IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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RYAN WOODHOUSE,

OPINION AND ORDER

Plaintiff,

13-cv-310-bbc

v.

CITY OF LA CROSSE, WISCONSIN,
STEVE CARLYON, RONALD TISCHER,
KIRK FLATTEN AND
TIMOTHY O'NEILL,

Defendants.

- -

Plaintiff Ryan Woodhouse has filed a motion for a preliminary injunction against defendants City of La Crosse, Wisconsin, Steve Carlyon, Ronald Tischer, Kirk Flatten and Timothy O'Neill to secure relief from restrictions on his religious expression in Riverside Park during a public festival known as Riverfest. Plaintiff challenges a city ordinance prohibiting literature distribution in city parks without prior approval and a city policy granting proprietary control of Riverside Park to Riverfest, Inc., which allegedly allows Riverfest Inc. to censor unwanted speech during the festival. Plaintiff seeks an injunction prohibiting enforcement of these policies during the 2013 Riverfest. Defendants filed a brief in opposition as well as a motion for leave to file a sur-reply brief. Dkt. #22. I am denying the motion for leave to file a sur-reply because defendants' proposed sur-reply simply repeats arguments it made in its brief in opposition.

Although preliminary injunctions constitute "extraordinary relief" and are granted

infrequently in this court, I conclude that plaintiff is entitled to a preliminary injunction in this case. Defendants do not deny that they violated plaintiff's constitutional rights during the 2012 Riverfest and instead, argue only that plaintiff's claim for relief is moot. However, plaintiff's claim is not moot because it is not "absolutely clear" that defendants will not restrict plaintiff's religious speech during the 2013 Riverfest. Therefore, I am granting plaintiff's request for an injunction.

From plaintiff's proposed findings of fact and defendants' responses, I find the following facts to be undisputed solely for purposes of resolving plaintiff's motion for a preliminary injunction.

FACTS

Plaintiff Ryan Woodhouse is an evangelical Christian who enjoys distributing Christian literature, speaking in public locations about his beliefs and engaging in one-on-one discussions about his beliefs with people he meets in public spaces. On several occasions, plaintiff has delivered his religious message in Riverside Park, a public park located in the downtown area of the City of La Crosse where the Mississippi, La Crosse and Black Rivers converge. Riverside Park is generally open and free for use by the public and is used by the public for various activities, including sightseeing, picnicking, walking, jogging and frisbee throwing.

An annual event celebrating America's independence has been held at Riverside Park since 1983. The multi-day event, known as Riverfest, is organized by Riverfest, Inc. Riverfest offers numerous activities for the public, including an outdoor movie, fireworks display, arts and crafts fair, food and beverage fair and several outdoor competitions and games. Riverfest charges an admission on all days of the festival with the exception of July 4, when Riverfest and

Riverside Park are free and open to the public.

During last year's Riverfest, on July 4, 2012, plaintiff went to Riverside Park to promote his religious beliefs through literature distribution, public speaking and conversation. On that day, admission to Riverfest was free and open to the public. Plaintiff chose July 4 intentionally because he knew the 2012 Riverfest event was taking place and there would be a significant number of people with whom he could discuss his message. At the entrance of Riverside Park, a sign was posted, stating that literature distribution was prohibited.

Plaintiff went to a spot in the park beneath a tree and proceeded to proclaim his beliefs. After a few minutes, a festival worker approached plaintiff and told him to leave. Plaintiff responded that the park was open to the public, but the festival worker told plaintiff that "they did not want his speech there." Plaintiff refused to leave. Soon thereafter, defendants Sergeant Flatten and Officer O'Neill from the La Crosse Police Department approached plaintiff. Flatten asked plaintiff for identification and other personal information and asked whether plaintiff was intending to hand out the gospel tracts in his possession. When plaintiff asked defendants to identify what particular laws he was violating, O'Neill responded that Riverfest, Inc. did not want plaintiff there. Plaintiff stated that he was protected by the First Amendment to express his views and hand out materials, and O'Neill responded that he was "well-versed in the Constitution" and knew about plaintiff's rights. O'Neill then asked plaintiff why he was in the park during the heat of the day and plaintiff responded that he wanted to tell people about Jesus.

Flatten told plaintiff that they had done "some checking" with the "head guys" in the Parks department who confirmed that Riverfest, Inc. leased the park from the city for the festival, meaning that Riverfest, Inc. "technically ha[d] proprietary rights down here and they

can ask you to leave and you do have to follow that." Flatten then told plaintiff that he had to leave because Riverfest, Inc. did not want him there. Plaintiff asked, "So basically if I continue to do what I'm doing, I'm going to get arrested?" Flatten responded that plaintiff would be charged with trespassing. Plaintiff argued with Flatten about this, but Flatten stated again that Riverfest, Inc. had the authority to tell plaintiff to leave. Eventually, plaintiff left the park for fear of arrest.

On October 24, 2012, plaintiff, through counsel, wrote to the La Crosse city attorney's office explaining why he thought the city's treatment of him during Riverfest violated his rights under the Constitution. He asked that La Crosse officials let him engage in his desired activities in Riverside Park during the 2013 Riverfest and during future festivals and asked for a response by November 15, 2012.

On November 15, 2012, the city attorney responded, stating that the city was still looking into the matter. Plaintiff's counsel wrote back the following day, asking how much time the city would need and stating that plaintiff wanted to insure that he would be able to exercise his First Amendment rights at the 2013 festival. The city has not yet responded to plaintiff's November 15 letter.

Until May 2013, the City of La Crosse had an ordinance pertaining to literature distribution in public parks titled "Distributing or Posting Circulars Prohibited," which provided that "No person shall distribute any circulars, cards or any other printed or written matter, excepting programs or concerts or entertainments, unless permission has been obtained from the Park Board or Park Director." La Crosse Mun. Code § 10.03(M). The La Crosse common council repealed the ordinance on May 16, 2013.

OPINION

Plaintiff asks the court to enter the following preliminary injunction:

> D. [E]njoining Defendants, their agents, officials, servants, employees, and all persons in active concert or participation with them, or any of them, from applying La Crosse Municipal Code 10.03 (M), or any other policy or practice, so as to restrict literature distribution of speakers, including Woodhouse, in Riverside Park during Riverfest;
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> E. [E]njoining Defendants, their agents, officials, servants, employees, and all persons in active concert or participation with them, or any of them, from applying the policy banning speech disfavored by Riverfest, Inc., or any other policy or practice, so as to restrict constitutionally-protected speech of speakers, including Woodhouse, in Riverside Park during Riverfest.

Cpt., dkt. #1, at 16. In his reply brief, plaintiff makes it clear that he is not seeking to bind anyone affiliated with Riverfest, Inc. Instead, he is seeking to bind only those affiliated with the city who enforce city policies and practices. Plt.'s Reply Br., dkt. #20, at 20. Additionally, he states that he is seeking an injunction only for the date of July 4, when Riverfest is open to the public, and not on days in which the public must pay an entrance fee to attend Riverfest. Plt.'s Reply Br., dkt. #20, at 3, n.2.

To obtain a preliminary injunction, plaintiff must show that he is reasonably likely to prevail on the merits of at least one of his claims. If he can make this showing, he must also show that he will suffer irreparable harm if an injunction is not granted, that the harm he will suffer if the injunction is denied will outweigh the harm defendant will suffer if the relief is granted and that an injunction will not disserve the public interest. Planned Parenthood of Indiana, Inc. v. Commissioner of Indiana State Dept. of Health, 699 F.3d 962, 972 (7th Cir. 2012).

In his brief in support of his request for a preliminary injunction, plaintiff argues that he has a likelihood of success on the merits of his First Amendment speech claim. (He also asserts

a due process claim in his complaint but that claim is not at issue in his motion.) He contends that his religious speech at Riverside Park is deserving of constitutional protection, DeBoer v. Village of Oak Park, 267 F.3d 558, 570 (7th Cir. 2001), that Riverside Park is a "traditional public forum," Marcavage v. City of Chicago, 659 F.3d 626, 633 (7th Cir. 2011), and that the restrictions on his speech were not "content-neutral" and "narrowly tailored to serve a significant government interest" and they did not "leave open ample alternative channels for communication." Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37, 45 (1983). Those restrictions include the city's ordinance prohibiting distribution of literature in city parks without prior approval, La Crosse Mun. Code § 10.03, and the city's policy of granting a private party propriety control over Riverside Park during the Riverfest event. Plaintiff also argues that defendants would suffer no harm from an injunction, while he would suffer irreparable harm in the absence of an injunction because his free speech rights would be suppressed. Further, the public interest supports an injunction because the public has an interest in protecting First Amendment rights.

In their brief in opposition to plaintiff's motion, defendants do not respond to any of plaintiff's arguments about whether his speech was protected or whether the restrictions on his speech were constitutional. They do not deny that plaintiff's constitutional rights were violated on July 4, 2012 and that a similar restriction on his expression would violate his constitutional rights again on July 4, 2013. Additionally, they do not argue that plaintiff behaved in any manner that would justify prohibiting him from speaking and distributing literature in the park. Therefore, I consider these issues waived. Bonte v. U.S. Bank, N.A., 624 F.3d 461, 466 (7th Cir. 2010) ("Failure to respond to an argument . . . results in waiver."). Instead, defendants argue that plaintiff's request for preliminary injunctive relief is moot and beyond the scope of

Fed. R. Civ. P. 65.

Defendants contend that plaintiff's claim has been mooted by the city's repeal of the § 10.03(M) ordinance regarding literature distribution in public parks. Plaintiff concedes in his reply brief that the repeal of § 10.03(M) "eliminate[s] any need for [plaintiff] to enjoin future application of that particular park rule banning literature distribution." Plt.'s Reply Br., dkt. #20, at 9. Federation of Advertising Industry Representatives, Inc. v. City of Chicago, 326 F.3d 924, 930 (7th Cir. 2003) ("[R]epeal of a contested ordinance moots a plaintiff's injunction request, absent evidence that the City plans to or already has reenacted the challenged law or one substantially similar."). Nonetheless, plaintiff contends that an injunction is still necessary because of the city's policy or practice of giving Riverfest, Inc. proprietary rights over Riverside Park during the festival. Plaintiff contends that defendants have not repealed their policy or practice regarding Riverfest, Inc.'s proprietary rights and have not shown that the city's law enforcement officers will allow plaintiff to deliver his religious message during the 2013 Riverfest.

In response, defendants contend that the city does not have a policy or practice of "censoring unwanted speech in deference to a permit or lease of the public park," Dfts.' Br., dkt. #16, at 5, and that even if it did, defendants have made "good faith averments" that they will not enforce any policy or practice that would restrict plaintiff's free speech rights. This response is problematic. First, defendants make no attempt to identify what policy or practice, if any, defendants Flatten and O'Neill were enforcing when they approached plaintiff in Riverside Park in 2012, told him that Riverfest, Inc. did not want him there and warned him that he could be arrested for trespassing if he remained. Defendants state only that plaintiff's claim is moot because Officer O'Neill and Sergeant Flatten "were not enforcing the challenged Ordinance [§

10.03(M)]." Dfts.' Br., dkt. #16, at 5. However, this means only that O'Neill and Flatten were enforcing a city policy or practice other than § 10.03(M) or were acting on their own, contrary to city policy or practice (an argument defendants do not make).

Defendants offer the statements of defendant Steve Carlyon, the Director of Parks, Recreation and Forestry, and defendant Ronald Tischer, the chief of police, that "[t]he City of La Crosse does not maintain a policy or practice of deference to censorship of unwanted expression in the public park by Riverfest, Inc., or other permit holders or leasees of public parks, or of enforcing Riverfest, Inc.'s decisions to censor expression." Carlyon Aff., dkt. #12, at ¶ 26; Tischer Aff., dkt. #13, at ¶ 9. However, defendants do not deny that the city grants Riverfest, Inc. proprietary rights over Riverside Park during the festival or that the city will respond to calls to enforce those proprietary rights. Defendants do not say whether the city's proprietary rights policy has been interpreted narrowly to avoid suppression of free speech or whether the city's policies and practices require law enforcement officers to evaluate whether requests for enforcement from Riverfest, Inc. may infringe free speech rights. In fact, defendants submit no evidence at all about the proprietary rights policy upon which plaintiff's claim is based.

The only evidence in the record on this issue is plaintiff's undisputed account of the July 4, 2012 events, and that evidence supports plaintiff's contention that defendants Flatten and O'Neill were acting to enforce the city's policy regarding Riverfest, Inc.'s proprietary control of Riverside Park. In particular, defendants admitted that O'Neill told plaintiff that Riverfest, Inc. did not want him there and that Flatten told plaintiff that he had done "some checking" with the Parks department and confirmed that Riverfest, Inc. "technically ha[d] proprietary rights" over the park and could require him to leave. Flatten then told plaintiff he had to leave because Riverfest, Inc. did not want him there and that if plaintiff did not leave, he could be arrested for

trespassing. In addition, neither Flatten nor O'Neill deny in their affidavits that they were enforcing the proprietary control policy. Both state only that they were "responding to a call for service from a Riverfest, Inc. representative." Flatten Aff., dkt. #14, at ¶ 11; O'Neill Aff., dkt. #11, at ¶ 10. Defendants have submitted no evidence to dispute the finding that Flatten and O'Neill were enforcing the city's policy regarding the propriety rights of leasees and were effectively giving Riverfest, Inc. the right to regulate speech in Riverside Park.

To prove that plaintiff's claim regarding the city's proprietary rights policy is moot, defendants must show that it is "absolutely clear" that this policy or practice would not be enforced to restrict plaintiff's free speech rights in the future. That is because generally, "voluntary cessation of allegedly illegal conduct does not render a case moot." Kikumura v. Turner, 28 F.3d 592, 597 (7th Cir. 1994) (citations omitted). Otherwise, "any government actor who is being sued could cease a challenged practice to thwart the lawsuit, and then return to old tricks once the coast is clear." Id. Thus, a party invoking the defense of mootness has a heavy burden of demonstrating that "'subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701, 719 (2007) (quoting Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 189 (2000)). See also Northland Family Planning Clinic, Inc. v. Cox, 487 F.3d 323, 342-43 (6th Cir. 2007) ("In this case, that burden is increased by the fact that the voluntary cessation only appears to have occurred in response to the present litigation, which shows a greater likelihood that it could be resumed.").

Defendants have not satisfied the "heavy burden" of showing that plaintiff's request for relief has been mooted. Defendants have submitted no evidence that city's policy or practice

regarding proprietary rights of Riverfest has been repealed or amended. Defendants do not say that the city has reviewed or amended the proprietary rights policy to insure that it is interpreted narrowly to avoid suppression of free speech. Defendants' only evidence on this point is the statement of the chief of police, defendant Tischer, that "[t]he City of La Crosse Police Department will respond to calls for service and evaluate complaints of legal violations or threats to public safety by Riverfest, Inc. during Riverfest, but will not act to prohibit or chill protected expression at the request of Riverfest, Inc. I will be immediately instructing my officers accordingly." Tischer Aff., dkt. #13, at ¶ 10. However, Tischer's statement does not repudiate the challenged proprietary control policy, does not state that the city has abandoned the policy or practice upon which O'Neill and Flatten relied in 2012, does not concede that O'Neill and Flatten acted in an illegal manner in responding to Riverfest, Inc.'s "call for service" on July 4, 2012 and does not say that plaintiff is free to come to Riverside Park during Riverfest 2013 and engage in religious speech and literature distribution. United States v. Raymond, 228 F.3d 804, 814 (7th Cir. 2000) (refusal of defendants to admit remorse for unlawful activity militated against their claim of voluntary cessation). Tischer does not say how officers should respond to situations like the one involving plaintiff in 2012 and does not say that he will be "instructing" his officers about how to handle calls from Riverfest, Inc. involving plaintiff or other individuals who are exercising their free speech rights in the park. Thus, Tischer's vague and non-binding statement made in the context of litigation does not make it absolutely clear that defendants will permit plaintiff to exercise his free speech rights at Riverside Park during Riverfest and is insufficient to moot plaintiff's claim for injunctive relief. Doe ex rel. Doe v. Elmbrook School District, 658 F.3d 710, 720 (7th Cir. 2011) (holding that "few scattered representations" regarding school district's intention not to use church again for graduation ceremony did not

moot establishment clause claim because there was no evidence of "formal or even informal policy change"), rev'd on other grounds, 687 F.3d 840 (7th Cir. 2012) (en banc) (reversing on merits but adopting panel's analysis of mootness); Tsombanidis v. West Haven Fire Dep't, 352 F.3d 565, 574 (2d Cir. 2003) (promise to enforce new interpretation of law did not moot challenge because "interpretation of the code might change again").

The cases cited by defendants are distinguishable. In Ragsdale v. Turnock, 841 F.2d 1358, 1365 (7th Cir. 1988), the court of appeals held that the plaintiff's claim relating to certain state abortion laws were moot because the "defendants have conceded, at least since 1983 [for five years], that th[e] requirement is unconstitutional under governing Supreme Court decisions and is therefore not enforced." Id. In this case, defendants have not conceded that the city's policy or practice of granting proprietary rights to Riverfest, Inc. is unlawful and have not repudiated defendants Flatten and O'Neill's treatment of plaintiff at the 2012 Riverfest. Additionally, in Ragsdale, the state's policy of non-enforcement was not adopted as a result of the present litigation, but had been in place for several years. In this case, defendant Tischer's statement that he would instruct officers to "not act to prohibit or chill protected expression at the request of Riverfest, Inc.," does not appear to be a city policy and was made only in response to plaintiff's lawsuit.

In Freedom From Religion Foundation, Inc. v. Manitowoc County, 708 F. Supp. 2d 773, 777 (E.D. Wis. 2010), the court concluded that the plaintiff's establishment clause claim regarding a nativity display at the courthouse was mooted by the county's newly enacted written policy governing the erection of displays at the courthouse. The policy prohibited viewpoint discrimination and required that permits be granted on a first-come, first-served basis. Id. The court rejected as speculative the plaintiff's argument that the new policy would be applied in a

discriminatory basis because there was no evidence that the county had discriminated even before a formal written policy was adopted. Id. In this case, defendants have not pointed to a newly adopted or amended policy regarding the proprietary rights of Riverfest, Inc. and plaintiff has submitted evidence showing that defendants Flatten and O'Neill applied the propriety rights policy to infringe his free speech rights in the past.

In sum, because defendants have offered no explanation for why plaintiff was approached and effectively silenced at Riverfest in 2012 and have not made it "absolutely clear" that plaintiff will not be silenced again at Riverfest in 2013, plaintiff's claim is not moot.

This leaves the question of the form of the injunction. Defendants argue that plaintiff's requested relief is overly broad and would exceed this court's "jurisdiction" under Fed. R. Civ. P. 65 because it asks the court to enjoin the conduct of unidentified, unnamed individuals. Cpt., dkt. #1, at 16 (seeking preliminary injunction over defendants and "their agents, officials, servants, employees, and all persons in active concert or participation with them"). However, Fed. R. Civ. P. 65(d)(2) provides expressly that a preliminary injunction order binds "the following who receive actual notice of it by personal service or otherwise:

(A) the parties;

(B) the parties' officers, agents, servants, employees, and attorneys; and

(C) other persons who are in active concert or participation with any described in Rule 65(d)(2)(A) or (B)."

Defendants do not explain why plaintiff's request is contrary to this provision and I can think of no reason why it would be. Therefore, I conclude that it is appropriate to enter an injunction prohibiting defendants and their officers, agents, servants, employees, attorneys and other persons who are in active concert or participation with them, from preventing plaintiff from

speaking and distributing literature at Riverside Park on July 4, 2013 during the Riverfest events that are free and open to the public. This injunction will not apply to Riverfest, Inc. employees, agents or affiliates. Also, the injunction applies only to those issues that were raised and litigated in this case. For example, the injunction does not bar defendants from enforcing valid noise or disorderly conduct ordinances against plaintiff, but it does prohibit defendants from restricting plaintiff's speech under any city policy providing proprietary rights to Riverfest, Inc.

ORDER

IT IS ORDERED that

1. The motion for leave to file a sur-reply filed by defendants City of La Crosse, Wisconsin, Steve Carlyon, Ronald Tischer, Kirk Flatten and Timothy O'Neill, dkt. #22, is DENIED.

2. Plaintiff Ryan Woodhouse's motion for a preliminary injunction, dkt. #2, is GRANTED. Defendants and their officers, agents, servants, employees, attorneys and other persons who are in active concert or participation with them, not including Riverfest, Inc. or its employees, agents or affiliates, are ENJOINED from restricting plaintiff's speech and literature distribution during the Riverfest events that are free and open to the public on July 4, 2013 at Riverside Park.

Entered this 10th day of June, 2013.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge