IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CIVIL

WARFIELD PHILADELPHIA, L.P.,	:	MARCH TERM, 2007
Plaintiff,	:	NO. 00154
v.	:	COMMERCE PROGRAM
TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA,	:	
Defendant.	:	

WARFIELD PHILADELPHIA, L.P.,	:	OCTOBER TERM, 2008
Plaintiff,	:	NO. 02142
v.	:	COMMERCE PROGRAM
TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA,	:	
Defendant.	:	

OPINION

Plaintiff Warfield Philadelphia, LP, ("Warfield") appeals from this court's Order of May 5, 2011, in which the court granted summary judgment in favor of defendant Trustees of the University of Pennsylvania ("Penn") on Warfield's remaining claims for common law unfair competition, violation of the Lanham Act, and violation of 42 U.S.C § 1983. For the reasons that follow, the court respectfully requests that its decision be affirmed on appeal.

I. FACTUAL HISTORY

Warfield owns property adjacent to the Schuylkill Expressway and operates a business known as Campus Park and Ride. Campus Park and Ride is specifically targeted to employees of the University of Pennsylvania and other organizations in the University area, offering

cheaper parking prices than lots closer to Penn's main campus. Warfield's parking lot is located in the Grays Ferry area of Philadelphia, some distance away from the University of Pennsylvania, and operates a shuttle service to take its customers to the University area.

In late 2006, Warfield employees began distributing brochures around the Penn Campus area, including outside of the Hospital of the University of Pennsylvania, and other university locations. Tens of thousands of handbills were distributed continuously in the vicinity. The Penn Police Department received several complaints about the aggressive tactics of Campus Park and Ride marketers. On October 18, 2006, Warfield's shuttle bus was parked "on a small parking lot opposite the entrance of the University of Pennsylvania to advertise their business." Although this is a "short term parking facility for hospital patients and visitors" the vehicle was allowed to remain the entire day. The next morning, when that activity was repeated, representatives of Penn insisted that the shuttle bus be removed. Warfield employee Myron Berman alleges that Penn employee David Brooks "holler[ed]" [at him] and "chastise[ed]" him for having the bus there.

Warfield alleges several other incidents that occurred between its employees and the employees of Penn. It alleges an incident in late 2006, in which Mr. Berman was approached by the police while handing out brochures, asked for his ID and permit, and asked to move locations, which he did. In another incident, Mr. Brooks allegedly told Mr. Berman that he "aught [sic] to get out of here" and that he was putting Penn Parking out of business and causing people to lose their jobs. Similarly, in early 2007, Mr. Brooks allegedly came by while Mr. Berman was distributing handbills, again told him he had "better get out of there" or he would call the police. The police arrived, asked whether he was blocking the driveway, and upon learning that he was not, left. Warfield also alleges an incident in which Mr. Atkinson (a Penn

employee) represented to Mr. Kates (a third party trolley driver) over the telephone that Warfield's parking lot was unsafe.

David Brooks received a formal written warning from his supervisor at Penn, Anthony Bozzuto, on March 9, 2007, because of his encounters with Warfield, including instructions to stay away from Campus Park and Ride in the future.

II. PROCEDURAL HISTORY

This is an appeal from a grant of summary judgment for Penn. Warfield originally filed its first Complaint in March 2007, which was assigned to the Honorable Albert W. Sheppard, sitting in the Commerce Program. This resulted in a Special Injunction enjoining Penn from interfering with Warfield's marketing, and enjoining Warfield from being "pushy" while distributing leaflets. Warfield subsequently filed an Amended Complaint bringing claims under the federal Lanham Act, 42 U.S.C. § 1983, and a state tort claim for interference with prospective contractual relations. The court dismissed the federal claims on preliminary objections. Warfield then moved to amend its complaint to assert a claim for unfair competition under Pennsylvania law, which motion was denied by the court. In March 2009, the court granted Penn summary judgment on the remaining claim (interference with prospective contractual relations). Warfield appealed, and the Superior Court affirmed in part and reversed in part; affirming the grant of summary judgment on the interference with contractual relations claim, reinstating the federal claims that were dismissed on preliminary objections, and reversing the trial court's denial of leave to amend Warfield's complaint to add a claim for unfair competition. The case proceeded on its case management track. In May of 2011, Penn again filed for summary judgment on the remaining claims, which the court granted without written opinion.

On September 4, 2011, Judge Sheppard unfortunately passed away. As a result Judge Sheppard's cases were divided among the remaining Commerce Court Judges and Judge Patricia McInerney was assigned the above-captioned matter. The Superior Court denied Warfield's application to have the Superior Court proceed directly to the disposition of the case, and directed this court to produce the instant opinion.

III. SUMMARY JUDGMENT WAS PROPERLY GRANTED DUE TO THE PROCEDURAL DEFECT IN WARFIELD'S RESPONSE.

The court properly granted Penn's motion for summary judgment because Warfield failed properly to respond to that motion.

> The response to the motion shall be divided into paragraphs, numbered consecutively, corresponding to the numbered paragraphs of the motion for summary judgment. The response shall state whether each of the allegations is admitted or denied. No general denial is acceptable. The factual reasons for the denial or dispute must be specifically stated and the "record," (as that term is defined in Pa.R.C.P. No. 1035.1) supporting the denial or dispute must be attached as an exhibit.[1]

Warfield's "Response" is wholly deficient in this regard. Instead of responding to each of the 209 paragraphs of Penn's detailed Motion with admissions or denials and citations to the record, Warfield ignores Penn's entire statement of facts and attempts a general denial as follows:

> 1-209. Denied. All averments are denied and denied on the basis of [Warfield's] attached Memorandum of Law, which is incorporated herein as if set forth at length. Additionally, all statements of law by [Penn] are denied as conclusions of law to which no response is required. The genuine and material factual disputes are also highlighted in the attached Memorandum of Law (and are again incorporated herein by reference) and prove that [Penn's] advocacy that this Court become the finder-of-fact at the summary judgment stage to be [sic] improper and, in any event, premature. Only a jury can decide such issues and summary judgment must be denied under binding precedent and the applicable rules of civil procedure.

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[1] Pa. R. Civ. P. 1035.3; Phila. L. R. 1035.2(a)(4).

By failing specifically to deny the assertions of fact made by Penn in its Motion, Warfield has admitted all of such facts.[2] Therefore, the court properly granted summary judgment based on those admissions of fact.

Although the above procedural defect is sufficient for summary judgment, the court will also address the merits of each issue for appeal.

IV. SUMMARY JUDGMENT WAS PROPERLY GRANTED ON WARFIELD'S LANHAM ACT CLAIM.

"Summary judgment is appropriate only in those cases where the record clearly demonstrates that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law."[3] In order to defeat a motion for summary judgment, "a non-moving party must adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof such that a jury could return a verdict in his favor."[4] Accordingly, the court must examine the evidence offered by Warfield to determine if it has provided evidence such that a jury could reasonably find for it on its Lanham Act claim.

The Lanham Act provides, *inter alia,* that

> [a]ny person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.[5]

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[2] Pa. R. Civ. P. 1029 (b); Busby v. Harrisburg Pipe & Pipe Bending Co., 312 Pa. 394, 396; 167 A. 313, 314 (1933).

[3] Atcovitz v. Gulph Mills Tennis Club, 571 Pa. 580, 585; 812 A.2d 1218, 1221 (2002).

[4] Ertel v. Patriot-News Co., 544 Pa. 93, 101-2; 674 A.2d 1038, 1042 (1996).

[5] 15 U.S.C. §1125(a)(1)(B).

In its Amended Complaint, Warfield alleges that Penn violated the Act by representing that "Warfield and/or its said parking lot [was] unsafe, below acceptable standards, and over-priced." Warfield elaborates that these alleged statements injured its ability to attract prospective customers and enter into contracts with them.

The commonly-used test for whether representations are "commercial advertising or promotion" under the Lanham act has four factors: "(1) commercial speech; (2) by a defendant who is in commercial competition with plaintiff; (3) for the purpose of influencing consumers to buy defendant's goods or services; and, (4) although representations less formal than those made as part of a classic advertising campaign may suffice, they must be disseminated sufficiently to the relevant purchasing public."[6]

The Third Circuit has discussed how a Lanham Act claim of false promotion should be analyzed. The court must first determine what message is being conveyed, then whether it is false or misleading.[7] Next, the court must determine if the falsity or misrepresentation is material, in that it is likely to influence purchasing decisions.[8] Finally, although "detailed individualization of loss of sales" need not be shown, the plaintiff must demonstrate that the "falsification [or misrepresentation] actually deceives a portion of the buying public."[9]

The incidents cited by Warfield in which statements were allegedly made by Penn employees do not meet the above test. The incidents of alleged disparagement cited are as follows:

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[6] Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc., 314 F.3d 48, 56 (2d Cir. 2002) (discussing the Gordon & Breach test).

[7] United States Healthcare v. Blue Cross of Greater Phila., 898 F.2d 914, 922 (3d Cir. 2001).

[8] Id.

[9] Id. (internal citations omitted).

- An incident in which Mr. Brooks directed Warfield's shuttle bus to leave the short-term parking lot near the Hospital of the University of Pennsylvania;
- A representation, over the telephone, by Mr. Atkinson (a Penn employee) to Mr. Kates (a third party trolley driver), that Warfield's parking lot was unsafe;
- An interaction between Mr. Brooks and Mr. Berman in late 2006, on the sidewalk in front of the Hospital of the University of Pennsylvania, in which Mr. Brooks told Mr. Berman "in a very loud angry voice" "to get out of here" and claimed that he had caused people to lose their jobs and was attempting to do so again;
- An incident in early 2007, at the intersection of 34th Street and Chestnut Street, in which Mr. Brooks came by while Mr. Berman was distributing handbills and told him he had "better get out of there" or he would call the police. The police arrived, asked whether Mr. Berman was blocking the driveway, and upon learning that he was not, left; and
- An incident in February 2007, on Walnut Street between 37th and 38th Streets, in which Mr. Berman was handing out brochures when he was approached by a policeman who told him to move or risk arrest, but then examined his identification and permit, and left.

None of these instances, separately or together, constitute a cognizable claim for false promotion under the Lanham Act. First and foremost, these statements were not alleged to be made to consumers or potential consumers, although members of the public may have inadvertently overheard some of them, they were not alleged to have been directed at the public.

Warfield has not provided evidence that would show that the alleged statements, if false, actually deceived a portion of the buying public, or even that they were likely to do so. As noted by Penn, Warfield could not point to any individual who was dissuaded from giving Warfield their business.

Warfield submitted expert reports that purport to show that its business was harmed as a result of 'negative word of mouth' disseminated by Penn; however, the conclusions within these reports are not sufficiently supported to defeat summary judgment. Warfield has not provided evidence of a causal link between the alleged statements of Penn and any loss of business it suffered, nor has it demonstrated actual damages under the Lanham Act.

Further, while a classic advertising campaign is not required, the disparaging statements must be "widely disseminated" to the relevant purchasing public and be "part of an organized campaign to penetrate the relevant market" in order to make out a cognizable Lanham act claim – "the language of the Act cannot be stretched so broadly as to encompass all commercial speech."[10] It is well-settled that "businesses harmed by isolated disparaging statements do not have redress under the Lanham Act; they must seek redress under state-law causes of action."[11] The statements and incidents described here do not rise to this level; one of the alleged incidents occurred on the phone between individuals who were not potential customers, while others occurred between employees of Penn and Warfield. The fact that members of the public may have observed these interactions does not constitute sufficient dissemination for these statements to constitute commercial promotion for this claim.[12]

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[10] Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc., 314 F.3d 48, 56-7 (2d Cir. 2002).

[11] Id. at 57.

[12] See Id. at 55 (explaining that "a dozen admissible comments within a purchasing public universe consisting of thousands of customers" did not constitute sufficient dissemination"); see also Diamond Triumph Auto Glass, Inc. v. Safelite Glass Corp., 441 F. Supp. 2d 695; 706 n. 4 (M.D.Pa. 2006) (finding that "[g]iven the total volume of calls

Because Warfield has not provided evidence indicating that a genuine issue of material fact existed regarding the dissemination of the alleged statements or that Warfield was actually damaged as a result, summary judgment was appropriate.

V. SUMMARY JUDGMENT WAS PROPERLY GRANTED ON WARFIELD'S §1983 CLAIM.

In order to make out a claim under §1983, Warfield would have to demonstrate that Penn, acting under color of state law, violated its federal rights.[13] Warfield alleges that Penn violated its free speech rights under the First Amendment; however, it has not supported this claim with sufficient evidence to defeat summary judgment.

Commercial speech is entitled to limited first and fourteenth amendment protections, but like other speech, it is subject to time, place and manner restrictions as long as the relationship between the restriction and the interest behind it is reasonable.[14]

Warfield claims that its right to free speech was violated by Penn when Penn's employees, including members of the Penn Police, threatened its employees with arrest and confiscated its leaflets. In order for liability to attach to a municipal institution, the actions taken by the employees of the institution must be under color of an official policy or custom.[15] As discussed by the Third Circuit,

> [a] government policy or custom can be established in two ways. Policy is made when a "decisionmaker possessing final authority to establish municipal policy with respect to the action" issues an official proclamation, policy, or edict. A course of conduct is

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and the total number of referrals...the [fewer than twenty] allegedly improper statements were not sufficiently disseminated to constitute advertising.")

[13] Smolow v. Hafer, 598 Pa. 561, 562; 959 A.2d 298, 299 n. 2 (2008).

[14] United States v. Edge Broadcasting Co., 509 U.S. 418, 429 (1993).

[15] Monell v. Dept. of Soc. Servs., 436 U.S. 658, 694-5 (1978).

> considered to be a "custom" when, though not authorized by law, "such practices of state officials [are] so permanent and well-settled" as to virtually constitute law. [16]

Even if Penn fits the definition of a municipal corporation, which is disputed, the record fails to show a genuine issue of fact as to the existence of such a policy or custom. The U.S. Supreme Court has held that

> it is not enough for a § 1983 plaintiff merely to identify conduct properly attributable to the municipality. The plaintiff must also demonstrate that, through its *deliberate* conduct, the municipality was the "moving force" behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights.[17]

Warfield has enumerated several incidents in which the Penn Police allegedly interacted with Warfield's employees. Warfield alleges that "the PENN Police, [at] all levels, were involved" in a policy and practice of harassing Warfield's employees so that they could not continue their advertising work. However, this bald assertion is not supported by the record. Warfield has pointed to a small number of discrete incidents that cannot be understood to form a pattern; moreover, the incidents themselves do not rise to the level of infringement of Warfield's freedom of speech. In these interactions, it appears that Penn Police officers investigated the behavior of individuals handing out leaflets, who were then permitted to continue their activities; in no instance is it alleged that employees were arrested or physically accosted by them. Additionally, that an individual Penn non-police employee yelled at a Warfield employee in one instance, or that a Penn police officer conversed with a Warfield employee but took no action, does not rise to the level of a First Amendment violation.

Moreover, Warfield has not produced evidence that shows that there was an official policy, or a practice so well-settled as to virtually constitute law, of restraining Warfield's

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[16] Beck v. City of Pittsburgh, 89 F.3d 966, 971 (3 d Cir. 1996).

[17] Bd. of the County Comm'rs v. Brown, 520 U.S. 397,404 (1997).

freedom of speech. On the question of a policy or custom of behavior, the written warning cited by Warfield from Penn employee Anthony Bozzuto to David Brooks as proof that "high up" individuals at Penn knew of its employees' alleged misconduct actually militates against Warfield's claim of a pattern or policy, by showing that Penn took steps to modify its employees' behavior toward Warfield. Finally, there is no evidence that Penn's actions toward Warfield were related to the content of Warfield's speech. Penn allegedly attempted to modify Warfield's *actions* –distributing handbills, blocking the sidewalk and/or parking the bus in a lot – but there is no evidence that this was related to the content of their speech rather than the time, place and manner in which they were speaking (i.e., that another message delivered in the same manner would not have gotten the same treatment).

For all the foregoing reasons, this Court's order granting summary judgment on Warfield's § 1983 claim was proper and should be affirmed.

VI. SUMMARY JUDGMENT WAS PROPERLY GRANTED ON WARFIELD'S UNFAIR COMPETITION CLAIM.

Summary judgment was proper because Warfield has not alleged facts sufficient to support a state law claim for unfair competition.

Warfield cites Restatement Third of Unfair Competition §1, which states:

> One who causes harm to the commercial relations of another by engaging in a business or trade is not subject to liability to the other for such harm unless: (a) the harm results from acts or practices of the actor actionable by the other under the rules of this Restatement relating to: (1) deceptive marketing, as specified in Chapter Two; (2) infringement of trademarks and other indicia of identification, as specified in Chapter Three; (3) appropriation of intangible trade values including trade secrets and the right of publicity, as specified in Chapter Four; **or from other acts or practices of the actor determined to be actionable as an unfair method of competition, taking into account the nature of the conduct and its likely effect on both the person seeking relief and the public**. (emphasis added).

Comment (g) to this section of the Restatement notes that "[a]n act or practice is likely to be judged unfair only it if substantially interferes with the ability of others to compete on the merits

of their products or otherwise conflicts with accepted principles of public policy recognized by statute or common law."[18]

Warfield alleges that Penn "embarked on a campaign to block expansion into the area" and that in so doing it violated the "catch-all" provision emphasized above. However, the allegations made by Warfield regarding Penn's behavior simply are not supported by the record. It alleges that representatives of Penn expressed interest in purchasing Warfield's lot, and that Penn's employees acted negatively toward Warfield in the incidents detailed *supra*. These incidents cannot reasonably be found to constitute a substantial interference with Warfield's ability to compete, nor are they otherwise against public policy.

Warfield, without evidentiary support, has alleged evil motive on the part of Penn to see its business fail; however, even so, motive itself cannot make Penn's otherwise permissible behavior actionable. Moreover, as previously discussed, Warfield has not alleged actual damages sufficient to survive summary judgment. Accordingly, summary judgment was properly granted and should be affirmed.

VII. CONCLUSION.

For the foregoing reasons, the court's judgment was proper and should be affirmed.

BY THE COURT:

PATRICIA A. MCINERNEY, J.

DATED: MARCH 30, 2012

[18] Restat 3d of Unfair Competition § 1, comment (g); see also Babiarz v. Bell Atlantic-Pennsylvania, Inc., 2001 Phila. Ct. Com. Pl. LEXIS 94, *30-31 (2001).