

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-009838

10/11/2012

HONORABLE MARK H. BRAIN

CLERK OF THE COURT
T. Nosker
Deputy

ALAN KORWIN, et al.

DIANE COHEN

v.

DEBBIE COTTON, et al.

BRADLEY D GARDNER

RULING MINUTE ENTRY

This matter came before the Court on competing motions for summary judgment. Having considered the parties' papers, arguments, and admissible evidence,¹ defendants' motion for summary judgment is GRANTED, and plaintiffs' motion for summary judgment is DENIED. Although the Court will not attempt to match the length of the parties' briefs, it notes the following in passing.

The case involves a free speech challenge to Phoenix's policy for selling advertising space on bus shelters and the like. Among other things, plaintiffs claim that Phoenix's policies (as amended from time to time during the pertinent period) violated the First Amendment, were vague, and were arbitrarily applied.²

¹ The responsive statements of facts included "motions to strike," which the Court interprets as merely objections to some of the statements in the statements of fact.

² The Court recognizes that plaintiffs' challenge is brought under both the First Amendment to the United States Constitution and its analog in the Arizona Constitution. Because there is no discernible difference as applied to the facts of this case, the Court will refer to these provisions collectively as the First Amendment.

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At all pertinent times, Phoenix's policies have limited advertising to that which proposes a commercial transaction.³ In particular, the December 8, 2009 standards provided, "The subject matter of transit bus, shelter and bench advertising shall be limited to speech which proposes a commercial transaction." Likewise, the March 7, 2009 standards provided, "A commercial transaction must be proposed and must be adequately displayed on the transit advertising panel." And, it has long been established that such restrictions pass constitutional muster. *See Children of the Rosary v. City of Phoenix*, 154 F.3d 972 (9th Cir. 1998) (in an opinion authored by Retired Justice Byron R. White, the Court rejected a free speech challenge of Phoenix's bus advertising standards, which required a commercial transaction).

Plaintiffs argue that Phoenix's standards are unconstitutional because they are vague. The Court disagrees. The standards do give a reasonable amount of guidance as to what will and will not be accepted. It is, of course, absolutely true that people can come up with an advertisement that will be a close call, and on which reasonable minds can differ. But the Free Speech clauses do not require a standard that would produce a clear-cut answer for every advertisement that a creative prospective advertiser can come up with. *See Children of the Rosary*, 154 F.3d at 982-983.⁴ Indeed, it appears that if one were to carry plaintiffs' arguments to its logical conclusion, Phoenix could only adopt one of two policies: (a) anyone can advertise anything; or (b) no one can advertise anything.

Finally, plaintiffs have failed to come forward with sufficient facts to create a triable issue regarding plaintiffs' claim that Phoenix is arbitrarily applying its rules.

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.

³ There are exceptions; for example, the advertisements may not relate to illegal activity, be sexually explicit or obscene, or advertise tobacco or alcohol. See Transit Advertising Standards dated 12/08/2009 and March 7, 2011 (attached to Defendants' Statement of Facts).

⁴ In that regard, plaintiffs' supplement citation to *FCC v. Fox*, 132 S. Ct. 2307 (2012), is clearly distinguishable. The specificity required by a statute used to impose penalties (such as that in *Fox*) is plainly different than that required by a regulation over the use of a non-public forum. *Children of the Rosary*, 154 F.3d at 983.