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STATE OF MISSOURI)
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CITY OF ST. LOUIS)

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MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(City of St. Louis)

MARIANO V. FAVAZZA
CLERK, CIRCUIT COURT
BY _____ DEPUTY

ALVIN BROOKS, et al,)
)
 Plaintiffs,)
)
 vs.)
)
 STATE OF MISSOURI, a state)
 government, et al.,)
)
 Defendants,)
)
 and)
)
 BULL'S EYE, LLC, GERI)
 STEPHENS, President of Bull's Eye,)
 LLC and JIM STEPHENS,)
)
 Defendants/Intervenors.)

Cause No. 034-02425
Division No. 1

REMINDER DATE _____
DUE DATE _____

MAY 03 2005

INITIALS *df*

ORDER

The Court has before it the Second Amended Memorandum In Opposition To Interevenors' Motion To Assess Damages Against The Bond of sureties Jeanne Kirkton, Burton Newman, and Lyda Krewson ("Sureties"). The Court, having reviewed the submissions of the parties, the arguments of counsel, and the relevant authorities, now rules as follows.

This motion comes to the Court from a somewhat peculiar procedural posture. The case had its genesis on October 8, 2003, when Plaintiffs filed their petition against the State of Missouri and Jeremiah W. Nixon in his capacity as the state Attorney General, seeking declaratory and injunctive relief concerning the Concealed-Carry Act, sections 50.535, 571 and

571.094 RSMo., which was to go into effect on October 11, 2003. The petition alleged the new law was unconstitutional on several grounds, including that it violated Article 1, section 23 and Article X, section 16 and 21 (the Hancock Amendment) of the Missouri Constitution. On October 10, 2003, Bulls Eye LLC, Geri Stephens and Jim Stephens¹ ("Intervenors") sought leave to intervene on the ground that they had a vested interested in the outcome of the case. Intervenors claimed that Bull's Eye was positioned to provide to interested citizens in the St. Louis area the eight hours of firearms training required by the new law before a concealed weapons permit could be issued, and that an injunction would interfere with this increased business expectancy. The motion to intervene was granted over Plaintiffs' objection. Following a hearing that same day, the trial judge granted a preliminary injunction. Plaintiffs were required to post a \$250,000.00 injunction bond. Sureties posted the bond on behalf of the Plaintiffs.

On October 23, 2003, the Court held a final hearing on whether to make the preliminary injunction permanent. The only issue on which evidence was presented at the hearing was whether implementation of the Concealed-Carry Act would require county sheriffs to increase their activities and incur additional costs, and thus violate the Hancock Amendment as an unfunded mandate. On November 7th, the trial court concluded that the Concealed-Carry Act violated Article 1, Section 23 of the Missouri Constitution and was therefore void. All other arguments made against the law, including the argument that the law violated the Hancock Amendment were denied by the Court. The preliminary injunction was made permanent, and the

¹ Bull's Eye, LLC, is a Missouri Corporation located in the City of St. Louis. Geri Stephens and Jim Stephens are co-owners of Bull'e Eye.

injunction bond was retained pending appellate review. Defendants appealed to the Missouri Supreme Court and Plaintiffs cross-appealed.

On February 26, 2004, the Supreme Court ruled that the concealed weapons law did not violate Article 1, Section 23, as the trial judge had ruled, but that the law did violate the Hancock Amendment as an unfunded mandate in those counties on which Plaintiffs had presented evidence in the trial court—that is, Jackson, Cape Girardeau, and Camden Counties. The upshot of the opinion was that the law potentially violated the Hancock Amendment in other counties of Missouri, but that determination could only be made on a county-by-county basis depending upon the circumstances in each county as determined by their respective sheriff's departments. Thus, the court ruled, the issue of whether the law violated the Hancock Amendment was not ripe for adjudication at that time as to any other counties because no evidence had been presented to the trial court regarding any other counties. The case was then "remanded for disposition of the bond under section 526.200 and assessment of costs as defined under article X, section 23²."

On the same day the Supreme Court issued its opinion, Intervenors filed their Motion For Assessment Of Damages and execution on the bond, seeking damages for lost business opportunities in firearms training of people who apply for concealed weapons in St. Louis City and County, and for legal fees. Relying on the testimony at the October 10, 2003 hearing on the motion to intervene, Intervenors' contend they sustained damages to the tune of \$300,000 in lost business opportunities, and legal fees of \$90,000 as a result of the injunction prior to its reversal.

² Article X, Section 23 provides that if a suit brought by a taxpayer alleging violations of the Hancock Amendment is sustained, the taxpayer "shall receive from the applicable unit of government his costs, including reasonable attorneys' fees incurred in maintaining such suit."

On June 7, 2004, Sureties filed their memorandum in opposition to any assessment of damages against the bond, and on November 29th, the cause was called for hearing on Sureties' Second Amended Memorandum In Opposition To Interevenors' Motion To Assess Damages Against The Bond. Following the hearing the matter was taken under submission as a motion to dismiss.

Intervenors have not called up for hearing their Motion To Assess Damages Against The Bond; the Sureties have not moved to have the injunction bond released; and to date, Plaintiffs have not sought reimbursement of their costs and legal fees under Article X, section 23. Therefore, the only issue properly before the Court is whether Intervenors' motion to assess damages should be dismissed for failure to state a claim upon which relief can be granted.

In addressing this motion the Court will employ the rules ordinarily applied to a defendant's motion to dismiss a plaintiff's cause of action. A motion to dismiss for failure to state a claim is solely a test of the adequacy of the plaintiff's petition, or in this case Intervenors' motion. The Court assumes that all of movants' averments are true, and liberally grants to movant all reasonable inferences therefrom. Grewell v. State Farm Mut. Auto. Ins.Co., 102 S.W.3d 33, 36 (Mo. 2003). No attempt is made to weigh any facts as to whether they are credible or persuasive. Instead, the motion is reviewed to see if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case. Nazeri v. Missouri Valley College, 860 S.W.2d 303, 306 (Mo. banc 1993). The claim is sufficient to withstand the motion to dismiss if it "invokes substantive principles of law entitling [movant] to relief and alleges ultimate facts informing [non-movant] of that which [movant] will attempt to establish at trial." Grewell, 102 S.W.3d 33 at 36, quoting Bracey v. Monsanto, 823 S.W.2d 946, 951 (Mo. banc 1992).

The purpose of requiring an injunction bond is to protect parties who sustain damages directly related to the compliance with an injunction that is later determined to have been either illegally or improperly issued. Buttress, 62 S.W.3d at 681. A trial court's authority to award damages for an improperly granted temporary restraining order or preliminary injunction is statutory. Lipp v. Lipp, 75 S.W.3d 736, 739 (Mo. App. 2002); See § 526.070 (requiring a bond from which the plaintiff will pay "all sums of money, damages and costs . . . adjudged against him if the injunction shall be dissolved"); § 526.200 (stating that "upon the dissolution of an injunction . . . damages shall be assessed . . ."); and § 526.210 (providing "the court shall enter judgment against the obligors in the bond, . . . including the damages so assessed . . ."). Interested parties, as well as enjoined defendants, may recover on an injunction bond. Buttress v. Taylor, 62 S.W.3d 672, 680 (Mo. App. W.D. 2001). The right to pursue action on the injunction bond does not accrue unless the trial court determines that the preliminary injunction was improperly or improvidently issued, and there is support in the record for such a determination. See Burney v. McLaughlin, 63 S.W.3d 223, 234 (Mo. App. 2001). Damages are allowed when the injunction was improvidently granted, was wrongful in its inception, or was continued due to some wrong on the part of the plaintiff. Id.

Sureties challenge Intervenors' right to recover damages on two grounds. First, the injunction was not the proximate cause of Intervenors' damages. The argument here is that Intervenors' damages were caused by the independent decisions of the St. Louis City and St. Louis County Sheriff's Offices to refuse to process concealed weapons applications because those offices believe that, as applied to them, the conceal and carry law also violates the Hancock Amendment, which decision had nothing to do with the injunction. Second, Intervenors may

collect damages only if the injunction was improper, which cannot have been the case because the Supreme Court found the law to be unconstitutional, at least with respect to three counties, and potentially unconstitutional in all other counties on the very ground argued by Plaintiffs before the trial judge and before the Supreme Court in their cross-appeal.

Intervenors allege in their motion that they are entitled to damages on the injunction bond because they are interested parties in that they were positioned in the marketplace to obtain substantial new business in the form of firearms training of citizens seeking to obtain a license to carry concealed weapons under the new law; that the injunction was dissolved in part by the Supreme Court, indicating the injunction was improper; and that the damages they suffered—lost business opportunities and attorney's fees—were the actual, natural and proximate result of the restraint because absent the injunction the Concealed-Carry Act would have gone into effect on October 11, 2003, and St. Louis City and County would have processed licenses for concealed weapons and the damages suffered by Intervenors would have been avoided.

The Court finds that Intervenors' motion contains allegations sufficient to overcome a motion to dismiss. This is not a ruling on the merits of Intervenors' claim, which is not before the Court, and the Court makes no ruling on the competing arguments outlined above. The Court merely rules that, taking all of Intervenors' averments as true and liberally granting to movant all reasonable inferences therefrom—as the Court must on a motion to dismiss—Intervenors', Motion to Assess Damages states a claim upon which relief may be granted.

THEREFORE, it is Ordered and Decreed that the Second Amended Memorandum In Opposition To Interevenors' Motion To Assess Damages Against The Bond of sureties Jeanne Kirkton, Burton Newman, and Lyda Krewson, taken as a motion to dismiss, is hereby denied.

SO ORDERED:



John J. Riley, Judge

Dated: 4/28/05

cc: Attorneys of record