



1997

Second Department Tillman v. Distribution Systems of America

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Recommended Citation

(1997) "Second Department Tillman v. Distribution Systems of America," *Touro Law Review*. Vol. 13 : No. 3 , Article 25.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol13/iss3/25>

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FREEDOM OF SPEECH & PRESS

N.Y. CONST. art. I, § 8:

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.

U.S. CONST. amend. I:

Congress shall make no law . . . abridging the freedom of speech . . . or of the press

SUPREME COURT, APPELLATE DIVISION

SECOND DEPARTMENT

*Tillman v. Distribution Systems of America, Inc.*¹
(decided October 7, 1996)

The defendants contended that their federal² and state³ constitutional right of free speech was violated when the court granted the plaintiffs' motion for summary judgment for an injunction which "permanently enjoined [defendants] from making deliveries of unsolicited newspapers and/or advertisements upon plaintiffs' property."⁴ The Appellate Division, Second Department, while recognizing the defendant's constitutional right to distribute newspapers, held that such right does not extend to allowing such distribution onto the property of

1. 224 A.D.2d 79, 648 N.Y.S.2d 630 (2d Dep't 1996).

2. U.S. CONST amend. I, cl. 3. This section provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech" *Id.*

3. N.Y. CONST. art. I, § 8. This section provides in pertinent part: "Every citizen may freely speak, write, and publish . . . on all subjects . . . and no law shall be passed to restrain or abridge the liberty of speech" *Id.*

4. *Tillman*, 224 A.D.2d at 82, 648 N.Y.S.2d at 632.

a homeowner who has notified the distributor not to make the delivery.⁵

On various occasions, the defendant left unsolicited newspapers with pull-out advertisements at the plaintiff's home.⁶ The plaintiff made repeated requests to the defendant to discontinue these unwanted deliveries, and the defendants repeatedly promised the plaintiffs, and their lawyer, that such deliveries would cease.⁷ Upon realizing that the defendants were not going to honor their promises, the plaintiffs, *inter alia*, sought "an injunction restraining the defendants from delivering any unsolicited free newspapers or advertisements to their property."⁸ The Supreme Court, Nassau County, granted summary judgment in favor of the plaintiffs, and the defendants appealed.⁹

On appeal, the defendants argued that the injunction infringed on their right of free speech.¹⁰ The Appellate Division, Second Department, declared that the defendants do not have a constitutional right of free speech "to continue to throw unwanted materials" on the property of a owner who has requested that such deliveries stop.¹¹ The court rejected the defendants' contention that the prohibition created by the injunction was state action that limited "non-commercial speech."¹² Moreover, the court found that "the constitutional right to free speech does not correspond to the 'right' to force others to listen to whatever one has to say."¹³

The holding in *Distribution Systems of America, Inc.* is consistent with Federal and other New York decisions on this issue. In *Martin v. City of Struthers*,¹⁴ the United States Supreme Court stated that a person could be punished for calling the home

5. *Id.* at 80, 648 N.Y.S.2d at 631.

6. *Id.* at 81, 648 N.Y.S.2d at 631.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 82, 648 N.Y.S.2d at 632.

11. *Id.*

12. *Id.* at 80, 648 N.Y.S.2d at 631.

13. *Id.* at 82, 648 N.Y.S.2d at 632.

14. 319 U.S. 141 (1943).

of another who has previously requested not to be called.¹⁵ The Court, in effect, pinpointed the stage where free speech takes a back seat to the concept that “‘a man’s home is his castle’ into which ‘not even the king may enter.’”¹⁶ Subsequently, in *Breard v. City of Alexandria*,¹⁷ the United States Supreme Court, balancing the homeowners’ “desire for privacy and the publisher’s right to distribute [its] publications,” upheld an ordinance that forbade the entry of persistent solicitors onto private property, absent an invitation of the homeowner.¹⁸ The Court emphasized that forcing a homeowner to allow “solicitors of publications” on to their property would be a misuse of the guarantees of free speech.¹⁹ Hence, in *Rowan v. U.S. Post Office Department*,²⁰ the Supreme Court rejected the argument that “[a] vendor has a right under the Constitution [] to send unwanted material into the home of another.”²¹ The Court noted that nothing in the Constitution compels a citizen “to listen or view any unwanted communication[s].”²²

In *People v. Bohnke*,²³ the New York State Court of Appeals upheld an ordinance that allowed a homeowner to decide whether to allow the circulation of pamphlets on his property.²⁴ The court further noted that the Constitution does not guarantee the right to cross freely on to the property of a homeowner.²⁵ The court made it clear that there was nothing wrong with an individual homeowner deciding whether to allow circulation of pamphlets on its property, because such action “does not prohibit

15. *Id.* at 148.

16. *Tillman*, 224 A.D.2d at 82, 648 N.Y.S.2d at 632 (quoting 397 U.S. 728, 737 (1970)).

17. 341 U.S. 622 (1951).

18. *Id.* at 644.

19. *Id.* at 645.

20. 397 U.S. 728 (1970). In *Rowan*, the Court upheld a statute that allowed a person to require that their name be removed from a mailing list. *Id.*

21. *Id.* at 738.

22. *Id.* at 737.

23. 287 N.Y. 154, 38 N.E.2d 478 (1941).

24. *Id.* at 159, 38 N.E.2d at 479.

25. *Id.*

pamphleteering [but rather] regulates pamphlet distribution in private . . . places."²⁶

Therefore, under both the Federal and State constitutions, the constitutional right of free speech does not guarantee the right to continue to throw a newspaper onto the property of a homeowner who has requested that such unwanted deliveries be discontinued. The Federal and the New York State Constitutions are in agreement with this free speech interpretation.

SUPREME COURT, APPELLATE DIVISION

FOURTH DEPARTMENT

Time Square Books, Inc.,

v.

City of Rochester²⁷

(decided July 12, 1996)

The plaintiff, Time Square Books, sought to enjoin the defendant, City of Rochester, from enforcing a newly passed ordinance²⁸ which mandated that booths used for private viewing of adult entertainment be constructed and maintained in such a manner that the interior of the booths be entirely visible to persons in adjacent public areas.²⁹ The plaintiff claimed that the showing of such material is protected by both the Federal³⁰ and New York State Constitutions.³¹ The plaintiff also asserted that

26. *Id.* at 158, 38 N.E.2d at 479.

27. 223 A.D.2d 270, 645 N.Y.S.2d 951 (4th Dep't 1996).

28. Rochester, N.Y., Municipal Code § 29-15 (1995).

29. Rochester, N.Y., Municipal Code § 29-15 [I] [2] (1995). This section states in pertinent part: "Visibility into such booths shall not be blocked or obscured by doors, curtains, partitions, drapes or any other obstruction whatsoever." *Id.*

30. U.S. CONST. amend. I. The First Amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . . or of the press . . ." *Id.*

31. N.Y. CONST. art. I, § 8. Granting a more expansive right than that afforded by the Federal Constitution, the article states: "Every citizen may