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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

GREGG SCHUMACHER and LINDA
SCHUMACHER, individually and as
husband and wife, and GREGG
SCHUMACHER FURS LLC dba
SCHUMACHER FURS & OUTERWEAR,

CV 07-00601-MO

Plaintiffs,

v.

CITY OF PORTLAND, a municipal
corporation; IN DEFENSE OF ANIMALS,
a foreign nonprofit corporation; ANIMAL
LIBERATION FRONT, an unincorporated
association; PEOPLE FOR THE ETHICAL
TREATMENT OF ANIMALS, INC., a
foreign nonprofit corporation; MATT
ROSSELL; KEVIN MIERAS aka "Bluejay";
CONNIE DURKEE; ALEX LILLI; JOHN
DOES 1-10; and JANE DOES 1-10,

DEFENDANT KEVIN MIERAS'
REPLY TO PLAINTIFF'S RESPONSE
TO MOTION FOR RECONSIDERATION
OF INJUNCTIVE ORDER DATED MAY
22, 2007

Defendants.

I. INTRODUCTION

This Court should grant Defendant Kevin Mieras' Motion for Reconsideration of Injunctive Order Dated May 22, 2007 because Mr. Mieras has presented newly discovered evidence, the injunction violates his First Amendment rights, and plaintiffs have failed to demonstrate a substantial likelihood of success on the merits of their tort claims against Mr. Mieras.

II. ARGUMENT

A. Mr. Mieras Has Made An Appropriate Showing for Relief from the Preliminary Injunction on Grounds of Newly Discovered Evidence and Manifest Injustice

Plaintiffs' claim that Mr. Mieras based his Motion for Reconsideration solely on newly discovered evidence overlooks that his motion also argues that the preliminary injunction is manifestly unjust. Memorandum in Support of Motion for Reconsideration at 3-20. Moreover, plaintiffs mistakenly contend that Mr. Mieras failed to show that he could not have discovered the evidence earlier. Plaintiffs' Response Memorandum at 2. In fact, Mr. Mieras has offered several reasons that he could not have discovered the evidence earlier.

First, since plaintiffs did not allege Mr. Mieras was in the video or photo exhibits attached to Gregg Schumacher's Declaration in support of Plaintiffs' Motion for Preliminary Injunction, he did not think a response regarding those exhibits was necessary. Memorandum in Support of Motion for Reconsideration at 3, 13. Second, the Supplemental Declaration of Gregg Schumacher, which plaintiffs submitted the day before the hearing on the motion for preliminary injunction, contained the plaintiffs' first offer of proof that they suffered physical symptoms of emotional distress as a result of the protests. Supp. Dec. of Gregg Schumacher at 2. Thus, Mr. Mieras' evidence, which shows that the plaintiffs were not afraid of him and in fact went out of

their way to confront him, was not particularly relevant until that time and so was not presented to the court before the hearing.

In addition, Mr. Mieras has recorded many hours of video footage of the anti-fur demonstrations, and he did not have time to view this footage prior to the preliminary injunction hearing. Memorandum in Support of Motion for Reconsideration at 13, 15. Finally, Mr. Mieras' evidence regarding his colleagues' reactions to the *Oregonian* articles on the Court's ruling was obviously not available at the time of the hearing, since the articles appeared in the paper after the preliminary injunction hearing. Memorandum in Support of Motion for Reconsideration at 19-20.

B. The Injunction Creates Reasonable Doubt As to the Conduct It Proscribes

Plaintiffs mistakenly contend that Mr. Mieras has taken portions of the injunction out of context when he states he is uncertain whether it prohibits anti-fur signs and slogans. Plaintiffs' Response Memorandum at 3. Since Mr. Mieras' anti-fur efforts to date have been directed to the general public, he has a legitimate fear that the Court intended to enjoin those efforts. See Affidavit of Kevin Mieras at ¶¶ 3, 8, 12. Thus, the situation here is readily distinguishable from that in *Garthright*, since there the court obviously did not intend to enjoin conduct that was irrelevant to the dispute. *Garthright v. City of Portland*, 439 F.3d 573, 581 (9th Cir. 2006).

C. The Injunction Is Overbroad Because It Goes Well Beyond Protecting Normal Retail Activity

As Mr. Mieras noted in his Motion for Reconsideration, the reasonableness of a time, place and manner restriction depends on whether the expression is incompatible with the normal activity of a particular place and whether the restriction enjoins more speech than necessary. Memorandum in Support of Motion for Reconsideration at 5 (citing *Grayned v. City of Rockford*, 408 U.S. 104, 155 (1972); *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*,

859 F.2d 681, 686-87 (9th Cir. 1988)). Plaintiffs mistakenly assert that the injunction against Mr. Mieras is justified on the grounds that anti-fur demonstrations interfere with the retail activity of Schumacher Furs. Plaintiffs' Response Memorandum at 3. Plaintiffs forget that Mr. Mieras never interfered with normal retail activity. Affidavit of Kevin Mieras ¶¶ 4, 7, 9-11, 13. Moreover, plaintiffs ignore that the injunction prohibits more speech than necessary in that it prohibits any form of communication directed at the Schumachers or their employees. Order at 2.

D. Plaintiffs Have No Evidence That Mr. Mieras Engaged in Conduct That Led to the Harm They Allege

Mr. Mieras' Motion for Reconsideration accurately reflected the record when it noted that plaintiffs made only two specific allegations against him, that he denied both those allegations, and that plaintiffs offered no proof other than their own accusations to substantiate those allegations. Memorandum in Support of Motion for Reconsideration at 11. Incredibly, plaintiffs respond by again asserting vague references to the conduct of unidentified individuals in an effort to demonstrate a substantial likelihood of success on the merits in their claims against Mr. Mieras. Plaintiff's Response Memorandum at 5-9. Plaintiffs' persistence in this regard demands a full review of the record.

1. Plaintiffs Have Not Demonstrated a Substantial Likelihood That They Will Prevail on Their Intentional Infliction of Emotional Distress Claims

Plaintiffs do not disagree that, to prevail on an IIED claim, a plaintiff must prove that 1) the defendants intended to inflict severe emotional distress on the plaintiff, 2) the defendant's acts were the cause of the plaintiff's severe emotional distress, and 3) the defendant's acts constituted an extraordinary transgression of the bounds of socially tolerable conduct. *Sheets v. Knight*, 308 Or. 220, 236 (1989).

Plaintiffs cite the “purposeful anonymity” of “many of the protestors” and the “documented behavior of many of the protestors” as support for their claims of emotional distress. Plaintiffs’ Response Memorandum at 5. As evidence, they direct the Court to the photos and video they submitted with Gregg Schumacher’s declaration. *Id.*; Declaration of Gregg Schumacher, Exs. 1-2. Yet plaintiffs have offered no evidence that Mr. Mieras participated in that “documented behavior.” In fact, those exhibits show that Mr. Mieras did not participate in unlawful behavior. Supp. Affidavit of Kevin Mieras ¶¶ 8, 9. The videos and photos show that he is fully clothed, not wearing a mask and not blocking the sidewalk or the doors to the store. *Id.*, Exs. A-C. Mr. Mieras never engaged in nudity, nor has he ever worn a mask, intentionally violated any ordinance, or exercised any control over other protestors. Affidavit of Kevin Mieras at ¶¶ 4, 6, 9, 11. Finally, Mr. Mieras has never been to the Schumacher residence. *Id.* at ¶ 12.

Plaintiffs point to “death threats from ALF” to support their claim of fear and intimidation. Plaintiffs’ Response Memorandum at 5 (citing to Declaration of Gregg Schumacher Ex. 3). However, Mr. Mieras has already stated he never made any death threats. Affidavit of Kevin Mieras at ¶ 10. Plaintiffs claim that Mr. Mieras “is known to be affiliated” with ALF, but have yet to produce any evidence to support this accusation. Plaintiffs’ Response Memorandum at 6. Mr. Mieras has never had any ties to ALF and has never acted on its behalf. Affidavit of Kevin Mieras at ¶ 13. Finally, Mr. Mieras never placed fecal matter, urine or red paint on or around the Schumacher Furs store. *Id.* at ¶ 11.

Plaintiffs misstated Mr. Mieras’ argument when they assert that he claims much of the evidence they offer amounts to simple annoyances. Plaintiffs’ Response Memorandum at 5. Rather, Mr. Mieras contends that the evidence they offer against *him specifically* does not support an emotional distress claim. Memorandum in Support of Motion for Reconsideration at

12. The only specific allegations made against Mr. Mieras are that Mr. Mieras “verbally taunted” Mr. Schumacher and that Mr. Schumacher heard a voice that sounded like Mr. Mieras call out “Hey Gregg” from about half a block from his residence. Memorandum in Support of Motion for Reconsideration at 11.

Notably, plaintiffs have not explained how Mr. Schumacher could possibly have recognized Mr. Mieras’ voice in February 2006 when Mr. Mieras first attended the anti-fur demonstrations in mid-February 2006. Declaration of Gregg Schumacher at ¶ 9; Affidavit of Kevin Mieras at ¶ 3. Even if the Court continues to credit these allegations, such actions do not amount to an “extraordinary transgression of the bounds of socially tolerable conduct.” *Patton v. J.C. Penney Co.*, 301 Or. 117, 122 (1986). “[I]nsults, harsh or intimidating words, or rude behavior ordinarily do not result in liability for damages.” *Hall v. The May Department Stores*, 292 Or. 131, 135 (1981).

Finally, plaintiffs have submitted no evidence that Mr. Mieras caused the emotional distress they claim to suffer. Gregg Schumacher attributes his “difficulty sleeping” to “repeated contact with protestors over the past 18 months”— not to any conduct on the part of Mr. Mieras specifically. Suppl. Declaration of Gregg Schumacher at ¶ 6. Similarly, Linda Schumacher attributes her difficulty sleeping and her “irritability, sadness, grief and fear” to the actions of protestors outside the Schumacher Furs store. Declaration of Linda Schumacher in Response at ¶ 1-2. Since Mr. Mieras has never had control or leadership over other demonstrators, he cannot be the cause of plaintiffs’ alleged distress. Affidavit of Kevin Mieras at ¶ 4. Thus, plaintiffs’ have failed to show a substantial likelihood of success on their IIED claims against Mr. Mieras.

2. Plaintiffs Have Not Demonstrated a Substantial Likelihood That They Will Prevail on Their Intentional Interference With Economic Relations and Interference With Contract Claims.

To prevail on their intentional interference with economic relations and intentional interference with contract claims, plaintiffs must demonstrate 1) the existence of a professional business relationship or enforceable contract, 2) intentional interference with that relationship by a third party, 3) accomplished through improper means or for an improper purpose, 4) a causal effect between the interference and the harm to the relationship or contract and 5) damages. *Allen v. Hall*, 328 Or. 276, 281 (1999); *McGanty v. Staudenraus*, 321 Or. 532, 535 (1995).

The evidence plaintiffs have proffered in support of their intentional interference with economic relations and interference with contract claims lacks *any* proof that Mr. Mieras engaged in tortious activity. Though plaintiffs point to Gregg and Linda Schumachers' declarations as support for their interference claims, those declarations do not include any allegation that Mr. Mieras interfered with their customers. Plaintiffs' Response Memorandum at 6. Gregg Schumacher's declaration makes no such accusation against Mr. Mieras. Declaration of Gregg Schumacher at ¶¶ 3-7. Similarly, Linda Schumacher's initial declaration lists four alleged incidents involving demonstrators in general, but not Mr. Mieras specifically. One of those allegations did not involve a customer. Declaration of Linda Schumacher at ¶ 7. Another occurred on January 14, 2006, before Mr. Mieras began to participate in the anti-fur demonstrations. *Id.*; Affidavit of Kevin Mieras at ¶ 3. The final incidents involved "six teenage youth." Declaration of Linda Schumacher at ¶ 8. The Court can discern for itself from the photos and videos of Mr. Mieras that he is not a teenager and that he did not interfere with any customers. See Supp. Affidavit of Kevin Mieras ¶¶ 8, 9. Finally, it bears repeating that Mr. Mieras never threatened anyone nor has he ever intentionally violated any ordinances. Affidavit of Kevin Mieras at ¶ 9-10.

Moreover, plaintiffs claim “the stated intention of putting plaintiffs out of business when they operate a lawful business is an improper purpose.” Plaintiffs’ Response Memorandum at 6. Even if plaintiffs provided case law to support this assertion, they certainly have not provided any evidence that Mr. Mieras intended to put them out of business, or that he stated as much. On the contrary, Mr. Mieras engaged in anti-fur demonstrations because of his belief that “the use of fur for fashion is immoral and unnecessary.” Affidavit of Kevin Mieras at ¶ 3.

Plaintiffs make one accurate statement with regard to Mr. Mieras: that he uses “portlandfurcruelty.com,” to post video clips of several anti-fur demonstrations in front of the Schumacher Furs store. Plaintiffs’ Response Memorandum at 6; Scott Castleman Declaration in Response at ¶¶ 2-3. The web site consists of short videos of several of Mr. Mieras’ conversations and encounters with supporters and detractors outside the Schumacher Furs store along with links to information on veganism, the fur industry and newspaper articles. Third Supp. Affidavit of Kevin Mieras at ¶ 3.

Mr Mieras is puzzled, however, as to the relevance of this information because it is not unlawful to post educational information and video on the Internet, nor do plaintiffs claim that the website contains anything unlawful. Plaintiffs’ Response Memorandum at 6. Mr. Mieras has never posted online any threat of harm against the Schumachers or their employees, nor has he ever used www.portlandfurcruelty.com to encourage others to engage in unlawful activity. Third Supp. Affidavit of Kevin Mieras at ¶¶ 5-6. Finally, Mr. Mieras has never used the web site to discourage mall owners or property owners from renting to Schumacher Furs. *Id.* at ¶ 4.

Plaintiffs also assert that they have presented “uncontroverted evidence” that they were evicted from their SW Morrison Street location. Plaintiffs’ Response Memorandum at 7. However, Gregg Schumacher’s initial declaration states that his landlord *attempted* to evict

Schumacher Furs and that the Schumachers resolved the action by agreeing to vacate. Declaration of Gregg Schumacher at ¶ 13. Moreover, plaintiffs do not attribute the eviction to any action by Mr. Mieras. In fact, plaintiffs claim they were evicted because officials from the City of Portland encouraged their landlord to evict them. *Id.*; Plaintiff’s Brief in Support of Motion for Preliminary Injunction at 6.

Plaintiffs allege “orchestrated efforts” to contact other landlords and property managers to prevent Schumacher Furs from moving to a new location. Plaintiffs’ Response Memorandum at 6 (citing to Declaration of Gregg Schumacher at 6, 7 and Exs. 4b, 4c). However, plaintiffs do not allege this conduct specifically against Mr. Mieras, and Mr. Mieras never orchestrated any efforts to have activists write to Bridgeport Village. Third Supp. Affidavit of Kevin Mieras at ¶ 4. Moreover, Gregg Schumacher’s statement that unknown individuals caused Bridgeport Village to reject Schumacher Furs as a tenant is controverted by evidence that the president of the company that owns Bridgeport Village rejected Schumacher Furs based on his own viewpoint—not due to any outside influence. Affidavit of Matt Rossell at ¶ 14, Ex. B. Plaintiffs have failed to demonstrate substantial likelihood of success on the merits on either of their interference claims against Mr. Mieras.

3. Plaintiffs Have Not Demonstrated a Substantial Likelihood That They Will Prevail on Their Trespass Claim Against Mr. Mieras

To prevail on their trespass claim, plaintiffs must provide proof of an intrusion upon the land of another, which invades the possessor’s interest in exclusive possession of the land. *Martin v. Union Pacific Railroad*, 256 Or. 563, 565 (1970). Plaintiffs at least acknowledge their doubt that Mr. Mieras ever trespassed at Schumacher Furs but nonetheless assert that Mr. Mieras is liable for trespass because “he may well have had knowledge or complicity in it as a leader of

the protests.” Plaintiffs Response Memorandum at 7. Plaintiffs have both the facts and the law wrong.

Mr. Mieras has never entered the Schumacher Furs store, nor has he ever had any control over other individuals expressing their views in front of the store. Affidavit of Kevin Mieras ¶¶ 4, 7. Moreover, it is well-established law that, “Ordinarily, an individual is under no duty to protect another from the criminal acts of a third party and may reasonably proceed on the assumption that others will obey the criminal law.” *Torres v. United States National Bank*, 65 Ore. App. 207, 210 (Or. Ct. App. 1983)(internal citations omitted). Finally, though plaintiffs claim they have “uncontroverted evidence” that someone trespassed in their store, they have no proof, other than their own accusations, to support that claim--no copies of the information tags they claim were inserted into coat pockets, no supporting statements of employees or security personnel.

4. Plaintiffs Lack Evidence To Support Their Claims Against Mr. Mieras for Nuisance.

Plaintiffs seem to assert that Mr. Mieras is liable for nuisance because he was present when other people may have violated city ordinances. Plaintiffs’ Response Memorandum at 7. Plaintiff once again asks the Court to refer to the videos and photos submitted with Gregg Schumacher’s declaration. *Id.*; Declaration of Gregg Schumacher, Exs. 1-2. As already noted, plaintiffs have offered no evidence that Mr. Mieras participated in the behavior portrayed on the video, while Mr. Mieras has demonstrated that those exhibits show that he did not participate in unlawful behavior. Supp. Affidavit of Kevin Mieras at ¶¶ 8, 9.

Moreover, plaintiffs also would have the Court infer that Mr. Mieras is a “leader of the protests” based on “the longevity and consistency of his presence.” Plaintiffs’ Response Memorandum at 9. Such consistency, however, speaks only to the sincerity of Mr. Mieras’

beliefs regarding the fur industry. To suggest otherwise asks this Court to enjoin Mr. Mieras based on the depth of his beliefs. *R.A.V. v. St. Paul*, 505 U.S. 377, 386 (1992)(stating the government may not regulate speech “based on hostility -- or favoritism -- towards the underlying message expressed”).

Plaintiffs insist “the evidence speaks for itself.” Plaintiffs’ Response Memorandum at 7. Yet plaintiffs’ evidence has said nothing that adds up to substantial likelihood of success on the merits of any of their tort claims against Mr. Mieras.

E. Mr. Mieras Has Demonstrated the Preliminary Injunction Has Subjected Him to Substantial Hardship

Plaintiffs mistakenly contend that the record does not support Mr. Mieras’ claims that the injunction has subjected him to humiliation and that plaintiffs and their employees treated him badly. Plaintiffs’ Reponse Memorandum at 8-9. Plaintiffs apparently ignored Mr. Mieras’ sworn statement that he has suffered shame as a result of press coverage of the injunction. Supp. Affidavit of Kevin Mieras at ¶ 11, Ex. D. They similarly ignore Mr. Mieras’ sworn statement and accompanying video that show the Schumachers and their employees have taunted him. *Id.* at ¶ 6, Ex. A. Moreover, plaintiffs misstate Mr. Mieras’ argument when they claim he introduced evidence of their mistreatment of him to criticize them. Plaintiffs’ Response Memorandum at 9. In fact, Mr. Mieras presented that evidence to show that the plaintiffs do not fear him and therefore he was not the source of their alleged irreparable harm. Memorandum in Support of Motion for Reconsideration at 12-14.

Plaintiffs also mistakenly contend that Mr. Mieras has not been limited in his legitimate protest activity. Plaintiffs’ Response Memorandum at 9. Plaintiffs ignore that the injunction enjoins more speech than necessary because it prohibits Mr. Mieras from directing “any form of communication” toward the Schumachers or their employees. Order at 2; Memorandum in

Support of Motion for Reconsideration at 3-6. As a result, Mr. Mieras took several precautions, including avoiding pointing any signs toward the Schumacher Furs store, when he attended anti-fur demonstrations there on May 19 and May 26, 2007. Third Supp. Affidavit of Kevin Mieras at ¶ 12.

A First Amendment “chilling effect” exists when potential speakers “out of reasonable caution or even an excess of caution . . . censor their own expression well beyond what the law may constitutionally demand.” *Nike, Inc. v. Kasky*, 539 U.S. 654, 683 (2003). Mr. Mieras’ cautious behavior demonstrates that his free speech rights have been chilled by the injunction. Third Supp. Affidavit of Kevin Mieras at ¶ 12. Moreover, plaintiffs’ decision to distribute the Court’s Order to demonstrators and visitors standing near Mr. Mieras likely had a similar chilling effect on their speech activity. Second Supp. Affidavit of Kevin Mieras at ¶¶ 4-9.

In addition, even though Mr. Mieras did not speak to the Schumachers, their security personnel or other employees on May 19, 2007 or May 26, 2007, plaintiffs ambiguously contend he directed communication to a Schumacher employee. Third Supp. Affidavit of Kevin Mieras at ¶ 10; Declaration of Danny Garner at ¶ 7. Since Mr. Mieras engaged in no other form of communication other than the sign he held, which he attempted to keep from the view of employees inside the store, he can only assume that Danny Garner referred to his sign when he said Mr. Mieras communicated with a Schumacher employee. Third Supp. Affidavit of Kevin Mieras at ¶¶10-12. Thus, it appears that plaintiffs seek to use the injunction to stop Mr. Mieras from engaging in protected First Amendment activity.

Finally, plaintiffs would have the Court believe that Mr. Mieras’ behavior in front of the Schumacher Fur store on May 19, 2007 made Schumacher employees “mentally and physically worn down” and caused Gregg Schumacher to be fearful. Declaration of Gregg Schumacher in

Response at ¶ 2; Danny Garner Declaration at ¶ 2. This assertion strains credibility in light of the video that depicts the peaceful and non-confrontational tenor of the protest on that day (and on May 26, 2007). Third Supp. Affidavit of Kevin Mieras at ¶ 14; Ex. A. Moreover, the video shows that Schumacher employees were on hand to videotape the demonstrations on both Saturdays, yet the plaintiffs have presented no video evidence to support their claim that Mr. Mieras' behavior made them fearful. As with all plaintiffs' assertions described above – the *lack* of evidence speaks for itself.

III. CONCLUSION

Based on the foregoing, Defendant Kevin Mieras respectfully requests that the Court grant his Motion for Reconsideration of Injunctive Order Dated May 22, 2007.

DATED: June 13, 2007



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