UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

DAVID FLAHERTY, JANE WENSLEY AND DAVID COSTA, Plaintiffs	)	
v.	)	C.A. NO. 12-CV-30055-MAP
DANIEL KNAPIK, Defendant	)	

DEFENDANT'S MOTION TO RECONSIDER ORDER FOR ENTRY OF SUMMARY JUDGMENT FOR PLAINTIFFS AS TO COUNTS 1 AND 2

Now comes the Defendant, Daniel Knapik, and moves this honorable court pursuant to Fed R. Civ. P. 59(e) for reconsideration of its Order regarding Plaintiffs' motion for summary judgment, entered February 21, 2014, that granted summary judgment to Plaintiffs as to counts 1 and 2 of their complaint.

As grounds therefore, Defendant states that a misunderstanding or other error not of reasoning, but apprehension, as to whether Defendant Knapik is in agreement that the order to remove signs was directed toward political signs *only*, led to a manifest error of law that such order was therefore "content based" as characterized under a First Amendment legal analysis. In fact, the undisputed facts, viewed in a light most favorable to Defendant as the non-moving party when considering Plaintiffs' motion, shows that Defendant Knapik ordered that all signs be removed, and as such, the order was "content neutral".

Based on the dispute of the material fact as to whether Defendant ordered all signs to be removed or only campaign signs, summary judgment for Plaintiffs is not appropriate, and the Order for Judgment for Plaintiffs as to counts 1 and 2 should be reconsidered.

In support, Defendant states the following:

1) The allegation that Defendant Knapik ordered only campaign signs removed is not made in the detailed factual allegations in the complaint, but first appeared

in Plaintiffs' Statement of Material Facts as to their Cross Motion for summary judgment, and was disputed by Defendant. Specifically, in paragraph 99 of the statement and the response reads:

> "99. Significantly, Defendant did not order the removal of this sign expressing commercial speech, notwithstanding the fact that it was placed in the exact same location as a campaign sign Defendant determined was either on municipally owned property or posed "a life threatening eminent [*sic*] hazard." (*Id.* at 103.)
> RESPONSE: Disputed."

2) While Plaintiffs' have argued that the fact is undisputed based on quotes from Defendant's deposition, where Defendant acknowledged that he did order the campaign signs removed, the quotes are used out of context in relation to the Defendant's deposition testimony as a whole, a fair reading of which indicates that Defendant Knapik ordered all signs, not just campaign signs, removed as described in the following legal analysis and argument.

3) In considering the evidence in the record relevant to this material point, the order for summary judgment erroneously draws an unfavorable inference against the Defendant as the non-moving party.

4) Since the order from Defendant to remove signs was content neutral, the application of "strict scrutiny" under a First Amendment legal analysis is inapplicable, and the public safety concerns of Defendant Knapik provided a rational justification for the order to remove the signs under the circumstances, and summary judgment for Plaintiffs on Counts 1 and 2 is not appropriate..

5) Since the order from Defendant to remove signs was content neutral, even if it had amounted to a violation of civil rights, Defendant Knapik is entitled to qualified immunity.

6) Additionally, the order for summary judgment erroneously analyzes the nature of the public forum in that, the activity as issue here involved unattended campaign signs rather than attended signs held by campaigners on either the side walk, street, or tree belt, and the analysis under such circumstances differs from the case law relied upon in the summary judgment order, such that under the circumstances here, summary judgment for Plaintiffs on counts 1 and 2 is not appropriate.

In support of the motion for reconsideration, the Defendant submits the following legal analysis and argument.

1) <u>The allegation that Defendant Knapik's order was "content based" due to ordering only campaign signs removed was and is disputed.</u>

The entry of summary judgment against Defendant Knapik on counts 1 and 2 hinges on Plaintiffs' contention that it is undisputed that the Defendant Knapik ordered the removal only of the political signs and allowed a commercial sign to stay. The Plaintiffs submitted a detailed 16 page complaint containing 70 written paragraphs. The Plaintiffs' main contention throughout the litigation was that Defendant had ordered employees to remove signs from private property. The land rights at issue was the focus of the discovery and arguments presented by both sides, and claims for conversion of private property and trespass onto private property were directed at the Defendant, but dismissed by this court, or determined to not be appropriate for summary judgment. However, nowhere in that complaint is it alleged that Defendant only ordered the removal of campaign signs. The first notice that Defendant had that such an allegation was part of this case was the appearance of in the Plaintiffs Statement of Undisputed Material Facts submitted with their cross motion for summary judgment. Specifically, in paragraph 99 of the statement, including the response, reads:

> "99. Significantly, Defendant did not order the removal of this sign expressing commercial speech, notwithstanding the fact that it was placed in the exact same location as a campaign sign Defendant determined was either on municipally owned property or posed "a life threatening eminent [*sic*] hazard." (*Id.* at 103.)
> RESPONSE: Disputed."

Additionally, the Plaintiffs' statement of material facts addresses and the Defendant replies in paragraph 103 that this is a disputed fact:

> 103.` It is undisputed that Defendant did not seek the removal of any other signs in any other locations – including South Maple Street and/or the so-called Lingbergh - Coleman Ave. corridor where fatal accidents had recently occurred.
> RESPONSE: Disputed.

Under Rule 56.1 of the Local Rules:

> Motions for summary judgment shall include a concise statement of the material facts of record as to which the moving party contends there is no genuine issue to be tried, with page references to affidavits, depositions and other documentation. Failure to include such a statement constitutes grounds for denial of the motion. Opposition to motions for summary judgment must be filed, unless the court orders otherwise, within 21 days after the motion is served. A party opposing the motion shall include a concise statement of the material facts of record as to which it is contended that there exists a genuine issue to be tried, with page references to affidavits, depositions and other documentation. Copies of all referenced documentation shall be filed as exhibits to the motion or opposition. Material facts of record set forth in the statement required to be served by the moving party will be deemed for purposes of the motion to be admitted by opposing parties unless controverted by the statement required to be served by opposing parties. Unless the court orders otherwise, the moving party may file a reply within 14 days after the response is served.

There is no citation or reference included in paragraph 103 of the plaintiffs' statement of material facts. In paragraph 99 of the Plaintiffs' statement, to satisfy the Local Rule requirement, Plaintiff cites to page 103 of Defendant Knapik's deposition (a copy of which is attached hereto as Exhibit A). A review of the transcript reveals there is no reference on that page that Defendant Knapik agreed that he ordered removal of campaign signs ***only***. In fact, a reading of the deposition page cited shows that the questioning assumes exactly the opposite; that Defendant Knapik did in fact want all signs removed.[1]

"Local Rule 56.1 was adopted to expedite the process of determining which facts are genuinely in dispute, so that the court may turn quickly to the usually more difficult task of determining whether the disputed issues are material." *Brown v. Armstrong*, 957 F. Supp. 1293, 1297 (D. Mass. 1997), aff'd, 129 F.3d 1252 (1st Cir. 1997). Under Local Rule 56.1, the party opposing a motion for summary judgment "must 'state what specific facts are disputed and prevent summary judgment.'" *Brown*, 957 F. Supp. at 1297 (*quoting Vasapolli v. Rostoff*, 864 F. Supp. 215,

[1] Beginning on line 5: "Q. Did you give any thought at that time to just personally getting out and taking ***all the signs?*** (emphasis added) A. Of course not. Q. Why not? A. Because that's what I have a Public Works crew for."

218 (D. Mass. 1993), *aff'd*, 39 F.3d 27 (1st Cir. 1994)).

In this case, the Plaintiffs original statement of material facts does not comply with Local Rule 56.1 as it cites a conclusion and includes a reference to non-existent facts without providing any further description or citation. While Defendant's lawyer could have pointed out the lack of any such reference in greater detail, it has not typically been the practice in this regard to submit detailed responses to statements of fact to dispute the obvious lack of any such statement on the deposition page referenced.

Moreover, Defendant's brief in opposition as well as Defendant's supplemental brief after oral argument noted the dispute as to whether the order was content based. Defendant's Attorney argued in several pages in the opposition brief, in section entitled *"B. Summary Judgment for Plaintiffs Must be Denied in Light of the lack of Evidence that Establishes Content-Based or Viewpoint Discrimination"*. (pp. 26 - 40). At oral argument, Plaintiffs' arguments became more crystalized and Plaintiffs' counsel cited a case that was not included in Plaintiffs' opposition to Defendant's motion for summary judgment or memorandum as to Plaintiffs' cross motion; *Driver v. Town of Richmond*, 570 F. Supp. 2d 269 (D.R.I. 2008). As a result, Defendant was allowed to submit a supplemental memorandum. As noted in Defendant's supplemental brief:

> Here, while not in the complaint, Plaintiffs claim in their opposition to summary judgment and cross motion that Defendant ordered a political campaign sign, but not a commercial real estate sign, and claim selective enforcement. Defendant denies such selectivity, and the documentary and photographic evidence on this issue bears out the Defendant's version of the facts on this newly raised issue.

Defendant's statement of material facts in support of summary judgment states in paragraph 9 that:

> Mayor Knapik has admitted that he had instructed the City's Director of Public Works ***to remove any signs in the tree belt, which included signs advertising the two plaintiffs/politicians,*** Mayor Knapik did not order any person

> to enter or remove any signs from private property. (Depo of Knapik p. 96) (emphasis added).

In a lengthy response to this statement, Plaintiffs indicate this is a "disputed" fact. The Plaintiffs list several citations from which an inference can be drawn that Defendant Knapik's order was limited to only the political signs. While the Plaintiffs may have done a good job garnering sufficient facts to deny Defendant's motion for summary judgment, the same litany of facts used to "dispute" the Defendant's claim that he ordered all signs removed, cannot be said to show there is no dispute that he ordered "only" political signs.

While comparing the statement of undisputed facts on cross motions can be confusing, there can be no question that whether Defendant Knapik ordered all signs or only political signs is and was disputed. From the pleadings, the analysis of whether the order was "content based" or "content neutral" hinges on whether Defendant Knapik ordered "***only***" political signs removed. A review of the evidence shows that this disputed fact precludes summary judgment for the Plaintiffs on counts 1 and 2.

2) <u>Plaintiffs' argument that Defendant ordered only the removal of campaign signs, utilizes quotes out of context in relation to the Defendant's deposition testimony as a whole. A fair reading of the quotes indicates that Defendant Knapik ordered the removal of all signs, not just campaign signs.</u>

Plaintiffs properly quote to several references where the record refers to witnesses, including Defendant Knapik, acknowledging that he ordered the campaign signs removed.[2] However, while those quotes may be accurate, they are taken out of context in relation to the deposition as a whole. As previously noted, the pleadings show each side alleged differences as to

[2] <u>Knapik Depo excerpts p. 94</u>

8 Q. So the communication that you gave
9 to Mr. Mulvenna did you reference any of the
10 signs by candidate?
11 A. I said the signs are Beltrandi,
12 Flaherty and Wensley on the right-of-way.

the content and intent of the order to remove signs. It is undisputed that Defendant Knapik referred to the political campaign signs in his phone call to DPW Director Mulvenna, but such an acknowledgement is not tantamount to admitting that the order to remove signs was limited only to political campaign signs. A fair reading of the quotes, drawing all reasonable inferences in his favor when considering Plaintiffs' cross motion, indicates that Defendant Knapik ordered the removal of all signs, not just campaign signs. Specifically, the deposition testimony indicates that Defendant Knapik did not limit the order to remove signs "only" to campaign signs. The question and answer on this subject was as follows:

Q. And what specifically do you recall saying to him --
A. (Interposing) I said at that moment in time that we need to get a vehicle

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down to Lindbergh to begin the process of clearing the street, and that I observed a number of signs in the right-of-way, and that they needed to be removed.
Q. And how did you direct him as to which signs should be removed?
A. I said, there is a number of signs in the right-of-way and they need to be removed.
Q. In what locations did you --
A. (Interposing) I said there is a number of signs in the right-of-way between Lindbergh and Cross Street.

Later in the deposition (p. 106) of Defendant Knapik, when shown pictures of intersection where the signs were, it is clear from the photo and testimony (See Exhibit #7 to Knapik deposition) that, in fact, the real estate sign hanging from the post had actually been removed on the day in question:

Q. So this time when this picture was taken that is not an accurate representation?
A. That's not what I'm saying. I'm

saying that is not what I viewed that day.
Q. Okay. #7, do you see a Dave Flaherty sign in --
A. (Interposing) I do.
Q. And is this the Dave Flaherty sign that was underneath the real estate sign?
A. That's correct.
Q. And is that a fair and accurate representation of what that --
A. (Interposing) I would say no, because as I recall that circumstances of the day the realtor sign was hanging at that time.

From the exchange and photograph, the removal of the hanging part of the real estate sign supports the fact that the order of the Defendant was not limited to political signs but included the real estate sign. Additionally, landowner and Plaintiff David Costa testified that a city official ordered him to move the entire real estate sign post farther away from the street and closer to the house. (Costa Depo p. 22-23).

3) <u>In considering the evidence in the record relevant to this material point, the order for summary judgment erroneously draws an unfavorable inference against the Defendant as the non-moving party.</u>

When addressing cross-motions for summary judgment, "the court must consider each motion separately, drawing inferences against each movant in turn." *Reich v. John Alder Life Ins. Co.,* 126 F.3d 1, 6 (1st Cir.1997)(citation omitted). Under Fed. R. Civ. P. 56 the facts and all reasonable inferences that might be drawn from them are viewed in the light most favorable to the non-moving party. *Pac. Ins. Co., Ltd. v. Eaton Vance Mgmt.,* 369 F.3d 584, 588 (1st Cir. 2004).

When considering the Plaintiffs' cross motion for summary judgment, viewing deposition evidence in a light most favorable to Defendant as the non-moving party, the issue of whether Knapik's order on November 7, 2011 was to remove "only" political signs in the vicinity of East Silver Street between Cross Street and Lindbergh Boulevard requires that all reasonable inferences be drawn in his favor. Based on the record evidence, the federal rules governing summary judgment require

that it be assumed Defendant did not limit his order to "only" political signs, and summary judgment on Counts 1 and 2 for Plaintiff must be denied.

4) **Drawing all inferences in favor of Defendant Knapik as the non-moving party, since the order from Defendant to remove signs was in fact content neutral, the application of "strict scrutiny" is inapplicable, and the public safety concerns of Defendant Knapik provided a rational justification for the order to remove the signs under the circumstances, and summary judgment for Plaintiffs on Counts 1 and 2 is not appropriate.**

The summary judgment order in this case points out that the "crucial inquiry" as to Defendant Knapik's order is "content-neutral" on whether it only targets certain content, by permitting commercial speech, but prohibits political expression, citing *Matthews v. Town of Needham* 764 F.2d 58 (1st Cir. 1985) where the Town of Needham enacted an ordinance prohibiting political signs on residential property, but allowed commercial signs, like those denoting a name of a building, relating to a sale or lease of a property, or temporarily planned for charitable purposes.

The memorandum and order states that that: "[i]t is clear from the undisputed facts that Defendant Knapik's removal of the signs -- whatever his actual intent -- constituted a content-based restriction of free speech." (p. 2) As previously noted, Knapik disputes that the removal of the signs was targeted at only the political signs. While it is undisputed that the removal included political signs, Defendant Knapik contended in his motion for summary judgment that is was undisputed that the removal included ***all*** signs, and Plaintiffs disputed this fact. Plaintiff then contended that it was undisputed that the order targeted political signs and Defendant Knapik disputed this. When considering Plaintiffs' motion for summary judgment, looking at the facts in a light most favorable to the non-moving party, the Plaintiffs are not entitled to summary judgment based on the content neutral nature of the order to remove signs.

"In a traditional or designated public forum, content-neutral restrictions on the time, place, and manner of expression must be narrowly tailored to serve some substantial government interest,

and must leave open adequate alternative channels of communication." *Kinton* 284 F.3d at 20, *citing Perry*, 460 U.S. at 45-46. Based on the disputed material fact, the Defendant respectfully requests that the court reconsider the Defendant's arguments concerning the public safety justifications for the order to remove the signs.

5) Drawing all inferences in favor of Defendant Knapik as the non-moving party, since the order from Defendant to remove signs was content neutral, even if it had amounted to a violation of civil rights, Defendant Knapik is entitled to qualified immunity.

In defense to the complaint, the Defendant sought summary judgment on the complaint on grounds which included qualified immunity. In addition, in defense to Plaintiffs cross motion for summary judgment, the Defendant asserted qualified immunity. While the motion for summary judgment based on qualified immunity by defendant may not have been justified based on disputed facts, when considering the cross motion for summary judgment, when such facts are viewed in a light most favorable to Defendant, in the event that the court reconsiders the decision to grant summary judgment and still concludes that the Defendant's removal order crosses the constitutional line, the grant of Plaintiffs motion for summary judgment and denial of Defendant's motion relating to qualified immunity should be reconsidered and either, summary judgment granted to Defendant or the case submitted to a jury. In the First Circuit, the three questions for analyzing qualified immunity are:

> (i) whether the plaintiff's allegations, if true, establish a constitutional violation; (ii) whether the constitutional right at issue was clearly established at the time of the putative violation; and (iii) whether a reasonable officer, situated similarly to the defendant, would have understood the challenged act or omission to contravene the discerned constitutional right.
> Limone v. Condon, 372 F.3d 39, 44 (1st Cir. 2004)(citation omitted).

At step one, as noted above, considering a content neutral removal of signs, any constitutional violation is not causally related to Defendants. As to the second question, even if

the constitutional protection to post political signs is well established, a reasonable person in Defendant's shoes would not have understood that the removal order would likely violate another's constitutional rights. Under the circumstances, Defendant's instructions to remove all signs may have been misapprehended to be limited to only political signs, as Plaintiffs attack the lack of guidance provided to Mulvenna as to how to go about removing the signs. It is clear from the record that the Mayor's order to Mulvenna left the discretion to determine what signs were in the right of way. Under the circumstances, when on an objective basis there can be disagreement as to whether a government official should not have given an order that he did, the *Harlow* rule gives ample room for mistaken judgments. Under the circumstances here, based on the facts, if the order to Mulvenna was simply not clear enough, Defendant is entitled to qualified immunity.

On the other hand, if in the court's judgment the order was relative "only" to political signs, then the dispute on this fact should preclude summary judgment on the issue of qualified immunity and the case should be submitted to a jury.

6) Additionally, the order for summary judgment erroneously analyzes the nature of the public forum in that the activity here involved unattended campaign signs rather than attended signs held by campaigners on either the side walk, street, or tree belt, and the analysis under such circumstances differs from the case law relied upon in the summary judgment order, such that under the circumstances here, summary judgment for Plaintiffs on counts 1 and 2 is not appropriate.

The memorandum and order granting summary judgment for Plaintiffs on counts 1 and 2 is based on a determination that the tree belt is between the sidewalk and the street and therefore must be considered public forums "where individuals have the right to traverse, speak freely, protest, and assemble." *See Frisby v. Schultz,* 487 U.S.474, 480 (1988) and *Carey v. Brown,* 447 U.S. 455 (1980). The error in relying on such case law is that *Frisby* involved an anti- picketing ordinance and *Carey* similarly involved peaceful demonstrations. Here, the speech involves

unattended signs placed in the tree belt.

The distinction becomes obvious in that, while street and sidewalks may be public forums where people are allowed to peaceably assemble and picket, it is difficult to imagine that such protestors or picketers have a constitutionally protected right to place signs conveying their message into the sidewalk or street and leave them unattended after the exercise of their free speech activities.

In virtually every election cycle, municipal officials are called upon to deal with complaints about unattended signs in improper locations, or unattended signs being improperly removed from proper locations. The likelihood of such disputes ending up in federal court will greatly increase if it is determined that candidates have a right to place unattended signs in the tree belt because it is a public forum. Such decisions typically involve a weighing of public safety concerns. The Defendant in this case should be given the benefit of the doubt as the first official to issue such an order that result in a civil rights violation.

The Defendant respectfully requests that the court reconsider the analysis to distinguish unattended signs from other scenarios where peaceful protests or picketing is involved.

Respectfully submitted on behalf of the Defendant By:

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system to counsel of record.

Date: 24th day of February, 2014

/S/ Edward M. Pikula
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Edward M. Pikula, Esq.