IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

2018-CA-003554-O

ANITA YANES

Plaintiff(s),

vs.

O C FOOD AND BEVERAGE LLC

Defendant(s).
_____/

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

THIS MATTER comes before the Court on Third Party Plaintiff's Motion for Summary Judgment Addressing the Facial Validity/Constitutionality of Chapter 22, Orange County Code. In addition to the motion, the Court has considered Third Party Plaintiff's Supplemental Legal Memorandum, Third Party Defendant's, Orange County Florida's Response and Memorandum in Opposition, Plaintiff's Response to Defendant's Motion for Summary Judgment, Third Party Plaintiff's Supplemental Memorandum Addressing Orange County v. McLean and arguments of Counsel.

Defendant/ Third Party Plaintiff asserts that Orange County Code Chapter 22, the Orange County Human Rights Ordinance ("HRO") violates Article VIII section 1.(g) of the Constitution of the State of Florida in that it is inconsistent with Florida Statute Chapter 760 the Florida Civil Rights Act("FCRA").

The matter arrives before this Court from a rather unusual procedural history. Plaintiffs allege that February 18, 2018, they were denied entry to Defendant/Third Party Plaintiff establishment. They further claim that the reason given was a policy that female patrons are

denied admission unless accompanied by a male companion. Plaintiffs choose to file suit in this Court under the HRO as opposed to the FRCA. Defendant/ Third Party Plaintiff quickly filed its Motion to Dismiss, which largely mirrored the arguments contained in the instant Motion for Summary Judgment. At hearing on January 24 2019, this Court's predecessor Judge granted the Defendant/Third Party Plaintiff Motion to Dismiss, and followed that ruling with a detailed order filed May 20, 2019. The Plaintiffs promptly filed notice of Appeal. Jurisdiction was briefly relinquished by the Fifth District Court of Appeals for the preparation of a Final Judgment in the matter, which was entered on July 20, 2020. Ultimately, that Court reversed the order of the Trial Court for the failure of the Defendant/Third Party Plaintiff to comply with Florida Statute 86.091 by joining Orange County as a party to this action. The Court declined to address the merits of the issue. Defendant/Third Party Plaintiff complied with the requirements of 86.091, by filing its Third Party Complaint against Orange County, resulting in the matter before the Court.

ARTICLE VIII SECTION 1.(G) OF THE CONSTITUTION OF THE STATE OF FLORIDA

Article VIII section 1.(g) of the Constitution of the State of Florida in states:

> Charter government. Counties operating under county charters shall have all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors. The governing body of a county operating under a charter may enact county ordinances not inconsistent with general law. The charter shall provide which shall prevail in the event of conflict between county and municipal ordinances.

Our Courts have held that the phrase "not inconsistent with general law" presents the question of whether the local government has encroached in an area of law which the state has reserved to itself. "Local ordinances are inferior to laws of the state and must not conflict with any controlling provision of a statute." *Phantom of Brevard, Inc. v Brevard County*, 3 So. 3d

309, 314 (Fla. 2008). In determining conflict, the Court must look to two considerations 1) does the ordinance concern a subject area that has been preempted by the State or 2) even in a field where both the State and local government can legislate concurrently, a county cannot enact an ordinance that directly conflicts with a state statute. Preemption looks to legislative intent, while conflict looks to the practical application of the statute and the ordinance.

LEGISLATIVE INTENT TO PREEMPT

Preemption may be either express or implied. All parties in this case agree that there is no express preemption in the FCRA. Defendant/Third Party Plaintiff argues that this Court should follow in the footstep of its predecessor and find that the FCRA impliedly preempted the field when is created a comprehensive scheme for the handling complaints of discrimination. This Court agrees that the scheme is comprehensive, modeled after its federal counterpart. However, the analysis does not stop there. *Masone v. City of Aventura* 147 So. 3d 492 (Fla. 2014) cites a number of cases for the proposition that a comprehensive scheme can lead to the conclusion that the intent of the legislature was to preempt the subject matter. A deeper dive into the cases cited in *Masone* reveal that the cases all involved regulatory schemes. *Barragan v. Miami* 545 So. 2d 252 (Fla. 1989) (offsetting worker's compensation payments against an employee's pension benefits), *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So.3d 880, 886 (Fla.2010) (the process of production, auditing and certifying elections) and *City of Palm Bay v. Wells Fargo Bank* 114 So. 2d 924 (Fla, 2013) (regulating the priority of liens on property). It is understandable that in legislative schemes meant to regulate, comprehensiveness of the scheme is strong evidence of intent to preempt in that multiple layers of differing regulations lead to inevitable conflict. "[I]mplied preemption occurs when the state legislative scheme is pervasive and the local legislation would present a danger of conflict with that pervasive scheme... In other words, preemption is implied when the legislative scheme is so

pervasive as to virtually evidence an intent to preempt the particular area or field of operation, and where strong public policy reasons exist for finding such an area or field to be preempted by the Legislature." *D'Agostino v. City of Miami* 220 So. 3d. 410 (Fla. 2017).

This argument seems far weaker when it relates to the creation of a civil cause of action. Multiple causes of action related to a single subject matter have little risk of conflict since they merely provide litigants with options for pursuing their claims, each with its own unique advantages and dis-advantages. The HRO does not seek to alter the FCRA but merely to provide an alternative remedy. The question is this. Did the legislature intend that FCRA be the only method available to pursue civil action for discrimination? Whatever assumption one might draw from the comprehensive administrative scheme enacted, they must be weighed against what is expressly stated in the Statute.

The legislature has set forth the general purpose of FCRA:

> (2)The general purposes of the Florida Civil Rights Act of 1992 are to secure for all individuals within the state freedom from discrimination because of race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status and thereby to protect their interest in personal dignity, to make available to the state their full productive capacities, to secure the state against domestic strife and unrest, to preserve the public safety, health, and general welfare, and to promote the interests, rights, and privileges of individuals within the state.
>
> (3) The Florida Civil Rights Act of 1992 shall be construed according to the fair import of its terms and shall be liberally construed to further the general purposes stated in this section and the special purposes of the particular provision involved. F.S. 760.01

Again, the question before the Court, stated in its simplest form, is whether the legislature, when it enacted FCRA, intended that it be the only vehicle available to aggrieved persons to address claims of discrimination. When Counsel for Defendant/Third Party Plaintiff was asked how he would reconcile a positive answer to the above question, with the general purpose of the statute contained F.S. 760.01, he was unable to provide one. Likewise, this Court

cannot reconcile the statements of purpose above with a finding that the Legislature intended to preempt this area of law.

CONFLICT

The Supreme Court of Florida in a number of cases has described preemption resulting from conflict between state statutes and local ordinance. "In the regulatory area involved in this case, the test of conflict is whether one must violate one provision in order to comply with the other. ...Putting it another way, a conflict exists when two legislative enactments "cannot co-exist." *Laborer's Intern. Union of North America v. Burroughs* 541 So. 2d 1160 (Fla. 1989); "[t]he test for conflict is whether 'in order to comply with one provision, a violation of the other is required." *Phantom of Brevard Inc. v. Brevard County* 3 So. 3d 309 (Fla. 2008).

A comparison of HRO and FCRA do not reveal any irreconcilable differences between the two. Defendant/ Third Party Plaintiff focus on the different pre-suit requirements between the two and reliance on *Orange County v. McLean* 308 So. 3d 1058 (5th DCA 2020) misses the point. HRO does not seek to alter the pre-suit requirements for filing suit under FCRA. Those who choose to forgo FRCA pre-suit requirements cannot avail themselves of the provisions of 760.06 and the investigative authority of the Human Rights Commission nor can they avail themselves of the administrative remedies provided by the statute. HRO is presented as an alternative to FCRA and nothing more. Those who choose to file suit under HRO are not violating FRCA, they are simply choosing not to avail themselves of its administrative remedies.

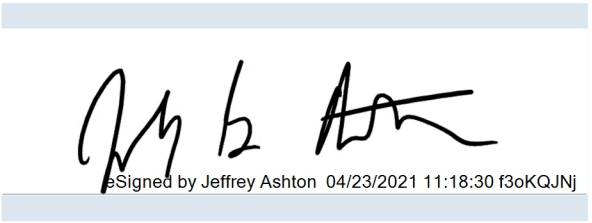
As the Court pointed out during argument, there seems nothing to prevent a litigant from exhausting all of the administrative remedies available under FCRA, then filing a civil action for violation of both FCRA and HRO. There simply is not practical reason that these two alternative causes of action cannot co-exist.

ODERED AND ADJUDGED:

1. That the Court vacates the Order Granting the Defendant's "Composite Motion Complaint Dated April 6, 2018 and Order Dismissing the Plaintiffs' Complaint Without Prejudice filed May 20 2019 and the Amended Final Judgement filed July 7, 2019.
2. That Third Party Plaintiff's Motion for Summary Judgment Addressing the Facial Validity/Constitutionality of Chapter 22, Orange County Code. is denied.

3. In aid of expedited appellate review of this matter the Court invites the parties to submit to the Court an Order, agreed to as to form only, granting Judgement on the pleadings to the third Party Defendant, and a Final Judgment.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on 23rd day of April, 2021.



Jeffrey L Ashton
Circuit Judge

The foregoing was filed with the Clerk of the Court this 23rd day of April, 2021 by using the Florida Courts E-Filing Portal System. Accordingly, a copy of the foregoing is being served on this day to all attorney(s)/interested parties identified on the ePortal Electronic Service List, via transmission of Notices of Electronic Filing generated by the ePortal System.