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' 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 in support of its Section 2-615 Motion to Dismiss Plaintiffs' Second Amended Complaint with Prejudice ("Motion"), submits the following reply memorandum to Plaintiffs' Response in Opposition to the Motion ("Response"), which states as follows:

Introduction

In its Motion, Evanston established that Plaintiffs' Second Amended Complaint must be dismissed with prejudice on one or more of the following grounds:

- 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.

In their Response, Plaintiffs fail to rebut the above referenced arguments and rely on arguments more befitting for a summary judgment motion.

The Court in this matter dismissed Plaintiffs' Amended Complaint on the basis that "[*t*]*he 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...*" (Motion, Exhibit 2, ¶ 1) (emphasis added). Plaintiffs only allege two (2) new factual allegations in the Second Amended Complaint, which are paragraphs 16 and 17. (Motion, Exhibit 3, ¶¶ 16 and 17). Such allegations by Plaintiffs fail to rebut the presumptive validity of Evanston's ordinance and the Second Amended Complaint should be dismissed with prejudice.

2-615 Motion to Dismiss with Prejudice

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.*

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). Plaintiffs "may not rely on mere conclusions of law or fact unsupported by specific factual allegations." *Newman, Raiz & Shelmadine, LLC v. Brown*, 394 Ill. App. 3d 602, 605 (1st Dist. 2009). Additionally, "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).

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). Based on the fact that Plaintiffs have now had three (3) attempts to allege sufficient facts challenging Evanston's mobile food vendor ordinance, but have failed to do so, it is properly within this Court's discretion to *finally terminate this litigation* by dismissing the Second Amended Complaint with

prejudice. *See Plocar v. Dunkin' Donuts of America, Inc.*, 103 Ill. App. 3d 740, 749 (1st Dist. 1981) (emphasis added).

Argument

I. Plaintiffs' continue to incorrectly assert that Evanston at this juncture of litigation needs to identify a justification or basis for the mobile food vendor ordinance at issue.

After briefing responses against three (3) motions to dismiss in this matter, Plaintiffs here with this Response remain confused about the particulars needed at the motion to dismiss stage. For instance, Plaintiffs state in the Response that Evanston "has not offered any health, safety, or welfare justification for the 'owner or agent' requirement..." (Response, pp. 8-9). Plaintiffs also state that "the City has not given any reason why it is not arbitrary to treat those two groups (people who are owners or agents of a licensed food establishment in Evanston and people who are not) differently in deciding who may operate a food truck." (Response, p. 13).

However, such statements by Plaintiffs misconstrue the question before the Court, which is whether Plaintiffs' Second Amended Complaint states a cause of action. *See Imperial Apparel*, 227 Ill. 2d at 392. As explained on pages 2 and 3, *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.

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). 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). At the motion to dismiss stage it is not Evanston's burden, as Plaintiffs incorrectly assert on pages 8-9 and 13 of the Response, to provide any "justifications" for its mobile food vendor ordinance and/or any reasons for any purported differences in treatment 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.

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

In the Response, Plaintiffs claim that they allege numerous additional factual allegations other than the new ones made in paragraphs 16 and 17 of the Second Amended Complaint. (Response, p. 4). However, the Second Amended Complaint speaks for itself and in the "Factual Allegations" section of said pleading, only two new allegations of fact are made by Plaintiffs in paragraphs 16 and 17. The remaining allegations in the "Factual Allegations" section of the Second Amended Complaint are completely the same as the allegations made by Plaintiffs in the Amended Complaint. Nonetheless, the allegations made in paragraphs 38, 45, 47, 48, 56, and 59 of the Second Amended Complaint are mere conclusions, which

remain deficient in rebutting the presumptive validity of Evanston's ordinance at issue.

A § 2-615 motion to dismiss the Second Amended Complaint with prejudice 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. "[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). 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.*" *Id.* at 320-21 (emphasis added).

Plaintiffs' attempt to use *Napleton* as support in the Response is without merit since Plaintiffs fail to allege specific facts in the Second Amended Complaint, but rather, they allege only conclusions that are not supported by factual allegations. Looking at the new "factual allegation" found in paragraph 16 of the Second Amended Complaint, Plaintiffs claim that certain requirements found in Evanston City Code §§ 8-23-1 and 8-23-3 "were included in Evanston's mobile food

vendor ordinance *for the sole purpose* of protecting Evanston brick-and-mortar food establishments from competition" (emphasis added). Plaintiffs then in paragraph 17 of the Second Amended Complaint make reference to an unsubstantiated statement purportedly made Evanston Alderman Melissa Wynne concerning the ordinance at issue. Plaintiffs must know, and the Court here can take judicial notice of the fact that, the Evanston City Council is made up of nine (9) aldermen and the purported allegation of a justification by one such alderman for an ordinance does not in and of itself speak for the entire Evanston City Council. Despite Plaintiffs' attempt to use such a statement to speak for the entire City Council, the allegations in paragraphs 16 and 17 are mere conclusions.

Additionally, Plaintiffs improperly conclude in the Second Amended Complaint that "[t]he requirement of Section 8-23-1 that mobile food vehicle operators be owners or agents of licensed food establishments *makes* mobile food vehicles and the food they serve *no safer* than they otherwise would be." (Second Amended Complaint, ¶ 38) (emphasis added). Plaintiffs improperly allege the mere conclusion that "*[t]here is no necessary connection* between being the owner or agent of a licensed food establishment and having the requisite knowledge or ability to safely operate a mobile food vehicle." (Second Amended Complaint, ¶ 45) (emphasis added). Plaintiffs further wrap up their improper conclusory allegations by alleging the following in the Second Amended Complaint:

- The City of Evanston *has not identified and cannot identify* a rational basis for the "owner or agent" requirement in Section 8-23-1 of the Evanston City Code (Second Amended Complaint, ¶ 47) (emphasis added);

- In the absence of any rational relationship to the public's health, safety or welfare, *the only purpose* of the "owner or agent" requirement *is to protect* brick-and-mortar food establishments in Evanston from competition (Second Amended Complaint, ¶ 48) (emphasis added);
- People who are not owners or agents of licensed food establishments in Evanston *are not less capable of safely operating* a mobile food vehicle than people who are owners or agents of licensed food establishments in Evanston (Second Amended Complaint, ¶ 56) (emphasis added); and
- Indeed, *the sole purpose* of the "owner or agent" requirement *is to protect* brick-and-mortar food establishments in Evanston from competition by mobile vendors, including Plaintiffs (Second Amended Complaint, ¶ 59) (emphasis added).

Plaintiffs' above-referenced narrative and conclusory allegations in the Second Amended Complaint are not facts. *See Veazey*, 334 Ill. App. 3d at 929; *Knox College*, 117 Ill. App. 3d at 308. Therefore, the Second Amended Complaint should be dismissed with prejudice 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.

III. The cases cited by Plaintiff in the Response are distinguishable on the facts and not relevant.

On pages 6-8 of the Response, Plaintiffs cite to certain case law to support their arguments that they have alleged sufficient facts that Evanston's "owner or agent" rule purportedly violates substantive due process. The cases cited by Plaintiffs are distinguishable from the instant matter for many reasons. Further, the cases cited by Plaintiffs in that portion of the Response do not articulate reasons why the allegations in the Second Amended Complaint are sufficient to withstand a motion to dismiss.

Chicago Title & Trust Co. v. Village of Lombard is distinguishable on the facts since in that case, the Court examined a municipality's ordinance concerning the location of gasoline stations. *Chicago Title & Trust Co. v. Vill. of Lombard*, 19 Ill. 2d 98, 100 (1960). Plaintiffs' reliance on *Gholson v. Engle* is without merit and not relevant since the issue in that case was "whether the interest of the public carries further and justifies the compulsory partial merger of their activities by requiring that a funeral director have the knowledge, skill and training of an embalmer before he can direct a funeral." *Gholson v. Engle*, 9 Ill. 2d 454, 458-59 (1956).

Plaintiffs' reliance on *Church v. State*, *People v. Johnson*, *People v. Masters*, *Schroeder v. Binks*, and *People v. Brown* are all distinguishable on the facts, misplaced, and not relevant for the issues at hand in examining the Motion. *See Church v. State*, 164 Ill. 2d 153, 158 (1995) (the Supreme Court examined whether a private alarm contractor's statute unconstitutionally granted members of the private alarm contracting trade an unregulated monopoly over entrance into the private alarm contracting trade); *People v. Johnson*, 68 Ill. 2d 441, 450 (1977) (in finding the statute at issue unconstitutional, the Supreme Court stated that said statute's provisions confer upon licensed plumbers essentially the same monopolistic right to instruct and control entry into the trade which they had prior to *Brown* and *Schroeder*); *People v. Masters*, 49 Ill. 2d 224, 227 (1971) (the Supreme Court failed to perceive any connection between considerations of public health and the requirement in the statute that a licensed plumber post a $20,000 bond and pay

an annual fee of $125 in order to become a certified plumber); *Schroeder v. Binks*, 415 Ill. 192, 195, 200 (1953) (the Supreme Court examined the constitutionality of a statute's plumbing license requirement of supervision by master plumbers of all plumbing work done by journeymen or apprentices; the statute was held to be unconstitutional since "ultimate control of the situation remains in the hands of the private group of master plumbers"); *People v. Brown*, 407 Ill. 565, 574 (1950) (plumbing licensing statute does not allow a person to learn the trade of journeyman plumber by acquiring the necessary instruction and training in any way, other than as an apprentice to a licensed master plumber; the licensed master plumber is in full and absolute control of the situation).

Unlike the statutes at issue in *Church*, *Johnson*, *Masters*, *Schroeder*, and *Brown*, Evanston's mobile food vendor ordinance here contains no requirements that place the ultimate outcome of an applicant's license determination in the hands of competitors in the food truck industry and/or brick-and-mortar restaurant establishments. Under the relevant mobile food vendor ordinance, it is Evanston and Evanston alone that has final say over whether a mobile food vendor application is approved or denied based on the ordinance's specific requirements. For similar reasons, *Koos v. Saunders*, referred to by Plaintiffs on page 10 of the Response, is distinguishable as well. *See Koos v. Saunders*, 349 Ill. 442, 448-49 (1932) (The provision of the Municipal Code purports to give the owners of one-half of the frontage on both sides of the streets surrounding the block in question or even the owners of one-half of the property abutting on the property at issue of the

proposed site, authority, uncontrolled by any rule or standard prescribed by legislative action, to prevent the plaintiffs in error from using their parcel of land for a gasoline service station).

Ultimately, the case law relied upon by Plaintiffs in the Response are not applicable to the allegations of fact in the instant matter and such cases do not provide any reasons to deny Evanston's Motion.

IV. The prohibition against special legislation only applies to acts by the Illinois General Assembly.

Plaintiffs in the Response point to one First District case, *Rothner v. City of Chicago*, 66 Ill. App. 3d 428, 436-37 (1st Dist. 1978), to purportedly show that the prohibition against special legislation in the Illinois Constitution applies to city ordinances as well state statutes. However, based on the case law, it appears that the *Rothner* case is an anomaly in Illinois jurisprudence.

For instance, in finding that the law at issue was not a violation of the prohibition against special legislation, the First District in *Rothner* relied upon three (3) Illinois Supreme Court cases which specifically analyzed this prohibition against the backdrop of three (3) state statutes and not ordinances. *See Rothner*, 66 Ill. App. 3d at 436-37 (the Court cited to the Supreme Court cases *Kobylanski*, *McRoberts*, and *Glass* in analyzing special legislation law and stated that "*a statute* classifying persons or objects is not unconstitutional because it affects one class and not another, provided that it affects all members of the same class alike and provided that the classification is not arbitrary, but based upon some substantial difference in circumstances properly related to the classification") (emphasis

added).[1]

The Supreme Court in *Best v. Taylor Mach. Works*, 179 Ill. 2d 367 (1997), examined the background behind the Illinois Constitution's prohibition against special legislation. "It has been noted that the prohibition against special legislation is the 'one provision in the legislative articles that specifically limits the lawmaking power of the General Assembly.'" *Best*, 179 Ill. 2d at 391. "The distinction between special and local laws may be stated as follows: '[a] local law is one which applies only to the government of a portion of the territory of the state, and a special law is one which applies only to a portion of the state-its people, its institutions, its economy-in some sense other than geographical.'" *Id.* at 392 (citation omitted).

A plain reading of the special legislation prohibition specifically shows that such a prohibition solely applies to actions of the Illinois General Assembly and not actions by municipalities through ordinances. *See* Ill. Const. art. IV, § 13 (emphasis added); *Elementary Sch. Dist. 159 v. Schiller*, 221 Ill. 2d 130, 149 (2006) Therefore, Count III of the Second Amended Complaint should be dismissed with prejudice.

V. **The Response's attempt to minimize the significance of the ruling in *Rice* is without merit.**

On page 15 of the Response, Plaintiffs attempt to downplay the significance of the holding in *Triple A Services, Inc. v. Rice,* 131 Ill. 2d 217 (1989). Such action

[1] The cases cited by the *Rothner* court concerning the prohibition against special legislation examined state school code statutes, the Illinois Motor Vehicle Code, and Illinois Revised Statutes. *See Kobylanski v. Chicago Bd. of Ed.*, 63 Ill. 2d 165, 173-75 (1976); *McRoberts v. Adams*, 60 Ill. 2d 458, 462-63 (1975); *Glass v. Ingalls Mem'l Hosp.*, 32 Ill. App. 3d 237, 238 (1st Dist. 1975).

by Plaintiffs to downplay the significance of the holding in *Rice* in this current matter is without merit.

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. *Id.* at 230.

The holding in *Rice* is important in analyzing Evanston's Motion because Plaintiffs contend that Evanston's mobile food vendor ordinance at issue serves no safety purpose and/or serves no legitimate governmental purpose. (Second Amended Complaint, ¶¶ 2, 37). 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. Plaintiffs' reliance on *Figura v. Cummins*, 4 Ill. 2d 44, 49 (1954), *N. Ill. Coal Corp. v. Medill*, 397 Ill. 98, 104 (1947), and *Metro. Trust Co. v. Jones*, 384 Ill. 248, 255 (1943), once again is misplaced since said cases are distinguishable on the facts from the current matter and are not directly on point with the facts concerning Evanston's mobile food vendor ordinance as *Rice* is.

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*. The Second Amended Complaint fails to allege

sufficient factual allegations to rebut Evanston's authority as a home-rule municipality to regulate mobile food vendors in the ordinance at issue and the Second Amended Complaint should dismissed with prejudice.

Conclusion

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

Respectfully submitted,
CITY OF EVANSTON

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