

Denver County, Colorado 1437 Bannock Street Denver, CO 80202	FILED IN DENVER COUNTY COURT AUG 8 2017 By _____ Clerk of the court
CITY AND COUNTY OF DENVER v. RUSSELL, CYNTHIA MOSELEY, ELIZABETH DEFENDANTS	
Attorney or Party Without Attorney (Name and Address): Phone Number: _____ E-mail: _____ FAX Number: _____ Atty. Reg. #: _____	Case Number: 17GS000999 17GS001005 Division 3F Courtroom
ORDER RE: DEFENDANTS' MOTION TO DISMISS	

On May 25, 2017, the court granted an oral motion to join the two cases captioned above, with no objection by the City. Each Defendant through their counsel filed a Motion to Dismiss, asserting essentially the same constitutional claims. As the determination of the constitutionality of the state action (in this case municipal action) turned on specific findings of fact, an evidentiary hearing was held after joinder of the cases.

The complaints in the cases reflect that each of the two Defendants has been charged with a sole count of Trespass, in violation of the Denver Revised Municipal Code ("D.R.M.C.") 38-115, carrying a possible penalty of up to one year in jail and/or a fine of \$999.00, and which reads as follows:

- Sec. ~~38-115~~ - Trespass.

(a) It is unlawful for any person knowingly to enter or remain upon the premises of another when consent to enter or remain is absent, denied, or withdrawn by the owner, occupant, or person having lawful control thereof.

(b) It shall be prima facie evidence that consent is absent, denied, or withdrawn, to enter or remain upon the premises of another when:

(1) Any person fails or refuses to remove himself from said premises when requested to leave by the owner, occupant or person having lawful control thereof;

* * *

Findings of Fact After Hearing on Defendants' Motion to Dismiss

ADAPT is a Colorado grassroots organization which was created to advocate for rights on behalf of people with disabilities. In January of 2017, the group was concerned about possible changes in Medicaid benefits and possible extinguishment of long term medical benefits pursuant to a contemplated repeal of the Affordable Care Act. Defendant Ms. Russell is an active member of this group, and has worked with ADAPT over the years to make positive changes in society to benefit the rights of the disabled. She expressed frustrations at the hearing as to the general lack of accessibility to their representative, United States Senator Cory Gardner, as she and other individuals of the group very much wanted to express a position and to discuss the matter of any possible repeals with the senator.

United States Senator Cory Gardner maintains an office on the fifth floor of the Chase Building in downtown Denver. At approximately 11:00 a.m. on January 27, 2017, the Defendants along with other members of the ADAPT group, proceeded to enter the Chase Building in an effort to speak to United States Senator Gardner or his staff. The group included approximately twenty-five people. Some members of the ADAPT group, but not all, possessed handmade signs on poster board that contained statements of a political nature. Many of the group utilized wheelchairs or motorized chairs in order to move about. There was no evidence presented at hearing that either of the Defendants possessed signs of any kind.

Unbeknownst to the ADAPT group, a representative from Senator Gardner's office had at 8:00 a.m. that same morning, contacted Mr. Turner, a member of the management and security team of the Chase Building. Mr. Turner was informed that ADAPT was planning a visit that day. The representative expressed that the senator's office was refusing to meet with ADAPT. Mr. Turner was told to communicate a message to ADAPT and express that they should try to make an appointment for an offsite location via email or phone, and that the senator's office would not be accepting the ADAPT group that day. In a response to this conversation, Mr. Turner disabled the elevators in the Chase Building so that the elevators would not engage when a person pressed the button to the fifth floor. This was done before the arrival of the ADAPT group to the Chase Building, and with the approval of his supervisor, one Ms. DeLeon. In this way, Mr. Turner succeeded in his stated purpose of preventing the ADAPT group from traveling to the senator's office, as well as preventing them from traveling to the common areas of the fifth floor outside of the senator's office.

Once ADAPT entered the Chase Building, they were able to see that another group, referred to at hearing as "the first group" were already in the lobby and were protesting by making loud noises and waving political signs. When the ADAPT group arrived at approximately 11:00 a.m. Mr. Turner immediately confronted them upon entry, and told them that could not be in the Chase Building because they carried signs with political messages. There was no credible evidence offered to the court whatsoever establishing that the sign possession by the ADAPT group (or the first group) disrupted the everyday business of the Chase Building in any way. Mr. Turner

determined that the handwritten, posterboard signage carried by some of the ADAPT members justified the expulsion of the ADAPT group because, according to Mr. Turner, they violated the imposed “no political message” policy of management. Mr. Turner testified credibly that he approached the group as they entered the building, and immediately told them to leave because of the signs.

The members of ADAPT did not leave but instead insisted that they were there to visit the office of the senator, and that they had already spoken with the senator’s office to arrange the visit. In fact, a person named Andrew traveled down to the lobby shortly after ADAPT’s arrival, and informed Ms. Russell that they were seeing constituents- seven people at a time, and that she would have to wait her turn. She agreed that she would wait.

Mr. Turner testified that the ADAPT group was in the Chase Building for only five minutes before police arrived. Once police arrived, the members of the first group essentially entirely dispersed, and according to Mr. Turner, members of ADAPT only then approached the elevator bank and began blocking the elevators. He explained what he meant by the phrase “blocking the elevators” by what he described as the wheelchair bound people being “backed up” around the elevators because, according to Mr. Turner’s testimony, they were waiting to get on the elevator. He agreed that this blocking only happened after Mr. Turner disabled the elevator, manipulating the elevator controls so that the elevator did not react when a patron pushed the button for the fifth floor. The elevators were otherwise functional in all other ways. He did not specifically identify either of the Defendants as a person blocking the elevator.

Lt. Edling of the Denver Police Department arrived and saw several of the elevator doors were impeded by people in wheelchairs. Although many of the elevators were functional, it appeared to him that some of the doors were being intentionally blocked by wheelchairs, and these blocked elevator doors were stuck open. He did not identify either of the Defendants as one of the people intentionally blocking the elevator.

Lt. Edling heard chanting and saw political signs by some of the ADAPT group members. He was able to talk to Defendant Russell and encouraged her to leave but she insisted on staying to see members of Senator Gardner’s office. Finally, after several orders to leave were made by the police over the bullhorn without result, the Defendants were ticketed for one count of Trespass in violation of D.R.M.C. 38-115. They never did get to the fifth floor on January 27, 2107.

The Chase Building Policies

Both Mr. Turner and Ms. DeLeon testified that they follow and enforce a policy wherein staff members are required to remove from the Chase Building any person with a sign that contained a political message. They stated repeatedly that it wasn’t the fact that an alleged policy offender in question had signs, but rather the fact that the messages on the signs were “political” in nature that offended their policy. According to their testimony, a person with a political sign is considered a protester, and protesters are not allowed anywhere in the building according to the policy. Mr. Turner and Ms. DeLeon were the only witnesses called with knowledge of the policy, and they spoke credibly, and very specifically to this working policy. Both confirmed unapologetically that

political expression via signage or otherwise was absolutely not tolerated, and justified the removal of any person associated with the same by building policy.

The written policy (People's Exhibit 1) does not reflect any language reflecting signage. However, it is clear that this content specific policy was consistently followed and imposed by the Chase Building management, and was so imposed on January 27, 2017. The imposition of this content specific policy was established beyond a reasonable doubt at hearing. Although signage is not specifically mentioned in the written policy, a definition of what constitutes a "demonstration" is included. A prohibited "demonstration" under the policy is "any gathering of people trying to protest a situation they object to." (*sic*) (People's Exhibit 1) There is no definition of "protest" in the written policy, but both Mr. Turner and Ms. DeLeon were confident and credible in their testimony that this was defined as any expression of a political nature. Whether the expression was violent or nonviolent, disruptive or nondisruptive, was not considered within the terms of the written or unwritten policy.

This written policy further directs the employee to do whatever they can to prevent "any gathering of people" from accessing any upper floor. The enforcement of this written policy is reflected in the actions of Mr. Turner in disengagement of the fifth floor access button. Unfortunately, this decision to restrict public access to the common areas of the fifth floor in front of Cory Gardner's office created a cluster of confusion and discontent for everyone involved on January 27th in the Chase Building.

Both Mr. Turner and Ms. DeLeon were adamant that the fact that the building was privately owned allowed them full discretion to impose this content specific banishment and bar to access to the senator's office. Ms. DeLeon testified that the policies followed were in place before United States Senator Gardner was leased a space on the fifth floor, and continued after the initial leasing to at least January 27, 2017 – the day the Defendants were charged with Trespass for refusing to leave the common areas after management directed them to do so.

The People admitted an exhibit which was submitted as proof of the policy in place on January 27, 2017, and was entitled at the header, "1125 17th St. POST ORDERS" (People's Exhibit 1). The document constitutes the written policy regarding riots, demonstrations, and labor disputes. In the language referencing demonstrations, the text provides as follows (all spelling and grammatical errors in original):

Demonstrations

A demonstration is any gathering of people trying to protest a situation they object to. They may protest peacefully in a location that is not private property, try to disrupt or block normal business, harass or confront employees or customers or occupy private property without permission.

Follow these guidelines regarding demonstrations:

- * Attempt to stop individuals from accessing the elevators by stopping and asking them what the nature of their business is. Our first priority is to try and keep

protestors from reaching their desired floor. Remain calm and proceed in your normal duties.

* If we've determined they are uninvited/protestors, advise that this is private property and they need to leave otherwise you will contact the police. Advise they are permitted to assemble on the city owned sidewalk. Do NOT make contact with demonstrators or react to them in a hostile manner.

* If they refuse to leave or access a floor and are in the common areas, we again should advise they must leave. If they do not and they are either assembling in the common corridor or disrupting other tenants while in a tenant space (i.e. the senators office), we need to advise the tenant if they cannot control the guest(s) then we will have to contact the police and sign an order to have them removed.

* If **media** arrives they should also be told this is private property and they'll need to leave. Our first line of defense is to state we have no comment and that you are not authorized to speak on behalf of ownership. It's possible that if the media persists, security may get authorization to provide Hines' corporate marketing contact information [MEDIA ONLY DO, NOT PROVIDE TO A PROTESTOR]. Houston (Hines office) handles all media related events; however you must first contact the property manager, Jennifer Hallinan DeLeon (303.296.1646).

* All protest or security events such as a disturbance that impacts the buildings operations or tenants needs to be reported to management immediately. By phone contact one of the individuals above. A detailed written report with video or photos should also be completed within 1 hour of the settled event.

People's Exhibit 1, emphasis in original.

The Chase Building Common Areas

The credible evidence offered at hearing further established that the Chase Building houses many business offices other than the one leased to United States Senator Cory Gardner (which, according to Ms. DeLeon, is paid for by the United States Government), and that certain areas of the Chase Building are deemed common areas which are open to the public. In order to visit an office in the Chase Building, a visitor must travel through such common areas including the lobby on the main floor (in front of the elevators), the elevators themselves, as well as the hallways on the upper floors (including the hallway of the fifth floor, which is the location of Senator Gardner's office). The witnesses employed by the building management consistently testified that members of the public are allowed to walk freely throughout these areas of the building to get to their intended office.

Arguments of the Parties

The Defendants do not assert a facial challenge to the Trespass statute itself. Instead, they argue that 1) the totality of the circumstances presented in the unique set of facts in this case, involving specifically the rental of a public office space to a United States Senator in the Chase Building, constituted sufficient governmental involvement in the privately owned building to trigger constitutional protections in spite of its privately owned status pursuant to *Bock v. Westminster Mall Co.*, 819 P.2d 55 (Colo.1991); and 2) that actions pursuant to the policies of management of the Chase Building violated the Defendants' Freedom of Speech rights, as well as rights under the Petition Clause under both the United States Constitution and the Constitution of the State of Colorado. The Defendants pray that the criminal charge of Trespass be dismissed as the underlying facts supporting the charge rely upon the unconstitutional acts of the players involved. The People respond to the Motion to Dismiss by arguing that the facts of *Bock* are so distinguishable from the case at bar that *Bock* should not be considered controlling in this case, and therefore the Defendants do not enjoy protection of constitutional rights because the Chase Building is privately owned and is not considered a public forum.

To prevail on an as-applied constitutional challenge, the challenging party must "establish that the statute is unconstitutional 'under the circumstances in which the plaintiff has acted or proposes to act.'" *Qwest Servs. Corp. v. Blood*, 252 P.3d 1071, 1085 (Colo.2011) (quoting *Developmental Pathways v. Ritter*, 178 P.3d 524, 534 (Colo.2008)). "The practical effect of holding a statute unconstitutional as applied is to prevent its future application in a similar context, but not to render it utterly inoperative." *Developmental Pathways*, 178 P.3d at 534 (quoting *Sanger v. Dennis*, 148 P.3d 404, 411 (Colo.App.2006)).

People v. King, 2017 CO 44, ¶ 7

No law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact.

Colo. Const. art. II, § 10

The people have the right peaceably to assemble for the common good, and to apply to those invested with the powers of government for redress of grievances, by petition or remonstrance.

Colo. Const. art. II, § 24

Analysis Under The *Bock v. Westminster* Holding

The Supreme Court of Colorado in *Bock* specifically addressed the extent of 1st Amendment protections enjoyed by a grassroots organization known as “The Pledge of Resistance” while disseminating pamphlets and soliciting protest signatures in the common areas of a privately owned shopping center. In the case at bar, the grassroots organization known as “ADAPT” is seeking enforcement of constitutional rights while in the common areas of a privately owned office building, referred to as the Chase Building. The respondents in *Bock* argued, as the People in this case argue, that Article II, section 10 of the Colorado Constitution applies only to direct state action which infringes upon an individual’s constitutional rights, and therefore the owner of a private retail space is insulated from constitutional scrutiny of its actions by virtue of the private ownership of the space involved. Clearly, *Bock* presents facts so closely mirroring the facts and issues raised within the case at bar, as to render the considerations of the *Bock* case applicable to the case in front of this court.

The *Bock* Court recognized the heightened protection afforded by our Colorado Constitution as opposed to the U.S. Constitution, and by its ruling directed the trial courts to recognize the impact on constitutional rights not just by state actors, but also by “many hybrid forms of governmental involvement and/or by private interests performing the equivalent of public functions.” *Id.*, at 60.

Where governmental entities or public monies are shown by the facts to subsidize, approve of, or encourage private interests and such private interests happen also to restrict the liberty to speak and to dissent, this court may find that such private restrictions run afoul of the protective scope of Article II, Section 10. It is possible for interests, otherwise private, to bear such a close relationship with governmental entities or public monies that such interests are affected with a public interest. Moreover, with or without the benefit of that relationship, a private project may develop and operate in a manner such that it performs a virtual public function.

Bock v. Westminster Mall Co., 819 P.2d 55, 60 (Colo. 1991)

The Court found that in spite of the private ownership of the Westminster Mall (“the Mall”) in *Bock*, the actions of the private owner in denying First Amendment rights triggered constitutional protections of protesters, despite the absence of directly obvious, traditional state action. In reaching this holding, the Court considered several factors. This court, in its analysis, will address the same factors considered and relied upon in *Bock*.

In *Bock*, the court considered that the Mall served the public outside of immediate area of the city of Westminster, and was therefore considered to be “regional” in nature, extending its service zone to Denver and to Boulder, Colorado. *Id.*, at 56. In the case before this court, the evidence at hearing established that the Chase Building houses a United States Senator. Clearly even the most cursory consideration in voluntarily leasing space to the same would include an anticipated regional service area that would extend its service zone to persons and entities far outside of the immediate Denver area. This is the very nature of an office housing a United States Senator that represents the State of Colorado. The Chase Building, by virtue of its voluntary engagement of such a tenant, and the

nature of that tenant as a United States Senator, is considered to be regional in nature, as was the Mall in *Bock*.

In *Bock*, the court found important in its analysis that the Mall's common areas are open to the general public without charge, and no purchase was necessary to enter or exit the Mall. *Bock*, at 56. In the case of the Chase Building, the testimony at hearing established that the general public is free to enter the building and to occupy the common areas of the building during business hours. "Walk-ins" (people with no pre-arranged appointments) were allowed come into the Chase Building and to go to the offices in the building, including the senator's office. The Chase Buildings common areas are found to be open to the general public as was the Mall in *Bock*.

The Court found significant in *Bock* that the policy imposed by the Mall, found to regulate and prohibit controversial or political activities in the common areas, relied upon the City's Trespass ordinance to enforce its private policy. *Bock*, at 56, 61. In the case at bar, the evidence at hearing established that the Denver Police Department responded at the behest of Chase Building management, confronted the persons indicated by Chase Building management as violating the private policy, and those indicated by management cited with Trespass for violating the private policy that disallows political messages. This was clearly established by all witnesses testifying at the hearing on this motion. The Lieutenant's testimony established that he cited the Defendants with Trespass because Ms. DeLeon wanted them removed. Mr. Turner confirmed that it was management's decision to "trespass" the defendants, not the police department's. Ms. DeLeon also confirmed that it was not the Denver Police that decided to cite the Defendants, but rather the order to vacate was done as a result of her direction. Clearly the owners of the privately owned Chase Building rely upon the City of Denver's police force to enforce its private policy, as was the case in *Bock*.

The *Bock* court also noted financial links between the government and the privately owned mall, as well as the use of public monies, as being significant to its analysis. In the case at bar, the hearing established that the United States government pays for the rental of the office space for the United States Senator in the Chase Building.

After consideration of the unique facts presented, the *Bock* court found that "governmental involvement exists and that the open and public areas of the Mall effectively function as a public place." *Bock* at 61. After finding that the common and accessible areas of the Mall effectively serve as a public space, the court noted that constitutional infringements cannot be tolerated when based upon a non-neutral, content based restriction. Specifically, although privately owned, the policies of the private Mall may not unconstitutionally limit the petitioners' exercise of Free Speech.

After considering the unique facts established at hearing, exhibits entered thereby, relevant law including *Bock v. Westminster Mall Co.*, 819 P.2d 55 (Colo. 1991), pleadings and arguments of the parties, this court finds that the Defendants have established that the Chase Building's common, open and public areas leading to the senator's office effectively function as a public place pursuant to the *Bock* holdings. A person wishing access to the senator's rented public office space (paid for with public funds), to express a non-violent opinion to the senator, or to appropriately speak with the senator to redress grievances, must by Chase Building design travel through these

areas to do so. This court also relies upon the management's provision of free access by the public to these areas. The Chase Building's policy which resulted in banishment of members of the ADAPT group, based solely upon the possession of something as unimposing as a handmade posterboard sign reflecting a political message, violated the Defendants' constitutional rights to Freedom of Speech. In addition, the policies imposed by management violated the Defendants' constitutional rights regarding their Right to Petition the Government for Redress of Grievances by calling for the disengagement of elevators in order to prevent access to the common areas in front of United States Senator Gardner's office. This prohibition of non-violent political speech amounts to non-neutral, content-based restriction. Importantly, there was no credible evidence presented at hearing that established that possession of such signage could or did interfere with the normal operations of the Chase Building.

There was much emphasis in the pleadings and at the hearing on the People's assertion that unidentified individuals were blocking the elevator and this blocking justified the action of management in its banishment of the Defendants from the premises, as well as the subsequent charges. However, the evidence presented at motions hearing established that the demand by management to leave the premises was imposed immediately upon the attempted entry of the building with political signage. The testimony of Mr. Turner was not disputed as to this fact. The evidence at hearing established beyond a reasonable doubt that management did not call the police based upon the business at the elevators, but rather upon the initial entry into the common area of the lobby with political signage.

This finding is bolstered by the credible testimony of Mr. Turner, who testified that it was only after police arrived on scene, upon the beckoning of the management for the removal of the ADAPT group, that the ADAPT members moved towards the elevator area. At any rate, whether unidentified persons were subsequently intentionally blocking some of the elevators, or were simply just backed up with their wheelchairs inside the elevator fruitlessly pressing the button that read, "5", was not proven at hearing, by any standard of evidence. Essentially, the scenes at elevators, with wheelchairs half in and half out, and confusion about why the elevator buttons did not work, were scenes depicted at most as scenes of mass chaos, with such chaos being created by management disabling the elevators, not by the persons in the wheelchairs. To be sure, the evidence at this hearing failed to establish that either of the Defendants were involved in the intentional impeding of any elevator. In fact, credible evidence presented, including a photograph (People's Exhibit 2) and a video, failed to establish that access to and from the elevator by persons in the building was hampered at all.

Further, it is noted by this court that the hearing in this matter brought forward unique, and specific facts that are relied upon in the holding of this court, in respect to the two named Defendants only. As the Bock court emphasized, this type of analysis is highly fact dependent and does not rely upon any single factor. *Bock* at 61. It cannot be ignored that people other than the two named Defendants were charged for the January 27th incident. The court does not intend for this ruling to apply to cases of other defendants, the facts of which may or may not be proven at another hearing, and which potentially may be established in a much different light. Additionally, the court notes that this ruling certainly should not be interpreted to mean that protesters are to have unlimited, unbridled license to behave however they feel is justified in a space housing a United States Senator. *Bock* applies in an extremely limited fashion, and applies only to non-violent political

speech and peaceful access for redress of grievances which do not adversely affect business operations in a privately owned setting.

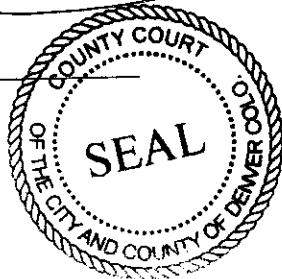
As constitutional protections, under these unique circumstances, are afforded the Defendants after being triggered in spite of private ownership of the Chase Building by virtue of the *Bock* holding, and as the charges of Trespass against each of the two Defendants rely solely upon facts constituting an affront of the Defendants' constitutional right to Freedom of Speech and their Right to Petition the Government for Redress of Grievances, the Motions to Dismiss are GRANTED.

The Jury Trial currently set for October 31, 2017 is VACATED.

SO ORDERED,



JUDGE CLARISSA GONZALES
Denver County Court



Date

8/8/17


Certificate of Service

The undersigned hereby certifies that a true and accurate copy of the foregoing Order re: Defendant's Motion to Dismiss was delivered to the following parties via e-mail and U.S. postage prepaid, on the 8 day of August, 2017.

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L. Baltazar, Clerk for Judge Gonzales

