ALLIANCE OF LOS ANGELES COUNTY PARENTS V. COUNTY OF LOS ANGELES DEPARTMENT OF PUBLIC HEALTH, et al.
22STCP 02772
October 3, 2023

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

On July 26, 2022, Alliance of Los Angeles Parents ("Alliance") filed a Petition which alleged several causes of action. A First Amended Petition ("FAP") was filed January 13, 2023. A January 17, 2023 Minute Order reflects that Alliance and defendants agreed that only the third cause of action remains. The third cause of action alleges two violations of the right to free speech: (1) the Department of Public Health ("DPH") closed public comment on its social media pages in order to block disfavored viewpoints and (2) DPH caused the suspension of Alliance's Twitter account. A bench trial has been set for October 16, 2023.

Now pending is defendants' Motion for Summary Judgment ("MSJ"). Defendants first argue that the DPM social media pages were a designated public forum which could be closed or changed "for any reason." Second, defendants argue that their actions in reporting the Alliance Twitter account ("Alt Account") were only to identify a "potential impersonation account" and were not coercive or threatening. In support of the MSJ, defendants have provided two declarations and a Separate Statement ("SS").

In its Opposition, Alliance argues that defendants closed the public comment portion of the DPM social media accounts to quash the expression of disfavored views, while allowing public comments deemed less controversial. Alliance also argues that defendants improperly coerced Twitter to permanently suspend the Alt Account. Alternatively, Alliance asks for a continuance of the MSJ because of some discovery issues. The Opposition is supported by some declarations, a Compendium of Evidence, a Request for Judicial Notice ("RJN") and an Opposing Separate Statement ("OSS").

Defendants have filed a Reply which concedes that DPH did not completely close public commentary on its social media accounts. But defendants argue that this was due to "human error" and "erratic enforcement" of its policy. The Reply then calculates a de minimis error rate and suggests that this does "not amount to inconsistent enforcement." As to the suspension of the Alliance Alt Account, the Reply argues that the DPM emails "cannot reasonably be interpreted as threats." Defendants' Reply also includes an opposition to the RJN and evidentiary objections to some of the Alliance evidence. However, defendants failed to provide the mandatory proposed order with their evidentiary objections. CRC 3.1354(c). Indeed, the

Court reminded defendants' counsel of this requirement at the September 28, 2023 hearing, but defendants still did not comply. As a result, defendants' objections are overruled. The Court also overrules the relevance objections to Alliance's RJN.

Two days prior to the hearing, and without seeking leave of Court, Alliance submitted so-called "supplemental papers," including a declaration of attorney Hamill and another compendium of exhibits. Defendants' objection to these untimely documents is well-taken and sustained.

As our appellate courts have often held, summary judgment is not a disfavored remedy. *E.g., 501 East 51st St. Long Beach LLC v. Kookmin Best Ins. Co.*, 47 Cal. App. 5th 924, 937 (2020). But because summary judgment denies the opposing party a trial, it should be granted with caution. *Colores v. Board of Trustees*, 105 Cal. App, 4th 1293, 1305 (2003). A party moving for summary judgment has the burden of showing that the opposing party's claims lack merit. *Rehmani v. Superior Court*, 204 Cal. App. 4th 945, 950 (2012).

In considering a summary judgment motion, the trial court must strictly construe the evidence of the moving party and liberally construe the evidence of the opposing party. *Colores, supra; Conroy v. Regents of the University of California*, 45 Cal. 4th 1244, 1249-50 (2009) (doubts concerning the evidence are resolved in favor of the opposing party).

Alliance has shown that there are material issues of disputed fact regarding the extent to which respondents have allowed their social media accounts to remain open. *See* OSS 3, 5, 8 and 9. Defendants' assertions of "human error" and "sporadic mistakes" raise quintessential factual issues.

Alliance has also shown that there is a material issue of fact as to whether DPM improperly used its political connections to coerce Twitter to suspend Alliance's Alt Account. *See* OSS 15.

Defendants attempt to negate these factual issues by filing a Reply to the OSS. But this Reply is not permitted by CCP 437c or by CRC 3.1350 and will be disregarded. *See also Nazir v. United Airlines, Inc.*, 178 Cal. App. 4th 243, 252 (2009). In any event, the Reply simply consists of improper legal argument. *See Page v. MiraCosta Community College*, 180 Cal. App. 4th 471, 479, n. 2 (2009) (arguments in a separate statement "are ineffective in raising triable issues").

Defendants concede that no published case in California has decided whether a

government controlled social media account is a public forum. Defendants then argue, and Alliance agrees, that social media accounts are a designated public forum. But this is where the parties diverge. Defendants contend that a governmental entity like DPM can close a designated public forum "whenever it chooses." In support of this contention, defendants rely on some federal cases which are not controlling and the dissenting opinion in *Sanctity of Human Life Network v. Cal. Highway Patrol*. 105, Cal. App. 4th 858, 885 (2003).[1]

Alliance, on the other hand, argues that a government entity is not permitted to close either a public forum or limited public forum in order to quash the expression of disfavored viewpoints. Alliance relies on a host of United States Supreme Court cases, including *Perry Educ. Ass'n v. Perry Local Educators' Assn,* 460 U. S. 37, 46 (1983) and its progeny. *See also Police Department of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.").[2]

In this case there is a material factual dispute as to whether defendants' admittedly imperfect closure of its social media accounts was benign or an attempt to quash the expression of disfavored viewpoints.

As for the suspension of Alliance's Alt Account, the parties generally agree that the law is unsettled as to the issue of when a private entity such as "X" becomes a state actor for First Amendment purposes. At the hearing, the parties argued the import of the recent decision of *State of Missouri v. Biden*, No. 23-30445 (5th Cir. September 8, 2023).

In the *Biden* case, the Fifth Circuit Court of Appeals dealt with the issue of government actors who were alleged to have coerced social media platforms to take adverse actions against parties who expressed disfavored viewpoints. The opinion noted that there is a difference on the one hand between "persuasion" by a government actor and, on the other hand, "coercion and significant encouragement." Where that line is drawn depends on the facts of the case.

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[1] In fact, the full text of the dissent on this issue reads: "while the government is not required to retain the open character of [the designated public forum] indefinitely, as long as it does so it is bound by the same rules that apply to traditional public forums, *i.e.*, 'content-based prohibition[s] must be narrowly drawn to effectuate a compelling state interest.'"

[2] Defendants' attempt to distinguish these Supreme Court cases for purposes of the MSJ is unpersuasive given the factual disputes which exist in this case.

The Fifth Circuit endorsed the "four factor test" previously relied upon by the Second and Ninth Circuit Courts of Appeal. The factors are: (1) the speaker's word choice; (2) whether the speech was perceived as a threat; (3) the existence of regulatory authority and (4) whether the speech refers to or intimates adverse consequences. In applying those factors to the evidence in *Biden*, the Fifth Circuit concluded that the FBI and the CDC had coerced and/or significantly encouraged social media platforms to take adverse actions against the plaintiffs in that case. Because the "deprivation of First Amendment rights, even for a short period is sufficient to establish irreparable injury," the Fifth Circuit approved a preliminary injunction as to the FBI, the CDC and a number of named federal officials.

Further, injunctive relief was held to be proper even though the government officials claimed that they had stopped all challenged conduct. The Fifth Circuit held that the trial court "was right to be skeptical of the officials' claims."

This Court concludes that the *Biden* case is well reasoned, highly persuasive and should be applied here. In doing so, it cannot be concluded as a matter of law that defendants' actions did not amount to coercion of and/or significant encouragement to X to suspend Alliance's Alt Account. Such a determination can only be made following a trial based on the evidence and the reasonable inferences to be drawn therefrom.

Accordingly, good cause having been shown,

IT IS ORDERED that defendants' Motion for Summary Judgment is Denied.

Notice by plaintiff.

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Judge, WILLIAM F. FAHEY

10/03/2023