

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR FLAGLER COUNTY, FLORIDA**

Case No.: 2016-CA-000180-O

PHILIP LOWE and
SARAH THOMPSON-LOWE

Plaintiffs,

v.

BRYAN STREETMAN,

Defendant.

DEFENDANT'S MOTION TO DISMISS

COMES NOW, the Defendant, BRYAN STREETMAN, by and through the undersigned counsel, and hereby files this Motion to Dismiss for failure to state a cause of action upon which relief can be granted. As detailed in the accompanying Memorandum of Law in support of Defendant's Motion to Dismiss, Plaintiffs' Complaint should be dismissed for the following reasons:

FIRST MOTION TO DISMISS

1. Count I of Plaintiffs' Complaint seeking an Injunction against the Defendant, BRYAN STREETMAN (hereinafter, "Streetman"), should be dismissed for the following reasons:

- a. Plaintiffs' Complaint, as a matter of law, cannot establish that Plaintiffs were entitled to clear legal right, which was violated by Defendant's conduct.

WHEREFORE, the Defendant, BRYAN STREETMAN, respectfully requests that the Court dismiss Plaintiffs' Complaint for failure to state any claims upon which relief may be granted.

Dated: May 2, 2016

Respectfully Submitted,

/s/ Ryan Mitchell

Ryan Mitchell, Esq.

FBN: 0062034

Attorney for the Defendant

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 2, 2016, a true and correct copy of the foregoing was served using the Florida E-Portal Filing system on the following persons/entities:

Marcus Thompson
Law Office of Marcus Thompson, PLLC
320 High Tide Drive, Suite 101A
Saint Augustine, FL 32080

/s/ Ryan Mitchell

Ryan Mitchell, Esq.

Attorney for the Defendant

**MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT’S MOTIONS TO DISMISS**

1. Count 1 of Plaintiffs’ Complaint seeks a temporary and permanent injunction against the Defendant, Streetman.

2. In order to prevail in an action for a permanent injunction, Plaintiffs must establish the following:

- a. A clear legal right;
- b. An inadequate remedy at law; and
- c. That irreparable harm will arise absent injunctive relief.

Liberty Counsel v. Fla. Bar Bd. Of Governors, 12 So.3d 183, 186 (Fla. 2009).

3. In order to prevail in an action for a temporary injunction, Plaintiffs must establish the following:

- a. Substantial likelihood of success on the merits;
- b. Lack of an adequate remedy at law;
- c. That irreparable harm will arise absent injunctive relief; and
- d. That injunctive relief will serve the public interest.

Liberty Counsel v. Fla. Bar Bd. Of Governors, 12 So.3d 183, 186 (Fla. 2009).

A. Plaintiffs have failed to establish a “clear legal right” and are thus not entitled to a permanent injunction

4. In their Complaint, Plaintiffs base their “clear legal right” on alleged violations of the “City of Palm Coast Code of Ordinances and federal statutes, including the Migratory Bird Treaty Act (1918) (hereinafter, “MBTA”), and the Lacey Act (1980)”. See Plaintiff Complaint at ¶¶ 10, 30, and 34.

i. The Migratory Bird Treaty Act, 16 USC § 703, is a criminal statute that does not confer a private right of action upon Plaintiffs

5. The MBTA is a criminal statute prohibiting the killing, hunting, taking, or capture of migratory birds. 16 USC § 703(a); *Protect our Cmty's. Found. v. Salazar*, 2013 US Dist. LEXIS 159281 at p. 52. “Take” means to pursue, hunt, shoot, wound, kill, trap, capture, or collect. 50 CFR § 10.12. Setting aside the fact that Plaintiffs’ Complaint is completely devoid of any allegations concerning the killing, hunting, taking, or capture of migratory birds, Federal case law has clearly established that there is no private right of action conferred on individuals under the MBTA.

6. As was noted by the United States District Court for the Southern District of California, “The MBTA is a criminal statute enforced by the FWS [Secretary of the Interior through the United States Fish and Wildlife Service]. See USC §§ 706, 707(a), (d). It creates no private right of action.” *Protect our Cmty's. Found. v. Salazar*, 2013 US Dist. LEXIS 159281 at p. 52, citing *City of Sausalito v. O’Neill*, 386 F.3d 1186, 1203-04 (9th Cir. 2004). See also, *Hill v. Norton*, 275 F.3d 98, 103 (D.C. 2001) “...the MTBA does not create a private right of action or otherwise provide a process for judicial review...”; *Friends of the Boundary Mts. v. United States Army Corps of Eng’rs*, 24 F. Supp. 3d 105, 113 (D. Me. 2014), “Unlike the CWA [Clean Water Act], the MBTA does not include a citizen suit provision.”

7. This line of authority has been echoed by the United States District Court for the Southern District of Florida, which held that MTBA “...provided no private right of action...”. *Fund for Animals, Inc. v. Florida Game & Fresh Water Fish Com.*, 550 F. Supp. 1206, 1208 (S.D. Fla. 1982).

ii. The Lacey Act, 18 USC 3371 -3378, is a criminal statute that confers no private right of action

8. Like the MBTA, the Lacey Act is a criminal statute authorizing the Secretary of the Interior, through the United States Fish and Wildlife Service, to regulate the importation and interstate transport of species determined to be injurious to the health and welfare of humans, the interest of agriculture, horticulture or forestry, or the welfare and survival of wildlife resources of the United States. See 18 USC §§ 3371 – 3378; 18 USC § 42(a)(1); 50 CFR 16.3. Notwithstanding the fact that there are absolutely no allegations in Plaintiff's Complaint pertaining to the importation or transportation of proscribed species, the Lacey Act is a criminal statute that does not confer a private cause of action upon Plaintiffs.

9. To determine if a private cause of action exists, Florida courts will look to the legislative intent, with a view to the wording and structure of a statute. *Murthy v. N. Sinha Corp.*, 644 So.2d 983, 985 (Fla. 1984); *Vaughn v. Segal*, 707 So.2d 951, 952 (Fla. 3rd DCA 1998), respectively. Where a statute sets up a list of prohibited activity, and provides for enforcement by governmental authorities through an agency's enforcement procedures, there is no intention to create a private cause of action. *Vaughn v. Segal*, 707 So.2d 951, 952 (Fla. 3rd DCA 1998).

10. The Lacey Act contains a list of prohibited acts, and provides for civil and criminal penalties and sanctions. 18 USC §§ 3372, 3373. The Secretary of Interior or its designee is solely responsible for enforcement. 18 USC §§ 3373(a), (d), and 18 USC § 3371. Consequently, the Lacey Act confers no private right of action upon Plaintiffs.

iii. The Palm Coast Municipal Ordinances do not confer a private right of action upon Plaintiffs

11. Florida courts will look to the legislative intent of a statute to determine whether a private cause of action should be judicially inferred. *Murthy v. N. Sinha Corp.*, 644 So.2d 983, 985 (Fla. 1984). The same inquiry applies to local ordinances. Courts regularly look to the wording and structure of a statute or ordinance to determine intent. *Vaughn v. Segal*, 707 So.2d 951, 952 (Fla. 3rd DCA 1998).

12. Where an ordinance sets up a list of prohibited activities, and provides for enforcement by county authorities through the county's enforcement procedures, there is no intention to create a private a cause of action. *Vaughn v. Segal*, 707 So.2d 951, 952 (Fla. 3rd DCA 1998).

13. Though it is not expressly stated in Plaintiffs' Complaint, it appears that Defendant's alleged violations of the Palm Coast City Ordinance (hereinafter, the "Code") pertain to Chapter 35 pertaining to noises and other sundry offenses.

14. Code §§ 35-51 and 35-52 set forth various general and specific prohibitions against loud and raucous activity. Code § 35-56 provides that Chapter 35 applies to and is enforced by the City, and is specifically enforced by the City Manager or its designee. Finally, Code § 35-59 provides certain forfeiture remedies upon repeat offenses.

15. Clearly those Code sections dealing with loud noise and raucous activity were not intended to create a private right of action, given (i) the enforcement provisions clearly delegate enforcement authority to the City Manager, and (ii) there is absolutely no language in the Code that provides for a private right of action.

CONCLUSION

16. In order to establish a cause of action for a permanent injunction, the Plaintiffs have to establish the existence of a clear legal right. Plaintiffs' reliance on the Migratory Bird Treaty Act, the Lacey Act, and the Palm Coast City Ordinances is misplaced because none of the foregoing statutes or ordinances confer a private right of action upon Plaintiffs. If Plaintiffs cannot establish a clear legal right necessary to secure a permanent injunction they would be unlikely to establish the substantial likelihood of success required to secure a temporary injunction.

WHEREFORE, the Defendant, BRYAN STREETMAN, respectfully requests that the Court dismiss this case for failure to state any claims upon which relief may be granted.

Dated: May 2, 2016

/s/ Ryan Mitchell

Ryan Mitchell, Esq.

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