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

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

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO STAY ENFORCEMENT OF THE SIGN ORDINANCE DURING POST-JUDGMENT MOTIONS AND PENDING APPEAL

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I. Introduction

Without an order from the Court staying enforcement of the relevant provisions of Defendant Village of Downers Grove's Sign Ordinance, including the accrual of fines, Plaintiff Leibundguth Storage & Van Service, Inc. ("Leibundguth") will be forced to choose between forgoing its free speech rights by removing its signs – including two painted signs that were erected before 1971 and potentially as long ago as the 1930s – and risking the assessment of tens or even hundreds of thousands of dollars in fines while it exercises its right to appeal the judgment against it.

II. Legal Standards

Fed. R. Civ. P. 62(b) provides that the Court may stay the execution of a judgment—or any proceedings to enforce it—pending disposition of a Rule 59 motion to alter or amend a judgment. Fed. R. Civ. P. 62(c) provides that while an appeal is pending from final judgment that denies an injunction, the court may grant an injunction on terms for bond or other terms that secure the opposing party's rights. In ruling on a Rule 62(c) motion, courts apply the same "sliding scale" approach used in determining motions for preliminary injunction, *Cavel Int'l, Inc. v. Madigan*, 500 F.3d 544, 547 (7th Cir. 2007), and used by the appellate court on a motion for a stay on appeal under Fed. R. App. Proc. 8(a), *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

Under that test, a plaintiff must show: (1) a likelihood of success on the merits; (2) the lack of an adequate remedy at law; and (3) irreparable harm if the Court

does not grant the injunction. The Court will then (4) balance the hardship the moving party will suffer in the absence of relief to any hardship the nonmoving parties will suffer if the injunction is granted and (5) consider the interests of nonparties. *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 895 (7th Cir. 2001); *see also Korte v. Sebelius*, 528 F. App'x 583, 585-86 (7th Cir. 2012). Under the sliding scale analysis, the more the irreparable harm with no adequate remedy at law, balance of the hardships, and interests of nonparties favor a stay, the less a movant need show a likelihood of success. *Thomas v. Evanston*, 636 F. Supp. 587, 591 (N.D. Ill. 1986).

III. Argument

A. Without a stay Leibundguth will suffer irreparable harm for which it has no adequate remedy at law.

In this case, factors two through five strongly support granting Leibundguth's motion to stay enforcement of the Sign Ordinance. Plaintiff seeks to protect its First Amendment free speech right to use its longstanding signs. Removing those signs, and thus suppressing Leibundguth's speech, would constitute an irreparable injury for which monetary damages would be inadequate. *Christian Legal Society v. Walker,* 453 F.3d 853, 859 (7th Cir. 2006) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).[1]

Without a stay, Defendant Village of Downers Grove (the "Village") would be free to enforce the challenged provisions of its Sign Ordinance against Leibundguth, using its numerous remedies and enforcement powers. (Zoning Code, Section

[1] To "take down" the two painted signs, the paint must be removed or the signs must be painted over. Doing so during appeal would mean that Leibundguth would effectively have to take those signs down forever, even if it prevailed on appeal, since it would be impossible to duplicate those exact painted signs in their entirety.

13.020(D).) Although the Village has stated that it "will stay the numerous remedies it has under the Zoning Ordinance, including suspending or revoking [Leibundguth's] business license or occupancy permit," it has also stated that it "will not agree to a stay of the accrual of daily fines, or the costs of collection for the continuing sign ordinance violations during the appeal." (Dec. 18, 2015 Letter, attached as **Exhibit A**.)[2]

The accrual of fines would require Leibundguth to choose between declining to exercise its free speech rights via the use of its longstanding signs and risking the assessment of daily fines that could put it out of business. The Village code calls for a minimum fine of $75 per day and a maximum fine of $750 per day *per offense*. (Mun. Code Section 1.15(a).) Because the Village maintains that Leibundguth's signs give rise to three violations, the fines the Village would impose would be between $225 and $2,250 per day – or $82,125 and $821,250 per year. Imposing even the minimum fine on Leibundguth during the post-judgment and appeals process would severely harm Leibundguth's business, if not put an end to it. *See Korte*, 528 F. App'x at 588 ("Without an injunction pending appeal, the Kortes will be forced to choose between violating their religious beliefs by maintaining insurance coverage for contraception and sterilization services contrary to the teachings of their faith and subjecting their company to substantial financial penalties"); *Grote v. Sebelius*, 708 F.3d 850, 855 (7th Cir. 2013) (same).

[2] The Village also would not agree to stay accrual of daily fines during the winter months, when removing the paint or painting over the exterior brick of the building would be impossible. (See Motion ¶¶ 7-8.)

B. A stay will not harm the village or the public.

In contrast, allowing Leibundguth to display its signs during post-judgment motions and any appeal would not cause any harm to the Village. There can be no harm to a municipality when it is prevented from enforcing an unconstitutional ordinance because injunctions protecting First Amendment freedoms are always in the public interest. *Joelner v. Village of Washington Park, Illinois*, 378 F.3d 613, 620 (7th Cir. 2004).

The Village has permitted Leibundguth to display its signs for a decade since amending the Sign Ordinance, and Leibundguth's signs existed on its building for decades before that. The signs pose no threat of physical harm to the Village, its citizens, or anyone else. The only alleged harm to the Village is supposed aesthetic harm, which is minuscule, particularly when compared to the loss of Leibundguth's First Amendment rights and the destruction of its business. And while no members of the public would be harmed if the Court grants the stay, there are third parties who might be harmed if the Court does *not* grant the stay: Leibundguth's employees, who may lose their jobs if fines accumulate and the business cannot survive.

The Village would not be harmed by its inability to accumulate fines during any appeals because such fines are simply a mechanism by which the Village ensures compliance with the Sign Ordinance. It is the failure of Leibundguth to comply with the Sign Ordinance, not the potential loss of fines, that is the putative harm to the Village, and, as explained, the Leibundguth's failure to comply with the Sign

Ordinance does not and would not seriously harm the Village. Thus, the balancing of harms overwhelmingly favors Leibundguth.

The Village contends that "were it to stay the daily accrual of fines, the Village would effectively be giving [Leibundguth] an economic incentive to seek an appeal, as [Leibundguth] has alleged . . . that the painted sign on the rear of the building alone generates between $40,000 [and] $60,000 per year in revenue."[3] (Dec. 18, 2015 Letter). That is not relevant to the Rule 62 analysis. The harm to Plaintiff is its loss of First Amendment rights, which is irreparable. When a plaintiff would suffer the loss of First Amendment freedoms without an injunction, the fact that the plaintiff would also suffer monetary damages without the injunction does not mitigate the irreparability of the First Amendment harm. *See e.g., Norton v. City of Springfield*, 806 F.3d 411, 412 (7th Cir. 2015) (preliminary injunction against enforcement of an ordinance banning panhandling).

Leibundguth clearly would be irreparably harmed by the loss of its free speech rights for which monetary damages are inadequate. The balancing of the harms therefore overwhelmingly favors Leibundguth.

C. Leibundguth has a likelihood of success on appeal.

When considering a motion to stay judgment, courts have recognized a conceptual difficulty with analyzing the likelihood-of-success factor: a court

[3] In its Statement of Facts in Support of Summary Judgment, Leibundguth alleged that the sign on the back of its building accounts for 15 to 20 percent of its business revenue, an assertion that the Village, in response, disputed, asserting that Leibundguth had not provided any evidence of such. In reply to the Village's response, Leibundguth noted that it had no allegations for damages and an estimate of how much revenue the sign on the back of the building generates was enough for the purpose of showing the importance of the sign to Leibundguth. (Doc. 48, Pl. Reply SOF 16.)

considering a motion to stay judgment has already ruled against the moving party and will generally stand by its decision and believe that the appellate court will affirm it. But a party seeking a stay need not show that it is more than 50% likely to succeed on appeal; otherwise, no district court would ever grant a stay. It is enough that Leibundguth has a substantial case on the merits. *Thomas*, 636 F. Supp. at 590. Further, because factors two through five in the sliding-scale analysis so heavily favor granting a stay, the Court may put less emphasis on the likelihood of success factor. *Id.* at 591.

For the reasons stated in its motion for summary judgment, supporting memorandum, and reply, Leibundguth has a likelihood of success on appeal. In addition, for the following specific reasons, Leibundguth has a likelihood of success on appeal.

1. There is a likelihood that the appellate court will find the ban on painted signs unconstitutional.

Under the "time, place and manner" test of *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984), (Doc. 51, Memo. Op. at 11), the appellate court could find the prohibition on "any sign painted directly on a wall, roof, or fence" (Section 9.020(P)) is not narrowly tailored to serve the Village's only significant interest that the Court recognized in this case: aesthetics (Memo. Op. at 16).

a. There is a likelihood that the appellate court will find that the Village provided insufficient evidence to show that the painted sign ban advances an interest in aesthetics.

The Village has the burden of showing there is evidence supporting its proffered justification in aesthetics. *Weinberg v. City of Chicago*, 310 F.3d 1029, 1038 (7th Cir.

2002). There is a likelihood that the appellate court will find that photographs of signs around the Village and in nearby towns and the documentation of various sign styles relied on by the Court (Memo. Op. at 17, citing R. 37-4, Exh. 1D at 160-348) is insufficient evidence to show that the painted sign ban advances the Village's aesthetic interest.

These photographs do not support a conclusion that banning painted signs advances an aesthetic interest. Nothing in the record accompanying these photographs connects those photographs to aesthetic concerns or otherwise mentions aesthetic considerations related to painted signs. The Village's view of painted signs at that time is hardly clear because the Sign Ordinance it adopted in 2005 *allowed* painted signs in the downtown zoning districts – districts in which the Village would likely find aesthetics to be especially important. Thus, there is a likelihood that the appellate court would not find this evidence sufficient.

There is also a likelihood that the appellate court will find the July 6, 2015 Staff Report (R. 36-3, Ex. C) insufficient to support the claim that the painted sign ban advances the Village's interests in aesthetics. The Staff Report was prepared for the Village's Plan Commission in July 2015 – *after discovery had closed in this case* – in support of an amendment to Section 9.020(P) adopted later that month, which banned painted wall signs in all zones. The Report provided three reasons for the ban: (1) painted wall signs require on-going maintenance; (2) paint on a wall of a building is subject to water damage; and (3) painted signs on a wall is usually permanent or hard to remove. The Report was written by the Village Planning

Manager, Stanley Popovich, who provided no citations or any references for the Report's assertions about painted wall signs.

The Village cannot simply "blindly invoke" aesthetic concerns to support its restriction on hand painted signs. (Memo. Op. at 17.) We cannot know whether the contents of the Report accurately reflect real concerns about painted signs because it provides no authority for those assertions and was written after discovery was closed in this case, so no discovery could be taken on that issue. Assertions that are not based on any authority are blind assertions – exactly what this Court said the Village could not rely on to justify its sign restrictions. Thus, the appellate court could find that the Village has not provided sufficient evidence that its painted sign ban advances an aesthetic interest.

b. There is a likelihood that the appellate court will find that the painted sign ban is not narrowly tailored to serve the Village's interest in aesthetics.

Even if the appellate court were to find that the Village has provided sufficient evidence to show that the painted sign ban advances an aesthetic interest, there is a likelihood that the appellate court will find that the ban is not narrowly tailored to serve that interest.

The appellate court could disagree with the Court's finding that banning painted signs is "probably the only effective way to address the aesthetics problem posed by painted wall signs." (Memo. Op. at 19.) As Leibundguth pointed out, the aesthetic problems cited by the Village – that it requires on-going maintenance, may suffer water damage, and is permanent or hard to remove – all exist to the same extent for

painted brick in general. Although the Court stated that a painted sign could pose a more serious aesthetic problem that just a painted wall (Memo. Op. at 20), the Village never actually made that assertion, nor did it provide any evidence to support that conclusion. The appellate court could find that the Village's concern about water damage and maintenance would be easily cured by a requirement that painted signs be properly maintained[4] and that its concern about painted signs being permanent or hard to remove could be easily cured by a requirement that signs not in use be painted over, which is exactly what the Village is demanding that Leibundguth do to its painted wall sign. (Doc. 40, Pl. SOF 19.)

The appellate court could also reject the District Court's conclusion that the Sign Ordinance does not permit painted flags and murals on the wall of a building (Memo Op. at 15 n. 6) based on the Staff Report's statement that "[t]here are instances of flags and murals painted on buildings and these are permitted by the code on the basis that they are decorative, and do not convey constitutionally protected commercial or non-commercial speech." (Def. Ex. 4, Report of Plan Commission, July 6, 2015, at 3). The Report clearly indicates that there are painted murals and flags on buildings in Downers Grove and that the Village is not enforcing the sign ordinance against them. The appellate court will likely consider the Village's "own authoritative construction of the ordinance, including its implementation and interpretation" and defer to that construction "so long as its

[4] The Court relies on pictures of Leibundguth's sign as evidence of water damage, (Memo. Op. at 18), but that is no reason to think that continued maintenance would not fix this problem. Understandably, Leibundguth has not touched up its painted signs with paint since the Village informed it that its signs were in violation of the Sign Ordinance.

interpretation is based on a permissible construction." *Southlake Prop. Assocs., Ltd. v. City of Morrow, Ga.*, 112 F.3d 1114, 1119 (11th Cir.1997).

The appellate could likely find that the Village's non-enforcement of the sign code against painted signs and murals shows that its ban is not narrowly tailored to address aesthetic concerns, since every aesthetic interest for signs, such as Leibundguth's, would exist for painted flags and murals.

2. There is a likelihood that the appellate court will find that the size and number restrictions in the Sign Ordinance are unconstitutional.

Leibundguth's signs exceed Section 9.050(A)'s limit of the total sign area to 1.5 square feet per linear foot of tenant frontage and Section 9.050(C)(1)'s requirement of only one wall sign per tenant frontage along a public roadway or drivable right-of-way. In addition, the sign on the back of Leibundguth's building exceeds the amendment to Section 9.050(C)'s limit of the total sign area to 1.5 square feet per lineal foot of tenant frontage along the BNSF railroad right-of-way. Leibundguth challenged these restrictions in two ways, arguing that (1) the Village cannot provide evidence that these restrictions advance a government interest and are narrowly tailored under Central Hudson, and (2) these restrictions are content-based.

a. There is a likelihood that the appellate court could find that the size and number restrictions are content-based under *Reed v. Town of Gilbert*.

The appellate court could apply the Supreme Court's recent decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231-32 (2015), which held that a town's sign code was unconstitutionally content-based because it applied different restrictions to

signs depending on their content, to the Sign Ordinance. (See Memo. Op. at 27-28.) Indeed, in its only opinion to date applying *Reed*, the Seventh Circuit found a panhandling ordinance that prohibited an oral request for an immediate donation of money in the City's downtown historic district, but allowed signs requesting money and oral pleas requesting money later, was a content-based violation of free speech. *Norton*, 2015 U.S. App. LEXIS 13861, at *3. It is possible that the Seventh Circuit, which was willing to find content-based discrimination in a restriction on speech requesting money in exchange for nothing, could find content-based discrimination in a restriction on speech requesting money in exchange for goods and services.

b. There is a likelihood that the appellate court will find that the Village did not meet its burden to show that the size and number restrictions advance a government interest.

Even under the commercial speech standard of *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447* U.S. 557 (1980), it is likely that the appellate court will find that the Village did not meet its burden to provide sufficient evidence supporting the assertion that the size and number restrictions advance the Village's aesthetic interests. The evidence the Village presented consisted only of pictures of commercial signs in the Village, pictures in surrounding communities for comparison purposes, and communications with several Village members regarding the different signage in use by town residents and businesses. (Memo. Op. at 34.)

There is no discussion in the record about how restrictions on the size and number of wall signs advance any specific aesthetic interest. No pictures or communications with residents address the size and number of wall signs. It is

reasonable to think that an appellate court will find that the Village "fail[ed] to develop any actual argument based on these [photographs and communications] or to explain how these [photographs and communications] support its contention that [aesthetics] is a real problem for the Village." (Memo. Op. at 32-33.) "Without a developed argument, actually analyzing the [photographs and records], the Court cannot accept 'speculation or conjecture' as proof that the Ordinance's restrictions advance the Village's interest in [aesthetics]." (Memo. Op. at 33.) Similarly, the Village must "more than simply cite [aesthetics] as a governmental interest (which is exactly what the Village has done here)"; rather, it "must provide some sort of evidence showing that [a specific aesthetic interest] is advanced by restrictions like the ones the Village has imposed here." (Memo. Op. at 33.)

c. There is a likelihood that the appellate court will find that the size and number restrictions are not narrowly tailored to serve the Village's interest in aesthetics.

The appellate court could find that the exemptions to the restrictions on the size and number of wall signs that the Village has granted to some businesses demonstrate that those restrictions are not narrowly tailored. *See City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994). A restriction on speech can be underinclusive, and therefore, invalid, when it has exceptions that undermine and counteract the interest the town claims its restrictions further. (Memo. Op at 37, *citing Vanguard Outdoor, LLC v. City of Los Angeles*, 648 F.3d 737, 742 (9th Cir. 2011)). The appellate court also could likely find that because the Sign Ordinance allows other kinds of signs without the same size and number restrictions, the restrictions on

size and number of wall signs are *not* an effective approach to the aesthetic issues advanced by the Village. Therefore, an appellate court could likely find that the Village failed to show that the size and number restrictions are narrowly tailored to serve an aesthetic interest.

d. There is a likelihood that the appellate court will find that the Sign Ordinance is content based and apply strict scrutiny.

The appellate court could find that, because Section 9.050 of the Sign Ordinance applies to both commercial speech and noncommercial speech, the sign ordinance is content based, strict scrutiny applies, and the Village's evidence cannot survive strict scrutiny.

Nothing in Section 9.050 limits its application to commercial speech alone. Section 9.050 is entitled "Sign Regulations Generally" and does not contain the word "commercial." Although some signs do not require a permit, such as political and noncommercial signs, Section 9.030 provides some limitations on signs not requiring a permit, such as a provision limiting the size of political and noncommercial signs to 12 square feet. But political and noncommercial signs in excess of 12 square feet could be erected with a permit, making them subject to the requirements of Section 9.050. Noncommercial wall signs with a permit are limited to 1.5 square feet per tenant frontage, while noncommercial flags have no size restrictions.

The appellate court could likely find that Leibundguth can bring a claim under the First Amendment's overbreadth doctrine to challenge Section 9.050's application to noncommercial signs. *Bd. of Trustees of State Univ. of New York v.*

Fox, 492 U.S. 469, 481 (1989). Therefore, there is a likelihood that an appellate court will rule in favor of Leibundguth on its overbreadth facial challenge.

D. A bond is impractical for Leibundguth in this case.

Pursuant to the Court's request, Leibundguth spoke with Sam Newberry of American Surety Bonds, to obtain an estimate of what an appeal bond would cost. Newberry explained that the industry standard for costs of appeal bonds is between one and three percent of the amount at issue, but that any surety will require the principal to have the cash on hand or have an irrevocable letter of credit for at least that amount. So the effective cost to Leibundguth is the amount of the accumulated fines plus the cost paid to the surety.

An appeal bond is impractical in this case. In a typical appeal, the judgment contains an amount that one party is required to pay another at the time of judgment, and the bond ensures that the party appealing can pay that amount. Here, however, at the time of judgment the Village is not entitled to any amount; it will only accumulate fines if Leibundguth does not comply with the Sign Ordinance once the Village begins enforcement. This motion asks the Court to stay enforcement including the accumulation of fines. So a bond is unnecessary if the Court grants this motion. If the Court denies Leibundguth's motion, it's not unreasonable to think that rather than risk accumulation of fines that would severely hurt its business, Leibundguth would take down the signs before enforcement, in which case the Village would not be entitled to any fines and a bond would be unnecessary.

IV. Conclusion

For the reasons stated, the Court should stay enforcement of the Sign Ordinance, including the accumulation of fines, during post-judgment motions and pending appeal.

Respectfully submitted,

LEIBUNDGUTH STORAGE & VAN SERVICE, INC.

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CERTIFICATE OF SERVICE

I, Jeffrey M. Schwab, an attorney, hereby certify that on January 21, 2016, I served Plaintiff's Memorandum of Law in Support of its Motion to Stay Enforcement of the Sign Ordinance During Post-Judgment Motions and Pending Appeal on Defendant's counsel by filing it through the Court's electronic case filing system.

/s/ Jeffrey M. Schwab