

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

1-11-3814

---

IN THE APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

---

CSWS, L.L.C.,	)
	) Appeal from
Plaintiff-Appellant,	) the Circuit Court
	) of Cook County
	)
v.	) 09 CH 34846
	)
VILLAGE OF BEDFORD PARK, an Illinois Municipal Corporation, LISA	) Honorable
MADIGAN, Attorney General of the State of Illinois, and ANITA	) Sophia H. Hall,
ALVAREZ, State's Attorney of Cook County,	) Judge Presiding
	)
Defendants-Appellants.	)

---

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.  
Justices Howse and Taylor concurred in the judgment.

**O R D E R**

HELD: Where business owner failed to allege actual controversy between it and State and county officials regarding new State law, those officials were not necessary parties; however, where business owner alleged municipality was enforcing an unconstitutional law, court should not have assumed law was constitutional and should not have dismissed municipal defendant.

¶ 1 Plaintiff CSWS, L.L.C., has been in and out of federal and state courts since 2005, trying to obtain zoning variances and licenses needed to operate a striptease club within the village limits of defendant Village of Bedford Park, Illinois. We will refer to the plaintiff as

1-11-3814

CSWS and to this defendant as the Village. CSWS now appeals from an order of the circuit court of Cook County dismissing CSWS' latest pleading against the Village; Lisa Madigan, in her capacity as the Attorney General of the State of Illinois; and Anita Alvarez, in her capacity as the State's Attorney of Cook County pursuant to sections 2-615 and 2-619(a)(9) of the Code of Civil Procedure. 735 ILCS 5/2-615, 2-619(a)(9) (West 2010). CSWS contends the three defendants are proper parties to its corrected third amended complaint and that we should reinstate the pleading asserting violations of CSWS' contractual and constitutional rights to open an "adult entertainment facility" in the suburban community of Bedford Park. 65 ILCS 5/11-5-1.5 (West 2010).

¶ 2 CSWS pled the following. In May 2004, CSWS bought commercial property in Bedford Park at 5555 West 70th Place, with the intention of opening and operating a restaurant and stripclub in what was then primarily an industrial area. Later in the year, the Village denied CSWS' applications for zoning and licensing relief to offer live erotic entertainment at that location. CSWS sued the Village in federal court but reached a settlement agreement entitling CSWS to open and operate an adult entertainment business under certain conditions, including the payment of an annual licensing fee and restrictions on conduct in and around the facility and the content of advertising. "In reliance on that Agreement," CSWS voluntarily dismissed its federal suit and "expended in excess of One Million Dollars \*\*\* preparing to open and operate its business." In 2007, however, the Illinois General Assembly enacted a law forbidding new adult entertainment establishments from opening if they were located "within one mile of the property boundaries of any school, day care center, cemetery, public park, forest preserve, public

1-11-3814

housing, or place of religious worship located in that area of Cook County outside the City of Chicago." 55 ILCS 5/5-1097.5 (West 2008); 65 ILCS 5/11-5-1.5 (West 2008). This law had been in effect for about four months when CSWS reapplied in December 2007 for licenses to open its business. CSWS' property came within the scope of the new law, so the Village declined to grant the licenses. In response, CSWS filed suit against the Village and a separate action against the Illinois and Cook County officials in the United States District Court for the Northern District of Illinois, seeking declarations that the new law was unconstitutional and to enjoin its enforcement. Both suits were dismissed. CSWS then filed the instant suit in Illinois state court in September 2009, initially naming the Village as the only defendant, and claiming the law violated both the federal and state constitutions. The circuit court, however, granted the Village's motion to dismiss the federal claims on grounds that they had already been dismissed in federal court.

¶ 3 CSWS then filed an amended complaint against the Village in June 2010 and a second amended complaint against the Village in January 2011, this time seeking declaratory judgment and injunctive relief based on its state constitutional rights and seeking damages for breach of the settlement agreement. CSWS' constitutional allegations included that the Village's refusal to grant the necessary licensing was a prior restraint on free speech and that the statute itself was invalid because its definition of "adult business" was both vague and overbroad; the one-mile buffer zone did not serve a substantial or significant governmental purpose, was not narrowly tailored, was not the least restrictive means to regulate adult communicative businesses, and was a content-based, prior restraint on free speech; the predominant purpose of the law was

1-11-3814

to censor free speech, the law was not based on reasonable information that the stripclub would cause "adverse secondary effects" that would justify the one-mile buffer zone; the law was a "zone out" that deprived CSWS of the only location outside of Chicago but within Cook County where it could legally offer erotic entertainment; and the law failed to provide an alternative location for an adult entertainment venue. Also, the law on its face and as applied by the Village violated the free speech clause of section 4 of Article I of the Illinois constitution; deprived CSWS of its rights to due process guaranteed by section 2 of Article I of the State constitution; was an *ex post facto* law that impaired the obligation of contracts, in violation of section 16 of Article I; and was special legislation, in violation of section 13 of Article I of the State constitution. Based on these allegations, CSWS sought the licenses it needed to open for business at 5555 West 70th Place and the award of no less than \$1 million in damages for its attorney fees, litigation costs, and the expenditures it made in reliance on the settlement agreement, including its mortgage payment, real estate tax obligation, property insurance coverage, and provision for security staff.

¶ 4 CSWS motioned for summary judgment and the Village responded in part with studies documenting the adverse secondary effects caused by sexually-oriented businesses and the propriety of buffer zones to reduce the secondary effects on schools, churches, and other protected properties. The circuit court denied CSWS' motion for summary judgment, holding in part:

"Dispositive of this case is the Village's second argument that it has not breached the Settlement Agreement. The Village argues that CSWS' rights under

the Settlement Agreement were limited pursuant to its terms, and CSWS has no basis to to complain to the Village about the bargain it made.

The Settlement Agreement explicitly states that CSWS 'shall conform to all federal, state and local laws, ordinances and codes including, but not limited to building and fire codes. In the event any such law, ordinance or code is amended in the future, CSWS will comply with the same.' This clause is similar to the force majeure clause referenced by the court in \*\*\* [*Horwitz-Matthews, Inc., v. City of Chicago*, 78 F. 3d 1248, 1251 (7th Cir. 1996)]. CSWS agreed to conform to any amendments in the law in the future. Accordingly, CSWS' property rights under the Settlement Agreement are limited by the terms of the Settlement Agreement.

The decision herein finding that the Settlement Agreement was not breached because CSWS agreed to abide by future amendments to applicable law disposes of the case without reaching the constitutional issue raised by CSWS as to the constitutionality of the statute. *Hearne v. Illinois State Board of Education*, 185 Ill. 2d 443, 454 [706 N.E.2d 886, 891] (1999)."

¶ 5 After this ruling, CSWS sought and received leave to file a third amended complaint, and then a corrected third amended complaint, adding the Illinois Attorney General and Cook County State's Attorney as parties.

¶ 6 The allegations against the Village were essentially the same as the allegations in the second amended complaint. The circuit court granted the Village's motion to dismiss the

1-11-3814

corrected third amended complaint for the same reasons the court had denied CSWS' motion for summary judgment on the second amended complaint. See 735 ILCS 5/2-619(a)(9) (West 2010) (providing for the dismissal of an action where an affirmative matter defeats the claim); *Gamboa v. Alvarado*, 407 Ill. App. 3d 70, 74, 941 N.E.2d 1012, 1016 (2011) (indicating a court will not enforce a contract that violates law or public policy and that illegality of contract is an affirmative matter within the meaning of section 2-619(a)(9)); *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116, 619 N.E.2d 732, 735 (1993) (indicating a section 2-619(a)(9) motion to dismiss is similar to a motion for summary judgment).

¶ 7 The circuit court granted the State's Attorney's motion to dismiss the pleading because a) CSWS failed to allege that the government official has prosecuted or threatened to prosecute anyone under the statute and b) nothing in the statute or the State's Attorney's general duties to enforce state laws requires that she defend the State and its legislative actions. The circuit court granted the Attorney General's motion to dismiss the pleading on grounds that (1) CSWS failed to allege that the Attorney General ever enforced or threatened to enforce the statute against CSWS, (2) section 11-5-1.5 of the statute at issue does not grant enforcement power to the Attorney General or include a criminal penalty, and (c) the Attorney General has no duty to address the constitutionality of every statute challenged. Thus, CSWS had failed to allege a justiciable actual controversy between itself and either of the government officials. See 735 ILCS 2-615 (West 2010) (providing for the dismissal of a complaint which is factually deficient).

¶ 8 CSWS now appeals from the dismissal orders. Its main arguments are that the Attorney General of Illinois and the State's Attorney of Cook County are necessary parties and

1-11-3814

that the court must determine whether the statute is valid and entitles the Village to withhold the licenses that CSWS needs to open its door to customers.

¶ 9 We apply the *de novo* standard to a trial court's order dismissing a complaint under either section 2-615 or section 2-619 of the Code of Civil Procedure. *Northern Trust Co. v. County of Lake*, 353 Ill. App. 3d 268, 274, 818 N.E.2d 389, 394 (2004). The elements of a declaratory judgment action consist of: (1) a plaintiff having a legal, tangible interest; (2) a defendant having an opposing interest; and (3) the existence of an actual controversy between the parties concerning those interests. *Northern Trust Co.*, 353 Ill. App. 3d at 274, 818 N.E.2d at 394; 735 ILCS 5/2-701 (West 2010) (actual controversies may be addressed by declaratory judgment actions). "An actual controversy exists when 'a concrete dispute admitting of an immediate and definitive determination of the parties' rights, the resolution of which will aid in the termination of the controversy or some part thereof.'" *Northern Trust Co.*, 353 Ill. App. 3d 268, 818 N.E.2d at 394 (quoting *Howlett v. Scott*, 69 Ill. 2d 135, 141-42, 370 N.E.2d 1036, 1038 (2003)).

¶ 10 According to CSWS, the Attorney General is a necessary party because only the Attorney General has the authority to present argument on behalf of the State regarding the constitutionality of an Illinois statute. *Spinelli v. Immanuel Lutheran Evangelical Congregation, Inc.*, 118 Ill. 2d 389, 515 N.E. 1222, 1227 (1987). Further, the Attorney General's argument that the statute does not give her authority to enforce it is simply wrong, because the Attorney General has inherent common law powers to enforce any statute on behalf of the State. CSWS cites *People of the State of Illinois v. Buffalo Confectionary Co.*, 78 Ill. 2d 447, 453, 401 N.E.2d

1-11-3814

546, 549 (1980) for the proposition that the Attorney General's common law powers and duties "include the initiation and prosecution of litigation on behalf of the people," and *Lyons v. Ryan*, 201 Ill. 2d 529, 780 N.E.2d 1098 (2002) for the proposition that the legislature may not authorize any one else to act on behalf of the State in litigation where the State is the real party at interest. CSWS concludes that not only does the Attorney General have the authority to speak on behalf of the State in regard to the validity of statutes, but she has a duty to do so, and yet has "cavalierly shirked her constitutional responsibilities" by declaring that she has done nothing to enforce the statute against CSWS.

¶ 11 The flaw in this argument is that CSWS challenged section 11-5-1.5 after the Village refused to issue licenses due to that statute, the Attorney General had nothing to do with the Village's refusal, and the Attorney General has never prosecuted or threatened to prosecute CSWS under the statute. As explained in *Quinones*, the proper defendant to name in a constitutional challenge is the person who is enforcing it against the plaintiff. *Quinones v. City of Evanston, Illinois*, 58 F.3d 275 (7th Cir. 1995). In *Quinones*, a firefighter sued the City of Evanston alleging that its compliance with an Illinois law violated a federal law. *Quinones*, 58 F. 3d at 277. The City of Evanston insisted that the State of Illinois was the only proper party to the firefighter's action. *Quinones*, 58 F. 3d at 277. The court rejected that view, reasoning:

"A person aggrieved by the application of a legal rule does not sue the rule *maker* – Congress, the President, the United States, a state, a state's legislature, the judge who announced the principle of common law. He sues the person whose acts hurt him. If Buyer and Seller have a dispute that is governed by the Uniform

1-11-3814

Commercial Code, Buyer does not sue the state that enacted the UCC; Buyer sues Seller, which may justify its conduct by appealing to the UCC. If Bank believes that a statute administered by the Federal Reserve is constitutionally invalid, Bank sues the person claiming rights under the statute (or, conceivably, the Fed, if it has taken adverse action based on the statute); Bank does not sue Congress. Every day courts consider the validity and application of statutes in cases between private parties; that is why \*\*\* [certain statutes] provide for notice to state and federal governments, so that they may intervene or appear as *amici curiae* to defend their handiwork." *Quinones*, 58 F.3d at 277.

When "a city carries out a state law," the proper defendant is the city. *Quinones*, 58 F. 3d 275. Accord, *Illinois Press Ass'n v. Ryan*, 195 Ill. 2d 63, 67, 743 N.E.2d 568 (2001) (applying *Quinones* and finding Illinois Governor was not a proper defendant to defend challenged legislation); *Sherman v. Township High School District 214*, 404 Ill. App. 3d 1101, 1108, 937 N.E.2d 286 (2010) (indicating school district was enforcing Illinois statute when it charged the student a fee, the school district's actions were alleged to have "hurt" the student, the school district was the proper defendant).

¶ 12 This authority leads us to conclude that the Village is the proper defendant. It also leads us to conclude that the Attorney General has no part in this action, she has not caused any injury to CSWS, and there is no controversy between CSWS and the Attorney General. Thus, CSWS' pleading does not state the elements of declaratory judgment claim against the Attorney General. Moreover, CSWS pled that the grant of injunctive relief against the Attorney General

1-11-3814

was warranted only if CSWS' declaratory judgment count was successful. For these reasons, we affirm the dismissal of the declaratory judgment and injunctive relief allegations directed at the Attorney General. (The breach of contract count was directed at the Village only.)

¶ 13 Similarly, CSWS contends the State's Attorney of Cook County is a necessary party because the powers and duties of this governmental office include the defense of "all actions and proceedings brought against his [or her] county, or against any county or State officer, in his [or her] official capacity, within his [or her] county." 55 ILCS 5/3-9005(4) (West 2010). Her other statutory duties include to give her opinion "to any county officer in his county, upon any question or law relating to any criminal or other matter, in which the people or the county may be concerned," and to "assist the attorney general whenever it may be necessary." 55 ILCS 5/3-9005(7), (8) (West 2010). CSWS concludes the State's Attorney must be here so that the court may properly determine who is responsible for defending the statute at issue.

¶ 14 We disagree with CSWS, because the State's Attorney has taken no part in the enforcement of the statute against CSWS and she has not threatened to take any enforcement action against CSWS. For the reasons stated above regarding the Attorney General, we conclude CSWS has failed to plead a cause of action for declaratory judgment or injunctive relief against the State's Attorney. The dismissal of the declaratory judgment and injunctive relief allegations directed at the State's Attorney is affirmed.

¶ 15 Our final consideration is whether the circuit court erred by dismissing the allegations against the Village. CSWS presents a host of constitutional arguments, none of which were addressed in the circuit court because the court concluded it was unnecessary to

1-11-3814

reach those claims. This was error.

¶ 16 The circuit court based its dismissal of the Village on *Horwitz-Matthews*, which is not applicable here for the following reasons. In *Horwitz-Matthews*, the City of Chicago entered into a real estate contract which included what is known as a force majeure clause, entitling the municipality to not perform the contract if certain conditions occurred, but not excusing the municipality from paying damages for breach of contract. *Horwitz-Matthews*, 78 F.3d 1248. There was no dispute that a stated condition subsequently occurred and that the City was not required to perform the contract. *Horwitz-Matthews*, 78 F.3d. 1248 (indicating city council announced it was terminating the contract). The only question before court was whether the City's refusal to perform was a constitutional violation as well as a breach of contract. *Horwitz-Matthews*, 78 F.3d at 1249 (indicating the trial court dismissed a constitutional count for failure to state a claim but retained a supplemental claim for breach of contract). The appellate court affirmed the dismissal of the constitutional claim, reasoning:

"when a state [or municipality] repudiates a contract to which it is a party it is doing nothing different from what a private party does when the party repudiates a contract: it is committing a breach of contract. It would be absurd to turn every breach of contract by a state or municipality into a violation of the federal Constitution." *Hortwitz-Matthews*, 78 F.3d at 1250.

¶ 17 In contrast here, however, there is a dispute as to whether an event has occurred which entitles the municipality to repudiate its settlement agreement with CSWS: CSWS has disputed the validity of the new legislation. CSWS has alleged, among other things, that the

1-11-3814

statutory language is impermissably vague and overbroad, that the statute is not narrowly tailored, and that the new terms restrain a form of communication that is protected by the State constitution. CSWS has further alleged the statute "is unconstitutional on its face for all the reasons stated above and \*\*\* [the Village] has unconstitutionally applied this statute to plaintiff CSWS, in retaliation for Plaintiff CSWS' desire to disseminate adult-oriented entertainment." Also, "There is an actual, *bona fide* controversy \*\*\* in that Plaintiff CSWS contends that the subject statute which forms the basis for \*\*\* [the Village's] refusal to allow it [(CSWS)] to operate its adult entertainment business is unconstitutional on its face, and as applied \*\*\* [but the Village] contends that its actions and the statute \*\*\* are binding \*\*\* and force it to refuse to allow Plaintiff to operate its business." And, finally, "CSWS is being prevented from opening and operating its lawful business, pursuant to an agreement entered into between it and [the Village]."

¶ 18 These are allegations that the new law is not enforceable and does not implicate the contract clause indicating CSWS must "conform to all federal, state and local laws, ordinances and codes [and their amendments]." We read this contract clause to mean that CSWS agreed to comply with any *valid* laws, ordinances, codes, and their amendments. In our opinion, the circuit court erred by concluding, "CSWS agreed to conform to *any* amendments in the law in the future" [(emphasis supplied)] and "the Settlement Agreement was not breached because CSWS agreed to abide by future amendments to applicable law." This was error because CSWS did not agree to conform to unconstitutional legislation and CSWS did not contract away its right to assert its constitutional rights. The factual premise of the circuit court's analysis is incorrect.

1-11-3814

¶ 19 The circuit court's reference to *Hearne*, 185 Ill. 2d at 454, 706 N.E.2d at 891, was an acknowledgment of the rule that a court should not declare statutes unconstitutional unless absolutely necessary and should decide cases on alternative, nonconstitutional grounds whenever possible. It is "well established that questions regarding the constitutionality of statutes should be considered 'only where essential to the disposition of a case, *i.e.*, where the case cannot be determined on other grounds.'" *Hearne*, 185 Ill. 2d at 454, 706 N.E.2d at 891 (quoting *Bonaguro v. County Officers Electoral Board*, 158 Ill. 2d 391, 396, 634 N.E.2d 712, 714 (1994)). But this principle did not permit the circuit court to assume the subject legislation was constitutional and enforceable in this instance. The motion to dismiss the Village as a defendant to CSWS' corrected third amended complaint required the court to consider the merits of CSWS' constitutional arguments before determining the effect of the contract clause. This case is an exception to the general rule discussed in *Hearne*.

¶ 20 Moreover, the general rule that all statutes are presumed to be constitutional is a principle that entitles individuals or entities to rely on State statutes when making decisions and it is a starting point for a court's analysis of a constitutional challenge. *Perlstein v. Wolk*, 218 Ill. 2d 448, 459, 844 N.E.2d 923, 929 (2006) (when the General Assembly enacts legislation, that legislation "is presumptively valid"); *Beaubien v. Ryan*, 198 Ill. 2d 294, 298, 762 N.E.2d 501, 505 (2001) (statutory enactments are "cloaked with the presumption of validity"); *Flynn v. Ryan*, 199 Ill. 2d 430, 436, 771 N.E.2d 414, 418 (2002) (the party challenging the constitutionality of a statute bears the burden of rebutting the presumption that the law is valid); *Board of Commissioners of the Wood Dale Public Library District v. County of Du Page*, 103 Ill. 2d 422,

1-11-3814

429, 469 N.E.2d 1370, 1373 (1984) (local government officials, like individuals, are entitled to rely on legislation when making decisions and shaping their conduct). It is not a principle that authorized the circuit court to disregard CSWS' allegations and summarily enforce what is alleged to be an unconstitutional statute. See *Perlstein*, 218 Ill. 2d at 459, 844 N.E.2d at 929 ("Individuals are not required or empowered to determine whether a law is constitutional; that duty belongs to the judiciary.")

¶ 21 We have no opinion about the factual sufficiency of CSWS' allegations or the persuasiveness of its constitutional arguments about its claims against the Village. We are certain, however, that the circuit court's assessment of the facts and the relevance of *Hortwitz-Matthews* and *Hearne* was in error. Therefore, we vacate the court's dismissal of the allegations against the Village and remand the cause as to the Village for further proceedings consistent with this order.

¶ 22 Affirmed in part; vacated and remanded in part.