UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No.: 1:20-cv-22583-UNGARO

JARED McGRIFF,
OCTAVIA YEARWOOD,
NAIOMY GUERRERO, and
RODNEY JACKSON,

Plaintiffs,
v.

CITY OF MIAMI BEACH,

DAN GELBER, in his official capacity as Mayor of the City of Miami Beach, and in his individual capacity, and

JIMMY MORALES, in his official capacity as City Manager of the City of Miami Beach, and in his individual capacity,

Defendants.
_____/

PLAINTIFFS' OPPOSITION TO DEFENDANTS JIMMY MORALES' AND DAN GELBER'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT, OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiffs have brought suit against Defendants related to the Defendant Morales' decision to censor a piece of artwork (a painting titled "Memorial for Raymond Herisse") that was included in "cultural programming" sponsored by the City of Miami Beach during the Memorial Day Weekend of 2019.[1] Defendant Jimmy Morales, who was and is the City Manager of Miami Beach, in an action endorsed by Defendant Mayor Dan Gelber, ordered that the painting be removed from the exhibit and threatened that if the painting was not taken down, then the entire installation would

[1] Plaintiffs included a comprehensive Statement of Facts in their Opposition to Defendant City of Miami Beach's Motion to Dismiss which is being contemporaneously filed and which is adopted and incorporated into this response.

be closed. As a result of these actions, Plaintiffs have alleged that Defendants violated their First Amendment rights to freedom of expression by requiring the removal of the painting.

In response to Plaintiffs' First Amended Complaint (ECF 9), Morales and Gelber filed Motions to Dismiss or in the alternative, for Summary Judgment and arguing that (1) the official capacity suit against them is redundant and treated as a claim against the City, so should be dismissed,[2] and (2) that both Defendants are immune from suit in their individual capacities pursuant to the doctrine of qualified immunity[3]. Gelber raises an additional defense of absolute legislative immunity as well.

Defendants' request for qualified immunity should be denied because, as explained below, his act of censorship violated clearly established constitutional rights, and these rights had been well-established by decisional law of the Supreme Court and 11th Circuit at the time the violation occurred. Furthermore, Gelber's assertion of legislative immunity should be denied because Gelber was not involved in any legislative activity when he ratified the decision to order the removal of Herisse painting.

[2] Plaintiffs agree that maintaining the lawsuits against Defendants Gelber and Morales *in their official capacity* is redundant given the claim against Defendant City of Miami Beach and will proceed against Gelber and Morales only in their individual capacities.

[3] Defendant Morales also incorporates the Statement of Facts and Memorandum of Law submitted by Defendant City of Miami Beach in ECF 21. Plaintiffs addressed those arguments in its Opposition to Defendant City of Miami Beach's Motion to Dismiss, or in the alternative, for Summary Judgment which is likewise adopted and incorporated in this response.

ARGUMENT

I. QUALIFIED IMMUNITY

To show that a public official is not entitled to qualified immunity, a plaintiff must establish (1) that the official's conduct "amounted to a constitutional violation" and (2) that "the right violated was 'clearly established' at the time of the violation." *Lewis v. City of West Palm Beach*, 561 F.3d 1288, 1291(11th Cir. 1991).

In this case, Defendants have stated that the Herisse painting was removed because they found that it was "not at all constructive, potentially divisive and definitely insulting to our police as depicted and narrated." ECF 13-4, *Letter from Defendant Morales to City Commission*. Through this statement, Defendants have admittedly engaged in an act of censorship, retaliating against Plaintiffs for their critical viewpoint toward the police, thereby depriving Plaintiffs of the tangible benefits of being included in the ReFrame project.

As such, Defendants Gelber and Morales are not entitled to qualified immunity because they engaged in conduct that violates three "broad statements of principle within the Constitution, statute, or case law that clearly establishe a constitutional right." *Lewis,* at 1291. The first constitutional right that Defendants violated was Plaintiffs' right to criticize the police without facing government retaliation. Defendants also violated the clearly established prohibition against the government conditioning a benefit on the restriction of Plaintiffs' free exercise of expression. Lastly, Defendants engaged in blatant viewpoint discrimination in clear violation of well-established constitutional law.

These constitutional principles were clearly established prior to Defendants' actions and subject them to individual liability. As such, Defendants' motion to dismiss based on qualified immunity must be denied.

A. Criticism of the Police

The right to engage in speech that is critical of the police is well protected and has been well established in the United States, Court of Appeals for the Eleventh Circuit, and in Florida. In *Houston v. Hill*, 482 U.S. 451, 461 (1987), the Supreme Court held that "the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." Indeed, criticism of the police will be protected "unless [it is] shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *Id*. at 462.

In *Carr v. Cadeau*, 658 Fed. Appx. 485 (11th Cir. 2016), the 11th Circuit applied the principle announced in *Hill* that American citizens have a broad freedom to criticize the police without reprisal. In so doing, the court held that "This Court and the Supreme Court have long held that state officials may not retaliate against private citizens because of the exercise of their First Amendment rights." *See also, Bennett v. Hendrix*, 423 F.3d 1247, 1255 (11th Cir. 2005). The Eleventh Circuit also said that the right of citizens to criticise the police and be free from relationship from so doing "was clearly established at the time" and was actionable. *Carr* at 490. *See also, Merenda v. Tabor*, 506 Fed. Appx. 862, 867, 868 (11th Cir. 2013) (finding that an officer violated the plaintiff's clearly established First Amendment right to criticize the police by cursing at an officer).

Each of the above cases was decided prior to May 24, 2019 when Defendants unlawfully censored Plaintiffs' speech by ordering the removal the Herisse painting. The overriding reason

for the finding that the plaintiffs in the above cases suffered a constitutional violation is the holding that the plaintiffs were engaged in valid and protected First Amendment activity, i.e. criticism of the police.

B. Benefits / unconstitutional conditions doctrine

Under the "unconstitutional conditions doctrine," even though a person has no "right" to a valuable governmental benefit, and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. *In re Tam*, 808 F.3d 1321, 1349 (Fed. Cir. 2015) (internal citations omitted)(subsequently affirmed in *Matal v. Tam*, 137 S. Ct. 1744 (2017). *See also, Bd. of Cty. Comm'rs*, 518 U.S. at 674 (1996) (explaining that "the threat of the loss of [a valuable financial benefit] in retaliation for speech may chill speech on matters of public concern" and "[r]ecognizing that constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental efforts that fall short of a direct prohibition against the exercise of First Amendment rights") (citations and alterations omitted)).

This is because "[t]o deny [a benefit] to claimants who engage in certain forms of speech is in effect to penalize them for such speech." *Speiser v. Randall*, 357 U.S. 513, (1958); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.").

In this case, Defendants, by threatening to shut down the entire *I See You, Too* exhibit, effectively conditioned Plaintiffs' receipt of the benefits of being involved in the ReFrame production (i.e. exposure to the public), with the censorship of the Herisse painting. Defendants,

however, have argued that since the contract price under the PSAs was paid, then there was no deprivation of benefits. ECF 21, p.12. However, this is an unreasonably narrow interpretation of the benefits that inclusion in the ReFrame production brought. Plaintiffs would also receive substantial exposure to the public and artistic community based on this production. In fact, it was this coercion, facing the prospect that Defendants would shut down the entire ReFrame project, that ultimately led to Plaintiff Yearwood capitulating to Defendants' pressure to remove the exhibit that they found offensive.

The prohibition against this sort of insidious government coercion was clearly established by the above cases prior to Defendants' unlawful actions. Therefore, Defendants are not entitled to qualified immunity as they violated a clearly established constitutional right of Plaintiffs.

II. LEGISLATIVE IMMUNITY

Defendant Gelber has argued that he is entitled to legislative immunity for his involvement in the decision to censor the Herisse panting. However, Defendant Gelber was not involved in any legislative function when he contributed to the decision to require the removal of the Herisse painting.

As the Eleventh Circuit explained in *Yeldell v. Cooper Green Hosp.,* 956 F.2d 1056, 1062 (11th Cir. 1992) (internal citations omitted),

> The common law doctrine of legislative immunity is available to state officials, but this form of immunity is not available for every act that a legislative official might perform. Only those acts which are necessary to preserve the integrity of the legislative process are protected…It is the nature of the act which determines whether legislative immunity shields the individual from suit.

The routine administrative acts of a legislator "are generally not protected by the doctrine of legislative immunity. These tasks are not an essential part of the legislative function." *Id.*

Gelber misconstrues the allegations against him as "[relating] solely to his conduct in considering and deciding not to introduce and pass legislation instructing the City Manager to reverse his decision." ECF 22, p.4. Gelber claims that his legislative immunity stems from Miami Beach Code Section 82-504 Memorials or Monuments. *Id*.

Gelber attempts to characterize Plaintiffs' claims as a suit against him for failing to introduce legislation to establish a "memorial" to Raymond Herisse. DE 22, p. 4-5. The section of the Miami Beach Code that Gelber relies upon to support his claim for legislative immunity does not apply. Section 82-504 establishes the framework for the City of Miami Beach to "establish a memorial or monument on public property in the city."

There is, however, no evidence that Plaintiffs sought to propose the establishment of a memorial to Raymond Herisse through the City Commission. Furthermore, the Herisse painting was not erected on public property. The venue for *I See You,* Too was 737 Lincoln Road which is owned by PPF MBL Portfolio, LLC. The City was a mere licensee of the property for less than a month. See ECF 13-5, *Temporary License Agreement*.

In reality, the crux of the claim against Gelber is his contribution to the decision to censor the Herisse painting. This was not a legislative function, and Gelber should not be permitted to stretch the bounds of the immunity to this situation.

Respectfully submitted,

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