ELECTRONICALLY FILED
6/4/2013 12:18 PM
2012-CH-30062
CALENDAR: 08
PAGE 1 of 10
CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
CHANCERY DIVISION
CLERK DOROTHY BROWN

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 PLAINTIFFS' AMENDED VERIFIED 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 Plaintiffs' Amended Verified Complaint ("Amended Complaint") be dismissed with prejudice, and in support of this motion, states:

BACKGROUND

1. On August 7, 2012, Plaintiffs filed a Verified Complaint against Evanston alleging that Evanston's mobile food vendor ordinance violates the equal protection provision of the Illinois Constitution (Count I) and the substantive due process provision of the Illinois Constitution (Count II).

2. In an order dated January 29, 2013, the Court granted Evanston's Motion to Dismiss Plaintiffs' Verified Complaint without prejudice due to the fact that it determined that the matter was not ripe for adjudication.

3. On May 14, 2013, the Court granted Plaintiffs leave to file their Amended Complaint and on that same date, they filed said pleading. Attached as Exhibit 1 is a true and correct copy of Plaintiffs' Amended Complaint.

4. Other than the allegations concerning Evanston's denial of Plaintiffs' mobile food vendor license application (*see* Amended Complaint, ¶¶ 24-26), the Amended Complaint contains the same equal protection and substantive due process counts (Counts I and III respectively) as the original complaint. However, the Amended Complaint now contains three (3) counts against Evanston, with the new one being a claim that Evanston's mobile food vendor ordinance (Evanston City Code Section 8-23-1) constitutes a special legislation that is allegedly prohibited by the Illinois Constitution. Amended Complaint, ¶ 34 (Count II).

ELECTRONICALLY FILED
6/4/2013 12:18 PM
2012-CH-30062
PAGE 2 of 10

5. 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).

6. 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).

7. 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).

8. As demonstrated below, Plaintiffs' Amended Complaint is riddled with numerous factual and legal defects, all of which provide separate and independent grounds to dismiss the

Amended Complaint with prejudice. Plaintiffs' three (3) 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. Evanston's Home Rule powers are liberally construed and Plaintiffs' purported allegations fail in light of home rule authority.

9. Article VII, § 6 of the Illinois Constitution sets forth the powers of home rule units of government, and Evanston is a home rule unit of government. Namely, that section provides that 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.

10. The powers of a home rule unit such as Evanston are to be construed liberally pursuant to Article VII, § 6(m) of the Illinois Constitution, and Evanston'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, 174 (1992).

11. The Amended 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. *See* Article VII, § 6(i) of the Illinois Constitution; *Triple A Services, Inc. v. Rice*, 131 Ill. 2d 217, 230 (1989).

ELECTRONICALLY FILED
6/4/2013 12:18 PM
2012-CH-30062
PAGE 3 of 10

12. 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, 107, 113-14 (1981) (Evanston's broadly construed home rule powers confirmed that Evanston's residential landlord tenant ordinance was constitutional).

13. 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.

Create, 85 Ill. 2d at 113.

ELECTRONICALLY FILED
6/4/2013 12:18 PM
2012-CH-30062
PAGE 4 of 10

14. Thus it is clear, Evanston's home rule mandate conclusively trumps Plaintiffs' purported constitutional claims, and the Amended Complaint should be dismissed with prejudice.

15. Further, there is no way Plaintiffs can legitimately challenge, let alone overcome, the Evanston City Council's keen and unique awareness of the needs of the community it serves. *Id.*

16. In *Rice*, 131 Ill. 2d at 233, the Supreme Court established a city's presumptive right to regulate and license mobile food vendors. That case is squarely on all fours with the facts as alleged in the Amended Complaint since the broad authority of a home rule municipality, like Evanston, to license Plaintiffs' activities here is uncontroverted. Therefore, the Amended Complaint should be dismissed with prejudice.

II. Evanston's mobile food vendor ordinance is presumptively valid and Plaintiffs fail to meet their high burden of overcoming this presumption.

17. Plaintiffs' Amended Complaint at ¶¶ 31, 34, and 37 admit that Evanston's mobile food vendor 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.

18. 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) (citations omitted).

ELECTRONICALLY FILED
6/4/2013 12:18 PM
2012-CH-30062
PAGE 5 of 10

19. 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 of the statute's/ordinance's validity. *Napleton*, 229 Ill. 2d at 306-07, *citing People ex rel. Sherman v. Cryns,* 203 Ill. 2d 264, 291 (2003).

20. An ordinance will be upheld if it bears a rational relationship to a legitimate legislative purpose and is neither arbitrary nor unreasonable. *Napleton*, 229 Ill. 2d at 307, *citing Village of Lake Villa v. Stokovich*, 211 Ill. 2d 106, 122 (2004).

21. The rational basis standard of review encumbers the Plaintiffs with a very high burden of production and persuasion. Plaintiffs' conclusory allegations in the Amended Complaint purport to allege a "class-of-one" equal protection violation. To state a cause of action under this theory, Plaintiffs must allege that they were treated differently from others who were similarly situated and that there is no rational basis for the difference in treatment. *See 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).

22. Plaintiffs, as the parties attacking Evanston's mobile food vendor ordinance, bear the burden of overcoming that presumption by means of clear and convincing evidence. *See Village of Niles v. City of Chicago*, 201 Ill. App. 3d 651, 662 (1st Dist. 1990), *citing City of Evanston v. Ridgeview House, Inc.*, 64 Ill. 2d 40, 66 (1976). If the fundamental challenge is that Plaintiffs were unfairly discriminated against in terms of their 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. *Niles*, 201 Ill. App. 3d at 662.

ELECTRONICALLY FILED
6/4/2013 12:18 PM
2012-CH-30062
PAGE 6 of 10

23. In sum, an ordinance is not rational if it is arbitrary and capricious. *Napleton*, 229 Ill. 2d 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.

Triple A Services, Inc. v. Rice, 131 Ill. 2d 217, 234 (1989), *citing City of New Orleans v. Dukes*, 427 U.S. 297, 303-304 (1976).

24. 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. *Napleton*, 229 Ill. 2d at 309, 321-22. Here, as in the *Napleton* case, Plaintiffs' purported right to drive their donut truck and sell coffee is not a fundamental right. *Id.* at 308-09. 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. *Id.* at 310. The *Napleton* plaintiff's conclusory allegations in that case failed to survive the village's motion to dismiss.

25. 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 Plaintiffs' Amended Complaint at bar exist, such as the following allegations that: (a) "...[the ordinance] serves only to protect Evanston restaurant owners from competition...;" or (b) "[a]ny law that exists only for that protectionist purpose cannot survive the rational basis test." *See* Amended Complaint, ¶¶ 31 and 37. These types of conclusory allegations befit a press release, not fact pleading required under Illinois law.

ELECTRONICALLY FILED
6/4/2013 12:18 PM
2012-CH-30062
PAGE 7 of 10

26. The Supreme Court in *Dean Milk Co. v. City of Chicago*, 385 Ill. 565, 578 (1944), *citing Booth v. Illinois*, 184 U.S. 425, 432 (1902), 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.

27. Indeed, no one has an inherent right to use the streets or highways for business purposes. *See* Rice, 131 Ill. 2d at 237 (citation omitted).

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

29. Plaintiffs fail to meet their burden of overcoming the presumptively valid Evanston mobile food vendor ordinance, and they cannot muster clear and convincing evidence

to survive the rational basis standard of review. Viewing Plaintiffs' conclusory allegations through this prism, the Amended Complaint should be dismissed with prejudice.

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

30. 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.

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

ELECTRONICALLY FILED
6/4/2013 12:18 PM
2012-CH-30062
PAGE 8 of 10

32. 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.

33. Evanston's police powers and its authority under the Illinois Municipal Code to regulate Plaintiffs' business is an alternate source of authority for Evanston's regulations. This authority is independent and complementary to Evanston's home rule authority.

34. 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, 229 (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. 131 Ill. 2d at 230.

35. Rational restrictions on mobile food vendors can be related to legitimate public safety concerns. *Id.* (citation omitted).

36. It is well settled that police power must be liberally construed in favor of Evanston, since:

> 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).

ELECTRONICALLY FILED
6/4/2013 12:18 PM
2012-CH-30062
PAGE 9 of 10

IV. The "Introduction" to Plaintiffs' Amended Complaint should be stricken.

37. Pursuant to 735 ILCS 5/2-603(a) and (b), ¶ 1 of the Amended 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."

38. Paragraph 1 of the Amended Complaint instead consists of five (5) sentences of long-winded narrative containing multiple conclusory allegations, none of which have any basis in law or fact. Should this Amended Complaint not be dismissed, this paragraph should at minimum be stricken.

CONCLUSION

39. For the reasons stated herein, Plaintiffs' Amended Complaint must be dismissed with prejudice. Ultimately, Plaintiffs improperly want to use this Court to act as a super-legislature and overturn a City of Evanston ordinance which as a matter of law is presumed valid and accorded great deference. Further, the conclusory allegations in the Amended Complaint are not well-taken under Illinois law.

WHEREFORE, Defendant, City of Evanston, respectfully requests that this Court dismiss and strike the Verified Amended Complaint with prejudice for the other reasons set forth, or alternatively, to strike ¶ 1, and award Defendant its costs and such other relief as this Court deems proper.

ELECTRONICALLY FILED
6/4/2013 12:18 PM
2012-CH-30062
PAGE 10 of 10

Respectfully Submitted,
CITY OF EVANSTON

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