

IN THE OREGON COURT OF APPEALS OF THE STATE OF OREGON

21+ TOBACCO AND VAPOR RETAIL ASSOCIATION OF OREGON, a domestic non-profit corporation; NO MOKE DADDY, LLC, a domestic limited liability company, doing business as Division Vapor; and PAUL BATES, and individual,
Plaintiffs-Appellants,

v.

MULTNOMAH COUNTY, a political subdivision of the State of Oregon,
Defendant-Respondent.

Multnomah County Circuit Court No. 23CV03801

Court of Appeals No. A182442

ORDER GRANTING TEMPORARY RELIEF

Appellants move for an order staying the general judgment as it applies to Multnomah County Ordinance (MCO) 1311, and enjoining enforcement of MCO 1311, which is scheduled to go into effect on January 1, 2024, “in order to maintain the status quo during the pendency of this appeal.” See ORS 19.350; ORS 19.360. According to appellants, enforcement of MCO 1311, which “acts to ban the sale of flavored tobacco products and inhalant delivery systems in Multnomah County,” will “permanently and irreparably harm” appellants and other similarly situated businesses “resulting in the evisceration of their businesses, termination of employees, breach of leases, and substantial lost income to business owners and employees.” Appellants request immediate temporary relief by December 31, 2023, before respondent has had the opportunity to file a response to the motion, because, appellants assert, they “and other similarly situated businesses will be forced to permanently close without that relief by that date.” The request for immediate and temporary relief is granted, and respondent may not enforce MCO 1311, temporarily, pending respondent having the opportunity to respond to the appellants’ motion, appellants having the opportunity to reply, and the court considering the parties’ filings and rendering a decision on the motion.

The court notes that, although the motion requests a stay of the general judgment, it is not clear what such a stay would accomplish. The general judgment, by its terms, grants respondent’s motion for summary judgment,¹ denies appellants’ cross-motion for summary judgment, and dismisses with prejudice appellants’ complaint for declaratory and injunctive relief. No preliminary injunction nor other relief that would halt enforcement of MCO 1311 entered in the underlying case. Therefore, it appears to the court that a stay of the judgment would simply put the case back into the status quo

¹ The court treated respondent’s motion to dismiss as “the functional equivalent as a motion for summary judgment.”

ORDER GRANTING TEMPORARY RELIEF

prior to entry of the judgment and, at that time, the only thing preventing enforcement of MCO 1311 was the fact that it was not yet scheduled to be effective.

Thus, appellants do not appear to truly seek a stay of the judgment but, instead, effectively are seeking an injunction on the enforcement of the ordinance pending completion of the appeal. Appellants assert, “[i]n approving a stay of a trial court judgment, the Court may also enjoin enforcement of a challenged law” and, in support of that proposition, rely on *Does 1-7 v. State of Oregon*, 164 Or App 543, 547, 993 P2d 822 (1999). In that case, the court granted a stay of the judgment pending appeal where the plaintiff sought declaratory and injunctive relief regarding a state ballot measure, which provided that adopted people over the age of 21 could gain access to their original birth certificates and thus determine the identities of their birth mothers. *Id.* at 546-48. While the case was pending at the trial court, the parties had “entered into a stipulation for issuance of a preliminary injunction restraining defendants and their agents from enforcing the provision of” the ballot measure “until entry of a trial court judgment.” *Id.* at 547. Therefore, in *Does 1-7*, the status quo maintained by the stay prevented enforcement of the challenged ballot measure because the parties had entered into a stipulation to preliminarily enjoin enforcement of the measure. The *Does 1-7* court also noted that without a stay, the subject matter of the appeal would be eviscerated before a decision on the merits could be made. *Id.* at 546. Here, although the enforcement of MCO 1311 pending appeal would clearly cause significant harm to appellants’, it is not clear that relief is necessary to preserve the subject matter of the appeal, nor does *Doe* appear to be as helpful in evaluating the issue of the court’s authority to enjoin the ordinance as appellants’ motion suggests.

This court has “the inherent powers of a court in equity and those powers include the authority to grant provisional, including injunctive, relief,” *Northwestern Title Loans v. Division of Finance*, 180 Or App 1, 5, 42 P3d 313 (2002).² However, as the Oregon Supreme Court has explained, that authority is not without limitations:

“It is the general rule that either the lower or appellate court, according to the circumstances, has inherent power to grant a stay of proceedings pending an appeal even where there is no statute entitling a party to such stay. Where the right to a stay is entirely regulated by statute, or where the statute prescribes the conditions upon which it may be obtained or allowed, the courts cannot grant a stay of proceedings in a case which is not within the statute, or in the absence of compliance with the prescribed conditions.”

Blair v. Blair, 199 Or 273, 284, 247 P2d 883 (1952) (internal citations omitted). In *Northwestern Title Loans*, the court considered whether the authority of the appellate

² Although *Northwestern Title Loans* was vacated as moot by unpublished order, the court continues to apply the portions of that case that remain persuasive. See *Lovelace v. Board of Parole (A109609)*, 183 Or App 283, 51 P3d 1269 (2002).

ORDER GRANTING TEMPORARY RELIEF

Appellate Court Administrator, Appellate Court Records Section
1163 State Street, Salem, Oregon 97301-2563
Page 2 of 3

court to stay enforcement of an administrative rule during the course of a direct rule challenge under ORS 183.400 was entirely regulated by statute, explaining that, if it was not, the court could act pursuant to its inherent authority to stay enforcement of the rule pending completion of the rule challenge. 180 Or App at 6. And, having concluded that the issue was not entirely (or perhaps at all) regulated by statute, the court held that it was within the inherent authority of the appellate court to stay enforcement of an administrative rule during the course of a rule challenge. *Id.*

In civil cases, generally, stays pending appeal are regulated by ORS chapter 19. Specifically, ORS 19.330 provides that the “filing of a notice of appeal does not automatically stay the judgment that is the subject of the appeal” and that a “party may seek to stay a judgment in the manner provided by ORS 19.335, 19.340 or 19.350, or as provided by other law.” The question that arises, then, is whether the relevant statutes providing for stays entirely regulate the relief that may be granted pending appeal of a judgment in a case such as the one at issue, or whether the court retains inherent authority to grant injunctive relief pending completion of the appeal. The court requests that, in its response to appellants’ motion, respondent address the court’s authority to grant the relief requested and, in the reply, appellants’ also address the issue further in light of the discussion set forth above. The parties are also encouraged to address whether a stay of the judgment itself would provide relief to appellants that the court has not identified.



Theresa Kidd
Appellate Commissioner
12/28/2023

c: Andrew T Weiner
B Andrew Jones
Tony L Aiello Jr.
Multnomah County Trial Court Administrator

ORDER GRANTING TEMPORARY RELIEF