

FILED
11/12/2024 12:00 AM
IRIS Y. MARTINEZ
CIRCUIT CLERK
COOK COUNTY, IL
2023CH05147
Calendar, 14
30139953

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, CHANCERY DIVISION

PRESTIGE FEED PRODUCTS, LLC, an Illinois
limited liability company,

Plaintiff/Counter-Defendant,

v.

VILLAGE OF MOUNT PROSPECT, an Illinois
municipal corporation, et.al.,

Defendants/Counter-Plaintiffs.

Case No. 2023 CH 05147

CITY OF DES PLAINES, an Illinois municipal
corporation,

Intervening Petitioner

PRESTIGE FEED PRODUCTS, LLC’S COMBINED § 2-619.1 MOTION TO DISMISS
THE VERIFIED COMPLAINT OF INTERVENOR CITY OF DES PLAINES

Prestige Feed Products, LLC (“Prestige”), by its attorneys, Robbins DiMonte, Ltd.,
moves to dismiss the Verified Complaint of Intervenor-Plaintiff City of Des Plaines filed on
September 24, 2024 (the “City Complaint”) under 735 ILCS 5/2-619.1, and states as follows:

Introduction

The City Complaint should be dismissed pursuant to § 2-619.1 for several reasons. **First**,
Counts II and III should be dismissed with prejudice pursuant to §2-619(a)(9) because the City’s
attempted enforcement of City Code §§ 12-12-6 and 12-12-7 against Prestige is unconstitutional,
because it exceeds the City’s authority under Article VII of the Illinois Constitution and statutory
authority under Section 5/7-4-1 of the Illinois Municipal Code. **Second**, Count I should be
dismissed with prejudice pursuant to §2-615 because the City does not and cannot factually plead
common law public nuisance against Prestige nor that the City is entitled to permanently enjoin
Prestige from operating at the Facility. **Third**, Counts II and III should each be dismissed
pursuant to §2-615 because the City does not factually plead that Prestige omits odors in

detectable quantities that exceed legal thresholds, or that Prestige's activities constitute environmental detriment or public nuisance, or that the City is entitled to permanently enjoin Prestige from operating at the Facility. **Fourth**, Counts I, II, and III should be dismissed pursuant to §2-619 because Prestige does not emit odors in detectable quantities above legally defined odor threshold levels.

Legal Standards For Combined Motions To Dismiss Under § 2-619.1

Section 2-619.1 of the Illinois Code of Civil Procedure allows a party to file a combined §2-615, §2-619, and/or §2-1005 motion. 735 ILCS 5/2-619.1. Section 2-619.1 provides that §2-615 and §2-619 motions to dismiss may be filed together as a single motion but that a combined motion shall be divided into parts that are limited to and specify the single section of the Code under which relief is sought. *Burton v. Airborne Exp. Inc.*, 367 Ill.App.3d 1026, 1029 (5th Dist. 2006). A §2-615 motion challenges the legal sufficiency of the complaint. *Napleton v. Vill. of Hinsdale*, 229 Ill.2d 296, 305 (2008). The question is whether the allegations of the complaint, when viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted. *Borowiec v. Gateway 2000, Inc.*, 209 Ill.2d 376, 382 (2004). A §2-619 motion may go beyond allegations in the complaint and present other affirmative matters that may defeat the claims made in the complaint. (See e.g., *Kedzie & 103rd Currency Exch., Inc. v. Hodge*, 156 Ill.2d 112, 116 (1993). A §2-619 motion admits the legal sufficiency of the claim but asserts an affirmative matter that defeats the claim or operates to avoid its legal effect. *Ross v. May Co.*, 377 Ill.App.3d 387, 390 (1st Dist. 2007).

Statement of Facts

1. For its Statement of Facts, Prestige restates all well plead facts in the City Complaint.

2. Prestige also restates all well plead facts in Prestige's Verified Complaint For Injunction, For Declaratory Judgment, and For Damages filed against the Village of Mount Prospect on May 25, 2023 ("Prestige Complaint").
3. Prestige also restates all well plead facts in the Affidavits of Joseph Pesoli, Ryan Hartley, and Riccardo A. DiMonte filed on September 4, 2024 (respectively, "Pesoli Affidavit", "Hartley Affidavit", and "DiMonte Affidavit").
4. Prestige also restates all well plead facts in Prestige's Combined § 2-619.1 Motion for Judgment on the Pleadings and for Partial Summary Judgment on the Village's Third Amended Counterclaim filed on September 11, 2024 ("Prestige's September 11 Motion"), which remains pending and undetermined.
5. The Illinois Joint Committee on Administrative Rules, Administrative Code, Title 35: Environmental Protection, Subtitle B: Air Pollution, Chapter I: Pollution Control Board, Subchapter L: Air Quality Standards and Episodes, Part 245 Odors, Section 245.121 Objectionable Odor Nuisance Determination ("35 IAC 245.121"), states,

"Section 245.121 Objectionable Odor Nuisance Determination

An objectionable odor nuisance exists:

- a) On or adjacent to residential, recreational, institutional, retail sales, hotel or educational premises when odor is detectable in the ambient air after it is diluted with eight volumes of odor-free air as measured by the Scentometer;
- b) On or adjacent to industrial premises when odor is detectable in the ambient air after it is diluted with twenty-four volumes of odor-free air as measured by the Scentometer;
- c) On or adjacent to premises other than those above when odor is detectable in the ambient air after it is diluted with sixteen volumes of odor-free air as measured by the Scentometer;
- d) When concurrent determinations made by three trained inspectors as outlined above in any given one hour period and at intervals of not less than

fifteen minutes result in two positive determinations in each series of three determinations; and

e) Provided that any quantitative odor level measurements taken to arrive at a determination that an objectionable odor nuisance exists shall be at or beyond the property line or at or near places where people live or work.” (emphasis added).

6. Count I of the City Complaint alleges that Prestige’s current operations constitute a Common Law Public Nuisance. *City Complaint*, ¶¶ 64-78.

7. Count II of the City Complaint alleges that Prestige’s current operations violate § 12-12-6 of the City Code, which provides “Emission of noxious, objectionable or annoying odor in such quantities as to be detectable at any point along a lot boundary is prohibited.” *Id.*, ¶ 83. (emphasis added). Des Plaines alleges that it adopted § 12-12-6 pursuant to its home rule authority, common law authority, and Section 7-4-1 of the Illinois Municipal Code. *Id.*

8. Section 7-4-1 of the Illinois Municipal Code (“65 ILCS 5/7-4-1”) states “Sec. 7-4-1. The corporate authorities in all municipalities have jurisdiction in and over all places within one-half mile of the corporate limits for the purpose of enforcing health and quarantine ordinances and regulations.” (emphasis added).

9. Count III of the City Complaint alleges that Prestige’s current operations violate § 12-12-7 of the City Code, which provides “No use shall be operated or maintained which creates an environmental detriment or public nuisance, including, but not limited to, visual clutter created by excessive signage, lighting, or outdoor storage; noise or odors as defined herein; or other noise and odors such as those created by pets or garbage.” *City Complaint*, ¶ 96. (emphasis added). Des Plaines alleges that it also adopted § 12-12-7 pursuant to its home rule authority, common law authority, and Section 7-4-1 of the Illinois Municipal Code. *Id.*

10. The Complaint further alleges that “It is competent for the legislature to confer power to pass ordinances operative beyond the corporate boundaries for the purpose of suppressing and

preventing nuisances, which affect the inhabitants of the corporation.” *Id.*, ¶ 82 and ¶ 95, citing *Rockford v. Hey*, 366 Ill. 526, 533-34 (1937). (emphasis added).

11. In all three Counts, the City also seeks to permanently enjoin Prestige from operating its business. *Id.*, pages 10, 13, 15.

Argument

I. Counts II and III Must be Dismissed With Prejudice Under §2-619(a)(9) Because the City’s Attempt to Enforce §12-12-6 and §12-12-7 Against Prestige is Unconstitutional.

First, the City’s home rule power is limited by Constitutional and statutory authority. Further, the City’s attempts to extraterritorially enforce §12-12-6 and §12-12-7 against Prestige exceeds the City’s Constitutional authority under Article VII of the Illinois Constitution and 65 ILCS 5/7-4-1. Finally, the City’s reliance on *Rockford v. Hey* is misplaced because that case stands for the proposition that Des Plaines can seek to enforce its ordinances against Prestige only to the extent that the Illinois Legislature explicitly empowers it to do so and that the City’s code cannot be more restrictive than 65 ILCS 5/7-4-1.

(a) The City’s home rule power is limited by Constitutional and statutory authority.

Des Plaines is a home-rule municipality. *City Complaint*, ¶ 1. “The essence of home rule power is set forth in section 6(a) of Article VII of the Illinois Constitution: “Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt.” *Ill. Const. 1970, art. VII, § 6(a)*; *Schillerstrom Homes, Inc. v. City of Naperville*, 198 Ill. 2d 281, 287 (2001). However, Section 6 of Article VII of the Illinois Constitution does not authorize home rule units to enact extraterritorial regulations absent “an express grant of statutory authority.” *Harris Bank of Roselle v. Vill. of Mettawa*, 243 Ill. App. 3d 103, 114 (2d Dist. 1993) (emphasis in original).

Illinois municipalities have no jurisdiction beyond their corporate limits, and their ordinances are confined in their application to their territories. *Vill. of Chatham v. Cnty. of Sangamon*, 216 Ill. 2d 402, 429 (2005). Both home-rule and non-home-rule municipalities may not extend their powers beyond their borders unless expressly authorized by the legislature. *Hertz Corp. v. City of Chicago*, 2017 IL 119945, ¶ 14. Extraterritorial jurisdiction of a municipality is strictly controlled by statute. *City of Springfield v. Judith Jones Dietsch Tr.*, 321 Ill. App. 3d 239, 242 (4th Dist. 2001). Hence, the City, being a creature of statute, can only exercise its powers within its corporate limits in the absence of express statutory authority or authority implied from powers expressly granted by statute. *City of Chicago v. Cuda*, 403 Ill. 381, 387 (1949).

(b) The City's attempts to extraterritorially enforce §12-12-6 and §12-12-7 against Prestige exceeds its Constitutional and statutory authority.

It is undisputed that Prestige does not operate within the boundaries of Des Plaines. The City alleges that it is authorized to exercise extraterritorial police power over Prestige's operations pursuant to 65 ILCS 5/7-4-1 because Prestige is located within one-half mile of the City's corporate limits. *Compl. at* ¶¶ 81 & 94. 65 ILCS 5/7-4-1 confers extraterritorial power to municipalities in certain strictly enumerated instances as follows: "The corporate authorities in all municipalities have jurisdiction in and over all places within one-half mile of the corporate limits for the purpose of enforcing health and quarantine ordinances and regulations." 65 ILCS 5/7-4-1. (*emphasis added*). The term 'health' is not defined in §5/7-4-1. *Harris Bank*, 243 Ill. App. 116 (finding that while sewage treatment may be generally related to matters of "public health," § 5/7-4-1 authority to enact health and quarantine ordinances did not authorize the municipality to regulate extraterritorial waste sanitation management systems). The *Harris Bank* court also held that the term "health" must be interpreted by "both the plain meaning of the statute's language and legislative intent." *Id.* The court noted that §5/7-4-1 uses the terms "health" and "quarantine" in a

related manner and found that that term “health,” has the “common and plain meaning: of, relating to, or engaged in welfare work directed to the cure and prevention of disease.” *Harris Bank*, 243 Ill. App. 3d at 116.

On their face, §12-12-6 and §12-12-7 that the City seeks to extraterritorially enforce against to Prestige do not relate in any way, to the concepts of “health” and “quarantine” as used in § 5/7-4-1. Neither §12-12-6 or §12-12-7 relate to “welfare work directed to the cure and prevention of disease.” In fact, neither section references or relates to any health concerns of any kind. Further, the City Complaint brings forth no factual allegations that Prestige’s activity has had any detrimental effect on the health of any resident or that Prestige is violating any quarantines regulations. The Affidavits attached to the City Complaint merely state that the affiants believe the alleged odors emitting from the Prestige Facility poses a threat to the health. (*See City Complaint, Exhibit A, Affidavit of Ed and Marta Kulaga* ¶ 20; *Exhibit B, Affidavit of Rebecca Pfisterer* ¶ 14; and *Exhibit C, Affidavit of Steven Stedman*, ¶ 18) (emphasis added). The City has not and cannot present any factual allegations that Prestige’s operations have endangered the health of any individual since it began operations in March 2019.

(c) The City’s reliance on *Rockford v. Hey* is misplaced.

The City’s reliance on *Rockford v. Hey* in Counts II and III is misplaced. This 1937 case interprets an earlier version of 65 ILCS 5/7-4-1, known as Section 83 of article 5 of the Cities and Villages Act. The direct quote from *Rockford v. Hey* states:

“It is, of course, competent for the Legislature to confer power to pass ordinances operative beyond the corporate boundaries for the purpose of suppressing and preventing nuisances, which affect the inhabitants of the corporation. [...] Section 83 of article 5 of the Cities and Villages Act (Smith-Hurd Ill.Stats. c. 24, § 65.82) expressly confers power upon municipal corporations in this state to prohibit any offensive or unwholesome business or establishment within, or within one mile of, the corporate limits. No other provision of article *534 5 purports to grant power to cities to enact ordinances effective outside their boundaries. The Legislature has not delegated power to municipal corporations to pass a

regulatory and license ordinance which assumes to regulate ice cream factories outside their corporate limits.” 366 Ill. at 533-34. (emphasis added).

In other words, *Rockford v. Hey* stands for the proposition that Des Plaines can seek to enforce its ordinances against Prestige only to the extent that the Illinois Legislature explicitly empowers it to do so.¹ Currently, 65 ILCS 5/7-4-1 limits the City’s authority to regulate or enforce Prestige’s activity only for the purpose of enforcing health and quarantine ordinances and regulations. Several recent cases reiterate this general rule. In *City of Des Plaines v. Chicago & N. W. Ry. Co.*, the Supreme Court of Illinois held that noise pollution is matter of statewide concern, and that the attempt by Des Plaines to regulate noise pollution emissions via local ordinance was not within its constitutional home rule power granted by section 6(a) of article VII of the 1970 Constitution. 65 Ill.2d 1, 7, 357 N.E.2d 433, 436, 2 Ill.Dec. 266, 269 (1976). In its decision, the Court also recalled *Metropolitan Sanitary District v. City of Des Plaines*, where the Court held that the application of a Des Plaines health ordinance that required that a permit be obtained if the sewage works were capable of causing or contributing to the emission of airborne odors or bacteria in violation of standards set forth in the ordinance did not pertain to its ‘government and affairs’ within the meaning of section 6(a). *Id.* Further, in *Village of Mount Prospect v. Malouf*, the First District, held that municipalities may exercise police power concurrently with the state, even though their police regulations may differ from those of the state on the same subject, so long as municipal regulation is not in conflict with state regulation. 103 Ill.App.2d 88, 91 243 N.E.2d 434, 436 (1st Dist. 1968). In our case, Prestige’s conduct is clearly governed by 35 IAC 245.121.

¹ In *Rockford v. Hey*, the Supreme Court of Illinois held invalid as not within powers delegated by statute a City of Rockford ordinance that attempted to prohibit conducting of ice cream factory and sale of ice cream products within the city unless factory or vendors registered and paid license fee and were inspected by city inspector, in so far as they purported to extend to factories in other cities. 366 Ill. at 535.

Neither provision of the City Code, which the City seeks to enforce against Prestige in Counts II and III, falls within the definition “health” as that term is used in 65 ILCS 5/7-4-1. Further, neither §12-12-6 nor §12-12-7 can be more restrictive than 35 IAC 245.121. Hence, the City lacks express statutory authority to impose its police powers upon Prestige. Therefore, the City’s attempts to enforce its police powers against Prestige’s operations outside Des Plaines is unconstitutional and Count II and III of the City’s Complaint should be dismissed with prejudice.

II. Count I Should be Dismissed With Prejudice Under §2-615 Because the City Does Not and Cannot Factually Plead Common Law Public Nuisance Against Prestige.

To sufficiently plead a cause of action for public nuisance, the City must factually allege: (1) the existence of a public right; (2) Prestige’s substantial and unreasonable interference with that right; (3) proximate cause; and (4) injury. *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill.2d 351, 369 (2004). A public nuisance is an unreasonable interference with a right that is common to the public. *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill.2d 351, 366 (2004). On the other hand, “A private nuisance is the substantial invasion of a person’s interest in the use and enjoyment of his property.” *Whipple v. Village of North Utica*, 2017 IL App (3d) 150547, ¶ 45. It is well settled that “a pleading that merely paraphrases the elements of a cause of action in conclusory terms is insufficient.” *Alpha Sch. Bus Co. v. Wagner*, 391 Ill. App. 3d 722, 735 (1st Dist. 2009).

In its Complaint, the City merely restates the elements of common law nuisance but fails to factually allege that the Prestige’s operations at the Facility affect the public in general. To the contrary, the City alleges facts that show that only a limited number of individuals in City claim to be affected by Prestige’s operations. (See *City Complaint*, ¶ 19, 77, 78; and *Exhibits A, through C*). The City does not adequately plead facts that establish the alleged odor is affecting the public at large to constitute a public nuisance. Rather, at best, the City pleads facts that the alleged odor is affecting a small number of individuals who may find Prestige’s operation disagreeable. The

City also emphasized the quantity of complaints that come from the same group of individuals and not the quantity of alleged odors, or that the alleged odors are a nuisance to the public at large and all members of the public that experience such odors.

The small number of individuals who have lodged the vast number of complains with respect to Prestige's operations brought their own claims against Prestige as part of a class action suit filed on March 5, 2024, in the case of *Mary Beth Stillmaker and Sargon Merza, etc., vs. Prestige Feed Products, LLC and Cereal Byproducts Company*", Case No. 2024 CH 01504, in the Circuit Court of Cook County, County Department, Chancery Division (the "Class Action Suit"). In the Class Action Suit, this Court recently entered an order on November 1, 2024, a copy of which is attached hereto as Exhibit 1. In that order, the Court found that any alleged nuisance by Prestige is a temporary nuisance and not a permanent nuisance. *See Exhibit 1, ¶ 1*. The City does not have a public interest because its citizens are asserting private rights of action against Prestige for a temporary nuisance and are seeking monetary damages as part of their request for relief. Because the City has failed to plead, and cannot plead, facts that establish the existence of a public nuisance, the City cannot sustain a cause of action for common law public nuisance and the Complaint should be dismissed with prejudice.

Further, in Count I, the City seeks to permanently enjoin Prestige from operating its business at the Facility. *City Complaint, page 10*. However, such prayer for relief should be dismissed pursuant to §2-615 because the City Fails to factually allege that it is entitled to permanently enjoin Prestige from operating at the Facility. In Count I, the City does not plead clear and ascertainable rights in need of protection. The City Complaint also fails to factually plead irreparable harm. The City also fails to plead that it has no adequate remedy at law. Finally, the balance of the equities favors Prestige, not the City of Des Plaines. In support of these

arguments, Prestige adopts, incorporates, and restates all arguments that Prestige made in Argument section II of Prestige's September 11 Motion in pages 12 through 16.

III. Count II Should be Dismissed Under §2-615 Because the City Fails to Allege Facts that Prestige Emits Odors in Quantities that Exceed Legal Thresholds.

Count II of the City Complaint alleges that Prestige's current operations violate § 12-12-6 of the City Code, which provides "Emission of noxious, objectionable or annoying odor in such quantities as to be detectable at any point along a lot boundary is prohibited." *Complaint*, ¶ 83. (emphasis added). The City alleges that it adopted § 12-12-6 pursuant to its home rule authority, common law authority, and 65 ILCS 5/7-4-1. *Id.* First, the City Complaint has no factual allegations of legislative intent that the City adopted §12-12-6 pursuant to 65 ILCS 5/7-4-1. Further, 65 ILCS 5/7-4-1 limits the adoption of ordinances that may affect actions or uses beyond municipal boundaries only for the purpose of enforcing health and quarantine ordinances and regulations. *See Argument I (b) and (c), supra.* The terms "health" and "quarantine" have the common and plain meaning: "...of, relating to, or engaged in welfare work directed to the cure and prevention of disease." *Harris Bank*, 243 Ill. App. 3d 116. Hence, the City's allegation that it adopted §12-12-6 pursuant to 65 ILCS 5/7-4-1 is disingenuous, and the City's attempt to enforce §12-12-6 against Prestige is unconstitutional.

Moreover, §12-12-6 clearly focuses on quantitative amounts and the objective measurements as the criteria for determining whether odors are detectable. However, neither the City nor the affiants have performed a single objective, measurable, scientific test of the ambient air that they allegedly complain about. There is not a single allegation in the City's Complaint that Prestige is releasing odors above threshold levels specified by Illinois law, by 35 IAC 245.121, or by City Code. The City also fails to make a single allegation that Prestige is releasing odors detectable in the ambient air after it is diluted with 24 (or even 8) of odor free air as measured by

a Scentometer pursuant to 35 IAC 245.121, which is so aptly called “Objectionable Odor Nuisance Determination.”. So, the City’s Complaint fails to allege that Prestige is releasing odorous matter across residence or business lot lines in quantities that exceed objective odor threshold levels.

Further, in Count II, the City seeks to permanently enjoin Prestige from operating its business at the Facility. *City Complaint, page 13*. However, such prayer for relief should be dismissed pursuant to §2-615 because the City Fails to factually allege that it is entitled to permanently enjoin Prestige from operating at the Facility. In Count II, the City does not plead clear and ascertainable rights in need of protection. The City Complaint also fails to factually plead irreparable harm. The City also fails to plead that it has no adequate remedy at law. Finally, the balance of the equities favors Prestige, not the City of Des Plaines. In support of these arguments, Prestige adopts, incorporates, and restates all arguments that Prestige made in Argument section II of Prestige’s September 11 Motion in pages 12 through 16. Since the City cannot rely on 65 ILCS 5/7-4-1 to enforce §12-12-6 against Prestige, and since §12-12-6 cannot be more restrictive than 35 IAC 245.121, and since the City fails to factually plead that Prestige omits odors in detectable quantities that excess legal thresholds, Count II should be dismissed pursuant to § 2-615 with prejudice.

IV. Count III Should be Dismissed Under §2-615 Because the City Fails to Factually Plead that Prestige’s Use Causes Environmental Detriment or Public Nuisance.

Count III of the City Complaint alleges that Prestige’s current operations violate § 12-12-7 of the City Code, which provides “No use shall be operated or maintained which creates an environmental detriment or public nuisance, including, but not limited to, visual clutter created by excessive signage, lighting, or outdoor storage; noise or odors as defined herein; or other noise and odors such as those created by pets or garbage.” *Complaint, ¶ 96. (emphasis added)*. The City alleges that it adopted § 12-12-7 pursuant to its home rule authority, common law authority, and

65 ILCS 5/7-4-1. *Id.* (emphasis added). However, as argued above, the City's allegation that it adopted §12-12-7 pursuant to 65 ILCS 5/7-4-1 is disingenuous, and the City's attempt to enforce §12-12-7 against Prestige is unconstitutional. *See Argument I, supra*. Also, the City's reliance on *Rockford v. Hey* is misplaced. *Id.*

Moreover, §12-12-7 focuses on uses that cause an "environmental detriment or public nuisance". *City Complaint*, ¶ 96. The uses listed after these words in §12-12-7 are merely illustrations of environmental detriment or public nuisance. In this case, the City has not and cannot allege that Prestige's activities constitute a public nuisance. *See Argument II, supra*. The City also has not alleged that Prestige's activities constitute an environmental detriment. There are no allegations in the City Complaint that any odor or substance allegedly generated from Prestige's operation detrimentally impacts the environment. The City also fails to allege that the Facility violates any terms of the Illinois Environmental Protection Act, 415 ILCS 5/1 et. seq. The City also fails to make a single allegation that Prestige is releasing odors detectable in the ambient air after it is diluted with 24 (or even 8) volumes of odor free air as measured by a Scentometer, pursuant to 35 IAC 245.121, which is aptly titled "Objectionable Odor Nuisance Determination."

Further, in Count III, the City seeks to permanently enjoin Prestige from operating its business at the Facility. *City Complaint*, page 15. However, such prayer for relief should be dismissed pursuant to §2-615 because the City Fails to factually allege that it is entitled to permanently enjoin Prestige from operating at the Facility. In Count III, the City does not plead clear and ascertainable rights in need of protection. The City Complaint also fails to factually plead irreparable harm. The City also fails to plead that it has no adequate remedy at law. Finally, the balance of the equities favors Prestige, not the City of Des Plaines. In support of these arguments, Prestige adopts, incorporates and restates all arguments that Prestige made in Argument

section II of Prestige's September 11 Motion in pages 12 through 16. Since the City cannot rely on 65 ILCS 5/7-4-1 to enforce §12-12-7 against Prestige, and the City fails to factually plead that Prestige's activities constitute environmental detriment or public nuisance, Count III should be dismissed pursuant to § 2-615 with prejudice.

V. Counts I, II, and III Should be Dismissed Pursuant to §2-619 Because Prestige Does Not Emit Odors in Detectable Quantities Above Odor Threshold Levels

Finally, Prestige has a complete defense that defeats the City Complaint pursuant to §2-619(a)(9). Specifically, Prestige does not emit odors in detectable quantities above legally defined odor threshold levels. Between March 2019, when Prestige began operating at the Facility and September 24, 2024, when the City filed its Complaint, the City failed to perform a single objective scientific or measurable study concerning the odors which it complains Prestige is releasing from its Facility. Instead of measurable scientific data, the City relies entirely on subjective complaints from three Des Plaines residents and one Des Plaines business. (*See City Complaint, Exhibit A, Affidavit of Ed and Marta Kulaga; Exhibit B, Affidavit of Rebecca Pfisterer; and Exhibit City, Affidavit of Steven Stedman*).

However, the only objective, measurable, and scientific evidence collected in this case shows that Prestige is emitting odors which are either non-detectable or at levels well below legal thresholds. The June 2, 2021, Mostardi Platt Investigation Odor Report states:

“...The Olfactometer results of all four Tedlar Bag samples collected at the boundaries of the neighboring real properties adjacent to the Facility had detection readings of 3 or lower. The Scentometer results at all 21 tested locations had detection readings of less than 2. Therefore, no objectionable odor nuisance from the Facility exists on the properties surrounding the Facility. As a result, the normal operation of the Facility does not have a significant impact on the use and enjoyment of neighboring real properties. *See Hartley Affidavit, Exhibit 2, PREST000062.*

Further, the October 31, 2022, Mostardi Platt Investigation Odor Report provides:

“...Based on our analysis of the data collected at the Facility during our investigation and in preparation of both these reports, we conclude that Prestige’s operation of the feed producing machinery does not emanate objectionable odor nuisances anywhere near to the applicable threshold levels. As a result, this operation does not impact the use and the enjoyment of neighboring properties, and it does not constitute a nuisance.

Since our first report of June 14, 2021, Prestige has installed at the Facility additional odor control measures including newer air filtration and vapor units. As a result, key readings at the Real Property boundaries improved significantly. The Scentometer readings were **zero (0)** at 7 of the 8 tested fence-line locations. The only one noticeable Scentometer reading of **less than two (2)** was at the location directly by the Facility’s discharge bay in the North-East corner of the Real Property. These results demonstrate that the Facility’s operation does not reach or surpass the nuisance threshold Scentometer readings under applicable law (8 along the Real Property’s southern border and 24 everywhere else).” *See Hartley Affidavit, Exhibit 3, PREST000173.*

Further, the V3 Odor Assessment Report dated April 1, 2024, concludes:

“...The odor strength at the real property boundaries lines is either non-existent or below the threshold levels established in *Illinois Administrative Code, Title 35: Environmental Protection, Subtitle B: Air Pollution, Chapter I: Pollution Control Board, Subchapter L: Air Quality Standards and Episodes, Part 245 Odors, Section 245.121 Objectionable Odor Nuisance Determination* (“35 IAC 245.121”). The onsite Scentometer readings and odor panel Olfactometer results of air samples collected at the real property lines and adjacent properties in January 2024 are depicted in **Table 1** below and are similar to or lower than those of the 2022 Report. Also, the addition of the Strobic Fan at the Facility has increased air dispersion to further reduce any odor impacts at the real property line and the neighboring properties. **Based on these results, Prestige’s operation at the Facility does not constitute a nuisance [...]**” *See Hartley Affidavit, Exhibit 4, PREST000252.*

Conclusion

The City Complaint should be dismissed pursuant to § 2-619.1 because (i) the City’s attempted enforcement of City Code §§ 12-12-6 and 12-12-7 against Prestige is unconstitutional, and because (ii) the City does not and cannot factually plead (a) common law public nuisance against Prestige, (b) that Prestige omits odors in detectable quantities that exceed legal thresholds, (c) that Prestige’s activities constitute environmental detriment or public nuisance, and (d) that the City is entitled to permanently enjoin Prestige from operating at the Facility.

WHEREFORE, The Plaintiff/Counter-Defendant Prestige Feed Products, LLC, respectfully requests that the Court dismiss the Verified Complaint of Intervenor-Plaintiff City of Des Plaines pursuant to §2-619.1 of the Civil Practice Law, and for any further relief the Court deems just.

Respectfully submitted,

Prestige Feed Products, LLC

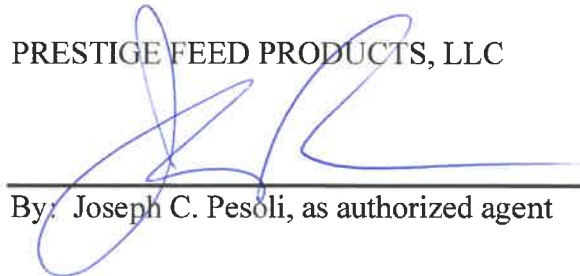
By: /s/ Riccardo A. Di Monte _____
One of its attorneys

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VERIFICATION

Under penalties as provided by law pursuant to §1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated upon information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

PRESTIGE FEED PRODUCTS, LLC



By: Joseph C. Pesoli, as authorized agent

Dated: November 8, 2024

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION**

MARY BETH STILLMAKER and)
SARGON MERZA, on behalf of)
themselves and all others similarly)
situated,)

Plaintiffs,)

v.)

Case No. **2024 CH 01504**

PRESTIGE FEED PRODUCTS, LLC and)
CEREAL BYPRODUCTS COMPANY,)

Defendants.)

ORDER

This cause coming before the Court on (i) *Joint Motion* by Defendants, Prestige Feed Products, LLC And Cereal Byproducts Company, to Strike Diminution of Property Value Allegations and Prayer for Relief (the “Motion to Strike Diminution of Property Value Allegations and Prayer for Relief”); and (ii) Plaintiffs’ Motion to Strike Defendants’ Affirmative Defenses (the “Motion to Strike Affirmative Defenses”), counsel for each of the parties having appeared, and with the Court having considered all of the parties’ briefs and pleadings and applicable case law and heard oral argument as to these motions and ruled on their merits,

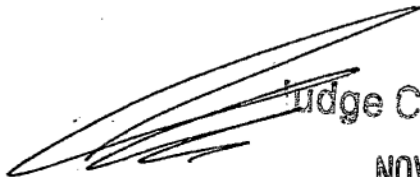
IT IS HEREBY ORDERED:

1. For the reasons stated in open court, Defendants’ Motion to Strike Diminution of Property Value Allegations and Prayer for Relief is granted. The Court finds that the Plaintiffs, for themselves and on behalf of the Class, cannot recover damages for diminution of the Plaintiff’s and Class members’ property values as matter of law because *Moorman* and its progeny bars the Plaintiffs and the Class members from recovering such damages under all three Counts I (Private Nuisance), II (Public Nuisance), and III (Negligence). *See Moorman Mfg. Co. v. Nat’l Tank Co.*, 91 Ill. 2d 69 (1982). Independently, as to Count I (Private Nuisance) and Count II (Public Nuisance), the Plaintiffs and the Class members cannot recover diminution of their property values as matter of law because the Plaintiffs and the Class admit that the alleged nuisance is temporary and not permanent and thus, such damages are not recoverable. *See Avery v. GRI Fox Run, LLC*, 2020 IL App (2d) 190382. Accordingly, all the Plaintiffs and Class members’ allegations in Plaintiffs’ Complaint that concern or reference damages for diminution in value to their properties, including but not limited to the allegations in Paragraphs 35, 52, 55, 60, 65, 66, 80, 81, 82, and 84, and in the prayer for relief applicable to each of the three Counts, are stricken pursuant to 735 ILCS 5/2-615(b), with prejudice;

2. For the reasons stated on the record, Plaintiffs’ Motion to Strike Affirmative Defenses is granted in part, and denied in part. The Motion to Strike Affirmative Defenses is denied as to Affirmative Defenses # 3, 6, 9, 11 and Plaintiffs’ Motion to Strike Affirmative Defenses is granted, without prejudice and with leave to replead, as to Affirmative Defenses # 1, 2, 4, 5, 7, 8, 10. During open court, the Defendants voluntarily withdrew Affirmative Defense # 12;

- FILED DATE: 11/12/2024 12:00 AM 2023CH05147
3. Defendants are given leave to replead their Affirmative Defenses by December 6, 2024;
 4. Plaintiffs shall respond to any repleaded Affirmative Defenses by December 20, 2024;
 5. All written fact discovery closes on December 31, 2024;
 6. This matter is set for further status on December 18, 2024 at 9:30 a.m., before Judge Quish via Zoom Meeting ID: 953 7174 9534, Password: 253498, Dial-In (312) 626-6799, and
 7. The Parties' Joint Motion for Entry of a Protective Order is hereby granted by separate order.

ENTERED:


Judge Clare J. Quish
NOV 01 2024

Judge Clare J. Quish

Circuit Court - 2160

DATE: November 1, 2024

Judge Clare J. Quish (312) 603-3733 ccc.chancerycalendar14@cookcountyl.gov Zoom Meeting ID: 953 7174 9534 Zoom Password: 253498 Zoom Dial-In: (312) 626-6799
