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 **SUPERIOR COURT OF NEW JERSEY**

**PAUL KARDOS : CHANCERY DIVISION MORRIS COUNTY**

 **: GENERAL EQUITY : DOCKET NO.: MRS-C-000102-18**

 **Plaintiff, :**

 **:** Civil Action

**-vs- :**

 **:**

 **:**

**FOX HILLS AT ROCKAWAY :**

**CONDOMINIUM ASSOCIATION, INC. :**

 **:**

 **:**

 **Defendants. :**

***Defendant, Fox Hills at Rockaway Condominium Association, Inc.’s, Reply Brief to Plaintiff’s Opposition to Summary Judgment as to Paragraph 9 of the First Count of the Plaintiff’s Complaint***

***Of Counsel and On the Brief***: George Karousatos, Esq.

***On the Brief***: Daniel J. Giordano, Esq.

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**LEGAL ARGUMENT**

**POINT I**

**BECAUSE THE ISSUE WAS EVALUATED BY JUDGE BRENNAN IN HIS WELL-REASONED STATEMENT OF REASONS, THE LAW OF THE CASE CONTROLS AND THIS SUMMARY JUDGMENT MOTION SHOULD BE GRANTED.**

Defendant asserted that the Court, in the exercise of its discretion should, consistent with Judge Brennan’s well-reasoned Statement of Reasons, find that the regulation at issue here is, on its face, constitutionally sound. Defendant moved for summary judgment as to the only issue remaining in this case: whether requiring board review and approval before a resident is permitted to distribute literature to willing and unwilling residents alike is an unreasonable restriction on the right to free speech as interpreted broadly here in New Jersey.

1. ***Because Sullivan dealt with the federal constitution’s entitlement, it is not precedential or even informative on the issue presented.***

Plaintiff alleges in opposition that Judge Brennan was not aware of the federal case New York Times Co. v. Sullivan, 376 U.S. 254 (1964) when he made his findings. Based on a single quotation of a principle that free speech “may well include vehement . . . attacks on government and public officials,” Plaintiff suggests Judge Brennan’s opinion is “contrary to existing case law” because the Judge’s Statement found that “Defendant has the right . . . to ban flyers . . . containing . . .attacking language.” (Plntf’s Brf, at 2 (quoting emphasized only).

Because Plaintiff relies on Sullivan so heavily, the importance and relation of precedent in this Republic should be discussed. Indeed, because of New Jersey’s most-expansive free speech clause, this Plaintiff is in unprecedented territory; the farthest reaches of any free speech right. As noted in Defendant’s brief in support, the Plaintiff’s actions are not covered by Sullivan or any federal free speech right. Instead, this Plaintiff seeks to further expand the already broad protections provided by the New Jersey Constitution. Because we are dealing in a protection which is not even provided by the federal constitution, federal case law is not helpful, much less precedential and for that reason, it is of no moment whether Judge Brennan was aware of Sullivan.

Additionally, the Court in Sullivan was presented with a set of facts at an intersection of the freedom of speech and the freedom of the press. The New York Times published an editorial advertisement which referenced specific, apparently racist city commissioner. An Alabama court awarded the commissioner $500,000 libel verdict against the newspaper for having published the advertisement. Sullivan, supra, 376 U.S. at 256. So, the question before the Court there was whether a state libel law ran afoul of the U.S. Constitution because it was applied to a newspaper for publishing libelous content about a public official. This Plaintiff wants to be able to be able to distribute pamphlets door-to-door unsolicited, and notwithstanding a contracted no-solicitation policy, throughout an entire 600-unit residential association. No press, no publication, no as-applied state law challenge, indeed no $500,000 verdict against a newspaper here. Just a plaintiff who wants to bother his neighbors with his personal opinions about the governance of the association.

Finally, as to the Plaintiff’s quoted passage from Sullivan: just because the right of free speech “may well include vehement, caustic and sometimes sharp attacks on government and public officials,” does not mean that people have a free speech right to go door-to-door, in a place that contracted to avoid such disturbances, and espouse to everyone his own personal attacks on the volunteer association Board members. Here, we are focused on the single question of whether it is an unreasonable restriction on the right of free speech in New Jersey to require that an association member, prior to being permitted to solicit with his views all of the 600 association members, to seek prior approval from the Board. The answer clearly given already in this case is that it is not unreasonable and that defendant has that right.

1. ***Because the Statement of Reasons already evaluated whether the regulation, standing alone, was constitutionally sound, the integrity of the Court requires a finding that a facial challenge to the regulation must fail.***

Judge Brennan well-reasoned Statement of Reasons evaluated the claims under Dublirer. The Court evaluated the balance between the expressional rights and private property rights. (Statement, at 5). In evaluating the private property rights, the Court emphasized that “Defendant’s rules and regulations regarding flyers and their distribution are constitutionally sound and do not constitute an unreasonable restriction on Plaintiff’s Freed of Speech.” (Ibid.). Whereas previously, Plaintiff sought an as-applied challenge to the Board’s application of this rule to the Plaintiff’s previously proposed flyer, now plaintiff seeks a facial attack on the rules and regulations. This is to say that plaintiff is seeking to get the Court to evaluate whether the rules and regulations are, without reference to a specific application, constitutionally sound. But that question was already answered for him by Judge Brennan.

Judge Brennan reviewed the defendant’s private property rights and already determined that, in the absence of some application, the regulations, standing alone, are “constitutionally sound.” The Court should not, consistent with the law of the case doctrine, find here that the rules and regulations are not constitutionally sound or do represent an unreasonable restriction on the plaintiff’s freedom of speech right as such a finding would be inconsistent with Judge Brennan’s previous opinion on this very same issue. Such inconsistent findings have the dangerous affect of eroding the integrity of the judicial system. See, e.g., Kimball Intern. Inc. v. Northfield Metal Prods., 334 N.J. Super. 596, 607 (App. Div. 2000), certif. denied, 167 N.J. 88 (2001) (quoting Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 599 (6th Cir. 1982) (“Absent judicial acceptance of the inconsistent position, application of [judicial estoppel] is unwarranted because no risk of inconsistent results exists. Thus, the integrity of the judicial process is unaffected.”)).

**POINT II**

**BECAUSE ONLY POLITICAL SPEECH IS ENTITLED TO THE PROTECTION PROVIDED BY THE STATE’S CONSTITUTION, PRIOR REVIEW FROM THE BOARD IS A REASONABLE RESTRICTION ON THIS UNIQUE RIGHT.**

Plaintiff, again relying on federal opinions, suggests that in the unprecedented context here, where a homeowner is seeking to distribute materials, unsolicited, to the entirety of the community, the community must also meet the standard under federal law relating to prior restraint. As noted in defendant’s brief in support of this motion for summary judgment, it is the case that the only speech which is even provided the type of entitlement this plaintiff seeks is political speech. This is to say, that a “prior restraint” is permitted by a condo association’s non-solicitation policy on all non-political speech. Indeed, such a “prior restraint” is permitted in this context virtually everywhere in the country regardless of whether the speech is political. But here in New Jersey, a homeowner is entitled to distribute political flyers to the community. And since there is only one way to ensure that the speech which is entitled to this protection is the speech which is being exercised (political speech), prior approval from the Board before distributing materials is a reasonable restriction on this unique entitlement.

Plaintiff’s position is that he should be entitled to distribute literature to the entire community, notwithstanding that each and every one of the residents signed up to not be bothered with solicitation, and he was to be able to do so wholly unfettered, as of right and without the Board even having reviewed the flyer. But the only way for there to be assurances that the speech being exercised is the speech which is permitted, is for the Board to review the material in advance of its distribution. Because it is imminently reasonable to require authorization from the Board before distributing even political flyers, the defendant’s motion for summary judgment should be granted.

**POINT III**

**BECAUSE PRIOR APPROVAL FROM THE BOARD IS A REASONABLE RESTRICTION ON AN ASSOCIATION MEMBER’S SOLICITING THE OTHER MEMBERS REGARDING HIS OWN OPINIONS ON THE GOVERNANCE OF THE BOARD, THE REGULATION AS WRITTEN IS CONSTITUTIONAL.**

Plaintiff alleges that ‘free speech delayed is free speech denied.’ But there is no basis with which to engraft Gladstone or Penn’s statement on the harm associated with delayed justice on the free speech doctrine. Indeed, no one is delaying plaintiff’s free speech. He can, insofar as he can obtain an audience, discuss all the issues he has, both at Board meetings and amongst his community. The question here is whether a Plaintiff must be required to get Board approval before soliciting unwelcoming association members—who thought they signed up to avoid door to door solicitations—with his own personal opinions on the governance of the association.

Plaintiff also asserts that he wants to engage in point-counter point with the Board, some type of door-to-door back-and-forth about everything that goes on with the association. Indeed, plaintiff already exhibits here the concern that this overbroad application of the free speech rights begs.

Plaintiff suggests that the Board meets too infrequently for his liking because, it is supposed, he wants to regularly disturb association members with his door-to-door pamphlets illustrating his opinions on the governance of the Board. Basically, he wants a position on the Board without actually having persuaded the association members to vote for him. That notwithstanding, it is of no delay that the plaintiff, before breaching the non-solicitation rules of the association, must first get approval from the Board. The elections and board meetings are regularly scheduled. Their dates are known in advance. Consequently, it will not be the case that the plaintiff will not have an opportunity to submit his (apparently regular) pamphlets at the Board meeting in advance of the elections so that he may exercise his political speech in his most invasive manner.

In support of plaintiff’s position, he presents a hypothetical. But the issue presented here is not an as-applied challenge to the regulation; it is instead a facial challenge.

Where, as here, claimants challenge the validity of a statute under the First Amendment, “[t]here are two quite different ways in which a statute ... may be considered invalid ‘on its face’—either because it is unconstitutional in every conceivable application, or because it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally ‘overbroad.’”

[Binkowski v. State, 322 N.J. Super. 359, 369 (App. Div. 1999) (quoting Members of the City Council v. Taxpayer for Vincent, 466 U.S. 789, 796 (1984)).]

Plaintiff presents his facial challenge by presenting a hypothetical set of facts which he alleges renders the regulations a burden to him. But this Plaintiff’s heavy burden must be met not by illustrating a single set of facts (which are not actually burdensome) where the regulation could be unconstitutional. Instead, plaintiff must illustrate that the regulation is unconstitutional “in every conceivable application.” Ibid. Because he has not, and cannot, defendant’s summary judgment should be granted.

**POINT IV**

**BECAUSE THE STANDARD PLAINTIFF BEGS FOR IS CONTAINED IN THE PROVISION FOLLOWING THE PROVISION AT ISSUE, THE REGULATION IS NOT VOID FOR VAGUENESS.**

Plaintiff alleges that the regulation is void for vagueness because there is “no standard for which the Board or anyone can know what is and is not allowed.” (Plntf Brf., at 5). But plaintiff is disingenuous here because he knows that it is Paragraph 3B which houses the standard he here suggests is wanting in Paragraph 3A.

“[T]he constitutional ban on vague laws is intended to invalidate regulatory enactments that fail to provide adequate notice of their scope and sufficient guidance for their application.” State v. Cameron, 100 N.J. 586, 591 (1985). “A statute that is challenged facially may be voided if it is impermissibly vague in all its application, that is, there is no conduct that it proscribes with sufficient certainty.” Id. at 593 (quotation marks omitted).

The regulation challenged here is Paragraph 3A of the Restated Rules and Regulations. Paragraph 3B addresses specifically political flyers. This Paragraph currently reads:

3.B. Political flyers may be distributed door to door with the following limitations:

1. The flyer must relate to the governance or operation of Fox Hills

2. The flyer date and the resident’s name must appear on the flyer; and may not contain any attack against persons or groups

3. The resident distributing the flyer is responsible for following the applicable N.J. Laws (e.g., libel, slander, etc.)

4. Residents from another building distributing flyers door to door must be accompanied by a building resident that allows them in.

The Board plans on revising Paragraph 3B and defendant understands that plaintiff is in agreement with the following language:

Section 3B shall . . . state that political flyers may be distributed door-to-door and/or placed in the flyer rack in the inner lobby of each building with the following limitations:

1. The flyer must relate to the governance and operation of Fox Hills;
2. The flyer date and residents name must appear on the flyer;
3. The resident distributing the flyer is responsible for following all applicable N.J. Laws (e.g., libel, slander, etc.);
4. Residents from another building distributing flyers door to door must be accompanied by a building resident that allows them in. If a building resident is not available, the community manager will furnish an individual to assist in the flyer distributions; and,
5. The flyer must not violate New Jersey or Federal law. By way of example only, the flyer must not incite violence or criticize or in any way negatively refer to religion, race, age, ancestry, color, creed, disability, marital status, domestic partnership status, national origin, sex, sexual orientation, gender identity, intelligence or physical appearance.

Whichever of the regulations is considered; the one that currently exists or one which is similar to the latter, there is a sufficient standard presented here to illustrate the type of literature which the plaintiff is entitled to distribute.

**CONCLUSION**

 For all of the above-stated reasons, and for the reasons presented in Defendant’s Brief in Support, its summary judgment motion should be granted.

 **BIANCAMANO & DI STEFANO, P.C.**

 Attorneys for Defendants, *Fox Hills at Rockaway*

 *Condominium Association, Inc.*



 By:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 GEORGE KAROUSATOS, ESQ.

Date: April 3, 2020