

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

KingCast.net

v.

Civil No. 10-cv-501-PB

Friends of Kelly Ayotte, et al.

REPORT AND RECOMMENDATION

Before me is plaintiff Chris King's¹ motion for temporary restraining order (Doc. No. 2). An evidentiary hearing took place on today's date. For the reasons stated below, I recommend that the court deny the motion.

I. Motion to Strike

As a preliminary matter, the court denies defendants' motion to strike plaintiff's video exhibit. The exhibit contains editorial content in addition to footage of relevant events. The video originally was attached to Doc. No. 2 in KingCast.net v. N.H. Republican Party, No. 10-cv-492-PB (D.N.H.). The editorial content is at times inflammatory. However, for purposes of the motion now before it, the court

¹No appearance has been filed by a licensed attorney on plaintiff Kingcast.net's behalf, as is required by Local Rule 83.2. At the hearing, the court granted King's oral motion to amend the complaint to name himself individually as plaintiff. The court ordered King to file a written amended complaint on or before November 16, 2010.

accepts and considers the relevant footage contained in the video and disregards all editorial content.

II. Legal Standards

In deciding whether to issue a temporary restraining order ("TRO"), the court examines (1) the plaintiff's likelihood of success on the merits of its claim, (2) the risk of irreparable harm to the plaintiff absent the injunction, (3) how that threatened harm balances against the harm that granting the motion threatens to cause the defendant, and (4) any effect the ruling would have on the public interest. See, e.g., Naser Jewelers, Inc. v. City of Concord, 513 F.3d 27, 32 (1st Cir. 2008). While all four factors must be considered, "[t]he sine qua non of this four-part inquiry is likelihood of success on the merits." New Comm Wireless Servs. v. SprintCom, Inc., 287 F.3d 1, 9 (1st Cir. 2002).

III. Discussion

Plaintiff has not, on this limited record, shown either likelihood of success on his claims, or the necessary exigency for entry of a TRO.

Plaintiff Chris King is an African American journalist who runs two internet blogs, "Chris Kings 1st Amendment Page" and "Kelly Ayotte Senate Blog." He filed a multi-count complaint under federal and state law in New Hampshire state court against defendants Kelly Ayotte Senate Campaign, the New Hampshire

Republican Party, Nashua Republican City Committee, and the Nashua Police Department. All defendants removed the case to this court under the general removal statute, 28 U.S.C. § 1446.

Plaintiff brings claims for violation of the First, Fourth, and Fourteenth Amendments to the U.S. Constitution, a violation of 42 U.S.C. § 1981, and state law claims for assault, false arrest, and negligence. The central events alleged in the complaint concern the actions of the defendants toward King during three political party rallies: (1) the August 29, 2010, Kelly Ayotte Facebook rally, (2) the September 12, 2010, Joe Arpaio event, and (3) the October 2, 2010, John McCain event. Plaintiff entered or sought entry to all three events as a journalist, but was either denied entry or was escorted from the event by Nashua police at the direction of persons working for the political party event sponsors. At all three events other media, all of whom were Caucasian, were allowed entry and were allowed to remain at the events. Evidence regarding one additional event that occurred on November 1, 2010, in Portsmouth, NH, was submitted at the hearing.

In his motion for a TRO, plaintiff seeks an emergency injunction requiring defendants to allow his entry to campaign events. At the hearing, however, plaintiff identified only a single imminent event to which he seeks entry, an anticipated Kelly Ayotte event tonight following the election. The event is

to be held on private property, the Grappone Center in Concord, is sponsored by the Friends of Kelly Ayotte, and is an event for Kelly Ayotte's supporters.

The court finds, on the limited record before it, that King is not likely to succeed on the merits of his claims. First, plaintiff is unlikely to succeed on his claim of race discrimination under the Fourteenth Amendment. To succeed on his claim, plaintiff must show that defendants acted with discriminatory intent. Washington v. Davis, 426 U.S. 229, 238-48 (1976). Plaintiff offers as proof of such intent, evidence (1) that he is the only black journalist at these events and the only journalist excluded from the events; (2) that Kelly Ayotte, a candidate for U.S. Senate, has refused to answer King's question to her whether she repudiates the racist sentiments of a certain website, and (3) that Ayotte and King have a past acrimonious history. The court finds that such evidence is insufficient proof of discriminatory intent on the part of any of the political party defendants or the Nashua police. In addition, King has not shown that any of the political party defendants are state actors for purposes of King's race discrimination claim. See Alberto San v. Consejo De Titulares Del Condominio San Alberto, 522 F.3d 1, 4 (1st Cir. 2008).

Second, King is unlikely to succeed in proving a violation of his First Amendment right to free speech. This court's

decision in Kay v. Bruno, 605 F. Supp. 767 (D.N.H. 1985), aff'd 821 F. 2d 31 (1st Cir. 1987), provides the relevant legal analysis for most of the events at issue in this proceeding. In Kay, this court held that plaintiff, a candidate for the United States presidency, failed to allege a violation of his First Amendment right to free speech against a private political organization who secured police assistance in removing plaintiff from a private political event. The court found that, because the event was a private event and was held on private property, (1) defendant political organizations were not "state actors" when they sought the assistance of police to remove plaintiff from the event, and (2) the rental of a building at a private college was not the "equivalent to the establishment of a public forum." Id. at 772.

In the present case, the Kelly Ayotte Facebook rally, the GOP Arpaio Fundraising rally, and the McCain rally, were all held by the private political organization defendants on private property. Specifically, the Facebook rally was held at a private parking lot; the Arpaio rally was held at the Crowne Plaza Hotel in Nashua; and the McCain rally was held at the VFW hall in Nashua.

King argues that the events and the properties on which they were held were essentially public forums. The court rejects the argument. The fact that the political organizations

invited the public and all media to the events did not convert these private events to public forums. Cf. Koczak v. Grandmason, 684 F. Supp. 763 (D.N.H. 1988) (holding private event sponsored by private political organization on grounds of public university not equivalent to public forum). See also Lloyd Corp. v. Tanner, 407 U.S. 551, 569 (1972) (holding shopping mall not public forum because property does not "lose its private character merely because the public is generally invited to use it").

Three other discrete occurrences for which plaintiff submitted evidence require further discussion. The first instance involves a police officer asking King to move off a sidewalk outside the VFW hall during the McCain rally. This situation is not governed by the Kay decision because it does involve a public forum (the sidewalk) and a state actor (the police officer). The court finds that the officer's actions do not amount to a violation of King's First Amendment rights. The video submitted by King shows that the action of the officer was de minimus and reasonable under the circumstances. The officer asked King to move in order to allow a car to maneuver through a parking lot. There is no evidence that King was not allowed back to the sidewalk after the car moved.

The second and third instances that this court must evaluate outside the purview of Kay, are ones involving Kelly

Ayotte's security guard, Steve Monier. At the Facebook rally, the McCain rally, and outside the diner in Portsmouth, Monier thwarted King's efforts to approach Kelly Ayotte. Monier testified that he believed King's jostling and pushing to get close to Ayotte were a threat to Ayotte. The court finds, on this limited record, that Monier reasonably believed King to be of some danger to Ayotte. His conduct, therefore, cannot be said to be motivated by the content of King's speech. In addition, in all of those instances Monier was acting as a private individual and not under color of state law. To the extent that Monier called the police during the Facebook incident, there was no evidence that police played any role in that incident.

Finally, King is not likely to prevail on his state law claims for false arrest, assault, and negligence. Those claims are undermined by the right of the defendants to remove King from private events taking place on private property and to protect Kelly Ayotte.

With respect to the exigency of King's request for a temporary restraining order, the court finds that the single imminent event planned for tonight is a purely private event to which King is not entitled to access, for the reasons set forth in Kay. King admits that no other events are imminent.

IV. Conclusion

For all of these reasons, this magistrate judge recommends that the court deny King's motion for a temporary restraining order (Doc. No. 2).

Any objections to this report and recommendation must be filed within fourteen (14) days of receipt of this notice. Fed. R. Civ. P. 72(b)(2). Failure to file objections within the specified time waives the right to appeal the district court's order. See *Unauthorized Pract. Of Law Comm. v. Gordon*, 979 F.2d 11, 13-14 (1st Cir. 1992).



Landya B. McCafferty
United States Magistrate Judge

Dated: November 2, 2010

cc: Brian J.S. Cullen, Esq.
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