

IN THE CIRCUIT COURT OF HOWELL COUNTY, MISSOURI
DIVISION I

FILED
MAR 09 2011
CINDY WEEKS
Circuit Clerk, Howell County MO

State ex rel. Chris Koster, Attorney)
General; Missouri Department of)
Agriculture; and Missouri State Milk)
Board,)
)
Plaintiffs,)
)
)
v.)
)
Morningland of the Ozarks, LLC,)
d/b/a Morningland Dairy)
)
Defendant.)

No. 10AL-CC00135

ORDER ON MOTION TO DISMISS COUNTERCLAIMS
AND MOTION TO STAY EXECUTION

On March 8, 2011, both parties appeared by counsel and defendant also by corporate representatives, and upon their agreement, the court took up and considered the above-named motions. Pending entry of final order on those motions, the court stayed execution of its *mandatory* injunction that defendants "shall destroy" certain cheese products, contingent upon defendant's posting, prior to 9 a.m. Wednesday, March 9, its cash or corporate surety bond in the sum of \$2,000, representing the estimated cost to the State of canceling and rescheduling arrangements for destruction of the cheese. The court did not stay execution of its *prohibitory* injunction, which forbids defendant to manufacture cheese absent proof of compliance with specified conditions. *See, State ex. rel Jarboe v. Holt*, 444 S.W.2d 857, 859 (Mo.banc 1959).

I. Motion To Dismiss Counterclaims

Prior to trial, the court sustained plaintiff's motion to sever defendant's third, fourth, and fifth counterclaims for later disposition. Plaintiff has now moved to dismiss those counterclaims. The court finds that Counterclaim Counts III and IV are facially foreclosed by its judgment on plaintiff's claims and fail in any case to state claims upon which relief might be granted. Accordingly counterclaims III and IV will be dismissed with prejudice.

Counterclaim Count V seeks recovery of damages occasioned by the State's condemnation and (if executed) destruction orders. At the hearing, counsel consented that Count V be dismissed with prejudice so as to accord finality to all components of the judicial unit, but without prejudice to appeal of that very dismissal. Believing this resolution untenable, the court dismisses Count V for failure to state a claim on which relief might be granted. Immunities and public duties aside, the State's actions have been found authorized by statute and neither arbitrary nor capricious. With matters in that posture, defendant cannot state a claim for recovery of damages in a regulatory taking by the State of Missouri. Counterclaim Count V will therefore also be dismissed with prejudice.

II. Motion to Stay Execution

Defendant has moved to stay execution of the judgment requiring destruction of the condemned cheese pending finality for all purposes. The court finds defendant has shown good cause for such stay in that (1) any sale or distribution of the cheese for human consumption prior to vacation of the judgment would be unlawful; (2) such violation would be punishable by contempt and by civil and criminal penalties; (3)

defendant's counsel and corporate representatives assured the court on the record that by no means or subterfuge would they commit or permit such violation; (4) there exists a reasonable likelihood that, following exhaustion of all post-judgment remedies, a substantial quantity of condemned cheddar cheese would remain unspoiled, and (5) should this or another court ultimately vacate the existing judgment, prior destruction of the cheese would likely cause defendant significant monetary damages not recoverable from the State of Missouri under the standards for regulatory takings.

The court is well aware of certain peculiar filings herein by Denise and Joseph Dixon, corporate principals of defendant, which are reasonably construable as threats of violation of judicial orders. At the March 8 hearing, however, the Dixons and corporate counsel explained that these misbegotten communications were intended not as threats to disregard court orders, but as expressions of belief in supernatural judgment of human affairs. That explanation will be accepted, if only because violation of court orders is amply deterred by the salient punishments afforded in this very material realm. Acceptable bond incident to such stay of execution should represent, as plaintiff's Memorandum in Opposition declares, "an amount sufficient to cover costs incurred by the Missouri State Milk Board in scheduling a time for destruction and for procuring a waste company"

At the hearing, counsel for plaintiff estimated that cost to be \$2,000.

WHEREFORE, plaintiff's motion to dismiss counterclaims is sustained and judgment of dismissal with prejudice is hereby entered on counterclaims III, IV, and V. Defendant's motion to stay execution of the mandatory injunction, compelling destruction of the condemned cheese pending finality of the judgment for all purposes but not

preclusively of other supersedeas in case of appeal, will be granted upon posting of defendant's cash or corporate surety bond in proper form in the sum of \$2,000.

SO ORDERED this 9th day of March, 2011.

A handwritten signature in black ink, appearing to read 'DUNLAP', is written over a horizontal line.

DAVID DUNLAP
Senior Judge