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.	)	

DEFENDANT CITY OF EVANSTON'S REPLY IN SUPPORT OF ITS § 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 in support of its Section 2-615 Motion to Dismiss Plaintiffs' Amended Verified Complaint ("Motion"), submits the following reply memorandum to Plaintiffs' Response to the Motion ("Response"), which states as follows:

1. In its Motion, Evanston established that Plaintiffs' Amended Verified Complaint ("Amended Complaint") must be dismissed on one or more of the following grounds:

> (a) Evanston's Home Rule powers are liberally construed and Plaintiffs' purported allegations fail in light of that authority;
>
> (b) Evanston's ordinance is presumptively valid and Plaintiffs in the Amended Complaint fail to meet their burden for overcoming the presumption; and
>
> (c) 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.

2. In the Response, Plaintiffs fail to rebut the above referenced arguments.

3. Plaintiffs claim that they are not challenging Evanston's food-truck ordinance's regulations related to health and safety, but instead claim that they are only challenging the provision that allegedly restricts who can operate a food truck in Evanston. (Response, p. 3). This attempted distinction by Plaintiffs is without merit since, based on Evanston's home-rule powers, the ability to restrict who can operate a food truck in this municipality is indeed rationally related to Evanston's legitimate governmental purpose of protecting its public's health and safety.

4. A § 2-615 motion to dismiss attacks the legal sufficiency of a complaint on the grounds that the complaint fails to state a cause of action. *See Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, 227 Ill. 2d 381, 392 (2008). Unlike a motion for summary judgment, a § 2-615 motion to dismiss is based on the pleadings, rather than the underlying facts. *Provenzale v. Forister*, 318 Ill. App. 3d 869, 879 (2d Dist. 2001) (citations omitted). Thus, depositions, affidavits, and other materials may not be considered in ruling on a § 2-615 motion. *Id.*

5. Conclusions of law or fact contained within the complaint are not to be taken as true unless they are supported by specific factual allegations. *Veazey v. LaSalle Telecommunications, Inc.*, 334 Ill. App. 3d 926, 929 (1st Dist. 2002) (citation omitted). Further, "excessively verbose narratives replete with legal conclusions which are not supported by sufficient facts" are deficient in form for pleading purposes. *Knox College v. Celotex Corp.*, 117 Ill. App. 3d 304, 308 (3d Dist. 1983).

6. Plaintiffs' Equal Protection, Due Process, and Special Legislation arguments in their Response do not address whether the Amended Complaint is legally sufficient. These are

arguments suited for a motion for summary judgment, but the parties have not arrived at that point in this litigation.

ARGUMENT

I. Plaintiffs' conclusory allegations in the Amended Complaint fail in light of the presumption of constitutional validity of the ordinance at issue.

7. According to Plaintiffs, Evanston's Motion "does not even attempt" to provide a rational basis for the mobile food vendor ordinance. (Response, p. 9, 11). However, this misconstrues the question before the Court, which is whether Plaintiffs' Amended Complaint states a cause of action. *See Imperial Apparel*, 227 Ill. 2d at 392. As explained in paragraph four, *supra*, a § 2-615 motion attacks the legal sufficiency of the pleading, it is not a motion for summary judgment and it is not the forum for trying a case.

8. It is well established that unless an enactment impinges on a fundamental personal right or is drawn upon an inherently suspect classification, it is presumptively valid and it will survive constitutional scrutiny if it is rationally related to a legitimate governmental purpose. *Triple A Services Inc. v. Rice*, 131 Ill. 2d 217, 225-26 (1989).

9. 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) (citation omitted). Therefore, at this stage of litigation, it is not Evanston's burden, as Plaintiffs incorrectly assert on page 10 of the Response, to provide a "justification" for its mobile food vendor ordinance since the burden is clearly on Plaintiffs to articulate a purported constitutional violation in a pleading that is legally sufficient and not full of legal conclusions. *See Napleton*, 229 Ill. 2d at 320-21.

10. A § 2-615 motion to attack the Amended Complaint here is proper. In *Napleton*, the Village of Hinsdale filed a § 2-615 motion to dismiss plaintiff's Amended Complaint, which

was a constitutional challenge of an as-applied zoning ordinance, and the Court granted said municipality's motion. *Id.* at 319, 322.

11. "[U]nder rational basis scrutiny, a legislative enactment will be upheld if it bears a rational relationship to a legitimate legislative purpose and is neither arbitrary nor unreasonable... Accordingly, to withstand a section 2–615 dismissal motion, a plaintiff must plead sufficient facts to establish that the challenged enactment did not satisfy this standard." *Id.* at 319 (citation omitted).

12. Further, under the rational basis standard of review, 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. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (citations omitted). Also, "[i]n the specific context of a facial challenge, a plaintiff must set forth more than mere conclusions to support allegations that the challenged enactment is arbitrary, capricious and unreasonable, and that it is invalid in its entirety and in all applications. Therefore, plaintiff's conclusory statements are not to be considered." *Napleton*, 229 Ill. 2d at 320-21 (emphasis added).

13. Here in the Amended Complaint, Plaintiffs fail to allege such specific facts, but rather, they allege only conclusions. For instance, Plaintiffs conclude in the Amended Complaint that the mobile food vendor ordinance at issue "cannot survive the rational-basis test." (Amended Complaint, ¶ 31).

14. Plaintiffs further improperly conclude that said ordinance "serves no health or safety concern; rather it is a special law that exists only to protect established restaurants from competition." (Amended Complaint, ¶ 2). Plaintiffs in the Amended Complaint also plead another legal conclusion by stating that Evanston City Code § 8-23-1 "serves only to protect

Evanston restaurant owners from competition, which is not a legitimate governmental purpose..." (Amended Complaint, ¶ 31).

15. Plaintiffs cannot use their Response to substantiate and/or remedy the numerous legal conclusions found in their defective pleading, which is the Amended Complaint. Ultimately, narratives and conclusory allegations in the Amended Complaint are not facts. *See Veazey*, 334 Ill. App. 3d at 929; *Knox College*, 117 Ill. App. 3d at 308.

16. Plaintiffs' arguments found in Section II of the Response, concerning the purported irrationality of Evanston's ordinance at issue, do not even reference any specific fact allegations in the Amended Complaint. This should be a telltale sign to the Court that the Amended Complaint is void of any such factual allegations.

17. Therefore, the Amended Complaint should be dismissed because Plaintiffs fail to allege specific facts that the mobile food vendor ordinance at issue was arbitrary, capricious, and/or unreasonable under the rational basis standard.

II. The Response's attempt to distinguish the ruling in *Rice* is without merit.

18. On page 12 of the Response, Plaintiffs attempt to distinguish the holding in *Triple A Services, Inc. v. Rice,* 131 Ill. 2d 217 (1989). Plaintiffs' attempt to distinguish and downplay the significance of the holding in *Rice* in this current matter is without merit.

19. As previously stated in the Motion, the Supreme Court in *Rice* established a municipality's presumptive right to regulate and license mobile food vendors. 131 Ill. 2d at 233-34. 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 Supreme Court further linked a city's presumptive rights in this sphere to the concept of home rule regulation. 131 Ill. 2d at 230.

20. The holding in *Rice* is important in analyzing the Motion here because one of Plaintiffs' main arguments against Evanston's mobile food vendor ordinance at issue is that said ordinance serves no safety purpose and/or serves no legitimate governmental purpose. (Amended Complaint, ¶¶ 2, 31). However, as the Supreme Court stated in *Rice* rational restrictions on mobile food vendors can be related to legitimate public health and safety concerns. 131 Ill. 2d at 233-34.

21. Therefore, Evanston's broad authority as a home-rule municipality to license and regulate Plaintiffs' activities within its jurisdiction is uncontroverted as a result of the ruling in *Rice*.

III. There is no fundamental right to operate a food truck in Evanston.

22. In the Response, Plaintiffs argue that the Evanston ordinance at issue infringes on Plaintiffs' right to earn a living. (Response, p. 5-9). Such an argument is without merit and disingenuous.

23. Plaintiffs' argument is without merit since a municipality has a presumptive right to regulate and license mobile food vendors. *Rice*, 131 Ill. 2d at 233. The ways that a municipality handles the licensing and regulation of such businesses do not automatically equate to a constitutional violation by the municipality.

24. Plaintiffs' infringement on their right to earn a living argument is disingenuous because as stated in the Amended Complaint, Plaintiffs are able to operate their business on a temporary basis with a temporary food vending license in Evanston. (Amended Complaint, ¶ 18). Plaintiffs allege that they have operated their business in Evanston with a temporary license. (Amended Complaint, ¶ 18).

25. Simply put, Plaintiffs appear to believe that they have a fundamental right to operate its truck and sell coffee and donuts in Evanston. Such a belief is invalid since no one has an inherent right to use the streets or highways for business purposes. *See* Rice, 131 Ill. 2d at 237 (citation omitted). *See also Napleton*, 229 Ill. 2d at 308-09 (listing examples of certain fundamental rights and how such examples did not apply to the ordinance at issue).

26. Plaintiffs in Section I of the Response cite numerous cases that allegedly show that Evanston's mobile food vendor ordinance does not bear a reasonable relationship to protecting the public. (Response, p. 5-9). However, as stated in Section I of this reply in support of the Motion, *supra*, Plaintiffs fail to cite specific factual allegations in the Amended Complaint that the ordinance at issue does not bear a reasonable relationship to protecting the public.

CONCLUSION

WHEREFORE, for the reasons stated in both its § 2-615 Motion to Dismiss Plaintiffs' Amended Verified Complaint and reply memorandum in support of said motion, Defendant, City of Evanston, respectfully requests that this Court enter an order: (a) dismissing the Amended Verified Complaint with prejudice; or (b) alternatively striking ¶ 1 of said pleading; and (c) award Defendant its costs and other such relief as this Court deems proper.

Respectfully submitted,
CITY OF EVANSTON

By: _____
One of Its Attorneys

W. Grant Farrar, Corporation Counsel
Henry J. Ford, Jr., Assistant City Attorney
Evanston Law Department, Cook County Attorney No. 46996
2100 Ridge Ave.
Evanston, IL 60201
(847) 866-2937