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Fourth Department Time Square Books, Inc., v. City of Rochester

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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

restrictions of the sort employed by the ordinance violate the free speech guarantees of both Constitutions.³² The Supreme Court, Monroe County, denied plaintiff's motion for a temporary injunction during the pendency of the action.³³ The Appellate Division, Fourth Department, reversed,³⁴ holding that the plaintiffs had sufficiently demonstrated a likelihood of success on their constitutional claims, that they would suffer irreparable injury, and that a balancing of equities weighed in their favor.³⁵

Concerned with the spread of sexually transmitted diseases, such as AIDS, the Rochester City Council amended its Municipal Code to ensure that private booths used for viewing adult entertainment were not conducive to the types of behavior which increased the risk of such diseases.³⁶ The Council found that the presence of doors and other sight obstructions on these booths facilitated the concealment of such activity.³⁷ In order to discourage such behavior, the Council promulgated regulations which required the owners and operators of premises which offered such booths to ensure that the booths were constructed and maintained in such a manner that the entire interior of the booths remained visible to the adjacent public area.³⁸ Additionally, the walls and windows of the booths were to be of solid construction, without openings, with the walls extending from the floor to a height of at least six feet.³⁹ Furthermore, the occupancy of the booths was to be limited to only one person at a time.⁴⁰

The plaintiff, Time Square Books, operates retail stores which, in addition to selling sexually explicit books and videotapes,

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 the press." *Id.*

32. U.S. CONST. amend. I; N.Y. CONST. art. I § 8.

33. *Time Square Books*, 223 A.D.2d at 270, 645 N.Y.S.2d at 951.

34. *Id.* at 279, 645 N.Y.S.2d at 958.

35. *Id.* at 278, 645 N.Y.S.2d at 958.

36. *Id.* at 272, 645 N.Y.S.2d at 953.

37. *Id.*

38. *Id.*

39. *Id.* at 271, 645 N.Y.S.2d at 953.

40. *Id.* at 271-72, 645 N.Y.S.2d at 953.

offers enclosed booths for viewing adult motion pictures.⁴¹ In challenging the open booth requirement of the amended Rochester Municipal Code,⁴² the plaintiff brought an action to permanently enjoin the enforcement of that portion of the new provision, which they claim violates the free speech guarantees of the Federal and State Constitutions.⁴³ The Supreme Court, Monroe County, denied plaintiffs' motion for a preliminary injunction⁴⁴ during the pendency of the action on this issue.⁴⁵

The court's analysis began with the premise that the First Amendment of the Federal Constitution⁴⁶ protects such forms of expression as the display of sexually explicit entertainment in private booths, such as those on plaintiffs premises.⁴⁷ Protection of this form of entertainment is also afforded by Article I, section 8,⁴⁸ of the New York State Constitution.⁴⁹ The Rochester ordinance offends the guarantees of both Constitutions in its attempt to regulate presentation of the protected expression.⁵⁰

In determining the scope of constitutionally guaranteed rights, "the Federal Constitution fix[es] only the minimum standards applicable throughout the Nation, and the State[s] . . .

41. *Id.* at 272, 645 N.Y.S.2d at 954.

42. Plaintiffs did not challenge the solid wall requirement nor the one person occupancy requirement of the ordinance. *Id.*

43. *Id.*

44. "To be entitled to a preliminary injunction, plaintiffs were required to demonstrate (1) the likelihood of ultimate success on the merits; (2) irreparable injury if the preliminary injunction is not granted; and (3) a balancing of the equities in their favor." *Id.*

45. "The court determined that plaintiffs failed to establish a likelihood of success on the merits of their constitutional challenges to the ordinances. From that determination, the conclusion followed that plaintiffs also failed to demonstrate irreparable injury or a balancing of equities in their favor." *Id.*

46. U.S. CONST. amend. I.

47. *Time Square Books*, 223 A.D.2d at 273, 645 N.Y.S.2d at 954. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) (holding that "[n]ude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment").

48. N.Y. CONST., art. I, § 8.

49. *Time Square Books*, 223 A.D.2d at 273, 645 N.Y.S.2d at 954.

50. *Id.*

supplement those standards to meet local needs or expectations."⁵¹ Freedom of expression is one of the areas in which New York, through its Constitution, has chosen to expand upon the minimal guarantees of the Federal Constitution.⁵² Those standards employed in federal cases involving a determination of First Amendment rights are informative, but not dispositive, in cases involving a determination of the same rights decided under Article 1, section 8 of the New York State Constitution.⁵³

The plaintiff raised the issue of the degree to which the ordinance limits protected speech.⁵⁴ A distinction is drawn between "content-based regulations," which directly aim to affect the protected activity, and "content-neutral regulations," which only incidentally affect those protected activities.⁵⁵ As a form of

51. *Immuno A.G. v. Moor-Jankowski*, 77 N.Y.2d 235, 249, 567 N.E.2d 1270, 1277, 566 N.Y.S.2d 906, 913 (1991), *cert. denied*, 500 U.S. 954 (1991).

52. *People ex rel. Arcara v. Cloud Books*, 68 N.Y.2d 553, 557, 503 N.E.2d 492, 494, 510 N.Y.S.2d 844, 846 (1986).

53. *Id.* at 558, 503 N.E.2d at 494-95, 510 N.Y.S.2d at 847. In *Arcara*, the district attorney sought to enjoin a bookstore from permitting illicit sexual contact on its premises and to obtain an order of abatement to close the premises for one year. *People ex rel. Arcara v. Cloud Books, Inc.*, 65 N.Y.2d 324, 326, 480 N.E.2d 1089, 1091, 491 N.Y.S.2d 307, 309 (1985), *rev'd*, 478 U.S. 697 (1986), *rev'd on other grounds*, 68 N.Y.2d 553, 503 N.E.2d 492, 510 N.Y.S.2d 844 (1986). The court of appeals ruled that the closure constituted an impermissible prior restraint of the First Amendment rights of Cloud Books, on the grounds that termination of the illicit sexual contact could be accomplished in a manner which did not impinge upon the sale of books. *Id.* at 337, 480 N.E.2d at 1099, 491 N.Y.S.2d at 317. The United States Supreme Court reversed, finding that the closure statute, N.Y. Public Health Law § 2321, was directed at non-expressive activity and therefore not violative of First Amendment rights. *People ex rel. Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 708 (1986). On remand, the court of appeals held that although it was bound to accept the Supreme Court's interpretation of § 2321 as not being violative of the First Amendment, under state constitutional law the statute fails for being broader than necessary to achieve its purpose. *Arcara*, 68 N.Y.2d at 558, 503 N.E.2d at 495, 510 N.Y.S.2d at 847.

54. *Time Square Books*, 223 A.D.2d at 273, 645 N.Y.S.2d at 955.

55. *Town of Islip v. Caviglia*, 73 N.Y.2d 544, 556, 540 N.E.2d 215, 221, 542 N.Y.S.2d 139, 145 (1989). The Town of Islip, petitioner, limited the

content-based regulation,⁵⁶ aimed specifically at "adult entertainment," plaintiff argued that the ordinance was presumptively invalid and subject to strict scrutiny.⁵⁷ The court declined to rule on this issue, however, deciding instead that under the lower standards employed for content-neutral regulation,⁵⁸ the plaintiff was entitled to relief.⁵⁹

operation of adult entertainment businesses by zoning ordinance to certain industrial areas. *Id.* at 549, 540 N.E.2d at 216, 542 N.Y.S.2d at 140. Respondent Caviglia operated the Happy Hour Bookstore in a downtown area outside any of the appropriately zoned industrial areas. *Id.* at 550, 540 N.E.2d at 217, 542 N.Y.S.2d at 141. The Town sought to enjoin the bookstore's non-conforming use, which Caviglia opposed on the grounds that an injunction violated his First Amendment rights. *Id.* at 550, 540 N.E.2d at 217, 542 N.Y.S.2d at 141. The New York State Court of Appeals found that the intent of the zoning ordinance, based on a study of the detrimental effects of adult businesses on their surrounding neighborhoods, was not to restrict free speech, but rather to prevent the deterioration of downtown business areas. *Id.* at 553, 540 N.E.2d at 219, 542 N.Y.S.2d at 143. The court of appeals explained that "[g]overnment action may restrict speech either intentionally or incidentally. Intentional restrictions are directed at the message conveyed, either its content or the time, place and manner in which it is disseminated." *Id.* at 556, 540 N.E.2d at 221, 542 N.Y.S.2d. at 145. The court further explained that "[c]ontent-neutral regulations . . . relate only to the time, place and manner of expression," *Id.* at 556-57, 540 N.E.2d at 221, 542 N.Y.S.2d. at 145, and "have a purpose other than suppressing protected speech, but which have incidental effects on speech." *Arcara*, 65 N.Y.2d at 336, 480 N.E.2d at 1099, 491 N.Y.S.2d at 316.

56. "Where a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." *Consolidated Edison Co. v. Public Service Comm.*, 447 U.S. 530, 540 (1980).

57. *Caviglia*, 73 N.Y.2d at 556, 540 N.E.2d at 221, 542 N.Y.S.2d. at 145.

58. *U.S. v. O'Brien*, 391 U.S. 367 (1968). O'Brien burned his draft card in an antiwar protest. *Id.* at 369. He fought his conviction for destruction of the certificate on the grounds that the controlling statute, 50 U.S.C. app. § 462 (b)(1)-(6) (1965), violated his First Amendment freedom of expression rights. *Id.* at 376. The Court found that the government had a substantial interest in preventing the destruction of draft registration certificates. *Id.* at 380. The statute was aimed at the non-communicative aspects of draft card destruction, not at suppressing the expressive element. *Id.* at 382. As such, it burdens speech only incidentally. *Id.* at 376. The Supreme Court stated:

Accordingly, the rules announced in *U.S. v. O'Brien*,⁶⁰ and similar rules adopted in New York,⁶¹ provide that the State must show that regulations which "incidentally burden free expression" are "no broader than necessary" to carry out a legitimate governmental objective.⁶² Interpretation of the "no broader than necessary" mandate has developed under federal and state constitutional law to include an examination of the means employed to restrict free expression.⁶³ Where alternate avenues exist to accomplish the aims of the governmental intrusion, without also impinging on free expression, courts have struck down overbroad regulations as being unconstitutional.⁶⁴ Conversely, demonstration that less restrictive measures have been unsuccessful in achieving the desired effect, suggests to the court that stronger remedies are appropriate.⁶⁵

[An] incidental limitation[] on First Amendment freedoms . . . is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 376-77.

59. *Time Square Books*, 223 A.D.2d at 275, 645 N.Y.S.2d at 955.

60. *O'Brien*, 391 U.S. at 377.

61. *Time Square Books*, 223 A.D.2d at 275-76, 645 N.Y.S.2d at 956. See *Matter of Nicholson v. State Comm. on Judicial Conduct*, 50 N.Y.2d 597, 409 N.E.2d 818, 431 N.Y.S.2d 340 (1980).

62. *Arcara*, 68 N.Y.2d at 558, 503 N.E.2d at 495, 510 N.Y.S.2d at 847 (citing *Matter of Nicholson*, 50 N.Y.2d 597, 409 N.E.2d 818, 431 N.Y.S.2d 340 (1980)).

63. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). The *Barnes* court found the statutory prohibition against totally nude dancing to be the "bare minimum" necessary to achieve the State's interest in protecting order and morality. *Id.* at 572. In *Arcara*, the burden of proving that closure was the "least restrictive means" of maintaining public health was placed on the State. *Arcara*, 68 N.Y.2d at 559, 503 N.E.2d at 495, 510 N.Y.S.2d at 847.

64. *Arcara*, 65 N.Y.2d at 337, 480 N.E.2d at 1099, 491 N.Y.S.2d at 317.

65. *Id.*

First Amendment challenges to open booth requirements have been uniformly unsuccessful throughout the nation.⁶⁶ A consideration of the rights of expression arising under the Federal Constitution was therefore excluded, simplifying the court's task.⁶⁷ The New York State Constitution, however, provided a more hospitable environment for those seeking its free expression protection.⁶⁸

The Fourth Department noted that, in *Arcara*, the district attorney sought closure of the bookstore after an investigation uncovered that the owner was aware of incidents of illicit sexual conduct on the premises.⁶⁹ Nevertheless, no patrons of the establishment were arrested nor was an injunction of the illegal acts sought.⁷⁰ The court of appeals found that, under New York law, the state had failed to prove that the closure was the least restrictive means of accomplishing the intended purpose.⁷¹ Similarly, in the instant case, the City of Rochester failed to show that the open booth requirement is no broader than necessary to fulfill the purpose of the ordinance.⁷²

Defendants failed to offer proof that limiting the spread of sexually transmitted diseases could not be accomplished in a less cumbersome manner than infringing on the free expression rights of the plaintiff.⁷³ Significantly, the court found that enforcement

66. *Time Square Books*, 223 A.D.2d at 273, 645 N.Y.S.2d at 954 (citing a large number of cases, decided under the Federal Constitution, which unsuccessfully challenged statutes similar to the Rochester ordinance).

67. *Arcara v. Cloud Books, Inc.* 68 N.Y.2d. 553, 503 N.E.2d at 492, 510 N.Y.S.2d at 844 (The court of appeals decided the case on First Amendment grounds, was subsequently reversed by the Supreme Court, and then re-decided on State Constitutional grounds).

68. *Time Square Books*, 223 A.D.2d at 274, 645 N.Y.S.2d at 955.

69. *Id.* at 276, 645 N.Y.S.2d at 956. The undercover investigator personally observed incidents of masturbation and fellatio and was solicited by a prostitute himself. *Arcara*, 65 N.Y.2d at 326, 480 N.E.2d at 1091-92, 491 N.Y.S.2d at 846.

70. *Arcara*, 68 N.Y.2d at 556, 503 N.E.2d at 493-94, 510 N.Y.S.2d at 846.

71. *Id.* at 559, 503 N.E.2d at 495, 510 N.Y.S.2d at 847.

72. *Time Square Books*, 223 A.D.2d at 276, 645 N.Y.S.2d at 956.

73. *Id.*

of the unchallenged portions of the amended Rochester ordinance, in particular those portions dealing with solid wall construction and the one person per booth requirement, provides a less intrusive means of facilitating that objective.⁷⁴ Additionally, the City made no other effort to ensure that the booths would not be used in the manner sought to be proscribed by the ordinance.⁷⁵

The court distinguished the instant case from both *Arcara* and *Caviglia* on the basis of its facts.⁷⁶ The action in *Arcara* was premised on the eyewitness testimony of an undercover agent that illegal activity was occurring on the bookstore premises.⁷⁷ *Caviglia* was based on studies that the Town of Islip had prepared detailing the harmful secondary effects of "adult entertainment businesses" on the immediate neighborhood and the mitigation of those effects through the town's zoning power.⁷⁸ In contrast, no illicit sexual activity had been observed in the plaintiff's establishments, nor was the plaintiff shown to be aware that high-risk sexual activity was occurring on the premises.⁷⁹

In conclusion, the court noted that in addition to a demonstration of likely success on the merits, the plaintiff also satisfied the remaining related requirements for a grant of preliminary injunction.⁸⁰ Infringement of the right of free expression, by itself, constitutes irreparable injury.⁸¹ Additionally, the costs associated with conforming to the new structural requirements while the action proceeds satisfies plaintiff's burden of proving that a balancing of equities weighs

74. *Id.*

75. *Id.*

76. *Id.* at 277, 645 N.Y.S.2d at 957.

77. *Arcara*, 65 N.Y.2d at 326, 480 N.E.2d at 1091, 491 N.Y.S.2d at 309. ("[T]he officer specified various lewd and illegal acts he had witnessed . . . including four acts of masturbation and one act of fellatio, and was himself solicited for sexual conduct for a fee by persons on the premises on several occasions."). *Id.*

78. *Caviglia*, 73 N.Y.2d at 549, 540 N.E.2d at 214, 542 N.Y.S.2d at 142-43.

79. *Time Square Books*, 223 A.D.2d at 277, 645 N.Y.S.2d at 957.

80. *Id.* at 278, 645 N.Y.S.2d at 957.

81. *Id.*, 645 N.Y.S.2d at 958.

in their favor.⁸² Without a sufficient showing by the city that the ordinance was necessary to achieve a reduction in the spread of sexually transmitted diseases, the court reversed the order below and granted the plaintiff's motion for a preliminary injunction.⁸³

The creators of the Federal Constitution envisioned that the citizens of this country would be guaranteed certain minimum liberty protections under the Federal Constitution which the states would be free to expand upon via their individual state constitutions. New York exercised this option and has, historically, chosen to extend greater protection in the area of free speech and expression than the federal government. While the Supreme Court has interpreted the First Amendment to require only that incidental burdens to free expression be "narrowly tailored,"⁸⁴ the New York State Court of Appeals has interpreted Article 1, section 8 of the New York State Constitution as requiring that "the least restrictive means" possible be employed to burden its citizens.⁸⁵ Thus, the disparity of results reached by a challenge brought under the Federal and State Constitutions can be understood not only as a contrast in the liberty interest provided by each, but also as a difference in the measuring standard utilized by the court.

SUPREME COURT

NEW YORK COUNTY

Stringfellow's of New York Ltd. v. City of New York⁸⁶
(decided October 24, 1996)

Plaintiff Stringfellow's, along with plaintiffs in two similar actions, sought to declare as invalid a zoning resolution which, if

82. *Id.*

83. *Id.* at 279, 645 N.Y.S.2d at 958.

84. *See O'Brien*, 391 U.S. at 382.

85. *See Matter of Nicholson*, 50 N.Y.2d 597, 409 N.E.2d 818, 431 N.Y.S.2d 340 (1980).

86. 653 N.Y.S.2d 801 (Sup. Ct. New York County 1996).