IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

WINDHOVER, INC. AND JACQUELINE GRAY,	)	
Plaintiffs,	)	Cause No. 07-cv-881 ERW
v.	)	
CITY OF VALLEY PARK, MISSOURI,	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs Windhover, Inc. ("Windhover") and Jacqueline Gray ("Gray") submit this memorandum of law in support of their motion for summary judgment that Valley Park Ordinance No. 1722, as amended (hereafter "Ordinance No. 1722"), is invalid and unenforceable because Defendant City of Valley Park (the "City") is precluded by a prior state-court judgment from asserting its validity under Mo.R.Stat. § 79.470.

INTRODUCTION

The complexion of this case has entirely changed. The Landlord Ordinance (No. 1721) is now gone, having been repealed in response to the plaintiffs' lawsuits. The Employer Ordinance (No. 1722) has been inoperative and was written so that it would not become operative unless the permanent injunction in State Cause No. 06-CC-3802 ("*Reynolds*") is reversed by a higher court. The City made the Employer Ordinance contingent on the outcome of any appeals because it recognized that the Ordinance fell within the scope of the *Reynolds* judgment. With the Landlord Ordinance gone, and the Employer Ordinance inoperative, there was no case or

controversy. The City then tried to resurrect the controversy by amending the Employer Ordinance to make it immediately effective. But the fundamental issue remains: the *Reynolds* court has already held that the penalty provision of the Employer Ordinance violates Missouri law. The City is thus precluded from asserting in this Court that the Ordinance does not violate Missouri law. Plaintiffs seek to end this matter by moving for summary judgment on that basis.[1]

BACKGROUND

On July 17, 2006, the City enacted Ordinance No. 1708, which purported to penalize any landlord who permitted an "illegal" immigrant to occupy a dwelling unit and to penalize any business that employed or contracted an "illegal" immigrant to work. (Statement of Uncontroverted Material Facts ("SOUMF") ¶¶ 2-4.) On September 22, 2006, Plaintiff Gray and others filed a Petition for Declaratory and Injunctive Relief in the Circuit Court of Saint Louis County, alleging that Ordinance No. 1708 violated state and federal law. *Reynolds v. City of Valley Park*, (hereafter "*Reynolds*"), Cause No. 06-CC-3802. (SOUMF ¶ 5.) In particular, the Petition alleged that Ordinance No. 1708 violated Missouri statute Mo.R.S. § 79.470. (*Id.* ¶ 6.)

On September 26, 2006, the City enacted Ordinance No. 1715, which, among other things, removed an "English-only" provision that was part of Ordinance No. 1708, but nevertheless purported to penalize any landlord who leased property to an "illegal" immigrant or any business that employed an "unlawful worker." (SOUMF ¶¶ 8-12.) As to the penalty for employing an "unlawful worker," Ordinance No. 1715 provided that "[t]he Valley Park

[1] Plaintiffs do not hereby abandon their federal claims, and indeed believe they would be entitled to judgment that Ordinance No. 1722 is invalid under federal law. However, Plaintiffs believe that full discovery would be required before the Court would have an adequate record upon which to rule on the federal issues. Such discovery may be obviated if the Court grants the present Motion, which can be decided purely as a matter of law.

Enforcement Office shall suspend the business license of any business entity which fails to correct a violation of this section within three (3) business days after notification of the violation by the Valley Park Enforcement Office." (*Id.* ¶ 13.)

On September 27, 2006, Gray and the other plaintiffs filed an Amended Petition to challenge Ordinance No. 1715, and the Circuit Court entered a Temporary Restraining Order temporarily enjoining the enforcement of Ordinance No. 1715. (*Id.* ¶ 15.) Windhover was subsequently added as a plaintiff in *Reynolds.* (*Id.* ¶ 36.)

On February 14, 2007, during the pendency of *Reynolds,* the City enacted Ordinance No. 1721 and Ordinance No. 1722. (*Id.* ¶¶ 17, 19.) Ordinance No. 1721 was directed to landlords. (*Id.* ¶ 18.) It apparently was intended to replace those provisions of Ordinance No. 1715 addressed to landlords, and was in the form of what the City would call a "permit model" rather than a "penalty model." (*Id.* ¶ 20.) Ordinance No. 1722 was directed separately to business entities and remained in the form of a "penalty model." (*Id.* ¶ 20.) Sections Two, Three and Four of Ordinance No. 1722 were virtually identical to Sections Two, Three and Four of Ordinance No. 1715. (*Id.* ¶ 21.) Ordinance No. 1722 contained a penalty provision identical to that of Ordinance No. 1715: "The Valley Park Enforcement Office shall suspend the business license of any business entity which fails to correct a violation of this section within three (3) business days after notification of the violation by the Valley Park Enforcement Office." (*Id.* ¶¶ 22, 23.)

The substantive terms of Ordinance No. 1722, as amended by Ordinance No. 1724, would not become effective until "the termination of any restraining orders or injunctions now in force in Cause 06CC-3802, now pending in St. Louis County, Missouri, in Division 13." (*Id.* ¶ 24.)

After *Reynolds* was removed to this Court and then remanded, and after discovery was completed, the Circuit Court held a hearing on March 1, 2007. (*Id.* ¶ 25.) The purpose of the hearing was: (1) to determine whether the validity of Ordinance No. 1708 and Ordinance No. 1715 was still a live issue before the court, given the enactment of Ordinance No. 1721 and Ordinance No. 1722; and (2) to take argument and testimony on the plaintiffs' motion for judgment on the pleadings. (*Id.* ¶ 26.) Ordinance No. 1721 and Ordinance No. 1722 were expressly the subject of oral argument, testimony and consideration by the court. (*Id.* ¶ 27.) Ordinance No. 1722 was submitted to the court as an exhibit. (*Id.* ¶ 28.)

On March 12, 2007, the temporary restraining orders in *Reynolds* were made permanent. (*Id.* ¶ 32.) The Circuit Court issued its Findings of Fact, Conclusions of Law, Order and Judgment, permanently enjoining the enforcement of Ordinance No. 1708 and Ordinance No. 1715. (*Id*.) The court held:

> Without deciding whether Defendant City of Valley Park has effectively repealed Ordinance No. 1708 and Ordinance No. 1715, . . . the Court finds the new ordinances [Ordinance No. 1721 and Ordinance No. 1722] are "sufficiently similar" to the old ordinances in that they are aimed at the same people and conduct and include some of the same penalties. Given that the substance of the new ordinances is the same, the Court concludes the challenged conduct will continue.

(Id. ¶ 33.) The court further held that Ordinance No. 1715 conflicted with Mo.R.S. § 79.740 because it penalized a violation of its provisions by forcing a business to forego a business permit. (*Id.* ¶¶ 34, 35.) The Court held that type of penalty to be unauthorized under the governing law. (*Id.* ¶ 34.)

On March 14, 2007, Windhover and Gray initiated this action, asserting, among other things, that the penalty provision of Ordinance No. 1722 exceeded that authorized by Mo.R.S.

§ 79.740, and that the City was estopped from enforcing Ordinance No. 1722 under principles of *res judicata* and collateral estoppel. (*Id.* ¶¶ 38-40.)

On April 20, 2007, the City filed a notice of appeal with respect to *Reynolds* in the Missouri Court of Appeals. (*Id.* ¶ 44.) However, counsel for the City has suggested to this Court that the City will not challenge the *Reynolds* court's ruling that the penalty provision for businesses under Ordinance No. 1715 -- which is identical to the penalty provision of Ordinance No. 1722 -- conflicts with and is unauthorized by Mo.R.S. § 79.740, but will focus only on its argument that the state court matter was moot at the time the *Reynolds* court ruled. (*Id.* ¶ 45.)

Nevertheless, on August 20, 2007, the City enacted Ordinance No. 1736, which purports to make Ordinance No. 1722 immediately effective. (*Id.* ¶ 46.)[2] Because the state court has already ruled that the same penalty provision that is contained in Ordinance No. 1722 violates state law, Plaintiffs seek summary judgment that the City is precluded from attempting to enforce Ordinance No. 1722.[3]

ARGUMENT

Under Fed.R.Civ.P. 56(c), summary judgment is warranted if the Court finds that, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact and movants are entitled to judgment as a matter of law. *Grey v. City of Oak Grove*, 396 F.3d 1021, 1034 (8th Cir. 2005). "Where the unresolved issues are primarily

[2] Plaintiffs have filed a Motion for Leave to File a Second Amended Complaint to conform to federal pleading conventions (the matter was removed from state court on May 1, 2007), to address the most recent version of Ordinance No. 1722, and to add a claim under the Missouri Open Meetings Act ("Sunshine Law"). (Doc. No. 71.) The proposed Second Amended Complaint retains the claim at issue in the present Motion for Summary Judgment.

[3] As a result of the City's attempt to activate Ordinance No. 1722, the plaintiffs in *Reynolds,* including Windhover and Gray, have moved the *Reynolds* court for an order to show cause and for contempt, based on their position that Ordinance No. 1722 falls within the scope of the permanent injunction issued by the *Reynolds* court. (Doc. No. 66-4.) A hearing on the order to show cause is scheduled for September 20, 2007.

legal rather than factual, summary judgment is particularly appropriate." *Uhl v. Swanstrom,* 79 F.3d 751, 754 (8th Cir. 1996). Under the right circumstances, summary judgment "can be a tool of great utility in removing factually insubstantial cases from crowded dockets, freeing courts' time for those that really do raise genuine issues of material fact." *Mt. Pleasant v. Associated Elec. Coop. Inc.*, 838 F.2d 268, 273 (8th Cir. 1988).

Here, though Plaintiffs believe there are many material fact issues relating to their federal claims, the preclusion claim raises straightforward legal issues that should dispose of this matter without further burdening the Court's docket. Below, we first clarify what ordinance is actually at issue. We then demonstrate that Plaintiffs are entitled to a permanent injunction based on summary judgment that the enforcement of Ordinance No. 1722 is barred by a prior state-court judgment.

I. All Versions Of Ordinance No. 1722 Contain The Same Penalty Provision.

As Plaintiffs have discussed elsewhere, the City has created much confusion as to which version of Ordinance No. 1722, if any, has been properly enacted and is currently in effect. (*See, e.g.*, Plfs' Motion to Consolidate, Docket No. 38, at 4-6; Def's Amended Answer, Docket No. 43, Ex. D.) For the purpose of the narrow issues raised in Plaintiffs' Motion for Summary Judgment, however, resolution of that confusion is not required because, in all respects relevant to the present Motion, all versions of Ordinance No. 1722 are the same. Each version contains the same penalty provision as that contained in Ordinance No. 1715. (SOUMF ¶¶ 13, 22, 23, 46.) Accordingly, for present purposes, Plaintiffs will base the present Motion on Ordinance No. 1722 as amended by Ordinance No. 1736.

II. Plaintiffs are Entitled to Summary Judgment and a Permanent Injunction.

A permanent injunction is warranted where the plaintiff can show: (1) actual success on the merits; (2) that the plaintiff faces irreparable harm; (3) that the harm to the plaintiff outweighs any harm to others; and (4) that an injunction serves the public interest. *Bank One, Utah v. Guttau*, 190 F.3d 844, 847 (8th Cir. 1999) ("The standard for granting a permanent injunction is essentially the same as for a preliminary injunction, except that to obtain a permanent injunction the movant must attain success on the merits."); *Dataphase Sys., Inc. v. C.L. Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (preliminary injunction standards). Plaintiffs here meet those standards.

A. Plaintiffs Can Show Actual Success On the Merits Because They Are Entitled to Summary Judgment Under Preclusion Principles.

The underlying purpose of issue preclusion is to "promote judicial economy and finality of litigation." *Liberty Mutual Ins. Co. v. FAG Bearings Crop.*, 335 F.3d 752, 758 (8th Cir. 2003). "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the same parties, whether on the same or a different claim." *Id.* This Court should give the same preclusive effect to a prior judgment that would be required under Missouri law. "The Full Faith and Credit Act, 28 U.S.C. § 1738, originally enacted in 1790, ch. 11, 1 Stat. 122, requires the federal court to 'give the same preclusive effect to a state-court judgment as another court of that state would give.'" *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 293 (2005)(*quoting Parsons Steel Inc. v. First Alabama Bank*, 474 U.S. 518, 523 (1986)).

Under Missouri law, the doctrine of issue preclusion bars a party from raising an issue in a subsequent proceeding if: (1) the issue decided in the prior action was identical to the issue

raised in the current action; (2) the prior adjudication resulted in a judgment on the merits; (3) the party against whom issue preclusion is asserted was a party in the prior action; and (4) the party against whom issue preclusion is asserted had a full and fair opportunity to litigate the issue in the prior action. *State ex rel. Johns v. Kays,* 181 S.W.3d 565, 566 (Mo. 2006); *Woods v. Mehlville Chrysler-Plymouth, Inc.,* 198 S.W.3d 165, 168 (Mo.App. E.D. 2006). All four of those factors exist in this case.

First, it cannot be disputed that Plaintiffs and the City were both parties in *Reynolds,* St. Louis County Circuit Court Cause No. 06-CC-3801. (SOUMF (*Id.* ¶¶ 36, 37.)

Second, it cannot be disputed that the *Reynolds* court's ruling that the penalty provision in Ordinance No. 1715 relating to business entities was invalid under Missouri law resulted in and was essential to a final judgment on the merits. (*Id.* ¶¶ 31, 35.) The court entered its final judgment on the merits of that issue, finding, among other things, that the imposition of the loss of a business permit as a penalty for violation of an ordinance in a fourth-class city is not authorized by the governing state statute. (*Id.* ¶¶ 34, 35.) In addition, the court held "[t]he monetary value of such penalties exceeds the $500 maximum fine authorized by Missouri law for an ordinance violation under Mo.R.Stat. § 79.470." (*Id.* ¶ 34.). The court further held that because the penalty provisions were thus invalid, the remaining provisions were "ineffectual" and, accordingly, "void in their entirety." (*Id.* ¶ 35.)

Third, it cannot be disputed that the City had a full and fair opportunity to litigate the issue. The issue of whether Missouri law authorized the City to impose the indefinite suspension of a business license for a violation of the ordinance was fully briefed and argued before the *Reynolds* court.

The only conceivable dispute, one that would be without merit, is whether the issue ruled on by the *Reynolds* court and the issue presented here are identical. The penalty provision in Ordinance No. 1722 is identical to the penalty provision in Ordinance No. 1715, and therefore the issue of whether it violates Mo.R.Stat. § 79.470 is identical. (SOUMF at ¶¶ 13, 22, 23.) In each of its permutations, Ordinance No. 1722 has the same penalty provision that the court found rendered Ordinance No. 1715 invalid. (*Id.*) In other words, precisely the same flaw that was fatal to Ordinance No. 1715 is present in Ordinance No. 1722. Indeed, Ordinance No. 1722 incorporates wholesale the substantive provisions of the business-entity section of Ordinance No. 1715. (*Id.* ¶¶ 21, 29, 30.) Surely, the City cannot circumvent a court judgment by adopting the same ordinance, containing the same unlawful penalty provision, and assigning it a new ordinance number. *See JBK, Inc. v. City of Kansas City, Mo.*, 641 F. Supp. 893, 899 (W.D. Mo. 1986) (subsequent constitutional challenges to newly enacted ordinance barred by *res judicata* in the absence of material changes in the ordinance previously adjudicated). None of the changes to (or versions of) Ordinance No. 1722 effectuated a material change to the employer provisions of Ordinance No. 1715 in a way that addresses the fatal flaws identified by the Missouri court.

In fact, the issue of whether Ordinance No. 1722 and Ordinance No. 1715 are the same was squarely before the *Reynolds* court, and it found that they were the same. The City had argued vigorously that the enactment of Ordinance No. 1721 and Ordinance No. 1722 mooted the case with respect to Ordinance No. 1708 and Ordinance No. 1715. The court held otherwise, finding that Ordinance No. 1722 was " 'sufficiently similar' to the old ordinances in that [it is] directed at the same class of people and conduct and include[s] some of the same penalties."

(SOUMF ¶ 33.) The court further held that, "[g]iven that the substance of the new ordinances is the same, the Court concludes the challenged conduct will continue." (*Id.*)[4]

Indeed, at the March 1, 2007 hearing in *Reynolds*, the City's attorneys admitted that, as Plaintiffs assert here, Ordinance No. 1722's penalty provisions are identical to the penalty provisions of Ordinances No. 1708 and 1715 that the state court held rendered the ordinance unlawful. The City Attorney, testifying under oath about the drafting process for the ordinance he helped author, agreed that the "substance" of Ordinance No. 1722 was "virtually identical" to the substance of Ordinance No. 1715. (SOUMF ¶ 29.) Counsel for City argued that the new housing ordinance at issue in *Reynolds* (Ordinance No. 1721) was substantially different than its predecessor provisions in Ordinance No. 1715. (*Id.*) In contrast, in describing the identity of the employment provisions of Ordinance Nos. 1708 and 1715 with Ordinance No. 1722, counsel admitted, "The employment provisions have not been changed in any of the statutes[,] and I would not represent to the court that there is a substantial change in the employment provisions." (*Id.* ¶ 30.)

Accordingly, there is no good faith argument that the issue giving rise to the invalidation of Ordinance No. 1715 in *Reynolds* is not identical to the issue raised here.

In its own summary judgment papers, the City nevertheless argues that Ordinance No. 1715 and Ordinance No. 1722 are different because the latter adds a Section Five dealing with "Implementation and Process." (Doc. No. 54 at 40.) But the addition of those provisions is not material to the issue of whether the penalty provisions violate Missouri law. Ordinance No. 1722 adopts wholesale the business provisions of Ordinance No. 1715, which the *Reynolds* court

[4] It is that ruling that the City's counsel has said will be the primary focus of its appeal in the Missouri Court of Appeals. (SOUMF. ¶ 45.)

held invalid in its entirety based on the invalid penalty provision. The additional implementation procedures did nothing to cure the infirmities that the *Reynolds* court identified.

The City further asserts that "*none* of the numerous provisions in Ordinances 1708 and 1715 that the *Reynolds* Court found fault with are present in Ordinance 1722." *Id.* (emphasis in original). It is difficult to fathom how the City could make that statement. As shown above, the penalty provision that the *Reynolds* court found fault with appears verbatim in both Ordinance No. 1715 and Ordinance No. 1722.[5]

In any event, the crux of the City's argument is that it disagrees with the *Reynolds* court that Ordinance No. 1715 and Ordinance No. 1722 are substantively the same. The place to lodge that disagreement is not in this Court, but in the Missouri Court of Appeals.

The City further argues that it can avoid preclusion where there has been "a change in controlling facts or legal princip[les.]" (Doc. No. 54 at 40.) But that potential exception to the preclusion doctrine is not applicable here. The two Supreme Court decisions that the City relies on -- *United States v. Stauffer Chem. Co.*, 464 U.S. 165 (1984) and *Montana v. United States*, 440 U.S. 147 (1979) -- found that issue preclusion *did* apply in the cases before the Court because any changes in facts were not material to the prior judgment. Indeed, in another case cited by the City, *Liberty Mutual*, the Eight Circuit rejected an argument that preclusion did not apply because of changed circumstances, holding that, at minimum, the change must have occurred between the first and second actions. 335 F.3d at 761. Here, there has been no change in the governing law, and the language that was added by Ordinance No. 1722 -- even if it were

[5] The *Reynolds* court's March 12, 2007 Order does reference language from Ordinance No. 1708 that the aiding or abetting of "illegal aliens" or "illegal immigration" would result in the suspension of a business permit for "not less than five (5) years." (SOUMF ¶ 34.) However, that language does not appear in Ordinance No. 1715 and thus was not material to the court's holding that the suspension of a business permit by a Class 4 municipality under these circumstances is not authorized under Missouri law.

material to the *Reynolds* court judgment (and it is not) -- was added with the enactment of Ordinance No. 1722 on February 14, 2007. The new language was therefore before the *Reynolds* court when it heard the case and decided that Ordinance No. 1722 and the prior ordinances were substantively the same, and that the penalty provision that was included in both ordinances violated Missouri law.

B. Plaintiffs Satisfy the Remaining Preliminary Injunction Considerations.

Plaintiffs will face irreparable harm if Ordinance No. 1722 is not enjoined for the reasons set forth in Plaintiffs' Motion for Preliminary Injunction, which is incorporated herein by reference. (Doc. No. 1-2, at 17-19.)

The harm to Plaintiffs in the absence of an injunction outweighs any harm to others if an injunction is entered for the reasons set forth in Plaintiffs' Motion for Preliminary Injunction (Doc. No. 1-2, at 19) and Plaintiffs' Reply Memorandum in Support of Preliminary Injunction (Doc. No. 42, at 19-22) which are incorporated herein by reference.

Issuance of an injunction serves the public interest for the reason explained in Plaintiffs' Motion for Preliminary Injunction (Doc. No. 1-2, at 19-20) and Plaintiffs' Reply Memorandum in Support of Preliminary Injunction (Doc. No. 42, at 19-20), which are incorporated herein by reference.

CONCLUSION

As this Court observed in remanding the *Reynolds* case to state court, "[i]t is state courts which have the first and the last word as to the meaning of state statutes, . . . we have disapproved anticipatory declarations as to state regulatory statutes . . . ." *Reynolds v. City of Valley Park*, Case No. 06 C 01487, 2006 U.S. Dist. LEXIS 83210 *27 (E.D. Mo. Nov. 15, 2006) (quoting *Pubic Service Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 247 (1952)). This Court

further observed "[i]t would not be the place of this Court, through original or removal jurisdiction, to declare a state statute unconstitutional or in violation of federal law, before the statute had been enforced against any individual, and before the state court had had the opportunity to address the legality of the statute." *Id.* Here, the Missouri trial court has already ruled that the municipal ordinance in question, or at least the relevant parts of it, are illegal under state law. That ruling is conclusive in this Court. It is for the Missouri Court of Appeals to determine whether that ruling is correct.

For the foregoing reasons, Plaintiffs respectfully request that this Court enter an order granting summary judgment that the Defendant is estopped from asserting in this Court that Ordinance No. 1722, as amended by Ordinance No. 1736, is valid under state law.

Dated: August 29, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served on Defendant's counsel of record, listed below, by operation of the Court's ECF/CM system on August 29, 2007.

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