UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 13-80437-CIV-MARRA

DAVID BENOIT MECH
d/b/a/ THE HAPPY MATH TUTOR,

Plaintiff,

vs.

SCHOOL BOARD OF PALM BEACH COUNTY,

Defendant.
_____/

**ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S FEDERAL CONSTITUTIONAL CLAIMS AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

This Cause is before the Court on the parties' competing motions for summary judgment. Plaintiff moved first, filing his Motion for Summary Judgment on April 25, 2014 (DE 48). Defendant responded on May 16, 2014 (DE 57), and Plaintiff replied on June 6, 2014 (DE 68). Plaintiff's Motion for Summary Judgment is ripe for review.

Defendant filed its Motion for Summary Judgment on May 13, 2014 (DE 54). Plaintiff responded on May 30, 2014 (DE 64), and Defendant replied on June 6, 2014 (DE 66). Defendant's Motion for Summary Judgment is ripe for review.

After considering the competing motions, responses, replies, and materials in the record, the Court finds that Plaintiff's Motion for Summary Judgment should be denied and Defendant's Motion for Summary Judgment granted in part.

## I. Background[1]

Plaintiff David Benoit Mech provides math tutoring services to school-age children under the business name "The Happy/Fun Math Tutor." (DE 55 ¶ 1) (Defendant's Statement of Undisputed Material Facts). In addition to his tutoring business, Plaintiff is the managing member of Dave Pounder Productions LLC, a company that formerly produced explicit adult media. (DE 49-1 ¶¶ 30-31) (Plaintiff's Corrected Statement of Undisputed Material Facts). Plaintiff operates his businesses as separate entities, although The Happy/Fun Math Tutor and Dave Pounder Productions share the same mailing address. (Id. ¶¶ 28-29).

In late 2010, Plaintiff noticed that several public schools in the area where he offers his tutoring services displayed banners on school fences from local businesses. (Id. ¶ 18). Plaintiff contacted three schools, Omni Middle School, Spanish River Community High School, and Boca Raton Community Middle School, about placing a banner for The Happy/Fun Math Tutor on school fences. (Id.). Starting in May 2011, Plaintiff entered into arrangements with these schools to display such banners. (DE 55 ¶¶ 14-16). Plaintiff contends that these arrangements were contractual "advertising agreements," whereas Defendant contends they were donations. (DE 49-1 ¶ 22, 37). The banners that were hung at the schools displayed The Happy/Fun Math Tutor's name, phone number, and email address and stated "Partner in Excellence." (DE 48-4 at 27).

In February 2013, Defendant removed The Happy/Fun Math Tutor banners at Omni Middle, Spanish River High, and Boca Raton Middle. (DE 55 ¶¶ 23, 34, 40.). In separate letters,

[1] The factual background is drawn from the summary judgment record. Unless otherwise indicated, the facts are not in dispute.

the principals of Omni Middle and Spanish River High informed Plaintiff of the removal. (DE 49-1 ¶ 49). The principals stated that Plaintiff's "position with Dave Pounder Productions, together with the fact that Dave Pounder Productions utilizes the same principal place of business and mailing address as The Happy/Fun Math Tutor creates a situation that is inconsistent with the educational mission of the Palm Beach County School Board and the community values." (DE 48-4 at 28, 29). In a subsequent letter, the School Board's General Counsel informed Plaintiff that the "connection between the Happy/Fun Math Tutor and Dave Pounder Productions was brought to the attention of the school administration by multiple parents who expressed great concern over the potential for the students using your tutoring service to become subjected to your adult entertainment business. Given that parents within the community have already made the connection between your tutoring business and your adult entertainment business, the principals had no choice but to remove your banners." (Id.).

Each of the letters stated that the banners were removed according to School Board Policies 7.151(1) and 7.151(2)(h). (DE 49-1 ¶ 49; DE 48-4 at 35). School Board Policy 7.151(1) states that:

> The District recognizes that athletic sponsors and other business partners provide a vital role in sponsorship of key programs within our schools. As such, schools have increased needs to visibly recognize these partners in the community. In the interests of community aesthetics and in consideration of local ordinances that may prohibit or restrict banners and advertising, these uniform standards have been developed. By permitting the recognition of business partners on school campuses, it is not the intent of the School Board to create or open any Palm Beach County School District school, school property or facility as a public forum for expressive activity, nor is it the intent of the School Board to create a venue or forum for the expression of political, religious, or controversial subjects which are inconsistent with the educational

> mission of the School Board or which could be perceived as bearing the imprimatur or endorsement of the School Board.

(DE 49-1 ¶ 44). Policy 7.151(2)(h) states that:

> In keeping with the express purpose of this Policy not to create or open schools as a public forum for expressive activity, Principals shall use their discretion in selecting and approving business partners that are consistent with the educational mission of the School Board, District and community values, and appropriateness to the age group represented at the school. Examples of inappropriate business partners include but are not limited to: businesses that sell goods or services which are illegal if possessed by or sold to a minor, adult entertainment establishments, businesses whose primary source of revenue is generated from the sale or distribution of alcohol or tobacco products, tattoo parlors, pain clinics and businesses soliciting addicts.

(Id. ¶ 45).

On April 30, 2013, Plaintiff initiated this action against Defendant and several School Board officials in their official capacities. (DE 1). Plaintiff dropped the officials from the suit and now brings four claims against Defendant School Board for violating his First Amendment right to Free Speech (Count I), Fourteenth Amendment rights to Due Process (Count II) and Equal Protection (Count III), and breach of contract (Count IV). (DE 36 ¶¶ 55-68).

Plaintiff moves for summary judgment on Defendant's liability. (DE 48). He argues that he is entitled to judgment as a matter of law because Defendant utilized "unbridled, standardless discretion" in deciding to remove his banners (id. at 3-5) and because Policy 7.151(h) is an unconstitutional "commercial advertising restriction" (id. at 5-6). In turn, Defendant moves for summary judgment arguing that Plaintiff did not have enforceable contracts with the schools at the time his banners were removed, thus negating his contractual and constitutional claims. (DE 54 at 2-3). For the following reasons, the Court agrees with Defendant that Plaintiff's federal

constitutional claims fail as a matter of law and summary judgment for Defendant on these claims is appropriate.

## II. Motion for Summary Judgment

### A. Legal Standard

The Court may grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant bears the burden of establishing the absence of a genuine dispute of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). It must do so by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for the purposes of the motion only), admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A). If the movant bears the burden of persuasion at trial, "that party must support its motion with credible evidence—using any of the materials specified in Rule 56(c)—that would entitle it to a directed verdict if not controverted at trial." Celotex, 477 U.S. at 331. On the other hand, if the burden of persuasion lies with the nonmovant, summary judgment may be granted if the movant either negates an essential element of the nonmovant's claim or demonstrates to the Court that the nonmovant's evidence is insufficient to establish an essential element of that claim. Id. Any doubt regarding whether a trial is necessary must be resolved in favor of the nonmovant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

After the movant has met its burden of production under Rule 56(a), the burden of production shifts to the nonmovant. "A party asserting that a fact cannot be or is genuinely

disputed must support the assertion by citing to particular parts of materials in the record . . . or showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot product admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1)(A) and (B). The nonmovant's evidence cannot, however, "consist of conclusory allegations or legal conclusions." Avirgan v. Hull, 932 F.2d 1572, 1577 (11th Cir. 1991) (citing First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 289 (1968)). And where the nonmovant bears the burden of persuasion on a claim, it must come forward with more than a mere scintilla of evidence supporting its position; "there must be enough of a showing that the jury could reasonably find for that party." Walker v. Darby, 911 F.2d 1573, 1577 (11th Cir. 1990).

**B. Discussion**

Defendant argues that, for Plaintiff to have claims under the First and Fourteenth Amendment, he must "show that at the time of the removal of the fence screens from the schools[']s fences, he had valid, enforceable contracts with each of the schools." (DE 54 at 2). Because Plaintiff's agreements with the schools had either expired or were not contractual, Defendant owed Plaintiff no contractual or constitutional duty to display the banners in February 2013. (Id.). Defendant further argues that Plaintiff's First Amendment claim is misplaced because the banners were not removed "because of the content of [Plaintiff's] speech or in retaliation for comments of great public concern." (DE 66 at 3).

Plaintiff responds that he "needs no contract or other property interest as a predicate to First Amendment protection," and "[e]ven if he did, the contracts were valid and enforceable." (DE 64 at 1). The Court concludes that Defendant's argument prevails.

**1. First Amendment Claim**

The thrust of Plaintiff's claims stem from the alleged violation of his First Amendment rights. Plaintiff's Motion for Summary Judgment asserts that, "[b]ecause the principals have and relied on unbridled discretion to disapprove his banners, Plaintiff is entitled to summary judgment under the First Amendment." (DE 48 at 3). Plaintiff's Response to Defendant's motion voices a similar theme—"First Amendment protections are not dependent on the existence of an enforceable contract or other state-recognized property interest." (DE 64 at 2). In his complaint, Plaintiff alleges that Defendant violated his "right to advertise useful, lawful consumer information at a limited public forum, in violation of the First and Fourteenth Amendments." (DE 36 ¶ 56).

It is axiomatic that in order to have a claim for a commercial speech violation, the defendant must have taken action against the plaintiff because of his commercial speech. Plaintiff asks this Court to follow the seminal commercial speech case, Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980). (DE 48 at 3, 5). That case was decided, however, only because the law in question banned advertising that "promot[ed] the use of electricity." 447 U.S. at 558. That is, the content of the advertising—non-misleading speech concerning a lawful activity—was the target of government action. Id. at 566. This is true in all First Amendment settings—scrutiny of the government's actions is warranted where the government directly limits speech itself or takes action because of the speech in question. See Bd. of Cnty. Comm'rs v. Umbehr, 518 U.S. 668, 675 (1996) ("The First Amendment's guarantee of freedom of speech protects government employees from termination because of

their speech on matters of public concern.") (emphasis in original); Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972) ("[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.") (emphasis added). For example, to state a claim for retaliation against one's speech under 42 U.S.C. § 1983, the plaintiff has the initial "burden of establishing that his protected conduct was a motivating factor behind any harm" caused by the defendant. Smith v. Mosley, 532 F.3d 1270, 1278 (11th Cir. 2008) (quoting Thaddeus-X v. Blatter, 175 F.3d 378, 399 (6th Cir. 1999)) (emphasis added).

The parties agree that The Happy/Fun Math Tutor was lawful activity and that the banners did not contain misleading information. The parties also agree, however, that the message conveyed by the banners—the only commercial speech present in this case—was not a motivating factor behind Defendant's decision to remove the banners. Rather, Plaintiff asserts that Defendant branded him a "disfavored advertiser" after his banners went up (DE 64 at 1), apparently because of The Happy/Fun Math Tutor's indirect association with Dave Pounder Productions (see DE 36 ¶ 60).

Simply put, this case does not implicate Plaintiff's commercial speech rights. Defendant did not remove Plaintiff's banners because of the expression contained therein. Rather, it removed the banners for a reason unrelated to Plaintiff's speech—the known association of Plaintiff's tutoring business with his adult media business. There is no genuine dispute that Defendant's actions were not motivated by Plaintiff's commercial speech; therefore, Defendant is entitled to summary judgment on Plaintiff's First Amendment claim (Count I).

Moreover, to the extent Plaintiff might be attempting to assert a "freedom of association"

claim,[2] such a claim also fails. First, Plaintiff makes no attempt to allege facts that would extend constitutional association protection between him, The Happy/Fun Math Tutor, and Dave Pounder Productions. See Seniors Civil Liberties Ass'n, Inc. v. Kemp, 965 F.2d 1030, 1036 (11th Cir. 1992). Second, as the Supreme Court reserves freedom-of-association protection for "intimate" relationships, see City of Dallas v. Stanglin, 490 U.S. 19, 24 (1989), constitutional protection does not exist for "unrelated, indirect associations" such as those between The Happy/Fun Math Tutor and Dave Pounder Productions (DE 36 ¶ 60).

For the foregoing reasons, Plaintiff's First Amendment claim fails as a matter of law.

**2. Fourteenth Amendment Claims**

Plaintiff devotes his summary judgment arguments to his First Amendment claim. Thus, it appears to the Court that his other constitutional claims rise and fall with the First Amendment. Nonetheless, the Court will discuss why Plaintiff's other constitutional claims, due process and equal protection, also fail as a matter of law.

**a. Due Process**

Plaintiff's due process claim contains both substantive and procedural components. First, he alleges that School Board Policy 7.151 vests "unbridled discretion" in Defendant to approve or disapprove of advertisements. (DE 36 ¶ 58). This substantive argument rests on an

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[2] Passing allegations in the complaint indicate that Plaintiff might have had such a claim in mind. Plaintiff alleged that Defendant applied School Board Policy 7.151 to his "other lawful, independent businesses," thus singling him out for "removal due to an indirect but lawful association with an adult media company." (DE 36 ¶¶ 38, 41). He also alleged that Defendant discriminated against him, a "disfavored advertiser," "on the basis of the content of the speech of [his] completely separate businesses." (Id. ¶ 44). Plaintiff does not support these allegations in his Motion for Summary Judgment or Response to Defendant's Motion for Summary Judgment.

interference with a fundamental right, in this case the right to free speech. See City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 757 (1988) ("[I]n the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship."); DE 48 at 4; DE 68 at 5 (Plaintiff relying on City of Lakewood to argue that unbridled discretion to "approve or disapprove of proposed speech" is unconstitutional). As discussed above, Defendant's actions do not implicate Plaintiff's fundamental right to free speech; therefore, neither do they implicate Plaintiff's substantive due process rights.

Second, Plaintiff invokes procedural due process and alleges that Defendant failed to give him "notice of wrongdoing and a meaningful opportunity to be heard." (DE 36 ¶ 59). In his summary judgment papers, Plaintiff makes no effort to support this assertion by citing particular parts of the record, and Defendant's Motion for Summary Judgment may be granted for that reason. See Fed. R. Civ. P. 56(c)(1)(A).

Summary judgment is appropriate on the procedural due process claim for another reason. A claim alleging a denial of procedural due process requires proof of "a constitutionally-protected liberty or property interest." Grayden v. Rhodes, 345 F.3d 1225, 1232 (11th Cir. 2003). Plaintiff argues the exact opposite, that he "needs no contract or other property interest" to avail himself of constitutional protection from Defendant's actions. (DE 64 at 1). In essence, Plaintiff argues that, because he was engaged in commercial speech, he was entitled to continue to engage in that speech. "[T]he First Amendment," however, "does not create property or tenure rights." Umbehr, 518 U.S. at 675; see also Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution."). Plaintiff must therefore

come forward with a constitutionally recognized property interest to invoke the protections of procedural due process.

To be sure, a contract with the state may give rise to a "property" interest entitled to due process protection. See Gary v. Bd. of Regents, 150 F.3d 1347, 1350-51 (11th Cir. 1998). However, "not every interest held by virtue of a contract implicates such process." Reich v. Beharry, 883 F.2d 239, 242 (3d Cir. 1989) (citing cases). In Lujan v. G & G Fire Sprinklers, Inc., the Supreme Court held that a claim for breach of contract by a state actor would not support a procedural due process claim unless state contract remedies were closed to the plaintiff. 532 U.S. 189, 196 (2001). Where a plaintiff fails to allege the absence of a complete and adequate remedy available under state law for breach of a state contract, the plaintiff's procedural due process claim fails as a matter of law. See Ramirez v. Arlequin, 447 F.3d 19, 25 (1st Cir. 2006) (discussing Lujan).

In this case, Plaintiff does not allege that the process afforded by a state law breach of contract action is unavailable to him. In fact, Plaintiff sues Defendant for both a violation of due process (Count II) and breach of contract (Count IV). An adequate remedy exists under state law, and Plaintiff's procedural due process claim must be dismissed. Defendant is therefore entitled to summary judgment on Count II.

**b. Equal Protection**

Defendant moves for summary judgment on all claims asserted by Plaintiff, arguing that Plaintiff's constitutional rights were not violated because Defendant did not act in a way that implicated constitutional protections. (DE 54). In his complaint, Plaintiff alleges that Defendant discriminated against "certain individuals" in a way that "implicates a fundamental right and,

alternatively, is arbitrary and capricious." (DE 36 ¶ 62). Plaintiff makes no effort to support his equal protection claim in his summary judgment papers, devoting his entire argument to his commercial speech claim. The Court has already discussed why Defendant's actions did not implicate a fundamental right, i.e., free speech. And Plaintiff's conclusory allegation that "certain individuals" have been denied equal protection cannot survive a motion for summary judgment. Defendant is therefore entitled to summary judgment on Count III.

**3. Remaining State Law Claim**

Plaintiff's federal constitutional claims eliminated, all that remains is Plaintiff's state law claim for breach of contract (Count IV). In cases such as this, where the Court's jurisdiction is based solely on a federal question, the Court may decline to exercise supplemental jurisdiction over remaining state law claims if the Court has eliminated all claims over which it has original jurisdiction. 28 U.S.C. § 1367(c)(3). In accordance with 28 U.S.C. § 1367(c)(3), the Court declines to exercise supplemental jurisdiction over the remaining state law claim. Because this Court lacks jurisdiction, Plaintiff's state law claim for breach of contract (Count IV) is dismissed without prejudice.

## III. Conclusion

Accordingly, it is hereby **ORDERED AND ADJUDGED** that Plaintiff's Motion for Summary Judgment (DE 48) is **DENIED**. Defendant's Motion for Summary Judgment (DE 54) is **GRANTED** as to Counts I, II, and III of Plaintiff's Second Amended Complaint (DE 36).

Count IV of the Second Amended Complaint (DE 36) is **DISMISSED WITHOUT PREJUDICE**.

**DONE AND ORDERED** in Chambers in West Palm Beach, Palm Beach County, Florida, this 24th day of October, 2014.

KENNETH A. MARRA
United States District Judge