

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE TRIAL COURT

District Court Department
Palmer Division
Civil Action No.: 1143CV293

BRIAN JOHNSON)
)
Plaintiff/)
Defendant-in-Counterclaim)
)
v.)
)
PETER FREI)
)
Defendant/)
Plaintiff-in-Counterclaim)

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR JUDGMENT NOTWITHSTANDING
THE VERDICT

Now comes Brian Johnson, the Plaintiff and Defendant-in-Counterclaim in the above-captioned matter and pursuant to Mass.R.Civ.Pro. 50(b) hereby moves this honorable Court for a judgment notwithstanding the verdict on Count VII – the Massachusetts Civil Rights claim, G.L. c. 12, §11 I.

The basis for this Motion is articulated herein.

I. INTRODUCTION

Brian Johnson, the Plaintiff/Defendant-in-Counterclaim ("Johnson") filed a one count complaint in Palmer District Court alleging violation of G.L. c. 272, §99 the wiretapping statute ("Wiretapping Statute") against the Defendant/Plaintiff-in-Counterclaim Peter Frei ("Frei"). In his revised answer, Frei alleged several counterclaims against Johnson. Frei alleged assault by attempted battery,

assault and battery, defamation, intentional and negligent infliction of emotional distress, abuse of process and violation of G.L. c. 12, §11 I (Civil Rights Act).

The Court directed a verdict on the abuse of process count. In addition to finding in favor of Johnson on the wiretapping statute claim, the jury found against Frei on assault by attempted battery, assault and battery, negligent infliction of emotional distress and intentional infliction of emotional distress. The jury found in favor of Frei on the defamation and civil rights violation claims.

Judgment on the verdict entered on July 25, 2013.

II. FACTS

The following facts were part of the evidence at the trial of this matter:

- Johnson called Frei derogatory names over an extended period of time, including “loser”, “white trash” and “scumbag”;
- Johnson took or pretended to take photographs of Frei with his cell phone on one occasion;
- Johnson called Frei on the telephone on two or three occasions; and
- Johnson was part of a group which competed in a fishing derby on February 19, 2011. Other members of the group lived on the south side of the lake; the same side of the lake on which Frei’s property was located. The group fished from a cove near Frei’s home on the south side of the lake. It is undisputed that Johnson never entered upon Frei’s property. There was no interaction between the fishermen and Frei until Frei approached them on the ice at

approximately 3:00 p.m. It is undisputed that Johnson never touched Frei on February 19, 2011.

Based on the foregoing facts, the jury found that Johnson violated the Civil Rights Act ("MCRA").

III. LEGAL ARGUMENT

The legal standard for judgment notwithstanding the verdict is

taking into account all the evidence in its aspect most favorable to the plaintiff, [is] to determine whether, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, the jury reasonably could return a verdict for the plaintiff ... The court will consider whether 'anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn' in favor of the non-moving party ... The inferences to be drawn from the evidence must be based on probabilities rather than possibilities and cannot be the result of mere speculation and conjecture.

McEvoy Travel Bureau, Inc. v. Norton Co., 408 Mass. 704, 720 n.3 (1990).

In order to prevail on a claim under the MCRA, Frei was required to prove by a preponderance of the evidence that Johnson interfered or attempted to interfere with Frei's exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the Commonwealth by threats, intimidation, or coercion. G.L. c. 12, §11 I.

Any intimidation or attempt to intimidate must be by threats, intimidation or coercion in order to constitute a violation of the MCRA.

A “threat is ‘the intentional exertion of pressure to make another fearful or apprehensive of injury or harm.’” *Mancuso v. Massachusetts Interscholastic Athletic Association, Inc.*, 453 Mass. 116, 131 (2009) *citations omitted*. “Intimidation involves putting one ‘in fear for the purpose of compelling or deterring conduct.’ *Id.* ‘Coercion is the application to another of force to constrain him to do against his will something he would not otherwise have done.’” *Id.* *citations omitted*.

Although the MCRA is entitled to liberal construction, the MCRA “was not intended to create, nor may it be construed to establish a ‘vast constitutional tort.’” *Id.* at 131-132. Thus, in order to violate the MCRA, any interference or attempt to interfere, with protected rights, must be by threats, intimidation, or coercion. Even when Johnson’s alleged conduct is viewed in the light most favorable to Frei, his conduct does not, as a matter of law, constitute threats, intimidation, or coercion as defined by courts in Massachusetts.

Actionable coercion as required under the MCRA is “the application to another of such force, either physical or moral, as to constrain him to do against his will something he would not otherwise have done.” *Currier v. National Board of Medical Examiners*, 462 Mass. 1, 12 (2012) *citations omitted*. Coercion is the ‘active domination of another’s will.’ *Id.* Examples of coercive conduct under the MCRA are: the deprivation by one party of the contractual rights of another, making it impossible for another to continue employment due to sexual harassment, or economic coercion. *Id.* at 13 *citations omitted*. Johnson’s conduct, which at most consisted of name calling and fishing near Frei’s house, does not, as a matter of law, constitute the active domination of Frei’s will by Johnson. The determination of whether Johnson’s conduct towards Frei was coercive is by an objective, reasonable person standard. *Id.* There is no evidence that Johnson coerced Frei to do something he would not otherwise have done.

In *Planned Parenthood League of Mass. Inc. v. Blake*, 417 Mass. 467, 473 (1994) the Supreme Judicial Court held that the defendant's conduct of sitting in abortion clinics and clinic doorways which resulted in the delay or prevention of abortions amounted to threats, coercion or intimidation. The Court concluded

that lecturing, counseling, picketing, singing and praying at or near the clinics by certain defendants and their supporters, where the patients' 'access to the clinics was not obstructed or precluded, did not constitute threats, intimidation or coercion of the clinics' patients. So long as the defendants remain on public property and do not create physical barriers or promote physical confrontation or physical contact, then their activities cannot reasonably be perceived as threatening, intimidating or coercive in violation of MCRA.

Id. at 476, fn. 9.

In the instant case, it is undisputed that Johnson always remained on public property. There was no evidence that Johnson trespassed onto Frei's property at any time. There is no evidence that Johnson created a physical barrier or promoted physical confrontation or contact. It is also undisputed that Johnson never touched or threatened to touch Frei. In fact, it was Frei who approached Johnson and the others while they were on the lake which is public property. Since it is undisputed that Johnson remained on public property, did not create physical barriers or promote physical confrontation or physical contact, his activities cannot be reasonably perceived as threatening, intimidating or coercive in violation of the MCRA. Johnson's alleged conduct is insufficient to violate the Act as a matter of well established law.

The derogation or interference of a secured right does not violate the MCRA unless such derogation or interference occurred by threat, intimidation or coercion. *Buster v. Moore, Inc.*, 438 Mass. 635, 645 (2003). Although actual or

attempted physical force is not necessary to a determination of coercion, in order to be coercive the conduct must cause a reasonable person not to exercise a constitutional right or such conduct must deprive a reasonable person of such right. *Doe v. Senechal*, 66 Mass.App.Ct. 68, 79 (2006). As the applicable standard is an objective and not subjective one, the state of mind of the person threatened is not controlling. *Cignetti v. Healy*, 89 F.Supp.2d 106, 125 (D.Mass. 2000). The alleged conduct by Johnson does not satisfy this standard as a matter of law.

In contrast to the conduct alleged in this case, examples of conduct that has been deemed to be coercive or intimidating are: threat of arrest by a security guard, physical threats, racial harassment, sexual harassment, threats of retribution by prison officials, and invasion and blockage of an abortion clinic. *Tedeschi v. Reardon*, 5 F.Supp.2d 40, 46 (D.Mass. 1998) *internal citations omitted*.

Threats made by individuals other than Johnson cannot, for purposes of determining whether the MCRA was violated by Johnson, be attributed to Johnson unless there is evidence that Johnson authorized or approved any threats allegedly made by others. *Id.* There was no evidence that Johnson authorized or approved the conduct of any of the individuals with whom he was fishing. Therefore, the conduct of the individuals with whom Johnson was fishing cannot be attributed to Johnson for purposes of determining whether Johnson violated the MCRA.

In *Kennie v. Natural Resource Dept. of Dennis*, 451 Mass. 754, 765 (2008) the Supreme Judicial Court noted that “[A] certain amount of verbal ‘posturing’ and ‘huffing and puffing’ is ‘not uncommon during neighborhood disputes, especially those wending their way through town hall en route to litigation.’” Central to the finding of a violation of the MCRA by the *Kennie* Court was the official status of the public employee “coupled with his actions in

furtherance of his statements.” *Id.* In particular the official threatened to “take care of” the results of the plaintiff’s shellfish survey and then did so by planting shellfish. By setting up a fraudulent shellfish survey which was to be submitted to the conservation commission in furtherance of his threats, the official violated the MCRA. There is no such conduct or threatened conduct in this case.

Although there is a history of acrimony between Frei and Johnson and Frei testified to publicly criticizing Johnson on three (3) occasions; permitting an unlicensed driver to operate town equipment, participating in a project which resulted in a citation from the Department of Environmental Protection, and utilizing town equipment to plow snow from Johnson’s father’s driveway, there is no evidence of threats by Johnson or any conduct by Johnson which rises to the level of coercion. None of the conduct attributed to Johnson by Frei constitutes intimidation, threats, or coercion. Rather, the alleged conduct is nothing more than mere posturing or huffing and puffing.

In *Haufler v. Zotos*, 446 Mass. 489 (2006) the Supreme Judicial Court found that the alleged conduct did violate the MCRA. In the *Haufler* case, in contrast to the instant case, several witnesses testified to the defendant’s threatening or very aggressive conduct. There was evidence that the defendant ran at one worker with a rake, threatened to telephone the police, and telephoned police to remove an authorized worker for trespassing. In cases in which a violation of the MCRA was upheld there was frequently a physical confrontation or the threat of a physical confrontation by the individual accused of violating the MCRA. In this case there are no threats to call or calls placed to the police by Johnson. Nor is there any physical confrontation or threatened physical confrontation by Johnson.

Not every violation of law is a violation of the MCRA. A violation of the MCRA requires threatening, coercive or intimidating conduct. There is no evidence of any such conduct in this case. The only evidence of any conduct by

Johnson, which occurred over a lengthy period of time, was that Johnson called Frei names on two occasions, called him on the telephone on two or three occasions, pretended to take Frei's picture with his telephone and was part of a group of fisherman fishing on public property near Frei's property on February 19, 2011. It is undisputed that Johnson never touched Frei. There was no evidence that Johnson ever threatened Frei. Johnson never entered Frei's property. Until Frei approached the group fishing on the ice, there was no interaction between Johnson and Frei. This conduct by Johnson does not constitute threatening, coercive or intimidating conduct under the well established legal definitions in the Commonwealth. Therefore, there is insufficient evidence to sustain the verdict in favor of Frei under the claim for violation of the MCRA.

WHEREFORE, for the reasons articulated in the Memorandum of Law the Plaintiff and Defendant-in-Counterclaim moves for judgment notwithstanding the verdict on Count VII, violation of the Massachusetts Civil Rights Act.

Respectfully submitted,

The Plaintiff,
Defendant-in-Counterclaim,
Brian Johnson,
By his attorney,



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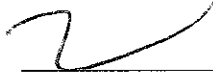
Dated: July 30, 2013

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above document was served upon the following by mailing a copy of it, postage prepaid, to:

Henry L. Rigali, Esq.
78 Maple Street
Springfield, MA 01105-1813

Dated: July 30, 2013



Tani E. Sapirstein