



Connie Taylor, Clerk of Superior Court
Cobb County, Georgia

IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

COBB COUNTY, GEORGIA, *
*
Plaintiff, *
* CIVIL ACTION
v. *
* FILE NO. 20107595
*
MICHAEL SCOTT MORRISON; *
*
ALFRED JAY NAULT; *
*
CHRISTOPHER JON COLEMAN; and *
*
1290 CLOTHING CO LLC, d/b/a *
*
Tokyo Valentino; *
*
*
*
Defendants. *

**DEFENDANTS' MOTION TO STRIKE OR, IN THE ALTERNATIVE,
MOTION TO DISMISS OR STAY**

I. Introduction.

The subject matter of this action is being litigated in federal court. See 1290 Clothing Co, LLC v. Cobb County, et al., Case No. 1:20-cv-04811-JPB (N.D. Ga. filed Nov. 26, 2020) ("the Federal Action"). By filing this action seeking "injunctive relief," the County is rather transparently attempting to prevent Tokyo from litigating a pending case in Tokyo's chosen forum, i.e., federal court. The Court should dismiss this proceeding, or, at least, stay it pending resolution of the Federal Action. And because the County is attempting to punish Tokyo's exercise of constitutional rights of petition and free speech by tying up its resources and driving up the costs of litigation, the Court should strike the complaint under O.C.G.A. § 9-11-

11.1.

II. Background.

1290 Clothing Co LLC d/b/a Tokyo Valentino ("Tokyo") operates a retail store that sells, among other items, devices which are designed to stimulate human genitalia. In addition to displaying and selling these non-media items, Tokyo advertises, stocks, and displays sexually explicit media ("the Media"). The Media (including DVDs and magazines) displayed and sold at Tokyo is non-obscene, constitutionally-protected erotic speech. Tokyo has taken great care to compile and isolate the Media in its store.

Tokyo applied for and obtained its business license -- referred to as an Occupation Tax Certificate ("OTC") -- on or about March 2, 2020.

Tokyo opened for business on or about June 9, 2020.

On or about June 10, 2020, counsel for Tokyo wrote a letter to the County's Community Development Director, advising the County that Tokyo Valentino intended to sell a small quantity of adult media together with sexual devices (which were not then regulated by the County's Code). The letter further stated that the adult media would be kept below the 25% threshold set by the County's Code (i.e. below the limit that would otherwise trigger restrictions on adult

entertainment establishments) and that, with respect to sexual devices, “[w]e have reviewed the adult entertainment regulations for Cobb County and do not see any restrictions to doing so.”

On August 10, 2020, the County’s Business License Division Manager, Ellisia Webb, responded to Tokyo Valentino’s letter by requesting that Tokyo provide a list of its inventory along with sales tax reports and sales records.

On August 28, 2020, counsel for Tokyo Valentino voluntarily provided all of the requested information while noting that “the Fourth Amendment to the United States Constitution actually would require the County to seek and receive an Administrative Warrant in order to obtain the information and documents you desire.”

On September 8, 2020, Ms. Webb (Business License Division Manager) issued an administrative order suspending Tokyo Valentino’s OTC, alleging violations of four provisions of the County Code. The September 8 suspension order stated that a hearing would be held on September 22, 2020 before the Board of County Commissioners (“the Board”) to consider the permanent revocation of the certificate.

Tokyo moved to continue the hearing based on its need

to subpoena witnesses and to secure records from the Licensing Division in support of its defense. That motion to continue was granted informally and the hearing was rescheduled for October 27, 2020.

On or about September 10, 2020, Tokyo sent a lengthy open records request to Ms. Webb, seeking a variety of records including OTC applications filed by similar businesses, its past treatment of errors or omissions in license applications and information concerning prior suspension and revocation hearings.

The information sought in the open records request was crucial for Tokyo's defense against the revocation proceeding. The open records request was needed to prove several aspects of Tokyo's anticipated retaliation defense, which was premised on hostility to Tokyo's speech and the consequent violation of Tokyo's First Amendment rights:

(1) The records would show that the County has not previously used its licensing system to regulate businesses;

(2) The records would show that the County had never before sought a license suspension or revocation or that such proceedings were vanishingly rare and directed only to similarly disfavored businesses.

(3) The records would bolster Tokyo's claim that the

revocation of its OTC was pretextual and was pursued to censor Tokyo's speech rather than to prosecute any actual violation of the County's ordinances.

(4) The records would show that the County has never previously utilized its licensing ordinance to punish a business for statements made to the media and third parties regarding the business inventory and purpose.

The OTC revocation hearing was conducted by the Board on October 27, 2020. The Board denied Tokyo's motion to continue the hearing and proceeded to take evidence, deliberate, and issue a ruling.

At the conclusion of the October 27 revocation hearing, the Board voted unanimously to revoke Tokyo's OTC.

Tokyo followed state law procedures to perfect and sanction review of the Board's administrative order by way of a petition for writ of certiorari.

On November 26, 2020, Tokyo sued the County in the Federal Action. Three days later, on November 29, the County filed this case against Tokyo seeking injunctive relief.

III. Argument.

- A. The Court should strike the complaint because it violates Georgia's anti-SLAPP statute.

It is understood that "strategic lawsuits against public participation" or "SLAPPs" are "meritless lawsuits brought not to vindicate legally cognizable rights, but instead to deter or punish the exercise of constitutional rights of petition and free speech by tying up their target's resources and driving up the costs of litigation." Wilkes & McHugh, P.A. v. LTC Consulting, L.P., 306 Ga. 252, 257 (2019). Codified at O.C.G.A. § 9-11-11.1, Georgia's anti-SLAPP statute was enacted to encourage participation by the citizens of Georgia in matters of public significance and public interest through the exercise of their constitutional rights of petition and freedom of speech. The General Assembly of Georgia has declared that "the valid exercise of the constitutional rights of petition and freedom of speech should not be chilled through abuse of the judicial process." O.C.G.A. § 9-11-11.1(a).

To advance this goal, the anti-SLAPP statute covers "any claim for relief against a person or entity arising from any act of such person or entity which could reasonably be construed as an act in furtherance of the person's or entity's right of petition or free speech under the Constitution of the United States or the Constitution of the State of Georgia in connection with an issue of public

interest or concern[.]”

As used in the anti-SLAPP statute, the term “act in furtherance of the person’s or entity’s right of petition or free speech under the Constitution of the United States or the Constitution of the State of Georgia in connection with an issue of public interest or concern” includes:

- (1) Any written or oral statement or writing or petition made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law;
- (2) Any written or oral statement or writing or petition made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law;
- (3) Any written or oral statement or writing or petition made in a place open to the public or a public forum in connection with an issue of public interest or concern; or
- (4) Any other conduct in furtherance of the exercise of the constitutional right of petition or free speech in connection with a public issue or an issue of public concern.

O.C.G.A. § 9-11-11.1(c).

Tokyo is pursuing a petition for writ of certiorari as a supplemental claim in the Federal Action. It has this right under federal law. See 28 U.S.C. § 1367 (supplemental jurisdiction); City of Chicago et al. v. Int’l College of Surgeons, 522 U.S. 156 (1997) (exercising supplemental

jurisdiction over state-law petition for certiorari where petition shared common nucleus of operative facts with federal claims). Under Georgia law, of course, a petition for writ of certiorari operates as a supersedeas of the lower tribunal's decision. See O.C.G.A. § 5-4-19 ("The writ of certiorari, when granted in civil cases, shall operate as a supersedeas of the judgment until the final hearing in the superior court."). So, if the County's decision to revoke Tokyo's business license is stayed pending the certiorari proceeding, this state court complaint for injunctive relief necessarily seeks a remedy that is unavailable as a matter of law.

It is clear that the County's claims here were filed to punish Tokyo for (a) continuing to display and sell adult Media, and (b) appealing from the revocation of its business license, i.e., exercising its right to petition the courts. See Grogan v. City of Dawsonville, 395 Ga. 79 (2019) (recognizing that counterclaim could be subjected to Anti-SLAPP analysis). The Court should holding a hearing on this motion and strike the complaint filed by the County, awarding attorney's fees and costs to Tokyo.

- B. The Court should dismiss this proceeding under O.C.G.A. § 9-11-12(b)(6).

Because Tokyo is pursuing its state-law certiorari remedy in the Federal Action, it is premature for the County to sue Tokyo (never mind its officers and employees) and argue that the store is operating without an appropriate business license. For this reason, this action should be dismissed.

C. The Court should stay this proceeding.

Even if this Court declines to dismiss the County's action, it should nonetheless stay the case because the Federal Action is underway. In Georgia, trial courts have the inherent power to control proceedings, and with this comes the right to stay proceedings:

[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.

Bloomfield v. Liggett & Myers, Inc., 230 Ga. 484, 485 (1973)

(staying Georgia declaratory judgment action pending resolution of suit previously filed in New York by the defendants against the plaintiff) (internal citation omitted).

Georgia courts have the discretion to stay civil state

proceedings pending the resolution of related civil federal actions, particularly where the pending federal action involves the same subject matter and parties. See, e.g., Fludd v. Tiller, 184 Ga. App. 93 (1987). In determining whether to grant a stay in favor of a earlier-filed suit in a different jurisdiction, the court should weigh the competing interests of its own docket and judicial economy, as well as the economy of efforts of counsel and the parties. See Bloomfield, 230 Ga. 484 (state court has discretion to stay proceedings pending resolution of out-of state federal action, notwithstanding constitutional mandate that no person shall be deprived of right to prosecute or defend his own cause in any court of State); cf. Flagg Energy Dev. Corp. v. GMC, 223 Ga. App. 259, 261 (1996) (reversing a dismissal but authorizing a stay); Commercial Union Ins. Co. v. Hoover Treated Wood Prod., 202 Ga. App. 35 (1991) (trial court did not abuse discretion by staying proceedings on claims with identical parties and issues with an ongoing Florida action).

Like this case, the Federal Action pits Tokyo against the County, and the core issues are whether Tokyo enjoys a vested right to operate in its current format and, if not, whether the County's recent laws violate Tokyo's rights

under the federal and Georgia Constitutions.

The County apparently does not want to litigate the subject matter in federal court. By filing this case, the County no doubt is hoping to create a situation where the federal court elects to abstain from hearing the case, or where the federal court is hampered by a 'res judicata' argument should this Court enter a final judgment.

The threat of losing jurisdiction in the first forum can be a reason for enjoining proceedings. See Tennessee Farmers Mut. Ins. Co. v. Wheeler, 170 Ga. App. 380 (1984). In Tennessee Farmers the court held that:

just as a trial court will not permit a party to initiate a new petition for declaratory judgment when a proceeding invoking the same issues is already pending in another forum, a trial court is authorized to grant injunctive relief to prevent a party under its jurisdiction from proceeding with such declaratory action in another forum when a declaratory proceeding in which the same issues may be raised is already pending in the trial court.

Id. at 381.

If a trial court can enjoin a party from proceeding with a later-filed action in a foreign court when the same issues are pending in that foreign court, certainly the trial court can stay its own proceeding involving the same parties and subject matter as the previously-filed court

proceeding.

IV. Conclusion.

For all these reasons, Tokyo asks the Court to issue a Rule Nisi and schedule a hearing on the motion to strike, as well as consider dismissing or staying this action in light of the Federal Action.

This 1st day of February, 2021.

Respectfully submitted,

BY: /s/ Cary Wiggins
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CERTIFICATE OF SERVICE

I certify that I have this day served upon the below-listed person a copy of the foregoing DEFENDANTS' MOTION TO STRIKE OR, IN THE ALTERNATIVE, MOTION TO DISMISS OR STAY by sending via email to:

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This 1st day of February, 2021.

By: /s/ Cary S. Wiggins
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