IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

MICHAEL E. SPREADBURY, Plaintiff, vs. BITTERROOT PUBLIC LIBRARY, CITY OF HAMILTON, LEE ENTERPRISES, INC., and BOONE KARLBERG P.C. Defendants.	)	CV 11-64-M-DWM-JCL ORDER

August 3, 2011, Magistrate Judge Jeremiah C. Lynch entered Findings and Recommendations (dkt # 79) recommending that this Court deny Plaintiff Michael

Spreadbury's motion for injunctive relief ("First Request Injunctive Relief," dkt # 70). Spreadbury timely objected to the Findings and Recommendations (dkt # 91). Defendants Boone Karlberg P.C., the City of Hamilton ("the City"), and the Bitterroot Public Library ("the Library") filed a joint response to Spreadbury's objections (dkt # 92), and Defendant Lee Enterprises filed its own response (dkt # 97). Spreadbury is entitled to *de novo* review of those findings or recommendations to which he objected. 28 U.S.C. § 636(b)(1). The portions of the Findings and Recommendations not specifically objected to will be reviewed for clear error. McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc., 656 F.2d 1309, 1313 (9th Cir. 1981).

In his motion for injunctive relief and again in his Objection to the Findings and Recommendations, Spreadbury states that his request is based on Counts 22 through 25 of his Second Amended Complaint.[1] (Dkt # 70, 4; dkt # 91, 2). Count 22 asks the court to enjoin Defendant Boone Karlberg from making defamatory statements about Spreadbury. (Dkt # 90, 38–39.) Count 23 asks the court to prohibit Lee Enterprises from publishing defamatory articles and comments about Spreadbury. (Id. at 39–40.) Count 24 asks the Court to mandate that the

[1]In his motion for injunctive relief, Spreadbury also requested the Court "quash a civil order of protection." However, Spreadbury did not object to Judge Lynch's recommendation that this request be denied, and this Court finds no clear error in Judge Lynch's determination.

Bitterroot Public Library restore his library privileges. (Id. at 41.) Count 25 seeks injunctive relief against the City of Hamilton, but the specific relief requested is unclear. Generally, Spreadbury asks the Court to enjoin the City of Hamilton from violating his civil rights. (Id. at 41–42.)

Judge Lynch found that Spreadbury is not entitled to a preliminary injunction against any of the Defendants. Because I agree with Judge Lynch's analysis and conclusions, I adopt his Findings and Recommendations in full. The procedural and factual background of the case will not be restated here as the parties are familiar with it and it has been described in previous findings and recommendations adopted by this Court in this matter. (See dkt ## 67, 75.)

I.

Judge Lynch properly construed Spreadbury's request for injunctive relief as a motion for a preliminary injunction against each defendant. A preliminary injunction is an "extraordinary and drastic remedy" that "is never awarded as of right." Munaf v. Geren, 553 U.S. 674, 689–690 (2008). Courts apply a four-factor balancing test to determine whether a preliminary injunction is merited. A plaintiff must show "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of hardships tips in his favor, and that an injunction is in the public interest."

Vanguard Outdoor, LLC v. City of Los Angeles, 648 F.3d 737, 739 (9th Cir. 2011)(quoting Winter v. Nat. Resources Def. Council, Inc., 555 U.S. 7, 20 (2008)).

Judge Lynch found that Spreadbury failed to meet this burden. Judge Lynch noted that Spreadbury did not address any of the Winter factors and particularly failed to demonstrate any likelihood of success on the merits of his claims.

In his Objection, Spreadbury attempts to address the first two Winter factors. He concentrates on the irreparable harm he believes he will face without an injunction. Another section of his brief is titled "Merits of Case," but he largely fails to explain why he is likely to succeed on any of his claims, merely reasserting the bare allegations. When a plaintiff fails to demonstrate a likelihood of success on the merits of his claims, his motion may be denied. Vanguard Outdoor, LLC, 648 F.3d at 739.

A. Boone Karlberg and Lee Enterprises

Spreadbury is not entitled to injunctive relief against Boone Karlberg or Lee Enterprises.

Some of Spreadbury's claims have been rendered moot by recent orders entered by this Court. This Court's Order dated September 27, 2011 (dkt # 107) dismissed Count 22 and all other claims against Boone Karlberg for failure to state

a claim upon which relief can be granted. Boone Karlberg is no longer a party to this case. This Court also dismissed Spreadbury's claims against Lee Enterprises insofar as they pertain to published reports on judicial proceedings involving Spreadbury, again for failure to state a claim upon which relief can be granted (October 4, 2011 Order, dkt # 113). Spreadbury is not entitled to preliminary injunctive relief related to claims that have been dismissed, because he has no likelihood of success on those claims. Accordingly, Spreadbury's request for injunctive relief against Boone Karlberg is denied, as is his request that Lee Enterprises be enjoined from publishing privileged news reports about him.

Nor is Spreadbury entitled to preliminary injunctive relief based on his one remaining claim against Lee Enterprises. This claim concerns the defamatory "comments" Lee Enterprises allegedly published online, which Judge Lynch found are likely to be protected under the Communications Decency Act. See Findings and Recommendations, dkt #79, 5–6. In his Objection, Spreadbury did not object to Judge Lynch's finding on this claim, merely reasserting the claims that have been dismissed. Accordingly, Judge Lynch's finding on this point is reviewed for clear error. The Court finds no clear error and so adopts Judge Lynch's determination that Spreadbury failed to show 1) a likelihood of success on the merits of the claim, 2) that the balance of hardships tips sharply in his favor, and

3) that he will suffer irreparable harm.

B. Bitterroot Public Library

The Court also adopts Judge Lynch's finding that Spreadbury is not entitled to injunctive relief against Defendant Bitterroot Public Library. In his Objection, Spreadbury generally realleges his claim that the Library denied him library privileges without cause, violating his due process rights under the Fifth and Fourteenth Amendments of the United States Constitution. (Dkt # 91, ¶ 4.) However, Mr. Spreadbury does not have a Fifth Amendment claim, and there are insufficient facts in the record to show a likelihood of success on the merits of his Fourteenth Amendment claim. Moreover, even if Spreadbury's bare allegations sufficed, he cannot show that irreparable harm is likely if an injunction is not granted.

1. Fifth Amendment Claim

Spreadbury does not have a Fifth Amendment claim against the Library. The Fifth Amendment's due process clause only applies to the federal government. See Bingue v. Prunchak, 512 F.3d 1169 (9th Cir. 2008)(citing Betts v. Brady, 316 U.S. 455, 462, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942), overruled on other grounds by Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); Castillo v. McFadden, 399 F.3d 993, 1002 n. 5 (9th Cir. 2005)).

The Library is not a federal actor. Spreadbury has not alleged that the Library is a federal actor, and the Library implicitly denies it is a federal actor in its response to Spreadbury's Objection (dkt # 92, 7). Both parties describe the Library as a "public library." Authority for establishing a public library is derived from state law. The Montana Code Annotated explains that a public library may be established by a county or city, by a citizen petition and vote of city or county electors, or under Title 7 of the Montana Code Annotated, which regulates local government. Mont. Code Ann. § 22-1-301, -303. The local government unit appoints a public library's board of trustees, which is responsible for establishing the library's rules and regulations. Id. at § 22-1-311. Because the Library is a local, not federal, unit, the Fifth Amendment does not apply to its actions.

2. Fourteenth Amendment Claim

The Fourteenth Amendment provides the same due process protections as the Fifth Amendment, but against state actors. U.S. Const. Amend. XIV, § 1 ("nor shall any *State* deprive any person of life, liberty, or property, without due process of law" (emphasis added)). In order to establish a likelihood of success on the merits of a due process claim, "the plaintiff must establish the existence of '(1) a liberty or property interest protected by the Constitution; (2) a deprivation of the interest by the government; [and] (3) [a] lack of process.'" *Shanks v. Dressel*, 540

F.3d 1082, 1090 (9th Cir. 2008) (quoting *Portman v. Co. of Santa Clara*, 995 F.2d 898, 904 (9th Cir. 1993)).

Whether the privilege to visit a public library constitutes a property interest under the Fourteenth Amendment has not been decided by the Ninth Circuit,[2] and the parties do not discuss the question. Where an alleged property interest is created by state law, federal constitutional law determines whether the plaintiff enjoys a "legitimate claim of entitlement" protected by the 14th Amendment. Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748, 756–757 (2005)(citations omitted). The "hallmark of property...is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'" Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982). First, the Court must determine what the state law provides. Town of Castle Rock, Colo., 545 U.S. at 757.

Montana Code Annotated § 22-1-311, provides:

> Every library established under the provisions of this part shall be free to the use of the inhabitants of the city or the county supporting such library. The board may exclude from the use of the library any and all persons who shall willfully violate the rules of the library. The board may extend the privileges and use of the library to persons residing outside of the city or county upon such terms and conditions as it may

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[2] Notably, however, the Third Circuit Court of Appeals has held that "First Amendment jurisprudence[] includes the right to some level of access to a public library, the quintessential locus of the receipt of information." Kreimer v. Bureau of Police for Town of Morristown, 958 F.2d 1242 (9th Cir. 1992).

prescribe by its regulations.

Thus, a public library is open to all inhabitants of the city or county supporting the library. However, the State explicitly permits each library board to establish rules for the library and to exclude anyone who willfully violates those rules.

Even assuming that this statute does create a property interest, Spreadbury has not demonstrated he is likely to succeed on his claim that the Library denied him due process when it revoked his library privileges. Generally, due process requires "notice and an opportunity to respond," in person or in writing. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546 (1985). While Spreadbury alleges that the director of the library cancelled a meeting with him prior to banning him from the library, he admits he was able to and did submit a Reconsideration Request. (Second Amended Complaint, ¶¶ 33–37.) The Library's alleged failure to respond to this Request does not on its own demonstrate that Spreadbury is likely to succeed on his claim he was denied procedural due process.[3]

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[3] The cases cited by Spreadbury do not relate to this claim. In Paul v. Davis, 424 U.S. 693 (1976), the plaintiff's name and photograph appeared on a flyer entitled "Active Shoplifters" that police distributed to stores. The Court held that simple defamation does not violate a person's liberty or property interests under the Fourteenth Amendment. Johnson v. Knowles, 113 F.3d at 1118–1120 (9th Cir. 1977), discusses when a private action amounts to state action. Matthews v. Eldridge, 424 U.S. 318 (1976), discusses the condemnation of federal trust lands and what constitutes appropriate compensation under the Fifth Amendment and New Mexico-Arizona Enabling Act.

The Court need not decide here what "procedural protections... this particular situation [might] demand," Gilbert v. Homar, 520 U.S. 924, 930 (1997)(quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)), because Spreadbury cannot show he will suffer irreparable harm in the absence of an injunction. "[A] preliminary injunction will not be issued simply to prevent the possibility of some remote future injury." Winter, 555 U.S. at 22 (quoting (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948.1, at 155 (2d ed. 1995)). An applicant must "demonstrate that irreparable injury is *likely* in the absence of an injunction." Id. (emphasis in original; citations omitted).

An injunction here would not prevent any harm, much less irreparable harm, from occurring. Even if the Court granted an injunction, Spreadbury would still be prohibited from visiting the library. A Permanent Order of Protection, which will not expire until November 20, 2014, requires that Spreadbury stay at least 600 feet away from the Library. This Court takes judicial notice that this Protective Order was granted by the Hamilton City Court and affirmed by the Twenty-First Judicial District Court for the County of Ravalli, Montana. The Montana Supreme Court has twice denied Spreadbury's attempts to appeal the Order and has cautioned Spreadbury from using it as a way to harass the library staffperson who

obtained the order.

Because Spreadbury cannot show irreparable harm in the absence of a preliminary injunction, and because the bare allegations and few facts in the record do not demonstrate a likelihood of success on the merits of this claim, Spreadbury is not entitled to a preliminary injunction against the Library.

C. City of Hamilton

Spreadbury seeks generally to enjoin the City of Hamilton from violating his civil rights. The allegations in his Objection are varied and vague, referring to encounters with city police as well as the District Court for the County of Ravalli and the County Sheriff's Department, which are not parties to this action.

The Ninth Circuit grants district courts discretion to consider, or not consider, evidence presented for the first time in an objection to a magistrate judge's recommendation. U.S. v. Howell, 231 F.3d 615 (9th Cir. 2000). Given that several of Spreadbury's allegations were raised for the first time in his Objection, and moreover appear unrelated to the underlying matter, this Court will not consider evidence that was not previously in the record. Thus, this opinion is limited to Spreadbury's argument that the City deprived him of his rights of free speech and assembly by directing him to stay away from Lee Enterprises's private property and by enforcing either the Protective Order or the Library's ban of

Spreadbury from its property.

"'The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" Klein v. City of San Clemente, 584 F.3d 1196, 1208 (9th Cir. 2009)(quoting Elrod v. Burns, 427 U.S. 347, 373 (1976)). However, First Amendment rights are not absolute. Chaplinsky v. N.H., 315 U.S. 568, 572–572 (1942); Am. Commun. Assn., C.I.O., v. Douds, 339 U.S. 382, 394 (1950). The scrutiny applied to restrictions on First Amendment rights varies depending on what type of forum is involved. See Christian Leg. Socy. Chapter of the U. of Cal., Hastings College of the L. v. Martinez, 130 S.Ct. 2971, 2984–2985 (2010). On private property that has not been dedicated to a broad public purpose, First Amendment protection is at its weakest. Lloyd Corp., Limited v. Tanner, 407 U.S. 551, 569–570 (1972). On public property that has been dedicated to a limited purpose, restrictions on First Amendment activities need only be reasonable and viewpoint neutral. Christian Legal Soc., 130 S. Ct. at 2984–2985. See also Kreimer, 958 F.2d at 1260–1262 (holding that a library is a limited public forum).

Spreadbury has not demonstrated that he is likely to succeed on the merits of his claim that his rights of free speech and assembly have been violated. His allegations do not show he has a protected liberty interest in accessing the private

business offices of Lee Enterprises, and the record does not indicate the police department engaged in viewpoint discrimination when it instructed him to leave the premises. Nor has Spreadbury demonstrated a likelihood of success on his claim that the Library violated his due process rights in barring him from the Library. No evidence suggests the Library's rules and application of its rules were anything but reasonable and viewpoint neutral, and the Court has already recognized the Protective Order as legal and enforceable. Spreadbury has failed to show any likelihood that the Police Department violated his First Amendment rights in citing him for trespass and cautioning him to stay away from Lee Enterprises and the Library.

Because Spreadbury has not shown that the Police Department's actions violated his First Amendment rights and his remaining allegations are too vague to permit analysis, he is not entitled to a preliminary injunction against the City of Hamilton.

II.

Finding no clear error in Judge Lynch's remaining findings and recommendations and based on the foregoing, this Court holds that Spreadbury is not entitled to a preliminary injunction against any of the Defendants.

Accordingly, IT IS HEREBY ORDERED that Judge Lynch's Findings and

Recommendations (dkt # 79) are ADOPTED.

IT IS FURTHER ORDERED that Spreadbury's Motion for a preliminary injunction (dkt # 70) as to all Defendants is DENIED.

Dated this 17 day of October, 2011.

Donald W. Molloy, District Judge
United States District Court