

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN MANCINI, and)	
NORTHEAST OHIO COALITION FOR)	
THE HOMELESS,)	
)	
Plaintiffs,)	
)	CASE NO. 1:17-CV-00410
v.)	
)	
CITY OF CLEVELAND,)	JUDGE DONALD C. NUGENT
FRANK JACKSON, in his official)	
capacity as Mayor of Cleveland, and)	
Calvin Williams, in his official capacity)	
as Chief of Police,)	
)	
Defendants.)	

BRIEF IN OPPOSITION TO PLAINTIFFS’ MOTION FOR EMERGENCY TEMPORARY
INJUNCTIVE RELIEF

Defendants, by and through undersigned counsel, respectfully oppose Plaintiffs’ emergency motion for a temporary restraining order on the grounds that Plaintiff’s request is without merit and cannot meet the standard for obtaining temporary injunctive relief. Plaintiffs’ Motion for Emergency Temporary Injunctive relief should be denied for the following reasons 1) Plaintiffs are unable to establish “irreparable harm” as required by Fed. Civ. R. 65, 2) Plaintiffs’ Motion causes substantial harm to the interests of the citizens of the City of Cleveland, 3) public interest would not be served by granting Plaintiffs’ Motion, they would actually be harmed by such a request 4) Plaintiffs have already agreed to a briefing schedule to resolve this case on the merits along with a possible permanent injunction for relief and 5) this Court previously considered granting a temporary injunction relief when this case was initially filed and declined to do so. A brief in support of Defendants’ motion is attached hereto and incorporated herein.

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RELIEF

I. INTRODUCTION

Plaintiffs are seeking to enjoin the City of Cleveland (“the City”) from enforcing two eleven year old ordinances which are codified as the Aggressive Solicitation Ordinance 605.031 (“605.031”) and Highway Safety Ordinance 471.06 (“471.06”). These ordinances were enacted to protect the public from aggressive solicitation that arises to the level of criminal activity and known hazards to health and safety on the City’s busy sidewalks, busy public streets and highways.

Aggressive solicitation under 471.06 includes physically harming individuals, causing individuals to fear bodily harm, or placing individuals in fear of bodily harm in areas of the City

to which they are the most vulnerable. This prohibited behavior includes blocking individuals from safe passage to and from entrances of buildings, car valets, isolating individuals while they are dining at restaurants, bus stops, and blocking the free passage of vehicles in lawful use of a public street. Such safety concerns were reflected in the legislative history of the ordinance when it was passed by City Council on November 27, 2006.

Under 471.06, no person is allowed to stand on a highway for solicitation purposes unless they are member of the police or fire department—positions that require substantial training on how to safely navigate highways that pose a danger to the average citizen. These ordinances narrowly define areas which the City (after consultation with its constituents, including Plaintiff NOCFH) concluded are necessary to protect traffic patterns and individuals where they are most vulnerable to unwanted, harmful or distracting approach.

One of the Plaintiffs in this case, John Mancini, has repeatedly violated the Aggressive Panhandling Ordinance and has sought temporary injunctive relief, permanent injunctive relief, and a declaration that the City's ordinances, 605.031 and 471.06, are unconstitutional. For the following reasons, Mr. Mancini's request for extraordinary temporary relief should be denied by this Court and the briefing schedule for the preliminary injunction should proceed as previously ordered and agreed upon by all parties.

II. LAW AND ARGUMENT

Federal Rule of Civil Procedure 65 governs the issuance of temporary restraining orders and preliminary injunctions. To issue a temporary restraining order under Civ. R. 65, this Court is required to consider the following factors: 1) whether the movant has a strong or substantial likelihood of success on the merits; 2) whether the movant will suffer irreparable harm without the relief requested 3) whether granting the relief requested will cause substantial harm to others

and 4) whether the public interest will be served by granting the relief requested. *Memphis Planned Parenthood, Inc. v. Sundquist*, 175 F.3d 456, 460 (6th Cir. 1999). Plaintiffs' emergency request does not overcome this burden.

A. Plaintiffs do not have a strong or substantial likelihood of success on the merits on their "emergency" motion.

Plaintiffs filed the instant action on February 28, 2017 requesting a Temporary Restraining Order and Preliminary Injunction. (ECF 2). In response, this Court scheduled a telephonic status conference on March 6, 2017, in which all parties participated through counsel. After review of the pleadings and motions, this Court determined that "[t]he issue will be addressed with an expedited preliminary injunction hearing rather than as a TRO." (E.C.F. #9). Plaintiffs did not object to that determination.

The parties then conferred and agreed that Defendants' response to the Motion for Preliminary Injunction would be due on April 7, 2017. Plaintiffs advised the Court that they intend to waive their reply time to expedite the process. *Id.*

Inexplicably, on Saturday, March 11, 2017 at 8:30 p.m., Plaintiffs filed an "Emergency Motion for Injunctive Relief" again seeking the extraordinary relief of an injunction claiming that Defendants are "exploiting this interval to escalate their aggressive enforcement" of the ordinance and retaliate against Mancini. Mancini's testimony, however, belies his claim that any new emergency exists to warrant a temporary restraining order.

Mancini claims that he interacted with police officers on Saturday afternoon. For the sake of argument, even if a conversation between Mancini and police officer occurred, the fact remains that Mancini was not cited for soliciting within the confines of the City and was free to proceed to solicit and otherwise go about his business.

Significantly, Mancini testified that he was panhandling on Euclid Avenue between 14th and 17th Street. (See Second Declaration of John Mancini, ECF 11). Soliciting in this area is clearly prohibited by the ordinance because it is within 20 feet from two open restaurants (Otto Moser and Sung House Restaurant), as well as the entrance to the Buckley Building. Despite this fatal admission, Mancini cannot establish that emergency relief is now warranted based upon “escalated” or “aggressive enforcement” of an ordinance. He cannot do so because Mancini was not cited for being in violation of the ordinance and chose to return to his home in Garfield Heights. Consequently, no action occurred on Saturday that would necessitate “emergency injunctive relief.” Plaintiff’s attempt at a second bite at the apple should fail and this matter should proceed according to the briefing schedule.

B. Plaintiffs will not suffer irreparable harm without the requested relief.

Plaintiff cannot establish that he will suffer irreparable harm without his requested relief. Irreparable harm is identified as that type of harm for which there could be no plain, adequate and complete remedy at law. *Cleveland v. Cleveland Elec. Illum. Co.* (1996), 115 Ohio App.3d 1, 12, 684 N.E.2d 343. The crux of Mancini’s complaint is that the Aggressive Panhandling Ordinance prevents him from supplementing his income. Mancini’s claim ignores the fact that panhandling is legal throughout the City of Cleveland with some narrowly defined exceptions above. Mancini does not explain why he is unable to panhandle within the confines of the ordinance or how complying with the ordinance impacts the supplementation of his income. Simply put, a desire to earn money at one location over another is not a demonstrable irreparable harm this Court can find sufficient to justify granting temporary injunctive relief upon. Nevertheless, should Mancini prevail in a hearing or trial of this matter, it is clear that he is seeking monetary damages. These money damages will exist without granting a temporary

injunctive relief. Consequently, Plaintiffs do not establish irreparable harm necessary to warrant emergency injunctive relief.

C. Granting the requested relief will cause substantial harm to the Citizens of the City of Cleveland.

Plaintiffs' claim that Defendants are unlikely to sustain costs and damages arising out of an injunction is simply incorrect. (ECF10-1, paragraph 4). The City and the public would suffer substantial harm if an emergency injunction is granted.

The ordinances at issue have become a critical part of the City's ability to protect the public. Ordinance 471.06 helps prevent highway accidents and fatalities that are associated with individuals who access the highway and distract motorists who are travelling at a fast speed. (Drummond, ¶7) Ordinance 605.031 allows police officers to cite aggressive panhandlers who engage in physical altercations or threatening behavior with individuals who do not want to engage the aggressive solicitor (Drummond Affidavit, ¶6).¹

In addition, the City police division would need to take steps to retrain its officers and promulgate new guidelines, all of which incur time and expense, and candidly take more time than allowed by the demand in Plaintiff's temporary restraining order to "immediately stop" all enforcement.

D. The public interest will not be served by granting this relief.

As a practical matter, granting the temporary restraining order will likely have the adverse effect of encouraging aggressive forms of solicitation such as intentional and reckless touching or physical contact with individuals without consent and engaging in behavior that would cause individuals to be intimidated, fear bodily harm, or fear damage to or loss of property. Incidents

¹ Drummond Affidavit Attached as Exhibit A.

of blocking pedestrians and vehicle traffic for the purpose of intimidating individuals to give money would increase without 605.031.

In this case, there is a demonstrable substantial harm that will be experienced by the public interest by granting the relief requested and movant will not suffer irreparable harm without a temporary restraining order.

Mancini's case presents a demand that he be allowed to intentionally block safe or free passage of individuals throughout the City, prevent citizens from safely passing through vehicles, to approach and follow citizens while they withdraw from their ATMs without consent, and be allowed to engage in physical contact with another person without consent. Mancini is requesting this Court allow him to engage in contact that would likely cause a reasonable person to feel restrained or intimidated. This is the practical effect of what a temporary restraining order on enforcement of the City's ordinance would allow him to do. This "interest" must be weighed against the interest that the City has in protecting its citizens from physical harm, vehicular traffic control and fire safety. Citizens and law enforcement throughout the City of Cleveland will be unable to safely disengage from encounters with aggressive solicitors and will have the even worse consequences of forcing officers to refrain from helping citizens who fear damage to oneself or to their property. The City is not against panhandling. The City does not have a ban on panhandling. Citizens of the City depend on Aggressive Solicitation and Highway Safety to safely navigate the streets, sidewalks, and public areas of the City of Cleveland. Mancini is free to panhandle virtually anywhere throughout the City of Cleveland.

III. CONCLUSION

Defendants respectfully request that this Court deny Plaintiffs' request for Temporary Restraining Order and continue to adhere to the briefing order set by this Court on March 6, 2017.

Respectfully submitted,
Barbara A. Langhenry (0038838)
Director of Law

/s/ Elizabeth M. Crook
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Attorneys for Defendants

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Notice of Appearance was filed electronically on March 16, 2017. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Elizabeth M. Crook
Elizabeth M. Crook (0088709)

Attorney for Defendants

COUNTY OF CUYAHOGA)
):SS
STATE OF OHIO)

AFFIDAVIT

I, Deputy Chief Dornat Drummond, being first duly sworn state as follows:

1. I am one of the Deputy Chiefs of Police serving the City of Cleveland. I have personal knowledge of the facts stated in this affidavit.
2. I have been employed by the City of Cleveland as a police officer for 28 years. I have served the City as a Deputy Chief for 3 years.
3. I have received a copy of the Temporary Injunctive Relief and Complaint filed in *Northeast Ohio Coalition for the Homeless et al. v. City of Cleveland et al.* Case No. 1:17-CV-00410.
4. I am familiar with City of Cleveland Ordinances 605.031 and 471.06. Solicitation is legal in the City of Cleveland. There is no ban on solicitation in the City of Cleveland.
5. Solicitors, including panhandlers such as Plaintiff John Mancini, may solicit throughout the City of Cleveland so long as they comply with Ordinance 605.031 and 471.06. Our officers are trained to understand that panhandlers can panhandle throughout the City so long as they are in compliance with 605.031 and 471.06.
6. Ordinance 605.031 has been a critical part of the City of Cleveland's ability to protect citizens from intentional or recklessly unwanted touching, physical conduct or threatening behavior in connection with aggressive solicitation that does not arise to the level of other criminal infractions in the Ohio Revised Code.
7. Ordinance 471.06 has also been a critical tool to prevent highway accidents and fatalities that are associated with individuals other than law enforcement who access the highway. Law enforcement and firefighters are trained on how to safely navigate vehicular traffic. The ordinance has a built in exception allowing all individuals to stand in the highway in case of an emergency or when the solicitation is due to the person needing hired transportation. Vehicles travelling at a fast speed pose a safety threat to individuals who do not know how to navigate or control traffic. Firefighters and police officers are authorized by law to control traffic when needed and know how to do so safely without causing harm to vehicles or drivers.
8. Granting the temporary restraining order will impair the City police division's ability to protect its citizens.
9. Granting the temporary restraining order could also have the adverse effect of encouraging aggressive forms of solicitation such as intentional and reckless touching or physical contact with individuals without consent and other behavior that could cause individuals to fear bodily harm, fear damage to or loss of property or to be intimidated.

EXHIBIT A

Incidents of blocking pedestrians and vehicle traffic for the purpose of intimidating individuals to give money may increase without 605.031.

FURTHER AFFIANT SAYETH NAUGHT
SIGNED:

Donald Drummond, D.C. #5044

Dornat Drummond, Deputy Chief, City of Cleveland

Sworn to before me and subscribed in my presence this ___ day of March 2017.

Anthony J. Gorsek



Notary Public
My Commission Expires:

12-3-17