

COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, SS

PITTSFIELD DISTRICT COURT
DOCKET NO. 12 27RO235

_____)
MEREDITH NILAN,)
)
Plaintiff,)
)
v.)
)
DAN VALENTI,)
)
_____)
Defendant.)

MEMORANDUM OF LAW OF AMICUS CURIAE THE AMERICAN CIVIL
LIBERTIES UNION OF MASSACHUSETTS IN SUPPORT OF DEFENDANT’S
MOTION TO VACATE THE HARASSMENT PREVENTION ORDER

The American Civil Liberties Union of Massachusetts respectfully submits this amicus curiae memorandum of law in support of defendant Dan Valenti’s motion to vacate the Harassment Prevention Order issued on June 27, 2012.

Introduction

This proceeding arises from a “Harassment Prevention Order” restraining speech by journalist Dan Valenti about plaintiff Meredith Nilan. The Order is an unlawful restraint on protected speech, in violation of the Massachusetts Anti-Harassment Law, the First Amendment to the United States Constitution, and Article 16 of the Massachusetts Declaration of Rights. It should, therefore, be vacated.

From January 2012 until June 2012, Valenti published on planetvalenti.com—a web site known as “Planet Valenti”—news and commentary about Nilan’s involvement in a traffic incident that left a pedestrian, Peter Moore, with a broken neck. On June 27, 2012, District Court Judge Bethzaida Sanabria-Vega issued a Harassment Prevention Order finding “a substantial likelihood of immediate danger of harassment” of Nilan by

Valenti. The Order prohibits Valenti from harassing or contacting Nilan, and it requires him to stay away from Nilan’s home and workplace. The Order also requires Valenti, presumably on a continuing basis, “to remove any and all information referring to [Nilan] from any and all websites, blogs, etc.”

“Temporary restraining orders and permanent injunctions—i.e., court orders that actually forbid speech activities—are classic examples of prior restraint.” Alexander v. United States, 509 U.S. 544, 550 (1993). “[T]he main purpose of [the First Amendment] is ‘to prevent all such previous restraints upon publications as had been practiced by other governments.’” Near v. Minnesota, 283 US 697, 714 (1931) (citation omitted). Nevertheless, Massachusetts General Law Chapter 258E authorizes a court to issue a harassment prevention order based on a showing of three acts of willful and malicious harassment. Under the statute, “harassment” means “fighting words” or “true threats,” categories of speech that can constitutionally be proscribed because they incite or threaten violence. O’Brien v. Borowski, 461 Mass. 415, 423-425 (2012).

The Order in this case is not authorized by Chapter 258E. It does not find that *any* of Valenti’s statements about Nilan—let alone *all* of them—constitute fighting-words or true-threat harassment. Yet it censors all past and future published statements by Valenti about Nilan, including statements that are clearly *not* harassment. Such sweeping censorship directly contradicts Chapter 258E.

This censorship is also anathema to the First Amendment and Article 16. “[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.” Nebraska Press Ass’n v. Stuart, 427 U.S. 539, 559 (1976). The Order in this case infringes those rights in two ways: it restrains Valenti

from publishing protected speech about Nilan in the future, and it requires Valenti to censor protected speech he has already published about Nilan.

For these reasons, and those stated in Valenti's submissions, the June 27 Order should be vacated and no further orders against Valenti should issue

Background

I. The Massachusetts Anti-Harassment Law

The Massachusetts Anti-Harassment Law, General Laws Chapter 258E, "was enacted in 2010 to allow individuals to obtain civil restraining orders against persons who are not family or household members, and to make the violation of those orders punishable as a crime." O'Brien, 461 at 419. A Chapter 258E order requires a finding of "harassment," which the statute defines as "[three] or more acts of willful and malicious conduct aimed at a specific person committed with the intent to cause fear, intimidation, abuse or damage to property and that does in fact cause fear, intimidation, abuse or damage to property." G.L. c. 258E, § 1. The Supreme Judicial Court has emphasized that the statute requires three acts that are both willful *and* malicious, where "malicious" acts are "characterized by cruelty, hostility or revenge." O'Brien, 461 Mass. at 420 (quoting G.L. c. 258E, § 1). The Court has also emphasized that the predicate acts must be intended to cause, and in fact cause, fear, intimidation, abuse, or property damage. Id.

In O'Brien, the Supreme Judicial Court narrowly construed Chapter 258E so that it would not violate the First Amendment or Article 16. The Court held that speech amounts to harassment under Chapter 258E only if it constitutes "fighting words or 'true threats'"—categories of speech that the First Amendment and Article 16 do not protect. 461 Mass. at 425. "Fighting words" are those "that are likely to provoke a fight: face-

to-face personal insults that are so personally abusive that they are plainly likely to provoke a violent reaction and cause a breach of the peace.” Id. at 423 (citing Cohen v. California, 403 U.S. 15, 20 (1971)). “‘True threats’ encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” Id. (quoting Virginia v. Black, 538 U.S. 343, 359-60 (2003)).

Speech does not constitute true-threat harassment under the statute unless the speaker “subjectively intend[ed] to communicate a threat.” O’Brien, 461 Mass. at 426. Moreover, speech that causes “fear” in another person does not constitute harassment unless it is the “fear of physical harm or fear of physical damage to property.” Id. at 430.

II. The Allegations Against Valenti

Daniel Valenti is a professional journalist, writer, author and broadcaster. He has a Master’s Degree in journalism from a respected school. He has decades of experience writing for newspapers, broadcasting on the radio, and writing books that have been published by both major publishers and small literary presses. He has been a member of the English Department faculty at Berkshire Community College for twenty years. And, since September 2010, Valenti has also published his own writing, as well as the comments of his readers, on a web site called Planet Valenti.

From January to June 2012, Planet Valenti carried stories and comments about Nilan’s role in a December 2011 traffic incident that left pedestrian Peter Moore with a broken neck. 6/22/2012 Affidavit of Meredith Nilan at 1 [“Nilan Aff.”]. Nilan, the daughter of the head of the Berkshire County Superior Court probation department, was charged with misdemeanor negligent operation of a motor vehicle and leaving the scene

of a personal injury accident. The misdemeanor charge was continued without a finding for six months in District Court, and the charge of leaving the scene was dismissed. Valenti and his commenters have asserted on Planet Valenti that Nilan was far more culpable than the outcome of her case might suggest, and that Nilan's prosecution was mishandled. On Valenti's account, Nilan might have been drunk when she struck Moore with her car, and she left the scene without knowing whether Moore would survive the impact. Id. at 1-3.

In June 2012, Nilan submitted to the District Court an affidavit in support of an application for a Harassment Prevention Order against Valenti. The affidavit insists that Valenti has lied about Nilan, but the affidavit does not allege three acts of either "fighting words" or "true threats" by Valenti or his web site.

Instead, the affidavit primarily alleges what Nilan calls an "attack on [her] reputation." Nilan Aff. at 1. The affidavit—which Valenti vigorously disputes—asserts that Valenti has engaged in "lies and innuendo," misled public officials about Nilan's conduct, and fomented outrage against Nilan. Id. Nilan asserts that Valenti's sensationalization of her case "has made [her] fear for [her] personal safety," has caused "emotional distress," and has "heightened [Nilan's] stress level." Id. at 2-4.

However, the affidavit alleges only one statement by Valenti concerning Nilan's personal well being. Specifically, the affidavit alleges that Valenti once expressed a "wish that there was a place where people could be 'put down.'" Nilan Aff. at 3-4.

The affidavit alleges the existence of other statements about Nilan's well being, but those statements do not appear to have been made by Valenti. The affidavit asserts that anonymous commenters on Planet Valenti—other than Valenti himself—have made

“threats against [Nilan].” Nilan Aff. at 1. These threats evidently include the threat to engage in expressive activities, including boycotts and marches against Nilan. Id. at 2. The affidavit also asserts that Nilan has “recently received death threats.” Id. at 4. Although Nilan asserts that the death threats are “related to Mr. Valenti’s words,” she does not allege that Valenti solicited those threats or that they were ever published on Planet Valenti. Id.

Argument

The Harassment Prevention Order against Valenti is a restraint on speech because it censors Valenti’s prior publications and forbids future publications about Nilan. That restraint contradicts the requirements of Chapter 258E, and it violates Valenti’s rights under the First Amendment and Article 16.

I. The Harassment Prevention Order Violates Chapter 258E.

Chapter 258E simply does not authorize the sweeping injunction ordered against Valenti. It authorizes harassment prevention orders only based on a showing of three or more willful and malicious acts of fighting-words or true-threat harassment. Nilan’s showing in this case fails each aspect of that requirement, and the Court’s Harassment Prevention Order would be overbroad even if Nilan had made the requisite showing.

A. Nilan Has Not Alleged Three Acts Of Fighting-Words Or True-Threat Harassment

The Order violates Chapter 258E because Nilan has not alleged any fighting words or true threats written or published by Valenti. Nilan cannot possibly have shown fighting words; whereas she complains of a web site’s content, fighting words require face-to-face confrontation. O’Brien, 461 Mass. at 423. Nor has Nilan shown a true threat published on Planet Valenti. To be sure, she alleges that she has received death threats.

But she does not allege that the threats came from Planet Valenti or from Valenti himself. Even if those were “true” threats, they do not support an order against Valenti because he neither made nor incited them. See Yakubowicz v. Paramount Pictures, 404 Mass. 624 (1989) (holding that a movie producer was not liable for a fatal assault committed by someone who had just seen a movie’s portrayal of urban violence).

The only arguably threatening remark that Nilan attributes to Valenti is the allegation that he once expressed a “wish that there was a place where people could be ‘put down.’” Nilan Aff. at 3-4. But Nilan has not shown that Valenti’s remark, however regrettable it might have been, was “subjectively intend[ed] to communicate a threat.” O’Brien, 461 Mass. at 426. There is no evidence that Valenti—a respected journalist with decades of experience writing about people rather than assaulting them—intended his remark to communicate to Nilan “a serious expression of an intent to commit an act of unlawful violence.” Id. at 423 (quoting Black, 538 U.S. at 359-60). Nor is there evidence that he acted with “cruelty, hostility or revenge.” Id. at 420. In fact, there is no evidence that Valenti intended his remark to reach Nilan *at all*.

Even if that one remark had been a true threat—though it was not—Nilan would still not be entitled to a harassment prevention order unless she could show at least *two additional instances* of fighting words or true threats by Valenti. G.L. c. 258E, § 1. She has made no attempt to do so, and that is surely because such a showing is impossible.

B. The Court’s Order Is Overbroad.

Even if Nilan had shown three predicate acts of fighting-words or true-threat harassment, the Order issued in this case would still violate Chapter 258E. After all, the

Order does not simply require Valenti to censor prior or future acts of harassment; it requires him to censor *everything* he has ever said or might say about Nilan.

That sweeping censorship has no basis in law. If Nilan believes that Valenti has published lies about her, then her remedy is a defamation suit rather than an injunction restraining Valenti's speech. "A criminal penalty or a judgment in a defamation case is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted." Nebraska Press Ass'n, 427 U.S. at 559. A harassment prevention order, which bypasses those protections, is authorized only for fighting words or true threats. It is implausible that everything Valenti has ever published or might publish about Nilan meets that exacting standard.

II. The Order Violates The First Amendment And Article 16 Because It Censors And Restrains Constitutionally Protected Speech.

Just as the Harassment Prevention Order runs afoul of Chapter 258E, it violates the speech protections of the First Amendment and Article 16. In particular, it is both an unconstitutional prior restraint on Valenti's future speech and, worse yet, unconstitutional censorship of protected speech he has already published.

A. The Order Is An Impermissible Prior Restraint.

Of all the protections provided by the First Amendment for the free exercise of speech, none is more fundamental to the purpose of the Amendment than its nearly absolute prohibition against prior restraints. See Near, 283 U.S. at 714.

Indeed, in its more than two centuries of existence, "the Supreme Court has never upheld a prior restraint on pure speech." In Re: Providence Journal Co., 820 F.2d 1342, 1348 (1st Cir. 1986), modified, 820 F.2d 1354 (1987) (en banc). The constitutional barriers to prior restraints are so high that, even during a time of war, the Supreme Court

reversed an order prohibiting the press from publishing documents that had been classified top secret and obtained without authorization. New York Times Co. v. United States, 403 U.S. 713 (1971).

The Supreme Judicial Court has been equally diligent in enforcing Article 16's safeguards against prior restraints. For example, in George W. Prescott Publishing Co. v. Stoughton Division of the District Court, 428 Mass. 309 (1998), the Court reversed an order prohibiting the media from revealing the name or address of any child who engaged in delinquent conduct in connection with a pending case and from publishing or revealing the name or address of any child witness who testified about his or her delinquent conduct. 428 Mass. at 311-312. Similarly, the Court has noted that “[m]ere intrusion on a person’s alleged privacy interest is not by itself a basis upon which to predicate a broad restraint on another’s speech.” Nyer v. Munoz-Mendoza, 385 Mass. 184, 188-89 (1982); see also Care & Protection of Edith, 421 Mass. 703, 705 (1996) (striking down a prior restraint prohibiting a father from “discuss[ing] any aspect of [care and protection] proceedings with any member of the media . . . if it is reasonable to believe that the information communicated will lead to the identity of the subject children.”).

When a prior restraint on speech does occur, its damage is “immediate and irreversible” because the restraint ““freezes”” the speaker for at least some time. Nebraska Press Ass’n, 427 at 559. “That damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events.” Id. Nor is the damage reduced when the speaker is a citizen journalist, rather than a member of the mainstream media. Demarest v. Athol-Orange Community Television, 188 F. Supp. 2d 82 (D. Mass. 2002).

That is the situation here. Nilan’s involvement in a traffic incident that severely injured a pedestrian, as well as the ensuing judicial proceedings, are matters of acute public concern. Valenti, a journalist with a long history of covering such matters, understandably published to his web site news and commentary on the Nilan incident and court proceedings. Yet, based on an allegation that *some* of Valenti’s commentary strayed into harassment—an allegation that is itself incorrect—the Court prohibited Valenti from publishing *any* “information” about Nilan.

This prohibition makes no distinction between speech that is protected by the First Amendment and speech that is not. Indeed, it is so broad that it arguably prohibits Valenti from publishing on the Internet information refuting Nilan’s recent accusations about him. This prior restraint cannot stand.

B. The Order Unconstitutionally Censors Previously Published Speech.

But there is more. The Court’s Order also requires Valenti to “remove” previously published information that is protected by the First Amendment and Article 16. This requirement is even more problematic than a typical prior restraint because it does not merely “freeze” the speaker; it requires him to bowdlerize prior speech. See Nebraska Press Ass’n, 427 at 559.

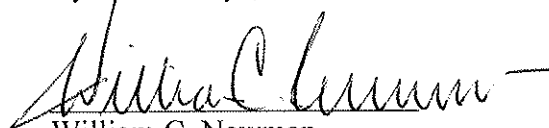
Much or all of the information that Planet Valenti has published about Nilan is undoubtedly protected speech. It questions Nilan’s account of her actions and it argues that she received unduly lenient treatment in court. Yet the Order requires Valenti to remove all of that information and commentary from the Internet, even though the Order fails to identify a single statement Planet Valenti ever published that exceeded Valenti’s rights under the First Amendment and Article 16. The U.S. Constitution and the

Massachusetts Declaration of Rights will not tolerate this censorship, and this Court should end it.

Conclusion

For the reasons stated above and by defendant Valenti, this Court should vacate the June 27 Harassment Prevention Order, and it should decline to issue further orders against Valenti.

Respectfully submitted,
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