

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

ROUTES 202 and 309 AND	§	
NOVELTIES GIFTS, INC.	§	CIVIL ACTION NO. 11-cv-5822
	§	
Plaintiff,	§	(Judge Petrese Tucker)
	§	
vs.	§	
	§	DEFENDANTS' REPLY IN
THE KING'S MEN, et al.	§	SUPPORT OF THEIR MOTION
	§	FOR SUMMARY JUDGMENT
Defendants.	§	

**DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR
SUMMARY JUDGMENT**

I. INTRODUCTION

Defendants, The King's Men, and the individual members named, file this Reply in Support of their Motion for Summary Judgment.¹

Defendants' Motion should be granted because Plaintiff failed to file an Answer to Defendants' Counterclaim until two (2) days ago which should not be considered and should be stricken for being filed after the close of discovery and after summary judgment motions were filed. In addition, because the record is devoid of any evidence supporting any of Plaintiff's claims, this case should be dismissed with prejudice.

¹ Defendants reply herein to both the Amended Response (Docket No. 58) and Response (Docket No. 55) that Plaintiff filed on June 26, 2013 and June 19, 2013. The only apparent difference between the two documents is a cover page and table of contents in the former. It was, however, filed a week after the deadline set by this Court in its revised scheduling Order (Docket No. 50).

A. The Plaintiff's Trespass Claim Is Not Supported by Record Evidence

Defendants do not seek to protest on property to which Plaintiff has exclusive use or possession. To the contrary, Defendants stand on the mulched area in front of Adult World which is a right of way, and on the neighboring Lukoil property. Plaintiff admitted at the beginning of this litigation that the mulched area is a Township right of way. (TRO Hearing Transcript 3:7-20.)

This Court has already recognized that “[u]nder Pennsylvania law, an action for trespass is valid only where the plaintiff has the exclusive right of use and possession of the land in question.” Mem. Op. Oct. 4, 2011, Docket No. 14, at 9 (noting that during the TRO hearing on September 22, 2011, “Plaintiff’s witness, Adult World manager Mr. Harris, testified that police officers who came to Adult World in response to Mr. Harris’ complaints about the protestors, instructed Defendants to use the mulched area because it is a right of way where the public may permissibly stand (18: 11-14)”). When this Court found “that Plaintiff’s trespass argument is unlikely to succeed,” “the facts at hand support[ed] a conclusion that the mulched area is a public forum, and not private property.” Because no additional or new facts are “at

hand” or anywhere in the record in this case with respect to the trespass claim, the claim must be dismissed and summary judgment granted.

B. There is No Evidence To Support a Section 1983 Claim

Plaintiff does not have standing under the U.S. Constitution, nor under the Pennsylvania Constitution because they only protect Plaintiff from the government’s intrusion on their First Amendment rights. There is nothing on the record in this case to suggest that Defendants are governmental or quasi-governmental actors. Indeed, there is nothing more on the record with respect to this issue as there was when this Court ruled, following the TRO hearing, that “There is nothing on the record to support Plaintiff’s claim that Defendants are carrying out a quasi-governmental function by enjoying the failure of the local police to stop Defendants from protesting on the mulched area in front of Adult World. We have already noted above that the facts indicate that the mulched area is indeed a Township right of way, where Defendants may permissibly exercise their free speech rights by carrying on peaceful protest.” Mem. Op., Oct. 4, 2011 at page 15. Plaintiff cites only to the TRO transcript in support of its section 1983 claim and therefore

judgment must be granted in Defendants' favor for the reasons this Court set forth in its October 4, 2011 opinion.

C. There is No Record Evidence to Support a RICO Claim

It must be noted that pages nine through fourteen (9-14) of the Plaintiff's Response brief, a section titled "The Lies," accuses Defendants of not following the Catholic Church's "norms and Canon Law." It is not clear which, if any, of its legal claims Plaintiff believes this rant is relevant to, but this Court cannot be asked to wade into a church's own doctrine and teaching to determine whether or not a party has somehow violated same. Such an action by this Court would, among other things, violate the Establishment and Free Exercise Clauses. As such, this Court should disregard Plaintiff's unusual invitation to determine whether or not Defendants are following the teachings of their church.

Further, none of the alleged failures to comply with the church's teachings constitute or even come close to describing "robbery or extortion" which the RICO statute requires. 18 U.S.C. § 1961(5) requires a pattern of racketeering activity comprised of the commission

of at least two predicate acts of robbery or extortion within a ten-year period.

Plaintiffs never used threats or force. See Hearing Tr. 102, 133-34. On Oct. 4, 2011, this Court found “that Plaintiff has not likely met its burden concerning its RICO claim, as Defendants’ activities of peacefully organizing protestors in front of adult businesses cannot likely be characterized as ‘racketeering activity’ as defined under 18 U.S.C. § 1961(5).” Mem. Op. at page 19.

D. There is No Evidence of Any Sherman Act Violation

Defendants’ First Amendment activities do not rise to the level of restraint on competition or any industry the Sherman Act prohibits. There remains no record evidence or a single fact to support the idea that Defendants took actions to “impose a conspiracy to place undue limitations on competitive opportunities within the adult entertainment industry.” Mem. Op., Oct. 4, 2011, page 16-17. Plaintiffs have not, for example, “meddl[ed] with pricing structures, or other facets of the industry or business allegedly harmed.” *Id.* at 17. Not only that, but there is no evidence of harm to Plaintiff whatsoever.

To date, the record continues to show nothing “other than the unspecified losses of revenue that the store manager, Mr. Harris, attributed to Defendants' protests.” Id. (citing TRO Hearing Transcript 28:7-17). Although months of discovery were permitted and then extended, Plaintiff still cannot “specify the amount of revenues lost, nor any solid evidence showing that the protests were the actual cause of such losses.” Id. Although Plaintiff makes much of the fact that the only individual it deposed in this case earns a modest living by working for the non-profit organization, The Kings’ Men, it has not thereby shown that he or the organization or any other defendant has a “financial stake in the adult entertainment business. (TRO Hearing Transcript 79:1-11).

For the reasons set forth in their Brief in Opposition to Plaintiff’s Motion to Compel (Docket No. 59), Defendants had no obligation to respond to requests propounded at the close of discovery and due after the discovery period ended. In any event, Plaintiff can point to no evidence of a violation it believes it would have found in any such responses.

E. There Is No Evidence of Any RICO / Hobbs Act Violation

Extortion, under the Hobbs Act, is inducing a victim to part with property through the use of fear and, in so doing, adversely affecting interstate commerce. *See* 18 U.S.C. § 1951(b)(2); United States v. Urban, 404 F.3d 754, 768 (3d. Cir. 2005). Plaintiff's conclusion that Defendants' protected, First Amendment activities in opposition to sexually explicit material are Hobbs Act violations is without a shred of support in the record.

To the contrary, the record shows that threats or force to induce persons to part with property have not been used by Defendants in their activities on the public fora surrounding Plaintiff's porn shop. The Plaintiff claims, without pointing to any record evidence, that one defendant was interviewed by "the Lansdale Patch" and attributes a statement to him regarding prostitution occurring at Plaintiff's business. No report from that publication appears on the record in this case and, even if it did, it is not extortion.

As this Court noted previously found in this case,

"In order to satisfy the burden of proving a violation under the Hobbs Act, a plaintiff must show that the defendant undertook any of the following prohibited actions under 18 U.S.C § 1951(a):
' . . . obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or

attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section”

Mem. Op. at 19-20 (citing TRO Hearing Transcript 102:15-23: 103: 1-11; 132:5-25. 133: 1-2) (finding that “Nothing on the record supports that Defendants engaged in extortion or robbery”).

The testimony in this case shows Defendants’ protests at the public fora surrounding Adult World have involved no threats or force to induce any persons to part with property. Therefore, for the reasons set forth in this Court’s Memorandum Opinion of October 4, 2011, the Hobbs Act / RICO claims must be dismissed as unsupported by record evidence.

F. Plaintiff Apparently Concedes there Is No Evidence of Public or Private Nuisance

Defendants moved for summary judgment on Plaintiff’s private and public nuisance claims. No response was filed by Plaintiff nor counter argument with respect thereto contained in either its Response (Docket No. 55) or Amended Response (Docket No. 58). Therefore, this Court may find that Plaintiff does not oppose a grant of summary judgment with respect to those Counts. Further, for the reasons set

forth in this Court's Oct. 4, 2011 Memorandum Opinion, summary judgment should be granted to Defendants on those counts.

G. Plaintiff's Response(s) Do Not Contain Oppositions To Defendants' Request for Summary Judgment On Its Counterclaim

Although Plaintiff moved for summary judgment with respect to Defendants' counterclaim, it never responded to Defendants' request for summary judgment in either its Response (Docket No. 55) or Amended Response (Docket No. 58). In any event, because Plaintiff neglected even to respond to Defendants' Counterclaim until well after the close of discovery and after the summary judgment deadline passed, Defendants will be prejudiced by any action on their counterclaim by this Court but a grant of summary judgment.

II. CONCLUSION

For the foregoing reasons, summary judgment must be granted to Defendants on their counterclaim and on all counts of the Plaintiff's complaint.

Respectfully Submitted,
CLYMER MUSSER & CONRAD, P.C.

s/ Emily M. Bell

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Dated: June 29, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2013, I electronically filed the above document with the Clerk of Courts using the CM/ECF system, which automatically sends an electronic notification to the following attorneys of record: Brian Smith, Esq. and Joseph Diorio, Esquire.

Respectfully Submitted,

/s/ Emily M. Bell
EMILY M. BELL
Attorney for Defendants

Date: June 29, 2013