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United States District Court, Southern District of New York, People for the Ethical Treatment of Animals v. Giuliani

Melissa Murphy

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UNITED STATES DISTRICT COURT

People for the Ethical Treatment of Animals v. Giuliani[1] (decided July 25, 2000)

The plaintiff, People for the Ethical Treatment of Animals, Inc. (hereinafter "PETA"), sued the City of New York, the Mayor of New York City (Rudolph Giuliani) and CowParade N.Y.C. 2000 and alleged that the "defendants violated 42 U.S.C. § 1983[2] and PETA's free speech rights under the First[3] and Fourth[4] Amendments of the United States Constitution."[5] The complaint further alleged violations of Article I, Section 8 of the New York State Constitution.[6] The plaintiff sought "declaratory and

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[1] 105 F. Supp. 2d 294 (S.D.N.Y. 2000).

[2] 42 U.S.C. § 1983. Section 1983 states in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Id.

[3] U.S. CONST. amend. I. The First Amendment of the United States Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Id.

[4] U.S. CONST. amend. IV. The Fourth Amendment of the United States Constitution states:

> The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particulary describing the place to be searched, and the persons or things to be seized.

Id.

[5] *Giuliani,* 105 F. Supp. 2d at 302. Plaintiff also brought suit against NYC 2000, New York City Department of Parks and Recreation, CowParade, LLC, CowParade Holdings Corp., and Velocity Sports and Entertainment. *Id.*

[6] *Id.;* N.Y. CONST. art. I, § 8. Article I, § 8 states in pertinent part: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press ... . ." *Id.*

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injunctive relief and damages."[7] The United States District Court for the Southern District of New York denied the plaintiff's request for a preliminary injunction, holding that the plaintiff failed to demonstrate a substantial likelihood of prevailing on the merits of its constitutional claims.[8]

PETA is a non-profit animal rights organization and states that its goal is to educate the public "in order to engender recognition of animal rights and ensure treatment of animals in accordance with animal rights."[9] PETA believes that animals are not for entertainment, experimental use, or for eating.[10]

The CowParade New York City 2000, a public art event, (hereinafter "CowParade"), began on June 15, 2000.[11] The CowParade was a joint public-private venture planned by the defendants and was to continue until September 3, 2000.[12] CowParade contained approximately 500 life-size fiberglass cow sculptures that were painted or decorated in some other artistic manner.[13] CowParade organizers solicited individuals and groups to adopt a cow to be displayed as part of the event.[14] The cows were $7,500 each and every sponsor could either choose a design from hundreds submitted to the CowParade, or they could submit their own design for the cow, subject to approval by the CowParade organizers.[15]

PETA notified the CowParade Organizers of its intention to sponsor two cows of its own designs.[16] The Committee approved one of PETA's two proposed designs.[17] The second design submitted by PETA, however, was rejected by the Committee as

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[7] *Giuliani,* 105 F. Supp. 2d at 302. Plaintiff further claimed that "CowParade NYC 2000 breached its agreement with PETA by not allowing it to display both cows" and sought specific performance and damages on this allegation. *Id.*

[8] *Id.* at 335.

[9] *Id.* at 298 (quoting Compl. ¶ 2).

[10] *Id.*

[11] *Id.* at 298.

[12] *Id.*

[13] *Giuliani,* 105 F. Supp. 2d at 298.

[14] *Id.*

[15] *Id.*

[16] *Id.* at 300.

[17] *Id.* This design was a cow covered in imitation leather products such as boots, belts and jackets, and said, "buy fake for the COW'S sake." *Id.*

being inappropriate.[18] The Committee perceived the design as "overtly and aggressively political in that it was too graphic and violent for a public display that was to be installed in public parks, on public streets, and on school property . . . ."[19] The proposed design "divided the cow into sections in a manner intended to resemble a butcher shop chart showing the cuts of meat derived from a cow."[20] Each section of the cow contained a statement or quotation "concerning the health and ethical problems associated with the killing of cows for food."[21] Of the nine panels contained in this design, the Committee deemed three inappropriate.[22] It remained disputed as to what PETA had been told by the Committee regarding the second design.[23] However, the CowParade Organizers did not change their decision and the proposed design was excluded from the many cows placed on exhibit.[24]

The plaintiff alleged that the exclusion of its proposed design violated its free speech rights under the First and Fourth Amendments to the United States Constitution and under Article 1,

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[18] *Id.* at 301.

[19] *Giuliani,* 105 F. Supp. 2d at 301.

[20] *Id.* at 300.

[21] *Id.*.

[22] *Id.* at 301. (committee determining that the following quotes offensive are: "A lot of times the man skinning the cow finds out an animal is still conscious."). *Id.* (quoting USDA Inspector Timothy Walker). "Cattle are castrated and dehorned without anesthesia." *Id.* "Eating meat causes impotence because it blocks the arteries to all vital organs, including the penis." *Id.* (quoting Dr. Dean Ornish, Medial Advisor to President Clinton).

[23] *Id.* at 302. (PETA alleging that it was told by the CowParade Organizers that the design was "graphic and profane" but were not informed of any specific guidelines the design violated. In a letter from PETA's attorney to the CowParade Organizers, PETA stated that, "the content of the slogans that the committee has deemed to be 'graphic and profane,' is intended to be candid and eye opening and does not sink to the level of the obscene" and that the cow "will vividly confront the viewing public with the truth about animal cruelty in the meat industry."). *Id.* (the CowParade alleging that PETA was told they could resubmit a modified design, and that the words "graphic and profane" were never used. CowParade further contended that PETA was provided with assistance in locating artists to paint an approved design and that PETA "repeatedly reaffirmed its intent to submit a modified design."). *Id.*

[24] *Id.*

Section 8 of the New York Constitution.[25] In denying the plaintiff's claims, the court began its analysis by first determining the type of injunction requested by the plaintiff.[26] The court found that PETA's application for an injunction was a request for a mandatory injunction and the standard was that the plaintiff must show, 1) "that it will suffer some irreparable harm if the injunction does not issue, and 2) either a clear or substantial likelihood of success on the merits, or extreme or very serious damage absent the preliminary relief."[27] The court denied the request for an injunction, holding that the plaintiff neither made a showing of irreperable harm,[28] nor that the plaintiff met the "requisite substantial likelihood of success on the merits."[29]

Next the court determined "whether the CowParade exhibit entailed speech protected by the First Amendment and whether the alleged violations resulted from state action."[30] The parties did not contest either issue, and the court found that both prerequisites were adequately demonstrated. The court further stated that artistic expression is "clearly protected by the First Amendment."[31] Finally, the court had to determine if the rejection of PETA's proposal was carried out under the color of state law. Since the defendants conceded that they formed a public-private partnership giving rise to a "symbiotic relationship" necessary for a claim under 42 U.S.C. § 1983, the court did not have to go any further in its analysis on this point.[32]

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[25] *Giuliani,* 105 F. Supp. 2d at 302.

[26] *Id.*

[27] *Id.* at 303. *See Tunick v. Safir,* 209 F.3d 67, 70 (2nd Cir. 2000); Tom Doherty Assocs., Inc. v. Saban Entertainment, Inc., 60 F.3d 27, 34 (2d Cir. 1995).

[28] *Giuliani,* 105 F. Supp. 2d at 335. The court stated that although PETA's interests would be furthered by participation in the CowParade, PETA's hardship was not serious enough. The court concluded that "Absent the establishment of a constitutional right to have its message displayed in this particular manner and forum, the harm PETA suffers by virtue of the exclusion of a portion of its message is relatively minor." *Id.*

[29] *Id.* (noting that limitations placed on PETA were not unreasonable because "ample alternatives exist for PETA to convey its full message to the same or a larger audience").

[30] *Id.*

[31] *Giuliani,* 105 F. Supp. 2d at 335.

[32] *Id.*

The court then went on to examine the issue of whether or not the government may "create a limited or a nonpublic forum within the confines of traditional public forum property without strict First Amendment justification?"[33] In order to answer this question the court looked to the United States Supreme Court's classification of forums and the applicable standard of judicial scrutiny necessary to sustain a restriction on a protected freedom.[34]

The Supreme Court identified and defined three distinct types of forums in *Perry Educ. Ass'n v. Perry Local Educ. Ass'n.*[35] The first is the quintessential public forum which included streets and parks that have historically been available and recognized for expressive activities.[36] Here, the government was able to enforce content-based exclusions if it showed "that its regulation was necessary to serve a compelling state interest and that it was narrowly drawn to achieve that end."[37]

The second type of forum identified by the United States Supreme Court is known as a "nonpublic forum."[38] This forum includes public property neither traditionally nor purposefully designated by the government as a forum for public debate.[39] Restrictions may be placed on free speech rights by the government so long as the regulation is "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[40]

The third forum was the designated or limited forum.[41] Uncertainties and ambiguities exist in this category because the *Perry* Court did not specifically label the forum "designated or limited," but did discuss the forum as being "designated" by the government and that it may be created for a "limited" purpose.[42] The Court did, however, conclude that this forum comprised "public property which the state has opened for use by the public

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[33] *Id.* at 311.
[34] *Id.* at 305.
[35] 460 U.S. 37, 44 (1983).
[36] *Perry Educ. Ass'n*, 460 U.S. at 45.
[37] *Id.*
[38] *Id.* at 46.
[39] *Id.*
[40] *Id.*
[41] *Giuliani,* 105 F. Supp. 2d at 305.
[42] *Id.*

as a place for expressive activity."[43] In this particular forum, any restrictions placed on free speech rights must satisfy the same compelling government interest that applies to the traditional public forum.[44]

After a long and detailed analysis as to which forum was applicable, the court concluded that the appropriate forum was the limited forum.[45] The court found "persuasive evidence demonstrating purposeful action by the City and CowParade Organizers not to create a public forum generally open to use for indiscriminate expressive purposes of the public at large."[46] The court went on to say, "indiscriminate public entry would be inconsistent with the purposes of the event, and the nature of the properties is incompatible with expressive activities universally open and unrestricted as to consent."[47] In support of this conclusion, the court listed measures taken by the Organizers and the City to make sure the event would serve its intended purpose.[48]

The court was then required to examine the reasonableness of the restrictions placed on the plaintiffs by the defendants. In *Perry*, the Supreme Court stated that reasonableness must be determined by looking at the purpose the forum at issue serves.[49] In a later case,[50] the Court reaffirmed this standard and reiterated that reasonableness must be assessed "in the light of the purpose of the forum and all the surrounding circumstances."[51] The Court further stressed that in a nonpublic forum the restriction only needs to be reasonable, "it need not be the *most* reasonable or the *only* reasonable limitation."[52] The Court indicated a number of

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[43] *Id.*
[44] *Id.*
[45] *Id.* at 318.
[46] *Giuliani*, 105 F. Supp. 2d at 305 (rejecting PETA's numerous arguments attempting to convince the court that the forum was a public-forum).
[47] *Giuliani,* 105 F. Supp. 2d at 318.
[48] *Id.* Access to the CowParade was restricted to pre-qualified sponsors who would pay a fee. Sponsors needed permission to participate in the exhibit, and were chosen "on the basis of aesthetic appeal and appropriateness of their cow designs." *Id*
[49] Perry Educ. Ass'n v. Perry Local Educ. Ass'n. 460 U.S. 37, 49 (1983).
[50] Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 809 (1985).
[51] *Id.*
[52] *Id.* at 808. *Emphasis added.*

surrounding circumstances it considered relevant in determining reasonableness.[53] Some of these include the "availability of alternative channels of communication for the speaker to reach the forum's audience,"[54] "the government's interest in avoiding potential conflict which may impair its ability to achieve the intended purposes for which the nonpublic forum was created,"[55] and "the extent to which the excluded expressive activity is incompatible with the uses of the property or would interfere with the government's forum objectives."[56]

As applied to the case at bar, the City and CowParade Organizers conceded that they excluded designs containing "religious, sexual or political"[57] subjects in order to achieve the expressive, economic and civic purposes they desired.[58] The defendants wanted a "festive, decorous, whimsical and appropriate" exhibit for all ages.[59] PETA contended that the standards imposed by the defendants were impermissible and overly-vague, and could not stand up to constitutional scrutiny.[60] They argued that government officials were given excessive discretion thereby limiting otherwise permissible artistic expression.[61] The court did not agree and stated, "the Constitution does not demand mathematical exactitude or code-like criteria to guide government decisions in these unique circumstances, some of which inevitably entail application of subjective judgements."[62]

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[53] *Giuliani,* 105 F. Supp. 2d at 319, 320.
[54] *Id.* at 320.
[55] *Id.*
[56] *Id.* Additional surrounding circumstances noted by the court included the following: [2] "fair, impartial administration and application of the restriction under circumstances suggesting that the public officials limiting access to expressive activities were mindful of the effect of their restriction . . . and [were] applying it in good faith . . . . " *Id.* at 319. [6] "the limitation of speech per se is not the motivating goal of the restriction on access but an incidental or inevitable consequence of creating the nonpublic forum." *Id.* at 320. [7] "whether the exlusion of access is adopted by the government acting in its proprietary capacity, managing its internal operations." *Id.*
[57] *Id.*
[58] *Id.*
[59] *Giuliani,* 105 F. Supp. 2d at 320.
[60] *Id.*
[61] *Id.*
[62] *Id.* at 322.

It held that the limitations imposed by the defendants were not overly-broad or vague, and were sufficient to withstand constitutional scrutiny.[63] The court said that although the CowParade Guidelines were broadly formulated, the restrictions were "sufficient to withstand First Amendment challenge in the context of the nonpublic or limited forum found here."[64]

The major issue in this case, to what extent a government may infringe upon the individual rights and freedoms of another in a limited forum, has been treated by New York State courts in a manner similar to the treatment by federal courts.[65] Although the New York State Constitution's free speech provision is occasionally considered broader than the First Amendment of the United States Constitution,[66] New York courts apply a forum analysis similar to the doctrine formulated by the Supreme Court.[67]

Despite the fact that New York courts are disposed toward avoiding restrictions on expressions, they have upheld restrictions in non-public or limited forums.[68] New York courts, when not directly applying the forum analysis announced by the United States Supreme Court, generally still refer to the same reasoning used by federal courts.[69] Therefore, because PETA's federal and state Constitution claims were so similar, the court denied the plaintiff's claim for a preliminary injunction under the State

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[63] *Id.*

[64] *Giuliani*, 105 F. Supp. 2d at 322-23.

[65] *Id.* at 336.

[66] *Id. See, e.g.* Bellanca v. New York State Liquor Auth., 54 N.Y.2d 228, 429 N.E.2d 765, 445 N.Y.S.2d 87, (1981), where the New York Court of Appeals held that a ban against topless dancing was unconstitutional under Article 1, § 8 of the New York State Constitution. It noted, however, that such a ban "[M]ight be permissible under the United States Constitution based on the effect of the Twenty-First Amendment on the First Amendment . . . ." *Giuliani,* 105 F. Supp. 2d at 336 n.14.

[67] *Id.* at 335. *See, e.g.,* Rogers v. New York City Transit Auth., 89 N.Y.2d 692, 680 N.E.2d 142, 657 N.Y.S.2d 891 (1997). (Holding that subway stations are "limited public forums subject to reasonable regulation.") *Id. See also* Byrne v. Long Island State Park Comm'n, 66 Misc. 2d 1070, 323 N.Y.S.2d 442 (Sup. Ct. 1971). (Holding the reasonableness test is the applicable standard for a nonpublic forum "whether the rule is a content based regulation on speech or an incidental restriction on expressive activity.") *Giuliani,* 105 F. Supp. 2d at 336.

[68] *Id.*

[69] *Id. See, e.g. Rogers,* 657 N.Y.S.2d 871.

Constitution without extensive analysis, concluding that PETA failed to "establish a likelihood of the success on the merits of its claim under the State provision."[70]

Melissa Murphy

[70] *Giuliani*, 105 F. Supp. 2d at 336.

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