

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Christopher J. Pagan,	:	Case No. 1:03-cv-541
	:	
Plaintiff	:	
	:	
vs.	:	
	:	
Police Chief Fruchey and The	:	
Village of Glendale, Ohio,	:	
	:	
Defendants.	:	
	:	

MEMORANDUM AND ORDER

Before the Court are the Defendants' motion for summary judgment (Doc. 8) and Plaintiff's cross-motion for summary judgment (Doc. 11).

Factual Background

The following facts are not in dispute. Plaintiff Christopher Pagan is a resident of the Village of Glendale, Ohio. He owned an automobile that he wanted to sell. He parked the car in front of his house on Sharon Road, a public street, and put a "For Sale" sign in the car window. A Glendale police officer saw the sign, told Pagan that the sign was illegal under a Village ordinance, and asked him to remove the sign.

The ordinance at issue, Section 76.06 of the Glendale Traffic Code, states:

It shall be unlawful for any person to stand or park any vehicle, motorized or towed, upon any public or private street, road, or highway within the village or upon any unimproved privately owned area within the village for the purpose of:

(A) Displaying it for sale, except that a homeowner may display a motor vehicle, motorized or towed, for sale only when owned and titled to said homeowner and/or a member of said household, and only when parked upon an improved driveway or apron upon the owner's private property.

(B) Washing, maintaining or repairing such vehicle except repairs necessitated by an emergency.

(C) Any advertising.

Pagan sent an email to Walter Cordes, apparently a Glendale official, asking for a copy of the ordinance. Pagan's email also states that he is a lawyer who litigates cases, and that he knows that "cities have been found liable in enforcing sign ordinances that prohibit commercial speech." Pagan stated he didn't want to be a problem, but he didn't want to forfeit his First Amendment rights either. (Doc. 8, Fruchey Affidavit Exhibit B) Mr. Cordes forwarded the email to Glendale Police Chief Matt Fruchey, who drove by Plaintiff's house, saw the car, and gave a copy of the ordinance to Plaintiff's wife. Chief Fruchey invited Plaintiff to call if he had further questions or concerns, but asked him to remove the sign. (Fruchey Affidavit Exhibit C)

Plaintiff instead responded that he had found a case supporting his right to "engage in commercial speech." He proposed that the police allow him to leave the car with the sign up for another three weeks, by which time he expected the car to be sold. If that deal was not "palatable," Plaintiff said he intended to file an action in federal court seeking to have the law declared unconstitutional. (Doc. 8, Fruchey Affidavit

Exhibit D) Chief Fruchey referred Plaintiff's concerns about the legality of the ordinance to the village solicitor, but told Plaintiff to remove the sign or he would be cited. (Fruchey Affidavit, Exhibit E) At approximately 6:30 p.m. that same day, a Glendale officer drove past the car and saw that the sign had been removed. Plaintiff was never cited by the Village for any violation of the ordinance. Instead, a week after the sign was removed, Plaintiff filed this lawsuit against the Village of Glendale and Chief Fruchey, asserting a panoply of constitutional claims and seeking an injunction against enforcement of the ordinance.

The parties filed motions for summary judgment. Plaintiff's motion (Doc. 11) withdraws his request for injunctive relief, and narrows his constitutional claims to one: the Glendale Traffic Ordinance violates Plaintiff's First Amendment rights. He also argues that Chief Fruchey is not entitled to immunity from his \$1983 claim, because Chief Fruchey violated Plaintiff's clearly established constitutional right to be free of the ordinance's restrictions.

ANALYSIS

1. Summary Judgment Standards.

The standards for summary judgment are well established. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to

any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The party opposing a properly supported summary judgment motion "'may not rest upon the mere allegations or denials of his pleading, but ... must set forth specific facts showing that there is a genuine issue for trial.'" Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (quoting First Nat'l Bank of Arizona v. Cities Serv. Co., 391 U.S. 253 (1968)). The Court is not duty bound to search the entire record in an effort to establish a lack of material facts. Guarino v. Brookfield Township Trs., 980 F.2d 399, 404 (6th Cir. 1992); InterRoyal Corp. v. Sponseller, 889 F.2d 108, 111 (6th Cir. 1989), cert. den., Superior Roll Forming Co. v. InterRoyal Corp., 494 U.S. 1091 (1990). Rather, the burden is on the non-moving party to "present affirmative evidence to defeat a properly supported motion for summary judgment..." Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479-80 (6th Cir. 1989), and to designate specific facts in dispute. Anderson, 477 U.S. at 250. The non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Electric Industries Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The court construes the evidence presented in the light most favorable to the non-movant and draws all justifiable inferences in the non-movant's favor. United States v. Diebold Inc., 369 U.S. 654, 655 (1962).

The court's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there

is a genuine issue for trial. Anderson, 477 U.S. at 249. The court must assess "whether there is the need for trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Id. at 250. "If the evidence is merely colorable, . . . , or is not significantly probative, . . . , the court may grant judgment." Anderson, 477 U.S. at 249–50 (citations omitted). The Supreme Court has held:

The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict...

Id. at 252. Hence the "'mere possibility'" of a factual dispute will not suffice. Mitchell v. Toledo Hospital, 964 F.2d 577, 582 (6th Cir. 1992), quoting Gregg v. Allen-Bradley Co., 801 F.2d 859, 863 (6th Cir. 1986).

Summary judgment is not appropriate simply because the weight of the evidence favors the moving party. Poller v. Columbia Broadcasting Systems, Inc., 368 U.S. 464, 472 (1962). The issue of material fact required "to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." Cities

Serv. Co., supra, 391 U.S. at 288-89.

Although summary judgment must be used with extreme caution since it operates to deny a litigant his day in court, Smith v. Hudson, 600 F.2d 60, 63 (6th Cir. 1979), cert. dismissed, 444 U.S. 986 (1979), the United States Supreme Court has stated that the "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to 'secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (citations omitted).

2. Plaintiff's Standing.

Defendants argue that Plaintiff lacks standing to challenge the ordinance, because he was never cited and voluntarily complied by removing the For Sale sign from his car. Plaintiff argues that under Mangual v. Rotger-Sabat, 317 F.3d 45 (1st Cir. 2003), a "credible threat of prosecution" is enough to confer standing to challenge the ordinance. Plaintiff contends that he faced 30 days in jail if he was cited under the ordinance. Defendants persuasively argue that Plaintiff misreads the applicable ordinances and the Ohio statute addressing "minor misdemeanors." If Plaintiff had been cited (which he was not), he would have been subjected to a fine of not more than \$100. See Glendale Ordinance Sec. 70.99(A) (3).

An "injury in fact" necessary to confer standing requires the plaintiff to "show that he *personally* has suffered some

actual **or** threatened injury." Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982) (emphasis added). While the potential monetary loss here appears to be relatively minor, a threatened fine of not more than \$100 plus a possible invasion of First Amendment rights are clearly a cognizable "injury." The Court finds that Plaintiff has standing to challenge the Glendale ordinance.

Plaintiff also suggests that because he was forced to remove the sign, he had to sell the car for \$500 less than its appraised value. Even if this economic impact is relevant, which is far from clear - see, DLS, Inc. v. City of Chattanooga, 107 F.3d 403, 412 (6th Cir. 1997) [aggregate economic effects, not any individual impact, is relevant to First Amendment inquiry] - the Court rejects Plaintiff's suggestion that this \$500 "loss" is an injury-in-fact. Plaintiff's bare assertion, supported only by his speculation, is not sufficient to raise a triable issue of fact on this question.

3. Constitutionality of the Glendale Traffic Ordinance.

The parties agree that Plaintiff's "For Sale" sign is commercial speech. Plaintiff argues that the ordinance is unconstitutional under the standards set forth in Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980), while Defendants assert that the ordinance passes constitutional muster.

Central Hudson set out a four-part analysis for commercial speech cases. "At the outset, we must determine whether the

expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." Central Hudson, 447 U.S. at 566. The first two steps of this analysis are not in dispute: Plaintiff's sign is a lawful activity and is not misleading.

Defendants contend that the Village of Glendale's interest in promulgating the ordinance is to promote traffic safety, and to prevent people from being in public roads and streets unless they are part of traffic flow (either vehicular or pedestrian). A secondary goal of the ordinance is to promote aesthetic objectives of the Village. (Affidavit of Fruchey, ¶3). Plaintiff concedes that traffic safety is a substantial governmental interest, but challenges the Village's evidence on whether the ordinance "directly advances" this governmental interest, and whether it is more extensive than necessary.

Plaintiff claims that the affidavit of Chief Fruchey is not sufficient to carry Defendants' burden on this question. While the Defendants have not presented the kind of evidence that Plaintiff obviously prefers, such as an ordinance "whereas" clause, a preamble, or a "legislative record," the Court finds that such evidence is not necessary here. It seems self-evident

that Traffic Ordinances in general, and the Glendale Ordinance in particular, are directly related to traffic control and safety. This Ordinance undoubtedly advances those interests by trying to keep people out of busy streets.

But, Plaintiff argues, the Village's "true interest" in passing the ordinance was to suppress vehicle sales. This is a puzzling argument, since the Ordinance expressly permits residents to advertise their cars for sale while parked on driveways, or an apron on their property. And since there are myriad ways to sell a vehicle, other than leaving it parked in a public street with a For Sale sign in the window, Plaintiff's argument is nonsensical.

Then Plaintiff contends that the Village has permitted other vehicles to be parked on public roads with For Sale signs, and has permitted commercial vans (which carry advertising on their sides of the business) to be parked on public roads. Thus Plaintiff suggests that the Village has unfairly subjected Plaintiff to the strictures of the Ordinance. The photographs Plaintiff offers do not substantiate his claim. The two photographs of vehicles parked with For Sale signs (Doc. 12, Plaintiff's Affidavit, Exhibit 4) clearly show that neither one is parked in a street. Both cars are off-street, on what appears to be, and what Defendants state is in fact private property. Plaintiff has not challenged Defendants' statement.

Another photo (Doc. 12, Plaintiff's Affidavit, Exhibit 5) shows a commercial van parked on a street, carrying the sign

"Iron Horse Inn." Plaintiff argues this violates §76.06(C), prohibiting the parking of a vehicle for the purpose of "any advertising." While Plaintiff was not charged with violating this subsection of the Ordinance, he contends that the Village tolerates violation of the ordinance, thus undermining the Village's asserted governmental interest in traffic safety.

Plaintiff's interpretation of subsection (C) of the Ordinance is unreasonable. It is intended to prohibit vehicles which are parked on the street for the singular purpose of advertising, not to prohibit all businesses from displaying their names or addresses on the sides of vehicles owned and used by those businesses. Defendant explains that subsection (C) of the ordinance is enforced against advertising that is not "an integral part of the vehicle, such as banners or other signage which could interfere with safety considerations." (Affidavit of Fruchey, ¶3). This seems plain from the text of the ordinance, and Plaintiff has offered no evidence which raises even an inference that the Ordinance is applied in some unacceptable or unconstitutional fashion.

Plaintiff also suggests that vehicle for-sale signs do not pose an "actual problem" for traffic safety, and that the Village has not adduced extrinsic evidence (traffic safety studies, for example) to support their conclusion. Plaintiff points out that other types of signs, like home for sale signs, political signs, garage sale signs, all may pose traffic safety issues. Yet the Village has chosen only to regulate the vehicle for-sale signs.

The fact that Plaintiff may believe that the ordinance does not go far enough or fails to regulate other types of "dangers" to traffic control or safety is irrelevant to the constitutional analysis of the ordinance. See, Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 509 (1981): "If the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them. The city has gone no further than necessary in seeking to meet its ends. Indeed, it has stopped short of fully accomplishing its ends: It has not prohibited all billboards, but allows onsite advertising and some other specifically exempted signs." The same observations hold true about Glendale's Traffic Ordinance.

Moreover, it is not this Court's task nor function to second-guess the decisions of the Village of Glendale concerning appropriate traffic safety ordinances. As the Supreme Court long ago observed, "We would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this regulation had no relation to the traffic problem of New York City. It is the judgment of the local authorities that it does have such a relation. And nothing has been advanced which shows that to be palpably false." Railway Express Agency, Inc. v. New York, 336 U.S. 106, 109 (1949). Plaintiff offers nothing more than his own speculation and subjective conclusions to argue that Glendale's legislative judgment is unreasonable, or

even "palpably false." That is not enough.

The Court finds that the Glendale Traffic Ordinance, §76.06, is not an unconstitutional invasion of Plaintiff's First Amendment rights.

4. Qualified Immunity of Chief Fruchey.

Finally, Chief Fruchey seeks summary judgment based on qualified immunity. Plaintiff agrees that Chief Fruchey is entitled to qualified immunity **unless** Plaintiff can establish a violation of a clearly established constitutional right that a reasonable public official would understand was being violated. Plaintiff relies almost entirely upon one California case, Burkow v. City of Los Angeles, 119 F.Supp.2d 1076 (2000), to support his argument that Chief Fruchey "knew or should have known" he was violating Plaintiff's First Amendment rights when he asked that the For Sale sign be removed. This argument borders on frivolity.

Burkow was a decision of a district court in another state; the court granted a preliminary injunction against a Los Angeles ordinance with some similarity to the Glendale ordinance at issue. There was no final decision on the merits. More importantly, however, a single preliminary injunction opinion does not create a "clearly established constitutional right" such that Chief Fruchey should forfeit his immunity. The Sixth Circuit has held in this regard: "A right is not considered clearly established unless it has been authoritatively decided by the United States Supreme Court, the Court of Appeals, or the

highest court of the state in which the alleged constitutional violation occurred." Durhm v. Nu'Man, 97 F.3d 862, 866 (6th Cir. 1996). In the absence of any clear authority of the Supreme Court or the Sixth Circuit that vehicle for sale sign prohibitions like the Glendale Ordinance violate the First Amendment, Chief Fruchey is entitled to qualified immunity.

CONCLUSION

For all of the foregoing reasons, the Court grants Defendants motion for summary judgment and denies Plaintiff's motion for summary judgment.

DATED: September 30, 2004

s/Sandra S. Beckwith
Sandra S. Beckwith, Chief Judge
United States District Court