

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO:

BRUCE KEVIN BATES,)
)
Plaintiff,)
)
vs.)
)
CITY OF WEST PALM BEACH,)
a Florida municipal corporation,)
WEST PALM BEACH COMMUNITY)
REDEVELOPMENT AGENCY, a public)
entity created by the City and authorized)
by Florida law, and CITYPLACE)
COMMUNITY REDEVELOPMENT)
DISTRICT, a local government unit of)
special purpose authorized by Florida law,)
)
Defendants.)
	/

COMPLAINT

Bruce Kevin Bates sues the City of West Palm Beach, the West Palm Beach Community Redevelopment Agency, and the CityPlace Community Redevelopment District, and alleges:

Introduction

1. By this action, Plaintiff, a prominent visual artist who enjoys painting streetscapes, challenges the Defendants' virtual ban on various expressive activities on public sidewalks, streets and a plaza at CityPlace, an upscale outdoor mixed-use mall in West Palm Beach which characterizes itself as "reminiscent of an Italian town center." Under policies and a licensing scheme that purport to allow some other narrow expression, officials are vested with unfettered, unreviewable, standard-less discretion to grant licenses for a fee primarily to benefit a private business. Compounding this exercise of discretion, officials are expressly given the

authority to grant licenses based on the content and viewpoint of the expression. They enforce these policies through threats of arrest and criminal prosecution, and ban certain individuals from entire blocks of the City, including public streets, sidewalks, and parks.

Parties and Jurisdiction

2. This action arises under the First Amendment to the United States Constitution for which 42 U.S.C. § 1983 provides a remedy.

3. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343 (a)(3) and (a)(4).

4. Venue is appropriate in the Southern District of Florida because the cause of action accrued in Palm Beach County, Florida and because one Defendant is a municipality located in Palm Beach County, Florida and the other two are governmental entities also located in Palm Beach County, Florida.

5. Plaintiff, Bruce Kevin Bates, hereinafter referred to as Bates, is an adult part-time resident of Palm Beach County.

6. Defendant, City of West Palm Beach, hereinafter referred to as the City, is a Florida municipal corporation located in Palm Beach County, Florida.

7. Defendant, West Palm Beach Community Redevelopment Agency ("CRA"), is a public entity created by the City and authorized by Part III of Chapter 163, Florida Statutes to carry out community redevelopment purposes, and is located in Palm Beach County, Florida.

8. Defendant, CityPlace Community Redevelopment District ("District"), is a local government unit of special purpose established pursuant to Chapter 190, Florida Statutes, and is located in Palm Beach County, Florida.

9. At all material times, the defendants and their agents and officers acted under color of state law and pursuant to the customs, practices and policies of the City, the CRA and the District. Notably, the City has adopted Ordinance Sec. 54-1, adopting all state laws relating to misdemeanors, including trespass, as its own official policy. In addition, the defendants, their agents and officers acted in concert with the owners of CityPlace, CityPlace Retail, L.L.C., Palladium at City Place, and other retailers and entities associated with CityPlace. (collectively, "CityPlace").

Bates, the Artist

10. Bates is a visual artist who enjoys painting scenes of Florida city streetscapes.

11. On August 27, 2009, Bates traveled to CityPlace in downtown West Palm Beach. Bates set up a portable easel, a portable chair, some painting supplies, and three unfinished canvases, in the Plaza area at the south end of the Harriet Himmel Theater and near South Rosemary Street. The Plaza area is depicted on Exhibit A, which is attached hereto. Bates located himself next to a planting around a palm tree, out of the way of foot traffic. He began painting the city scene in front of him.

12. At approximately 10:55 a.m., West Palm Beach police officer Brian Gellin and head of CityPlace security, Willie Perez, approached Bates and told him that he was on "private property" and that he needed to leave. When Bates did not immediately comply, Joseph Ianno, Jr., and Ryan Hallihan, who identified himself as the general manager of CityPlace, arrived.

13. At approximately 11:10 a.m., Officer Gellin issued a trespass warning to Bates. The trespass warning, attached hereto as Exhibit B, states that the owner or lessee of the property is "Palladium at City Place." The trespass warning further states that the trespass is "upon private property located at the above address," and

"The offender further acknowledges that if he/she returns to the listed property that he/she is *subject to arrest for the offense of Trespassing*. This warning will remain in force until canceled in writing by the owner/lessee, or authorized representative of said property."

(emphasis original). Therefore, the warning and prohibition is indefinite.¹

14. The second page of the trespass warning is a map of all of CityPlace, extending from Okeechobee Avenue in the South, to north of Fern Street in the North, to behind the parking garages in the East and nearly to Sapodilla Avenue in the West. Bates was ordered to initial each corner, signifying that the trespass warning applied to the entire area.

15. A handwritten notation on the trespass warning states "for not having mgmt. permission to draw pictures on property."

16. The Plaza area where the police issued a trespass warning to Bates is public property, not private property. The land is owned by the CRA and leased to the District.

17. Because of the trespass warning, which threatens Bates with arrest for trespass for merely being within any of the proscribed areas (including the sidewalks, streets and the two plaza areas, which are public), Bates has not returned to CityPlace, even though he prefers to paint cityscape paintings and finds the CityPlace plaza ambiance and architecture suitable for his style of art. Further, because of his treatment by Defendants and CityPlace as set forth herein, Bates desires to leaflet, wear t-shirts critical of the Defendants and CityPlace, and engage in other expressive activity on or about CityPlace streets and sidewalks.

CityPlace Sidewalks, Streets and Two Plaza Areas Are Public and Public Fora

18. In order to construct the Plaza area and the parking garages that service CityPlace, the District issued tax exempt municipal bonds. These areas must be made available for public, not private, use.

¹ Curiously, the Reporting Officer Narrative states that the warning is in effect for one year.

19. The District does not pay real estate tax on the two Plaza areas, unlike the retail tenants located around the Plaza area.

20. The public Plaza area is an urban park in the middle of the CityPlace commercial area. Members of the public walk through the Plaza area, and on streets and sidewalks in and about CityPlace, on their way to and through CityPlace and to destinations on either side of CityPlace, such as the Kravis Center, Convention Center, grocery shopping, Dreyfoos High School, and residential housing. Musicians frequently play music in the plaza. The Plaza space is open to the public for regular and everyday use. The streets and sidewalks in and about CityPlace are part of the City's transportation grid.

21. Although none of the defendants referenced any policy prohibiting Bates from painting in the Plaza area of CityPlace, the CRA and the District have passed two policies that purport to regulate public use of CityPlace Plaza. Resolution No. 01-43, October 1, 2001, attached hereto. The first is "Policy for Public Expression at CityPlace Plaza" and the second is "Policy for Short-Term Licenses at CityPlace Plaza." These two policies together regulate use of the public Plaza area. (Exhibits C and D).

22. The first sentence of Section IIA of the Public Expression Policy states: "The following areas are available for non-commercial public expressive activity at the CityPlace Plaza only within the Leafleting Area described below, pursuant to a valid permit granted by the District." This limits any "non-commercial public expressive activity" to both the "Leafleting Area" and "pursuant to a valid permit granted by the District." "Public expressive activities" are not defined.

23. Neither the term "commercial" nor "non-commercial" are defined in the Policy. The Policy does state: "The distribution of commercial leaflets or other forms of advertising on

the CityPlace Plaza is strictly prohibited except as allowed pursuant to a short-term license obtained from the District." Section IIE

24. Certain activities are listed as completely prohibited, including "singing," "chanting" and "similar forms of expression of public views." Section IIA(1).

25. "Non-disruptive leafleting" is allowed, with a permit, in a small, 10 foot by 5 foot area. Only two people may leaflet at a time. Section IIA (2) & B(1). "Leafleting" itself is not defined. The Policy prohibits leafleters from engaging in certain activities but does not define what they are allowed to do.

26. Since "non-commercial public expressive activity" is not otherwise defined and other types of expressive activity are not allowed in the Leafleting area, all other types of "non-commercial public expressive activity" are completely prohibited. This includes wearing a political tee-shirt, expressing unpopular political views to a group of friends while walking through the Plaza, reciting the Pledge of Allegiance, or even talking, gesturing, or any of the myriad of other activities protected by the First Amendment.

27. To the extent the Public Expression policy allows any "non-commercial activity," Section IIIC delegates to the private lessee, CityPlace, to determine the appropriate times.

28. The leafleting activities must be "non-disruptive" and leafleters may not "engage in other forms of public expression which this Policy prohibits." Section IID.

29. The permitting process under the Public Expression Policy requires the applicant to submit an application to the District. The Policy provides numerous reasons for denying the permit, including if the permit applicant "(j) has damaged CityPlace property and has not paid in full for such damage, or has other outstanding and unpaid debts to the District." Section IIF(j).

The Public Expression Policy conditions the granting of a permit based on claims by a private neighbor and payment of money owed to the District.

30. The policy conditions any permit on "provision of insurance and the indemnification of the District, the City and the Agency." Section IIF(5).

31. The District's second policy, "Policy for Short-Term Licenses for Space at CityPlace Plaza," "applies to person who seek a short-term license for the use of space at CityPlace Plaza." This is defined as "written permission from the District to use a defined area of CityPlace Plaza at a defined time, for a fee, subject to specific terms and conditions limiting the nature of the use."

32. The licenses require liability insurance "as determined necessary by the District or its General Manager" and licensees must "indemnify and hold the District, the city, the Agency and CityPlace Retail, L.L.C. harmless from any claims, actions or damages or costs arising from their use of CityPlace Plaza." Section IIB.

33. The Policy gives the District unfettered discretion to determine which events to license. Most of these considerations are content-based evaluations of the benefit of the prospective licensee to CityPlace and/or its tenants and are aimed at restricting any viewpoints that do not advance the private interests of CityPlace Retail, L.L.C. Some of the considerations are also subjective determinations about the prospective licensee including creditworthiness and references. Section IIC(2).

34. The Licensing Policy bans all political events: "The District does not permit electioneering or any other type of political advocacy directed at the general public to occur in the public areas of the CityPlace Plaza." Section IIC(3).

35. The Licensing Policy states the District's intention that "local not-for-profit cultural and civic groups" be able to use the CityPlace Plaza without charge and provides for a waiver of the licensing fee for these groups. At the sole and unfettered discretion of the General Manager, government entities, such as the Defendant or the State of Florida, may also use the facilities at CityPlace for free. Section IIC(4).

36. The Licensing Policy allows the District management to grant licenses to "registered charities to solicit donations from the general public at fixed locations on the CityPlace Plaza." "[T]he event in question must, in the opinion of the District management, create a significant potential for attracting patrons to the CityPlace Project, must provide free entertainment for patrons, or must offer some similar in-kind economic benefit to the District of CityPlace Project." Section IIC(5).

37. 42 U.S.C. §1983 provides, *inter alia*:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

42 U.S.C. §1983.

38. The First Amendment to the United States Constitution prohibits Congress from making any law "abridging the freedom of speech," and applies to states and local governmental entities such as these defendants through the Fourteenth Amendment.

39. Visual art is a protected form of expression under the First Amendment.

40. Defendants City, CRA, and District maintain customs, policies and practices of issuing trespass warnings to citizens on the public plaza areas of CityPlace, and of enforcing the

challenged policies, in order to eliminate First Amendment-protected activities in all of CityPlace, including the public sidewalks, streets and plaza areas.

Defendants' Practice of Using Trespass Law to Suppress Free Expression Violated the First Amendment

41. The Officer's actions censored Bates' First Amendment activities by threatening him with arrest if he did not comply with the warning and leave, and not return to the entire CityPlace area. This Trespass Warning keeps Plaintiff from entering the public Plaza area, public streets, public sidewalks, and the commercial spaces of CityPlace.

Defendants' Use Policies Are Not Reasonable Time, Place and Manner Restrictions

42. The two policies established by the CRA and District to regulate public use of the CityPlace Plaza are not valid time, place and manner restrictions.

43. Nor are the policies narrowly tailored to advance governmental interests. Some of the considerations used to grant a license do not advance governmental interests at all, but private interests. For example, these include "whether the event will involve food and beverage charges that will provide income to the CityPlace and/or its tenants" and "any other indirect or collateral revenue or in-kind benefit that the event will generate for the District and the CityPlace Project." CityPlace management is given the absolute discretion and authority to determine when the Plaza will be open for leafleters. Section IIC.

44. The ban on most First Amendment activities does not leave ample alternative channels of communication open.

The Policies Are Further Infirm Because They Favor Some Speech Over Other

45. The Policies are unconstitutional on their face because they make content-based distinctions among groups, favoring some over others solely based on the content of their message. The policies allow certain charitable and civic groups to solicit donations in the Plaza

area, but ban "electioneering or any other type of political advocacy directed at the general public," expression that is entitled to the highest level of protection under the First Amendment. By making this distinction, the District not only examines the message of each group, determining that one is "electioneering" or "political advocacy" while another, favored group, is "charitable," but also then bans one group while allowing the other group to use the public Plaza area for free.

46. The Policies expressly and impermissibly give content-based discretion to the District in granting licenses. The decision to grant a short-term license, including licenses issued to charitable and civic groups, is left to the unfettered "business judgment" of the District. The District is free to pick and choose the charitable groups, or other groups or individuals, that it decides to grant a short-term license. Few if any of these considerations are narrowly tailored to advance legitimate governmental interests. There is no provision for appeal or review of this discretion.

The Policies Are Impermissibly Vague

47. Many of the important, defining terms in the Policies, such as "non-commercial expressive activities" and the activities covered by the short-term licenses, are not defined at all or are defined in such a way that the average person cannot understand what is prohibited by the policies.

The Policies Are Also Overbroad

48. The Policies completely ban most First Amendment expressive activity, including wearing tee-shirts with slogans and singing. The Policies, together, expressly ban "electioneering or other types of political advocacy directed at the general public" in the CityPlace Plaza in any circumstance, which are core First Amendment activities.

49. The Policies are further overbroad because they apply to any size group, from a single individual wearing a political tee-shirt to groups of hundreds with bull-horns.

**The Indemnification and Insurance Requirements
Are Unreasonable and Constitute Impermissible Prior Restraints**

50. The Policies impermissibly burden the exercise of First Amendment rights with an unreasonable prior restraint and unspecified indemnification and insurance requirements. In the case of licenses, these requirements indemnify a private entity, CityPlace Retail, L.L.C.

51. Plaintiff has suffered damages by not being able to engage in his chosen form of expression.

WHEREFORE, the Plaintiff requests that this Court:

- a. Enter a declaratory judgment in favor of Plaintiff, declaring the public plaza, streets, and sidewalks located within the 72-acre CityPlace CRA district to be traditional public fora;
- b. Enter a declaratory judgment in favor of Plaintiff, declaring the District's Policy for Public Expression at CityPlace Plaza and Policy for Short-Term Licenses at CityPlace Plaza are unlawful and void *ab initio* and that Defendants violated his First Amendment right to freedom of expression;
- c. Enter a declaratory judgment in favor of Plaintiff, declaring the Trespassing Warning issued to the Plaintiff in the plaza on August 27, 2009, and banning the Plaintiff from the entire 72-acre CityPlace CRA district for one year from said date, to be unconstitutional as applied to the Plaintiff, and that it be stricken from the Plaintiff's record and removed from the West Palm Beach Police CAD system;
- d. Issue preliminary and permanent injunctions prohibiting defendants, their officers and agents from enforcing the "Policy for Public Expression at CityPlace Plaza" and the "Policy for Short-Term Licenses at CityPlace Plaza";
- e. Award the Plaintiff nominal, actual and compensatory damages;
- f. Award the Plaintiff his reasonable attorney's fees pursuant to 42 U.S. C. § 1988 and costs; and
- g. Award all further relief that the Court deems proper and necessary.

Respectfully submitted,

s/James K. Green

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