

STATE OF MAINE  
HANCOCK, ss.

SUPERIOR COURT  
CIVIL ACTION  
DOCKET NO. CV-11-70

STATE OF MAINE and  
WALTER WHITCOMB, COMM'R  
MAINE DEPT. OF AGRIC. AND  
RURAL RES.,

Plaintiffs,

v.

**DECISION AND ORDER ON  
CROSS-MOTIONS FOR  
SUMMARY JUDGMENT**

DAN BROWN d/b/a GRAVELWOOD  
FARM,

Defendant.

This matter came before the Court on April 23, 2013 for argument on cross-motions for summary judgment in connection with a dispute over the unlicensed sale of milk. The State argues that Mr. Brown d/b/a Gravelwood Farm was (1) selling milk without a license; (2) selling unpasteurized milk without marking it as such; and (3) operating a food establishment without a license. The Defendant counters that he was not required to have said licenses because (1) the state should be estopped from arguing he needs a milk distributor's license because previous policy permitted him to sell milk without such a license as a small farmer; (2) he did not sell unpasteurized milk without marking it as such because he displayed a sign in his farm stand indicating it was unpasteurized; and (3) Maine's home rule permits him to sell his products without a license. After consideration of the parties' respective arguments, the Court grants summary judgment for the Plaintiff and enjoins the Defendant from further unlicensed operations pursuant to 7 M.R.S. § 2910-A.

## BACKGROUND

Dan Brown operates a small farm in Blue Hill, Maine, under the business name of Gravelwood Farms, where he has sold food and milk products from a farm stand located on his property full time since 2006, and on occasion, he has also sold his products at local farmers' markets. Among the products produced and sold by Brown is raw unpasteurized milk. This milk is sold in containers that do not indicate whether it is pasteurized or not; though Brown does maintain a sign in his farm stand stating that the milk is unpasteurized. Throughout this period, Brown has never been licensed as a milk distributor in the State of Maine, nor has he ever been licensed to operate a food establishment.

In 2011, an inspector from the Maine Department of Agriculture encountered Brown while selling produce and milk. Brown was advised that the sale of milk and milk products required a license. Nevertheless, Brown continued to sell milk and milk products without applying for a license. After subsequent encounters with the Department, Brown was sent a letter on August 11, 2011,<sup>1</sup> notifying him that he was selling milk products illegally, demanding that he desist until properly licensed, and offering to expedite the licensing process for him. Despite the Department's repeated warnings, Brown has continued to sell milk from his farm stand and at local farmers' markets without a license and the State now seeks to enjoin him. 7 M.R.S. § 2910-A.

## ANALYSIS

In Maine, summary judgment is appropriate when review of the parties' statements of material facts and the record evidence to which the statements refer,

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<sup>1</sup> This letter was also hand delivered by the Department in September 2011.

considered in a light most favorable to the non-moving party, demonstrate that there is “no genuine issue of material fact [] in dispute,” thereby meriting judgment as a matter of law for the moving party. *Lougee Conservancy v. CitiMortgage, Inc.*, 2012 ME 103, ¶ 12, 2012 Me. LEXIS 103, \*11 (Aug. 2, 2012); *Dyer v. Dep’t of Transp.*, 2008 ME 106, ¶ 14, 951 A.2d 821. A contested fact is *material* if it is “one that can affect the outcome of the case,” and a fact issue is *genuine* “when there is sufficient evidence for a fact-finder to choose between competing versions of the fact.” *Lougee Conservancy*, 2012 ME 103, ¶ 12, 2012 ME. LEXIS at \*11 (Aug. 2, 2012). The Court views the summary judgment record in the light most favorable to the non-moving party, drawing all reasonable inferences in its favor. *See Cookson v. Brewer Sch. Dep’t*, 2009 ME 57, ¶¶ 11-12, 974 A.2d 276.

The genuine and material facts of this case are undisputed. Brown readily concedes that he has sold and continues to sell milk and milk products without a license. *See Defendant’s Response to Plaintiff’s S.M.F. 2*. The question before the Court is whether Brown’s unlicensed conduct is permissible as a matter of law.

*A. Illegal Sale of Milk*

The State first contends that Brown is acting in violation of 7 M.R.S. § 2901-C, which provides that “a person required to obtain a permit . . . may not sell . . . milk or milk products prior to obtaining the appropriate license or permit.” Section 2901-C(1) goes on to state that “[a] milk distributor shall obtain a license from the commissioner . . . .” The Statute defines a milk distributor as “any person who offers for sale or sells to another person any milk or milk products for sale.” 7 M.R.S. § 2900(8). The statute also

defines a milk producer as “any person who operates a dairy farm and provides, sells or offers milk or milk products for sale.” *Id.* § 2900(10).

The State contends that because Brown sells milk to the public he falls within the definition of “milk distributor” and therefore is required to obtain a license under section 2901-C(1). Brown argues that the State should be estopped from characterizing him as a milk distributor because past practice has been to permit small dairy farmers to sell milk without a license and he has relied upon that past practice. Brown asserts that the State could easily and reasonably characterize him as being a milk producer, rather than a distributor under the statute and permit him to continue selling milk without a license.

The doctrine of estoppel is an equitable doctrine that may be applied when “(1) the statements or conduct of the governmental official or agency induced the party to act; (2) the reliance was detrimental; and (3) the reliance was reasonable.” *Dept. of Health and Human Serv. v. Pelletier*, 2009 ME 11, ¶ 17, 964 A.2d 630. When determining whether to apply the equitable doctrine of estoppel, this Court looks to the totality of the circumstances and conducts a balancing of the equities. *City of Auburn v. Desgrosseilliers*, 578 A.2d 712, 715 (Me. 1990).

Thus, in *Desgrosseilliers*, the Law Court applied the doctrine of estoppel when a city induced a couple to spend large sums of money on building a business only to later be fined for the nonconforming nature of that same business under the city’s ordinance. *Id.* The Law Court determined that the balancing of the equities weighed against the city because of its failure to show that the “business activities seriously threaten[ed] the safety, welfare, prosperity, or character of the [ordinance], the couple’s reliance on the

city's previous representations, the city's delay in enforcing its ordinance, and the injury that would be suffered by the couple should the city prevail. *Id.*

Accepting as true Brown's assertions that he was advised that he did not need a license to operate prior to investing in his dairy operation, this contention is insufficient for estoppel purposes in light of the balancing of the equities. Brown's purported reliance on the State's former policy, any delay by the State in enforcing the statute against him, and the potential financial injury to him caused as a result of the application of the statute do not outweigh the public health implications of permitting him to continue to sell milk without a license.

The present case is inapposite to *Desgrosseilliers*, where the risk to the public was unclear and the injury to the other party was substantial given that their business would have to be closed entirely, because here, the public health implications of permitting Brown to continue to sell milk without a license are substantial, and the injury to Brown is minimal because he can obtain a license and continue on with his activities. In so stating, the Court notes that the licensing fee for a milk distributor license "may not be lower than \$25 or exceed \$300," under the statute, 7 M.R.S. § 2901-C(1), and that the Department has offered to expedite the licensing process for Brown in this case. While Brown may have to alter his production practices to satisfy the Department's safety standards, Brown's contention that his investment in dairy farming will be lost entirely should the State prevail is unpersuasive.<sup>2</sup> An examination of the totality of the circumstances does not favor Brown's position because of the important public health

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<sup>2</sup> Moreover, the more Brown argues he will have to alter his production practices to satisfy the Department's safety standards, the more the safety risks associated with his current unlicensed practices are called into question.

implications of permitting him to continue to sell milk without a license, which far outweigh Brown's proprietary interest in continuing his current operations uninhibited.

*B. Failure to Label Unpasteurized Milk*

The State next seeks to enjoin Brown from violating 7 M.R.S. § 2902-B(1) by failing to label his milk containers with the words, "not pasteurized." Section 2902-B(1) mandates that "a person may not sell unpasteurized milk or a product made from unpasteurized milk, including heat-treated cheese, unless the label on that product contains the words 'not pasteurized.'" Brown counters that because he hangs an 8.5 x 11 sign in his farm stand which states that the milk is not pasteurized he has satisfied the statutory requirement that he label his milk under the doctrine of substantial compliance.

Brown cites to an 1849 case in which the Law Court stated, "if there is substantial compliance with the law, it will be sufficient, although the form should vary." *Hatch v. Lawrence*, 29 Me. 480 (1849). However, none of the plethora of cases cited by Brown for this proposition are analogous to the present case, where the statute clearly mandates that a warning label be placed on the "product" itself. 7 M.R.S. § 2902-B(1). The Court finds that the sign in the farm stand does not constitute substantial compliance. Despite Brown's argument that a purchaser may reasonably be expected to inform those with whom they share the milk the warning that it is unpasteurized, there is no indication that this aspirational view was shared by the legislature. Nor does the placement of a sign in his farm stand ensure that all purchasers of milk will notice it when purchasing the milk. Brown's sign fails to functionally achieve the same result as compliance with the statutory language would achieve.

C. *Home Rule*

The State further claims that Brown has violated 22 M.R.S. § 2167, which states that a “person . . . may not operate a food establishment . . . unless licensed for that purpose by the commissioner.” A food establishment is defined as a “store in which food or food products are . . . held for introduction into commerce or sold.” *Id.* § 2152(4-A). However, this definition does not include, “establishments such as farm stands and farmers’ markets primarily selling fresh produce *not including dairy* and meat products.” *Id.* § 2152(4-A)(D) (emphasis added).

Brown argues that his activities are protected under the so-called “Home Rule” of the Maine Constitution, which permits local municipalities to enact regulations under certain circumstances. Me. Const., Art. VIII, Part 2, Sec. 1. In particular, a community may “exercise any power or function which the Legislature has power to confer upon it, which is not denied either expressly or by clear implication, and exercise any power or function granted to the municipality by the Constitution of Maine, general law or charter.” 30 M.R.S. § 3001. This rule, Brown asserts, permits the Town of Blue Hill to enact an ordinance governing the sale of milk. Brown contends that Blue Hill enacted just such an ordinance in April of 2011, which exempted producers of local foods selling directly to consumers from the inspection and licensing requirements of the statute. Thus, Brown avers that his farm stand operations did not violate either 7 M.R.S. § 2901-C or 22 M.R.S. § 2167.

As an initial matter, the Court does not necessarily agree that the Blue Hill ordinance cited by Brown authorizes him to sell milk without a license by its express terms. The ordinance in question permits local food producers selling their products at

local farmers' markets and from farm stands to engage in such activity without a license. (Blue Hill Food Ordinance, Section 5.1.) The ordinance defines local food as "any food or food product that is grown, produced, or processed, by individuals who sell directly to their patrons through farm-based sales, . . . [or] farmers' markets . . ." (Blue Hill Food Ordinance, Section 2(c).) While milk and milk products may reasonably be defined as local food, this ordinance may also readily be read in conformity with 22 M.R.S. § 2152(4-A)(D), which similarly exempts the sale of food from farm stands and farmers' markets, yet retains the bar against dairy products. Nothing in the Blue Hill ordinance clearly states that the town intended to include milk within the definition of "local food," and considering the ordinance in the context of Title 22, one could readily conclude that it was not intended to exempt dairy products from licensure.

Nonetheless, the State argues that the statute preempts the Blue Hill ordinance by clear implication because that ordinance permits residents of the town to conduct themselves in direct violation of the statute. When determining whether a local action is preempted by statute, the Court must ask whether the "local action would frustrate the purpose of any state law." *E. Perry Iron & Metal Co., Inc. v. City of Portland*, 2008 ME 10, ¶ 15, 941 A.2d 457. "Local action will be preempted by implication where it 'prevents the efficient accomplishment of a defined state purpose.'" *Id.*

Here, if the Blue Hill Ordinance were to be read in the light Brown attempts to portray it, that ordinance would clearly frustrate the purpose of the state law to the extent that it permits the unlicensed sale of milk products by permitting otherwise prohibited activities at the local level. At least in the context of food establishments, the legislature has already carved out an exception for small farmers seeking to sell produce in a farm



stand or at local farmers' markets, yet in doing so it expressly excluded individuals selling milk products. 22 M.R.S. § 2152(4-A)(D). This exclusion makes clear the legislative intent that milk products be subject to stricter regulation than other products, and supports the State's contention that Blue Hill may not exempt individuals selling milk from the statutory licensure requirements.

In light of the clear language of the statute and the legislative intent manifested through a complete reading of the statutory scheme, the Court declines to permit Brown to take shelter under the Home Rule. It is axiomatic that a municipality may only add to the requirements of the statute, it may not take away from those requirements unless permitted to do so otherwise.

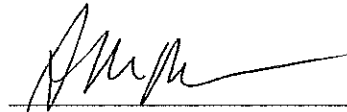
For all of the foregoing reasons, the Court grants Summary Judgment to the Plaintiff on all counts, and issues an injunction against the Defendant. Defendant is ENJOINED from: 1) selling milk without a license, 2) selling unpasteurized milk without labeling it as such, and 3) operating a food establishment without a license.

The Court will hold a hearing on all issues relating to civil penalties on May 16, 2013 at 9:00 A.M.. To the extent Defendant contests the occurrence of any particular statutory violation alleged in the Complaint, the State shall be prepared to present proof of the same. The Court will also address what penalty should be imposed for each such violation. If the parties anticipate needing more than 2 hours to address all issues relating to the State's request for imposition of civil penalties, the parties shall promptly notify the Court so additional time can be reserved.

The Entry is:

1. Plaintiff's M.R. Civ. P. 56 Motion for Summary Judgment seeking to enjoin Defendants from selling milk and milk products in violation of the statute is GRANTED. Defendant is ENJOINED from: 1) selling milk without a license, 2) selling unpasteurized milk without labeling it as such, and 3) operating a food establishment without a license. Defendant's Motion for Summary Judgment is DENIED.
2. The Court retains jurisdiction to address the civil penalty issue.
3. The clerk shall incorporate this order into the docket by reference. M.R. Civ. P. 79.

Dated: April 27, 2013



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Ann M. Murray, Justice  
Maine Superior Court