UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Civil Action No: 13-cv-80437-Marra/Matthewman

DAVID BENOIT MECH d/b/a THE HAPPY/FUN MATH TUTOR,

Plaintiff,

v.

SCHOOL BOARD OF PALM BEACH COUNTY, FLORIDA,

Defendant.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
AND INCORPORATED MEMORANDUM OF LAW

Plaintiff, DAVID BENOIT MECH d/b/a THE HAPPY/FUN MATH TUTOR ("Mech" or "Plaintiff"), hereby moves for summary judgment on liability against Defendant, SCHOOL BOARD OF PALM BEACH COUNTY, FLORIDA ("School Board" or "Defendant"). There are no material facts in dispute and Plaintiff is entitled to judgment as a matter of law. Therefore, Plaintiff respectfully moves for summary judgment pursuant to Fed. R. Civ. P. 56, S.D. Fla. L.R. 56.1, and this Court's Scheduling Order, ECF 21, with time extended by ECF 42. As required by Local Rule 56.1(a), a statement of material facts is submitted contemporaneously with this motion.[1]

I. INTRODUCTION

By this action, Plaintiff challenges the School Board's custom, policy or practice that prohibits David Mech d/b/a The Happy/Fun Math Tutor and other disfavored advertisers from

[1] The Statement of Undisputed Material Facts in Support of Plaintiff's Motion for Summary Judgment will be referred to herein as "SOF No. __."

advertising on the premises of public secondary schools within the School District of Palm Beach County on terms equal to those afforded favored advertisers, who have been, and are permitted to advertise on the premises of those schools. Further, Plaintiff seeks an injunction prohibiting the School Board from continuing to violate the Plaintiff's rights under the United States Constitution, as well as compensatory damages, together with pre- and post- judgment interest, for violation of the Plaintiff's constitutional rights and breach of contract.

II. PLAINTIFF IS ENTITLED TO FINAL SUMMARY JUDGMENT.

A. Standards to Be Applied.

The standards to be applied are well established. Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The moving party bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any" which it believes demonstrate the absence of a genuine issue of material fact. *Id.* at 323. The burden then shifts to the nonmoving party who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (*quoting* Fed.R.Civ.P. 56(e)).

Once the burden of production has shifted, the party opposing summary judgment cannot rest on its pleadings or merely reassert its previous allegations. It is not sufficient "simply [to] show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, Fed.R.Civ.P. 56(e) "requires the nonmoving party to go beyond the [unverified] pleadings" and present some type of evidentiary material in support of its position. *Celotex Corp. v. Catrett*, 477 U.S. at 324. Summary judgment

shall be rendered if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The mere existence of some evidence in support of the nonmoving party is not sufficient to defeat a motion for summary judgment; there must be enough evidence to enable a jury to reasonably find for the nonmoving party on that issue. *Anderson v. Liberty Lobby, Inc*., 477 U.S. at 249.

The substantive law of the case identifies which facts are material. *Id.* at 248. Therefore, only disputes of facts affecting the outcome of the suit under the First Amendment will preclude the entry of summary judgment. *Id*.

B. Argument.

1. Because the principals have and relied on unbridled discretion to disapprove his banners, Plaintiff is entitled to summary judgment under the First Amendment.

Plaintiff's banner ads offering math tutoring services constitute non-misleading speech proposing a lawful transaction; they are therefore protected under the First Amendment. *Central Hudson Gas v. Public Service Comm'n*, 447 U.S. 557 (1980); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). Regulations that grant a public official unbridled, standardless discretion to approve or disapprove of proposed speech are facially unconstitutional under the First Amendment. *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 108 S. Ct. 2138 (1988) Thus, whether the banner ad partnership is characterized as commercial speech or as a limited or nonpublic forum, the school principals' exercise of standardless, *post hoc* discretion to selectively ban Plaintiff's banner ads for reasons other than "precise" and "objective" criteria violates the First Amendment. Accordingly, Plaintiff is entitled to summary judgment on his First Amendment claim.

a. Unbridled Discretion

It is axiomatic that the First Amendment forbids vesting a governmental official with

unbridled or standardless discretion to license speech. *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 108 S. Ct. 2138 (1988) (ordinance granting mayor standardless discretion to approve or disapprove placement of commercial news racks on public property facially unconstitutional under First Amendment); *Atlanta Journal and Constitution v. City of Atlanta Dept. of Aviation*, 322 F.3d 1198 (11th Cir. 2003) (en banc) ("A grant of unrestrained discretion to an official responsible for monitoring and regulating First Amendment activities is facially unconstitutional."). The First Amendment protection against unbridled discretion encompasses and also forbids standardless licensing of commercial advertising. *Café Erotica of Florida, Inc. v. St. Johns County*, 360 F.3d 1274 (11th Cir. 2004) ("Further, the fact that Café Erotica and We Dare to Bare primarily engage in commercial advertising does not prevent us from considering their facial challenges"; standardless grant of authority to disapprove commercial advertising facially unconstitutional under First Amendment); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 505 n. 11, 101 S.Ct. 2882 (1981) (Commercial speech restrictions subject to facial challenge under First Amendment).

Policy 7.151(2)(h) establishes the banner partnership program and purports to enumerate standards for approval. SOFs 44-45. In provisions not at issue, it prohibits business partners who sell goods illegal for sale or possession to a minor, and favors businesses consistent with the school's educational mission that are suitable for the age of the school's population. SOFs 2, 8, 14-15, 63. Defendant concedes that math tutoring is lawful activity, that is a highly useful service for students, is consistent with the school's educational mission and that it is suitable for the age of the school's students. SOFs 43, 68. The policy similarly prohibits "adult entertainment establishments," but defendant makes no claim that Plaintiff, a math tutor, is operating an adult entertainment establishment under the guise of his math tutoring service. Neither does Plaintiff operate a tattoo parlor, a pain clinic or a business soliciting addicts. SOFs 45, 64, 67. In short,

Defendant does not and cannot rely on any of the "clear' and "objective" standards enumerated in Policy 7.151(h) for revoking the permit granted to the Happy/Fun Math Tutor. Instead, Defendant relies on shifting, standardless and *post hoc* judgments that are the hallmark of forbidden standardless discretion. SOFs 54-65; 69-74.

Policy 7.151(h) authorizes a school to consider "community values" in determining whether to approve a business partner. Although Defendant first relied on "community values" as a ground for withdrawing approval of Plaintiff, it has since shifted ground, perhaps recognizing that "community values" are exactly the sort of standardless criteria that the First Amendment forbids. *Compare* SOFs 59 ("community values") with SOFs 57-58 (complaints from parents or business competitors) with SOF 55 ("totality of circumstances"). But however phrased, Defendant's revocation of Plaintiff's license to advertise his math tutoring business is precisely the sort of standardless, subjective speech regulation the First Amendment forbids.

b. Commercial Advertising

The Supreme Court has subjected commercial advertising restrictions to even more exacting scrutiny since first holding in *Central Hudson* that a restriction on truthful nondeceptive advertising is constitutional only if it can be shown to directly further a substantial governmental interest through restrictions no more extensive than necessary to serve that interest. *44 Liquormart*, *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002) and *Sorrell v. IMS Health Co.*, 131 S. Ct. 2653 (2011) suggest the Court may be prepared to apply strict scrutiny to commercial speech restrictions, but this Court need not do so to determine that Defendant violated the First Amendment. A cursory glance at Policy 7.151(h) establishes that even under *Central Hudson*, Defendant has violated the First Amendment. Apart from provisions not at issue that forbid advertising of transactions and businesses unlawful for minors, SOFs 62-64, 66-68, the policy identifies no substantial governmental interest served by the grant

of standardless discretion Defendant has invoked. Having failed to identify that substantial governmental interest, it is not surprising that Defendant cannot articulate how censoring Plaintiff directly furthers that interest. Accordingly, Defendant cannot defend under *Central Hudson* its censorship of Plaintiff's banner ads.

WHEREFORE, Plaintiff respectfully urges the Court to declare that the Defendant violated his rights under the First and Fourteenth Amendments, and order Defendant to return the banners to where they were placed when they were unlawfully removed. In addition, the Court should set a trial as to the amount of damages due Plaintiff for the violation of his Constitutional rights.

Dated this 25th day of April, 2014.

Respectfully submitted,

s/James K. Green
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COUNSEL FOR PLAINTIFF

CERTIFICATE

I hereby certify that this motion has been filed on this 25th day of April, 2014, with the Court using the CM/ECF system which will send notice of electronic filing to parties and counsel of record.

s/James K. Green**.**