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SUPERIOR COURT OF NEW JERSEY
HUDSON COUNTY
Law DIVISION,
DOCKET NO. HUD-L-31-17

Daniel Markus, Inc. d/b/a
Perfect Pawn,

CIVIL ACTION

Plaintiff,

v.

OPINION

The Town of Kearny,
municipal corporation of
the State of New Jersey

Defendant.

ARGUED: July 26, 2017

DECIDED: July 28, 2017

Scott K. McClain, Esq. for plaintiffs (Merle, Brown & Nakamura,
P.C., attorneys).

Gregory J. Castano, Esq. for defendant (Castano Quigley, LLC,
attorneys).

Bariso, A.J.S.C.

Factual Background and Procedural History

Daniel Markus, Inc. d/b/a Perfect Pawn ("Markus") is a corporation organized under the laws of the State of New Jersey operating out of 869 Kearny Avenue, Kearny, New Jersey. The Town

of Kearny ("Kearny") is a municipal corporation of the State of New Jersey. Since 2011, Markus has operated as a pawnbroker licensed by the New Jersey Department of Banking and Insurance ("NJDOBI") in accordance with the New Jersey Pawnbroking Law, N.J.S.A. § 45:22-1, et.seq. ("Pawnbroker Law"). Markus is the only pawnbroker operating in Kearny.

This action originally commenced on December 29, 2016 when Markus filed a Verified Complaint and Order to Show Cause with preliminary restraints pursuant to Rules 4:69 and 4:52. In its Complaint, Markus argued state law regulating pawnbrokers preempted the original ordinance. Prior to the court's ruling on the initial application, Kearny withdrew the original ordinance and proposed a new amended ordinance 2017-21 revoking and replacing Sections 5-32.1 to 5-32.10 of the Town of Kearny municipal code (the "Amended Ordinance").

On May 2, 2017, Markus filed an Amended Complaint echoing similar concerns with the Amended Ordinance as the original ordinance in addition to concerns the Amended Ordinance violates constitutional protections against unlawful search and seizure. The court heard oral argument on July 26, 2017.

Amended Ordinance

On March 29, 2017, Kearny proposed Amended Ordinance 2017-21 entitled "An Ordinance Revoking Sections 5-32.1 to 5-32.10 of the Town Code and Replacing it with an Amended Ordinance Licensing Dealers in Precious Metals and Secondhand Goods." The Amended Ordinance proposes a municipal licensing scheme that would create parallel regulations to the existing state licensing scheme. The following is a recreation of the Amended Ordinance provisions at issue in this matter.

5A:32-3 Data base. The Police Department shall designate a dedicated and secure data base ("Designated Data Base") into which all electronic data collected pursuant to the provisions of this ordinance shall be transmitted.

5A:32-4 License. No Dealer or Itinerant Dealer shall engage or continue in a business which involves sales, pawns or consignment of precious metals and secondhand goods as herein defined in the Town of Kearny without a license issues by the Town Clerk upon the written recommendation of the Police Department.

5A:32-6 Police Department Approval. In the absence of any information that anyone with an ownership interest or any employee has been convicted of a crime of theft or the receipt of stolen goods or of any other disqualifying information, the Police Department within 10 days of receipt of the completed application forms shall in writing recommend to the Town Clerk that he or she issue a license to the applicant upon the payment of the license fee. The Town Clerk shall notify the applicant.

5A:32-9 Reportable Transactions. For every reportable transaction, the dealer shall obtain Acceptable Identification from the seller, pawnor or cosignor and shall input the date requested into the fields of entry on the Designated Data Base as now constituted or as it may be revised or supplemented from time to time as follows:

[Requiring reporting of customer name, ID type, ID number, ID issuer, expiration date, maiden/family name, hair color, height, race, gender, build, customer profile, ID card swipe, fingerprint, photo of customer, phone number, employer name, vehicle make, vehicle model, vehicle, color, interest rate, interest charge, and term of loan.]

The data entered in the computer, the photocopies, the photographs and a copy of the signed Declaration of Ownership shall be transmitted electronically by the end of the same day as the sale, pawn or consignment takes place.

5A:32-11 Revocation and Suspensions. A license may be suspended by the Police Department at any time for a violation of any provision of the Statutes or this

ordinance and may be restored when the violation is cured or corrected...

If the revocation or suspension is not rescinded by the Police Chief, the dealer shall have a right to appeal to the Mayor and Council which review shall be on the record below and the argument of the dealer or his or her attorney. After the hearing on the record, the Mayor and Council shall either confirm or reverse the revocation or suspension.

Kearny, N.J., Ordinance 2017-21

Markus's Argument

Markus asserts the Amended Ordinance is in Direct Conflict with the State of New Jersey's Pawnbroker Law and is Thus Preempted as a Matter of Law

Markus maintains that §5A:32.1 of the Amended Ordinance enacted under the authority of N.J.S.A. 2C:21-36, creates certain recordkeeping requirements for business that act as retailers, wholesalers or smelters of secondhand jewelry. Kearny is misguided in relying on N.J.S.A. 2C:21-36 as authority because it specifically states, "[n]othing in this section shall be construed to apply to pawnbrokers licensed and regulated pursuant to the pawnbroking law, N.J.S.A. 45:22-1 et seq." Because N.J.S.A. 2C:21-36 has a carve-out that specifically exempts licensed pawnbrokers, the Amended Ordinance is invalid as it applies to such licensees.

Markus maintains that the Amended Ordinance is expressly barred under the Licensing Act, N.J.S.A. 40:52-1. The Licensing Act expressly prohibits Kearny from having licensing authority because Markus is already licensed by the state, and the state has preempted the regulation of pawnbrokers. As evidence, Markus points to N.J.S.A. § 40:52-1:

Nothing in this chapter contained shall be construed to authorize or empower the governing body of any

municipality to license or regulate any person holding a license or certificate issued by any department, board, commission, or other agency of the State...

Markus enhances his argument with two illustrative cases: Coculo v. Trenton, 85 N.J. Super. 523 (App. Div. 1964) (ruling that a municipality may NOT require a person to obtain a municipal license to operate a business if that person already holds a license from the state issued pursuant to a specific controlling state law); and State v. Stockl, 85 N.J. Super. 591 (App. Div. 1964) (finding that the Real Estate Brokers and Salesmen Licensing Act preempted a municipal ordinance that attempted to regulate the municipalities real estate brokers). As in the two illustrative cases, Markus acknowledges that his business is regulated pursuant to the state's express licensing and regulatory requirements under the Pawnbroker Law. As a result, Markus asserts the Amended Ordinance is barred under N.J.S.A. § 40:52-1.

Markus outlines a five-factor test developed by the the New Jersey Supreme Court in Overlook Terrace Mgmt. Corp. v. Rent Control Bd. of W.N.Y., 71 N.J. 451, 461 (1976). In Overlook, the following five-factors were used to determine whether a state law preempts a municipal ordinance:

1. Does the ordinance conflict with state law, either because of conflicting policies or operational effect?
2. Was the state law intended, expressly or impliedly, to be exclusive in the field?
3. Does the subject matter reflect the need for uniformity?
4. Is the state scheme so pervasive or comprehensive that it precludes coexistence of municipal regulation?
5. Does the ordinance stand "as an obstacle to the accomplishment and execution of the full purposes and objectives" of the Legislature?

Under the first factor, Markus notes that §§ 5:32.4 and 5:32.5 of the Amended Ordinance give the chief of police the authority to

grant or deny a license to operate as a pawnbroker. Markus argues this is in clear conflict with N.J.S.A. § 45:22-2 which states, "[n]o person shall engage or continue in business as a pawnbroker except as authorized by this article, and without first obtaining a license from the commissioner of banking and insurance."

With respect to the second factor, Markus argues the Pawnbroker Law includes extensive requirements covering licensing, mandatory recordkeeping and reporting by licensees, limitations on interest rates and fees chargeable, surety bonding, insurance, and other regulatory requirements. Markus concludes that because the Pawnbroker Law is so extensive, it is clear the state has left no space for local pawnbroker regulation.

Looking to the third factor, Markus states the regulation of pawnbrokers clearly requires uniformity. Pawnbrokers licensed by the state are considered to be financial institutions that are authorized to engage in a specific type of collateral-based lending. The state requires uniform regulation as to how pawnbrokers conduct business to ensure consumer protection. Further, a local patchwork regulating pawnbrokers would defeat this purpose and leave consumers unprotected.

With regard to the fourth factor, Markus echoes his argument made for the second factor. Markus believes the state's extensive legislative and regulatory scheme clearly shows the intention of the Legislature to preempt the entire field with respect to the licensing and regulation of pawnbrokers.

Finally, with respect to the fifth factor, the Amended Ordinance does conflict with the Pawnbroker Law and thus would create an obstacle preventing the completion of the Legislature's objectives. According to N.J.S.A. §§ 45:22-4, -8, -10 and -11, the Legislature has empowered the State Department of Banking with the

sole authority to license and regulate pawnbrokers. Allowing the Amended Ordinance to take effect would permit Kearny to supersede the Banking Department's authority and impede the realization of the legislative intent.

The Reporting Scheme Mandated by the Amended Ordinance is in Violation of Constitutional Protections Against Unlawful Search and Seizure

Markus is also adamant about the potential problems that may arise by requiring the use of the Designated Data Base. The Amended Ordinance requires extensive reporting of customer's private information through a third-party vendor. Markus takes issue with the fact that the Amended Ordinance requires reporting confidential information without assuring the information will remain protected.

Markus asserts that the Amended Ordinance is in violation of Article I, § 7 of our State Constitution and the U.S. 4th Amendment protections against unlawful searches and seizures. Specifically, information such as fingerprints and biographical information would be turned over to the state without a subpoena, summons, or other official government request. Markus also emphasizes that while the language is similar, New Jersey affords greater protection in this area than the U.S. Constitution. New Jersey citizens clearly have a reasonable expectation of privacy with respect to financial records and the government cannot obtain those records without "a subpoena that carries a concomitant opportunity to make a motion to quash." New Jersey v. McAllister, 184 N.J. 17, 21 (2005). Based on the McAllister analysis, pawnbrokers are a form of regulated financial institution, like banks, and customers should have the same reasonable expectation of privacy with respect to their borrowing activity and shared information. Plaintiff's

brief goes on to argue that pawnbroker customers often resort to licensed pawnbrokers as the lender of last resort. Because it is a customer's last resort they may voluntarily provide information but only with the understanding that it will remain confidential.

Finally, Markus reiterates that N.J.S.A. 45:22-34 already requires the daily turnover of limited information on items pledged. The Amended Ordinance requires customers surrender much more detailed information. Markus argues the Amended Ordinance would make it possible for the municipality to create a base of pawnbroker customers which could be used for profiling low and moderate income individuals. The vendor or other third-parties could access the information stored in the Designated Data Base for illegal purposes, such as identity theft. Markus also notes that the same kind of Designated Data Base was proposed as an amendment to the New Jersey Pawnbroker Law but has continually stalled in the Legislature.

Kearny's Response

Opposition to Preemption Arguments

Kearny rebuts the argument that N.J.S.A. 2C:21-36 renders the Amended Ordinance null and void. Kearny concedes that N.J.S.A. 2C:21-36 specifically exempts pawnbrokers but claims that it applies to individuals and entities other than licensed pawnbrokers, such as, "[a]ny person in the business of buying precious metals," N.J.S.A. 51:6A-1, or anyone engaged in the buying or selling of "secondhand" goods. N.J.S.A. 45:22-34, *et seq.*

Kearny then states that Markus's argument pertaining to N.J.S.A. 40:52-1 is without merit. N.J.S.A. 40:52-1(c) clearly authorizes the municipality to license and regulate pawnbrokers.

Finally, Kearny asserts that Markus's reliance on Pawnbroker Law does not prove legislative intent to preempt the entire field. Kearny interprets Article 11 of the Pawnbroker law to contemplate "co-operation with the police and other officials of the several municipalities for the recovery or restoration of stolen property." The Amended Ordinance can coexist with the Pawnbroker Law because its purpose is consistent with the legislative finding permitting municipalities to act in the furtherance of the detection and prevention of crimes.

Opposition to The Reporting Scheme's Violation of Constitutional Protections Against Unlawful Search and Seizure

Kearny contends that the Pawnbrokers Law already includes a provision requiring pawnbrokers to record and turn over to local law enforcement detailed information about any pawn loans issued. The information that the Amended Ordinance requires pawnbrokers to input into the Designated Data Base is no different. Because the information that is being asked to be stored electronically is already being stored manually, Kearny argues that there is no privacy violation. Furthermore, the customer's decision to enter into a "pawn transaction" provides any consent that might otherwise be necessary.

Kearny further argues that the Supreme Court's review of N.J.S.A. 40:48-2 in Summer v. Teaneck Tp. revealed:

Any municipality may make, amend, repeal and enforce such other ordinances, regulations, rules and by-laws not contrary to the laws of this state or of the United States, as it may deem necessary and proper for the good government, order and protection of persons and property, and for the preservation of the public health, safety and welfare of the municipality and its inhabitants, and as may be necessary to carry into effect the powers and duties conferred and imposed by this subtitle, or by any law.

Construed liberally in favor of the local government as our Constitution... requires to be done, this provision has been held to accomplish a broad grant of police power...

Summer v. Teaneck Tp., 53 N.J. 548, 552 (1969).

Because the purpose of the Amended Ordinance is to regulate criminal conduct, it would be considered a legitimate exercise of its broad police power in service of the public interest.

Finally, Kearny asserts that no clear intention can be found in the applicable statutes. The Pawnbroker Law itself contains no statement that the Legislature intended its enactment to preclude the exercise of the police power delegated to the town. Rather, the Pawnbroker Law actually encourages the Commissioner of Banking to "cooperate with the police and other officials of several municipalities for the recovery or restoration of stolen property." When all the legislative enactments are read together, they demonstrate no "clear intention" to preempt the field of pawnbroking. Without a finding of "clear intention of preemption," the complaint must be dismissed.

Markus's Reply

In reply to Kearny's assertion that the Amended Ordinance is properly enacted under the authority of N.J.S.A. 2C:21-36, Markus repeats the argument that N.J.S.A. 2C:21-36 specifically exempts pawnbrokers. Thus, because the Amended Ordinance is based on N.J.S.A. 2C:21-36, the Amended Ordinance cannot accomplish that which the statute expressly forbids.

In response to Kearny's argument surrounding the Licensing Act, N.J.S.A. 40:52-1, Markus concedes that the statute allows municipalities to regulate pawnbrokers. However, N.J.S.A. 40:52-1 specifically states municipalities cannot "license or regulate any

person holding a license" issued by the state. Markus's state license preempts any municipal ordinance that would require acquiring a new, separate license.

Markus affirms its argument that the state has clearly preempted the field of pawnbrokers, including the recovery of stolen property. The Pawnbroker Law expressly endows the Commissioner of the Department of Banking with rule making authority with respect to business, reporting and regulations for the recovery of stolen property. Markus corrects Kearny's argument by pointing out that the statute clearly states that in the exercise of the commissioner's rule-making power, he shall "co-operate with" municipal police for the recovery of stolen property but it does not confer any actual rule-making power to the municipalities.

Markus reiterates that pawn customers have a clear expectation of privacy with respect to their social security numbers, fingerprints, employer information, etc. and reasonably expect this information will not be turned over as a result of a pawn transaction. Providing this information would be unconstitutional as it is tantamount to a warrantless search and falls outside of any exception to the warrant requirement. Kearny's argument that the Designated Data Base asks only to report information that is already required pursuant to the Pawnbrokers Law is also flawed. Currently, under the Pawnbrokers Act, the pawnbroker is only required to turnover a description of the item pledged, the amount of money loaned, and the description of the customer. The requirements under the Amended Ordinance are clearly much more extensive.

Markus repeats that the Amended Ordinance is analogous to a search because it requires the pawnbroker to obtain detailed

information from the customer that is far than necessary to process the transaction. The New Jersey Supreme Court has observed that "[a] subjective expectation of privacy is legitimate if it is one that society is prepared to recognize as reasonable[.]" State v. Stott, 171 N.J. 343,354 (2002), See New Jersey v. McAllister, 184 N.J. 17, 29 (2005) (recognizing a reasonable expectation of privacy to financial records held by customer's bank). Markus believes it cannot be reasonably argued that a pawn loan customer would reasonably expect all the information required under the Amended Ordinance to be turned over to the state.

Markus also points to New Jersey Transit PBA Local 304 v. New Jersey Transit, 151 N.J. 531, 543 (1997) to show the New Jersey Supreme Court's reluctance to authorize searches or seizures without a warrant, unless it falls under one of the established exceptions. Markus stipulates that the only exception that may be relevant to the issue at hand is the "pervasively regulated industry exception." Under this exception, there must first be a "substantial government interest that informs the regulatory scheme pursuant to which the exception is made..." and second, the warrantless search must be "necessary to further [the] regulatory scheme." Markus argues that there is no "substantial" government interest driving the proposed use of the Designated Data Base. Kearny has failed to provide any evidence showing a significant correlation between pawnbroker activity and criminal activity that would warrant the invasion of pawn customer's privacy. Kearny has not provided any evidence that the proposed use of the Designated Data Base is necessary or that the State Department of Banking's current pawnbroker regulations are in anyway inadequate. To provide further evidence, Markus points to Assembly Bill 1192 as an example of how similarly proposed legislation has been rejected for the same reasons set forth here.

Markus also questions the method of reporting. Currently, information that must be turned over is sent via fax. The Designated Data Base is operated by a third-party vendor that is, at this time, identified as "Business Watch International (US) Inc." with addresses in Canada and Florida. Markus argues that there is no plan to protect this information and it is even more troubling that the information will be stored outside of New Jersey.

Legal Conclusion

The validity of the Amended Ordinance centers around three issues: first, whether the Amended Ordinance is properly enacted under the authority of N.J.S.A. 2C:21-36 and N.J.S.A. 40:52-1; second, whether the Pawnbroker Law has clearly preempted the regulation of pawnbrokers; and third, whether the required personal identifiers violate the constitutional protections against unlawful search and seizure.

Violation of N.J.S.A. 2C:21-36

The Amended Ordinance is improperly enacted under the authority of N.J.S.A. §2C:21-36. While the statute creates recordkeeping requirements for persons engaging in business as retailers, wholesalers, or smelters of second-hand jewelry, it specifically states, "[n]othing in this section shall be construed to apply to pawnbrokers licensed and regulated pursuant to the pawnbroking law, N.J.S.A. 45:22-1..." N.J.S.A. §2C:21-36. Thus, Kearny cannot rely upon N.J.S.A. §2C:21-36 to support the Amended Ordinance requiring compliance when pawnbrokers are clearly exempt under the plain reading of the statute.

Violation of N.J.S.A. 40:52-1

Kearny's reliance upon N.J.S.A. 40:52-1(c) is also misplaced. This statute does name pawnbrokers as a type of business that can be licensed and regulated by a municipality. But this argument is flawed for two reasons. First, it fails to recognize that the end of the statute states, "[n]othing in this chapter contained shall be construed to authorize or empower the governing body of any municipality to license or regulate any person holding a license or certificate issued by any department, board, commission, or other agency of the State." Thus, Markus cannot be required to comply with the municipality's regulations as it is already licensed by the State of New Jersey. Second, the New Jersey Pawnbroker Law, N.J.S.A. 44:22-4 (amended 1981), was enacted subsequent to the Licensing Act, N.J.S.A. 40:52-1, enacted in 1941. The Licensing Act clearly provides that once the state has acted to license or regulate a business, a municipality no longer has that authority. The subsequent enactment of the Pawnbroker Law demonstrates that the state has clearly acted to license and regulate pawnbrokers.

The Pawnbroker Law Preempts the Amended Ordinance

The New Jersey Supreme Court has stated that preemption is "a judicially created principal based on the proposition that a municipality, which is an agent of the state, cannot act contrary to the State." Overlook, 71 N.J. 451,461. In the Overlook case the New Jersey Supreme Court established a five-factor test to determine whether a municipal ordinance is preempted by state law:

1. Does the ordinance conflict with state law, either because of conflicting policies or operational effect?
2. Was the state law intended, expressly or impliedly, to be exclusive in the field?

3. Does the subject matter reflect the need for uniformity?
4. Is the state scheme so pervasive or comprehensive that it precludes coexistence of municipal regulation?
5. Does the ordinance stand "as an obstacle to the accomplishment and execution of the full purposes and objectives" of the Legislature?

Id.

Applying the first and fifth factors, it is clear the Amended Ordinance is in direct conflict with N.J.S.A. 45:22-11, which creates an obstacle to the accomplishment of the Legislature's objective. The Amended Ordinance would empower the chief of police to grant or deny any requests for a pawnbroker license. However, N.J.S.A. 45:22-11 clearly endows the Commissioner of Banking with complete rule-making power as it pertains to the licensing and regulating of pawnbrokers. The statute only requires that the Commissioner of Banking "co-operate with police and officials." In no way does this statute endow the police or the municipality with any rule-making authority. Rather, the plain language of the statute indicates that a municipality should work within the existing state regulatory scheme rather than try to circumvent it. Allowing the Amended Ordinance to give such power to the chief of police would obviously stand as an obstacle to the Legislature's purpose and objectives.

Looking to the second and fourth factors, the extensive requirements embodied within the Pawnbroker Law demonstrate strong evidence that it was both intended to be exclusive in the field and so comprehensive it precludes coexistence of municipal regulations. The requirements under the Pawnbroker Law cover licensing, mandatory recordkeeping and reporting by licensees, limitations on interest rates and fees chargeable, insurance, and surety bonding. It is clear that the state created a thorough,

comprehensive scheme that has left no room for local pawnbroker regulations of the type envisioned in the Amended Ordinance.

With respect to the third factor, the very fact that the State of New Jersey has enacted the Pawnbroker Law is reflective of their belief that the pawnbroker business requires uniformity. State licensed pawnbrokers are licensed financial institutions authorized to engage in a specific type of collateral based lending. Uniformity is clearly needed to accomplish the legislative intention of protecting consumers. If municipalities are allowed to intervene with their own regulatory schemes it will only complicate and confuse the regulatory process already in place. Discrepancy in regulatory schemes across municipalities will only serve to convolute the chain of accountability and frustrate the Legislature's intent.

***Counsel Conceded at Oral Argument that Constitutional
Infirmities is Limited to Personal Identifier Requirements***

The argument that the proposed reporting system under the Amended Ordinance amounts to a violation of constitutional protections against unlawful search and seizure is a more complex one. The court recognizes that the use of the Designated Data Base does pose many potential privacy issues. The amount of information required is far more detailed than what is actually needed to complete the transaction. New Jersey Courts recognize that there is a reasonable expectation of privacy with respect to a bank customer's financial records. McAllister, 184 N.J. 17,21. In McAllister, the New Jersey Supreme Court noted that, "...the government cannot obtain [financial] records without adequate process..." Id. The present case does not deal with privacy of financial information, but there is credence to the argument that Social Security numbers or fingerprints require even greater

protection than financial records because it can lead to identity theft.

Kearny has made it clear that the Amended Ordinance is intended to help eliminate crime in connection with pawnshops and to aid in the recovery of stolen property. Kearny's argument rests on the assertion that banks are not inherently connected with criminal activity. Kearny believes it is the correlation between pawnshops and criminal activity that justifies the differentiation in protection afforded to pawnshops as opposed to other state regulated financial institutions. However, without any actual evidence to establish the alleged connection between pawnshops and criminal activity, Kearny's assertions cannot be taken as credible. Furthermore, the amount and detail of information required under the Amended Ordinance presupposes that customers of pawnshops are suspects.

Article 1, Paragraph 7 of the New Jersey Constitution states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized.

The information required under the Amended Ordinance does not fall under any of the permitted exceptions to this constitutional protection. The violation of privacy protected under the New Jersey State constitution is limited to the customer information required. The court recognizes that the proposed method of collecting said information does not violate any constitutional protections.

Conclusion

Based on the foregoing, it is clear that the Amended Ordinance is preempted by the Pawnbroker Law. In the event that a reviewing court disagrees with this conclusion, the personal identifiers required by N.J.S.A. §5A:32-9 of the Amended Ordinance should be stricken.

Therefore, the application to invalidate the Amended Ordinance as it relates to pawnbrokers is **GRANTED**, an appropriate Order follows.