

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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FIFTH AVENUE PRESBYTERIAN CHURCH, :
et al., :

Plaintiffs, :

01 Civ. 11493 (LMM)

- v -

MEMORANDUM AND ORDER

THE CITY OF NEW YORK, BERNARD KERIK, :
and RUDOLPH GUILIANI, :

Defendants. :

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McKENNA, D.J.

1.

Plaintiffs -- a religious corporation organized under the laws of New York which owns and operates a church at the corner of Fifth Avenue and 55th Street in Manhattan, New York City (the "Church"); Margaret Shafer, an employee and member of the church "employed as Associate for Outreach for the Church, and . . . a member of the Church who is personally and professionally engaged in the Church's program toward the homeless population" (Compl. ¶ 2); and ten homeless persons -- seek a preliminary injunction which, very briefly described, would prevent defendant The City of New York (the "City") from dispersing from the Church's property homeless persons, sleeping at night with the permission of the

Church on the Church's property, either in recessed entranceways to the church building, or within the sidewalk area belonging to the Church extending approximately five feet from the 55th Street side of the church building.¹

2.

Where . . . a moving party seeks a preliminary injunction to stay "government action taken in the public interest pursuant to a statutory or regulatory scheme," that party must show irreparable harm in the absence of an injunction and a likelihood of success on the merits. Violations of First Amendment rights "are commonly considered irreparable injuries for the purposes of a preliminary injunction."

Latino Officers Ass'n v. City of New York, 196 F.3d 458, 462 (2d Cir. 1999) (quoting New York Magazine v. Metropolitan Transp. Auth., 136 F.3d 123, 127 (2d Cir.) (quoting Jolly v. Coughlin, 76 F.3d 468, 473 (2d Cir. 1996)), cert. denied, 525 U.S. 824 (1998), and Bery v. City of New York, 97 F.3d 689, 693 (2d Cir. 1996), cert. denied, 520 U.S. 1251 (1997); other citations omitted.)

"[W]here the moving party seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme . . . the less rigorous fair-ground-for-litigation standard" is not

¹ On December 19, 2001, the Court granted a temporary restraining order in favor of plaintiffs. A hearing on the motion for a preliminary injunction was held on December 28, 2001, on which date the temporary restraining order was modified and extended as modified for 10 days.

applicable. Plaza Health Labs., Inc. v. Perales, 878 F.2d 577, 580

(2d Cir. 1989); see also Jolly v. Coughlin, 76 F.3d at 473.

The moving party must make a "clear" or "substantial" showing of a likelihood of success where (1) the injunction sought "will alter, rather than maintain, the status quo" -- i.e., is properly characterized as a "mandatory" rather than "prohibitory" injunction; or (2) the injunction sought "will provide the movant with substantially all the relief sought, and that relief cannot be undone even if the defendant prevails at a trial on the merits."

Jolly, 76 F.3d at 473 (quoting Tom Doherty Assocs., Inc. v. Saban Entm't, Inc., 60 F.3d 27, 33-34 (2d Cir. 1995)).

3.

For some 15 years, the Church has operated a homeless shelter for 10 males in its church house. (Shafer Decl. ¶ 10.) Apart from that shelter, for a number of years homeless persons had chosen to sleep at night on the stairs to entrances to the church building or on the ground next to the exterior walls of the church building. (Id. ¶ 11.) The Church refers to these persons as "Homeless Neighbors." (Id.)

After years of informal toleration, the Church adopted a formal policy of hospitality and welcome toward the Homeless Neighbors in February, 1999. . . . Pursuant to that policy, and in furtherance of the Church's religious beliefs, the Church has developed a set of programs (the "Hospitality Program") intended to develop relationship with the Homeless Neighbors and to

help to guide them off the streets and to reintegrate them into society in ways that serve their needs.

(Id. ¶ 15.) The Hospitality Program:

- a. Delimits two areas on Church property where Homeless Neighbors may sleep [described below].

* * *

- b. Set strict hours for sleeping on Church property. Currently, Homeless Neighbors may not arrive to set up their sleeping places until 9:00 p.m. at night, and are required to leave no later than 7:00 a.m each morning.
- c. Sets rules and regulations that the Homeless Neighbors are expected to observe. . . . These regulations include restrictions on noise, language, and behavior, and provide that any materials used to provide overnight shelter are to be taken with them or deposited in a defined location for pickup by trash haulers each morning.
- d. Provides toilet facilities in the Church building for use of the Homeless Neighbors within specified hours.
- e. Employs a liaison person to meet each of the Homeless Neighbors, learn about the person's history and needs, and assist members of the Church to come to know the Homeless Neighbors and provide them with the encouragement and assistance they need to get on with their lives.
- f. Organizes a steering committee of Church members to come to know the Homeless Neighbors, to recommend policy to the Church's

governing boards concerning homelessness, and to develop Church programs to assist them.

- g. Conducts luncheons, dinners, parties, and other opportunities for Church members and Homeless Neighbors to interact (the Church's "befriending ministry").
- h. Assists Homeless Neighbors to take steps, make contacts, and to complete papers that make it possible for them to move off the streets, obtain necessary financial, medical and psychiatric assistance, and resume their productive lives.

(Id. ¶ 16.)

4.

The first of the areas in which the Church permits homeless persons to sleep at night is "the landings at the top of the stairs leading into the Church's main sanctuary on Fifth Avenue and at the corner of 55th Street" which "are contained within arched entryways, are recessed approximately five to ten feet from the sidewalk, and are raised approximately six feet above the level of the sidewalk, up flights of stairs that recede progressively inward into the Church sanctuary building as they rise." (Shafer Decl. ¶ 16.a.i.) The second is along the side of the church building on 55th Street, an area easier to visualize from the new survey annexed as an exhibit to the December 27, 2001 Declaration of Thomas Piciocco. That survey, amending an earlier survey

submitted by Mr. Piciocco, shows the Church property line along 55th Street to extend "between four feet, ten inches, and five feet, zero inches, from the southerly wall of the Church sanctuary building" (Piciocco Decl. ¶ 3), i.e., not from the most southerly points of the entrance structures or the buttresses on the 55th Street side of the building. The Church, prior to the new survey, had believed that property line to extend approximately six feet, seven inches, from the wall of the church building. (Shafer Decl. 16.a.ii.) The property line is marked out by tape, and the Church is moving the tape to correspond to the new survey. (Third Safer Decl. ¶ 3.)² Reduction of the sidewalk area owned by the Church in conformity with the new survey reduces the number of persons able to sleep in that area plus the entrances to about 22, according to plaintiffs.

5.

Since the Church began to permit homeless persons to sleep on its property, the City did not interfere with such persons doing so until quite recently. On or about November 28, 2001, the City informally advised the Church that homeless persons would no

² What is not clear from the survey is whether the stairs of the entrances on the 55th Street side of the church building extend beyond the property line as shown in the new survey.

longer be permitted to sleep on exterior Church property. (Shafer Decl. ¶ 21.) On December 4, 2001, police came to the Church premises at about 2:00 A.M. and removed the homeless persons sleeping on or next to the exterior of the church building. (Id. ¶ 23.) On December 11, 2001, police came to the Church premises at about midnight, and removed the homeless sleeping on the 55th Street side of the church building (but not those sleeping on the steps on the Fifth Avenue side of the church building.) (Id. ¶¶ 26-27.) On December 12, 2001, police came to the Church premises prior to 9:30 P.M. and, according to Ms. Shafer, told the homeless persons present that they would have to leave or be arrested (id. ¶¶ 28-29), or, according to Sergeant Forsyth of the Police Department's Homeless Outreach Unit, engaged in outreach efforts with the homeless without threat of arrest. (Forsyth Decl. ¶¶ 19-22.) Ultimately, the homeless persons left. (Shafer Decl. ¶ 33.) To avoid confrontation, the Church advised the homeless not to come to the Church premises on the evening of December 13, 2001. (Id. ¶ 35.) When the parties appeared before the Part I Judge on December 14, 2001, they came to a "weekend 'stand-still' agreement allowing the Homeless Neighbors to stay on Church property without being removed until this action could be filed on December 17" (id.), which it was. On the nights of December 17-18 and 18-19,

police came to the Church premises and required persons sleeping on the 55th Street side of the Church to remove any tents or cardboard boxes under which they were sleeping. (Shafer Second Decl. ¶¶ 19, 21.) On December 19, 2001, this Court issued a temporary restraining order in favor of plaintiffs.

6.

Plaintiffs assert six claims, (i) under 42 U.S.C. § 1983, (ii) under the First Amendment to the United States Constitution, (iii) for common law trespass, (iv) under the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000, et seq., (v) for deprivation of due process, and (vi) for violation of the New York State Constitution, Article 1, Section 3.

However, at this stage of the case at least, plaintiffs argue primarily from the Free Exercise Clause of the First Amendment. They say that “[f]irst and foremost, this remains a case about the right of the Fifth Avenue Presbyterian Church to allow homeless people to sleep on its private property as part of the Church’s religious mission.” (Pl. Mem. at 1.) The “decision to allow the homeless to sleep on its property is an integral part of the Church’s religious work. This activity therefore is protected by the Free Exercise Clause of the First Amendment.” (Id. at 6 (citations omitted).)

The Supreme Court has made it clear that, in free exercise cases, the "compelling state interest" test, Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707, 718 (1981), does not apply in the case of a neutral, generally applicable law. "[Employment Div., Dept. of Human Resources of Oregon v. Smith [494 U.S. 872 (1990),] held that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest." City of Boerne v. Flores, 521 U.S. 507, 514 (1997).

"[T]he Church recognizes that its Free Exercise rights are not absolute" (Pl. Mem. at 8), and that "the government under Smith might well have the power to enforce general laws and regulations regulating use of Church property . . . thus burdening the Church's ability to allow the homeless to sleep on that property." (Id. at 9.) Plaintiffs argue, however, that the government "first has to adopt such laws and regulations. Because the laws and regulations cited by the City do not regulate the activity at issue here, they can provide no legal justification for the burden imposed on the plaintiffs' Free Exercise rights." (Id. (footnote omitted).)

The City argues, in the first place, "that there is no exercise of religious beliefs in allowing the homeless to sleep on

the sidewalk." (Def. Mem. at 5.) The City also argues that plaintiffs are violating applicable law or regulation in four specific ways: first, because the Church, in allowing the homeless to sleep on its property, is operating a de facto shelter without State certification, in violation of regulations of the New York State Department of Social Services contained in NYCRR Title 18, Chapter II, Subchapter D; second, because, in allowing the homeless to sleep on Church property, the Church is creating a public nuisance; third, because the sidewalk on which the homeless sleep is subject to City regulation (even though privately owned), and the Police Department "has determined that 35-40 people sleeping on the sidewalk is an unacceptable condition; it is both dangerous to the health and welfare of the homeless who are sleeping there and interferes with the public's use of the area." (Def. Mem. at 15); and, fourth, the use by the homeless of "boxes, tents and similar material" (id. at 17) violates N.Y.C. Administrative Code § 16-122(b). The Court considers these arguments in order.

7.

The Court does not concur in the City's argument that the Church, in permitting homeless persons to sleep on its property, is not acting according to the tenets of its faith.

In the first place, "[i]t is impermissible for the Court to evaluate the centrality of a religious practice or belief to a person's religion." Al-Amin v. City of New York, 979 F. Supp. 168, 171 (E.D.N.Y. 1997) (citing Smith, 494 U.S. at 887, and Thomas, 450 U.S. at 716).

The Court also notes that services to the homeless have been judicially recognized as religious conduct, within the ambit of the First Amendment. See Stuart Circle Parish v. Board of Zoning Appeals, 946 F. Supp. 1225, 1236-37 (E.D. Va. 1996), and Western Presbyterian Church v. Board of Zoning Adjustment, 862 F. Supp. 538, 544 (D.D.C. 1994).³ Stuart Circle and Western Presbyterian involved programs for feeding the homeless, however, and the City urges that that must be distinguished from allowing the homeless a place to sleep. That argument, however, is not persuasive. It is no doubt true that the personnel involved in the Church's Hospitality Program are not actively interacting with the homeless while the latter are asleep, but, as Ms. Shafer explains, allowing the homeless to sleep on Church property encourages their

³ The Court recognizes that Stuart Circle and Western Presbyterian were decided, in part, under the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000b, et seq., before that statute was invalidated by the Supreme Court in City of Boerne, and that the "compelling governmental interest" standard of review reflected in that statute does not now apply.

regular presence, and so fosters trust and friendship between the homeless and Church personnel, which then enables the Church to work with the homeless and, in some cases, to better their situation. (Second Shafer Decl. ¶¶ 10-12.)⁴

8.

The permission given by the Church to homeless persons to sleep on its property does not create a de facto shelter in violation of the regulations of the N.Y. State Department of Social Services cited by the City. The City has cited no authority, or statement from the Department of Social Services, for this contention, and the relevant definition of a shelter very strongly suggests a facility operated within a structure, indoors.⁵

⁴ Ms. Shafer states that "[s]ince January, 2001, the Church has assisted at least 77 persons who have been, at one time or another, its Homeless Neighbors, to move off the streets and into more permanent housing or other situations where their individual problems and needs receive professional attention." (Shafer Decl. ¶ 17.) The City and the Church appear to agree that at least many of the homeless are "service resistant" so that continued engagement is needed in order to break down mistrust as part of the process of bettering the conditions of the homeless. (See Forsyth Decl. ¶ 10, and Shafer Decl. ¶¶ 11-14; see also Markee Decl. ¶¶ 4-6.)

⁵ The regulations define a shelter for adults as follows:

Shelter for adults shall mean an adult-care facility established and operated for the purpose of providing temporary residential care, room, board, supervision, information and referral, and where required by the department or otherwise deemed necessary by the operator, social rehabilitation services, for adults in need of temporary accommodations, supervision and services. Such definition shall not include facilities

The presence of the homeless on the Church's property cannot, on the record before the Court, be regarded as a public nuisance. In Greentree at Murray Hill Condominium v. Good Shepherd Episcopal Church, 550 N.Y.S.2d 981, 988 (N.Y. Sup. Ct. 1989), cited by the City (Def. Mem. at 11), the court said that a public nuisance

consists of conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all in a manner such as to offend public morals, interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of persons.

(citations omitted).⁶ "To sustain a cause of action sounding in public nuisance, the plaintiff must establish by clear and convincing evidence a substantial and unreasonable interference with the public right." DeStefano v. Emergency Housing Group,

providing such temporary residential services to fewer than 20 persons, unless such facility is operated by a social services district.

18 NYCRR, Ch. II, Subch. D., Part 485, § 485.2(e).

⁶ In Greentree, involving a motion to temporarily enjoin the operation by a church of a homeless shelter brought by an adjacent condominium whose residents feared "crime, drug sales, prostitution and a diminution of property values," 550 N.Y.S.2d at 983, the court found that the plaintiffs had not adequately alleged a public nuisance. Id. at 988.

Inc., 722 N.Y.S.2d 35, 37 (N.Y. App. Div. 2001) (citations omitted).⁷

The record before the Court does not show that the activities of homeless persons given permission by the Church to sleep on its property have risen to the level of a public nuisance as defined in the case law. No arrests of any of such homeless persons for any reason are cited by the City. And, while the president of a condominium located on 55th Street has described, in general way, unpleasantnesses observed by him (McCoy Decl.), the descriptions are not very specific as to date or time or even as to frequency. While the presence of the homeless may, in a number of ways, be disturbing, their presence, as such, cannot be regarded as a public nuisance.

10.

The City next argues that "[t]he sidewalk on which [the homeless] plaintiffs sleep is subject to City regulation" (Def. Mem. at 12), and that "private property is subject to the same regulations of public places if the private property is used by the public with the consent of the owners." (Id. at 13 (citing

⁷ The New York City Administrative Code contains a definition of "nuisance" (which it declares to be illegal) that includes "public nuisance, as known of common law or in equity jurisprudence." N.Y.C. Admin. Code § 17-142.

Fieldston Property Owners' Assn., Inc. v. Bianchi, 215 N.Y.S.2d 834 (N.Y. Sup. Ct. 1961), aff'd, 230 N.Y.S.2d 665 (N.Y. App. Div. 1962), aff'd 241 N.Y.2d 175 (1963)).) The City's power to regulate the sidewalks, the City further argues, is, under the City Charter, exercisable by the Police Department, which has the power, among others, to "disperse . . . assemblages which obstruct the passage of public streets, sidewalks, parks and places." N.Y.C. Charter § 435. "Under the broad powers granted by the charter, the [Police Department] has determined that 35-40 people sleeping on the sidewalk is an unacceptable condition; it is both dangerous to the health and welfare of the homeless who are sleeping there and interferes with the public's use of the area." (Def. Mem. at 16.)

The Court is now persuaded that, in essence, this argument is correct: the Police Department does have authority to regulate those portions of the 55th Street sidewalk that are owned by the Church. The Church has not shown that that portion of the sidewalk on 55th Street that it owns is not, at the same time, a public place. The Court notes, however, that the City's argument, by its terms, applies only to the sidewalk which the City has shown that it can regulate, and not to the areas in the entranceways to the church building, raised above street level and thus not a part

of the sidewalk, in which the Church has invited the homeless to sleep. The City has not shown that it can regulate these areas.⁶

11.

As a part of its power to regulate the sidewalk on 55th Street, the City can also enforce, in that area, the prohibition of N.Y. City Administrative Code against the erection on a public street of "any shed, building or other obstruction," N.Y.C. Admin. Code § 16-122(b), in the case of cardboard shelters constructed by the homeless for sleeping purposes. The Court is convinced by Judge Martin's decision in Betancourt v. Guiliani, 2000 WL 1877071, at *4 (S.D.N.Y. Dec. 26, 2000), appeal pending, that such structures, even though temporary, are within that prohibition. The prohibition of the cited provision, the Court notes, does not apply to the entranceways to the church building, raised above street level and thus not a part of the sidewalk, in which the Church has invited the homeless to sleep. Those areas are not part of "any marginal or public street or any public place." N.Y.C. Admin. Code § 16-122(b).

⁶ That is not to say, of course, that the Police Department cannot make arrests in those areas for crimes committed or attempted, as plaintiffs appear to concede.

12.

Insofar as the Church permits homeless persons to sleep in the areas described in Paragraph 16.a.1 of Ms. Shafer's December 17, 2001 declaration, the Church has made a substantial showing of likelihood of success on the merits of its claim under the Free Exercise clause of the First Amendment and that it will suffer irreparable harm, through deprivation of its First Amendment rights, absent the injunction sought, and the Church's motion for a preliminary injunction is therefore, to that extent, granted. (See Section 13 hereof, below.) The motion is otherwise denied.


13.

It is ORDERED that the defendants are preliminarily enjoined from entering onto the property of the plaintiff 5th Avenue Presbyterian Church described below for the purpose of dispersing or arresting any person who shall be sleeping or otherwise lawfully on that property, provided that nothing in this order shall limit the authority of the New York City Police Department to arrest any person for other conduct that is unlawful, or from removing from church property anyone who is present there without the consent of the Church, or from removing homeless persons from Church property during a winter alert officially declared by the New York City Department of Health. For the

purposes of this order, the portion of the plaintiffs' property at issue constitutes the three staircases that extend from the Church building towards Fifth Avenue, and the two staircases that extend from the Church building towards 55th Street.'

SO ORDERED.

Dated: January 4, 2002
Issued: 3:48 AM.



Lawrence M. McKenna
U.S.D.J.

' The temporary restraining order is dissolved.