

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ATLANTIC SHOW PROMOTIONS, INC.,

Plaintiff,

vs.

CASE NO. 94-999-CIV-T-24(B)

CITY OF TAMPA; SANDRA W. FREEDMAN,
Individually and as Mayor of the
City of Tampa and WILHELMINA Y.
BOYD, Individually and as Director
of the Tampa Convention Center,

Defendants.

DEFENDANT'S REPLY TO AND MEMORANDUM OF LAW OPPOSING
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Defendants, through undersigned counsel, file their reply and Memorandum of Law in opposition to the Plaintiff's Motion for Preliminary Injunction and state as follows:

1. Plaintiff's Motion should be denied because Plaintiff has failed to meet its burden of proof in seeking injunctive relief.

2. Plaintiff is unlikely to prevail on the merits of the underlying case on the following bases:

a. The functions for which it desired to lease the Tampa Convention Center are non-expressive conduct, not speech.

b. The rights which the City has allegedly violated are those of third parties and not the Plaintiff's. Therefore, the Plaintiff lacks standing.

c. The Tampa Convention Center is not a public forum.

d. The City of Tampa has a substantial interest in fostering the best commercial use of its nonpublic property and protecting its citizens from accidental or deliberate injury.

3. Plaintiff has not suffered an irreparable injury.

4. Defendants reserve the right to file additional briefs and opposing affidavits prior to a hearing on the instant Motion as allowed by Rule 4.06 of the Rules of the United States District Court for the Middle District of Florida.

MEMORANDUM OF LAW

At issue is whether the Plaintiff has met the requirements for entitlement to a preliminary injunction. These prerequisites are: whether the Plaintiff has a substantial likelihood of prevailing on the merits; a substantial threat that Plaintiff will suffer irreparable injury if injunction is not granted; that the threatened injury to the Plaintiff outweighs the potential harm the injunction can cause the Defendants and that such an injunction will not disserve the public interest. Defendants submit that Plaintiff has failed to show its entitlement to a preliminary injunction as more fully discussed below.

PROCEDURAL & FACTUAL BACKGROUND

Plaintiff's Motion for Preliminary Injunction was served on the City of Tampa ("CITY") together with the Complaint on June 27th, 1994. The Motion is not accompanied by affidavits. The factual statement in the body of the Motion references to the Complaint that is allegedly verified. However, the copy of the Complaint served on the City lacks the signature of the presumed verifier, Robert Smith. A copy of the Verification (page 21) is attached hereto as Exhibit "A". Absent a verified signature, the Complaint lacks the character of sworn testimony.

It is alleged in the Complaint that Plaintiff is a for profit Florida corporation operating gun shows in the state for the last eight years. The Complaint does not state that the Plaintiff itself is engaged in any expressive endeavor . In arguing that its speech rights have been restricted by the CITY, Plaintiff alleges that leaflets and other politically related information were disseminated at previously held gun shows. In all relevant allegations, the purported political speech was performed by an entity other than the Plaintiff, to wit, The Florida Gun and Rod Trader and the National Rifle Association. (Complaint at page 6, paragraph 17). Nowhere in the Complaint does the Plaintiff allege that these entities have any connection or affiliation with the Plaintiff other than as exhibitors that may or may not appear at these gun shows. A perusal of the list of merchants attending the gun show held on November 20-23, 1993, makes no reference to the National Rifle Association or to Florida Gun and Rod Trader. What the list does reflect is a number of merchants involved in the sale or trade of items as diverse as guns and ammunition, leather goods, jewelry, blow guns and pepper spray. (Complaint Exhibit "C"). The Plaintiff also refers to two booksellers appearing at prior events but does not state the subject matter of this literature, whether it be political, religious or even at all connected with firearms or weaponry.(Complaint at pg. 6). Further factual deficiencies are reflected in paragraph 20 of the Complaint wherein the Plaintiff attempts to describe the make-up of a typical gun show. Despite purporting to present a verified Complaint, the Plaintiff bases these allegations, at least in part, on "information and belief", not personal knowledge. Nothing in the Complaint indicates that the Plaintiff is itself involved in political or even commercial speech, that it reserves or makes available exhibition space to political organizations involved with firearms issues or that it has scheduled speakers addressing these or any other

issues. All the Complaint says is that some entities have engaged in such speech in past gun shows. Whether these entities would be present at gun shows in the Tampa Convention Center is a fact not addressed by the Plaintiff. Despite the Plaintiff's efforts to inject the issue of free speech into this lawsuit, the most that can be derived from the Complaint is that the Plaintiff is engaged in the business of organizing merchants to sell or trade guns, ammunition and other goods at centralized locations - non-expressive conduct pure and simple.

Commenting further on the facts, the CITY denies, both factually and as a legal conclusion, that the Tampa Convention Center is a "public forum" or a "created public forum" as alleged by the Plaintiff. The Convention Center is a City-owned facility which is leased to private parties for the ultimate goal of creating revenue for the City. The fact that tax dollars may be used to subsidize losses does not change the essential proprietary function of the Convention Center. As any other business enterprise, the City has a substantial interest in ensuring the viability and acceptance of the Convention Center by a broad spectrum of the public in order to market the premises. This substantial interest is reflected in the policy to discontinue gun shows in that facility, i.e., to prevent the facility from being identified with conduct that the general public finds detrimental and could seriously affect future business in the Convention Center.

APPLICABLE LAW AND DISCUSSION

The issuance of a preliminary injunction is an extraordinary and drastic remedy. The movant has the burden of clearly proving all the prerequisites for this injunctive relief. Canal Authority of the State of Florida v. Calloway, 489 F.2d 567 (5th Cir. 1974). The elements the Plaintiff has the burden of proving are: (1) A substantial likelihood of success on the merits; (2)

substantial threat of irreparable harm if the injunction is not granted; (3) that the threatened injury to the Plaintiff outweighs the harm the injunction may cause the Defendants; and (4) that the injunction will not disserve the public interest. Cheffer v. McGregor, 6 F.3d 705 (11th Cir. 1993). This Plaintiff has failed to meet that heavy burden and the Motion for Preliminary Injunction should be denied.

The undersigned has not found any cases involving the matter at issue here, restriction on a gun show promoter at a municipally owned convention center. In fact, the majority of the cases researched involve non-profit corporations with clearly delineated political or religious speech issues. The commercial speech cases researched deal primarily with advertising or access to information and not with conduct (except one Seventh Circuit case discussed below) as the Defendants submit is at issue sub judice. To this extent, this is a case of first impression in this jurisdiction.

A. THE PLAINTIFF HAS FAILED TO MEET ITS BURDEN OF PROOF.

The Motion before this Court is not accompanied by any supporting affidavits establishing the facts relied upon by plaintiff. The only facts alluded by Plaintiff are those contained in the Complaint which, due to its defective verification, fails as sworn testimony. Therefore, there is no competent proof before this Court to allow a ruling on the Motion.

Even if the Plaintiff were to cure this deficiency, however, it would still fail to carry the burden of proof. Although arguing a violation of its own free speech rights, the Plaintiff does not allege in the Motion or the Complaint that Plaintiff itself has engaged in speech in past shows or that it intends to do so in future shows. All allegations citing examples of allegedly protected speech are vague allusions to past expressions of third parties who may or may not be

exhibitors at Plaintiff's proposed gun shows. Plaintiff's apparent argument that such activity may* occur at future gun shows does not rise to the level of clear proof required for the issuance of a preliminary injunction. Additionally, these out- of -court statements alleged by the Plaintiff amount to inadmissible hearsay under Rule 802 of the Federal Rules of Evidence.

B. THE PLAINTIFF'S ACTIVITY IN ORGANIZING GUN SHOWS IS NON-EXPRESSIVE CONDUCT.

What the Plaintiff intends to do at the Tampa Convention Center, if successful, is to hold a gun show; not a National Rifle Association rally or fundraiser, not a gun rights seminar. The only nexus alleged by the plaintiff to political speech in its proposed shows is the supposed leafletting by exhibitors in past shows and the conclusory allegation in the Complaint that gun shows equate gun advocacy. Yet ,the Plaintiff has not alleged that there are gun issues speakers scheduled for its gun shows or that space is provided or reserved to groups such as the National Rifle Association or other advocacy groups. What the Plaintiff has alleged is a list of "exhibitors" at the November 1993 show (See Complaint Exhibit "C"), which does not contain the name of any such organization. Instead the list reflects a heterogenous group of merchants who sell anything from clothing to Indian Jewelry to blowguns (as well, as weapons and ammunition). The clear and sole inference to be drawn from the Complaint allegations is that the function of the gun shows is to trade or sell goods. This is non-expressive conduct* , not speech.

The proscription of conduct has long been held to be within the rightful domain of municipal authority. Schneider v. State, 308 U.S. 147, 60 S.Ct. 146 (1939). Although decided in another jurisdiction, an interesting analogy can be drawn from the case of Graff v. City of

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C. PLAINTIFF LACKS STANDING.

The doctrine of *jus tertii* denies standing to one who seeks to vindicate Constitutional rights of third parties. Deerfield Medical Center v. City of Deerfield Beach, 661 F.2d 328 (5th Cir. 1981). In the instant case, the Plaintiff seeks to protect the speech rights of an amorphous and as yet unidentified group of merchant "exhibitors". It must be stressed again that the Complaint does not show that the Plaintiff itself has engaged in speech or other expressive conduct. The record before the Court is also devoid of any factual nexus between the Plaintiff and the merchant exhibitors that would show the Plaintiff to be particularly effective in litigating the speech rights of the National Rifle Association or Florida Gun and Rod Traders, the two entities cited as examples in the Complaint.

D. THE TAMPA CONVENTION CENTER IS NOT A PUBLIC FORUM AND DEFENDANTS HAVE A SUBSTANTIAL INTEREST IN PROTECTING ITS NONPUBLIC PROPERTY.

Both in its Motion and the Complaint, the Plaintiff refers to the Tampa Convention Center as a "public forum" or a "created public forum". Plaintiff cites the Widmar v. Vincent, 454 U.S. 263 (1981), as support for this designation. However, Widmar does not stand for that

designation. That case holds that a state university could not deny facilities it normally opened to registered student groups to a registered student religious group. Nothing in Widmar supports the conclusion that the Tampa Convention Center is a public forum. Defendants' preliminary research reveals only two cases where a public forum analysis has been applied to a convention center. Of these two, one can be disregarded in connection with our inquiry since the Court there found the convention center at issue to be private property. Ferner v. Toledo-Lucas County Convention and Visitors Bureau, 610 N.E.2d 1158 (Ohio 6th Dist. 1992). The second, International Society for Krishna Consciousness v. Schraeder, 461 F.Supp 714 (N.D. Texas 1978) ambiguously holds that a convention center could be a public forum for some purposes and not for others. This case is also distinguishable from the case sub judice in that it involves the ability of the municipality's tenant from restricting the access of a religious group to the convention center's passageways.

A better forum analysis is contained in M.N.C. of Hinesville v. U.S. Dept. of Defense, 791 F.2d 1466 (11th Cir. 1986). There, the Court explains that the Supreme Court has divided government property for purposes of speech analysis into "traditional public forums", "created public forums" and "nonpublic forums". Traditional public forums are described as those places that "have immemorially been held in trust for the use of the public..." Hague v. CIO, 307 U.S. 496, 59 S.Ct. 954 (1939). Parks and streets have been deemed the quintessential examples of public forums. Needless to say, the modern convention center is far from being the traditional place immemorially* held for the public trust.

Created public forums are areas that government has opened for the use of the public as a place of expressive activity. The Franklin Street Mall may be described as such in Tampa. The

Convention Center, on the other hand, is not open to the public. It is a facility owned by the City for the ultimate purpose of generating revenue. It is leased for compensation. It does not have the characteristic of a public thoroughfare (such as airport concourses which have been found to be public forums) nor does the public have access to its premises as a matter of course. Thus, the defendants submit that the Convention Center is nonpublic city property where the City has the greatest latitude in regulating conduct and speech. Hinesville, supra, at 1473. The City has a substantial proprietary interest in the Convention Center which it seeks to protect by not leasing to gun shows. To do otherwise may impair the ability of the City to market the Convention Center to large and broad based groups that find the sale of weaponry unacceptable.

E. PLAINTIFF HAS NOT SUFFERED AND IS NOT THREATENED WITH IRREPARABLE INJURY.

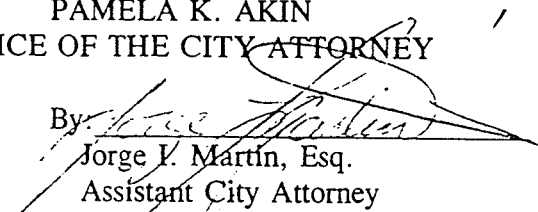
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CONCLUSION

The Plaintiff's Motion for Preliminary Injunction should be denied because the Plaintiff has not met its burden of proof in establishing all prerequisites for such relief. In addition, the Plaintiff is unlikely to prevail on the merits since the City has broad latitude to regulate non-expressive conduct on a nonpublic forum such as the Tampa Convention Center. Lastly, the Plaintiff has not incurred or is threatened by irreparable injury.

Respectfully Submitted ,

PAMELA K. AKIN
OFFICE OF THE CITY ATTORNEY

By: 
Jorge I. Martin, Esq.
Assistant City Attorney
Bar No. 378471
315 East Kennedy Blvd.
Tampa, Florida 33602
(813) 223-8396

CERTIFICATE OF SERVICE

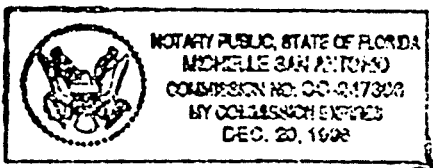
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Gregg D. Thomas, Esq., David S. Bralow, Esq., Elizabeth B. Johnson, Esq. and Ted Small, Esq., 400 North Ashley Drive, P.O. Box 1288, Tampa, Florida 33601-1288 on this 7th day of June, 1994.


Jorge I. Martin, Esq.
Assistant City Attorney

VERIFICATION

STATE OF FLORIDA
COUNTY OF BROWARD

Before me the undersigned Notary Public personally appeared Robert Smith, the Managing Director of Atlantic Show Promotions, Inc., who has read the foregoing Verified Complaint, knows the facts alleged therein to be true and correct to the best of his own personal knowledge and has signed same for the purpose of verification.



Michelle San Antonio
Notary Public
State of Florida
CC-247306
Commission No.

My Commission expires:
12/20/96

Respectfully submitted,

Gregg D. Thomas
Gregg D. Thomas, Esq.
Florida Bar No. 223913
David Bralow, Esq.
Florida Bar No. 802727
Elizabeth Belsom Johnson
Florida Bar No. 844100
HOLLAND & KNIGHT
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(813) 227-8500

Counsel for Atlantic Show
Promotions, Inc.

203380.1

EXHIBIT "A"

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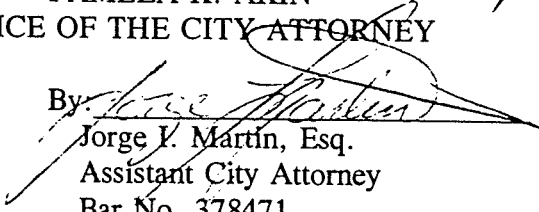
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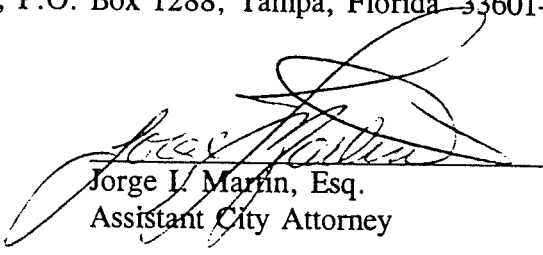
Respectfully Submitted ,

PAMELA K. AKIN
OFFICE OF THE CITY ATTORNEY

By: 
Jorge I. Martin, Esq.
Assistant City Attorney
Bar No. 378471
315 East Kennedy Blvd.
Tampa, Florida 33602
(813) 223-8396

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Gregg D. Thomas, Esq., David S. Bralow, Esq., Elizabeth B. Johnson, Esq. and Ted Small, Esq., 400 North Ashley Drive, P.O. Box 1288, Tampa, Florida 33601-1288 on this 16 day of June, 1994.

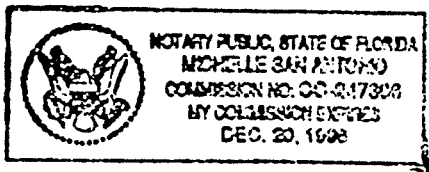

Jorge I. Martin, Esq.
Assistant City Attorney

VERIFICATION

STATE OF FLORIDA

COUNTY OF BROWARD

Before me the undersigned Notary Public personally appeared Robert Smith, the Managing Director of Atlantic Show Promotions, Inc., who has read the foregoing Verified Complaint, knows the facts alleged therein to be true and correct to the best of his own personal knowledge and has signed same for the purpose of verification.



Michelle San Antonio
Notary Public
State of Florida

CC-247306
Commission No.

My Commission expires:
12/20/96

Respectfully submitted,

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EXHIBIT "A"