IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
Plaintiff,	)	
	)	
v.	)	I.D. Nos.0112001060
	)	0109002426
FANTASIA RESTAURANT &	)	0112000958
LOUNGE, INC., DAVID R. LUI,	)	
AND JEFFREY LUI,	)	
	)	
Defendants.	)	

Submitted: December 2, 2003
Decided: March 9, 2004
Amended: March 15, 2004 (Pages 20 & 22)

On the Defendants' First Motion to Dismiss

OPINION and ORDER

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TOLIVER, JUDGE

STATEMENT OF FACTS AND NATURE OF THE PROCEEDINGS

This is the first of two motions to dismiss presently before this Court, which arises from charges filed by the State of Delaware ("State") against the corporate entity Fantasia Restaurant & Lounge, Inc., ("Fantasia") David R. Lui and Jeffrey Lui (collectively "Defendants") resulting from alleged violations of 24 *Del. C.* Ch. 16, also known as the Adult Entertainment Establishments Act ("Act").[1] Fantasia is a bar and restaurant that offers live entertainment consisting of female dancers dressed in costumes partially covering their genitalia, breasts and buttocks.

Between May and June of 2000, undercover police officers conducted investigations at Fantasia. These officers observed dancers wearing "g-strings", a small triangle of material with a thin strip of material going through the dancers' legs. This strip was then attached to a string that rode up between the buttocks and fastened in the rear. The g-string exposed the dancers' entire buttocks. The dancers also wore covers over the nipples of their breasts, which are known as "pasties," and a vertical strip of flesh-tone tape the width

[1] The second motion is being resolved by virtue of an opinion and order being issued contemporaneously with the instant decision.

of the areola running from the bottom of the pasties to the underside of the breast. This combination resulted in the exposure of the entire breast, less the areola itself, and the area covered by the strip of vertical tape. The officers observed a total of five dancers wearing these costumes.

The entertainment provided by the dancers consisted of routines that appeared to the officers to simulate sexual acts, including sexual intercourse and masturbation. One of those routines was known as the "hot seat," and involved one patron sitting in a chair on stage and being encircled by several dancers. They then would suggestively touch the face of the patron with their breasts and place their faces at or near his crotch as well as sit on the lap of the patron thrusting their buttocks in a manner that the officers concluded simulated sexual intercourse.

A record of the officers' observations was forwarded to the Office of the State Attorney General, who issued a cease and desist order on March 28, 2001. This order directed that the Luis stop the aforementioned activities or obtain a proper license pursuant to the Act. Neither individual complied with the order or obtained the proper license on behalf of Fantasia. The charges of ope[2]rating an adult entertainment

establishment without a proper license and conspiracy to do so were subsequently brought by the State against the Defendants on December 6, 2001.

On May 2, 2002, the Defendants filed the instant motion to dismiss the charges. The State filed its response to that motion on May 24, 2002 to which the Defendants filed a reply on June 3, 2002. The parties completed briefing on the issues so raised, and oral argument was held on June 7, 2002. Because of related litigation in the United States District Court for the District of Delaware,[3] resolution of this matter was stayed pending the outcome of the federal action. On January 31, 2003, the federal action was terminated in favor of this matter. Additional submissions were subsequently filed by the parties and argument held on December 2, 2003.

THE PARTIES' CONTENTIONS

The Defendants raise three primary arguments in their motion to dismiss. First, the Defendants contend that the Act is vague and overbroad. Specifically, they argue that the term "buttocks," as set forth in 24 *Del. C.* §§ 1602(17)(c) and (d)(2), and the phrase "female breasts below the top of the

[3] *Lui v. Commission on Adult Entertainment Establishments*, 213 F.R.D. 166 (D. Del. 2003).

areola," as set forth in 24 *Del. C.* § 1602(17)(d)(3), are vague because they are susceptible to more than one interpretation. Second, Defendants argue that Fantasia is not an adult entertainment establishment because its primary business is as a restaurant and bar. The exotic dancing performed as entertainment is merely ancillary to its primary business. Therefore, the Defendants assert that the application of the Act's license requirement to Fantasia, while exempting video stores that sell sexually explicit material, violates the Equal Protection Clause of the United States Constitution. Third, Defendants argue that the purpose of the Act does not have any factual relation to Fantasia's operation. As might have been anticipated, the State has opposed the Defendants' motion.

In terms of its response to the Defendants' first argument, the State contends that the definitions contained in the Act are readily understood by a person of ordinary intelligence and there is no uncertainty regarding what is meant by breast and/or buttocks. Thus, the Act is not vague or overbroad. Next, the State asserts that any enterprise or establishment, including video stores or restaurants/bars, that feature the "on-site display of sexually oriented

materials or sexual activities," is subject to the Act. The State argues that Fantasia is therefore not treated differently than other similarly situated businesses and that the Defendants' equal protection claim must fail. Lastly, the State responds that although it is not contending that any crimes of obscenity and prostitution have transpired on the premises of Fantasia, that does not mean that the Act was not intended to regulate businesses typified by Fantasia in order to prevent illegal activity. Additionally, the State claims that live exotic dancing and related activities performed at Fantasia facilitate and affirmatively foster an environment for crimes that the Act was designed to prevent.

DISCUSSION

Under the Act, an "adult entertainment establishment" is defined as "any commercial establishment, business or service, or portion thereof, which offers . . . specific sexual activities."[4] In turn, "specific sexual activities" is defined to include "the fondling or erotic touching of human genitals, pubic region, buttocks or the female breasts."[5]

[4] 24 *Del. C.* § 1602(2).

[5] 24 *Del. C.* § 1602(17)(c).

"Specific sexual activities" also includes the exhibition of "[l]ess than completely opaquely covered . . . buttocks [or] [f]emale breasts below the top of the areola."[6]

The Act requires that any business operating as an adult entertainment establishment must first be issued a license by the Commission on Adult Entertainment Establishments.[7] The Act also provides for criminal penalties for any corporation, including its principal stockholders, board of directors, officers and persons engaged in the management of an adult entertainment establishment who operate such an establishment without a license.[8]

Vagueness and Overbreadth

In support of their motion, the Defendants challenge the vagueness and overbreadth of the terms "buttocks" and "female breasts below the top of the areola."[9] The Defendants assert that there is no definition of "buttocks" in the Act. Also, the Defendants argue that the term "female breasts below the

[6] 24 *Del. C.* §§ 1602(17)(d)(2) & (3).

[7] 24 *Del. C.* § 1606(a).

[8] 24 *Del. C.* § 1606(c) (A party in violation of this section "shall be fined not more than $10,000 and imprisoned not more than 6 months, or both.").

[9] 24 *Del. C.* §§ 1602(17)(c) and (d)(2) & (3).

top of the areola" is amenable to more than one interpretation.[10] Before addressing this issue, however, it is important to note that § 1602 is only the definitional section of the Act. This section does not dictate how the dancers are to dress. It simply sets out examples of "specific sexual activities" that would qualify a commercial or business establishment as an adult entertainment establishment.[11] Once a business is deemed to be considered an adult entertainment establishment under the Act, that business must attain a license under § 1606.

There is a strong judicial tradition in Delaware which supports a presumption of the constitutionality of a legislative enactment.[12] All doubts are resolved in favor of

[10] The Defendants interpret this phrase as only referring to the breast area directly, narrowly, and immediately below the areola to the bottom of the entire breast. The State interprets this phrase as referring to the entire breast directly and laterally below the top of the areola.

[11] Section 1602(17)(d)(2) does not require exotic dancers to completely and opaquely cover their entire buttocks. It simply requires a business which has dancers who do not cover their buttocks completely and opaquely to attain a license because of its adult entertainment establishment classification. Similarly, § 1602(17)(d)(3) does not require exotic dancers to completely and opaquely cover their breasts below the top of the areola. It simply requires a business which has dancers who do not cover their breasts below the top of the areola completely and opaquely to attain a license because of its adult entertainment establishment classification.

[12] *Snell v. Engineered Systems & Designs, Inc.*, 669 A.2d 13, 17 (Del. 1995).

the challenged legislative act.[13] "A statute is unconstitutionally vague if it fails to give a person of ordinary intelligence fair notice that his contemplated behavior is forbidden by the statute, or if it encourages arbitrary and erratic enforcement."[14] A statute is overbroad when it ". . . is designed to burden or punish activities which are not constitutionally protected, but . . . includes within its scope activities which are protected by the [F]irst [A]mendment."[15]

Where a statute is challenged on the basis of vagueness and overbreadth, the court's first task "is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail."[16] "A law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth test may nevertheless be challenged on its face as

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[13] *State v. Baker*, 720 A.2d 1139, 1144 (Del. 1998).

[14] *United Video Concepts, Inc. v. City of Dover*, 1994 Del. Super. LEXIS 498, *7 (Del. Super. Ct.); *see Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982).

[15] RONALD D. ROTUNDA AND JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 20.8, at 26 (2d ed. 1992).

[16] *Baker*, 720 A.2d at 1144 (quoting *Village of Hoffman Estates*, 455 U.S. at 494-95).

unduly vague," if a due process violation is implicated.[17] However, "[t]o succeed, the complainant must demonstrate that the law is impermissibly vague in all of its applications."[18]

The Defendants contend that § 1602(17)(d) is unconstitutionally overbroad because it espouses conservative dress requirements that could be applied to lifeguards and people who attend Delaware beaches, public pools, etc.[19] However, as already stated, § 1602(17)(d) does not impose dress attire requirements. The subsection defines what constitutes "specific sexual activities," which is itself a component of the definition of an "adult entertainment establishment." Therefore, the overbreadth challenge fails because the definition of "specific sexual activities" and the Act itself only apply to businesses and commercial establishments that meet the definition of "adult entertainment establishment" for purposes of determining whether a license under the Act is required.[20] The definitions

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[17] *Village of Hoffman Estates*, 455 U.S. at 497.

[18] *Id.*

[19] The Defendants assert that "individuals wearing a g-string, thong, triangular-cut bikini top that covers the areola region of the breasts or other swim attire, whether or not used at a beach or elsewhere, would fall within the current proscriptions designated...[in § 1602(17)]." Defendants Reply Brief at p.6.

[20] *See* 24 *Del. C.* §§ 1602(2) and (17).

espoused in § 1602 and the Act itself, as a consequence, do not reach what attire an individual must wear at a public beach or pool.

The Court must also conclude that the terms "buttocks" and "female breasts below the top of the areola" are not unconstitutionally vague. Simply put, a person of ordinary intelligence would know that "buttocks" clearly refers to only one very specific part of the body and is unambiguous. And while the phrase "female breast below the top of the areola" could conceivably be open to some interpretation, this Court believes that a person of ordinary intelligence could reasonably be expected to know that the term refers to the entire area of the entire breast below the top of the areola, not simply the strip of flesh the width of the areola below the top of the areola.[21] Finally, the cases cited by the Defendants, including *Clarkson v. Town of Florence*[22] are not persuasive. They concern statutes which differ either by definition of the activities regulated/prohibited or the extent of any such regulation/prohibition set forth therein.

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[21] *See City of Daytona Beach v. Del Percio*, 476 So.2d 197, 200 (Fla. 1985) (interpreting the phrase "any portion of her breasts below the top of the areola" to mean "no portion of the breast directly or laterally below the top of the areola may be exposed to public view.").

[22] 198 F.Supp.2d 997 (E.D. Wis. 2002).

Equal Protection

The Defendants' second argument in support of their motion begins with the premise that Fantasia is not an adult entertainment establishment because its primary business is as a restaurant and bar. The Defendants claim that the exotic dancing performed as entertainment at Fantasia is ancillary to its primary business of food and alcoholic beverage sales. Based on this premise, the Defendants liken Fantasia to video stores that offer for sale sexually explicit videos. The Defendants assert that the application of the Act's license requirement to Fantasia, while exempting video stores that sell sexually explicit videos, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The Court does not agree. The Defendants' initial premise is incorrect. Based on the undercover police investigations, adult entertainment, as defined under the Act, in the form of minimally clad dancers performing simulated sexual acts as well as other sexually suggestive activity, was and is provided at Fantasia. Fantasia is therefore an adult entertainment establishment as defined in §§ 1602(2) and (17)

of the Act.

The Defendants rely on *Richardson v. Wile*[23] as support for their claim that by being prosecuted for the instant offenses, they are being denied the equal protection of law. In *Richardson*, the Delaware Supreme Court was asked to determine the scope of the phrase "adult entertainment establishment." In addressing that question, the Court applied a rule of statutory interpretation that favored legislative intent over literal meaning, and concluded that the General Assembly's intent was to limit enforcement of the Act to those businesses which are likely to facilitate the crimes of obscenity and prostitution.[24]

The Court drew a distinction between businesses that feature on-site displays of sexually oriented material or sexual activities, and those that simply offer materials primarily for in-home use.[25] "[V]ideo rental stores generally offer videos for home use and do not include the on-site element that Chapter 16 seems to contemplate."[26] As a result, the Court held that "a video rental store which rents or sells

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[23] 535 A.2d 1346 (Del. 1988).

[24] *Id.* at 1349; *see* 24 *Del. C.* § 1601.

[25] *Richardson*, 535 A.2d at 1350.

[26] *Id.*

x-rated videos is not per se an adult entertainment establishment as defined in 24 *Del. C.* § 1602."[27]

Based on *Richardson*, the live on-site display of simulated sex and related sexually suggestive activities would fall under the Act whether they were conducted at an establishment serving food and beverages or renting movies. It is the activities and not the nominal character of the establishment which governs whether the Act applies and an adult entertainment license is required. Regardless of where they took place, the activities described above clearly implicate the concerns articulated by the General Assembly in § 1601 and are more likely to promote the crimes of obscenity and prostitution.[28]

Under the Fourteenth Amendment, where a fundamental right or a suspect class is not implicated, a classification will be upheld if it is demonstrated that it is rationally related to a legitimate government interest.[29] The party asserting the equal protection claim has the heavy burden of showing a lack of rational justification for the classification created by

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[27] *Id.* at 1351.

[28] Under *Richardson*, Fantasia would be subject to the license requirement of the Act whether it described its business as a restaurant/bar or video store because of its on-site entertainment.

[29] *Helman v. State*, 784 A.2d 1058, 1074 (Del. 2001).

the statute.[30] The disparate treatment claimed by the Defendants is at best illusory. Any establishment promoting and/or presenting the kind of "entertainment" that was observed at Fantasia would be regulated under the Act as an adult entertainment establishment, again, whether it be a video store or a restaurant/bar. Their equal protection claim must fail as a result.

Prevention of Secondary Effects

The third argument advanced by the Defendants in support of their motion is that the Act is not intended to regulate a business like Fantasia because there has been no finding of prostitution, conspiracy to commit prostitution, obscenity, or conspiracy to commit obscenity occurring on its premises. Thus, the Defendants contend the purpose of the Act has no factual relation to the operation of Fantasia. The idea is that the prosecution of this case is inconsistent with the legislative intent.

[30] *Id.* at 1074-75 (citing *Kimel v. Florida Board of Regents*, 528 U.S. 62, 84-85 (2000) ("Usually, governmental action enjoys a strong presumption of constitutionality and statutory classifications will be set aside only if no grounds can be conceived to justify them.") (citations omitted)).

The Defendants argument is without merit for two reasons. First, the State adopted the Act for the purpose of protecting the "health, safety and welfare of the people of the State" from the "increasing incidence of the crimes of obscenity, prostitution and of offenses related thereto."[31] The General Assembly found that these crimes are "*principally facilitated* by the widespread abuse of legitimate occupations and establishments, to wit, adult entertainment establishments."[32] Fantasia, as this Court has previously determined, is such an establishment notwithstanding its protestations to the contrary. And, although no occurrences of the above offenses have in fact occurred to date at Fantasia, § 1601(a) clearly states that its purpose is to regulate businesses that *principally facilitate* prostitution, obscenity, and related offenses.[33] Consequently, the prosecution of this case is not inconsistent with the legislative intent behind the enactment of the Act.

Second, and more importantly, no legal authority, i.e.,

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[31] 24 *Del. C.* § 1601(a).

[32] *Id.* (emphasis added).

[33] The Supreme Court has recognized that States have a substantial interest in combating the secondary effects of adult entertainment establishments. *See e.g. Barnes*, 501 U.S. at 582 (Souter, J., concurring in judgment).

statutory, constitutional or common law, rule of court or other form of regulation, is cited as the support upon which this Court could premise a dismissal of the charges against the Defendants. Even if what the Defendants claim is true, there has to be some basis in law which would permit the granting of the relief sought on these grounds. Given that absence, it is the Defendants' contentions in this regard which must be dismissed as opposed to the criminal charges lodged against them.

CONCLUSION

For the aforementioned reasons, the Defendants' motion to dismiss the charges lodged against them on grounds that the Adult Entertainment Act is unconstitutionally vague and overbroad, that the prosecution violated the Equal Protection Clause of the Fourteenth Amendment and that the charges are inconsistent with the legislative intent of the Act, must be, and hereby is, **denied.**

IT IS SO ORDERED.

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TOLIVER, JUDGE