

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION
5:14-CV-438-D**

AMERICAN ENTERTAINERS, L.L.C.

Plaintiff,

vs.

CITY OF ROCKY MOUNT, NORTH
CAROLINA,

Defendant.

ANSWER

Defendant City of Rocky Mount, North Carolina (“Rocky Mount”), by and through the undersigned attorney, hereby responds to Plaintiff’s Complaint as follows:

FIRST DEFENSE

Responding to the specific allegations of the Complaint, Rocky Mount says as follows:

1. Paragraph 1 states a legal conclusion. Rocky Mount denies Plaintiff is entitled to any relief under 42 U.S.C. § 1983.
2. Paragraph 2 states a legal conclusion. Rocky Mount acknowledges this Court has jurisdiction over this action. Rocky Mount denies Plaintiff is entitled to any relief referenced in this paragraph.
3. Paragraph 3 states a legal conclusion. Rocky Mount acknowledges this Court has jurisdiction over this action, but denies Plaintiff is entitled to any relief.
4. Paragraph 4 states a legal conclusion. Rocky Mount acknowledges this Court has authority to issue declaratory judgments and permanent injunctions, but denies Plaintiff is entitled to any such relief.

5. Paragraph 5 states a legal conclusion. Rocky Mount acknowledges this Court may enter an award of attorneys' fees pursuant to 42 U.S.C. § 1988, but denies Plaintiff is entitled to any such fees. Rocky Mount, however, is entitled to recovery of such fees from Plaintiff.

6. Paragraph 6 states a legal conclusion and as such, no response is required. To the extent a response is required, paragraph 6 is denied. It is specifically denied Plaintiff is entitled to any relief against Rocky Mount as asserted.

7. Paragraph 7 is admitted.

8. Paragraph 8 is admitted upon information and belief.

9. Paragraph 9 is admitted.

10. Paragraph 10 states a legal conclusion and as such, no responses is required. To the extent a response is required, it is admitted Rocky Mount, from time to time, enacts laws, including but not limited to the Rocky Mount Code of Ordinances ("City Code"), which apply to the citizens of Rocky Mount. Except as admitted, paragraph 10 is denied.

11. Paragraph 11 is denied as Rocky Mount lacks sufficient knowledge and information upon which to form a belief as to its truth.

12. Paragraph 12 is denied as Rocky Mount lacks sufficient knowledge and information upon which to form a belief as to its truth.

13. Paragraph 13 is admitted.

14. It is admitted Rocky Mount has a Land Development Code ("LDC") which is identified as Appendix A to the City Code. The LDC is the best evidence of its contents and except as admitted, paragraph 14 is denied.

15. In response to paragraph 15, it is admitted Rocky Mount communicated with Plaintiff regarding the operation of Plaintiff's business and its need to operate the business in compliance with the City Code. Except as admitted, paragraph 15 is denied.

16. In response to paragraph 16, it is admitted Plaintiff filed a lawsuit against Rocky Mount captioned American Entertainers, LLC vs. City of Rocky Mount, case number 2003-CV-683 and that such suit was filed in the United States District Court for the Eastern District of North Carolina ("First Lawsuit"). The Complaint of that lawsuit is the best evidence of its contents and the allegations asserted by Plaintiff. It is denied Plaintiff was entitled to any relief in that action or received any Court ordered relief in that action.

17. In response to paragraph 17, it is denied the First Lawsuit was settled. It is admitted Plaintiff began operating its business in compliance with the City Code, in particular Article VII of Chapter 13 of the City Code, the Sexually Oriented Business Ordinance ("SOBO"). It is denied Plaintiff has operated its business in compliance with the SOBO since that time. Except as admitted, paragraph 17 is denied.

18. It is admitted Plaintiff filed a Stipulation of Dismissal of the First Lawsuit.

19. Paragraph 19 is denied.

20. Paragraph 20 is denied.

21. Paragraph 21 is denied.

22. Paragraph 22 is denied.

23. Paragraph 23 is denied.

24. Paragraph 24 is denied.

25. Paragraph 25 is denied.

26. Paragraph 26 is denied as Rocky Mount lacks sufficient knowledge and information upon which to form a belief as to its truth.

27. Paragraph 27 is denied.

28. Paragraph 28 is denied.

29. Paragraph 29 is admitted upon information and belief.

30. In response to paragraph 30, it is admitted the SOBO applies to Plaintiff's business.

31. In response to paragraph 31, the SOBO is the best evidence of its contents. To the extent paragraph 31 misrepresents the SOBO, it is denied.

32. In response to paragraph 32, the LDC is the best evidence of its contents. To the extent paragraph 32 misrepresents the LDC, it is denied.

33. In response to paragraph 33, the SOBO is the best evidence of its contents. To the extent this paragraph misrepresents the SOBO, it is denied.

34. In response to paragraph 34, the SOBO is the best evidence of its contents. To the extent this paragraph misrepresents the SOBO, it is denied.

35. In response to paragraph 35, the SOBO is the best evidence of its contents. To the extent this paragraph misrepresents the SOBO, it is denied.

36. In response to paragraph 36, the SOBO is the best evidence of its contents. To the extent this paragraph misrepresents the SOBO, it is denied.

37. In response to paragraph 37, the LDC is the best evidence of its regulations. To the extent this paragraph misrepresents the LDC, it is denied.

38. In response to paragraph 38, Rocky Mount, at this time, lacks sufficient knowledge and information upon which to form a belief as to its truth and therefore, it is denied.

39. In response to paragraph 39, it is admitted Rocky Mount's Chief of Police sent a letter dated July 18, 2014, to Gurnam Khara, 213 Dominick Drive, Rocky Mount, NC, (the "Notification Letter") which is attached as Exhibit E to the Complaint. Except as admitted, paragraph 39 is denied.

40. In response to paragraph 40, the Notification Letter is the best evidence of its contents. To the extent this paragraph misrepresents the contents of the Notification Letter, it is denied.

41. It is admitted Plaintiff's attorney communicated with an attorney for Rocky Mount through which Plaintiff's attorney contended Plaintiff was operating its business in such a manner that it did not need an SOBO license. It is denied Plaintiff was operating its business in such fashion.

42. It is admitted an attorney for Rocky Mount sent a letter to Plaintiff's attorney dated July 25, 2014, which stated, among other things, that Plaintiff was violating the SOBO. Except as admitted, paragraph 42 is denied.

43. Paragraph 43 states a legal conclusion and as such, no responses is required. To the extent a response is required, paragraph 43 is denied.

44. Paragraph 44 states a legal conclusion and as such, no responses is required. To the extent a response is required, paragraph 43 is denied.

45. Paragraph 45 states a legal conclusion and as such, no responses is required. To the extent a response is required, paragraph 43 is denied.

46. Paragraph 46 is denied.

47. Paragraph 47 is denied.

48. Paragraph 48 is denied.

49. Paragraph 49 is denied.

50. Paragraph 50 is denied.

51. Paragraph 51 is denied.

52. Paragraph 52 is denied.

53. Paragraph 53 is denied.

54. Paragraph 54 is denied.

55. In response to paragraph 55, it is admitted Rocky Mount is acting as a political subdivision of the State of North Carolina. Except as admitted, paragraph 55 states a legal conclusion and as such, no response is required. To the extent a response is required, paragraph 55 is denied.

56. Paragraph 56 is denied.

57. In response to paragraph 57, Rocky Mount incorporates its responses to paragraphs 1 through 56 as if fully set forth.

58. Paragraph 58 is admitted.

59. Paragraph 59 is admitted.

60. Paragraph 60 is denied.

61. Paragraph 61 is denied.

62. Paragraph 62 is denied.

63. Paragraph 63 is denied.

64. Paragraph 64 is denied.

65. Paragraph 65 is denied. In particular, subparagraphs A through D of paragraph 65 are denied.

66. In response to paragraph 66, Rocky Mount incorporates its responses to paragraphs 1 through 56 as if fully set forth.

67. Paragraph 67 is admitted.

68. Paragraph 68 is admitted.

69. Paragraph 69 is denied.

70. Paragraph 70 is denied.

71. Paragraph 71 is denied.

72. Paragraph 72 is denied.

73. Paragraph 73 is denied.

74. Paragraph 74 is denied.

75. Paragraph 75 is denied.

76. Paragraph 76 is denied.

77. Paragraph 77 is denied. Additionally, subparagraphs A through D of paragraph 77 are denied.

78. In response to paragraph 78, Rocky Mount incorporates its responses to paragraphs 1 through 56 as if fully set forth.

79. Paragraph 79 is admitted.

80. Paragraph 80 is denied.

81. Paragraph 81 is denied.

82. Paragraph 82 is denied.
83. Paragraph 83 is denied.
84. Paragraph 84 is denied.
85. Paragraph 85 is denied.
86. Paragraph 86 is denied.
87. Paragraph 87 is denied.
88. Paragraph 88 is denied.
89. In response to paragraph 89, Rocky Mount incorporates its responses to paragraphs 1 through 56 as if fully set forth.
90. Paragraph 90 is admitted.
91. Paragraph 91 is denied.
92. Paragraph 92 states a legal conclusion and as such, no responses is required. To the extent a response is required, paragraph 92 is denied.
93. Paragraph 93 is denied.
94. Paragraph 94 is denied.
95. Paragraph 95 is denied.
96. Paragraph 96 is denied. Additionally, subparagraphs A through C of paragraph 96 are denied.
97. Paragraph 97 is denied.
98. Paragraph 98 is denied.
99. Paragraph 99 is denied.
100. Paragraph 100 is denied.

101. Paragraph 101 is denied.
102. Paragraph 102 is denied.
103. Paragraph 103 is denied.
104. Paragraph 104 is denied.
105. Paragraph 105 is denied.
106. In response to paragraph 106, Rocky Mount incorporates its responses to paragraphs 1 through 56 as if fully set forth.
107. Paragraph 107 is admitted.
108. Paragraph 108 is admitted. It is denied that Plaintiff is entitled to such relief.
109. Paragraph 109 is admitted upon information and belief.
110. Paragraph 110 is denied.
111. Paragraph 111 is denied.
112. Paragraph 112 is denied.
113. Paragraph 113 is denied.
114. Paragraph 114 is denied.
115. Paragraph 115 is denied.
116. Paragraph 116 is denied.
117. Paragraph 117 is denied.
118. Paragraph 118 is denied.
119. Paragraph 119 is denied.
120. Paragraph 120 is denied. Additionally, subparagraphs A through E are denied.

121. In response to paragraph 121, Rocky Mount incorporates its responses to paragraphs 1 through 56 as if fully set forth.

122. Paragraph 122 is admitted.

123. Paragraph 123 is denied.

124. Paragraph 124 is denied.

125. Paragraph 125 is denied.

126. Paragraph 126 is denied.

127. Paragraph 127 is denied.

128. Paragraph 128 is denied.

129. Paragraph 129 is denied.

130. Paragraph 130 is denied.

131. Paragraph 131 is denied.

132. Paragraph 132 is denied. Additionally, subparagraphs A through E of paragraph 132 are denied.

133. Paragraph 133 is denied. Additionally, subparagraphs A through E of paragraph 133 are denied.

134. In response to paragraph 134, Rocky Mount incorporates its responses to paragraphs 1 through 56 as if fully set forth.

135. Paragraph 135 is admitted.

136. Paragraph 136 is denied.

137. Paragraph 137 is denied.

138. Paragraph 138 is denied.

139. Paragraph 139 is denied.

140. Paragraph 140 is denied.

141. Paragraph 141 is denied.

142. Paragraph 142 is denied.

143. Paragraph 143 is denied.

144. Paragraph 144 is denied. Additionally, subparagraphs A through D of paragraph 144 are denied

145. Paragraph 145 is denied.

146. Paragraph 146 is denied.

147. Paragraph 147 is denied. Additionally, subparagraphs A through E of paragraph 142 are denied.

148. In response to paragraph 148, Rocky Mount incorporates its responses to paragraphs 1 through 56 as if fully set forth.

149. Paragraph 149 is admitted.

150. Paragraph 150 is denied.

151. The SOBO is the best evidence of its contents. To the extent this paragraph misrepresents the SOBO, it is denied.

152. Paragraph 152 is denied.

153. Paragraph 153 is denied.

154. Paragraph 154 is denied. Additionally, subparagraphs A through B of paragraph 154 are denied.

155. Paragraph 155 is denied.

156. Paragraph 156 is denied. Additionally, subparagraphs A through F of paragraph 156 are denied.

157. In response to paragraph 157, Rocky Mount incorporates its responses to paragraphs 1 through 56 as if fully set forth.

158. Paragraph 158 is admitted.

159. Paragraph 159 is denied.

160. Paragraph 160 is admitted.

161. The LDC is the best evidence of its contents. To the extent this paragraph misrepresents the LDC, it is denied.

162. The LDC is the best evidence of its contents. To the extent this paragraph misrepresents the LDC, it is denied.

163. The LDC is the best evidence of its contents. To the extent this paragraph misrepresents the LDC, it is denied.

164. Rocky Mount lacks sufficient knowledge and information upon which to form a belief as to the truth of this paragraph and therefore, it is denied.

165. Paragraph 165 is denied.

166. Paragraph 166 is denied.

167. Paragraph 167 is denied.

168. Paragraph 168 is denied. Additionally, subparagraphs A through C of paragraph 168 are denied.

169. Paragraph 169 is denied.

170. Paragraph 170 is denied. Additionally, subparagraphs A through E of paragraph 170 are denied.

171. In response to paragraph 171, Rocky Mount incorporates its responses to paragraphs 1 through 56 as if fully set forth.

172. Paragraph 172 is admitted.

173. Paragraph 173 is denied.

174. Paragraph 174 is denied.

175. In response to paragraph 175, the SOBO is the best evidence of its contents. To the extent this paragraph misrepresents the SOBO, it is denied. Except as admitted, paragraph 175 is denied.

176. In response to paragraph 176, the LDC is the best evidence of its contents. To the extent this paragraph misrepresents the LDC, it is denied. Except as admitted, this paragraph is denied.

177. In response to paragraph 177, the SOBO is the best evidence of its contents. To the extent this paragraph misrepresents the SOBO, it is denied. Except as admitted, this paragraph is denied.

178. Paragraph 178 is denied. Additionally, subparagraphs A through E of paragraph 178 are denied.

179. Any and all allegations of the Complaint not admitted are herein denied.

SECOND DEFENSE

1. Rocky Mount incorporates all prior defenses as if fully set forth.

2. Section 13-270 of the City Code expressly states the purpose of the SOBO. That purpose is as follows:

- a. The purpose of this Article shall be to set forth the regulatory license and requirements for sexually oriented businesses located within the City. Sexually oriented businesses, because of their very nature, are recognized as having serious objectionable operational characteristics. Studies and experiences in other municipalities have shown that lower property values and increased crime rates tend to accompany and are brought about by sexually oriented businesses. The City Council finds that regulation of these uses is necessary to insure that these adverse secondary affects do not contribute to the blighting of surrounding neighborhoods and to regulate acts, omissions or conditions detrimental to the health, safety or welfare in the peace and dignity of the City. Regulation to achieve these purposes can best be accomplished by the licensing procedures set forth hereinafter. The authority for this regulation is North Carolina General Statute § 160A-174, 160A-181.1, and 160A-194.
- b. The provisions of this Article have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative activities. Similarly, it is not the intent or effect of this Article to restrict or deny access to communicative activities protected by the United States Constitution or the Constitution of the State of North Carolina. This Article represents a balancing of the legitimate ends of the community by imposing an incidental, content neutral time, place and manner regulation of sexually oriented businesses, without alternative avenues of communication, and at the same time, requiring the businesses to carry its share of financing the administration and enforcement activities.

3. As the SOBO was enacted to address the secondary impacts of the operation of a sexually oriented business, the SOBO is “content neutral”.

4. As the SOBO complies with the requirements of the United States Constitution and the Constitution of the State of North Carolina, it should be upheld as complying with all

requirements of both federal and state law applicable to the operation of Plaintiff's sexually oriented business.

THIRD DEFENSE

1. Rocky Mount incorporates all prior defenses as if fully set forth.
2. The sexually oriented business owned and operated by Plaintiff, "Gentlemen's Playground," conducts its business in such a manner so that it constitutes a sexually oriented business and as such, is required to have a sexually oriented business license ("SOBL") as set forth in Sec. 13-272 of the SOBO.
3. Upon information and belief, Gentlemen's Playground has females who dance for the entertainment of its customers. The female dancers perform in various states of undress before the customers at Gentlemen's Playground.
4. Upon information and belief, the female dancers request or accept payment, tips or other compensation to provide entertainment by dancing, posing or otherwise appearing at Gentlemen's Playground with (a) a less than fully opaque covering over a part of the genitals, pubic region, buttocks, or part of the areola of the female breast. As such, the female dancers are "adult entertainers," as defined in Sec. 13-271 of the SOBO.
5. Plaintiff operates Gentlemen's Playground as a retail business or private club as defined in N.C. Gen. Stat. § 18B-1000 by (a) serving food or beverages, or permitting the consumption of food or beverages; and (b) regularly providing or having available for viewing by its patrons or members adult live entertainment. By operating Gentlemen's Playground in such fashion, Gentlemen's Playground is an "adult cabaret" as defined in Sec. 13-271 of the SOBO.

6. Plaintiff allows the female dancers, which are adult entertainers as defined by the SOBO to, among other things, perform with less than completely and opaquely covered (i) human genitals and pubic region, (ii) buttock, or (iii) female breast below a point immediately above the top of the areola.

7. Upon information and belief, Plaintiff operates Gentlemen's Playground and allows the female dancers to perform "specified sexual activities" as defined in Sec. 13-271 of the SOBO. The dancers display and/or touch human genitals in a state of sexual stimulation or arousal, fondle or otherwise engage in erotic touching of the human genitals, pubic regions, buttocks or female breasts, engage in sex acts, normal or perverted, actual or stimulated/simulated, including intercourse, oral sex, masturbation, or sodomy.

8. Plaintiff operates Gentlemen's Playground in such a fashion as to provide "adult live entertainment" to its customers and/or members by providing performances of or involving the actual presence of real people that exhibit specified sexual activities or specified anatomical areas, as defined in the SOBO, and the operation of Gentlemen's Playground in this fashion requires for Plaintiff to obtain an SOBL.

9. Plaintiff does not have an SOBL.

10. Upon information and belief, Plaintiff operates Gentlemen's Playground in such a fashion as to allow the female dancers (adult entertainers under the SOBO) to straddle the legs of customers or members over a part of the body of said customers or members whether there is touching or not.

11. As Plaintiff operates an adult cabaret as defined in the SOBO, it is required to obtain an SOBL pursuant to Sec. 13-272 of the SOBO.

12. By operating an adult cabaret without an SOBL issued to it, Plaintiff is in violation of the SOBO.

13. Upon information and belief, Plaintiff operates Gentlemen's Playground by having private or semi-private performances of adult live entertainment in an area known as a "VIP Room, VIP Booth, or VIP Area" (collectively referred to as "VIP Areas"). The operation by Plaintiff of the VIP Areas, presents opportunities for illegal activity such as, but not limited to, indecent exposure and solicitation for prostitution. The SOBO, pursuant to Sec. 13-280, does not allow adult live entertainment to be performed in VIP Areas and requires all adult live entertainment to occur in a manner and location that freely permits management and a broad number of patrons to visually observe the entertainment so as to minimize the opportunities for adult live entertainment to lead to illegal activity.

14. Upon information and belief, Plaintiff operates Gentlemen's Playground in such a fashion where the following, but not limited to, adult live entertainment occurs:

- a. Adult live entertainment occurs outside of the presence of one of Plaintiff's employees (who is not an adult entertainer) and when it is not visibly observable by an employee of Plaintiff.
- b. Adult live entertainment occurs when it is not in the presence of and visibly observable by more than one patron.
- c. Adult live entertainment occurs in an area and on a stage that is not shown on an approved diagram as where adult live entertainment may occur.

- d. Adult live entertainment occurs in an area that is visually screened, obstructed, or separated from the majority of the patrons located in Gentlemen's Playground.
- e. Adult live entertainment occurs in areas that are not accessible to all patrons without payment of a charge other than a charge, if any, for entry into the premises.
- f. Adult live entertainment occurs in such a manner that payment or tipping is directly made or personally made by members or guests of Gentlemen's Playground to an adult entertainer and that such tips or payments are made in ways other than placing them in a receptacle that has been provided by Plaintiff.
- g. Adult live entertainment is provided in such a fashion that adult live entertainers at Gentlemen's Playground touch patrons or clothing of patrons.
- h. Adult live entertainment occurs at Gentlemen's Playground in such a fashion that patrons touch adult entertainers.

15. Pursuant to Sec. 13-285 of the SOBO and N.C. Gen. Stat. § 160A-175, Rocky Mount requests the Court to enter a permanent injunction against Plaintiff regarding the operation of Gentlemen's Playground as long as such operation is in violation of the SOBO.

FOURTH DEFENSE

1. Rocky Mount incorporates all prior defenses as if fully set forth.
2. The plaintiff is challenging the constitutionality of Rocky Mount's LDC in this action.
3. To the extent Plaintiff is attempting to have a judicial determination as to whether its operation of Gentlemen's Playground is an "adult establishment" as defined in Sec. 503 - Table 5-2 of the LDC, such relief cannot be granted as Plaintiff has failed to exhaust all of the administrative remedies available to it as provided in the LDC.
4. Plaintiff's failure to exercise and exhaust all of the administrative remedies available to it as provided in the LDC constitutes grounds for the dismissal of this action to the extent Plaintiff seeks any judicial determination as to whether the operation of Gentlemen's Playground is such that it is in conformance with the LDC.

FIFTH DEFENSE

1. Rocky Mount incorporates all prior defenses as if fully set forth.
2. N.C. Gen. Stat. § 160A-181.1 authorizes Rocky Mount to adopt laws regulating sexually oriented businesses, as such regulations are necessary to reduce the adverse secondary impacts of such businesses. The regulations allowed by this statute include restrictions on location and operation of the facilities for such businesses, licensing requirements and charging reasonable fees for such licenses. Such regulations may be included in zoning regulations, such as the LDC, in licensing requirements or other local ordinances, such as the SOBO.
3. The SOBO and LDC are ordinances and regulations authorized by N.C. Gen. Stat. § 160A-181.1. As such, the SOBO and LDC should be recognized by this Court as being in

compliance with this statute and other federal and/or state constitutional or statutory laws. In particular, the LDC does not “zone out” Plaintiff from operating a sexually oriented business (adult cabaret) in Rocky Mount as there are an adequate number of realistic, alternative sites for Plaintiff to operate a sexually oriented business, such as an adult cabaret.

WHEREFORE, Rocky Mount respectfully prays to the Court as follows:

1. That any and all relief sought by Plaintiff in this action be denied.
2. That a permanent injunction be entered against Plaintiff to prevent it from operating Gentlemen’s Playground as a sexually oriented business, in particular, an adult cabaret, as defined in the SOBO, as its current location is in violation of the LDC.
3. Alternatively, should the Court find the location of Gentlemen’s Playground complies with the LDC, that a permanent injunction be entered against Plaintiff to prevent it from operating Gentlemen’s Playground as a sexually oriented business, in particular, an adult cabaret, as defined in the SOBO, without Plaintiff obtaining an SOBL.
4. That should the Court consider whether the SOBO complies with the United States Constitution and the Constitution for the State of North Carolina, that it determine that the SOBO does comply with both the federal and state Constitutions and other applicable federal and/or state law.
5. That should the Court consider whether the LDC complies with the United States Constitution and the Constitution for the State of North Carolina, that it determine that the LDC does comply with both the federal and state Constitutions, as well as complies with other applicable federal and/or state law.
6. That this matter be tried by a jury.

7. That the Court tax all costs against Plaintiff.
8. That the Court tax Rocky Mount's attorneys' fees as allowed by law, including but not limited to, 42 U.S.C. § 198, against Plaintiff.

This the 9th day of October, 2014.

POYNER SPRUILL LLP

By: /s/ J. Nicholas Ellis

J. Nicholas Ellis

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