

**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF SENECA

Meadowsweet Dairy, LLC	:	Index No. 40558
	:	
and	:	
	:	
Steven and Barbara Smith	:	
	:	
Plaintiffs	:	
	:	
against	:	
	:	
Patrick Hooker, Commissioner Department of Agriculture and Markets of the State of New York	:	MOTION FOR PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER AND MEMORANDUM IN SUPPORT
	:	
and	:	
	:	
Will Francis, Director Division of Milk Control and Dairy Services	:	Assigned Judge: Dennis F. Bender JSC Acting
	:	
Defendants	:	

Pursuant to NY CLS CPLR 6301 *et seq.*, Plaintiffs Meadowsweet Dairy, LLC and Steven and Barbara Smith move the Court for a preliminary injunction and temporary restraining order. The reasons for this motion are more fully described in the attached memorandum in support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

Plaintiffs (all of them) are engaged in private conduct and the State of New York's Department of Agriculture and Markets is harassing and intimidating them into complying with burdensome regulations that do not apply to Plaintiffs or risk enforcement action. Moreover, the Department of Ag. and Mkts. is attempting to collect civil penalties from Plaintiffs and shut down their operations even though Plaintiffs are engaged in legal conduct that is not subject to regulation by Ag. and Mkts. For these reasons, Plaintiffs will suffer immediate and irreparable harm if a temporary restraining order is not issued, and they need the protection of a preliminary injunction.

Factual background

Plaintiffs Steve and Barbara Smith ("the Smiths"), husband and wife, reside at a dairy farm owned by them located at 2054 Smith Rd, Lodi, New York (the "farm"). The Smiths have 9 children, ranging in age from 8 to 27, six of whom reside with them at their farm. (Affidavit of Barbara Smith, attached hereto, ¶1).

The Smiths have been dairy farmers since 1995. From 1995 to March 2007 the Smiths sold milk to dairy processors, made yogurt with their milk and sold it through retail outlets and sold raw milk at their farm. During this time they had all the required permits from the State of New York: a milk dealer's license, a grade A permit, a raw milk permit and a milk processing permit. Therefore, the Smiths were inspected and regulated by Defendants. (Smith affidavit, ¶2).

On March 1, 2007, however, Plaintiff Meadowsweet Dairy, LLC ("Dairy LLC") was duly formed in the State of New York as a limited liability company. Currently, the Dairy LLC has 121 members with an office and business located at 2054 Smith Rd, Lodi, New

York. The only assets of the Dairy LLC are dairy cows that are used for the production of raw milk and raw milk products. (Smith affidavit, ¶3).

In March 2007, the Smiths relinquished all of their dairy permits and surrendered them to the State of New York. Since March 2007, the Smiths have become Operating Managers of the Dairy LLC and provide boarding services for the dairy cows owned by the Dairy LLC. The Dairy LLC's cows are kept at the Smiths' farm and the Smiths tend to, manage and take care of the cows on behalf of the Dairy LLC. The Dairy LLC's cows produce raw milk, some of which is converted by the Smiths into raw milk yogurt, raw milk butter, raw milk cheese and raw milk buttermilk, none of which are pasteurized. (Smith affidavit, ¶4).

The Dairy LLC's members want raw, unpasteurized milk and milk products from the dairy cows they own. The only people that have access to the raw milk and raw milk products produced by the Dairy LLC's dairy cows are the Dairy LLC members and their respective families. Neither the Dairy LLC nor the Smiths "offer," "distribute" or "otherwise make available" for sale to any member of the consuming public any of the raw milk or raw milk products that are produced by the Dairy LLC's dairy cows. (Smith affidavit, ¶5).

Plaintiffs' raw milk products have been tested for pathogens since at least 1998. During this time the Smiths' milk and yogurt was always in compliance with New York State health standards for pathogens. (Smith affidavit, ¶6).

Nature of the Controversy

From March 2007 to October 2007, the Smiths and the Dairy LLC were inspected on almost a monthly basis by Defendants who would always ask for permission first

before entering the Smiths' property. Although Plaintiffs were not in possession of any permits during that time period, the Smiths allowed inspectors from Ag. and Mkts. onto their property to conduct routine inspections. Since that time, however, enforcement by Ag. and Mkts. of Plaintiffs has escalated. (Smith affidavit, ¶7).

On August 2007 Ag. and Mkts. levied a fine of \$1700 on the Smiths for minor inspection violations. The fine was based on evidence collected during inspections conducted since the Smiths relinquished their permits in March 2007. (Smith affidavit, ¶8).

In early October 2007, representatives from Ag. and Mkts. appeared at the Smiths' farm and again asked permission to inspect, yet this time the Smiths refused the inspection. By this time, it was clear the inspections were conducted for the sole purpose of gathering evidence against the Smiths, and that the agency refused to believe that Plaintiffs were making raw milk and raw milk products available only to the Dairy LLC's members. Consequently, on October 11, 2007, Defendants executed a search warrant against Plaintiffs at the Smiths' farm. (Smith affidavit, ¶9).

On October 11, 2007, representatives from Ag. and Mkts. inspected the Smiths' farm pursuant to the warrant, seized 260 pounds and 7.5 gallons of raw milk buttermilk, raw milk, and raw milk yogurt, and issued to the Smiths "seizure form S10409" that pertained to the seizure. These 260 pounds of raw milk products were manufactured by the Dairy LLC's dairy cows. (Smith affidavit, ¶10).

On Friday, October 12, 2007, at 5:00 p.m., the Department faxed to Plaintiffs' counsel a "Notice of Hearing" that was scheduled for October 23, 2007 to commence at 11 a.m. in Albany, NY. The Notice was issued to "show cause" why the 260 pounds of

raw milk products “should not be destroyed or otherwise disposed of.” (Smith affidavit, ¶11).

The Department scheduled the hearing for that time and date even though the Smiths had not requested a hearing. Plaintiffs did not attend the October 23rd hearing because to do so would have been futile. (Smith affidavit, ¶12).

On October 31, 2007, a “Legal Assistant” of the Department sent a letter to the Dairy LLC and to the Smiths, alleging that they have been “selling, offering for sale, or otherwise making available raw milk for consumption by the consumers” in May, June and July 2007. The letter also indicated that additional administrative penalties in the amount of \$1,000 have been levied. (Smith affidavit, ¶13).

During November 2007, Plaintiffs attempted to make arrangements with Ag. and Mkts. for the destruction of the seized 260 pounds of raw milk products. However, Ag. and Mkts. refused to supervise the destruction unless the Smiths agreed to sign a statement waiving their right to a hearing. The Smiths declined so the seized product was in their cooler for another month. (Smith affidavit, ¶14).

On December 11, 2007, it was announced on an internet blog that Plaintiffs were going to file suit against Defendants. On December 13, 2007, Plaintiffs filed their complaint in this matter against Defendants. On that very same day, December 13, 2007, Defendants issued an administrative “show cause” complaint against Plaintiffs, scheduling a show cause hearing for January 17, 2008 to take evidence on why Defendants should not shut down the Dairy LLC and the Smiths’ farm. (Smith affidavit, ¶15).

The show cause notice alleges that Plaintiffs need a permit for their activity and that Plaintiffs are “selling, offering for sale or otherwise making available raw milk to members of the consuming public.” The show cause notice contains an “Exhibit A” which refers to samples of dairy products that were collected by Ag. and Mkts. from the private properties Dairy LLC members without a warrant. The show cause notice also alleges that Defendants will seek a civil penalty from Plaintiffs. (Smith affidavit, ¶16).

In an obviously orchestrated effort to gather evidence in support of their show cause order, representatives from Ag. and Mkts. showed up at the Smiths’ farm on December 13th without a warrant allegedly to supervise the destruction of the seized products. They also demanded to inventory and photograph any new product of the Dairy LLC’s that had been manufactured since October 2007. The Smiths refused to allow the representatives of Ag. and Mkts. to take any photographs or collect any samples of the Dairy LLC’s product. Representatives of Ag. and Mkts. refused to leave the Smiths’ farm until they were finally escorted off the property by a Deputy from the Seneca County Sheriff’s office. (Smith affidavit, ¶17).

ARGUMENT

NY CLS CPLR 6301 provides, in part, that a preliminary injunction “may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff’s rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the

plaintiff.” A temporary restraining order can be issued without notice if the movant demonstrates that “immediate and irreparable injury, loss or damages will result unless the defendant is restrained before a hearing can be had.” CPLR 6313(a).

Courts look to four factors to determine whether to issue a preliminary injunction: likelihood of success on the merits, irreparable injury to the plaintiff in the absence of injunctive relief, balance of hardships or equities favoring the moving party, and the requested relief not being outweighed by public policy considerations. See *Kuttner v. Cuomo*, 147 A.D.2d 215, 543 N.Y.S.2d 172 (3d Dep't 1989), *aff'd*, 75 N.Y.2d 596, 555 N.Y.S.2d 235, 554 N.E.2d 876 (1990) (temporary restraining order); *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860, 552 N.Y.S.2d 918, 552 N.E.2d 166 (1990) (preliminary injunction); *Albini v. Solork Associates*, 37 A.D.2d 835, 326 N.Y.S.2d 150 (2d Dep't 1971) (preliminary injunction). To meet this burden, the movant, pursuant to CPLR 6312, “shall show, by affidavit and such other evidence as may be submitted, that there is a cause of action, and either that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action.”

In this case, the Smiths and the Dairy LLC are being harassed by Defendants and this harassment has escalated since March 2007. Initially, inspectors from Ag. and Mkts. would ask for “permission” to conduct their inspections and the Smiths were accommodating. Since October, however, Ag. and Mkts. has executed a search warrant, has seized 260 pounds of raw dairy products, issued a destruction show cause order, threatened civil penalties of \$2,700, destroyed 260 pounds of legally produced raw dairy products, attempted to seize more product, and has now issued another show

cause order threatening to shut down the Dairy LLC and the Smiths. Such behavior needs to stop because the Department lacks jurisdiction over private conduct.

Unless the Department is enjoined, Plaintiffs will be subjected to immediate and irreparable harm because the Department has already concluded that Plaintiffs should be shut down and penalized. The risk is real and not imaginary. It exists in the form of an administrative hearing already scheduled for January 17, 2008 and in the form of civil penalties in the amount of \$2,700 that were administratively levied on August 24 and October 31, 2007. Therefore, Plaintiffs will be irreparably harmed if the injunction does not issue.

As alleged in Plaintiffs complaint for declaratory judgment, 1 NYCRR 2.2(y) defines “milk” as milk “*which has been pasteurized.*” Emphasis added. 1 NYCRR Section 2.3(b) is captioned “permit to *sell* raw milk” and Section 2.3(b)(1) applies to “[e]very person who *sells*, offers for *sale* or otherwise makes available raw milk for consumption by *consumers.*” Emphasis added. New York’s dairy laws, its milk control laws and their respective implementing regulations do not define “consumer” anywhere.¹ Finally, NY CLS Agr & M Section 199-a.1. provides, in part, that misbranding or adulterating food that is “for *sale*” is prohibited. Emphasis added.

In this case, however, Plaintiffs are engaged in private conduct and have opted out of the government-sanctioned dairy system. Plaintiffs believe they can produce a superior quality product and do not care if the government believes that raw milk and raw milk products may be harmful to their health. Plaintiffs willingly consume raw milk and raw milk products and have every right to do so free from governmental

¹ However, 1 NYCRR § 191.3 defines “consumer” as “(c) The term “consumer” whenever used in this Part shall mean any person *purchasing* eggs for his or her own family use or consumption.” Emphasis added.

interference, harassment and intimidation. Eating the foods of one's choice is a fundamental right. Thus, Plaintiffs will prevail on the legal merits of their claim.

Plaintiffs are the only entities that have access to the raw milk and raw milk products produced by the Dairy LLC's dairy cows. For the Department to allege that they are "protecting" the public from the alleged inherent dangers of raw milk is arrogant in the extreme. In essence, the Department considers Plaintiffs as "wards" of the State who are unable to make decisions for themselves. Consequently, there will not be any harm to any third parties if the injunction issues.

While Plaintiffs sympathize with the Department's belief that "we're just doing our job" Plaintiffs believe that they have access to a superior product. There is no public policy interest that would be served by prohibiting private citizens of the state from engaging in an activity that ensures their health and freedom of choice. For the Department to allege that the public would be served by shutting down the Plaintiffs legal operation is to suggest that citizens have no right to band together in a common enterprise, and that such matters (i.e., producing food) should be left to far away business interests and corporations. Consequently, there is no policy reason to prevent the issuance of the injunction.

For these reasons, a temporary restraining order should issue preventing the Department from regulating Plaintiffs until a preliminary hearing can be had on this matter, and the scope of this restraining order should also prevent the Department from harassing, intimidating or interfering with third persons who receive the Dairy LLC's product for distribution to its members.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by regular U.S. mail, postage prepaid, on this 21st day of December, 2007, to the following:

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