Briefs and Other Related Documents

United States District Court, M.D. Florida.
ROBERT MANN ENTERPRISES, INC., A Florida corporation, d/b/a "Lollipops," Tocco's, Inc., a Florida corporation, d/b/a "the Players Club," Calendar Girls of Hudson, Inc., A Florida corporation, d/b/a "Calendar Girls," Pasco Investments, Inc., A Florida corporation, and 42nd Street, Inc., A Florida corporation, d/b/a "42ND Street Video," Plaintiffs,
v.
PASCO COUNTY, Florida, a political subdivision of the State of Florida, Defendant.
No. 8:01-CV-805.

Dec. 3, 2001.

OPINION & ORDER

LOVELL, Senior J.
***1** On November 28, 2001, the above-captioned case came on for hearing on Plaintiffs' Motion for Preliminary Injunction. Plaintiffs were represented by Mr. **Luke Lirot**, and Defendant was represented by Mr. Sidney Kilgore. Having considered the record, the briefs, and the arguments of the parties, the Court is prepared to rule.

Plaintiffs are three dance clubs that serve alcoholic beverages and feature exotic dancers, one adult bookstore, and the landlord of one of the dance clubs.

Plaintiffs challenge two new Ordinances enacted by the County of Pasco, Florida. Ordinance 99-26, effective April 19, 2001, is a zoning ordinance that rezones adult sexually-oriented businesses from commercial zones to industrial zones where alcohol cannot be served. Ordinance 99-26 is effective as to current establishments regardless of the length of time they may have been in business or their investment in their current business location. Ordinance 99-26 also has a provision regulating signs for such establishments. Ordinance 99-26 provides an eighteen-month business wind-up period, after which affected businesses may not operate. Plaintiffs claim that Ordinance 99-26 effectively puts them out of business without providing them with any reasonable alternative locations to conduct their businesses.

Ordinance 01-07, enacted shortly after 99-26, requires adult entertainment businesses to keep records of all current employees and former employees within the past year, including current or former legal name, aliases, date of birth, and photograph, such records to be updated annually. Such records are to be made available to law enforcement, health department representatives, and county representatives, for inspection without warrant. Ordinance 01-07 also requires that a stage for dancers must be raised 18 inches above the floor, dancers must maintain three feet distance from the nearest table or chair, and that windows must be covered. Ordinance 01-07 requires dancers to maintain a 3 foot distance from customers except for passing of gratuities from hand to hand, and prohibits dancers from touching any person other than an employee while exposing "any anatomical area" (except "during the employee's bona fide use of a restroom, or … a dressing room"). A violation of Ordinance 01-07 is a second degree misdemeanor punishable by imprisonment not to exceed sixty (60) days and a fine not to exceed $500, and three violations may result in revocation of the occupational license. Ordinance 01-07 also provides for warrantless inspections by law enforcement and other county officials for the purposes of determining compliance with all applicable laws and ordinances, and extends those officials immunity from prosecution for good faith trespass upon any sexually-oriented entertainment establishment while acting within the scope of this ordinance.

Plaintiffs claim that the cumulative effect of Ordinance 99-26 and Ordinance 01-07 is to destroy their businesses and to deprive them arbitrarily of their property rights, their freedom of expression, and right to contract. Plaintiffs claim that a flawed legislative predicate was used by the County of Pasco to articulate a legitimate government interest in support of the two ordinances. Plaintiff claims that the County arbitrarily ignored Plaintiffs' expert testimony showing that the County's studies from foreign jurisdictions were flawed and also arbitrarily ignored Plaintiffs' expert studies prepared from County of Pasco data showing that Plaintiffs cause very few adverse secondary affects compared to non-adult entertainment establishments. Plaintiffs claim that the Ordinances are unconstitutional both facially and as applied.

LEGAL STANDARD FOR PRELIMINARY INJUNCTION

***2** A party seeking a preliminary injunction must establish (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if relief is denied; (3) an injury that outweighs the potential injury to an opponent if relief is granted; and (4) that the entry of a preliminary injunction would not harm the public interest.

Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Intern., 238 F.3d 1300, 1308 n. 18 (11th Cir.), *cert. denied,* 121 S.Ct. 1958 (2001).

DISCUSSION

Like it or not, erotic nude dancing is expressive conduct within the outer ambit of the First Amendment's protection. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2001) (plurality opinion) (citing *Barnes v. Glen Theatre, Inc.* 501 U.S. 560, 565-66 (1991) (upholding Indiana statute requiring pasties and g-strings on nude dancers); *Schad v. Mountain Ephraim*, 452 U.S. 61, 66 (1981)). Because the stated purpose of the two County of Pasco Ordinances is unrelated to suppression of expression, the applicable level of scrutiny is intermediate. *See United States v. O'Brien*, 391 U.S. 367, 377 (1968) (establishing four-part test for content-neutral regulation of expressive conduct). First, the government regulation must be within the constitutional power of the government to enact, second, the regulation must further important or substantial government interest, third, the government interest must be unrelated to suppression of free expression, and fourth, the restriction must be no greater than is essential to furtherance of the government interest. *Id.* In this case, there are significant questions as to the second and fourth prongs of the *O'Brien* test, and at least some question as to the first prong.

In *City of Erie,* the United States Supreme Court's most recent pronouncement in this area of law, the Court examined a city ordinance that prohibited public nudity but allowed erotic dancers to perform if wearing pasties and g-strings. A plurality of the Supreme Court interpreted this restriction to be a *de minimis* restriction "on the overall expression." *City of Erie*, 529 U.S. at 301. Important to the plurality, "Erie's ordinance does not effect a 'total ban' on protected expression." *Id.* at 295. A total ban would be unconstitutional. *See Schad v. Mount Ephraim*, 452 U.S. 61 (1981).

One of the early cases relied upon by the Supreme Court in *City of Erie* is *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), in which the Supreme Court upheld a Detroit zoning ordinance that did not reduce the number of adult theaters but simply dispersed them throughout the city, but crucial to the holding was the fact that the ordinance did not reduce the market of the businesses and by that reduction prevent the message from being sent to its previous audience. *Id.* at 71.

Another early case underlying the *City of Erie* decision is *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), in which the City of Renton enacted a prospective zoning ordinance that was deemed by the Supreme Court to be content neutral despite the fact that it was directed to adult entertainment theatres because the stated purpose of the ordinance was to alleviate the adverse secondary effects of such establishments. *Id.* at 48. (The ordinance was prospective because there were no adult theaters in operation in Renton prior to passage of the ordinance.) The Supreme Court also determined that a city need not conduct its own studies to show the problem of secondary effects, but could rely instead upon studies prepared by other cities "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id.* at 51-52. A city can also take legislative notice of facts within its own knowledge. *City of Erie*, 529 U.S. at 298.

***3** However, in *City of Erie* the Supreme Court also emphasized that adult entertainment establishments bear the burden of showing that the city's secondary effects evidence is inadequate:
Kandyland has had ample opportunity to contest the council's findings about secondary effects-before the council itself, through the state proceedings, and before this Court. Yet to this day, Kandyland has never challenged the city council's findings or cast any specific doubt on the validity of those findings. Instead, it has simply asserted that the council's evidentiary proof was lacking. In the absence of any reason to doubt it, the city's expert judgment should be credited. And the study relied on by *amicus curiae* does not cast any legitimate doubt on the Erie city council's judgment about Erie.

Id.

In this case, however, Plaintiffs have proffered substantial evidence that casts some doubt on the County of Pasco's findings about secondary effects. The Plaintiffs have presented testimony explaining the flaws in the County's foreign studies, and the Plaintiffs have also presented their own evidence showing comparatively minimal secondary effects emanating from their own businesses. There are other significant differences between the facts of this case and the facts of many of the Supreme Court cases cited by the County. The chief factual distinction is that the County of Pasco Ordinances are not prospective only in their application, while at the same time the County of Pasco Ordinances are not *de minimis* but appear instead to have the apparent practical effect of putting Plaintiffs out of business. Instead of a mere time, place, and manner restriction as conceived in *Young* and *Renton,* the County of Pasco Ordinances send existing adult entertainment/bar establishments to industrial parks presumably where no other commercial establishments are located and where alcohol cannot be served. It is the cumulative effects of the retroactive application and the diminishment of the opportunity to convey the message to the audience, along with the myriad signage, inspections, employee regulations and record keeping regulations, etc, that may have an unconstitutional effect upon Plaintiffs, and apparently may have, indeed, already chilled the Plaintiffs' expressive conduct. The full weight of these cumulative effects cannot be summarily evaluated, but the spectre of repression looms over these ordinances.

It is at least conceivable although unlikely that the final disposition in this case will rest on a judicial finding that the County of Pasco reasonably relied upon its evidence supporting adverse secondary effects and reasonably discounted Plaintiffs' evidence. So much doubt about the matter remains, however, that in the meantime the Plaintiffs should not be forced to vacate their businesses until a final determination is made as to the constitutionality of the Ordinances.

The Court finds that there is a substantial likelihood that Plaintiffs will succeed on all or part of their claims and that there is a substantial threat of irreparable injury if relief is denied. While a grave injury threatens Plaintiffs if the injunction is denied, only the status quo will be preserved if the injunction is granted. Given that the County of Pasco's previous regulations and ordinances served the County for many years prior to the enactment of the two extreme Ordinances in question here today, the entry of a preliminary injunction will not harm but will promote the public interest.

***4** Accordingly,

IT IS HEREBY ORDERED that Plaintiff's Motion for Preliminary Injunction is GRANTED; the injunction will issue forthwith.

The Clerk shall forthwith notify the parties of entry of this order.

M.D.Fla.,2001.
Robert Mann Enterprises, Inc. v. Pasco County
Not Reported in F.Supp.2d, 2001 WL 1868513 (M.D.Fla.), 15 Fla. L. Weekly Fed. D 113

Briefs and Other Related Documents (Back to top)

• 2001 WL 34780754 (Trial Motion, Memorandum and Affidavit) Memorandum of Pasco County in Opposition to Motion of the Plaintiffs for a Preliminary Injunction (Aug. 29, 2001) Original Image of this Document with Appendix (PDF)
• 2001 WL 34780753 (Trial Motion, Memorandum and Affidavit) Plaintiffs' Memorandum of Law in Support of Issuance of Preliminary Injunction (Jul. 6, 2001) Original Image of this Document (PDF)
• 2001 WL 34780752 (Trial Pleading) Answer (Jul. 3, 2001) Original Image of this Document (PDF)
• 2001 WL 34780751 (Trial Pleading) Verified Complaint for Declaratory and Injunctive Relief and for Damages, Attorney's Fees and Demand for Jury Trial (Apr. 23, 2001) Original Image of this Document with Appendix (PDF)
• 8:01CV00805 (Docket) (Apr. 23, 2001)
• 8:01CV00805 (Docket) (Apr. 23, 2001)

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