

COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT FOR ESSEX COUNTY
CASE NO. 2336 RO 000521

| | |
|------------------------|---|
| _____ |) |
| HOPE WATT-BUCCI |) |
| Plaintiff, |) |
| |) |
| v. |) |
| |) |
| KIMBERLY KAHAN |) |
| Defendant. |) |
| _____ |) |

KIMBERLY KAHAN’S MEMORANDUM IN OPPOSITION TO 258E TPO PETITION

1.0 Introduction

Ms. Hope Watt-Bucci disagrees with Ms. Kahan’s political views. Rather than let their ideas compete in the marketplace of ideas, as our Constitution mandates, Ms. Watt-Bucci prefers to act the part of the bully, censor, and comes to this Honorable Court under quite the cloud of hypocrisy. She has harassed Ms. Kahan directly, sought to enlist others to harass Ms. Kahan, has incited others to steal Ms. Kahan’s property, and has even incited others to throw feces at Ms. Kahan’s home. This is all because Ms. Hope Watt-Bucci disagrees, politically, with Ms. Kahan. Since none of this has succeeded in suppressing Ms. Kahan from expressing her views (peacefully and lawfully), Ms. Hope Watt-Bucci unethically seeks an injunction from this Honorable Court for no purpose other than to silence Ms. Kahan.

The Petition must be disallowed and reasonable fees and costs should be awarded to Defendant. Ms. Kahan hereby submits this Memorandum in support of her arguments to deny the Petition, and in support of her request to be reimbursed her attorney’s fees in light of the Petition’s frivolous nature.

2.0 Relevant Facts

Ms. Kahan has strong beliefs about recent matters of public debate. She is in support of equal rights for all people regardless of their sexual orientation. See Declaration of KIMBERLY KAHAN (“Kahan Decl.”) attached hereto as Exhibit 1, at ¶ 5. However, she believes that the struggle for equality has been won, and that we have entered a period where things have gone beyond merely seeking equality. See id. at ¶ 6. Ms. Kahan also has strong views on how our media and Silicon Valley companies unduly influence our discourse. See id. at ¶ 7.

Reasonable minds may agree with Ms. Kahan, and reasonable minds may disagree with her as well. However, the First Amendment demands that we tolerate all viewpoints – not only those that Ms. Watt-Bucci believes should be approved of.

Ms. Kahan is a devout Christian and a political conservative. See Kahan Decl. at ¶ 8. While such beliefs and viewpoints are not rare, nationwide, it would be an understatement to say that she is anything other than an endangered species in the Commonwealth of Massachusetts. The fact that she is in a small and shrinking minority does not invalidate her views. To express these views, she placed a trio of signs in her yard at 12 North Street, Manchester.¹ See id. at ¶ 9. Notably, she placed them all there at the same time. See id. at ¶ 10.

Ms. Kahan’s signs were as follows, and are cited in the manner that Ms. Watt-Bucci cites them in her Affidavit:

“It’s not about your lifestyle, its about the grooming of our children while theyre too young to understand.” [sic]. See Picture 1.

She placed another that showed two anthropomorphic figures: the first stands under a flag that has composite symbols representing the transsexual flag, the Satanic pentagram, and the Islamic crescent. That figure is wearing a mask, has a syringe poking into itself, and wears a

¹ Ms. Watt-Bucci describes North Street as a “very public street in the town that is well-traveled.” See Affidavit of Watt-Bucci. What is “very public” and “well traveled” is perhaps a matter of personal opinion. However, when calibrating Ms. Watt-Bucci’s perception to objective reality, this is probably helpful. North Street is a narrow one-way street that leads to another one-way street. It is likely one of the least well-traveled streets in the town. However, this does not change the legal analysis of this matter, it simply casts light on Ms. Watt-Bucci’s credibility.

variety of logos including the communist hammer and sickle, the CNN logo, and Facebook and Twitter's corporate logos. That figure is scolding another figure with the words "they brainwashed you." The other figure sports a crucifix and the American flag, and responds "really?" See Picture 2.

The third sign she placed shows the words "PRIDEMONTH" and then the letters on each side of "PRIDEMONTH" fade out, to "PRIDEMONTH" to finally "DEMON" and on the last line, it says "Makes sense now." See Picture 3.

Ms. Watt-Bucci, who lives around the corner from Ms. Kahan, was displeased with Ms. Kahan's opinions. Rather than speak to her neighbor about them, Ms. Watt-Bucci instead took to Facebook on the page "Manchester the What When Where How?" – a page that is largely used for community discussions in Manchester, but where political views are for the most part only welcome if they adhere to one particular orthodoxy – an orthodoxy that Ms. Kahan rejects.

On June 16 at 4:52 PM Ms. Watt-Bucci, knowing full well that posting Ms. Kahan's address would result in vandalism and harassment, did exactly that. See Kahan Decl. at ¶ 11. She had both the intent and the desire to see harassment and vandalism visited upon her neighbor. See id. at ¶ 12. Her desires were rewarded, as shortly thereafter, her summoned minions stole Ms. Kahan's signs and threw feces at her home. See id. at ¶ 13. Even in the largely-politically-and-socially-orthodox online community, some members expressed concern about Ms. Kahan's address being posted, with one member stating: "Now that her address was posted people are driving by taking pictures. Look up Doxxing." See id. at ¶ 14. Another wrote "and there is a prevailing sentiment of revenge as vigilantism. This entire post should be taken down ... lest there is harm caused to any person or property." See id. at ¶ 15. Ms. Watt-Bucci, even upon being notified that there would be "vigilantism" joyfully continued her campaign to ensure that Kahan would be harassed and intimidated.

Ms. Watt-Bucci also published a letter to the editor in the Manchester Cricket, ironically enough, calling for a display of "community" in opposition to Ms. Kahan. This is ironic, because we should not forget that not only do the two parties live in a small community, but live

less than ¼ mile from each other. Ms. Watt-Bucci also *mailed* a tank top shirt to Ms. Kahan that said “be kind” on it. See Kahan Decl. at ¶ 16.

Once Ms. Watt-Bucci decided to create a public dispute between herself and her neighbor (rather than speaking to her) and once Ms. Watt-Bucci knowingly and willfully incited actual criminal conduct and vandalism against Ms. Kahan, Ms. Kahan responded with more yard signs, all placed in her yard at the same time. See Kahan Decl. at ¶ 17. She hung the tank top outside her home, with the card that Watt-Bucci included, as well as two signs criticizing Watt-Bucci’s statements in the Manchester Cricket and on the Manchester Facebook Page. See id. at ¶ 18.

Further escalating this matter, Watt-Bucci called the Manchester police, seeking criminal sanctions against Ms. Kahan for daring to have an opposing viewpoint. See Affidavit of Watt-Bucci. To the Police Department’s credit, they declined to arrest Ms. Kahan, but they did speak with her, merely suggesting that she remove the signs. See Affidavit of Watt-Bucci. Ms. Kahan stated that she would do so, if Ms. Watt-Bucci would apologize to Kahan’s children, who were now terrified by the actions that Watt-Bucci knowingly and willfully incited against Kahan. See Kahan Decl. at ¶ 26. Watt-Bucci refused. The signs remained up.

We now find ourselves here, where Watt-Bucci seeks a court order suspending Ms. Kahan’s First Amendment rights, and using the power of contempt to then ensure that Ms. Watt-Bucci need not tolerate any viewpoints except those of which she approves.

No Court in the United States, nor any other free country, should give Watt-Bucci what she asks for. Any order issued by this Honorable Court should remind Ms. Watt-Bucci that we live in a free country, where freedom of expression means freedom for viewpoints you dislike, as well as those you approve of. Freedom of expression is there even for, and in fact *especially* for viewpoints that the community may consider to be a minority viewpoint.

3.0 Legal Standards

Mass. Gen. L. ch. 258E provides for civil restraining orders and makes it a crime to violate them. See O’Brien v. Borowski, 461 Mass. 415, 419 (2012). If a Court is inclined to grant the order, it must make a finding of “harassment.”

“Harassment” is defined in 258E, § 1, as “[3] 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.”

There are two hurdles that the Plaintiff must pass in order to prove civil harassment under c. 258E: First, the acts of harassment must be willful and malicious. “[T]he latter defined as ‘characterized by cruelty, hostility or revenge,’” Id. Then, the plaintiff must prove that the Defendant committed all three acts “with the intent to cause fear, intimidation, abuse or damage to property.” M.G. L. c. 258E, § 1. If she fails to get over either, the Petition must be disallowed.

Further, even if the petition makes it past these two hurdles, there is a third hurdle when the alleged acts involve speech: Constitutional protections. The Legislature defined harassment to “exclude constitutionally protected speech,” O’Brien, 461 Mass. at 425. Any speech that leads to a 258E order must be either “fighting words” or “true threats.” See Seney v. Morhy, 467 Mass. 58, 63 (2014).

To qualify as “fighting words” the words “must be a direct personal insult addressed to a person, and they must be inherently likely to provoke violence.” O’Brien, at 423. As for “true threats,” these include “direct threats of imminent physical harm,” as well as “words or actions that — taking into account the context in which they arise — cause the victim to fear such [imminent physical] harm now or in the future.” Id. at 425.

Moreover, to constitute “harassment” under 258E, “the fighting words or true threats must have been made with an *intention* to cause, and *must actually cause*, abuse, fear, intimidation, or damage to property. Van Liew v. Stansfield, 474 Mass. 31, 37 (2016) (emphasis added; quoting O’Brien at 425). “Fear” in this context is “narrowly defined as fear of physical harm or fear of physical damage to property; it must be more than ‘a fear of economic loss, of unfavorable publicity, or of defeat at the ballot box’” Id. at 37-38, quoting O’Brien, at 427.

4.0 Argument

Ms. Watt-Bucci hopes that this Court will simply rubber stamp the Petition, without considering any of the required factors. Watt-Bucci stumbles over literally every single requirement in 258E.

4.1 The Petition Fails to Allege Three or More Acts

In this case, there are at best only two. While Watt-Bucci provided six photos of six signs, the first three are of three different signs that were put up all at the same time. See Kahan Decl. at ¶ 28. The second three pictures were also put up at the same time. See id. To claim that three signs, put up at the same time, are more than one “act” would be as illogical as claiming that three sentences uttered, one after the other, are “three acts.” That is two “acts.”

However, let us be charitable and call each sign an “act.” Even then, the Petition fails. The first three signs are described above, and have absolutely nothing to do with Ms. Watt-Bucci. She simply does not like their content. A sign that someone dislikes is not an “act” under the statute. The first three Pictures are of signs that are wholly irrelevant under this law, and must be disregarded by this Court.

Watt-Bucci then, in her Affidavit, complains about two more. Even if we are to be charitable and call these signs (put up at the same time) *two* separate acts, and we are to assume, *arguendo*, that they are “harassing” under 258E, Watt-Bucci has (at best) sought redress for *two* acts, and not *three*. Petition denied.

4.2 The Conduct Was Willful, but Not Malicious, so the Petition Fails

Ms. Kahan must admit that half of this element is met. She certainly did not place the signs in her yard by accident. Therefore, they were willfully placed there. However, there is nothing to suggest that she did so *maliciously* as the law defines that term. The term maliciously requires “cruelty, hostility, or revenge.” However, Ms. Kahan placed the *relevant* signs, mentioning Ms. Watt-Bucci as part of an ongoing public dialogue. The Court is reminded that this started with three generic political signs that mentioned nobody. Then, Ms. Watt-Bucci sought to incite violence and vandalism against Ms. Kahan, and she succeeded in doing so. Ms.

Watt-Bucci made this a public event in the Manchester Cricket. Ms. Kahan did not have a friend who works for the Cricket, so her only way to respond to now a town-wide discussion was to place signs in her yard. See Kahan Decl. at ¶ 19. Ms. Kahan denies that this was cruel (in fact, it was far more kind than Watt-Bucci’s intentional acts to incite violence and vandalism). Kahan also denies that she did so out of “hostility.” See id. at ¶ 20. If this is “hostility” than anyone taking the opposite side of a debate is then “hostile?” Finally, there was no motivation of “revenge.” See id. If Ms. Kahan wanted “revenge” it would be no great feat to simply go throw dog feces at Ms. Watt-Bucci’s home under the cover of darkness, as Watt-Bucci incited others to do to Ms. Kahan. Engaging in public debate is not “revenge” and no case in the history of American jurisprudence would support such a conclusion.

4.3 No intent to cause fear, intimidation, abuse, or damage to property.

Ms. Kahan responded to an ongoing debate, which Ms. Watt-Bucci made a town-wide debate in the Manchester Cricket and on the Manchester Facebook page. However, as above, it was never her intent to cause fear, intimidation, abuse, or damage to property. See Kahan Decl. at ¶ 20. It was her intent to exercise a right to reply to mail sent to her home and to public declarations about her. Ms. Watt-Bucci is the one who made this a matter of public debate. If she does not like that the other party to a debate has the right to retort, then she should exercise her right to remain silent. One she entered the arena of debate, she does not get to falsely claim “fear, intimidation, abuse, or damage to property” because someone replies. And it is worth noting that she does not so much as *allege* this element, much less *establish* it in the petition. The Petition must be denied.

4.4 No fear, intimidation, abuse, or damage occurred

Certainly, when we are before the Court, we anticipate that Ms. Watt-Bucci is at least capable of lying to the Court that she was in fear, intimidated, felt abused, and there was damage. However, the petition is void of such allegations. In fact, unless the Affidavit is perjurious on its face, it establishes the exact opposite. Ms. Watt-Bucci goes to great lengths to brag in the Affidavit about how she has an outpouring of support from “many” residents who are unaware of

why Ms. Kahan is allowed to disagree with the current political orthodoxy. She claims that she has been “offered support” (but she does not go so far as to admit that this “support” was the violence and vandalism she incited).

4.5 Even if the statutory standards were met, any order granted under this Petition would violate the First Amendment

Petitioner can not meet the high bar to show that Kahan’s political signs are unprotected under the First Amendment or the Massachusetts Constitution.

To be deemed a “true threat,” the speech must be “*aimed at placing the victim in fear of physical violence[.]*” Commonwealth v. Walters, 472 Mass. 680, 692 (2015) citing Virginia v. Black, 538 U.S. 343, 359-60 (2003). “[S]peech that has an expressive purpose other than to instill fear in another may be explicitly threatening, but may nevertheless fail to rise to the level of a true threat.” Id. at 691. We have already established that the *intent* was to engage in debate on matters of public concern and to exercise a right to reply. See Kahan Decl. at ¶ 19. In fact, if we examine the signs themselves, not even the most thin skinned person could think that *this* is language someone would use to put someone in fear of physical violence.

Similarly, the “fighting words” exception “*is limited to words 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.*” O’Brien v. Borowski, 461 Mass. 415, 423 (2012). Such provocation must be *immediate*. See Byrnes v. City of Manchester, 848 F. Supp. 2d 146, 157 (D.N.H. 2012) citing Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942). The statute thus requires three or more acts of harassment that must either be a true threat or fighting words. See G.L. § 258E, § 1.

Here, there is neither an allegation that the political signs are intended to place Ms. Watt-Bucci in “fear of physical violence,” nor that they are even in the same universe as those that are “plainly likely to provoke a violent reaction.” Indeed, the only reaction they provoked was Ms. Watt-Bucci seeking to do figurative violence to the First Amendment.

While Ms. Watt-Bucci may not like the signs, nothing on them would provoke an immediate violent reaction or breach of peace. Compare Baker v. Glover, 776 F. Supp. 1511, 1516 (M.D. Ala. 1991) (“To the extent that there are any true fighting words left, the court is of the opinion that the phrase ‘Eat Shit’ does not fall within this category. Such words do not ‘by their very utterance inflict injury or tend to incite an immediate breach of the peace.’”) quoting Chaplinsky, 315 U.S. at 572. See also Nolan v. Krajcik, 384 F.Supp.2d 447, 459 (D. Mass. 2005) (“the use of epithets or otherwise profane language alone is not a basis for regulating speech as fighting words.”); Commonwealth v. A Juvenile, 368 Mass. 580, 589, 334 N.E.2d 617 (1975) (noting state cannot sanction “[v]ulgar, profane, offensive or abusive speech” alone under First Amendment). In fact, by the very sworn Affidavit provided by Ms. Watt-Bucci, the element of immediacy is dissolved. She claims that the signs went up in June of 2023. Certainly, if there were to be an *immediate* breach of the peace, that immediacy would no longer exist now that we are four months out from the signs being put in Kahan’s yard.

4.6 The Order Sought is an Unconstitutional Prior Restraint

“Temporary restraining orders and permanent injunctions – i.e., court orders that actually forbid speech activities – are classic examples of prior restraints.” Alexander v. United States, 509 U.S. 544, 550 (1993). “[P]rior restraints ‘require an unusually heavy justification under the First Amendment.’” Commonwealth v. Barnes, 461 Mass. 644, 652, 963 N.E.2d 1156, 1164-65 (2012) quoting New York Times Co. v. United States, 403 U.S. 713, 733, 91 S. Ct. 2140, 29 L. Ed. 2d 822 (1971) (Pentagon Papers) (White, J., concurring). “A prior restraint ... has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication ‘chills’ speech, prior restraint ‘freezes’ it at least for the time.” Nebraska Press Ass’n v. Stuart, 427 U.S. 539, 559 (1974). As the First Circuit observed, “[t]he Supreme Court has declared: ‘Any prior restraint on expression comes to this Court with a ‘heavy presumption’ against its constitutional validity.’” In re Providence Journal Co., 820 F.2d 1342, 1348 (1st Cir. 1986) quoting Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971).

“[A]ny order seeking to enjoin speech must be based on detailed findings of fact that (a) identify a compelling interest that the restraint will serve and (b) demonstrate that no reasonable, less restrictive alternative to the order is available.” George W. Prescott Publ. Co. v. Stoughton Div. of the Dist. Court Dep't of the Trial Court, 428 Mass. 309, 311 (1998).

5.0 Conclusion

Anti-gay sentiment has been largely (and blessedly) wiped from our national discourse. It is not enough that our culture has completely rejected anti-gay sentiment, from the military to professional sports. It is easier to find an LGBTQ+ flag flying on a home in Manchester than it is to find an American flag. In fact, if someone arose from a coma this year, they might believe that we had been conquered by a foreign nation. That level of victory has not been achieved by anyone since the bombing of Nagasaki.

Further, Ms. Kahan does not even have an issue with LGBT individuals. She simply disagrees, *in part*, with the level to which the nationwide “victory lap” has gone. Is she right? That isn’t the point. She is a free American, and even if she wanted to express the most vile hate, and the most virulent disagreement, Ms. Kahan would have every right to do so. Ms. Watt-Bucci can not tolerate even one last shred of dissent – and there is a word for that: Fascism.

The Petition must be denied. It was brought specifically in retaliation for political yard signs, put up to communicate Ms. Kahan’s views about matters of public concern and which are part of an ongoing debate that Ms. Watt-Bucci entered, escalated, and now seeks to use the Government to do what she could not do by bullying, intimidation, and incitement.

The relief sought, if granted, would be an unconstitutional prior restraint. There is no evidence of three acts as to Plaintiff not based on protected speech. Finally, there is no need for the HPO; barring Defendant from engaging in First Amendment protected speech hardly serves the noble purpose for which Chapter 258E was enacted. The HPO should be denied and the matter should be dismissed. Reasonable fees and costs, a petition for which will be brought by separate petition, must be awarded to Ms. Kahan.

KIMBERLY KAHAN

By her attorney,

/s/ Marc J. Randazza

Marc J. Randazza, BBO# 651477

Randazza Legal Group, PLLC

30 Western Avenue

Gloucester, MA 01930

(978) 801-1776

ecf@randazza.com

Dated: 18 Sept. 2023

CERTIFICATE OF SERVICE

I, Marc J. Randazza, hereby certify that a true and correct copy of the foregoing document is being served upon all *pro se* parties and all attorneys of record in the above-captioned matter by hand delivery, this 18th day of September 2023, as follows:

/s/ Marc J. Randazza
MARC J. RANDAZZA