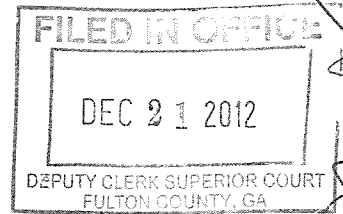


COPY

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA



LARRY MILLER and
STANLEY HAMBRICK,
Plaintiffs,

v.

CITY OF ATLANTA,
Defendant.

CIVIL ACTION FILE NO:

2011CV203707

ORDER

This matter came before the Court for oral argument on both Plaintiffs' and Defendant's motions for summary judgment. Having considered the record, briefs and arguments of parties, and applicable law, the Court hereby GRANTS PLAINTIFFS' motion for summary judgment and DENIES Defendant's motion for summary judgment.

This action arises from a public vending management program initiated by the City of Atlanta (the "City"). In order to achieve certain goals regarding the City's vending program, the City passed City Ordinance No. 08-O-1220 (the "Ordinance") and City Resolution 08-R-1209 (the "Resolution"). Pursuant to the Ordinance and Resolution, the City entered into a contract entitled FC-600700095, Public Vending Management Program (the "Contract", together with the Ordinance and the Resolution, the "Vending Documents") with non-party U.K. – LaSalle, LLC ("LaSalle"). Plaintiffs, who are vendors in the City, filed the current action, alleging that the Vending Documents exceed the City's powers under its charter and violate the anti-monopoly, non-delegation and due process provisions of the Georgia Constitution.

The City is a municipal corporation and "[m]unicipal corporations are creations of the state and possess only those powers that have been expressly or impliedly granted to them. The source of their power is the delegation of power from the state, manifested in the constitution, state laws, and the municipal charter." Porter v. City of Atlanta, 259 Ga. 526 (1989); See also

Ga. Const. art. IX, § 2, ¶ II. The purpose of such delegation to allow for the handling of “matters pertaining to the municipalities...without the necessity of action by the General Assembly.” Ga. Const. art. IX, § 2, ¶ II.

However, “[a]llocations of power from the state to local governments are strictly construed,” and the Georgia courts have “refute[d] any notion that municipalities had the green light to write their own tickets and assume such powers as they might choose to exercise.” Porter v. City of Atlanta, 259 Ga. 526 (1989); Phillips v. City of Atlanta, 210 Ga. 72 (1953). When it comes to the creation of an exclusive franchise, the City’s discretion is even narrower: “[t]he prevailing rule is that unless the power is expressly conferred by the legislature a municipal corporation cannot grant to any person, firm or corporation an exclusive privilege or monopoly.” Macon Ambulance Service, Inc. v. Snow Properties, Inc., 218 Ga. 262 (1962).

The City’s Charter (the “Charter”) does not contain language expressly granting the City the power to create an exclusive franchise. Therefore, the City does not have authority to do so. See Macon Ambulance Service, Inc., 218 at 265-266. While the City concedes that the Charter does not authorize the creation of an exclusive franchise, it asserts that the Vending Documents have not created such an exclusive franchise.

The Ordinance adopts amendments to the City Code of Ordinances that authorize the City to contract the right to manage vending on public property to persons or entities. Additionally, the amendments allow that such a contract may grant the “exclusive right to vend on public property within a specified area of the city or the entire city.” Ordinance, Exhibit B-6. The Resolution authorizes the City’s Mayor to enter into the Contract.

The Contract grants LaSalle “the exclusive right to occupy and use all public property vending sites which meet the requirements of the Atlanta City Code including without limitation those vending sites currently occupied by public property vendors already licensed by the city...” Contract §1.3. While Exhibit A to the Contract includes provisions for the development of both a leasing plan and a vendor management program, the Contract states that the Contract takes precedence over any conflicting terms in the exhibits. Contract § 3.2. The scope of services detailed in Exhibit A may contemplate LaSalle acting as a manager, but the Contract still

explicitly grants LaSalle the right to exclusively occupy and use the sites and, as conceded by the City, nothing in the Contract limits that right or requires LaSalle to use outside vendors.

The City argues that the conduct of the City and LaSalle is further evidence of the LaSalle's intended role as a management company as opposed to a vendor. However, the Court may not consider parol evidence in its interpretation of a contract unless such contract is ambiguous. O.C.G.A. §13-2-2(1). "Where the terms of a written contract are clear and unambiguous, the court will look to the contract alone to find the intention of the parties. Such a contract is the only evidence of what the parties intended and understood by it." Safe Shield Workwear, LLC v. Shubee, Inc., 296 Ga. App. 498 (2009). Here, the Contract contains an unambiguous grant of exclusive right to use and occupy all of the public property vending sites contained in the City. The fact that LaSalle has chosen to act as a management company does not negate the fact that it has the right to use and occupy all the approved vending sites in the City.

A party is entitled to summary judgment where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. O.C.G.A. § 9-11-56. Because the Vending Documents grant the exclusive right to occupy and use all public property vending sites in the City, the Court finds that, as a matter of law, the City exceeded the powers granted to it in the Charter by creating an unauthorized exclusive franchise. Therefore, pursuant to O.C.G.A. § 9-4-2, the Court declares that the Vending Documents are void and without effect. This ruling renders moot the additional challenges to the Vending Documents.

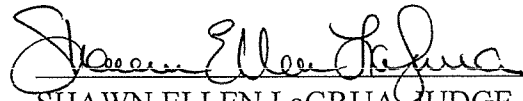
Plaintiffs have additionally requested a permanent injunction barring the City from preventing Plaintiffs from continuing to operate from their current locations pursuant to the provisions of the Vending Documents. "Entry of a permanent injunction is appropriate in clear and urgent cases where there is a vital necessity to prevent a party from being damaged and left without an adequate remedy at law." Smith v. DeKalb County, 288 Ga. App. 574 (2007). Additionally, the Court "must weigh and balance the convenience of the parties in exercising its discretion over whether to grant a permanent injunction." City of Atlanta v. Southern States Police Benev. Ass'n of Georgia, 276 Ga. App. 446 (2005).

The Court finds that entry of a permanent injunction is appropriate here, as Plaintiffs would be damaged and without adequate remedy at law were the City to prevent Plaintiffs from

operating at their current locations due to enforcement of the Vending Documents. The City is hereby enjoined from preventing Plaintiffs from continuing to operate from their current locations pursuant to the Vending Documents. This ruling is limited to any decision made pursuant to the Vending Documents and the City may continue its other licensing and regulatory operations.

Plaintiff has requested reasonable attorney's fees and costs of this action pursuant to O.C.G.A. § 13-6-11. This statute authorizes the expenses of litigation where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense." O.C.G.A. § 13-6-11. The record does not reveal any evidence that would authorize an award of expenses under this statute. Therefore, the Court does not award Plaintiffs attorney's fees and costs of litigation.

SO ORDERED this the 21st day of Dec, 2012.


SHAWN ELLEN LaGRUA, JUDGE
Fulton County Superior Court
Atlanta Judicial District

Distributed via electronic mail only to:

Yasha Heidari, Esq.	yasha@heidariplank.com
Robert Frommer, Esq.	rfrommer@ij.org
Robert Gall, Esq.	bgall@ij.org
William G. Mellor, Esq.	wmellor@ij.org
Laura J. Sauriol, Esq.	ljsauriol@atlantaga.gov
Christopher Walker, Esq.	cgwalker@atlantaga.gov