

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

<b>LE CABARET 481, INC.,</b>	:	<b>No. 3:03cv1230</b>
<b>Plaintiff</b>	:	
	:	<b>(Judge Munley)</b>
v.	:	
	:	
<b>MUNICIPALITY OF KINGSTON, A</b>	:	
<b>Pennsylvania Municipal Corporation,</b>	:	
<b>Defendant</b>	:	

.....

**MEMORANDUM**

Before the court for disposition is Defendant Municipality of Kingston’s (“Defendant”) motion for summary judgment on Plaintiff Le Cabaret 481, Inc.’s (“Plaintiff”) complaint. The matter has been fully briefed and is ripe for disposal. For the following reasons, we will grant the motion for summary judgment and dismiss the case.

**I. Background**

Plaintiff is a corporation seeking to open an adult entertainment business in the city of Kingston, Pennsylvania. (Pl. Compl. ¶ 18). Plaintiff seeks to run a business involving “nude and partially nude dancing performances by female entertainers.” (Pl. Compl. ¶ 9). Jules Greenberg (“Greenberg”) is Plaintiff’s president. (Pl. Compl. Decl. ¶ A). Plaintiff’s sole other corporate officer is Greenberg’s wife. (Summ. J. Oral Arg. Transcript at 22, line 2-4). Plaintiff’s principal place of business is 481 Market Street in Kingston. (Pl. Compl. ¶ 1).

Kingston Zoning Code § 181-17(B) (“the ordinance”) requires that adult businesses in Kingston operate within certain zoning districts and prevents them from operating within 300 feet of any church, elementary school, secondary school, nursery, university, college,

vocational or business school, boundary to any residential district, public park adjacent to a residential district, or property line of a lot devoted to any residential use. (Pl. Compl. ¶ 16). Prior to March 17, 2003, the ordinance prohibited the operation of adult businesses within 1000 feet of the aforementioned properties. (Pl. Compl. ¶¶ 16-17). Plaintiff filed the instant suit on July 24, 2003, alleging that the current zoning ordinance unreasonably restricts the locations available for adult businesses in Kingston. (Pl. Compl. ¶ 18). It alleges that the ordinance prevents it from opening an adult business in Kingston because there are no locations in Kingston for new adult businesses, and therefore the ordinance violates Plaintiff's rights under the First Amendment of the United States Constitution. (Pl. Compl. ¶¶ 19-20). Plaintiff also alleges that the amendment to the ordinance which limited the restrictions from 1000 feet to 300 feet was executed in violation of the laws of Pennsylvania because the meeting at which the amendment was adopted was not properly advertised to the public. (Pl. Compl. ¶¶ 38-45).

## **II. Jurisdiction**

As this case is brought pursuant to 42 U.S.C. § 1983 for constitutional violations we have jurisdiction under 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."). We have supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. 1367.

## **III. Standard of Review**

Granting summary judgment is proper if the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. See Knabe v. Boury, 114 F.3d 407, 410 n.4 (3d Cir. 1997) (citing FED. R. CIV. P. 56(c)). “[T]his standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (emphasis in original).

In considering a motion for summary judgment, the court must examine the facts in the light most favorable to the party opposing the motion. International Raw Materials, Ltd. v. Stauffer Chemical Co., 898 F.2d 946, 949 (3d Cir. 1990). The burden is on the moving party to demonstrate that the evidence is such that a reasonable jury could not return a verdict for the non-moving party. Anderson, 477 U.S. at 248 (1986). A fact is material when it might affect the outcome of the suit under the governing law. Id. Where the non-moving party will bear the burden of proof at trial, the party moving for summary judgment may meet its burden by showing that the evidentiary materials of record, if reduced to admissible evidence, would be insufficient to carry the non-movant's burden of proof at trial. Celotex v. Catrett, 477 U.S. 317, 322 (1986). Once the moving party satisfies its burden, the burden shifts to the nonmoving party, who must go beyond its pleadings, and designate specific facts by the use of affidavits, depositions, admissions, or answers to interrogatories showing that there is a genuine issue for trial. Id. at 324.

#### IV. Discussion

Defendant advances three arguments in support of its motion for summary judgment. First, it argues that there is no case or controversy because Plaintiff has not sought a building permit or special exemption from the municipality's zoning board.

Second, Defendant argues that this case has been litigated previously, and therefore the doctrine of *res judicata* precludes our inquiry into the merits here. It notes that in Jay-Lee, Inc., & Four G. Corp., Inc., & Jules Greenberg v. Municipality of Kingston Zoning Hearing Board, 799 A.2d 923 (Pa. Commw. Ct. 2002) Jules Greenberg and two corporations mounted an identical challenge to the ordinance and sought to open an adult business at 481 Market Street, which is Plaintiff's corporate address.<sup>1</sup>

Additionally, Defendant argues that Plaintiff has not shown a genuine issue of material fact that the ordinance unreasonably restricts the available locations for adult businesses. Defendant has submitted a surveyor's report outlining the space in Kingston available for such activity. (Mot. Summ. J. Ex. B). The report shows that 6.17% of Kingston is available for adult entertainment. (Id.) In response, Plaintiff has submitted the affidavit of Jules Greenberg stating that, using methods he learned by attending Defendant's expert's deposition, he calculated there are no locations, or maybe one location, available for

---

<sup>1</sup> We take judicial notice of those facts contained in the record in Jay Lee which were undisputed either in the prior or present litigation. See United States v. Weber, 396 F.2d 381, 387 (3d Cir. 1968) (a "court can take judicial notice under F.R.Civ.P. 56(c) of the documents and other material of record in [a previous litigation] and can find that privity exists if there is no doubt of the facts on that prior record and also no dispute has been raised as to those facts by material filed in this case.").

adult businesses. (Greenberg Decl. in Opp'n to Summ. J.). Defendant argues that we may not consider Greenberg's testimony because he is not qualified as an expert, and therefore Plaintiff has submitted no evidence in opposition to the motion for summary judgment. We will consider each of these arguments *in seriatim*. For the reasons that follow, we find that we have jurisdiction but will dismiss the case.<sup>2</sup>

### **A. Ripeness**

As an initial matter, Defendant argues that Plaintiff does not present a ripe case in controversy because it has failed to submit a request to the municipal zoning board for a building permit or a special exception. Plaintiff does not allege that it has submitted such a request, and does not contend that such application procedures are unavailable. Plaintiff argues that it should not have to file a request for a permit with the zoning board because it cannot find a location for which it may seek a permit.<sup>3</sup> As we have a continuing duty to determine whether we have jurisdiction,<sup>4</sup> we will examine the record on the whole to discern

---

<sup>2</sup> We address the issue of jurisdiction first because, although we will dismiss this case on *res judicata* grounds and for lack of a genuine issue of material fact, we must first determine whether we have jurisdiction to do so. Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 93-94 (1998).

<sup>3</sup> Plaintiff also argues that under Patsy v. Florida Board of Regents, 457 U.S. 496 (1982), it is not required to exhaust administrative remedies prior to filing a suit pursuant to 42 U.S.C. § 1983. Plaintiff's argument, however, conflates the issue of exhaustion of remedies with the issue of whether a ripe case and controversy exists for the purposes of Article III of the United States Constitution. See Taylor v. Upper Darby, 983 F.2d 1285, 1291 (3d Cir. 1993). "While the policies underlying the two concepts overlap, the finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision." Id. (quoting Williamson Planning Comm. v. Hamilton Bank, 473 U.S. 172 (1985))

<sup>4</sup> Federal courts, being courts of limited jurisdiction, have a continuing duty to satisfy themselves of jurisdiction before addressing the merits of a case. Packard v. Provident Nat'l Bank, 994 F.2d 1039, 1049

whether Plaintiff has presented a ripe case and controversy. After a careful analysis, we find that it has.

“The existence of a case and controversy is a prerequisite to all federal actions, including those for declaratory or injunctive relief.” Peachlum v. City of York, 333 F.3d 429, 433 (3d Cir. 2003) (quoting Presbytery of New Jersey of Orthodox Presbyterian Church v. Florio, 40 F.3d 1454 (3d Cir. 1994)). Ripeness is a question of timing and “its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.” Taylor v. Upper Darby, 983 F.2d 1285, 1290 (3d Cir. 1993) (quoting Abbott Lab. v. Gardner, 387 U.S.136, 148 (1967)). Where a case involves a challenge to an ordinance that has yet to be enforced, the following three-part test enunciated in Step-Saver Data Systems, Inc. v. Wyse Technology, 912 F.2d 643, 647 (3d Cir. 1990) determines whether the matter is ripe for declaratory relief: 1) whether the parties’ interests are sufficiently adverse; 2) whether the court can issue a conclusive ruling in light of potentially evolving factual developments; and 3) whether the decision will render practical help to the parties. Taylor, 983 F.2d at 1290 (citing Step-Saver, 912 F.2d at 647).

Additionally,

A First Amendment claim, particularly a facial challenge, is subject to a relaxed ripeness standard. The courts have repeatedly shown solicitude for First Amendment claims, because of concern that, even in the

---

(3d Cir. 1993). Moreover, federal courts have the obligation to address the question of subject matter jurisdiction *sua sponte*. Meritcare Inc. v. St. Paul Mercury Ins. Co., 166 F.3d 214, 217 (3d Cir. 1999); see generally Nelson v. Keefer, 451 F.2d 289, 293-95 (3d Cir. 1971) (finding that the federal judiciary has been too cautious in addressing the large number of cases which do not belong in federal courts).

absence of a fully concrete dispute, unconstitutional statutes or ordinances tend to chill protected expression among those who forbear speaking because of the law's very existence.

Peachlum v. City of York, 333 F.3d 429, 434-35 (2003) (internal citations omitted).

We find that the present case satisfies each of prong of the Step-Saver test, and thus presents a ripe case and controversy.

i. *Adverse Interests*

Plaintiff can establish that its interests are sufficiently adverse to Defendant's to warrant declaratory action to protect against the enforcement of the ordinance by demonstrating, "that the probability of [enforcement] is real and substantial, 'of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" Presbytery of New Jersey v. Florio, 40 F.3d 1454, 1466 (3d Cir. 1994). Thus, where the state has demonstrated a willingness to enforce the statute in question, its position is adverse to those who seek to engage in the proscribed conduct. Id. at 1467-68 (citing Steffel v. Thompson, 415 U.S. 452, 455-59 (1974)). In Steffel, the plaintiff was threatened with arrest for trespassing when he distributed literature in opposition to the Vietnam War. Steffel, 415 U.S. at 455-56. The plaintiff's companion was in fact arrested. Id. The plaintiff challenged the trespassing statute as a violation of his First Amendment rights. Id. The Court found that the plaintiff did not need to expose himself to arrest to be able to assert an active case in controversy because the "prosecution of petitioner's handbilling companion is ample demonstration that petitioner's concern with arrest has not been 'chimerical.'" Id. at 459.

A review of Plaintiff's allegations clearly shows that it seeks to engage in a course of

conduct that is likely to run afoul of the ordinance. Plaintiff proposes to run a business involving “nude and partially nude dancing performances by female entertainers.” (Pl. Compl. ¶ 9). The Ordinance prohibits “any adult business” from operating outside the reserved areas. (Pl. Compl. ¶ 14).

Although Plaintiff itself has not sought a permit for nude dancing, Plaintiff’s president has applied for a permit for nude dancing at an establishment called “Le Cabaret” located at Plaintiff’s corporate address, 481 Market Street. Jay Lee v. Municipality of Kingston, 799 A.2d 923, 924-25 (Pa. Commw. Ct. 2002). An ordinance need not be enforced against a plaintiff to give rise to a case in controversy so long as the plaintiff can establish that the defendant intends to enforce the statute and the plaintiff’s concern is not “chimeral.” Steffel, 415 U.S. at 459, 460 (the threat of enforcement must be “of sufficient immediacy and reality to warrant the issuance of a declaratory judgment”); see also Armstrong, 961 F.2d at 412 (“One does not have to await the consummation of threatened injury to obtain preventative relief.”) (quoting Pacific Gas & Elec. Co. v. State Energy Resource Conservation & Dev. Comm’n, 4612 U.S. 190 (1983)). Defendant’s previous denial of a permit for Plaintiff’s president Greenberg to conduct a nude dancing business at Plaintiff’s corporate address establishes that the threat of enforcement is immediate and real. Therefore the parties are sufficiently adverse.

ii. *Conclusiveness*

The second prong of the Step-Saver analysis requires that we determine whether

“judicial action at the present time would amount to more than an advisory opinion based upon a hypothetical set of facts.” Presbytery, 40 F.3d at 1468. The statute in question must have an immediate impact on the Plaintiff; it must “direct them to act or not act, or prevent or hinder them from acting in any particular manner to their detriment.” Armstrong World Industries v. Adams, 961 F.2d 405, 421 (3d Cir. 1992). The court must determine whether factual development would add to claims and whether it can conclusively determine the legal issues at stake. Presbytery, 40 F.3d at 1468-69.

In Felmeister v. Office of Attorney Ethics, the Third Circuit analyzed whether the plaintiffs’ challenge to an attorney advertising regulation was ripe. 856 F.3d 529, 530-31 (3d Cir. 1988). The plaintiffs had not presented their proposed advertising to an advisory board that was available to determine whether requested advertising would violate the regulation. Id. The regulation was never enforced against them prior to their filing suit. Id. The court found that the case was not ripe, stating “until it is shown that the plaintiffs wish to engage in an activity that would be prohibited under the revised attorney advertising rule, their challenge lacks the specificity to make the matter ripe for adjudication.”<sup>5</sup> Id. at 537. The

---

<sup>5</sup> The court in Felmeister did not use the Step-Saver test, as Step-Saver was decided two years after Felmeister. Felmeister instead applied a two-part fitness and hardship test described in Abbott Labs v. Gardner, 387 U.S. 136, 149 (1967). Felmeister, 856 F.3d at 535-538. Step-Saver, however, refined the Abbott Labs fitness and hardship test to address “ripeness in actions initiated before an ‘accomplished’ injury is established.” Amstrong World Industries v. Adams, 961 F.2d 405, 411 (3d Cir. 1992) (citing Step-Saver, 912 F.2d at 647).

Significantly, the Felmeister court did not rely solely on the holding of Williamson County Regional Planning Comm’n v. Hamilton Bank, 473 U.S. 172 (1985). In Williamson, the Court held that the plaintiff’s Fifth Amendment Just Compensation Clause claim and Fourteenth Amendment Due Process claim were not ripe because the plaintiff landowners had not applied for a possible variance with the local zoning board. Felmeister, 856 F.2d at 536 (citing Williamson, 473 U.S. at 200). The Felmeister court observed that the posture of the plaintiff’s First Amendment challenged resembled that of the plaintiffs in Williamson, and

court reviewed the plaintiff's complaint and affidavits and found "it impossible to determine whether plaintiffs' proposed advertisements are likely to run afoul of the revised rule or whether publication of the ads is likely to subject plaintiffs to disciplinary action." Id. at 531.

We find that a decision rendered in the present case would be sufficiently conclusive without requiring Plaintiff to submit an application to the zoning board. Plaintiff intends to run a business involving "nude and partially nude dancing performances by female entertainers" (Pl. Compl. ¶ 9) in the town and asserts that the ordinance unconstitutionally restricts it from doing so. (Pl. Compl. ¶ 9). The ordinance prohibits "any adult business" from operating outside the restricted areas. Kingston Zoning Code § 181-17(B). Plaintiff's president previously ran a nude dancing business at Plaintiff's corporate address until the ordinance forced him to stop. Jay Lee, 799 A.2d at 926. Defendant subsequently denied Plaintiff's president's application for a permit to conduct nude dancing at Plaintiff's location Id. Plaintiff presents a facial challenge to the ordinance, and no further factual development would change the "substance or clarity" of the challenge. Presbytery, 40 F.3d at 1469. Therefore, we find that a decision in this case would not be an advisory opinion and would be sufficiently conclusive.<sup>6</sup>

---

noted that the distinction between the First Amendment claim and the Just Compensation Clause claim was not dispositive of the ripeness issue. Id. As the court did not find Williamson dispositive, it proceeded to apply the two-part fitness test from Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967).

<sup>6</sup> Defendant argues that prior to filing suit, Plaintiff must find a location other than its current address and apply for a permit there. No case reviewing the constitutionality of a similar ordinance has imposed a requirement that a business located outside the bounds of the ordinance must seek a location within the

iii. *Utility*

The final prong requires that we analyze the utility of entering a declaratory judgment at this juncture by determining “whether the parties’ plans of actions are likely to be affected by a declaratory judgment.” Presbetry 40 F.3d at 1469 (quoting Step-Saver, 912 F.2d at 649 n.9). It is important that they “face the threat of sanction for noncompliance with [the challenged act].” Id. at 1470 (quoting Armstrong, 961 F.2d at 423). Plaintiff seeks to run an adult business in Kingston, and because he currently would face sanctions under the ordinance for doing so “we assume his willingness to do so is likely to be affected by resolution of this action.” Id. Furthermore, Defendant’s willingness to enforce the ordinance will be determined by the outcome of this case. Therefore, we find that the instant matter satisfies the final prong of the Step-Saver test, and therefore presents a ripe case in controversy.

As we have a ripe case and controversy, we proceed to address the merits of the instant summary judgment motion. For the reasons that follow, we will dismiss this case because *res judicata* bars Plaintiff’s claims and Plaintiff has not shown a genuine issue of

---

bounds prior to filing suit. See Phillips v. Borough of Keyport, 107 F.3d 164 (3d Cir. 1997) (addressing the merits of a challenge to an ordinance, which prohibited adult businesses within 300 feet of certain locations, where plaintiff had sought a permit for an adult business and was denied because the ordinance prohibited such activity at his location); CR of Rialto v. City of Rialto, 975 F. Supp. 1254, 1258-59 (C.D. Cal. 1997) (finding that the plaintiff had standing to challenge an ordinance which restricted adult businesses from operating within 1000 feet of certain uses, even though plaintiff had not applied for a permit and was not located within an area where adult businesses were allowed, because the plaintiff was “currently being chilled as to its First Amendment rights to free expression in its efforts to seek alternative sites”); Adventures Plus v. City of Dallas, No.CIV.A.00-2500, 2001 WL 1018732, at \*2 (N.D. Tex. Aug. 17, 2001) (finding that the plaintiff’s challenge to an ordinance prohibiting adult businesses from operating within 1000 feet of certain uses was ripe even though the plaintiff had not applied for a permit because the fear of punishment was a sufficient injury).

material fact.

**B. *Res Judicata***

Under *res judicata*, “a final judgment on the merits bars further claims by parties or their privies based on the same cause of action.” Brown v. Felsen, 442 U.S. 127, 132 (1979) (quoting Montana v. United States, 440 U.S. 147, 153, 99 S.Ct. 970, 973, 59 L.Ed.2d 210 (1979)). The purpose is to ensure the finality of decisions. Id. A party can show that a previous judgment is *res judicata* against a later suit if: “(1) the earlier judgment is final and on the merits; (2) the claims asserted by the plaintiff are the same as those asserted in the earlier action; and, (3) the parties are the same as, or in privity with, the parties from the earlier action.” Huck v. Dawson, 106 F.3d 45, 48 (3d Cir. 1997).

Defendant argues that under the doctrine of *res judicata*, the judgement in Jay-Lee, Inc., & Four G. Corp., Inc., & Jules Greenberg v. Municipality of Kingston Zoning Hearing Board, 799 A.2d 923 (Pa. Commw Ct. 2002) bars Plaintiff’s claims in the instant case.

Plaintiff argues solely that it is not in privity with the plaintiffs in Jay Lee.

In Jay-Lee, Jules Greenberg and two corporations mounted an identical challenge to the same zoning ordinance that Plaintiff seeks to challenge in the instant case. Jay Lee, 799 A.2d at 924. Prior to filing that suit, Greenberg and the companies joined in a request to the zoning board to obtain a permit for nude dancing at 481 Market Street, and were denied. Id. at 926. Following this denial, they filed suit against the zoning board, arguing that “the Ordinance violates the United States Constitution and the Pennsylvania Constitution in that it

fails to provide for any location in Kingston for the establishment of adult entertainment uses.” Id. at 930. In support of this argument, Greenberg introduced a videotape which he took while driving through Kingston, and testified that under the ordinance’s restrictions there was no location in town where an adult business could open. Id.

Plaintiff asserts that it is a separate corporate entity, and therefore is not in privity with Greenberg. Defendant argues that Jules Greenberg has complete control over Plaintiff and therefore is in privity. We find that Plaintiff is in privity with Jules Greenberg because in Jay Lee he adequately represented Plaintiff’s interests.

A party’s status as a corporate entity does not preclude a finding that it is in privity with one of its officers. “A judgement against a corporation bars later litigation on the same cause of action by an officer, director, or shareholder of the corporation if the individual participated in and effectively controlled the earlier case.” Teletronics Services Inc., v. Anaconda-Ericsson Inc., 762 F.2d 185, 191 (2d Cir. 1985). In Teletronics, the court found a company’s president to be in privity with the company and dismissed claims brought by the president. Id. at 190. The court noted that the individual was the “founder, president, chairman of the board and a substantial shareholder.” Id. The court reasoned that he submitted an affidavit in the previous litigation, was the sole witness at a hearing for a preliminary injunction, executed a consent form for a change of counsel, and caused the company to file a second suit. Id. at 190-91. Thus, the court found that he extensively participated in the previous litigation and had a sufficient personal interest to justify precluding him from filing a second suit. Id. See also Greenberg v. Potomac Health

Systems, Inc., 869 F. Supp. 328, 331 (E.D. Pa. 1994) (finding that subsidiary company was in privity with its parent company and one of the parent company's officers).

In Minnesota Mining and Manufacturing Company v. Egly, No.CIV.A.85-0477, 1989 WL 55384, at \*1 (E.D. Pa. May 23, 1989), the plaintiff sued a number of corporate officers to enforce a previous judgment against the corporation. The plaintiff moved for summary judgment, arguing that *res judicata* precluded the defendants from defending the suit. Id. The defendants claimed that the judgment against the corporation was not preclusive against them because they were not in privity with the corporation. Id. at \*2. The court reasoned “[w]hen a party has obtained judgment against a corporation, and sues corporate individuals to enforce the judgment, the individuals are in privity with the corporation if they are alter egos of the corporation.” Id. The court noted that inquiring into alter ego status and piercing the corporate veil is appropriate “to prevent fraud, illegality, or injustice, or when recognition of the corporate entity would defeat public policy.” Id. (quoting Carpenters Health and Welfare Fund v. Abrose, 727 F.2d 279, 284 (3d Cir. 1983)). The court then found that the corporate officers were in privity with the corporation because they commingled funds, controlled the company, and controlled the previous litigation. Id. at \* 3-4.

The notion of privity is a flexible doctrine and tests whether there is a sufficiently close relationship between the party to the prior litigation and the nonparty against whom the prior judgment is being used to justify barring the nonparty's claims. See First Options of Chicago Inc., v. Kaplan, 913 F. Supp. 377, 384 (E.D. Pa. 1996) (citing Bruszewski v. United States, 181 F.2d 419, 423 (3d Cir. 1950)); see also Brody v. Hankin, 299 F. Supp. 2d 454,

461 (E.D. Pa. 2004) (finding the plaintiff in privity with a corporation when he was the president, vice president, secretary, and he testified on behalf of the company in a previous litigation, because his representation of the company ensured that his interests were adequately represented even though he personally was not a party in the company's earlier litigation).

We find that Plaintiff has a sufficiently close relationship with its President, Jules Greenberg, to bar Plaintiff's claims under the doctrine of *res judicata*. The doctrine of *res judicata* embodies the strong public policy in support of the finality of prior judgments. In light of Greenberg's role in the instant litigation and the litigation in Jay Lee, ignoring Plaintiff's relationship with Greenberg would eviscerate the finality of Jay Lee. Jules Greenberg is Plaintiff's president, and the only other corporate officer is Greenberg's wife. (Transcript 22, line 2-4). Plaintiff's corporate address is 481 Market Street, a building that Greenberg owns. Jay Lee, 799 A.2d at 924. Greenberg has already tried to obtain a permit for nude dancing at Plaintiff's corporate address and personally filed suit challenging the ordinance following the denial of the permit.<sup>7</sup> Id. at 926.

Significantly, Greenberg is controlling Plaintiff's participation in the current litigation

---

<sup>7</sup> Plaintiff notes that it is using 481 Market Street as its corporate address only until it can find another location to operate its proposed adult business. (Pl. Compl. n.2). This does not alter out *res judicata* analysis. Greenberg adequately represented Plaintiff's interest regardless of the different addresses because both Greenberg and Plaintiff have presented identical facial challenges to the ordinance. Furthermore, Plaintiff has not argued that the claim in Jay Lee is distinct from the claim in the present case, as it has argued only that it is not in privity with the Jay Lee plaintiffs. (Br. in Opp'n to Summ. J.).

in the same way that he represented his own interests in Jay Lee. In this case, Greenberg has issued the declaration that the facts of the complaint were true as alleged, (Pl. Compl. Decl.) and the sole evidence Plaintiff submitted in opposition to Defendant's motion for summary judgment is Greenberg's affidavit. Greenberg submits that he attended the deposition of Defendant's expert surveyor, learned how the surveyor calculated the space available for adult entertainment, and then performed the same calculations himself. (Pl. Br. in Opp'n Decl. ¶ 3-4). He presents his calculations as adequate to show a genuine issue of material fact that there is insufficient space in Kingston for adult businesses. (Id. ¶ 5-6). Greenberg's calculations and affidavit are the only evidence submitted by Plaintiff. Similarly, in Jay Lee, the only evidence submitted in opposition to the defendant's motion for summary judgment was Greenberg's videotape of the town and his estimation that the town did not have sufficient space for adult businesses. Jay Lee, 799 A.2d at 930-31.

It would be contrary to the strong public policy in favor of the finality of judgments to allow Greenberg, under the guise of Plaintiff's corporate form, to simply resubmit an affidavit against Defendant supporting a contention that they previously adjudicated. Furthermore, the similarity between the evidence presented by Greenberg individually in Jay Lee and the evidence he presents in the instant case as Plaintiff's representative demonstrates that he adequately represented Plaintiff's interest in Jay Lee. See First Options of Chicago Inc., v. Kaplan, 913 F. Supp. 377, 384 (E.D. Pa. 1996) (noting that privity exists if the party to the previous litigation adequately represented the non-party's interest). Therefore, we find that Plaintiff is in privity with Greenberg, and that under the doctrine of *res judicata*, the

decision against him in Jay Lee bars Plaintiff's claims.

**C. Plaintiff's Evidence**

Although we decide this case on *res judicata* grounds, a review of the record establishes that Plaintiff's evidence is insufficient to create a genuine issue of material fact. Opposing affidavits must "set forth such facts as would be admissible evidence." FED. R. CIV. P. 56(e). We find that Greenberg's affidavit is admissible neither as a lay opinion or an expert opinion. A lay witness may testify solely to those opinions that are "rationally based on the perception of the witness." FED. R. EVID. 701. Greenberg's assertion that there is insufficient space in the town for adult businesses is not rationally based on his perceptions, but is instead based on surveyor calculations.

Furthermore, Greenberg is not qualified as an expert to testify to these calculations. A witness must be qualified as an expert by "knowledge, skill, experience, training, or education." FED. R. EVID. 702. Greenberg attended one deposition where a surveyor explained his calculations, and then Greenberg performed the same calculations. We find that this is insufficient knowledge, experience, training, or education to qualify Greenberg as an expert. Therefore, we find that Plaintiff has submitted no admissible evidence in opposition to Defendant's summary judgment motion.

Defendant has provided evidence that 6.17% of the town is available for adult businesses, including two areas zoned C1 with 717,300 and 19,375 square feet available respectively, three areas zoned M1 with 45,750, 666,315, and 95,000 square feet available respectively, and one area zone C3 with 44,725 feet available. (Mot. Summ. J. Ex. B).

Therefore, we find that no genuine issue of material fact exists with respect to the sufficiency of space available in Kingston for nude dancing.

Thus, for the reasons expressed above, we will grant Defendant's motion for summary judgment. As we will dispose of all of the federal claims, the only remaining counts are state court claims over which we had supplemental jurisdiction with no independent basis for jurisdiction. We will exercise our discretion to dismiss these counts as well. 18 U.S.C. 1367(c)(3) ("The district courts may decline to exercise supplemental jurisdiction over a claim . . . if . . . (3) the district court has dismissed all claims over which it has original jurisdiction."); Henglein v. Informal Plan for Plan Shutdown Benefits for Salaried Employees, 974 F.2d 391, 398 (3d Cir. 1992) ("it is well settled that, after disposal of a federal claim, a district court has discretion to hear, dismiss, or remand a supplemental claim for which there is no independent basis for federal subject matter jurisdiction") (internal citations omitted). An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

<b>LE CABARET 481, INC.,</b>	:	<b>No. 3:03cv1230</b>
<b>Plaintiff</b>	:	
	:	<b>(Judge Munley)</b>
<b>v.</b>	:	
	:	
<b>MUNICIPALITY OF KINGSTON, A</b>	:	
<b>Pennsylvania Municipal Corporation,</b>	:	
<b>Defendant</b>	:	

.....

**ORDER**

**AND NOW**, to wit, this 19<sup>th</sup> day of January 2005, Defendant Municipality of Kingston's motion for summary judgment (Doc. 14) is hereby granted. It is hereby

**ORDERED** that:

- 1) Counts I-II are **DISMISSED**.
- 2) Counts III-IV are **DISMISSED** for lack of jurisdiction.
- 3) The Clerk of Court is further directed to close this case in this district.

**BY THE COURT:**

s/ James M. Munley  
**JUDGE JAMES M. MUNLEY**  
**United States District Court**