NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 13

Case Disposed	☐
Settle Order	☐
Schedule Appearance	☐

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

EFRAIN GALICIA et al X

Index Nº. 24973/15E

-against-

Hon.. ~~F~~ Fernando Tapia

Justice, SC

Donald J. Trump et al X

The following papers numbered 1 to ____ Read on this motion,
Noticed on _____ and duly submitted as No. ____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this

See attached Order.

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Dated: 10/8/15

Hon. _____
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: Part 13

EFRAIN GALICIA, FLORENCIA TEJEDA PEREZ, GONZALO CRUZ FRANCO, JOHNNY GARCIA & MIGUEL VILLALOBOS,

Index No.: 24973/2015E

Hon. Fernando Tapia, J.S.C

Plaintiffs,

v.

DONALD J. TRUMP, DONALD J. TRUMP FOR PRESIDENT INC., THE TRUMP ORGANIZATION LLC, KEITH SCHILLER and JOHN DOES 1-4,

Defendants.

DECISION

The plaintiffs, Efrain Galicia, Florencia Tejeda Perez, Gonzalo Cruz Franco, Johnny Garcia and Miguel Villalobos, through their counsel move by order to show cause for a preliminary injunction against the Defendants, Donald J. Trump, Donald J. Trump for President, Inc., The Trump Organization LLC, Keith Schiller and John Does 1-4, to estop defendants and their agents from touching and assaulting plaintiffs while engaged in lawful demonstrations in front of Trump Tower and from all forms of interference with plaintiffs' lawful demonstrations. This Court grants plaintiffs' motion to the extent provided by the injunction below.

FACTS

On September 3, 2015, plaintiffs assembled in front of the Manhattan office of Republican Party Presidential candidate Donald J. Trump located at 725 Fifth Avenue for the purpose of demonstrating their opposition to him as a political candidate. The high-rise building also houses commercial and residential property. Two plaintiffs were costumed in white hoods and robes, intending to call attention to the recent endorsement of Mr. Trump by David Duke, an

individual associated with the Ku Klux Klan and recognized as a former KKK leader. Additionally, the plaintiffs brought with them three signs that they made which read in large letters "TRUMP MAKE AMERICA RACIST AGAIN" the word "RACIST" having displaced the word "GREAT".

Plaintiffs positioned themselves and arranged their signs along a portion of the sidewalk opposite the entrance of the building. Security personnel approached the plaintiffs and admonished them to remove the signs. This was not the first demonstration by these plaintiffs in front of this property. This was also not the first time there were tensions between the building security and these demonstrators, however on this occasion the situation certainly became more intense. At some point, Keith Schiller ("Schiller"), Director of Security, physically attempted to remove two of the signs from where they were located tearing one in the process. In response, plaintiff Galicia attempted to wrest the sign back from Schiller whereby Schiller's reaction was to repel Galicia ultimately striking him. The plaintiffs attached a draft complaint to their order alleging assault and battery as well as conversion.

I. BASIS FOR A PRELIMINARY INJUNCTION

The function of a provisional remedy, such as a preliminary junction, is not to determine the ultimate rights of the parties, but to maintain the status quo until there can be a full hearing on the merits (*Lehey v. Goldburt*, 90 AD3d 410 [1st Dept 2011]). To be entitled to a preliminary injunction, plaintiffs are required to show a probability of success on the merits, danger of irreparable injury in the absence of an injunction, and a balance of the equities in their favor (*Aetna Insurance Co. v. Capasso*, 75 NY2d 860 [1990]).

II. PLAINTIFFS' FIRST AMENDMENT CLAIMS

Plaintiffs claim that the above-mentioned property owners and their agents have violated their rights to free speech and assembly. Plaintiffs assert that Defendants, through their agent Schiller and other security guards, violated their constitutional rights by committing assault and battery and unlawfully taking their signs. Plaintiffs argue that they will suffer irreparable harm if they are unable to demonstrate free from the fear of being assaulted. The motion for the injunction seeks to protect against the actions of this property owner and its agents from infringing on plaintiffs' constitutional rights in the manner described.

III. DEFENDANT'S RESPONSE

On the other hand, the defendants argue property owners are responsible for maintaining the public sidewalk abutting their property and that their obligation goes beyond mere snow removal. It is incumbent upon them to maintain the sidewalk in a safe condition free from any hazards. Defendants contend that the signs, because of their size, constituted a hazard as they blocked ingress and egress from curbside pick-ups and drop-offs by car services and taxis. Defendants claim that it was improper for the plaintiffs to rest their signs against the large, concrete flower planters lining the curb. The signs created a barricade which the security guard removed, allegedly acting within his rights and responsibilities as agent of the property owner to maintain safety. It was also alleged that the signs could cause someone to trip or fall when attempting to bypass them. Plaintiffs deny this and assert the signs were only placed along the planters momentarily posing no safety hazzard.

IV. FIRST AMENDMENT RIGHTS IN RELATION TO PRIVATE PROPERTY OWNER

It should be noted, the space in front of the property where the protestors were located is a public sidewalk. The defendants do not dispute that the First Amendment applies to this

publicly accessed area. Public parks, streets, and sidewalks have long been recognized as traditional public forums. It is indisputable that a public sidewalk is a "quintessential public forum" that has "immemorially been held in trust for the use of the public" (*Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 US 37, 45 [1983] quoting *Hague v. CIO*, 307 US 496, 515 [1939]). During oral argument, defense counsel briefly commented on the lack of state actor involvement. Taking counsel's statements to their logical conclusion, a private property owner, whenever they wish, would be free to curtail all speech occurring on the sidewalk in front of their property which that particular owner finds offensive. *Even where the public forum is privately owned*, it has been assumed for the purpose of argument, that the property owner must not violate the First Amendment (*Waller v. City of New York*, 34 Misc3d 371, 375 [Sup Ct. New York County, 2011]) (Court assumed First Amendment applied in privately owned public-access plaza).

The analysis then turns on whether the restriction of speech is content-neutral or content-based. Content-neutral restrictions are considered reasonable regulations of time, place, and manner of speech if they are narrowly tailored to serve a significant government interest (*See Frisby v.* Schultz, 487 US 474, 481-82 [1988]). Content-based restriction in public forums are strictly scrutinized and permitted only as necessary to serve a compelling state interest and only where narrowly drawn in the least restrictive way possible (*See Boos v.* Barry, 485 US 312, 321 [1988]). It is not alleged that the defendants imposed unreasonable time, place, and manner restrictions in this instance. The plaintiffs' claim is far more basic than that i.e. threatened physical harm. Defendants in response raise the justification of pedestrian safety with regards to convenience of ingress and egress from the street submitting their actions were necessary pursuant to their responsibility to maintain the sidewalk. Whether there existed a valid

justification, or, as the plaintiffs argue, whether this is merely pretext to justify acts aimed at stifling content-based speech critical of Mr. Trump, is in dispute. In deciding the motion, it is not for the Court to resolve this dispute (*New York Auto. Ins. Plan v. New York Schools Ins. Reciprocal*, 241 AD2d 313, 314 [1st Dept 1997] ("The purpose of such relief is not to reach a determination of the ultimate merits of the action, but to "maintain the status quo" pending such resolution")).

DISCUSSION

I. REQUIREMENTS FOR A PRELIMINARY INJUCTION

A. LIKELIHOOD OF SUCCESS

Where denial of injunctive relief would render the final judgment ineffectual, the degree of proof required to establish the element of likelihood of success on the merits should be accordingly reduced (*Ma .v Lien*, 198 AD2d 186, 187 [1st Dept 1993]). These demonstrations involve expressing viewpoints regarding the current frontrunner Republican primary candidate for the office of the President of The United States of America. There is only a finite period in which plaintiffs can deliver their message. Without injunctive relief, if plaintiffs ultimately prevail, the judgment will not apply with the same force and effect because of the potential delay. While any determination made by this Court must involve some degree of speculation regarding the likelihood of success, it is necessary to adjust the element of proof in proportion with the reality of a pyrrhic victory absent an injunction.

B. IRREPARABLE HARM

Defendants argue that no irreparable harm will be suffered in the absence of an injunction. Defendants claim to fully support the demonstrator's rights to protest and concede

that there have been several other large protests in front of the premises without incident. Defendants recognize the need to preserve such rights in the public space in front of this property which they purport to have done so and to continue to do so. Accordingly, plaintiff's motion must fail.

However, there is no denying that the harm resulting from the unlawful inhibition of the demonstrators' fundamental rights is irreparable. Loss of one's right to free speech is considered an irreparable injury. Where a preliminary injunction is sought to prevent violations of First Amendment rights, it has been held that the moving party need not demonstrate that it is likely to suffer irreparable harm in the traditionally understood sense, because violations of First Amendment rights are commonly considered defacto irreparable injuries (*Bery v. City of New York*, 97 F3d 689, 693-694 [2d Cir 1996], *cert. denied* 520 US 1251 [1997], quoting *Elrod v. Burns*, 427 US 347, 373 [1996] ("[t]he loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury")).

Returning to demonstrate after the conclusion of this litigation would be meaningless, if, as it must be presumed, their purpose is to affect public opinion during the primary campaign. In all likelihood, the primary will be over by the time of trial. As stated above, even if the plaintiffs were to prevail it would be an empty victory as the time period crucial to giving their demonstration any meaningful impact will have elapsed. Certainly, in that there is no award or amount that adequately addresses this predicament, the harm suffered is irreparable.

C. THE EQUITIES

By and large, the facts of this incident are not disputed. The gravamen here involves striking the appropriate balance between both the property owner's rights and necessities and the

rights of individuals to peacefully assemble and exercise their freedom of expression. This balance was disrupted when Director of Security Schiller found it incumbent upon himself to approach the protestors and take their signs resulting in a confrontation, which, given the potentially volatile nature of the atmosphere, he provoked. The question that needs to be asked is, "Who was in the best position to have avoided a confrontation?" It must be highlighted here that when Schiller's credentials were called into question at the hearing, Defendants asserted that he is not only the Director of Security, but he is also a retired New York City Police Department officer with approximately twenty years of experience. It stands to reason that this property owner and especially someone with the experience that Schiller has would be in the best position to avoid such an occurrence. It is incumbent upon the property owner and its agents to involve the NYPD, which by their counsel's own admission, successfully worked to avoid conflict on prior occasions. The NYPD is the proper authority to contact regarding potential safety concerns. What's more, through the conduct of their agent's, defendants have cast a "chilling pall" over plaintiffs' fundamental rights to freely assemble and be heard.

CONCLUSION

This Court recognizes the equitable arguments raised by the defendants and has given them due consideration. Just as freedom of speech is not an absolute right, limitations also exist on the rights of the property owner. To paraphrase a famous quotation, the freedom to move my fist is directly limited by the proximity of your chin.[1] Plaintiffs' counsel acknowledges that any injunction ordered by this Court would not be applicable to a situation where safety is clearly a concern. Plaintiffs seek an Order that would be violated should defendants "touch, assault or beat

[1] Zechariah Chafee, Jr., *Freedom of Speech in Wartime*, 32 Harvard Law Review 932, 957 (1919).

plaintiffs, convert or damage plaintiffs' property, or otherwise interfere with plaintiffs' lawful demonstrations..."As it stands, such an Order would be violated even if the contact was necessitated due to valid safety concerns. This strikes the Court as overly broad and unnecessary to protect the plaintiffs' rights.

Therefore, this Court finds the following Order to more accurately address the injunctive relief sought. Defendants are hereby enjoined from:

> Interfering with the plaintiffs' lawful demonstrations on the sidewalk abutting the property; and from,
>
> Unilaterally interfering with the plaintiffs' demonstrations or confiscating their signs without first resorting to the proper authorities, unless there is a danger presented where safety concerns require immediate intervention.

This constitutes the Decision and Order of the Court.

Dated: October 8, 2015
Bronx, NY

Hon. Fernando Tapia J.S.C

Roger J. Bernstein
Fax # (646) 964-6633

FERNANDO TAPIA

At IAS Part 13 of the Supreme Court of the State of New York, held in and for Bronx County, located at the Courthouse, 851 Grand Concourse, Bronx, New York, on the 11th day of September, 2015.

SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY

EFRAIN GALICIA, FLORENCIA TEJEDA PEREZ, GONZALO CRUZ FRANCO, JOHNNY GARCIA & MIGUEL VILLALOBOS,

Plaintiffs,

vs.

DONALD J. TRUMP, DONALD J. TRUMP FOR PRESIDENT, INC., THE TRUMP ORGANIZATION LLC, KEITH SCHILLER and JOHN DOES 1-4,

Defendant.

ORDER TO SHOW CAUSE

Index No. 24973 /2015E

Upon reading and filing the complaint, Affidavits of Efrain Galicia, Florencia Tejeda Perez and Gonzalo Cruz Franco sworn to on September 8, 2015 with annexed exhibits, the Affirmation of Benjamin N. Dictor affirmed on September 8, 2015, and all prior papers and proceedings had herein,

IT IS HEREBY ORDERED THAT defendants Donald J. Trump, Donald J. Trump For President, Inc., The Trump Organization LLC, and Keith Schiller appear and show cause before this Court, at IAS Part No. 13, Room 402 at the Courthouse located at 851 Grand Concourse, Bronx, New York, on the 25th day of September, 2015, at 9:30 a.m. of that day or as soon thereafter as counsel can be heard, why an order

should not be entered herein:

(1) enjoining Keith Schiller from touching, assaulting and beating plaintiffs, from converting or damaging plaintiffs' property, and from all other forms of interference with plaintiffs' lawful demonstrations in front of Trump Tower on the public sidewalk or in any other public place;

(2) enjoining Donald J Trump, Donald J. Trump For President, Inc., and The Trump Organization LLC from causing or directing Keith Schiller or any of their other employees to touch, assault or beat plaintiffs, convert or damage plaintiffs' property, or otherwise interfere with plaintiffs' lawful demonstrations in front of Trump Tower on the public sidewalk or in any other public place;

SUFFICIENT CAUSE BEING ALLEGED THEREFOR, LET service of this Order to Show Cause together with the papers upon which it is granted to be served ~~in a manner compliant with the New York Civil Practice Law and Rules and~~ on each defendant by ~~overnight~~ PERSONAL service at their place of business at 725 Fifth Avenue, New York NY 10022; ~~and~~ ON OR BEFORE THE 17TH DAY OF SEPTEMBER 2015. SHALL BE DEEMED GOOD AND SUFFICIENT SERVICE

J.S.C

~~**IT IS FURTHER ORDERED** that opposition papers, if any, shall be served upon plaintiffs' counsel Roger J. Bernstein, 535 Fifth Avenue, 35th Floor, New York, NY 10017 either by hand delivery or by overnight courier service for delivery no later than 5 p.m.~~

J.S.C

ENTER.

J.S.C.

FERNANDO TAPIA