

Document: Ash v. Bd. of Mgrs. of 155 Condominium, 44 A.D.3d 324

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Supreme Court of New York, Appellate Division, First Department

October 2, 2007, Decided; October 2, 2007, Entered

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Reporter

44 A.D.3d 324 * | 843 N.Y.S.2d 218 ** | 2007 N.Y. App. Div. LEXIS 10303 *** | 2007 NY Slip Op 7332 ****

[****1] Allan A. Ash et al., Appellants, v Board of Managers of the 155 **Condominium** et al., Respondents, et al., Defendants. Index 106769/03.

Subsequent History: Summary judgment granted by, Summary judgment denied by, Motions ruled upon by *Ash v. Bd. of Mgrs. of the 155 Condominium*, 23 Misc 3d 1103A, 881 NYS2d 361, 2008 N.Y. Misc. LEXIS 7458 (2008)

Prior History: *Ash v. Bd. of Managers of the 155 Condo.*, 2007 N.Y. App. Div. LEXIS 848 (N.Y. App. Div. 1st Dep't, Jan. 23, 2007)

Core Terms

prior restraint, free **speech**, suppression, heavy burden, trial court, fair trial, plaintiffs', contacting, discovery, rights, vacate, bears

Case Summary

Procedural Posture

In an action between plaintiff and defendant board, the Supreme Court, New York County (New York), granted plaintiffs' motion to vacate certain prior orders and prohibited plaintiff from "directly" contacting individuals involved in the litigation. Plaintiff appealed.

Overview

The trial court's order prohibited plaintiff from "directly" contacting individuals involved in the litigation, and required plaintiff to submit any communications, questions, assertions of opinion, discovery demands, etc., to his counsel, who in turn was to submit such information to counsel for the board, who was then to present that information to the board. The appellate court held that any imposition of prior restraint, whatever the form, bore a heavy presumption against its constitutional validity and that a party seeking to obtain such a restraint bore a correspondingly heavy burden of demonstrating justification for its imposition. It was also incumbent upon a trial court to insure that each of the parties received a fair trial, bearing in mind the fact that prior restraints upon the rights of free **speech** and publication may only have been overcome upon a showing of a clear and present danger of a serious threat to the administration of justice. The appellate court was not convinced that the board shouldered the heavy burden or demonstrated that plaintiffs' numerous, unnecessary, and vexatious ramblings had compromised the board's right to a fair trial.

Outcome

The judgment was reversed, and the order was vacated. The trial court was directed to set, and enforce, an expedited discovery schedule.

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> [Prior Restraint](#) ▼

HN1 **Judicial & Legislative Restraints, Prior Restraint**

A "prior restraint" on **speech** is a law, regulation, or judicial order that suppresses

speech-or provides for its suppression at the discretion of government officials-on the basis of the **speech**'s content and in advance of its actual expression and it has long been established that such restraints are the most serious and the least tolerable infringement on **First Amendment** rights. [More like this Headnote](#)

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Constitutional Law > ... > Fundamental Freedoms ▼ > Judicial & Legislative Restraints ▼
> Prior Restraint ▼

Evidence > Burdens of Proof ▼ > Allocation ▼

HN2 Judicial & Legislative Restraints, Prior Restraint

Any imposition of prior restraint, whatever the form, bears a heavy presumption against its constitutional validity and a party seeking to obtain such a restraint bears a correspondingly heavy burden of demonstrating justification for its imposition. It is also incumbent upon a trial court to insure that each of the parties receives a fair trial and, to that end, possesses both the power and responsibility to safeguard their rights. The trial court, in so doing, must bear in mind the fact that prior restraints upon the rights of free **speech** and publication may only be overcome upon a showing of a clear and present danger of a serious threat to the administration of justice. [More like this Headnote](#)

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Headnotes

Constitutional Law--Freedom of **Speech**.--Order prohibiting plaintiff from "directly" contacting any of litigants involved in matter was reversed; such "prior restraint" on **speech** was unjustified since defendants failed to demonstrate that plaintiffs' numerous, unnecessary and vexatious ramblings had compromised defendants' right to fair trial.

Counsel: [***1] Henry R. Kaufman, P.C. ▼, New York (Henry R. Kaufman ▼ of counsel), for appellants.

Balber Pickard Battistoni Maldonado & Van Der Tuin, PC ▼, New York (John Van Der Tuin ▼ of counsel), for respondents.

Judges: Concur--Andrias ▼, J.P., Marlow ▼, Nardelli ▼, Sweeny ▼ and McGuire, JJ.

Opinion

[*324] [**219] Order, Supreme Court, New York County (Walter B. Tolub ▼, J.), entered on or about October 25, 2006, which, to the extent appealed from, granted plaintiffs' motion to vacate certain prior orders of the court prohibiting plaintiff Allan A. Ash from contacting any of the litigants involved in this matter during its duration and, instead, prohibited him from "directly" contacting such individuals, and to submit any communications, questions, assertions of opinion, discovery demands, etc., to his counsel, who in turn was to submit such information to counsel for defendants, who was then to present that information to defendants, unanimously reversed, on the law, without costs, and that part of the order vacated. The motion court is directed to set, and enforce, an expedited discovery schedule.

HN1 A "prior restraint" on **speech** is "a law, regulation or judicial order that suppresses **speech**--or provides for its suppression at the discretion of government [***2] officials--on the basis of the **speech's** content and in advance of its actual expression" (*United States v Quattrone*, 402 F3d 304, 309 [2005]; see also *Hobbs v County of Westchester*, 397 F3d 133, 148 [2005], cert denied 546 US 815, 126 S Ct 340, 163 L Ed 2d 51 [2005]), and it has long been established that such restraints "are the most serious and the least tolerable infringement on **First Amendment** rights" (*Nebraska Press Assn. v [**325] Stuart*, 427 US 539, 559, 96 S Ct 2791, 49 L Ed 2d 683 [1976]; see also *Whitney v California*, 274 US 357, 376, 47 S Ct 641, 71 L Ed 1095 [1927, Brandeis, J., concurring] ["(to) justify suppression of free [**220] **speech**, there must be reasonable ground to fear that serious evil will result if free **speech** is practiced"]). Accordingly, **HN2** any imposition of prior restraint, whatever the form, bears a "heavy presumption against its constitutional validity" (*Bantam Books, Inc. v Sullivan*, 372 US 58, 70, 83 S Ct 631, 9 L Ed 2d 584 [1963]; *United States v Quattrone*, 402 F3d at 310), and a party seeking to obtain such a restraint bears a correspondingly heavy burden of demonstrating justification for its imposition (*Organization for a Better Austin v Keefe*, 402 US 415, 419, 91 S Ct 1575, 29 L Ed 2d 1 [1971]; *Near v Minnesota ex rel. Olson*, 283 US 697, 713, 51 S Ct 625, 75 L Ed 1357 [1931]).

It is also incumbent upon a trial court to insure [***3] that each of the parties receives a fair trial [***2] and, to that end, possesses both the power and responsibility to safeguard their rights (*Matter of National Broadcasting Co. v Cooperman*, 116 AD2d 287, 289-290, 501 NYS2d 405 [1986], citing *Sheppard v Maxwell*, 384 US 333, 86 S Ct 1507, 16 L Ed 2d 600 [1966]). The trial court, in so doing, must bear in mind the fact that prior restraints upon the rights of free **speech** and publication "may only be overcome upon a showing of a clear and present danger' of a serious threat to the administration of justice" (*Matter of National Broadcasting Co. v Cooperman*, 116 AD2d at 290, quoting *Bridges v California*, 314 US 252, 263, 62 S Ct 190, 86 L Ed 192 [1941]; see also *Lowinger v Lowinger*, 264 AD2d 763, 695 NYS2d 127 [1999]; *Matter of New York Times Co. v Rothwax*, 143 AD2d 592, 533 NYS2d 73 [1988]).

In this matter, on the record before us, we are not convinced, at least at this juncture, that defendants have shouldered their heavy burden and demonstrated that plaintiffs' numerous, unnecessary and vexatious ramblings have compromised defendants' right to a fair trial. Concur--Andrias ▼, J.P., Marlow ▼, Nardelli ▼, Sweeny ▼ and McGuire, JJ.

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