

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

GREENVILLE BISTRO, LLC, a South Carolina Limited Liability Company, d/b/a Buck's Racks & Ribs, and FRONTAGE ROAD ASSOCIATES, INC., a South Carolina Corporation,

Plaintiffs,

v.

GREENVILLE COUNTY, a Political Subdivision of the State of South Carolina, and WILL LEWIS, in his Official Capacity as Sheriff of Greenville County,

Defendants.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C.A. No.: 2017-CP-23-03372

**ORDER FOR PARTIAL GRANT AND
PARTIAL DENIAL OF
TEMPORARY INJUNCTIVE RELIEF**

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SC Court of Appeals

This matter comes before the Court on a Motion filed May 24, 2017, moving the Court to enter a Temporary Injunction enjoining Defendants from enforcing or attempting to enforce certain County Code provisions and ordinances against Plaintiffs. A hearing on Plaintiffs' Motion was held on June 16, 2017. At the call of the case, O. W. Bannister, Luke C. Lirot and Luke A. Burke were present on behalf of Plaintiffs. John Devlin and Scott D. Bergthold were present on behalf of Defendants. The Court has considered all Motions, Memoranda, affidavits, and exhibits filed in this matter, together with the arguments of counsel.

This Court has jurisdiction over this matter pursuant to § 15-53-20, S.C.C., Rule 57, S.C.R.Civ.P., § 15-53-120, S.C.C., and pursuant to Rule 65, S.C.R.Civ.P. The Court also has jurisdiction over Plaintiffs' Federal claims pursuant to 28 U.S.C., §§ 1331, 1343, and 2201 and pursuant to 42 U.S.C. Sec. 1983; 42 U.S.C., Sec. 1988, and to the First, Fifth, and Fourteenth Amendments to the Constitution of the United States: *see Howlett v. Rose*, 496 U.S. 356, 110 S.Ct. 2430 (1990).

PROCEDURAL HISTORY OF THE CASE

On February 9, 2017, after a long history of controversy between similar businesses at the subject location and Greenville County, Judge Charles B. Simmons entered a Consent Order concerning the establishment of Greenville Bistro's at the subject location. Greenville Bistro represented to the Court that it had no connection with the businesses at the location. Based on that representation, and the like representation of the parties to the suit, Judge Simmons found that there was "no evidence of any connection between Elephant, Inc., Gaines and Greenville Bistro." This Court construes that language as a finding that this Plaintiff, Greenville Bistro, is not a successor to the earlier operator of the business at the location which is the subject of this action. That Order simply allows Greenville Bistro to open and operate a "similar business" to that of the former tenant. Judge Simmons Order further provided that "in the event that Greenville Bistro or any other adult entertainment venue commences operation at the location, full and complete compliance with all applicable laws, ordinances, etc. is expected." Twelve days after this Court entered its Order that had the effect of allowing Greenville Bistro to open and operate, the County adopted Ordinance 4869, which purports to amend the definition of an adult cabaret to regulate establishments offering "semi-nude" entertainment. Once Greenville Bistro commenced its operations, Defendants believed those operations were in violation of various County regulations and ordinances and began to enforce those regulations against Plaintiffs.

Accordingly, Plaintiffs commenced this action on May 23, 2017, and, on May 24, 2017, filed a Motion for Temporary Injunction. Subsequently, on May 30, 2017, Plaintiffs filed a Motion for a Temporary Restraining Order in order to preserve the *status quo* while the Motion for Temporary Injunction was under consideration by the Court.

On June 2, 2017, Judge Perry Gravely entered a Temporary Restraining Order in favor of Plaintiffs granting much of the relief sought by Plaintiffs in their Motion for a Temporary Restraining Order. Subsequently, on June 16, 2017, the undersigned heard oral argument on the Motion for Temporary Injunction and, on July 10, 2017, received Proposed Orders from the parties regarding the Motion for Temporary Injunction.

STANDARD FOR AWARD OF TEMPORARY INJUNCTIVE RELIEF

Rule 65 of the South Carolina Rules of Civil Procedure sets forth the procedure for issuing Temporary Injunctive Relief. Under the relevant case law, a party seeking injunctive relief must demonstrate irreparable harm, a likelihood of success on the merits, and the absence of an adequate remedy of law. *Rawlinson Road Homeowners Association, Inc., vs. Jackson*, 395 S.C. 25, 35 (Ct. App. 2011). The Courts recognize that an injunction is a drastic remedy and should be issued only to prevent irreparable harm suffered by the moving party. *AJG Holdings, LLC, vs. Dunn*, 382 S.C. 43 (Ct. App. 2009). The Court must consider each of the three elements to determine whether the drastic remedy of Temporary Injunctive Relief should be granted.

FINDINGS

IRREPARABLE HARM

The loss of First Amendment freedoms constitutes irreparable injury as a matter of law, *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, (1976). Consistent with *Elrod*, the Fourth Circuit has held:

Indeed, the Supreme Court has stated in no uncertain terms that “loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion); see also

Johnson v. Bergland, 586 F.2d 993, 995 (4th Cir. 1978)
("Violations of first amendment rights constitute per se irreparable injury."). ...

International Refugee Assistance Project v. Trump, 2017 WL 2273306, *69, (4th Circuit May 25, 2017, *en banc*), partially reversed on other grounds, 2017 WL 2722580, May 25, 2017.

More importantly, the mere showing of a deprivation of First Amendment or other federally protected rights in and of itself establishes both injury and damage. *Basista v. Weir*, 340 F.2d 74 (3d Cir. 1965).

Sambo's of Ohio v. City Council of City of Toledo, 466 F.Supp. 177 (N.D. Oh., 1979).

The Court is cognizant of these sound constitutional and legal principles. Further, this Court is particularly sensitive to the free expression of constitutional rights. However, the Plaintiffs have failed to demonstrate how compliance with the provisions of the 2017 Consent Order causes irreparable harm. In that Order, notwithstanding assertions to the contrary by Plaintiff, there is no finding that Greenville Bistro is a successor to previous businesses at the subject location. To the contrary, the Court found, by consent, that there is "*no evidence which establishes a connection between these parties.*" Given the Plaintiff's assertions at the previous hearing before Judge Simmons, the claim of successor status in this suit is a dubious contention. It is problematic, therefore, for the Plaintiffs to claim that they have been harmed by an Order of the Court of which they freely, voluntarily, and readily approved.

The Plaintiffs, however, may have a complaint as to the adaption of Ordinance 4869 soon after the issuance of the February 2017 Order. In keeping with established law, the Plaintiffs would suffer irreparable harm if the subject ordinance abridges its constitutional freedom of expression.

LIKELIHOOD OF SUCCESS ON THE MERITS

When seeking a preliminary injunction, the moving party need not prove an absolute legal right; he need only present “a fair question to raise as to the existence of such a right.” *Williams v. Jones*, 92 S.C. 342, 347, 75 S.E. 705, 710 (1912). The determination of whether an injunction is granted should not be based on the merits of the underlying case except insofar as the merits may assist the trial court in determining whether a *prima facie* showing has been made: *MailSource, LLC v. M.A. Bailey & Assocs.*, 356 S.C. 363, 368, 588 S.E.2d 635, 638 (S.C. App. 2003 (citing *Transcon. Gas Pipe Line Corp. v. Porter*, 252 S.C. 478, 481, 167 S.E.2d 313, 315 (1969))). “The court must determine only the likelihood of whether [the moving party] will prevail on the merits based on the allegations in his complaint” *Compton v. S.C. Dept. of Corrections*, 392 S.C. 361, 367, 709 S.E.2d 639, 642 (2011). “Once a *prima facie* showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits.” *Helsel v. City of North Myrtle Beach*, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992).

The Plaintiff has met its burden with respect to the issue of enforcement of Ordinance 4869. As discussed above, the Plaintiffs have, however, failed to demonstrate a likelihood of success of the merits for the remaining issues. The Court’s decision is based solely on the moving party’s alleged facts without regard to the ultimate merits of the case.

INADEQUATE REMEDY AT LAW

With regard to the enforcement of Ordinance 4869, Plaintiffs have no adequate remedy at law because Defendants’ efforts to regulate Plaintiffs’ business threaten Plaintiffs with the loss of constitutionally protected rights and freedoms. Therefore, the Plaintiffs have, on this point, met the requisite burden.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that:

1. Defendants, Greenville County and Will Lewis, their officers, agents servants, employees, and attorneys, and those persons in active concert or participation with them are hereby temporarily enjoined from, in any way, enforcing the provisions of Ordinance 4869 as to the Plaintiffs at the subject location;
2. The remaining temporary relief prayed for by Plaintiffs are respectfully denied. The Plaintiff must comply with any and all applicable laws or ordinances existing at the time of issuance of the February 9, 2017 Consent Order.
3. This Order is without prejudice to any findings of fact or findings of law at the ultimate hearing on the merits; and
4. This injunction shall take effect on the date and time on which it is signed and shall remain in effect pending further order of the Court.

IT IS SO ORDERED.

Robin B. Stilwell, Judge
13th Judicial Circuit

Greenville, South Carolina

Date: _____



Greenville Common Pleas

Case Caption: Greenville Bistro LLC , plaintiff, et al vs. Greenville County ,
defendant, et al
Case Number: 2017CP2303372
Type: Order/Temporary Injunction

So Ordered

s/ Robin B. Stilwell 2158