

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 17-23958-CIV-UNGARO/O'SULLIVAN

BEACH BLITZ CO., a Florida
corporation d/b/a OCEAN 9 LIQUOR, and
d/b/a as OCEAN 11 MARKET,

Plaintiff,

v.

CITY OF MIAMI BEACH, FLORIDA,
a municipal corporation of the State of Florida,
PHILIP LEVINE, an individual, JIMMY
MORALES, an individual, MICKEY
STEINBERG, an individual, RICKY ARRIOLA,
an individual, MICHAEL GREICO, an individual,
JOY MALAKOFF, an individual, KRISTEN
ROSEN GONZALEZ, an individual,
JOHN ELIZABETH ALEMAN, an individual,
RAUL J. AGUILA, an individual, and
ALEKSANDR BOKSNER, an individual,

Defendants.

_____ /

REPORT AND RECOMMENDATION

THIS MATTER is before the Court on the Plaintiff's Emergency Motion for Preliminary Injunction with Incorporated Memorandum of Law (DE# 4, 11/3/17). This matter was referred to the undersigned by the Honorable Ursula Ungaro for a report and recommendation in accordance with 28 U.S.C. § 636(b). See Order of Reference (DE# 23, 11/14/17). Having carefully considered the applicable filings and the law and having held an evidentiary hearing on November 17, 2017, the undersigned respectfully recommends that the Plaintiff's Emergency Motion for Preliminary Injunction with Incorporated Memorandum of Law (DE# 4, 11/3/17) be **DENIED** for the reasons stated herein.

BACKGROUND

On October 30, 2017, Beach Blitz Co. d/b/a Ocean 9 Liquor and d/b/a as Ocean 11 Market (hereinafter “plaintiff” or “Beach Blitz”) filed the instant action alleging the following causes of action against all defendants: Declaratory Judgment/injunctive Relief (Wrongful Closure) (Count I); violation of 42 U.S.C. §1983 (Count II); violation of the 14th Amendment – substantive due process and takings claim (Count III); violation of 42 U.S.C. §1983 (Retaliation for First Amendment Expression) (Count IV); declaratory judgment/injunctive relief (Section 102-377(e) of the Code) (Count V); declaratory judgment/injunctive relief (The Ordinances) (Count VI) and breach of Fla. Stat. § 562.45 (The Ordinances) (Count VII). See Complaint (DE# 1, 10/30/17).

On November 3, 2017, the plaintiff filed the instant motion. See Plaintiff’s Emergency Motion for Preliminary Injunction with Incorporated Memorandum of Law (DE# 4, 11/3/17) (hereinafter “Motion”). The defendants filed their response on November 13, 2017. See Defendants’ Response to Plaintiff’s Emergency Motion for Preliminary Injunction (DE# 22, 11/13/17) (hereinafter “Response”). The plaintiff filed its reply on November 15, 2017. See Reply in Support of Plaintiff’s Emergency Motion for Preliminary Injunction [ECF NO. 4] (DE# 25, 11/15/17).

On November 17, 2017, the undersigned held an evidentiary hearing on the instant motion. The plaintiff presented the testimony of Doron Doar, the principal of Beach Blitz. The defendants presented the testimony of Manuel Marquez, the Assistant Director of Finance for the City of Miami Beach and Hernan Cardino, the Director of Code Compliance for the City of Miami Beach. The undersigned admitted into evidence

the Plaintiff's Exhibits 1 through 17 and the Defendants' Exhibits 1 through 18. The undersigned permitted the parties to file supplemental briefs. See Supplemental Memorandum in Support of Plaintiff's Emergency Motion for Preliminary Injunction (DE# 36, 11/22/17) (hereinafter "Plaintiff's Supplemental Memorandum"); Defendants' Response to Plaintiff's Supplemental Memorandum in Support of Its Emergency Motion for Preliminary Injunction (DE# 38, 11/26/17) (hereinafter "Defendants' Supplemental Memorandum"). This matter is ripe for adjudication.

FACTUAL FINDINGS

Ocean 9 Liquors (hereinafter "Ocean 9") is a liquor store operating in the City of Miami Beach (hereinafter "City"). On October 6, 2017, Ocean 9 was closed for failing to timely obtain a Business Tax Receipt.

I. Business Tax Receipts ("BTRs")

All for-profit businesses operating in the City are required to have a Business Tax Receipt (hereinafter "BTR"). A BTR is an occupational license. A business seeking to obtain a BTR must submit an application to the City along with other documentation such as a lease or warranty deed evidencing the location of the business, a state license if needed and articles of incorporation.

The Finance Department receives applications for BTRs involving liquor sales. Upon receipt of an application, the Finance Department electronically routes it to the City's other regulatory departments: the Building Department, the Fire Department, the Planning Department and the Code Compliance Department. These departments weigh in on whether to issue the BTR.

A BTR is valid for one fiscal year, from October 1 through September 30th of the following year. Pursuant to state law, all BTRs expire on September 30th of the fiscal year that they were issued. To renew a BTR, a business needs to pay the annual renewal fee. Every July, the City mails out a reminder notice as a courtesy to businesses. The City's records reflect that a renewal reminder notice was created for Ocean 9 on July 1, 2016. A business may pay the BTR renewal fee at City Hall, at the Customer Service Center, at the City's lockbox, at the City's satellite office in North Miami Beach or online. The online system does not prevent businesses from making an online payment for a BTR even if there are outstanding violations.

It is the City's practice to accept payments for BTRs.¹ In instances where a business has outstanding fines or debts owed to the City, the City will withhold the BTR until the business pays the money owed. Once the debt is paid, the City will release the BTR. If a business has an outstanding code violation and that business presents evidence to the City of a proceeding before the Special Master challenging that code violation, the City will release the BTR. If however, a violation has been issued and the time to appeal that violation has passed, the debt becomes due to the City and the City expects the business to pay the debt owed before releasing the BTR. If a Special Master has adjudicated a business guilty and imposed a fine, that business would need to pay the fine before obtaining a BTR. See Transcript (DE# 39 at 132).

If a fiscal year passes and a BTR is not renewed, that BTR will be placed in

¹ The plaintiff's principal, Dorian Doar, testified that he attempted multiple times to submit payment for Ocean 9's BTR, but each time, the City refused to accept payment.

“closed status.” A closed BTR cannot be renewed. If a business misses the time period for renewing its BTR, that business will need to file a new application to obtain another BTR. If an application for a BTR is denied, the City provides an appeal process through the City Manager or a designee.

II. Ocean 9 Liquors (“Ocean 9”)

Doran Doar is the owner of plaintiff Beach Blitz. Mr. Doar owns two businesses through Beach Blitz: Ocean 9, a liquor store, and Ocean 11 Market (hereinafter “Ocean 11”), a convenience store that sells beer and wine. Ocean 9 has been in business since 2012 and has been very profitable. Tourists make up approximately 85 percent of the customer base of the two stores.

Ocean 9 and Ocean 11 are located in the MXE District in the City of Miami Beach, Florida. Presently, there are only three liquor stores operating in the MXE District. The City has passed several ordinances reducing the hours of operation for liquor stores in the MXE District. The City has also passed an ordinance precluding the opening of any new liquor stores in the MXE District.

On September 30, 2016, the BTR for Ocean 9 expired when it was not renewed. On December 21, 2016, Ocean 9 was cited for selling alcohol outside the permitted hours. See Defendants’ Exhibit 10. The citation imposed a \$1,000 fine. The back of the citation contained a notice stating that fines could be appealed within twenty (20) days of receipt. Id.

On June 25, 2017, the City of Miami Beach Code Compliance Division issued two citations to Ocean 9. See Plaintiff’s Exhibit 5. One of the citations was for selling alcohol outside the permitted business hours. The other citation was for failing to timely

renew a BTR.² Each citation imposed a \$1,000 fine. The back of the citation contained a notice which stated that fines could be appealed within ten (10) days of receipt. At no time did the plaintiff appeal the three violations in the manner proscribed on the back of the citations.

Mr. Doar was overseas when the June 25, 2017 citations were issued. A store clerk advised Mr. Doar of the two citations and Mr. Doar returned to the United States on June 27, 2017. Prior to receiving notice of the citations, Mr. Doar did not realize the BTR for Ocean 9 was expired.

Ordinarily, Mr. Doar would receive courtesy renewal notices in July notifying him that the BTRs would expire on September 30th of that year. Mr. Doar testified that he never received the BTR renewal notice for Ocean 9 on or about July 2016 or anytime thereafter. Mr. Doar did receive a renewal notice for Ocean 11 and he renewed that BTR. Mr. Doar did not recall why he did not renew the Ocean 9 BTR at the same time he renewed the Ocean 11 BTR.

On June 27, 2017, Mr. Doar went to the City's Finance Department and tried to pay for the BTR. Mr. Doar did not recall the exact conversation he had with the employee in the Finance Department. However, he testified that the employee told him that he was not allowed to renew his BTR because he had violations. See Transcript (DE# 36 at 76). Mr. Doar understood, in general, that he needed to resolve the

² The Notice of Violation corresponding to this citation contained the following instruction "Cease immediately until you obtain a Business Tax Receipt from the City of Miami Beach." Defendants' Exhibit 12. Ocean 9 did not cease operating at that time.

violations³ in order to pay for his BTR. Id. at 77. The Finance Department employee provided Mr. Doar with an invoice totaling \$2,246.46, which included the BTR fee and late fee. See Defendants' Exhibit 15. If Mr. Doar had paid this amount plus the \$1,000 fine for the outstanding December 21, 2016 violation, he would have received the BTR.⁴

Mr. Doar did not believe the December 21, 2016 violation was merited. He wanted his "professional people" to deal with that violation and the other two outstanding violations.

Mr. Doar then went to the office of a woman named Rochelle Malik. Ms. Malik helps small business owners resolve problems with the City of Miami Beach and had worked with Mr. Doar in the past. Mr. Doar gave the June 25, 2017 citations (Plaintiff's Exhibit 5) to Ms. Malik and told her to appeal them. Mr. Doar also gave Ms. Malik the citation from December 2016 and told her to resolve that citation as well. Mr. Doar specifically instructed Ms. Malik to go to the City and try to get a BTR.

At the same time, Mr. Doar also hired an attorney, Guy Shir, to appeal the citations. Mr. Shir sent a check for \$100 to the Special Master's Office to appeal the citations, but that check was not accepted. It was Mr. Doar's understanding that without

³ At the evidentiary hearing, Mr. Doar referred to "violations" in the plural form. However, he also testified that he did not think the violations he needed to resolve to obtain his BTR included the June 25, 2017 violations because those violations were new.

⁴ The City presented testimony that the June 25, 2017 violations would not have been considered due on June 27, 2017 because the time to appeal those violations had not run. Therefore, the only violation that needed to be paid on June 27, 2017 was the December 21, 2016 violation.

resolving his citations, he could not obtain a BTR.⁵

At the end of July 2017, Mr. Doar hired another attorney, Harold Rosen. Mr. Rosen was successful in obtaining an appeal. However, it was not an ordinary appeal process through the Special Master's office. It was initiated through the City Attorney's office and later, an agreed order was placed before the Special Master for a hearing and ratification.

On August 28, 2017, Mr. Rosen reached an agreement with the City to resolve all three citations for \$1,000. On the same day, Mr. Doar gave Mr. Rosen a check for \$1,000 to pay for the citations. Mr. Rosen told Mr. Doar that he gave the check to Aleksandr Boksner, the Deputy City Attorney, on August 28 or August 29, 2017. The check was deposited by the City on October 18, 2017.

The Special Master did not sign the Agreed Order reflecting the parties agreement to resolve all three citations until September 28, 2017. See Plaintiff's Exhibit 7. The City was shut down for a number of days in September due to Hurricane Irma. Under the terms of the Agreed Order, the plaintiff admitted to the violations being properly issued by the City and the plaintiff was assessed a fine of \$1,000. While the Agreed Order's \$1,000 fine resolved all outstanding debt due to the City, Ocean 9 would still need to pay an additional amount to obtain a BTR.

Mr. Rosen provided Mr. Doar with a copy of the Agreed Order on September 28, 2017. On September 28 or September 29, 2017, Mr. Doar went to the City's offices to

⁵ The City of Miami Beach presented testimony that had Mr. Doar paid for his BTR with the citations still outstanding, the clerk would have accepted payment for the BTR and held onto the BTR until the citations were resolved.

pay the violation and to obtain a BTR. A City employee told Mr. Doar that Mr. Doar would not receive a BTR because there were outstanding violations. Mr. Doar told the employee that the violations had been resolved. The employee responded that Mr. Doar had a violation and he could not renew the BTR. Ms. Malik later explained to Mr. Doar that it probably meant that the City's computer system had not yet been updated.

The following week, on Tuesday, October 3, 2017, Mr. Doar again went to the City's offices to obtain a BTR. He renewed the BTR for Ocean 11. See Plaintiff's Exhibits 9 and 10.⁶ He also attempted to obtain a BTR for Ocean 9. The City refused to accept Mr. Doar's payment because Ocean 9 had open violations.

On October 6, 2017, two code enforcement officers and two Miami Beach police officers came to Ocean 9 and gave Mr. Doar a violation for operating without a BTR. They told Mr. Doar he had to shut down his store. Mr. Doar explained to them that he had an agreed order for the violations. They told Mr. Doar that if he did not shut down his business within five minutes, he would be arrested. Ocean 9 has been shut down since that time.

The Notice of Violation corresponding to the October 6, 2017 violation advised the plaintiff of its right to appeal within ten (10) days of receipt of the violation. See Defendants' Exhibit 14. The plaintiff never appealed the October 6, 2017 violation.

On or about Monday, October 9, 2017, someone from the City gave Mr. Doar a computer screenshot for the Ocean 9 account. See Plaintiff's Exhibit 17. The top of the

⁶ Mr. Doar could not renew the BTR for Ocean 11 on September 29, 2017 because Ocean 11 had an open violation. The violation was dismissed and on October 3, 2017, Mr. Doar renewed the BTR for Ocean 11.

document stated “Active Holds Exist On This Record,” signifying that the were outstanding monies owed to the City or outstanding violations. Id.; Transcript (DE# 36 at 123). The screenshot also contained the following note “As per City Attorney Office, close BTR for nonpayment. Entity cannot reapply for liquor sales and/or entertainment at 865 Collins Ave,” the location of Ocean 9. See Plaintiff’s Exhibit 17.

The plaintiff did not file an application for a new BTR. Had the plaintiff filed an application for a new BTR, it most likely would not have been granted because a City ordinance prohibits the new sale of liquor in the MXE District. Had the plaintiff applied for a new BTR and the application was denied, the plaintiff would have had the opportunity to appeal the decision, first through the City and then through the state court.

On October 11, 2017, the plaintiff paid for Ocean 9's BTR online. That payment is “in suspense” until the resolution of the instant action. Transcript (DE# 36 at 136). However, it cannot be applied to the fiscal year ending on September 30, 2017 because that “permit” has expired. Id.

Had the plaintiff made an online payment for a BTR, the BTR for Ocean 9 would have been issued once the plaintiff paid its outstanding violations, even if those violations were not paid until October 2017.

The plaintiff did not file a lawsuit in state court. The plaintiff filed the instant action on October 30, 2017.

STANDARD OF REVIEW

A preliminary injunction may be granted only if the moving party establishes four elements: (1) a substantial likelihood of success on the merits; (2) an immediate and

irreparable injury absent injunctive relief; (3) a threatened harm to the plaintiff that outweighs any injury the injunction would cause to the nonmovant and (4) the injunction will not disserve the public interest. Carillon Imps. v. Frank Pesce Int'l Grp. Ltd., 112 F.3d 1125, 1126 (11th Cir. 1997) (citation omitted); see also N. Am. Med. Corp. v. Axiom Worldwide, 522 F.3d 1211, 1217 (11th Cir. 2008) (citing Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc., 299 F.3d 1242, 1246-47 (11th Cir. 2002)). A preliminary injunction is “an extraordinary and drastic remedy not to be granted unless the movant clearly establishe[s] the ‘burden of persuasion’ as to the four [elements].” McDonald’s Corp. v. Robertson, 147 F.3d 1301, 1306 (11th Cir. 1998) (citing All Care Nursing Serv., Inc. v. Bethesda Mem’l Hosp., Inc., 887 F.2d 1535, 1537 (11th Cir. 1989)).

ANALYSIS

The plaintiff seeks an Order:

(i) enjoining the enforcement of Ordinance No. 2016-4047 as applied to Plaintiff, (ii) enjoining the enforcement of Section 102-377(e) of the City of Miami Beach Code as applied to Plaintiff; (iii) preventing Defendants from enforcing Citation No. CC2017-03686 and (iv) ordering Defendants to issue Plaintiff a Business Tax Receipt for fiscal year 2017-2018 for its location at 865 Collins Avenue and to re-open said location without Defendants’ interference and (iv) granting such further relief deemed just and proper.

Reply (DE# 25 at 5, 11/15/17). As noted above, in order to obtain a preliminary injunction, the movant must demonstrate: “(1) [that there is] a substantial likelihood of success on the merits; (2) that irreparable injury will be suffered if the relief is not granted; (3) that the threatened injury outweighs the harm the relief would inflict on the non-movant; and (4) that the entry of the relief would serve the public interest.” Schiavo

ex. rel Schindler v. Schiavo, 403 F.3d 1223, 1225-26 (11th Cir. 2005). The undersigned will address each of these elements below.

I. Substantial Likelihood of Success on the Merits

The first element, the substantial likelihood of success on the merits, requires an analysis of the plaintiff's ability to make a showing of each of the required elements of the claims asserted. See Seiko Kabushiki Kaisha v. Swiss Watch Int'l, Inc., 188 F. Supp. 2d 1350, 1353-55 (S.D. Fla. 2002).

At the November 16, 2017 status hearing, the plaintiff told the undersigned that the plaintiff is seeking a preliminary injunction pursuant to the following counts: declaratory judgment/injunctive relief (Wrongful Closure) (Count I); violation of 42 U.S.C. §1983 (Count II); violation of the 14th Amendment – substantive due process and takings claim (Count III); violation of 42 U.S.C. §1983 (Retaliation for First Amendment Expression) (Count IV) and declaratory judgment/injunctive relief (Section 102-377(e) of the Code) (Count V). For the reasons stated below, the undersigned finds that the plaintiff has not shown a substantial likelihood of success on the merits of the above claims.

a. Procedural Due Process Claims (Counts I, II and V)

"[I]n order to maintain a § 1983 action, a plaintiff must allege conduct depriving him of a right, privilege or immunity secured by the Constitution or laws of the United States" Marrero v. City of Hialeah, 625 F.2d 499, 512 (5th Cir. 1980).⁷ The Due

⁷ The Eleventh Circuit in Bonner v. City of Prichard, 661 F. 2d 1206, 1207 (11th Cir. 1981) (en banc), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

Process Clause of the Fourteenth Amendment provides that no state shall “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. Amend. XIV, § 1. “The Supreme Court’s interpretation of this clause explicates that the amendment provides two different kinds of constitutional protection: procedural due process and substantive due process.” McKinney v. Pate, 20 F.3d 1550, 1555 (11th Cir. 1994). “A violation of either of these kinds of protection may form the basis for a suit under section 1983.” Id.

Procedural due process claims are analyzed in two steps: “the first asks whether there exists a liberty or property interest which has been interfered with by the State. . . . ; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient.” Kentucky Dep’t of Corr. v. Thompson, 490 U.S. 454, 460 (1989) (citations omitted).

“Protected property interests derive from ‘existing rules or understandings that stem from an independent source such as state law—rules or understandings that . . . support claims of entitlement to those benefits.’” Casas v. Swacina, No. 12-21083-CIV, 2012 WL 12894275, at *7 (S.D. Fla. Sept. 4, 2012), *aff’d sub nom. Casas v. USCIS Dist. Dir. Miami*, 518 F. App’x 669 (11th Cir. 2013) (quoting Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972)). “[T]he range of interests protected by procedural due process is not infinite.” Roth, 408 U.S. at 570. For instance, the Supreme Court has rejected a “generalized right to be secure in one’s business interests” as a property right protected by the Due Process Clause. Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 672 (1999). The Supreme Court has explained that:

The assets of a business (including its good will) unquestionably are

property, and any state taking of those assets is unquestionably a “deprivation” under the Fourteenth Amendment. But business in the sense of the activity of doing business, or the activity of making a profit is not property in the ordinary sense

Id. at 675.

Here, the parties dispute whether the plaintiff has asserted a protected property interest. The defendants argue that “there is no property right to the renewal of an expired business license or permit.” Defendants’ Supplemental Memorandum (DE# 38 at 7). The plaintiff maintains that “[t]he loss of Plaintiff’s business (including, inter alia, all associated goodwill, customers and reputation) is the loss of a protected property interest.” See Plaintiff’s Supplemental Memorandum (DE# 36 at 4).

The plaintiff cites to Marrero v. City of Hialeah, 625 F.2d 499, 514 (5th Cir. 1980) for the proposition that “Florida law recognizes business reputation/good will as an interest protectable under the strictures of 42 U.S.C. §1983.” See Plaintiff’s Supplemental Memorandum (DE# 36 at 4). The court in Marrero noted that:

Although Florida law may not recognize personal reputation as a liberty or property interest, **it does recognize business reputation, at least to the extent it approximates goodwill, as a property interest. Florida has long extended its protection to the intangible interests of a business. Under Florida law, “[o]ne’s business, aside from the investment of money and tangible property therein, is in every sense of the word property, and, as such, if lawful, entitled to protection from all unlawful interference.”** NAACP v. Webb’s City, Inc., 152 So.2d 179, 182 (Fla. Dist. Ct. App.1963), vacated as moot, 376 U.S. 190, 84 S. Ct. 635, 11 L. Ed. 2d 602 (1964). **Hence, since one’s business is property under Florida law, it cannot be injured or destroyed by the state without due process of law.** See Paramount Enterprises, Inc. v. Mitchell, 104 Fla. 407, 140 So. 328 (1932). Thus, for example, in eminent domain proceedings, the loss of goodwill is compensable. See, e. g., Matthews v. Division of Administration, State of Florida, Department of Transportation, 324 So.2d 664 (Fla. Dist. Ct. App. 1975). In addition, the State of Florida provides means of redress for private interference with goodwill. For

instance, the purchaser of the goodwill of a business may recover compensatory damages from a seller who destroys the value of the goodwill. See, e.g., West Shore Restaurant Corp. v. Turk, 101 So.2d 123 (Fla. 1958); Yoo Hoo of Florida v. Catroneo, 175 So.2d 220 (Fla. Dist. Ct. App.), cert. denied, 179 So.2d 212 (Fla. 1965). Also a plaintiff may recover actual damages caused by a defendant's disparaging comments about the plaintiff's business which are of a kind calculated to prevent others from dealing with the plaintiff. See, e.g., Continental Development Corp. of Florida v. Duval Title & Abstract Co., 356 So.2d 925 (Fla. Dist. Ct. App. 1978); Kilgore Ace Hardware, Inc. v. Newsome, 352 So. 2d 918 (Fla. Dist. Ct. App. 1977).

It thus appears that Florida does extend to appellants a “legal guarantee of present enjoyment” of goodwill, i.e., the value inhering in the favorable consideration of customers arising from a business’ reputation as being well established and well conducted. Since that interest is a protected property interest under Florida law, Florida may not deprive appellants of that interest without due process of law. Just as a state may not physically destroy a person's tangible property without complying with the requirements of the fourteenth amendment, so it may not destroy through the medium of speech a person's intangible property without the same compliance. **Hence, to the extent the defamatory statements injured appellants’ goodwill without due process of law, appellants have stated a claim upon which relief can be granted.**

Marrero, 625 F.2d at 514-15 (footnotes omitted; emphasis added).

Assuming, without deciding, that the plaintiff’s business is a protected property interest under Florida law, the plaintiff has not shown a substantial likelihood of success on the merits of its procedural due process claims because the plaintiff has a post-deprivation remedy. “In order to state a claim under the fourteenth amendment, the complainant must allege facts showing not only that the State has deprived him of a liberty or property interest but also that the State has done so without due process of law.” Marrero, 625 F.2d at 519. “The United States Supreme Court has held that as long as some adequate post-deprivation remedy is available to a plaintiff, no procedural

due process violation has occurred.” Peterson v. Scott, No. 2:14-CV-420-FTM-38CM, 2015 WL 3935376, at *3 (M.D. Fla. June 26, 2015); see also Cotton v. Jackson, 216 F. 3d 1328, 1330-31 (11th Cir. 2000) (stating that “[o]nly when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation actionable under section 1983 arise.”). Here, the October 6, 2017 Notice of Violation which resulted in the plaintiff shutting down its store contained instructions on how to appeal the violation. The plaintiff could have pursued those appellate remedies.

As the Eleventh Circuit has noted, “the state may cure a procedural deprivation by providing a later procedural remedy; only when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation actionable under section 1983 arise.” McKinney, 20 F.3d at 1557; id. at 1560 (noting that “[w]hen a state procedure is inadequate, no procedural due process right has been violated unless and until the state fails to remedy that inadequacy.”). Assuming, arguendo, that had the plaintiff applied for a new BTR, the City would have denied the application, the plaintiff is not likely to succeed on the merits of a procedural due process claim because the plaintiff would still have an opportunity to appeal the City’s denial to the state court. See McKinney, 20 F.3d at 1563 (noting that “even if [the plaintiff] suffered a procedural deprivation at the hands of a biased Board at his termination hearing, he has not suffered a violation of his procedural due process rights unless and until the State of Florida refuses to make available a means to remedy the deprivation. As any bias on the part of the Board was not sanctioned by the state and was the product of the intentional acts of the commissioners . . . only the state’s refusal to provide a means to correct any error resulting from the bias would engender a

procedural due process violation.”).

The plaintiff has not shown that the process, which includes review by the state court, is inadequate. The plaintiff may appeal any decision by the City to the state court. The state court has the power to review and redress any deficiencies in the City’s decisions with respect to the issuance of a BTR. The plaintiff’s failure to avail itself of the protections afforded through the appeal process and through the state court system does not mean that the procedures available to the plaintiff were constitutionally inadequate. See Cotton, 216 F. 3d at 1331 (stating that “[i]f adequate state remedies were available but the plaintiff failed to take advantage of them, the plaintiff cannot rely on that failure to claim that the state deprived him of procedural due process.”).

The plaintiff’s argument that it is not required to exhaust administrative remedies, see Plaintiff’s Supplemental Memorandum (DE# 36 at 4-5), is inapposite. As the Eleventh Circuit explained in McKinney:

[the plaintiff] cannot state a valid constitutional claim . . . because Florida provides an adequate process to remedy [the plaintiff]’s alleged injury.
[The plaintiff]’s case fails, therefore, not for want of exhaustion;
indeed, exhaustion is irrelevant to our decision and finds no mention in the opinion. Rather, **[the plaintiff]’s case fails because he fails to state a procedural due process claim . . .** that would give rise to a section 1983 suit.

20 F.3d at 1564 n. 20 (emphasis added). Similarly here, whether the plaintiff must first exhaust administrative remedies or not, does not change the fact that a state procedure was available to the plaintiff to remedy the asserted loss of its business. “All that due process requires . . . is a post-deprivation ‘means of redress for property deprivations satisfy[ing] the requirements of procedural due process.’” McKinney, 20 F.3d at 1563 (quoting Parratt v. Taylor, 451 U.S. 527, 537 (1981) (alteration in original)).

For the foregoing reasons, the plaintiff has not shown a substantial likelihood of success on the merits of its procedural due process claims.

b. Substantive Due Process Claim (Count III)

The defendants maintain that the plaintiff cannot show a substantial likelihood of success on the merits of its substantive due process claim because the plaintiff cannot show the violation of a fundamental right. “A ‘fundamental’ right is one that is ‘explicitly or implicitly guaranteed by the Constitution.’” Morrissey v. United States, 871 F.3d 1260, 1268 (11th Cir. 2017) (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973)). Supreme Court jurisprudence provides that:

The substantive component of the Due Process Clause protects those rights that are “fundamental,” that is, rights that are “implicit in the concept of ordered liberty,” Palko v. Connecticut, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937). The Supreme Court has deemed that most—but not all—of the rights enumerated in the Bill of Rights are fundamental; certain unenumerated rights (for instance, the penumbral right of privacy . . . also merit protection. It is in this framework that fundamental rights are incorporated against the states. A finding that a right merits substantive due process protection means that the right is protected “against ‘certain government actions regardless of the fairness of the procedures used to implement them.’” Collins v. City of Harker Heights, 503 U.S. 115, – , 112 S.Ct. 1061, 1068, 117 L.Ed.2d 261 (1992) (quoting Daniels v. Williams, 474 U.S. 327, 331, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986)).

McKinney, 20 F.3d at 1556 (footnotes omitted). “[S]ubstantive due process rights are created only by the Constitution.” Id. (quoting Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 229 (1985) (Powell, J., concurring)).

“The substantive due process doctrine prevents the government from engaging in conduct that is ‘arbitrary or conscience shocking.’” Koeppel v. Romano, 252 F. Supp. 3d 1310, 1321 (M.D. Fla. 2017) (quoting Doe v. Braddy, 673 F.3d 1313, 1318 (11th Cir.

2012) (per curiam)). The facts presented at the evidentiary hearing and the allegations contained in the Complaint do not rise to this standard. Accordingly, the undersigned finds that the plaintiff has not shown a substantial likelihood of success on the merits of its substantive due process claim.

c. Retaliation/First Amendment Claim (Count IV)

Finally, the plaintiff has not shown a substantial likelihood of success on the merits of its retaliation/First Amendment claim. The Complaint alleges that “on or about October 5, 2017, Plaintiff, through his counsel met with Deputy City Attorney Boksner to discuss Plaintiff[s] concerns regarding the ongoing changes to the hours in which a package store could sell alcohol.” Complaint (DE# 1 at ¶ 137). The plaintiff’s counsel communicated to Mr. Boksner that “Defendant[s] ongoing changes to the hours were severely impacting Plaintiff’s business income and that as a result Plaintiff would oppose any further reductions to the hours of operation.” *Id.* at ¶ 138.⁸ The following day, Code Enforcement officers and City of Miami Beach police officers effectively shut down the plaintiff’s store. *Id.* at ¶ 140. These conclusory allegations are insufficient to support a section 1983 claim based on the alleged violation of the plaintiff’s First Amendment rights.

In sum, the plaintiff has not met its burden of showing a substantial likelihood of success on the merits. “If the movant is unable to establish a likelihood of success on the merits, a court need not consider the remaining conditions prerequisite to injunctive

⁸ The Complaint also asserts that “Deputy City Attorney Boksner essentially suggested that the City’s actions were intentional[ly] targeted toward Plaintiff.” Complaint (DE# 1 at ¶ 141). However, this conclusory allegation is not supported by any facts.

relief.” Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc., 299 F.3d 1242, 1247 (11th Cir. 2002) (citing Pittman v. Cole, 267 F.3d 1269, 1292 (11th Cir. 2001)).

Nonetheless, for the sake of completeness, the undersigned will address the remaining elements for obtaining a preliminary injunction.

II. Immediate and Irreparable Injury Absent Injunctive Relief

The plaintiff must also show an immediate and irreparable injury if injunctive relief is not granted. To establish irreparable injury, the plaintiff must show that it will suffer an injury that cannot be adequately compensated if, at some later point in time, it prevails on the merits. United States v. Jefferson Cnty., 720 F.2d 1511, 1520 (11th Cir. 1983). The plaintiff is the owner of a liquor store that has been effectively shut down since October 6, 2017 and has been unable to generate revenue since that date. The injury complained of by the plaintiff is an economic injury. “An injury is ‘irreparable’ only if it cannot be undone through monetary remedies.” Ne. Florida Chapter of Ass’n of Gen. Contractors of Am. v. City of Jacksonville, Fla., 896 F.2d 1283, 1285 (11th Cir. 1990). Because the plaintiff can recover monetary damages, the undersigned concludes that the plaintiff has not shown it will suffer irreparable harm if an injunction is not issued.

III. Balancing of Harms

The plaintiff has shown that it will suffer economic injury should an injunction not issue. On the other hand, the issuance of an injunction would result in, at most, minimal harm to the defendants. The City has an interest in collecting taxes from businesses and ensuring that all businesses operating within the City are licensed businesses.

However, the plaintiff has been operating a licensed business since 2012. The City has also collected payment from the plaintiff for the BTR for Ocean 9 for the October 1, 2016 through September 30, 2017 fiscal year. That payment remains “in suspense” until this litigation is resolved. If an injunction is issued, the City would still be able to regulate the plaintiff’s business. The harm to the plaintiff therefore outweighs any harm to the defendants.

IV. Public Interest

The Court should also consider whether an injunction, if issued, will disserve the public interest. The plaintiff argues that “[a]n injunction which prevents the enforcement of patently unconstitutional Ordinances does not disserve the public interest. To the contrary, the public’s interest lies in the vindication of rights guaranteed under the Fourteenth Amendment.” Motion (DE# 4 at 15). The defendants maintain that “the public interest is not served by permitting unlicensed business owners to operate in the City.” Response (DE# 22 at 5). However, the issuance of the injunction sought by the plaintiff would only permit the operation of a single store, Ocean 9. The undisputed evidence is that had the plaintiff resolved its violations and paid the appropriate fee, the City would have renewed the BTR for Ocean 9. Therefore, the undersigned finds no basis to support the defendants’ assertion that “[i]t would create chaos in the City if unlicensed businesses could operate with impunity.” Id.

In the instant case, the undersigned finds that this factor is, at best, neutral.

RECOMMENDATION

Based on the foregoing, the undersigned respectfully **RECOMMENDS** that the Plaintiff’s Emergency Motion for Preliminary Injunction with Incorporated Memorandum

of Law (DE# 4, 11/3/17) be **DENIED**.

The parties shall have until **Friday, December 8, 2017**⁹ to file written objections, if any, with the Honorable Ursula Ungaro, United States District Judge. Failure to file objections timely shall bar the parties from a de novo determination by the District Judge of an issue covered in the Report and shall bar the parties from attacking on appeal unobjected-to factual and legal conclusions contained in this Report except upon grounds of plain error if necessary in the interest of justice. See 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140, 149 (1985); Henley v. Johnson, 885 F.2d 790, 794 (1989); 11th Cir. R. 3-1 (2016).

RESPECTFULLY SUBMITTED in Chambers at Miami, Florida this **1st** day of December, 2017.



JOHN J. O'SULLIVAN
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
United States District Judge Ungaro
All Counsel of Record

⁹ The plaintiff has requested that the time period for filing objections be shortened because it has asserted a continuing injury.