

**IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL
CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA**

CASE NO: 2016-018370-CA-01
SECTION: CA25
JUDGE: Valerie R. Manno Schurr

Florida Retail Federation, Inc
Plaintiff(s)

vs.

City of Coral Gables, Florida
Defendant(s)

ORDER AND FINAL JUDGMENT IN ACCORDANCE WITH APPELLATE MANDATE

This matter came before the Court upon the mandate of the Third District Court of Appeal, appellate case no. 3D17-0562, dated October 7, 2019 (the “Mandate”), which followed the Third District’s appellate opinion in this case dated August 14, 2019 (the “Opinion”). Based upon the Opinion and Mandate, it is hereby

ORDERED AND FINALLY ADJUDGED AS FOLLOWS:

1. This matter originally came before the Court for hearing on February 2, 2017 upon the cross-motions for summary judgment filed by the Plaintiffs, Florida Retail Federation, Inc. (“FRF”) and Super Progreso Inc. (“Super Progreso”), and the Defendant, the City of Coral Gables (the “City”). The Court initially granted the City’s Motion for Summary Judgment and denied the Motion for Summary Judgment of FRF and Super Progreso. The Third District Court of Appeal thereafter reversed this Court’s final judgment in favor of the City and remanded the case to this Court for entry of final judgment in favor of FRF and Super Progreso. This Court hereby enters final judgment in favor of FRF and Super

Progreso, as follows:

2. The issue in this case is whether the City may enforce an ordinance regulating polystyrene use as follows: “Food service providers and stores shall not sell, use, offer for sale or use, or provide food or beverage in expanded polystyrene containers.” § 34-264(a), Coral Gables Code. The facts in this case are undisputed, and both Plaintiffs FRF and Super Progreso and the City agree that resolution of this case requires a declaration by the Court of the parties’ respective rights as to whether Coral Gables may regulate stores’ use of expanded polystyrene containers as it did with § 34-264, Coral Gables Code. Plaintiffs contend that the ordinance is preempted in part by three state laws, and Coral Gables contends that those laws either do not apply to its ordinance or violate the Florida Constitution. The Attorney General of the State of Florida intervened to defend the constitutionality and address the interpretation of the state statutes at issue and has appeared and argued at hearings. Following the Mandate of the Third District Court of Appeal, this Court finds that the pleadings and other materials on file show that there is no genuine issue as to any material fact, and so enters summary final judgment as a matter of law in favor of FRF and Super Progreso.

The Undisputed Facts

3. Plaintiffs’ Complaint has alleged that § 34-264, Coral Gables Code, concerning regulation of polystyrene products enacted by Coral Gables in early 2016 is preempted in part by State law, specifically by the following statutes:

- a. **Section 403.708 Fla. Stat. *Prohibition; penalty***, which provides since 1974 in pertinent part:

(9) The packaging of products manufactured or sold in the

state may not be controlled by governmental rule, regulation, or ordinance adopted after March 1, 1974, other than as expressly provided in this act.

Section 403.708 Fla. Stat. has been in full force and effect at all times material to this action.

- b. **Section 403.7033, Fla. Stat.** which provides:

The Legislature finds that prudent regulation of recyclable materials is crucial to the ongoing welfare of Florida's ecology and economy. As such, the Department of Environmental Protection shall undertake an analysis of the need for new or different regulation of auxiliary containers, wrappings, or disposable plastic bags used by consumers to carry products from retail establishments. The analysis shall include input from state and local government agencies, stakeholders, private businesses, and citizens, and shall evaluate the efficacy and necessity of both statewide and local regulation of these materials. To ensure consistent and effective implementation, the department shall submit a report with conclusions and recommendations to the Legislature no later than February 1, 2010. Until such time that the Legislature adopts the recommendations of the department, no local government, local governmental agency, or state government agency may enact any rule, regulation, or ordinance regarding use, disposition, sale, prohibition, restriction, or tax of such auxiliary containers, wrappings, or disposable plastic bags.

While the Department of Environmental Protection (DEP) has made its recommendations to the Legislature, the latter has considered them, yet not adopted them. Section 403.7033, Florida Statutes, has been in full force and effect at all times material to this action.

- c. **Section 500.90, Fla. Stat.,** which provides:

500.90 Regulation of polystyrene products preempted to [State Department of Agriculture and Consumer Services]. – The regulation of the use or sale of polystyrene products by entities regulated under Chapter 500 is preempted to the department. This preemption does not apply to local

ordinances or provisions thereof enacted before January 1, 2016, and does not limit the authority of a local government to restrict the use of polystyrene by individuals on public property, temporary vendors on public property, or entities engaged in a contractual relationship with local government for the provision of goods or services, unless such use is otherwise preempted by law.

Ch. 2016-61, § 7, Laws of Fla. (codified as § 500.90, Fla. Stat.). The legislation was signed into law on March 16, 2016, became effective July 1, 2016, and has been in full force and effect since that time. *Id.* at 27.

The Court's Conclusions of Law

A. State Preemption of Local Law

9. Article VIII, section 2(b) of the Florida Constitution “specifically recognizes” that municipal power may be limited “by law.” *Masone v. City of Aventura*, 147 So. 3d 492, 495 (Fla. 2014). This Court adopts in this regard the legal analysis of the Third DCA in its Opinion in all respects.

B. Section 403.708(9), Florida Statutes, preempts and invalidates the Polystyrene Ordinance.

10. The plain language of Section 403.708(9), Florida Statutes, since 1974 has prohibited governmental rules, regulations or ordinances of the packaging of products manufactured or sold in the state, except as expressly stated by the Legislature. The Court finds that the Polystyrene Ordinance is an “ordinance adopted after March 1, 1974,” and Coral Gables has not disputed that its ordinance seeks to “control the packaging of products manufactured or sold in the state.” The Court thus holds that Section 403.708(9), which is in full force and effect

at this time, renders a portion Coral Gables Code section 34-264 rendered null and void, specifically the portion that provides that “[f]ood service providers and stores shall not sell, use, offer for sale or use, or provide food or beverages in expanded polystyrene containers.”

C. Section 403.7033, Florida Statutes, also preempts and invalidates the Polystyrene Ordinance.

11. Pursuant to section 403.7033, Florida Statutes, local government regulation of auxiliary food containers, including polystyrene food containers, has been preempted to the state effective July 1, 2008. Section 403.7033, Florida Statutes, expressly prohibits local regulation of auxiliary food containers, including polystyrene food containers at this time. The Court determines, and Coral Gables has not disputed, that the Coral Gables’ Ordinances regulate auxiliary food containers. The Court thus holds that Section 403.7033, which is in full force and effect at this time, renders a portion Coral Gables Code section 34-264 rendered null and void, specifically the portion that provides that “[f]ood service providers and stores shall not sell, use, offer for sale or use, or provide food or beverages in expanded polystyrene containers.”

C. Section 500.90 Florida Statues also preempts and invalidates the Polystyrene Ordinance.

12. The Court further holds that section 500.90, Florida Statutes, also preempts the Polystyrene Ordinance. A plain reading of section 500.90, Florida Statutes, shows that the Legislature by way of the section has expressly preempted certain regulation of polystyrene products. The Court finds that Plaintiffs FRF and Super Progreso are entities regulated under Chapter 500, and that the Polystyrene Ordinance, enacted on February 9, 2016, was not “enacted before January 1, 2016.” The Court thus holds that Section 500.90, which is in full force and effect at this time, renders a portion Coral Gables Code section 34-264 rendered null and void, specifically the portion that provides that “[f]ood service providers and stores shall not sell, use,

offer for sale or use, or provide food or beverages in expanded polystyrene containers.


13. The City's Motion for Summary Judgment is hereby denied.

CONCLUSION

14. For the foregoing reasons, the Court enters summary final judgment in favor of Plaintiffs, and denies the City's Motion for Summary Judgment. The Court hereby declares that § 34-264(a) of the Coral Gables Code is preempted by (i) section 403.708(9) Fla. Stat.; (ii) section 403.7033, Fla. Stat.; and (iii) section 500.90, Fla Stat., and thus unconstitutional and null and void.

16. The Court grants Plaintiffs' request for permanent injunctive relief barring the City from enforcing the portions of its Code declared unconstitutional as violative of state preemption laws, and thus unconstitutional and null and void in this Order and Final Judgment.

DONE and **ORDERED** in Chambers at Miami-Dade County, Florida on this 8th day of April, 2020.

2016-018370-CA-01 04-08-2020 8:25 AM


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Hon. Valerie R. Manno Schurr

CIRCUIT COURT JUDGE

Electronically Signed

Final Order as to All Parties SRS #: 12 (Other)

THE COURT DISMISSES THIS CASE AGAINST ANY PARTY NOT LISTED IN THIS FINAL ORDER OR PREVIOUS ORDER(S). THIS CASE IS CLOSED AS TO ALL PARTIES.

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