

STATE OF NORTH CAROLINA

File No.

14CVS 448

WATAUGA

County

In The General Court Of Justice

☐ District ☒ Superior Court Division

Name Of Plaintiff

MOUNTAINEER TOWING & RECOVERY, LLC

Address

C/O NATHAN A. MILLER

City, State, Zip

P.O. BOX 49; BOONE NC 28607

VERSUS

Name Of Defendant(s)

TOWN OF BOONE

CIVIL SUMMONS

☐ ALIAS AND PLURIES SUMMONS (ASSESS FEE)

G.S. 1A-1, Rules 3, 4

Date Original Summons Issued

Date(s) Subsequent Summons(es) Issued

To Each Of The Defendant(s) Named Below:

Name And Address Of Defendant 1

TOWN OF BOONE

C/O GREG YOUNG, TOWN MANAGER

567 WEST KING STREET

BOONE

NC 28607

Name And Address Of Defendant 2

A Civil Action Has Been Commenced Against You!

You are notified to appear and answer the complaint of the plaintiff as follows:

1. Serve a copy of your written answer to the complaint upon the plaintiff or plaintiff's attorney within thirty (30) days after you have been served. You may serve your answer by delivering a copy to the plaintiff or by mailing it to the plaintiff's last known address, and
2. File the original of the written answer with the Clerk of Superior Court of the county named above.

If you fail to answer the complaint, the plaintiff will apply to the Court for the relief demanded in the complaint.

Name And Address Of Plaintiff's Attorney (If None, Address Of Plaintiff)

NATHAN A. MILLER

MILLER & JOHNSON, PLLC

P.O. BOX 49

BOONE

NC 28607

Date Issued

8/13/14

Time

10:30

☒ AM

☐ PM

Signature

[Handwritten Signature]

☒ Deputy CSC

☐ Assistant CSC

☐ Clerk Of Superior Court

☐ ENDORSEMENT (ASSESS FEE)

This Summons was originally issued on the date indicated above and returned not served. At the request of the plaintiff, the time within which this Summons must be served is extended sixty (60) days.

Date Of Endorsement

Time

☐ AM

☐ PM

Signature

☐ Deputy CSC

☐ Assistant CSC

☐ Clerk Of Superior Court

NOTE TO PARTIES: Many counties have **MANDATORY ARBITRATION** programs in which most cases where the amount in controversy is \$15,000 or less are heard by an arbitrator before a trial. The parties will be notified if this case is assigned for mandatory arbitration, and, if so, what procedure is to be followed.

FILED

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

COUNTY OF WATAUGA

2014 AUG 13 AM 10:31

SUPERIOR COURT DIVISION

WATAUGA COUNTY, C.S.C.

14-CVS-448

MOUNTAINEER TOWING &
RECOVERY, LLC,
Plaintiff,

Vs.

TOWN OF BOONE,
Defendant.

VERIFIED COMPLAINT

NOW COMES the Plaintiff, Mountaineer Towing & Recover, LLC, by and through their undersigned counsel who complains of the Defendant, Town of Boone, as follows:

PARTIES

1. Plaintiff is a North Carolina Limited Liability Company duly organized and existing under the laws of the State of North Carolina and whose principal place of business is in Watauga County, North Carolina.
2. Defendant, Town of Boone, is a body politic and a municipal corporation duly organized and existing under the laws of the State of North Carolina and is located in Watauga County, North Carolina.

JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction pursuant to N.C.G.S. § 1-75.4.
4. Venue is proper in Watauga County, North Carolina.

FACTUAL ALLEGATIONS

5. Plaintiff is a limited liability company which is in the business of towing illegally parked motor vehicles from lots owned by Plaintiff's clients and protecting the personal property rights of said clients.
6. The majority of Plaintiff's towing activity involves parking lots of malls and/or shopping centers. Plaintiff does not engage in the practice known as booting vehicles.
7. On July 24, 2014 the Boone Town Council voted to approve a revision of Chapter 73: Towing of the Town of Boone's Code of Ordinances by a unanimous vote.

8. Defendant's legal counsel warned the Defendant's Town Council that portions of the ordinance were possibly suspect due to the recent North Carolina Supreme Court decision but the Defendant's Town Council approved the ordinance anyway.
9. This ordinance's effective date and the date of implementation is August 15, 2014.
10. Plaintiff has purchased and placed numerous signs that conformed with the older towing ordinance which required signs that were no smaller than two square feet and no larger than 4 square feet.
11. Section 73.04(B) of Defendant's new revised ordinance requires signs in parking lots to be posted in both directions of the entrance to the parking lot, within 10 feet from the street, and for the signs to be no less than four square feet and no more than six square feet in diameter.
12. Defendant's ordinance does not have a clause wherein the old signs are grandfathered in or otherwise exempted from this ordinance.
13. Section 73.06(A) of Defendant's new ordinance sets forth a mandatory payment structure that all people or businesses similarly situated as Plaintiff must adhere to or face criminal penalties including the price of towing, price of storage and mandatory discounts that towing companies must offer depending on how far into the tow the towing company is.
14. Section 73.99(C) of Defendant's new ordinance states, "No person convicted of a misdemeanor as the result of violating this chapter and no person convicted of any crime under State law related to activities connected to parking lot or parking space enforcement within the town may thereafter engage in towing or in the application of parking control devices or methods in the town for a period of ten (10) years from the date of conviction."

FIRST CAUSE OF ACTION
VIOLATION OF N.C. CONST. ARTICLE I, SECTION 1
VIOLATION OF N.C.G.S. § 160A-174

15. Plaintiff realleges and incorporates by reference their allegations contained in Paragraphs 1 through 14 of their Complaint herein as if set out in full.
16. N.C. Const. art. I, section 1 states, "The equality and rights of persons. We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness."
17. The right to work and earn a livelihood is a property right and is a fundamental right.
18. Section 73.04(B) violates N.C. Const. art. I, section 1 because changing the regulation of signs from a minimum of 2 square feet to a maximum of 4 square feet to a minimum of

4 square feet to a maximum of 6 square feet serves no probable consequence, if changed, would produce substantial injury to the public peace, health or welfare.

19. To comply with Section 73.04(B), Plaintiff would have to spend thousands of dollars for no legitimate public health, safety or welfare reason.
20. Rewriting Section 73.04(B) exceeds the Defendant's scope of power to protect citizen health, safety and welfare pursuant to N.C.G.S. § 160A-174 as the increased size of the signage bears no rational basis to the health, safety and welfare of Defendant's citizens.

SECOND CAUSE OF ACTION
VIOLATION OF N.C. CONST. ART. I, SECTION 1
VIOLATION OF N.C.G.S § 160A-174

21. Plaintiff realleges and incorporates by reference their allegations contained in Paragraphs 1 through 20 of their Complaint herein as if set out in full.
22. Section 73.06(A) sets forth a schedule of payments and various other payment requirements that Plaintiff must comply with to operate in the Town of Boone.
23. Defendant's schedule of payments impedes the ability of Plaintiff to make financial decisions regarding the operation of their business and impedes their ability to make a profit.
24. Section 73.06(A) violates N.C. Const. art. I, section 1. by restricting the Plaintiff's fundamental right to earn a livelihood.
25. Section 73.06(A) violates N.C.G.S. § 160A-174 by restricting the Plaintiff's fundamental right to earn a livelihood.

FOURTH CAUSE OF ACTION
VIOLATION OF N.C. CONST. ART. I, SECTION 1
VIOLATION OF N.C.G.S. § 160A-174

26. Plaintiff realleges and incorporates by reference their allegations contained in Paragraphs 1 through 25 of their Complaint herein as if set out in full.
27. Section 73.99(C) violates N.C. Const. art. I, section 1. by restricting the Plaintiff's fundamental right to earn a livelihood and is an arbitrary government action that interferes with the right to the right to the fruits of one's own labor.
28. Section 73.99(C) violates N.C.G.S. § 160A-174 by restricting the Plaintiff's fundamental right to earn a livelihood is an arbitrary government action that interferes with the right to the fruits of one's own labor. Further the imposition of a 10 year period is arbitrary and capricious and serves no legitimate state interest.

DECLARATORY JUDGMENT

29. Plaintiff realleges and incorporates by reference their allegations contained in Paragraphs 1 through 28 of their Complaint herein as if set out in full.
30. That this action sets forth a claim for declaratory relief with respect to the applicability and interpretation of Defendant's towing ordinance known as Section 73. This Court has jurisdiction over this claim pursuant to N.C.G.S. § 1-253.
31. That Plaintiff is a North Carolina Limited Liability Company operating in Watauga County, North Carolina.
32. That Defendant is a North Carolina municipality and chartered by the North Carolina Legislature.
33. That this action involves the constitutionality of Defendant's towing ordinance known as Section 73 and whether or not the Defendant exceeded the scope of their authority granted to them in N.C.G.S. § 160A-174.
34. That the parties have an actual, justiciable controversy as to the rights and obligations of each in accordance with the respective portions of the Defendant's ordinance known as 73 herein above mentioned and desire that the Court declare the rights and obligations as to the following issue:
 - a. Whether or not Section 73.04(B) of Defendant's ordinance violates the Plaintiff's North Carolina constitutional rights and whether or not Section 73.04(B) of Defendant's ordinance exceeds the scope and authority granted to Defendant in N.C.G.S. § 160A-174.
 - b. Whether or not Section 73.06(A) of Defendant's ordinance violates the Plaintiff's North Carolina constitutional rights and whether or not Section 73.06(A) of Defendant's ordinance exceeds the scope and authority granted to Defendant in N.C.G.S. § 160A-174.
 - c. Whether or not Section 73.99 of Defendant's ordinance violates the Plaintiff's North Carolina constitutional rights and whether or not Section 73.99 of Defendant's ordinance exceeds the scope and authority granted to Defendant in N.C.G.S. § 160A-174.

MOTION FOR TEMPORARY INJUNCTION

35. Plaintiff realleges and incorporates by reference Paragraphs 1 through 34 of their Complaint herein as if set out in full.
36. Plaintiff is a Watauga County business actively engaged in the consensual and non-consensual towing business in around the municipality of Boone.

37. Defendant's ordinance directly affects the Plaintiff's fundamental right to earn a living.
38. Defendant's ordinance directly violates the North Carolina Constitution and North Carolina General Statutes as evidenced by the recent North Carolina Supreme Court decision filed on June 12, 2014 entitled King v. Town of Chapel Hill.
39. Unless restrained, the Plaintiff alleges that the Defendant will continue to violate the Plaintiff's constitutional rights and violate the Defendant's statutory authority.
40. There is probable cause to believe that Plaintiff will prevail on the merits of the case and there is reasonable apprehension of irreparable loss to Plaintiff unless injunctive relief is granted.
41. The enforcement of the ordinance by Defendant will cause irreparable loss and damage to Plaintiff that will be difficult to ascertain before Defendant or their attorney can be heard in opposition to the restraining order in that this ordinance is scheduled to be effective on August 15, 2014.
42. A Temporary Restraining Order pursuant to Rule 65 of the North Carolina Rules of Civil Procedure is needed to stop Defendant from violating Plaintiff's constitutional rights and exceeding their statutory authority and causing further harm to Plaintiff until a preliminary injunction can be heard by the Court.

MOTION FOR INJUNCTIVE RELIEF

43. Plaintiff realleges and incorporates by reference their allegations contained in Paragraphs 1 through 42 of their Complaint herein as if set out in full.
44. Defendant's ordinance which shall be effective on August 15, 2014 will violate the constitutional rights of Plaintiff and Plaintiff will suffer immediate and irreparable losses.
45. Plaintiff has posted a bond simultaneously with the filing of this Verified Complaint, in the amount of \$200.00 as security for the payment of such costs and damages as may be incurred or suffered by Defendant if it be found that they were wrongfully enjoined.
46. Upon a trial of this case on its merits, for a Permanent Injunction, pursuant to N.C.G.S. § 1-485, et. seq. and Rule 65 of the North Carolina Rules of Civil Procedure thereby restraining and enjoining Defendants from enforcing Section 73 of their ordinance.

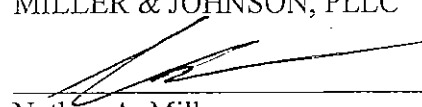
WHEREFORE, the Plaintiff respectfully prays unto the Court for the following relief:

1. That the Court finds that Section 73.04(B) violates N.C. Const. art. I, section 1 and N.C.G.S. 160A-174.

2. That the Court finds that Section 73.06(A) violates N.C. Const. art. I, section 1 and N.C.G.S. 160A-174.
3. That the Court finds that Section 73.99 violates N.C. Const. art. I, section 1 and N.C.G.S. 160A-174.
4. That the Court grants the Plaintiff's motion for a temporary injunction.
5. That the Court grants the Plaintiff's motion for a preliminary injunction.
6. That the Court grants the Plaintiff's motion for a permanent injunction.
7. That the costs of this action, including the Plaintiff's reasonable attorney's fees, be taxed against the Defendant.
8. For such other and further relief that this Court deems just and proper.

This the 12 day of August, 2014.

MILLER & JOHNSON, PLLC



Nathan A. Miller
Attorney for Plaintiff
P.O. Box 49
Boone, NC 28607
828-264-1125
828-262-3544 fax
N.C. State Bar # 35451

STATE OF NORTH CAROLINA

VERIFICATION

COUNTY OF WATAUGA

Tyler McKeithan, being duly sworn, deposes and says that he is a member, Mountaineer Towing & Recovery, LLC, Plaintiff herein; that he has read the foregoing Complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to those he believes them to be true.

Mountaineer Towing & Recovery, LLC

By: Tyler McKeithan
Member

Sworn to and subscribed before me
this the 12th day of August, 2014.

Sarah M. Poston

Notary Public

My commission expires: 7/29/2017

NOTARIAL SEAL:

