. Cohen (#6199493)
Jacob H. Huebert (#6305339)

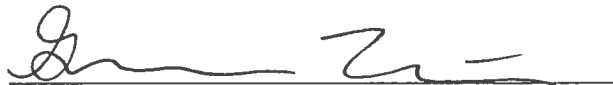
Liberty Justice Center
190 S. LaSalle Street, Ste. 1630
Chicago, Illinois 60603
Telephone (312) 263-7668
Facsimile (312) 263-7702
dcohen@libertyjusticecenter.org
jhuebert@libertyjusticecenter.org

VERIFICATION BY CERTIFICATION

I, JAMES NUCCIO, on behalf of myself and After Hours Pizza LLC, under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, do certify that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief, and as to such matters the undersigned certifies as above that I verily believe the same to be true.


James Nuccio

I, GABRIEL WIESEN, on behalf of myself and After Hours Pizza LLC, under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, do certify that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief, and as to such matters the undersigned certifies as above that I verily believe the same to be true.


Gabriel Wiesen