IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROBERT PETERSON and LEIBUNDGUTH STORAGE & VAN SERVICE, INC. Plaintiffs, v. VILLAGE OF DOWNERS GROVE, ILLINOIS, an Illinois municipal corporation Defendant.	)	Case No. 14-cv-9851 Hon. Edmond E. Chang

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS

On February 5, 2015, Defendant Village of Downers Grove filed its Motion to Dismiss[1] pursuant to Federal Rule of Civil Procedure 12(b)(6) seeking to dismiss the facial challenge contained in Count I and the as-applied challenges contained in Counts II, III, and IV. As explained below, the Village's motion should be denied.

I. Motion to Dismiss Standard

The Village purports to bring its motion under Fed. R. Civ. P. 12(b)(6) (Mot. 1), but because the Village filed its motion after filing its Verified Answer and Counterclaim to Verified First Amended Complaint (Doc. 12), it should be treated as a motion for judgment on the pleadings under Fed. R. Civ. P. 12(c). *Republic Steel Corp. v. Pa. Eng'g Corp.*, 785 F.2d 174, 182 (7th Cir. 1986). Nonetheless, in considering a Rule 12(c) motion, the court applies the same standard that applies to a motion to dismiss under Rule 12(b)(6). *Id.*

[1] Although entitled "Motion to Dismiss," the Village's motion actually seeks only to partially dismiss the First Amended Complaint.

In considering a motion to dismiss under Rule 12(b)(6), the Court must accept the well-pleaded allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Savory v. Lyons*, 469 F.3d 667, 670 (7th Cir. 2006). A complaint should not be dismissed for failure to state a claim unless no relief could be granted under any set of facts that could be proved consistent with the allegations. *Veazey v. Communications & Cable, Inc.*, 194 F.3d 850, 854 (7th Cir. 1999).

II. Argument

A. No statute of limitations bars Plaintiffs' claims.

The Village's suggestions that Plaintiffs' claims are barred by statutes of limitations lack merit. (Mem. 2-5.) There is only one statute of limitations relevant to Plaintiffs' First Amendment claims: the two-year statute of limitations for actions brought under 42 U.S.C. § 1983. *See Dominguez v. Hendley*, 545 F.3d 585, 588 (7th Cir. 2008) (citing 735 ILCS 5/13-202). The Village has not shown – or even argued – that Plaintiffs have brought their claims outside of that statute of limitations, and dismissal on the basis of the statute of limitations is therefore improper.

Instead of citing the statute of limitations that actually applies in this case, the Village points to a 90-day statute of limitations for judicial review of the Village Council's legislative October 7, 2014 decision to deny Plaintiffs a text amendment to the Village's sign ordinance (Mem. 3) and a 35-day statute of limitations "for seeking judicial review of the November 19, 2014 decision of the Zoning Board of Appeals ("ZBA") to deny Plaintiffs variance requests (Mem. 5). The Village asserts

that these statutes of limitations apply to an "as-applied constitutional challenge" but does not clearly state which, if any, counts that it seeks to dismiss by these assertions.

In any event, those local statutes of limitations are not relevant to this case. This is a federal constitutional challenge that states only federal constitutional causes of action, with a statute of limitations governed by federal case law.

Moreover, even if the local statutes of limitations did apply, they still would not bar Plaintiffs' claims. The Village asserts that Plaintiffs had until January 5, 2015 to seek judicial review (Mem. 3, 5), but Plaintiffs filed their Complaint on December 8, 2014. (Plaintiffs filed their First Amended Complaint, by leave of Court, on January 30, 2015 to fix the proper name of the corporate Plaintiff. The claims asserted in the First Amended Complaint, and indeed the entire text save the name of the corporate plaintiff, are identical to those in the original Complaint.)

Further, an assertion of noncompliance with the statute of limitations is an affirmative defense,[2] and dismissal under Rule 12(b)(6) should be granted only where the allegations of the complaint itself set forth everything necessary to satisfy the affirmative defense. *Chi. Bldg. Design, P.C. v. Mongolian House, Inc.*, 770 F.3d 610, 613-14 (7th Cir. 2014). Here, as explained, the First Amended Complaint does not reveal that the action is untimely under the governing statute of limitations. Therefore, the Court should deny the Village's assertion that the statute of limitations bars Plaintiffs' claims.

[2] Defendant's Verified Answer and Counterclaim does not contain any affirmative defenses.

B. Plaintiffs have standing to facially challenge the sign ordinance as a content-based restriction on speech.

The Village is incorrect in its claim that Plaintiffs lack standing to bring Count I of Plaintiffs' First Amended Complaint because it supposedly fails to assert or "causally connect" any injury to Plaintiffs.[3] (Mem. 5.) The First Amended Complaint clearly asserts an injury, and therefore Plaintiffs have standing to bring Count I.

1. Count I asserts a content-based violation of the First Amendment and properly alleges an injury to Plaintiffs.

Count I alleges that Plaintiffs' signs would not run afoul of certain provisions in the sign ordinance, and Plaintiffs would not be subject to fines and enforcement action, if the content of those signs were different. Count I meets the requirements for standing because it alleges: (1) injury (the loss of First Amendment rights); (2) a causal connection between the injury and the conduct complained of (Plaintiffs' inability to display their signs because of their content); and (3) that the injury can be redressed with a favorable decision (an injunction against the Village enforcing the sign ordinance against Plaintiff). *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

The Village's argument fails to acknowledge that Count I challenges the provisions of the sign ordinance as content-based restrictions on speech in violation of the First Amendment.[4] Count I asserts that "[t]he sign ordinance places greater

[3] The Village improperly seeks to dismiss Count I for lack of standing under Rule 12(b)(6), rather than Rule 12(b)(1). *Lee v. City of Chicago*, 330 F.3d 456, 468 (7th Cir. 2003).

[4] The United States Supreme Court is currently considering the issue of content-based sign ordinances in the case of *Reed v. Town of Gilbert*, 707 F.3d 1057 (9th Cir. 2013), *cert. granted*, 134 S. Ct. 2900 (July 1, 2014) (No. 13-502). Oral argument was held on January 12, 2015.

restrictions on some signs than others *based on the sign's content* and therefore violates the First Amendment to the United States Constitution and Article I, Section 4 of the Illinois Constitution." (First Am. Compl. ¶ 66.) Count I states that Plaintiffs were injured because of the sign ordinance's content-based restriction: Plaintiffs would be permitted to have a sign facing only the Metra rail tracks and could display more than one wall sign on their building if the content of their signs were political or noncommercial, advertised the sale or lease of the property, or stated "no trespassing," or if they were memorial signs or tablets cut into masonry surface or inlaid so as to be part of the building. (First Am. Compl. ¶¶ 68-70.) Plaintiffs' injury is the loss of their First Amendment rights to display their signs. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976).

The Village asserts that "the injury Plaintiffs allege 'causally connects' only to the Village's commercial wall sign regulations, and this same injury is the subject of the facial challenges to the three specific regulations in Counts II, III, and IV of their Complaint." (Mem. 6.) But the Village provides no reason and no authority to show why Plaintiffs' content-based challenge to the sign ordinance and their injury in the form of the loss of their First Amendment rights are insufficient to give them standing.

2. The cases cited by the Village are inapposite and do not accurately reflect the law in this Circuit.

The cases the Village cites for the proposition that Plaintiffs lack standing to "generally" prosecute a facial constitutional challenge to the overall sign ordinance (Mem. 6) are inapposite. The Village cites *FW/PBS, Inc. v. Dallas*, in which the

Supreme Court held that a plaintiff must allege facts essential to show jurisdiction, for the proposition that standing cannot be inferred from arguments in the pleadings, but rather must affirmatively appear in the record. 493 U.S. 215, 231 (1990). (Mem. 6.) But in that case the Court held that the plaintiff lacked standing to challenge a licensing requirement for "sexually oriented businesses" that prohibited granting a license to applicants who resided with an individual whose license application had been denied or revoked and to applicants who themselves, or whose spouses, had been convicted of certain crimes because none of the plaintiffs actually met the criteria for a disqualified applicant. *Id.* That is, the plaintiffs could not challenge a restriction that did not affect their own rights. Here, in contrast, the restrictions Plaintiffs challenge do undisputedly affect them: Plaintiffs display signs that the Village contends violate certain provisions in its sign ordinance, which it has ordered Plaintiffs to remove to avoid fines and other enforcement action. In sum, the facts establishing standing are stated in the First Amended Complaint, are uncontested, and do not have to be inferred from Plaintiffs' arguments.

Similarly, the three Eleventh Circuit cases cited by the Village held that plaintiffs did not have standing to challenge various restrictions that simply *did not apply to them*. The plaintiff in *Advantage Adver., LLC v. City of Hoover* lacked standing to challenge a permitting scheme because it could not apply for the type of permit in question. 200 F. App'x 831, 835-36 (11th Cir. 2006). The plaintiff in *Granite State Outdoor Adver., Inc. v. City of Clearwater* lacked standing to challenge an ordinance giving city officials unlimited time to grant or deny a permit

because the plaintiff's own permit application was promptly denied. 351 F.3d 1112, 1117 (11th Cir. 2003). And the plaintiff in *Tanner Adver. Group, L.L.C. v. Fayette County* lacked standing to challenge a restriction on "attention getting devices" because it did not seek to erect such a device. 451 F.3d 777, 791 (11th Cir. 2006). Again, it is undisputable that the restrictions Plaintiffs challenge here *do* apply to them.

These Eleventh Circuit cases are also contrary to Seventh Circuit case law. *See Weinberg v. City of Chicago*, 310 F.3d 1029, 1046 (7th Cir. 2002) (licensing scheme for peddling on city sidewalks unconstitutional on its face even though plaintiff did not file for such a permit); *see also Brandt v. Vill. of Winnetka*, 2007 U.S. Dist. LEXIS 18772, *45 (N.D. Ill. Mar. 15, 2007) (plaintiff had standing to bring a facial challenge to licensing ordinance as granting unbridled discretion despite not applying for a license). Thus, not only do the cases cited by the Village not apply to this case, but also they are not even good statements of law in this Circuit.

3. The Village has not challenged the assertion in the First Amended Complaint that the sign ordinance is content-based.

The Village's motion does not specifically argue that Count I should be dismissed because the sign ordinance is content-neutral, although it asserts elsewhere in its memorandum that the sign ordinance is content-neutral. (Mem. 8).

In any event, the Village's blanket assertion that the sign ordinance is content-neutral could not be a basis for dismissing Count I because the restrictions in the sign ordinance are content-based. A restriction on speech is content-based if it "suppress[es], disadvantage[s], or impose[s] differential burdens upon speech

because of its content." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994). The restrictions Plaintiffs challenge are content-based since the ordinance entirely exempts particular signs based on their content, such as real estate signs, government signs, no trespassing signs, non-commercial flags, political signs, non-commercial signs, and memorial signs and tablets. Sec. 9.030. If Plaintiffs' signs fell under any of these exemptions – that is, if their content were different – the challenged restrictions of the sign ordinance would not prohibit them. Only by looking at the content of a particular sign can the Village know whether the sign ordinance's restrictions apply to that sign. *See Cincinnati v. Discovery Network*, 507 U.S. 410, 429 (1993) (finding a regulation banning commercial handbills, but allowing newspapers, from being distributed at news racks to be content-based).

For these reasons, the Court should deny the Village's motion to dismiss Count I.

C. Plaintiffs have properly stated as-applied claims challenging the sign ordinance.

The Village lacks any basis for its argument that Plaintiffs may not bring their as-applied First Amendment claims stated in Counts II, III, and IV. (Mem. 7-12.) Those Counts all state First Amendment claims that challenge provisions in the sign ordinance as unconstitutional both on their face and as applied to Plaintiffs. While Count I alleges that the sign ordinance provisions discriminate on the basis of content, Counts II, III and IV allege that even if the provisions of the sign ordinance are content-neutral, they still violate the First Amendment because they are not narrowly tailored to serve a significant government interest and do not leave open ample alternative channels of communication for such information. *See*

Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984). (First Am. Compl. ¶¶ 75-95.)

The Village's argument as to why it believes Counts II, III, and IV should be dismissed is not entirely clear. The Village appears to be contending either that (1) the case law prohibits any as-applied First Amendment challenge to a sign ordinance, or (2) Plaintiffs have not stated as-applied claims because they have alleged facts showing how the sign ordinance's restrictions affect Plaintiffs in particular rather than facts regarding the relationship between the ordinance and "the overall general problem the Village seeks to address" (Mem. 11). Either way, the Village's argument is without merit.

1. Plaintiffs can properly raise an as-applied First Amendment challenge to the Village's sign ordinance.

To the extent that the Village is asserting that Plaintiffs simply cannot bring an as-applied First Amendment claim challenging the sign ordinance, the Village's motion to dismiss should be denied because that assertion is simply incorrect and is based on a misapplication of the case law.

Supreme Court precedent makes clear that an as-applied First Amendment challenge is proper even in the commercial speech context. For example, in *Edenfeld v. Fain*, 507 U.S. 761 (1993), the Court affirmed summary judgment in favor of the plaintiff certified public accountant on his as-applied First Amendment challenge to a state rule prohibiting CPAs from soliciting engagements to perform public accounting services. The Village has cited no Supreme Court case law suggesting

that *Edenfeld* has been overruled or that as-applied First Amendment challenges to sign ordinances are otherwise improper.

The Village bases its assertion that an as-applied challenge is improper on a statement in *United States v. Edge Broadcasting Co.* that "the validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interest in an individual case." 509 U.S. 418, 430 (1993) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 801 (1989)). (Mem. 9-10.) The Village also cites the Seventh Circuit case of *Lavey v. City of Two Rivers*, for the conclusion that "to the extent that [plaintiff's] case may be construed as an 'as applied' challenge to the validity of the ordinance, that challenge cannot be sustained." 171 F.3d 1110, 1115 (7th Cir. 1999). (Mem. 10.) The Village concludes that, because the standard for evaluating as-applied challenges in commercial speech is the same as the standard governing facial challenges, Plaintiffs cannot bring an as-applied challenge to a sign ordinance regulating commercial speech. (Mem. 11-12.) However, the Village's representation of these cases is inaccurate and incomplete.

In *Edge*, the Supreme Court noted that it had upheld an as-applied First Amendment challenge to commercial speech in *Edenfield*. 509 U.S. at 431. The Seventh Circuit in *Lavey* also recognized that the *Edge* Court had acknowledged, but not overruled, the decision allowing a successful as-applied challenge in *Edenfield*. 171 F.3d at 1115 n.18. Both *Edge* and *Lavey* were decided on summary judgment, not motions to dismiss. *Edge* and *Lavey* therefore cannot stand for the

broad proposition that Plaintiffs cannot bring an as-applied First Amendment claim challenging the sign ordinance and that Counts II, III, and IV therefore should be dismissed.

The Village cites *Nat'l Council of Arab Americans v. City of New York*, 331 F. Supp. 2d 258 (S.D.N.Y. 2004), and *United for Peace & Justice v. City of New York*, 323 F.3d 175 (2d Cir. 2003), only for the proposition that "[t]he framework governing as-applied challenges to time, place or manner restrictions on speech is the same as that for facial challenges." *Nat'l Council of Arab Americans*, 331 F. Supp. 2d at 270. (Mem. 10-11.) These cases do not support the Village's assertion that Plaintiffs cannot bring an as-applied First Amended challenge to restrictions on commercial speech. Like *Edge* and *Lavey*, neither of these cases dismissed an as-applied First Amendment claim or otherwise suggested that as-applied challenges should be dismissed.

The statement in *Edge* cited by the Village – that the restrictions at issue are to be judged by the relationship they bear to the overall general problem the Village seeks to address – arose in the context of determining, on a motion for summary judgment, whether a restriction was "more extensive than is necessary to serve the governmental interest." 509 U.S. at 429. The Court stated that, when looking at whether the restriction was more extensive than necessary to serve the government interest, the Court would look not just at how the restriction affected plaintiff in the specific case at issue, but also at how it related to the general problem the restriction sought to address. *Id.* at 430-31. Similarly, in *Lavey*, the Seventh Circuit,

in ruling on a motion for summary judgment, found that the challenged ordinance was carefully crafted to meet the safety and aesthetic goals articulated by the defendant. 171 F.3d at 1115. The *Lavey* court then noted that this analysis of whether the ordinance was crafted to meet these goals is applied not *only* to how they related to plaintiff in that specific case, but also to how it related to the general problem the restriction sought to address. *Id.*

At most, *Edge* and *Lavey* stand for the proposition that in applying the test in *Clark* – which requires that the restrictions in the sign ordinance be narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication for such information – to Plaintiffs' as-applied challenges, this Court should take into account how the restrictions relate to the general problem the Village seeks to address. As explained below, the First Amended Complaint asserts that the restrictions in the sign ordinance are not narrowly tailored to serve a significant government interest and do not leave open ample alternative channels of communication, even as they relate to the broad general problem they seek to address.

2. Counts II through IV allege sufficient facts to support their as-applied challenges.

To the extent the Village is asserting that the First Amended Complaint must be dismissed because Plaintiffs alleged how the challenged restrictions affect them and failed to allege how the restrictions bear upon the overall general problem that the Village seeks to address, the Village's argument is baseless. The First Amended Complaint clearly *does* plead how the restrictions bear to the overall general

problem that the Village seeks to address. For example, the First Amended Complaint alleges:

> 77. The Village does not possess a compelling, important, or even rational justification for Section 9.020(P)'s prohibition of any sign painted directly on a wall, including Plaintiffs' hand-painted signs, outside of the Downtown Business, Downtown Transitional or Fairview concentrated business districts.
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> 78. Upon information and belief, the Village possesses no evidence that Section 9.020(P)'s ban on any sign painted directly on a wall, including the ban of Plaintiffs' signs, outside the Downtown Business, Downtown Transitional or Fairview concentrated business districts advances public health and safety or enhances the Village's appearance.
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> 79. The restriction on any sign painted directly on a wall of a building, including Plaintiffs' hand-painted signs, is not narrowly tailored to serve any governmental interests in public health and safety or enhancing the Village's appearance.

(First Am. Compl. ¶¶ 77-79; *see also* ¶¶ 84-86, 91-93.)

Even if Plaintiffs had not pleaded facts showing how the restrictions affect the general problem the Village seeks to address, which it has done, the Village's motion to dismiss still should be denied. "[P]leadings in federal court need not allege facts corresponding to each 'element' of a statute. It is enough to state a claim for relief and Fed. R. Civ. P. 8 departs from the old code-pleading practice by enabling plaintiffs to dispense with the need to identify, and plead specifically to, each ingredient of a sound legal theory." *Doe v. Smith*, 429 F.3d 706, 708 (7th Cir. 2005). Indeed, it is the Village's burden to prove with genuine evidence that the restrictions, as they bear to the general problem the Village seeks to address, are narrowly tailored to serve a significant government interest and leave ample alternative channels of

communication available. *Edenfield*, 507 U.S. at 770–71. Thus, Counts II, III, and IV cannot be dismissed for failure to allege facts showing how the restrictions relate to the general problem the Village seeks to address – that is the Village's burden to prove.

The Village's motion to dismiss the as-applied challenges to Counts II, III, and IV should therefore be denied.

III. Conclusion

For the reasons stated above, Defendant's Motion to Dismiss should be denied.

Dated: February 27, 2015

Respectfully submitted,

ROBERT PETERSON and LEIBUNDGUTH STORAGE & VAN SERVICE, INC.

By: /s/ Jeffrey M. Schwab

Jacob H. Huebert
Jeffrey M. Schwab
Liberty Justice Center
190 S. LaSalle Street, Suite 1500
Chicago, Illinois 60603
Telephone (312) 263-7668
Facsimile (312) 263-7702
jhuebert@libertyjusticecenter.org
jschwab@libertyjusticecenter.org

CERTIFICATE OF SERVICE

I, Jeffrey M. Schwab, an attorney, hereby certify that on March 4, 2015, I served Plaintiffs' Response to Defendant's Motion to Dismiss on Defendant's counsel by filing it through the Court's electronic filing system, pursuant to the Court's March 4, 2015 order (Doc. 22).

/s/Jeffrey M. Schwab