

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BILL O'NEILL, : CIVIL ACTION
Plaintiff, :
 :
v. :
 :
TOWNSHIP OF NORTHAMPTON :
TOWNSHIP OF LOWER SOUTHAMPTON :
TOWNSHIP OF UPPER SOUTHAMPTON :
TOWNSHIP OF WARMINSTER, :
Defendants. : NO. 00-CV-1559

MEMORANDUM & ORDER

J.M. KELLY, J.

DECEMBER , 2001

Presently before the Court are the following Motions: (1) the Motion for Summary Judgment of Defendant, Township of Lower Southampton ("Lower Southampton"); (2) the Motion for Summary Judgment of Defendants, Township of Upper Southampton ("Upper Southampton") and Township of Northampton ("Northampton"); (3) the Amended Motion to Dismiss of Defendant, Warminster Township ("Warminster"); and (4) the Counter-Motion for Summary Judgment of Plaintiff, Bill O'Neill ("O'Neill").

BACKGROUND

This action was initially commenced by O'Neill as a petition for a writ of mandamus and a motion for a preliminary injunction. O'Neill was an unsuccessful candidate for the Republican Party nomination for the Pennsylvania State Assembly in the 178th District. The nomination was decided in a primary election on

April 4, 2000.¹ Defendants Northampton, Lower Southampton, of Upper Southampton and Warminster are municipalities located within the 178th Assembly District. Each Defendant requires that candidates for political office post a bond prior to placing signs advertising their candidacy in the municipality. These bonds range from \$50.00 to \$135.00. Non-political entities must post the same bond before posting signs. O'Neill paid the required bond in Northampton, Upper Southampton and Lower Southampton, but not in Warminster. O'Neill sought injunctive relief because he believed Defendants' bond requirements were interfering with his free speech rights under the First Amendment. The injunction was denied because O'Neill failed to demonstrate a likelihood of success on the merits and that he would suffer irreparable harm absent an injunction. O'Neill subsequently filed a Complaint.

STANDARD OF REVIEW

A. Motion to Dismiss

In considering whether to dismiss a complaint for failing to state a claim upon which relief can be granted, a court must consider only those facts alleged in the complaint and must accept those facts as true. Hishon v. King & Spalding, 467 U.S.

¹ O'Neill, with 857 votes, was defeated in the primary election by Roy Reinard, with 4,005 votes. Department of State, Official 2000 General Primary Results for Representative in the General Assembly for District 178, at <http://web.dos.state.pa.us/elections/elec-results/cgi-bin/district2.cgi?choice=STH&district=178&eyear=2000&etype=P>.

69, 73 (1983). Moreover, the complaint is viewed in the light most favorable to the plaintiff. Tunnell v. Wiley, 514 F.2d 971, 975 n.6 (3d Cir. 1975). In addition to these expansive parameters, the threshold a plaintiff must meet to satisfy pleading requirements is exceedingly low: a court may dismiss a complaint only if the plaintiff can prove no set of facts that would entitle the plaintiff to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). A complaint must, however, set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

B. Summary Judgment

Under Federal Rule of Civil Procedure 56(c), summary judgment "shall be rendered forthwith 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." This court is required, in resolving a motion for summary judgment pursuant to Rule 56, to determine whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In making this determination, the evidence of the nonmoving party is to be believed, and the district court must draw all reasonable inferences in the nonmovant's favor. See id. at 255.

Furthermore, while the movant bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact, Rule 56(c) requires the entry of summary judgment "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

DISCUSSION

A. Warminster

Warminster initially filed a Motion to Dismiss which the Court denied by Memorandum and Order dated May 17, 2001. In its renewed Motion to Dismiss, Warminster argues that O'Neill's deposition testimony conclusively proves that he suffered no restraint upon his speech as a result of Warminster's Ordinance. As an initial matter, the Court is not permitted to review evidence beyond the Complaint, such as O'Neill's deposition testimony, on a motion to dismiss. Other than O'Neill's deposition testimony, the present Motion adds nothing to Warminster's previous argument. The Court is not inclined to convert the present Motion to a motion for summary judgment on this issue as there remains a very real possibility that a subsequent candidate will be faced with the choice of posting a

bond, campaigning illegally in Warminster or not campaigning in Warminster at all. See Patriot Party of Allegheny Co. v. Allegheny Co. Dep't of Elections, 95 F.3d 253, 257 (3d Cir. 1996) (holding that First Amendment election issue is likely to be repeated but not subject to review before issue becomes ripe).

B. Restrictions Upon Speech

The initial inquiry in First Amendment analysis is whether the challenged restriction upon free speech is content-neutral. Rappa v. New Castle Co., 18 F.3d 1043, 1053 (3d Cir. 1994). The proper test for content neutrality is far from clear. See Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (plurality, concurrence and dissent all view city's regulation of noncommercial billboards in a different manner, thereby creating no majority test). Where a regulation of speech is content based, the governmental entity regulating speech must show that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." Boos v. Barry, 485 U.S. 312, 321 (1988). The United States Court of Appeals for the Third Circuit has developed the following test:

[W]hen there is a significant relationship between the content of particular speech and a specific location or its use, the state can exempt from a general ban speech having that content so long as the state did not make the distinction in an attempt to censor certain viewpoints or to control what issues are appropriate for public debate and so long as the exception also survives the test proposed by the Metromedia concurrence: i.e. the state must show that the exception is substantially related to advancing an

important state interest that is at least as important as the interests advanced by the underlying regulation, that the exception is no broader than necessary to advance the special goal, and that the exception is narrowly drawn so as to impinge as little as possible on the overall goal.

Rappa, 18 F.3d at 1065.

A regulation of speech that is not content based may restrict the time, place and manner of the protected speech. Rappa, 18 F.3d at 1054. The restrictions must, to survive the time, place and manner analysis, be: "(1) justified without reference to the content of the regulated speech, (2) . . . narrowly tailored to serve a significant governmental interest, and (3) . . . leave open ample alternative channels for communication of the information." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

O'Neill complains of the following infirmities in the Ordinances of the Townships: (1) the Ordinances are content based in that they target political speech; (2) the use of escrow payments acts as a de facto fee for political speech; (3) allowing political parties to pay one escrow payment for a slate of endorsed candidates unfairly favors endorsed candidates; and (4) the Ordinances unduly restrict the time place and manner of political speech.

C. Escrow Payments

The Defendants impose an escrow requirement in order to ensure that political signs are removed following an election.

The Townships have an interest in maintaining the aesthetics and character of their townships by having political signs removed. This may well be a content based restriction in that the sign may have a dual message. For example, a sign that read "O'Neill, Republican for Assembly," while conveying the message to vote for O'Neill, could also be conveying the message to vote for a Republican for Assembly. Without further development of the record, the Court cannot say that the escrow scheme is not more important than the aesthetic interests of the Townships, the ordinances are not broader than necessary and the escrow scheme is as narrowly drawn as possible. The escrow schemes may also fail a time, place and manner examination.

D. Northampton

Northampton's sign ordinance is codified at Article XVI of the Northampton code. The intent and purpose of the sign ordinance are stated as: (1) minimizing hazards to vehicles and pedestrians; (2) protecting the aesthetics and character of the Township; (3) preventing "unsightly and detrimental sign development;" and (4) establishing standards for size, design, placement and construction of signs. § 140-82. A political sign is defined as "a sign which promotes or addresses a candidate for public office, political party, ballot or election issue or political issue." § 140-83. A sign greater than two square feet in area requires a zoning permit, unless it meets one of fourteen

enumerated exemptions. § 140-84. In addition, signs may not obstruct the view of traffic, be placed in the right-of-way of a street or road or be placed on utility poles or similar objects. Id. One political sign may be erected in a residential lot, § 140-85, but not in a commercial or industrial district. § 140-86. A political sign in a residential district may not be illuminated. § 140-88.

It does not appear that Northampton is attempting to censor a viewpoint in order promote a governmental view, therefore Northampton must show that its Ordinance is necessary to a compelling interest while narrowly drawn to serve that interest. In viewing O'Neill's Complaint, it is certain that there is a compelling interest in protecting pedestrian and traffic safety by limiting the signs that may be placed in the right-of-way of a street or road or on utility poles or similar objects. There is a significant relationship between the restriction on signs in those areas and traffic and pedestrian safety. Limiting signs in those areas to ones that are necessary to the flow of traffic is a narrowly drawn restriction. Accordingly, these restrictions pass the content based test. As the restrictions are not content based, the Court must determine whether it is a valid restriction on the time, place and manner of communication. While the restriction can be justified without reference to content and is narrowly tailored to serve a significant governmental interest,

the record is unclear on whether ample alternative channels for communication of a candidate's message exist. Northampton does not allow more than one political sign per residential lot and does not allow political signs in commercial or industrial zones. Likewise, Northampton does not allow political signs to be illuminated. Therefore, summary judgment is inappropriate on this issue.

E. Upper Southampton

Upper Southampton's sign regulations are codified at § 712 of the Township Code which provides that the purpose of the ordinance is to promote "health, safety and general welfare by lessening hazards to pedestrian and vehicular traffic, by preserving property values, [and] by preventing unsightly and detrimental development." Only official signs are allowed within street lines. § 712(1)(F)(7). Political signs must not exceed eight feet in area and are permitted in residential, commercial and industrial districts. § 712(2)(B)(2). Political signs must be removed within twenty days of an election. § 712(2)(B)(2)(a).

Upper Southampton's restriction on signs in street lines does not endorse an official position and it is narrowly drawn to serve a significant governmental interest. Accordingly, it is not a content based restriction. There is also no evidence that Upper Southampton unduly restricts the time, place or manner of political signs. Accordingly, summary judgment in favor of Upper

Southampton is proper on this issue.

H. Lower Southampton

Lower Southampton's sign regulations are codified at Chapter 19 of the Township Code. Political signs must be removed within twenty days following an election. Only governmental signs may be placed within the right-of-way of a street.

Lower Southampton's restriction on signs in street lines does not endorse an official position and it is narrowly drawn to serve a significant governmental interest. Accordingly, it is not a content based restriction. There is also no evidence that Lower Southampton unduly restricts the time, place or manner of political signs. Accordingly, summary judgment in favor of Lower Southampton is proper on this issue.

G. Endorsed Slates

A question of fact remains as to whether the Defendants allowed endorsed candidates to pool within one escrow and whether non-endorsed candidates were denied that opportunity. Consequently, summary judgment is not appropriate on this issue.

H. Removal of Signs

O'Neill's Complaint alleges that Northampton removed and destroyed his signs, however, a question of fact remains as to whether Northampton removed and destroyed these signs. In addition, if Northampton's ordinance survives a First Amendment challenge, the removal of the signs would be justified under the

ordinance.

CONCLUSION

The Court shall set out what matters have been resolved in order to help the parties define what issues remain against each Defendant for trial: (1) all claims against Warminster remain to be tried; (2) all Defendants must defend their escrow scheme as a content based restriction on speech and a restraint upon the time place and manner of political speech; (3) Northampton must demonstrate that it provides ample alternative channels for the communication of a candidate's message; (4) all Defendants must defend O'Neill's claim that they restrict content of political speech by allowing endorsed candidates to pool their escrow into one payment while unendorsed candidates are not allowed the same opportunity; and (5) Northampton must defend the allegation that it improperly removed O'Neill's signs.

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TOWNSHIP OF UPPER SOUTHAMPTON :
TOWNSHIP OF WARMINSTER, :
Defendants. : NO. 00-CV-1559

O R D E R

AND NOW, this day of December, 2001, upon consideration of: the Motion for Summary Judgment of Defendant, Township of Lower Southampton (Doc. No 41); (2) the Motion for Summary Judgment of Defendants, Township of Upper Southampton and Township of Northampton (Doc. No 40); (3) the Amended Motion to Dismiss of Defendant, Warminster Township (Doc. No. 42); and (4) the Counter-Motion for Summary Judgment of Plaintiff, Bill O'Neill (Doc. No 56), and the various responses thereto, it is ORDERED:

1. The Motions for Summary Judgment of the Township of Lower Southampton and the Township of Upper Southampton are DENIED IN PART as to whether their escrow schemes for political signs are unconstitutional.

2. The Motion for Summary Judgment of the Township of Lower Southampton is GRANTED IN PART. The Township of Lower Southampton does not place content based restrictions upon the placement of signs.

3. The Motion for Summary Judgment of the Township of Upper Southampton is GRANTED IN PART. The Township of Upper Southampton does not place content based restrictions upon the placement of signs.

4. The Amended Motion to Dismiss of Defendant, Warminster Township is DENIED.

5. The Motion for Summary Judgment of Defendant, Northampton Township is DENIED.

BY THE COURT:

JAMES MCGIRR KELLY, J.