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' SECOND AMENDED COMPLAINT WITH PREJUDICE

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 pursuant to § 2-615 of the Code of Civil Procedure moves that Plaintiffs' Second Amended Complaint be dismissed with prejudice. In support of this motion ("Motion"), Evanston states as follows:

BACKGROUND

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). 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.

On May 14, 2013, the Court granted Plaintiffs leave to file their Amended Verified Complaint and on that same date, they filed said pleading. Attached as Exhibit 1 is a true and correct copy of Plaintiffs' Amended Verified Complaint. Other than the allegations concerning Evanston's denial of Plaintiffs' mobile food vendor license application (*see* Amended Complaint, ¶¶ 24-26), the Amended Verified Complaint contained the same equal protection and substantive due process counts (Counts I and III respectively) as the original complaint. However, the Amended Verified Complaint contained 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. *See* Exhibit 1, ¶ 34 (Count II).

Evanston filed a Motion to Dismiss the Amended Verified Complaint and in an order dated September 26, 2013 ("September 26th Order"), the Court dismissed Plaintiffs' Amended Verified Complaint without prejudice. Attached as Exhibit 2 is a true and correct copy of the Court's September 26th Order. Specifically, the September 26th Order states as follows:

> The court concludes that the plaintiffs have failed to allege sufficient facts to support its claims that the ordinance at issue violates the Equal Protection Clause of the Illinois Constitution, that the ordinance violates the prohibition against special legislation and that the ordinance violates substantive due process. *The amended complaint sets forth mere conclusions and inadequate facts. The allegations of the amended complaint*

are insufficient to rebut the presumption of the validity of the ordinance...

See Exhibit 2, ¶ 1 (emphasis added).

On October 22, 2013, Plaintiffs filed their Second Amended Complaint against Evanston. In the Second Amended Complaint, Plaintiffs allege the same three counts of purported constitutional violations as the Amended Verified Complaint, albeit in a different order. In the Second Amended Complaint, Count I alleges a substantive due process cause of action, Count II alleges an equal protection cause of action, and Count III alleges a violation of the special legislation prohibition cause of action. Attached as Exhibit 3 is a true and correct copy of the Plaintiffs' Second Amended Complaint.

The Second Amended Complaint *contains only two (2) new allegations of fact* against Evanston (emphasis added). *See* Exhibit 3, ¶¶ 16 and 17. The remainder of the Second Amended Complaint contains conclusory allegations and improper argument in the re-ordered Counts I (substantive due process) and II (equal protection).[1] Contrary to the September 26th Order, the Second Amended Complaint still suffers from the same factual and legal defects found in the Amended Verified Complaint.

The Second Amended Complaint should be dismissed with prejudice for the following reasons:

[1] Other than the incorporation of the allegations preceding it, Count III of the Second Amended Complaint, concerning a purported violation of the Illinois Constitution's prohibition against special legislation, is pleaded exactly the same way as in the Amended Verified Complaint.

- Evanston's mobile food vendor ordinance is presumptively valid and Plaintiffs fail to allege sufficient facts and proper allegations to overcome this presumption;
- Count III of the Second Amended Complaint is without merit and should be dismissed with prejudice because the Illinois Constitution's prohibition against special legislation only concerns legislation by the Illinois General Assembly and not local municipalities;
- Plaintiffs' three (3) purported causes of action in the Second Amended Complaint are still trumped by Evanston's home rule authority conferred upon it by the Illinois Constitution; and
- Evanston's police powers extend to the subject matter of the ordinance at issue.

Plaintiffs have now filed three (3) total complaints against Evanston concerning its mobile food vendor ordinance. It is clear that Plaintiffs cannot allege sufficient facts to maintain their causes of action against Evanston so the Court should dismiss Plaintiffs' Second Amended Complaint with prejudice.[2]

ARGUMENT

I. The Second Amended Complaint fails to allege sufficient facts to overcome the presumptive validity of Evanston's mobile food vendor ordinance.

In the September 26th Order, the Court dismissed Plaintiffs' Amended Verified Complaint against Evanston since Plaintiffs failed to allege sufficient facts to support its claims and said pleading set "forth mere conclusions and inadequate facts." *See* Exhibit 2, ¶ 1. The Court found that the allegations of the Amended Verified Complaint were "insufficient to rebut the presumption of the validity of the

[2] The circuit court may properly dismiss a complaint *with prejudice* under section 2–615 of the Code where it is clearly apparent that the plaintiff can prove no set of facts that entitles it to recovery. *Bellik v. Bank of Am.*, 373 Ill. App. 3d 1059, 1065 (1st Dist. 2007) (*citing Schiller v. Mitchell*, 357 Ill. App. 3d 435, 438-39 (2d Dist. 2005)) (emphasis added). Further, a trial court has discretion to allow the amendment of pleadings or to *finally terminate litigation. Plocar v. Dunkin' Donuts of America, Inc.*, 103 Ill. App. 3d 740, 749 (1st Dist. 1981) (emphasis added).

ordinance." *See id.* Plaintiffs filed their Second Amended Complaint against Evanston on October 22, 2013, but said complaint still suffers from the same deficiencies identified by the Court in the September 26th Order.

Plaintiffs attempt to overcome the presumptive validity of Evanston's mobile food vendor ordinance by now alleging simply two (2) new additional allegations of fact in the Second Amended Complaint. The first new additional allegation of fact is found in Paragraph 16 of the Second Amended Complaint and said allegation states in a conclusory fashion as follows:

> The "owner or agent" requirement of Evanston City Code § 8-23-1 and the 100-foot proximity ban of Evanston City Code § 8-23-3(C) were included in Evanston's mobile food vendor ordinance for the sole purpose of protecting Evanston (sic) brick-and-mortar food establishments from competition.

See Exhibit 3, ¶ 16. The second new additional allegation of fact is found in Paragraph 17 of the Second Amended Complaint and said allegation states: "[i]ndeed, Evanston Alderman Melissa Wynne, who voted in favor of the ordinance, has stated that these provisions were included in the ordinance because the City Council "wanted to make sure we didn't cannibalize our own restaurant community we have here." *See id.* at ¶ 17. These two (2) new additional allegations of fact in the Second Amended Complaint fail to overcome the presumptive validity of Evanston's mobile food vendor ordinance.

Plaintiffs' Second Amended Complaint at ¶¶ 34, 37, 47, 48, and 58 admit that Evanston's mobile food vendor ordinance is to be viewed under the "rational basis test." For purposes of this Motion, Evanston agrees that this is the applicable standard of review of Evanston's mobile food vendor ordinance. 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).

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. *Id.* at 306-07 (*citing People ex rel. Sherman v. Cryns,* 203 Ill. 2d 264, 291 (2003)). An ordinance will be upheld if it bears a rational relationship to a legitimate legislative purpose and is neither arbitrary nor unreasonable. *Id.* at 307 (*citing Village of Lake Villa v. Stokovich*, 211 Ill. 2d 106, 122 (2004)).

The rational basis standard of review encumbers Plaintiffs with a very high burden of production and persuasion. Plaintiffs' conclusory allegations in the Second 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).

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, then 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 (emphasis added). An ordinance is not rational if it is arbitrary and capricious. *Napleton*, 229 Ill. 2d at 315. However, courts cannot:

> [S]it 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)).

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. Similar to *Napleton*, Plaintiffs' purported right to operate their donut truck and sell food from said truck in a municipality 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.

In *Napleton*, the court identified allegations such as "no community need for amendments," as just one example of the mere conclusions which could not survive the village's motion to dismiss. *Id.* at 320. Plaintiffs' Second Amended Complaint contains numerous similar deficiencies. Rather than belabor the Court with a verbatim recitation of all of the numerous conclusions in the Second Amended Complaint, Evanston identifies the following paragraphs for the Court's review: ¶¶ 36-37; 40-43; 46-50; 54-60; and 62. *See* Exhibit 3. These types of allegations are mere conclusions, which are not supported by sufficient facts and are in violation of the fact pleading requirements under Illinois law. *See Napleton*, 229 Ill. 2d at 305 (Because Illinois is a fact pleading jurisdiction, a plaintiff must allege facts and not mere conclusions); *Capitol Indem. Corp. v. Stewart Smith Intermediaries, Inc.*, 229 Ill. App. 3d 119, 123 (1st Dist. 1992) (Illinois is a fact pleading jurisdiction).

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)) states:

> 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.

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

Plaintiffs fail to meet their burden of overcoming Evanston's presumptively valid mobile food vendor ordinance, and they cannot muster clear and convincing evidence to survive the rational basis standard of review. Plaintiffs attempt to allege that they, as mobile food vendors, are similarly situated to non-mobile food vendors in Evanston. In arguments against Evanston's motion to dismiss the Amended Verified Complaint, Plaintiffs cited as support Judge Flynn's ruling (during oral arguments) on the defendant's motion to dismiss in *Burke v. City of Chicago*, Case No. 12 CH 41235. Attached as Exhibit 4 is true and correct copy of the hearing transcript from *Burke v. City of Chicago*, Case No. 12 CH 41235. However, in dismissing the plaintiffs' equal protection claim in that case, Judge Flynn states:

> The problem with Count Two of the complaint is that there is a substantial history of Illinois cases which rather clearly concludes... that there is a major difference between mobile food vending on the one hand and nonmobile food vending on (sic) other hand, which means necessarily that *an equal protection argument pitting mobile food vending against nonmobile food vending is not going to get very far because the two things are not just similarly situated... Nor can I fashion from Count Two an equal protection argument that, as far as I could see has legs,*

pitting one group of mobile food vendors against another group of mobile food vendors.

See Exhibit 4 at 68:4-14 and 68:21-24 (emphasis added). Therefore for the same reasons articulated in *Burke*, Plaintiffs' equal protection claim against Evanston fails as well. Overall, Plaintiffs' Second Amended Complaint should be dismissed with prejudice since they cannot, after three (3) attempts to do so before this Court, allege specific facts and non-conclusory allegations to support their three (3) purported constitutional challenges against Evanston's mobile food vendor ordinance.

II. The Constitution's special legislation prohibition cannot be used to attack municipal ordinances.

Article IV, § 13 of the Illinois Constitution states in relevant part that "*the General Assembly* shall pass no special or local law when a general law is or can be made applicable." Ill. Const. art. IV, § 13 (emphasis added). *See also Elementary Sch. Dist. 159 v. Schiller*, 221 Ill. 2d 130, 149 (2006) (The special legislation clause prohibits the General Assembly from conferring a special benefit or privilege upon one person or group and excluding others that are similarly situated) (citations omitted); *Big Sky Excavating, Inc. v. Illinois Bell Tel. Co.*, 217 Ill. 2d 221, 234-35 (2005).

It is clear from a plain reading of said constitutional provision that the special legislation prohibition specifically only applies to the Illinois General Assembly and not the legislatures of local municipalities and its ordinances. Therefore, Count III of the Second Amended Complaint should be dismissed with prejudice since the special legislation prohibition of the Illinois Constitution is not

applicable to Evanston and its mobile food vendor ordinance.

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

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

> [E]xercise 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. Ill. Const. art. VII, § 6(a).

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). The Second Amended Complaint continues to ignore over 40 years of legal precedent defining 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* Ill. Const. art. VII, § 6(i); *Triple A Services, Inc. v. Rice*, 131 Ill. 2d 217, 230 (1989).

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). The Supreme Court states:

> 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 113-14.

It is clear that Evanston's home rule authority conclusively trumps Plaintiffs' purported constitutional claims. Additionally, there is no way that 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.* 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 Second Amended Complaint since the broad authority of a home rule municipality, like Evanston, to license Plaintiffs' activities here is uncontroverted. Therefore, the Second Amended Complaint should be dismissed with prejudice.

IV. 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.

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. The corporate

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

Evanston's police powers authorize 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. 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.

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 also linked a city's presumptive rights in this sphere to the concept of home rule regulation. 131 Ill. 2d at 230. Further, rational restrictions on mobile food vendors can be related to legitimate public safety concerns. *Id.* (citation omitted).

In examining Evanston's authority under the Illinois Municipal Code to adopt and enforce its mobile food vendor ordinance, it is well settled that such 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).[3] Therefore, alternatively pursuant to the Illinois Municipal Code, it is a proper use of Evanston's police powers to regulate and license mobile food vendors in its municipality through its mobile food vendor ordinance. As such, Plaintiff's Second Amended Complaint should be dismissed with prejudice.

CONCLUSION

For the reasons stated herein, Plaintiffs' Second Amended Complaint must be dismissed with prejudice. Plaintiffs have not, and cannot, allege sufficient factual allegations to support first their Initial Verified Complaint, then their Amended Verified Complaint, and now their Second Amended Complaint. Ultimately, Plaintiffs want to use this Court to improperly act as a super-legislature and overturn an Evanston ordinance which as a matter of law is presumed valid and accorded great deference.

WHEREFORE, Defendant, City of Evanston, respectfully requests that this Court dismiss the Second Amended Complaint with prejudice for the reasons set forth in this Motion, and award Defendant its costs and such other relief as this Court deems proper.

[3] *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).

Dated: November 19, 2013

Respectfully Submitted,
CITY OF EVANSTON

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