

plaintiff

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 08-2223-G

RICHARD MAX STRAHAN

vs.

SIMON PROPERTY GROUP, INC. & another¹

**MEMORANDUM OF DECISION AND ORDER REGARDING PLAINTIFF'S
EMERGENCY MOTION FOR A PRELIMINARY INJUNCTION AND DEFENDANTS'
CROSS-MOTION FOR A PRELIMINARY INJUNCTION**

The plaintiff, Richard Max Strahan ("Strahan"), brought this action to enforce his ability to engage in "Public Outreach" at Copley Place Shopping Mall ("Copley Place") from now until mid-November 2008.² Strahan wants to gather the signatures of Massachusetts registered voters through the initiative petition process to place the "Whale Safe Law," aiming to protect whales and sea turtles from state licensed fishing gear, on the 2010 ballot. The defendants, Simon Property Group ("Simon") and Allied Barton Security Services ("Allied Barton"), oppose Strahan's motion and cross-move for a preliminary injunction.

¹ Allied Barton Security Services.

² On the day this motion was heard, Strahan presented the court with papers for an Amended Emergency Motion for a Preliminary Injunction that included prayers for access to other Simon-owned properties in Massachusetts. However, this court will rule only on Strahan's access to Copley Place, the subject of Strahan's original preliminary injunction motion, because it has insufficient information before it as to what restrictions the defendants might impose with regard to other properties. Logically, this lack of information is the result of insufficient notice from Strahan to the defendants of Strahan's request for "Public Outreach" access to venues other than Copley Place.

BACKGROUND

In May 2008, Strahan filed suit against the defendants alleging violations of the Massachusetts Civil Rights Act with regards to Strahan's petitioning activities at the Copley Place and the South Shore Plaza shopping malls. Simon is the indirect corporate parent of the owner of both malls and Allied Barton provides security services. Strahan seeks (1) a declaratory judgment affirming that articles 9, 16, 19 and 48 of the Massachusetts Declaration of Rights protect him and members of the public engaging in "Public Outreach" in the common areas of private shopping malls, (2) a declaratory judgment that there is no probable cause for shopping mall owners to arrest any member of the public for criminal trespass while conducting "Public Outreach," and (3) compensatory and punitive damages.

In the motion before the court, Strahan prays for injunctive relief allowing him to (1) collect signatures on ballot sheets for the Whale Safe Law in Copley Place from now until November 19, 2008, (2) use a small table, with an affixed banner placed by the waterfall, (3) accept donations while gathering signatures and (4) distribute literature relating to his campaign for the Whale Safe Law.

DISCUSSION

To prevail on a request for a preliminary injunction, the moving party must satisfy the three-part test articulated in Packaging Indus. Group, Inc. v. Cheney, 380 Mass. 609 (1980). First, the court must evaluate the moving party's claim of injury and its likelihood of success on the merits. Id. at 617. Second, it must determine whether failing to issue an injunction "would subject the moving party to a substantial risk of irreparable harm." Id. Third, if the judge finds

that such harm would arise to the moving party from denial of the injunction, the judge must balance this risk against any similar risk of irreparable harm to the opposing party. *Id.* at 617. In balancing these factors, “[w]hat matters as to each party is not the raw amount of irreparable harm the party might conceivably suffer, but rather the risk of such harm in light of the party’s chance of success on the merits. Only where the balance between these risks cuts in favor of the moving party may a preliminary injunction properly issue.” *Id.*

When the public interest is at stake, a fourth factor may be considered by the court in deciding whether to grant a request for a preliminary injunction. Although many cases dealing with this public interest factor involve suits between the government and a private entity,³ “[t]he public interest may also be considered in a case between private parties where the applicable substantive law involves issues that concern public interest.” Bank of New England, N.A. v. Mortgage Corp. of New England, 30 Mass.App.Ct. 238, 246 (1991) (citing Krebiozen Research Foundation v. Beacon Press, Inc., 334 Mass. 86, 99 (1956) and Planned Parenthood League, Inc. v. Operation Rescue, 406 Mass. 701, 716 (1990).).

I. Application of the Preliminary Injunction Standard

The first element that must be met to justify the issuance of a preliminary injunction is a substantial likelihood of success on the merits. The United States Supreme Court held that there is no right to petition in private shopping malls under the First Amendment to the United States Constitution. See Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) (holding that the First Amendment offers no protection to speech in private shopping malls when the speech is not related to the

³ See Commonwealth v. Mass. CRINC, 392 Mass. 79, 89-90 (1984) (noting that the Attorney General is not required to demonstrate irreparable harm where opposing party’s activities may adversely affect the public interest).

mall's functions and adequate alternatives to such communication exist). Nevertheless, the Court provided some room for expansion upon free speech liberties in privately owned shopping malls and elsewhere, asserting that states "may adopt in [their] own Constitution[s] individual liberties more expansive than those conferred by the Federal Constitution." Pruneyard Shopping Ctr. v. Robins 447 U.S. 74, 81 (1980).

As interpreted by the Supreme Judicial Court ("SJC"), the rights provided by the Massachusetts Declaration of Rights are indeed broader and allow petitioning in private shopping malls in certain limited circumstances. In Batchelder v. Allied Stores Int'l, Inc., 388 Mass. 83 (1983), the plaintiff Donald P. Batchelder asserted a right under articles 9 and 16 of the Declaration of Rights to seek signatures supporting ballot access in the common areas of the North Shore Shopping Center. The SJC concluded that article 9⁴ permits an individual to both seek signatures for ballot access and to distribute associated material as long as they do so in a "reasonable and unobtrusive manner" in compliance with reasonable regulations imposed by the mall's ownership. Id. at 84. The decision rested on ballot access grounds and not on free speech rights. Id. at 92.

Although Batchelder recognized only an individual's right to petition for signatures in support of ballot access in a privately-owned shopping mall, the right was expanded upon by the Federal District Court in Strahan v. Frazier, 156 F.Supp. 2d 80 (D. Mass. 2001). In Frazier, Strahan brought suit against four officers of the Braintree Police Department alleging that the officers unlawfully prevented him from gathering signatures for an initiative petition at the

⁴ Article 9 provides that "All elections ought to be free; and all the inhabitants of this Commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments." art. 9 of the Massachusetts Declaration of Rights.

privately-owned South Shore Plaza shopping mall. The initiative petition process is governed by article 48 of the Declaration of Rights, which provides in relevant part:

“Legislative power shall continue to be vested in the general court, but the people reserve to themselves the popular initiative, which is the power of a specified number of voters to submit constitutional amendments and laws to the people for approval or rejection; and the popular referendum, which is the power of a specified number of voters to submit laws enacted by the general court, to the people for their ratification or rejection.” art. 48 of the Massachusetts Declaration of Rights

In Frazier, the strong similarities between the right to individual ballot access governed by article 9 and the right to the initiative petition process governed by article 48, led a Federal District Court Judge (Young, D.C.J.) to extend Batchelder’s rationale to protect petitioning in a shopping mall for the “purpose of placing proposed legislation on the ballot.” Id. at 94. First, neither articles 9 nor 48 are limited in their application to protection against governmental interference with rights created directly in the people and may therefore be asserted against private property owners. Id. Second, obtaining signatures for ballot access and for initiatives and referenda depends a great deal on personal contact with the voters whose signatures are sought. As the Frazier court observed, “[i]deas and views can be transmitted through the press, by door-to-door distributions, or through the mail, without personal contact. On the other hand, a person needing signatures for ballot access requires personal contact with voters. He or she cannot reasonably obtain them in any other way.” Id. at 94-95 (citing Batchelder, 388 Mass at 92). In observing the importance of personal contact, the Frazier court noted that the initiative petition process is arguably more entangled with an individual’s ability to interact with the public than are ballot access petitions. See Id. at 95 (citing Meyer v. Grant, 486 U.S. 414, 421-22 (1988) (“[C]irculation of a petition involves the type of interactive communication concerning political

change that is appropriately described as ‘core political speech’”)). The court concluded that “Strahan has the right to collect signatures for his initiative petition in a private shopping mall.” Id.

Due to the clear, albeit limited, holding of Batchelder and the convincing rationale expressed in Frazier behind the extension of Batchelder to the initiative petition process, Strahan is likely to succeed on the merits of his declaratory judgment claim with regard to articles 9 and 48.⁵

The second showing that must be made in order to obtain a preliminary injunction is whether the failure to issue an injunction would expose the moving party to a substantial risk of irreparable harm. Strahan states that the time sensitive nature of the initiative petition process presents the potential for such harm. Under article 48, the time period for collecting signatures on initiative petitions in 2008 does not extend beyond November 19, 2008. Strahan contends that the loss of even a single day in connection with his efforts to collect the needed signatures subjects him to irreparable harm incapable of remedy through monetary damages. Viewed in light of the strong arguments for a right of access for the initiative petition process and the substantial likelihood of success on the merits in this regard, interference with Strahan’s petitioning abilities would cause considerable harm.

The third factor in the Packaging Industries three-part test for issuance of a preliminary injunction involves balancing the risk of harm to the moving party resulting from denial of the

⁵ Because this court finds a substantial likelihood of success on the merits of Strahan’s article 9 and 48 claims, it is not necessary to examine the merits of the other claims made in his original complaint. Moreover, the rights granted by article 16 (free speech) or article 19 (right of assembly) would not seem to extend any additional protections to Strahan in the context of a private shopping mall.

injunction against the risk of harm to the opposition if the injunction is granted. The defendants, while alleging that Strahan has no substantial likelihood of success on the merits, have not met their burden of showing irreparable harm to their interests in their cross-motion for a preliminary injunction. Further, Strahan contends that petitioning activities actually serve to enhance the commercial interests of property owners like the defendants. This is a contention that the defendants do not expressly contest.

This court also finds that the relief Strahan seeks in this motion for a preliminary injunction implicates many important issues related to the public interest. Strahan asserts a right to petition in Copley Place that he contends is granted by the Massachusetts Declaration of Rights. The public clearly has a substantial interest in rights afforded under the Massachusetts Constitution, and particularly in those rights that implicate the political process. In this specific case, Strahan also seeks to place legislation on the 2010 ballot which purports to advance environmental interests that are inherently in the public interest.

In sum, Strahan has met his burden of showing a substantial likelihood of success on the merits of his article 9 and 48 claims to the right to petition for signatures in accordance with the initiative petition process as well as the right to distribute material associated with that petitioning.⁶ Strahan has also shown a substantial risk of irreparable harm with regard to his petitioning efforts, which outweighs any potential harm alleged by the defendants. Additionally, Strahan's proposed "Public Outreach" and his contention that the Massachusetts Declaration of Rights protects his rights as well as those of others are issues that directly implicate the public

⁶ The right to petition and to distribute associated materials are the subject of Strahan's first and fourth prayers for relief.

interest. The court's consideration of these factors together weigh in favor of granting Strahan's request for a preliminary injunction subject to the limits discussed below.

II. Strahan's Specific Prayers for Relief and Batchelder's Limits

In his second prayer for relief, Strahan asks this court for the right to place his table in Copley Place at a location of his own choosing and contends that Batchelder supports his right to do so. However, both Batchelder and Frazier recognize that the rights of owners of private property are due substantial consideration in spite of the rights granted to others on their property. Batchelder states that collection of signatures and the distribution of "material associated therewith" are "subject to reasonable regulations adopted by the mall owner." 388 Mass. at 84. Further, the SJC noted that

Close attention must be given to the property interests of a mall owner in determining whether an intrusion is reasonable in time, place, and manner. We are not discussing signature solicitations in stores but only unobtrusive and reasonable solicitations in the common areas of the mall, areas that have been dedicated to the public as a practical matter. Id. at 92.

The defendants are not contesting Strahan's access to Copley Place in the instant case and have offered Strahan the opportunity to collect signatures for his initiative petition at a location in the mezzanine concourse near the Marriot hotel, which would allow him access to mall patrons traveling between Copley Place and the Prudential Center.⁷ The defendants also communicated their willingness to permit Strahan 43 hours per week from now until November 19, 2008 to conduct his petitioning activity in a reasonable and unobtrusive manner and subject only to the same uniform rules of conduct that mall ownership imposes upon all visitors to Copley Place

⁷ That the defendants may specify such a location subject to reasonable time, place and manner restrictions is suggested by language in Batchelder acknowledging the mall owner's right to "prescribe reasonable limitations on the locations at which signatures may be solicited and the manner in which they may be sought." 388 Mass at 93.

regardless of their purpose. Having examined the photographs and documents submitted by both parties, this Court finds these time, place and manner restrictions to be reasonable.

In his third prayer for relief, Strahan seeks the right to solicit donations while conducting his petitioning at Copley Place. Whether Strahan has such a right is contested by both parties and has not been determined by any Massachusetts appellate court. However, neither the rationale nor holding of Batchelder provides support for the right to collect donations. First, unlike ballot access or initiative petitions, there is no constitutionally entrenched right to collect donations in the Commonwealth of Massachusetts. Second, donations to support Strahan's cause reasonably can be collected in ways that do not require the same kind of personal contact involved in collecting signatures for either ballot access or initiative petitions. For example, funds can be raised through website campaigns or perhaps through the mail after interested individuals have perused the materials distributed to them through Strahan's public outreach efforts. Therefore, this court finds no support for Strahan's claimed right to collect donations in Copley Place in connection with his petitioning activities.⁸

⁸ This court declines to follow the decision of the court, Cratsley, J. in Prudential Insurance Company of America v. Greenworld, Inc., SUCV1994-6034 (Mass. Super. November 29, 1994) (unpublished) cited by Strahan. That decision allowed Strahan to solicit donations in connection with the solicitation of signatures pursuant to the initiative petition process at the Prudential Center shopping mall. That decision was rendered in connection with an expedited hearing on a non-dispositive motion for injunctive relief almost fourteen years ago and the holding regarding the solicitation of donations has never been tested by an appellate court.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the defendant's cross-motion for a preliminary injunction is **DENIED**. Strahan's motion for a preliminary injunction is **ALLOWED** in part subject to the following terms:

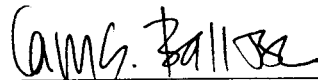
The plaintiff, including those assisting him or acting at his direction, may solicit signatures and distribute associated material at Copley Place in conjunction with the Initiative Petition for the passage of the Whale Safe Law. However, these activities must be conducted in accordance with the conditions set forth below, and he is enjoined from conducting the "Public Outreach" activities described in this paragraph in violation of the following conditions:

1. Strahan and those assisting him or acting at his direction must conduct their activities in a reasonable and unobtrusive manner;
2. Strahan and those assisting him or acting at his direction must abide by the Uniform Rules and Regulations for Soliciting Signatures and Nominating Papers and Ballot Questions in Massachusetts adopted by the defendant Simon Property Group, which include restrictions proscribing the placement of banners, signs, posters and placards in Copley Place;
3. Strahan and those assisting him or acting at his direction must abide by the "Code of Conduct" adopted by the defendant Simon Property Group for Copley Place;
4. Strahan and those assisting him or acting at his direction may solicit signatures in support of the Whale Safe Law and distribute associated material in the mezzanine concourse in front of the Marriott Hotel and between the Tiffany store and the entrance to the bridge to the Prudential Center (located between and in line with the Bocelli and Truffles kiosks);
5. Strahan and those assisting him or acting at his direction may conduct his petitioning activities in the area described above on Saturdays from 10:00 am to 6:00 pm, Sundays from 12:00 pm to 5:00 pm, and 30 hours per week to be used from Monday through Friday between 7:00 am and 7:00 pm;
6. Strahan's activities must cease by 5:00 pm on Wednesday, November 19, 2008, the

deadline for the submission of signatures; and

7. During his petitioning activities at Copley Place, Strahan may not solicit donations.

By the Court,

A handwritten signature in cursive script, appearing to read "Carol S. Ball", written over a horizontal line.

Carol S. Ball
Justice of the Superior Court

Date: 10/2/08