2004 WL 2471406 (S.D.N.Y.) (Not reported in Federal Supplement)

United States District Court, Southern District of New York.

FIFTH AVENUE PRESBYTERIAN CHURCH, et al., Plaintiffs, v.
THE CITY OF NEW YORK, Bernard Kerik, and Rudolph Guiliani, Defendants.
No. 01 Civ. 11493(LMM).
Oct. 29, 2004.

MEMORANDUM AND ORDER

MCKENNA, J.

Plaintiffs--a religious corporation which owns and operates a church at the corner of Fifth Avenue and 55th Street in Manhattan, New York City (the "Church"); Margaret Shafer, "employed as Associate for Outreach for the Church, and ... a member of the Church who is personally and professionally engaged in the Church's program toward the homeless population" (Compl.p 2); and ten homeless persons--brought this action to obtain a permanent injunction preventing the City of New York (the "City") [FN1] from dispersing homeless persons sleeping, at the Church's invitation, in the landings at the tops of the staircases leading up into the Fifth Avenue and the 55th Street entrances to the Church (contained within arched entryways and recessed about five to ten feet from the sidewalk and raised about six feet above the sidewalk) and on the Church's property along 55th Street adjacent to the Church wall (extending about five feet into the public sidewalk), as well as for a declaration that the dispersal of such persons from such areas has violated plaintiffs' rights.

FN1. The City's former Mayor and Police Commissioner are named as defendants; the officials presently holding those positions have not been substituted.

1.

Homeless persons had been sleeping in the areas described above for some time when, in February 1999, they were officially designated by the Church as places where the homeless might sleep at night. In November of 2001, however, the City notified the Church that it would no longer permit the homeless to sleep on the Church's outdoor property described above, and on three occasions in early December of 2001, the police removed the homeless from the Church's property during the night.

By Memorandum and Order dated January 4, 2002 ("January 4, 2002 Order"), the Court granted a preliminary injunction against defendants, against their entering onto the property of the plaintiff 5th Avenue Presbyterian Church ... for the purpose of dispersing or arresting any

person who shall be sleeping or otherwise lawfully on that property, provided that nothing in this order shall limit the authority of the New York City Police Department to arrest any person for other conduct that is unlawful, or from removing from church property anyone who is present there without the consent of the Church, or from removing homeless persons from Church property during a winter alert officially declared by the New York City Department of Health. (January 4, 2002 Order at 17.) The injunction was limited, however, to the staircases. (Id. at 17-18.) The Court of Appeals affirmed the January 4, 2002 Order. Fifth Avenue Presbyterian Church v. City of New York, 293 F.3d 570 (2d Cir.2002).

2.

Plaintiffs move, and defendants cross-move, for summary judgment. Under Fed.R.Civ.P. 56, Summary judgment is appropriate when, after reviewing the evidence in the light most favorable to the non-moving party, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. A dispute is not "genuine" unless "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Nabisco, Inc. v. Warner-Lambert Co., 220 F.3d 43, 45 (2d Cir.2000) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); other citation omitted).

The burden of showing that no genuine factual dispute exists rests upon the moving party, and in assessing the record to determine if such issues do exist, all ambiguities must be resolved and all inferences drawn in favor of the party against whom summary judgment is sought. This remedy that precludes a trial is properly granted only when no rational finder of fact could find in favor of the non-moving party. Carlton v. Mystic Transp., Inc., 202 F.3d 129, 133-34 (2d Cir.2000) (citations omitted). The Court considers plaintiffs' motion first.

3.

Plaintiffs' principal claim is that the City's actions in removing homeless persons from the Church's property (the "City's actions") have violated their rights under the Free Exercise Clause of the First Amendment to the United States Constitution. "The Free Exercise Clause of the First Amendment, which has been applied to the states through the Fourteenth Amendment, provides that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." ' Government enforcement of laws or policies that substantially burden the exercise of sincerely held religious beliefs is subject to strict scrutiny. "To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." Where the government seeks to enforce a law that is neutral and of general applicability, however, then it need only demonstrate a rational basis for its enforcement, even if enforcement of the law incidentally burdens religious practices. Fifth Avenue Presbyterian, 293 F.3d at 574 (quoting Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531, 546 (1993); other citations omitted).

That the Church's practice of allowing homeless persons to sleep out-of-doors on its property is

an "exercise of sincerely held religious beliefs," Fifth Avenue Presbyterian, 293 F.3d at 574, cannot be seriously disputed. See Declaration of Margaret Shafer, June 27, 2003, "Shafer Decl.," pp 7-10, 60-70; Declaration of Dr. Larry Rasmussen (Reinhold Niebuhr Professor of Social Christian Ethics at Union Theological Seminary), Mar. 26, 2003, pp 3-12; and Rule 56.1 Statement of Uncontested Facts in Support of Plaintiffs' Motion for Summary Judgment, "Pl. 56.1 Rule Stmt." pp 11-20 (not disputed in Defendants' Response to Plaintiffs' Local Rule 56.1 Statement).

Defendants argue that "[t]he mere act of permitting, or of not objecting to, a de facto shelter on [the Church's] property from 9:00 pm to 5:30 am does not rise to the level of a sincerely held religious belief that implicates First Amendment free exercise clause protection" because, during the hours in question, the Church "is obviously not ministering to any one since no one from [the Church] is present, and since most, if not all of, the individuals on the steps of [the Church] are sleeping." (Def. Mem. at 8 (footnote omitted)) [FN2] The argument, in the first place, is too narrow. See Shafer Reply Declaration, October 12, 1993, "Shafer Reply Decl." p 28 ("Giving those persons a place to sleep at night is a central aspect of the Church's hospitality to them."). In the second place, the argument runs afoul of the rule that "courts are not permitted to inquire into the centrality of a professed belief to the adherent's religion or to question its validity in determining whether a religious practice exists." Fifth Avenue Presbyterian, 293 F.3d at 574 (citing Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 886-87 (1990)). [FN3]

FN2. Defendants repeatedly refer to plaintiffs' activities as constituting a "de facto shelter," a terminology that does no more than muddy the argument. In allowing homeless persons to sleep out-of-doors on its property, the Church has not created a shelter within any legal definition of the word. See Fifth Avenue Presbyterian, 293 F.3d at 575.

FN3. Moreover, as the Court found in its January 4, 2001 Order: "services to the homeless have been judicially recognized as religious conduct, within the ambit of the First Amendment." See Stuart Circle Parish v. Board of Zoning Appeals, 946 F.Supp. 1225, 1236-37 (E.D.Va.1996); Western Presbyterian Church v. Board of Zoning Adjustment, 862 F.Supp. 538, 544 (D.D.C.1994).

Defendants recognize that "[a]ssuming arguendo, that the plaintiffs have a sincerely held religious belief that implicates the First Amendment's free exercise clause, plaintiffs must next establish that the City's actions 'substantially burden the exercise of sincerely held religious beliefs." ' (Def. Mem. at 12 (quoting Fifth Avenue Presbyterian, 293 F.3d at 574)) Defendants do not--it is hard to see how they could--dispute that the Church's expression of its religious belief in allowing homeless persons to sleep out-of-doors on its property would be substantially burdened by police removing those persons from the Church's premises. Rather, defendants urge, that burden can be eliminated if the Church expands its indoor shelter, housing ten males (Shafer Decl., June 27, 2003, p 10), cost being irrelevant because "there is no substantial burden placed on an individual's free exercise of religion where a law or policy merely 'operates so as to make

the practice of [the individual's] religious beliefs more expensive." Goodall by Goodall v. Stafford County School Bd., 60 F.3d 168, 171 (4th Cir.1995), cert. denied, 516 U.S. 1046 (1996) (quoting Braunfeld v.. Brown, 366 U.S. 599, 605 (1961) (plurality opinion)).

The cases defendants cite do not support their argument. [FN4] Adopting defendants' approach would subject plaintiffs to a far higher standard than is required by the Second Circuit's directive that demonstrating substantial burden is "not a particularly onerous task." McEachin v. McGuinnis, 357 F.3d 197, 202 (2d Cir.2004); see also Ford v. McGinnis, 352 F.3d 582, 592-94 (2d Cir.2003) (explicitly rejecting strict approach to substantial burden inquiry). A limited judicial inquiry is necessary because it respects the danger of undue judicial involvement in religious activity. See, e.g., Jolly v. Coughlin, 76 F.3d 468, 476 (2d Cir.1996) (citations omitted). Thus, by necessity, "[o]ur scrutiny extends only to whether a claimant sincerely holds a particular belief and whether the belief is religious in nature. An inquiry any more intrusive would be inconsistent with our nation's fundamental commitment to individual religious freedom." Id.

FN4. Defendants cite cases with inapposite facts: the need for alternatives to prisoners' chosen religious practices due to safety concerns, Bryant v. Gomez, 46 F.3d 948 (9th Cir.1995); Weir v. Nix, 114 F.3d 817 (8th Cir.1997), the use of property not yet owned by a church, Daytona Rescue Mission, Inc. v. City of Daytona, 885 F.Supp. 1554 (M.D.Fla.1995)(no burden in prohibiting foodbank on site church did not yet own), government subsidization of religious activity, Goodall, 60 F.3d 168 (no burden exists when government declines to subsidize); United States v. Any and All Radio Station Equipment, 93 F.Supp.2d 414 (S.D.N.Y.2000) (government not required to allow broadcast of religious message without FCC license), and where no real modification of religious activity is required, Henderson v. Stanton, 76 F.Supp.2d 10 (D.D.C.1999).

Finally, it is not clear as a factual matter that an expanded indoor shelter would provide the Church a commensurate alternative. The record indicates that some portion of the homeless persons who sleep on Church property do so because they are "service resistant," and would be as unlikely to stay in an indoor church shelter as in a City shelter. See, e.g., Fifth Avenue Presbyterian, 293 F.3d at 576 ("common sense, in addition to evidence put forth by the homeless plaintiffs, suggests that the majority of these homeless will not go to shelters if the City is permitted to disperse them; rather they will find another place on the street upon which to sleep."); see also Shafer Decl. at p 25. Effectively requiring the Church to forgo its work with service resistant homeless persons would force the Church to modify its religious activity; a result that is entirely improper. See, e.g., Jolly, 76 F.3d 468 at 477 (finding that "a substantial burden exists where the state 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs." ') (quoting Thomas v. Review Bd. of the Indiana Employment Sec. Div., 450 U.S. 707, 718 (1981)).

Plaintiffs next argue that because their Free Exercise rights are implicated, the City's actions

must be subject to strict scrutiny analysis. (Pl. Mem. at 32) In response, defendants argue that even assuming, arguendo, that the City substantially burdened the Church's sincerely held religious belief, "[w]here the government seeks to enforce a law that is neutral and of general applicability ... it need only demonstrate a rational basis for its enforcement." Fifth Avenue Presbyterian, 293 F.3d at 574 (citing Church of Lukumi Babalu Aye, Inc., 508 U.S. at 546; Smith, 494 U.S. at 878-79). Defendants contend that the City's actions should not be held to strict scrutiny because they were undertaken to address violations of neutral laws of general applicability in that: (1) homeless persons who sleep on Church property have no access to Church toilet facilities between the hours of 9 p.m. and 5:30 a.m. and relieve themselves in public in violation of s s 143.03, 131.01, and 153.09 of the New York City Health Code, and s 16-118(b) of the New York City Administrative Code; (2) the Church operates a de facto shelter that fails to maintain minimum habitability standards; (3) allowing homeless persons to sleep on Church property is not a proper accessory use and thus violates New York City Zoning Regulation s 12-10; and (4) homeless persons' activities create a public nuisance. (Def. Mem at 16-19)

As an initial matter, defendants' de facto shelter argument can be rejected outright for reasons previously stated. [FN5] Defendants' argument on the zoning issue must also be rejected because it relies upon an assumption that allowing homeless persons to sleep out-of-doors on Church property "serves no religious function." (Def. Mem. at 19) Because the Court has found here that plaintiffs' actions are in fact based upon a sincerely held religious belief, allowing homeless persons to sleep on their property constitutes a proper accessory use. [FN6]

FN5. See supra note 2.

FN6. Plaintiffs' move for summary judgment on their claim under the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S .C. s 2000cc et seq (RLUIPA) based on their allegation that the City used its zoning laws to prohibit religious activity. (Pl. Mem. at 50) Because zoning law is no longer at issue, the Court need not reach this claim.

The Court now turns to defendants' claim that the City's actions were necessary to protect public health, safety, and welfare from homeless persons who allegedly relieve themselves in public, in violation of City law and in such a way that creates a public nuisance. Defendants devote their argument to several sections of the New York City Health Code and Administrative Code, and the law of public nuisance. They claim the "Free Exercise Clause offers no protection" to plaintiffs' activity "since [plaintiffs are] violating various neutral, generally applicable laws." (Def. Mem. at 14) Their focus on the neutrality and general applicability of individual New York City laws is misplaced. Plaintiffs have challenged the constitutionality of the City's actions, and those actions must pass muster under either a strict scrutiny or rational basis analysis. Thus, in order to avoid strict scrutiny, it is not an individual City law that must be neutral and generally applicable, but the City's actions in applying City law that must be neutral and generally applicable.

In the Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, the Supreme Court found that the neutrality of a challenged government action is suspect where that action "proscribe[s] more religious conduct than is necessary to achieve their stated ends." 508 U.S. at 538. In that case, the Court reviewed a law that prohibited, for public health reasons, the animal sacrifice practice of the Santeria religion. The Court found the neutrality of the law suspect because it was overbroad, in that it resulted in a "flat prohibition" on the targeted religious practice and did not exempt those aspects of the activity which did "not threaten the city's interest in public health." Id. at 538-9. Moreover, the Court found that "[t]he legitimate government interests ... could be addressed by restrictions stopping far short of a flat prohibition." Id. at 538.

The record indicates that the City sought a prohibition on homeless people sleeping out-of-doors on Church property.

> "[T]he police came onto Church property and told the Church representatives ... and the Homeless Neighbors, that the Homeless Neighbors would not be permitted to sleep outside the Church, and that if they lay down on the ground, or remained beyond the time permitted by the police, they would be arrested. The police formed a cordon in front of the Church ... to block the front steps of the Church ... All of the Homeless Neighbors who came to the Church that night to sleep were intimidated by police threats, including threats of arrest, into leaving the Church property that night instead of sleeping there.... The police informed the Church ... that [it] would not longer be allowed to permit anyone to sleep ... on the Church Steps ... and that anyone who attempts to do so ... will be arrested ..."

Shafer Decl. at p p 35, 41; see also Def. Mem. at 7 (acknowledging that the City acted to prohibit sleeping outside the Church); Deposition of Bernard Kerik, July 2, 2002, "Kerik Dep." at 79-80 ("[O]n several nights in December ... we prevented people from setting up ... [t]elling them that you're not going to be able to ... sleep there.").

Defendants do not argue that the homeless persons' act of sleeping out-of-doors on Church property violates City law, in and of itself. The fact that there were no arrests and only a single anonymous complaint regarding the homeless persons' conduct (Def.Ex. F) suggests that the misconduct at issue did not constitute a significant subset of the homeless persons' activity during the hours of 9:00 p.m. and 5:30 a.m., as compared to their lawful act of sleeping. [FN7] That conclusion is strengthened by defendant Bernard Kerik's testimony that, when the City's actions were undertaken, he was unaware of any complaints from the neighborhood and "didn't see a crime being permitted per se." Kerik Dep. at 28-29, 39. Thus, the record suggests, as would common sense, that the pattern of activity that most consistently characterized the homeless persons' presence on Church property was the lawful act of homeless persons sleeping out-of-doors. In light of that, the City's actions to prevent that activity are problematic because they swept within their ambit a significant amount of harmless, lawful, First Amendment protected conduct.

FN7. In fact, as will be discussed in more depth, defendants have presented evidence indicating, at most, individualized acts of questionable conduct.

It is also troubling that the City adopted a group approach to individual violations of the law, taking adverse action against all homeless persons who wished to sleep on Church property based upon individuals' misconduct. See Shafer Reply Decl. at 3 ("the police have responded that they cannot remove just one person, it must be all or none.") The City has thus left no room for homeless persons who sleep on Church property without violating any laws in the process, a fact that is constitutionally problematic. See, e.g., Pottinger v. City of Miami, 810 F.Supp. at 1551, 1577 (S.D.Fla.1992) ("the challenged ordinances as applied to [the homeless] are overbroad to the extent that they result in class members being arrested for harmless, inoffensive conduct"); Streetwatch v. National Railroad Passenger Corp., 875 F.Supp. 1055, 1065 (S.D.N.Y.1995) (finding unconstitutional ejection of homeless persons from Penn Station for their "mere presence").

In considering whether a governmental action is overbroad, one relevant factor is the severity of the penalty that resulted from the challenged action. See, e.g., United States v. Rybicki, 354 F.3d 124, n. 2 (2d Cir.2003). Plaintiffs contend, and photographs support their claim, that the City's actions were undertaken in a fairly draconian fashion, in that the City mobilized twenty-two police officers to the Church "bearing nightsticks and large clusters of handcuffs," threatening arrests and accompanied by "three police vans, two squad cars, and a paddy wagon." See Pl. 56.1 Rule Statement at p 47-8; Pl.Ex. 15. This show of force is significant, first, because defendants have not shown that a single arrest was made previously, and, second, because at least one decision-maker did not contemporaneously believe that any laws had been violated. See, e.g., Kerik Dep. at 28-29, 39 (testifying that he "didn't see a crime being permitted per se"). [FN8]

FN8. Moreover, as an enforcement action to address a public nuisance, the City's approach is problematic, because in the absence of imminent danger to life, health or safety, due process mandates that notice and reasonable opportunity to abate the nuisance be provided before enforcement measures are taken. See, e.g., City of New York v. Basil Co., 589 N.Y.S.2d 319 (N.Y.App.Div.1992). Plaintiffs allege, and defendants offer no evidence to the contrary, that the Church was not given either. (Shafer Reply Decl. p 9)

The Court is persuaded that the City's interests could have been addressed by restrictions stopping far short of a flat prohibition. Church of Lukumi, 520 U.S. at 538. Plaintiffs contend, and defendants do not dispute, that the Church previously worked with the City to address concerns, and is willing to continue to do so. For example, the Church expanded homeless persons' access to their toilets, hiring someone to supervise the use of Church bathrooms starting at 5:30 am, instead of 7:00 am. See Deposition of Margaret Shafer, May 2, 2002, "Shafer Dep." at 50. Moreover, the Church accepts that the police retain the right to enter Church property to address specific instances of unlawful conduct. See Shafer Dep. at 61-2 ("It is a great comfort to know that ... [w]e could always ask the police to come and remove anybody ... who was being disruptive or dangerous"). However, despite the feasibility of pursuing a narrower approach, the

City chose to implement a policy that effectively bans all homeless persons from sleeping out-of-doors on Church property, and in so doing, have burdened a substantial amount of protected conduct. As a result, the Court finds that the City's actions are overbroad, and do not constitute a neutral government action.

6

Even if the City's actions were neutral, they are not generally applicable. Government actions are underinclusive, and thus not generally applicable, when, though intended to advance legitimate interests, they result in disparate treatment of religious activity by failing "to prohibit nonreligious conduct that endangers these interests in a similar or greater degree." Church of Lukumi, 520 U.S. at 543.

Plaintiffs argue that the "City treats the Church's Hospitality Ministry in a way that is entirely different from, and less favorable than, its treatment of other activities that infringe upon or violate the regulations that they are attempting to apply to the Church's homeless activities." (Pl. Mem. at 39) Plaintiffs contend that most homeless persons New York City have insufficient access to public toilets and are forced to relieve themselves daily (Pl. Mem. at 22) "on the sidewalk outside Penn Station ... underneath the 59th Street Bridge," (id.) "on Madison Avenue [and] on Third Avenue," (Deposition of Donald Jesse Robison, March 13, 2003, "Robison Dep." at 21) because "[t]hat is how homeless people cope ." (Shafer Dep. at 46) Moreover, plaintiffs argue that [r]esidents of the neighborhood walk their dogs every day on the sidewalk on 55th Street. Although most of them ... "scoop" their animals' "poop" and curb them, they do not wash the sidewalks before the next person walks there ... they frequently deposit bags of their dogs' "poop" in public waste receptacles on the corner of 55th Street and elsewhere. Shafer Reply Decl. at 3. Plaintiffs also note that existing New York City law does not "prohibit the urination of dogs on public sidewalks and streets." (Pl. Reply Mem. at 22-3) In contrast, the Church and their homeless guests engage in a daily clean-up, washing the Church steps and sidewalk every morning. See Shafer Dep. at 47-8. Another difference is that much of the activity at issue here occurs on private property, in contrast to similar conduct occurring daily on public property, where conditions affect a vastly greater number of people. [FN9] Defendants, in turn, have articulated no reason why conduct taking place on private property should be targeted for a flat prohibition, while similar conduct occurring on a daily basis on public property is not.

FN9. Defendants present evidence from investigations on June 29, 2002, September 5, 2002, and September 6, 2002. Although defendants' papers allege multiple acts of public urination, many are merely speculative. The Initial Report, purporting to document events memorialized on videotape, contains allegations of what homeless persons "appeared" to do and assumption regarding what was contained in bottles poured into flowerpots, and onto the street and sidewalk. (Def.Ex. G, H) Mere speculation or conclusory allegations are not probative for purposes of summary judgment. See, e.g., Meiri v. Dacon, 759 F.2d 989 (2d Cir.1985). Two of the three allegations from September 5 are speculative, as are three of the six from September 6. Of the remaining four allegations, three occurred on the Church's private property and involved the Church steps and flowerpot.

Because underinclusiveness requires evidence of disparate treatment, the Supreme Court has looked to equal protection jurisprudence for guidance. [FN10] See, e.g., Church of Lukumi, 508 U.S. at 540. In that context, courts have found probative a plaintiff's showing "that the government suddenly began enforcement against it after a lengthy period of non-enforcement." West 95th Housing Corp. v. New York City Dept., No. 01 Civ 1345, 2001 WL 664628, at *10 (S.D.N.Y. June 12, 2001) (citing LaTrieste Rest. & Cabaret v. Village of Port Chester, 40 F.3d 587, 590 (2d Cir.1994)). Plaintiffs present such a claim here. They contend that in November 1999, the Church sent then Police Commissioner Howard Safir a letter to inform him of the Church's formalized policy of allowing homeless persons to sleep on Church property. See Pl.Ex. 11. Defendants themselves concede that "prior to November 2001, some members of the New York City Police Department observed that homeless people had slept on or about the steps of the Fifth Avenue Presbyterian Church and adjacent property." Defendants' Responses and Objections to Plaintiffs' Requests for Admission, Pl.Ex. 31. However, it was not until November 2001, two years later, that the City acted to prevent homeless persons from sleeping on Church property. See Deposition of John E. Healy, April 24, 2002, "Healy Dep." at 50-1. Defendants, in turn, articulate no reason as to why the City suddenly acted to prevent activities that were ongoing for years.

FN10. The invocation of the Equal Protection Clause does not require a showing that disparate treatment was motivated by plaintiffs' membership in a protected class. For example, the "class of one" Equal Protection jurisprudence directs that a cause of action exists "where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the different treatment." Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (other citations omitted); see also Cobb v. Pozzi, 363 F.3d 89, 110-111 (2d Cir.2004). Thus, the fact that plaintiffs allege that their religious activity was singled out, but do not alleged that they were treated differently because of their religion, is not dispositive.

In sum, the Court finds that the City's policy resulted in unjustifiable differential treatment in that it targeted plaintiffs, yet failed to prohibit the same or similar nonreligious conduct, and as a result is underinclusive and not generally applicable. [FN11]

FN11. Plaintiffs suggest that the City's proffered law enforcement justifications are "merely a pretext," (Pl. Mem. at 39) that the City's actions were "caused in part by the location of the Church in a district of expensive hotels, restaurants and shops," and were taken "primarily for the purpose of eliminating a visible presence of homeless persons ... out of a belief that some people think the presence of homeless persons in that zoning district detracts from its beauty, attractiveness, financial well-being and tourist appeal." See Pl. 56.1 Rule Stmt. p 63; Pl.Ex. 3 ("defendants' appellate brief argued that the Church's Hospitality Ministry is inconsistent with 'the upscale commercial character of the corner of 55th Street and 5th Avenue" '). While the Court take no position here on the subjective intent of the City, the pretext assertion, if true, would further support a finding that the City's actions were not generally applicable.

The Court is not persuaded by defendants' claim that the City's actions were necessary to address a public nuisance. A public nuisance is conduct or omissions which offend, interfere with, or cause damage to the public in the exercise of rights common to all in a manner such as to offend public morals, interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of people. Greentree at Murray Hill Condominium v. Good Sheperd Episcopal Church, 550 N.Y.S.2d 981, 988 (N.Y.Sup.Ct.1989) (citations omitted). "To sustain a cause of action sounding in public nuisance, the plaintiff must establish by clear and convincing evidence, a substantial and unreasonable interference with the public right." Destefano v. Emergency Housing Group, Inc., 722 N.Y.S.2d 35, 37 (N.Y.App.Div.2001) (citations omitted). The alleged conduct includes: panhandling, prostitution solicitation, littering, altercations, public urination and defecation, and operation of a de facto shelter that fails to meet minimum standards of habitability. [FN12] That such conduct violates particular ordinances is not dispositive. See, e.g., State v. Fermenta ASC v. Corp., 656 N.Y.S.2d 342, 403 (N.Y.App.Div.1997).

FN12. With respect to defendants' claim that a public nuisance is created by the Church's operation of a de facto shelter that fails to meet minimum standards of habitability, the Court rejects this argument for reasons previously stated. See supra, note 2.

Although defendants take issue with panhandling that occurred on or near Church property, such conduct is a form of speech that cannot be banned outright, unless it takes an aggressive form. Loper v. New York City Police Dept., 999 F.2d 699 (2d Cir.1993). Defendants present, at best, two instances of panhandling [FN13] (Def.Ex. G, H), and make no allegations that either was aggressive. The same is true for defendants' complaint regarding "a woman who was soliciting as a prostitute," an allegation that they do not dispute is based on a single incident. See Shafer Dep. at 59. Such individualized instances of misconduct, not of a violent or aggressive nature, simply cannot, without more, constitute a substantial and unreasonable interference with the public right.

FN13. Defendants contend that a homeless man was observed "asking passerbys for money" and that "[h]e did this one other time," without alleging the time, date, or location of a second incident. (Def.Ex. H)

Defendants also argue that instances of littering contributed to a public nuisance. (Def. Mem. at 20) However, they do not dispute that the Church engages in daily clean-up activities, washing the Church steps and sidewalk every morning (Shafer Dep. at 47-8), and that any litter "is cleaned up and discarded ... everything ... is cleaned up every morning." Shafer Dep. at 50. Nor do defendants suggest that plaintiffs' daily efforts are insufficient. The Court cannot agree that sporadic littering, addressed by daily cleaning, can contribute to the creation of a public nuisance.

Additionally, defendants complain of "instances of altercations" (Def. Mem. at 20), and present

evidence from an investigation of activity on Church property on three nights: June 29, 2002, September 5, 2002, and September 6, 2002. On September 5 and 6, exchanges among homeless persons consisted of yelling, a homeless man putting his finger in the face of another man, and a man hitting a woman. (Def.Ex. G, H) Such facts do not support a finding of a pattern of violent behavior, particularly given that defendants have not received a single complaint about violent conduct by homeless persons on or near Church property, and have not made a single arrest. Moreover, the nuisance standard in New York City is necessarily different than in other locales because "[i]n a densely populated municipality ... daily interactions and even altercations ... are far more extensive than elsewhere[,] ... are not uncommon and are all a part of life in a crowded metropolis." Domen Holding Co. v. Aranovich. 753 N.Y.S.2d 57, 61 (N.Y.App.Div.2003), aff'd as modified on other grounds, 769 N.Y.S.2d 785 (N.Y.2003).

The final factual allegation is that homeless persons who sleep on Church property engage in "public urination and inappropriate disposal of sewage." (Def. Mem. at 20) As stated previously, to constitute a nuisance, conduct must offend public morals, interfere with use by the public of a public place, or endanger or injure the property, health, safety or comfort of a considerable number of people. Defendants do not contend that public urination and defecation by homeless persons sleeping on a Church's private property offends public morals, and defendants point to only a single complaint from the public regarding the conduct at issue, (Def.Ex. F); a significant fact because complaints are probative of community opinion. See, e.g., State v. Monoco Oil Co., 713 N.Y.S.2d 440, 444 (N.Y.Sup.Ct.2000). The nature of the locale is also relevant to this analysis, see, e.g., Domen Holding Co., 753 N.Y.S.2d at 61, and as most New York City residents can attest, homeless persons sleeping and performing basic human functions in public is not uncommon. Thus, that such activity occurs on Church property, with the full consent of the Church, is hardly the type of conduct likely to offend the community, [FN14] but rather, is simply the reality "of our life in a crowded metropolis." Id.

FN14. The moral offense that some might take to the very existence of homelessness in our society is not the type of offense that is relevant to the public nuisance analysis.

Neither do defendants claim that the activity at issue interferes with the use of a public place. In fact, the record suggests that much of the conduct at issue here took place on the Church's private property. [FN15]

FN15. See supra note 9.

The remaining ground for a public nuisance finding is that the property, health, safety or comfort of a considerable number of people have been endangered or injured. Although the conduct at issue violates the City's Health Code, that fact alone is insufficient to show that the health of a considerable number of people has in fact been endangered or injured. See, e.g., Fermenta ASC Corp., 656 N.Y.S.2d at 403. Mere speculation about danger or injury is not generally sufficient, see, e.g., Greentree at Murray Hill Condominium, 550 N.Y.S.2d at 988, and

successful nuisance claims typically include evidence of the actual danger or injury resulting from challenged conduct. See, e.g., Monoco Oil Co., 713 N.Y.S.2d at 445; Fermenta ASC Corp., 656 N.Y.S.2d 342; City of New York v. New Saint Mark's Bath House, 497 N.Y.S.2d 979 (Sup.Ct.1986), aff'd 505 N.Y.S.2d 1015 (N.Y.App.Div.1986). Defendants have not proffered any evidence that the conduct at issue endangers or injures anyone's health, much less the health of a considerable number of people. Defendants also do not dispute that the Church cleans the affected area on a daily basis, thereby abating some substantial portion of the alleged nuisance. See Shafer Reply Decl. p 6; Shafer Dep. at 47-48, 50; Deposition of James McCoy, August 23, 2002, "McCoy Dep." at 58.

Finally, the concept of reasonableness is one that permeates the case law on nuisance. See, e.g., County of Westchester v. Town of Greenwich, Connecticut, 76 F.3d 42, 45 (2d Cir.1996). With respect to the conduct here, it is relevant that homeless persons live their lives in public places, sleeping, eating, and even relieving themselves in public because many have, or feel they have, no alternative. [FN16] As a result, if the homeless persons who wish to sleep on Church property were prevented from doing so, many would simply move to another location and continue to engage in identical conduct. The City's actions thus would not prevent public urination and defecation, but would succeed only in relocating the conduct elsewhere. Moreover, if reasonableness is to prevail, organizations that work with homeless individuals by meeting with them, learning about their individual histories and needs, providing encouragement and assistance, and giving them a place to sleep at night (Shafer Decl. at p 18), should be encouraged, not discouraged. This is particularly true, given that the Church has demonstrated a willing to address the City's concerns: adopting Rules to discourage misconduct (Pl.Ex. 9); allowing access to toilets at 5:30 a.m. instead of 7:00 a.m. (Shafer Dep. at 50); cleaning the affected area on a daily basis; and welcoming the police to address any potentially dangerous incidents. (Shafer Dep.at 47-8, 50)

FN16. See discussion of service-resistance, supra Section 3.

For the reasons discussed, the Court is not persuaded that defendants have presented evidence sufficient to establish the existence of a public nuisance.

8

Plaintiffs argue that the City's actions burdened their First Amendment rights to free speech. In order for conduct to warrant First Amendment free speech protection, it must be "reasonably understood by the viewer to be communicative," Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) an analysis that depends wholly on context. Id. at 294. Defendants argue that the homeless persons' conduct is not expressive because it bore none of the indicia of "a larger organized protest that is normally accompanied by signs and literature." (Def. Mem. at 10-11) However, indicia of protest is not a requirement of expressive conduct. See e.g., Bery v. City of New York, 97 F.3d 689, 696 (2d Cir.1996) (recognizing that selling street art is First Amendment conduct because it conveys a message that "[a]nyone, not just the wealthy, should be able to view it and buy it."). Rather, the relevant inquiry is whether the

conduct at issue is "inseparably intertwined with a 'particularized message." ' Id. 695 (quoting Young v. New York City Transit Authority, 903 F.2d 146, 153 (2d Cir.1990)). Defendants argue that the homeless persons' conduct is not expressive because it did not communicate any particular message. (Def. Mem. at 10-11) Defendants' focus on the conduct of the homeless persons is misplaced. The expressive conduct at issue here is not that of the homeless persons, but rather the Church's act of allowing homeless persons to sleep out-of-doors on its property. Plaintiffs argue that the Church's act is expressive conduct because it is their "way of telling the world that the poor and the homeless are welcome and not forgotten ... it is a visible and easily understood challenge to our society's tendency toward apathy, materialism, despair and irresponsibility." Shafer Decl. p p 68-9. The Court is persuaded that by allowing such activity, the Church engaged in expressive conduct by communicating a highly particularized, easily understood, religious and political message regarding how homeless persons should be treated by society. [FN17]

FN17. Plaintiffs also argue that their rights to free association under the First Amendment were burdened. (Pl. Mem. at 31) Because the Court has found that plaintiffs' First Amendment Free Exercise and Free Speech rights were implicated, this argument need not be reached.

9

Having determined that plaintiffs' conduct at issue here deserves First Amendment protection, the Court turns to an application of the proper constitutional analysis. "Government enforcement of laws or policies that substantially burden the exercise of sincerely held religious beliefs is subject to strict scrutiny." Fifth Avenue Presbyterian, 293 F.3d at 574 (citing Church of Lukumi Babalu Aye, Inc., 508 U.S. at 546).

A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance "interests of the highest order" and must be narrowly tailored in pursuit of those interests. The compelling interest standard that we apply once a law fails to meet the Smith requirements is not "water[ed] ... down" but "really means what it says." A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases. Church of Lukumi, 508 U.S. at 546 (citations omitted).

Defendants argue that the City's policy was implemented in order to advance its interest in public health, safety, and welfare. (Def. Mem. at 15). However, when [t]he proffered objectives are not pursued with respect to analogous non-religious conduct, and those interests could be achieved by narrower [actions] that burdened religion to a far lesser degree [then [t]he absence of narrow tailoring suffices to establish the invalidity of the [actions]. Church of Lukumi, 520 U.S. at 546 (citations omitted). Assuming arguendo that the City's interests are compelling, the City's actions were "not drawn in narrow terms to accomplish those interests" Church of Lukumi, 508 U.S. at 546, because, as discussed in Sections 5 and 6, supra, the City's actions are overbroad and underinclusive in substantial respects.

Additionally, defendants have not demonstrated that the interests at issue here are compelling. The Court is mindful that "a law cannot be regarded as protecting an interest 'of the highest order' ... when it leaves appreciable damage to that supposedly vital interest unprohibited." Id. at 547 (citations omitted). As discussed in depth previously, [FN18] the City's actions to prevent homeless persons from sleeping out-of-doors on Church property are substantially underinclusive, and thus do not advance "interests of the highest order." Church of Lukumi, 508 U.S. at 546-47.

FN18. See supra Section 6.

Regardless of the outcome of the Free Exercise claim, the City's actions unconstitutionally burden the Church's free speech rights as an independent matter. Although distinct analyses exist, depending on whether the challenged action discriminates on the basis of content or is content-neutral, the City's actions fail even the more lenient test, which provides that [a] content-neutral regulation may restrict the time, place, and manner of protected speech, provided that it is "narrowly tailored to serve significant governmental interests" and "leave[s] open ample alternative channels for communication." Bery, 97 F.3d at 697. In the instant case, regardless of whether the City's interests are significant, the City "cannot bar an entire category of expression to accomplish ... accepted objective[s] when more narrowly drawn regulations will suffice." Id. The City's actions "effectively bar" homeless persons from sleeping out-of-doors on Church property and prevent the Church from spreading its message, and thus are "too sweeping to pass constitutional muster." Id.; see also Metropolitan Council, 99 F.Supp. at 439, 448 (finding complete ban on sleeping on public sidewalks is not narrowly tailored).

The Court finds that no genuine issues of material fact remain as to Plaintiffs' First Amendment claim. Thus, plaintiffs' motion for summary judgment and a declaratory judgement on that claim is granted, and accordingly, defendants' cross motion for summary judgment is denied. [FN19]

FN19. Plaintiffs also move for summary judgment on their s 1983 claim. Section 1983 is not itself a source of substantive rights; it merely provides a method for vindicating federal rights elsewhere conferred. 42 U.S.C.A. s 1983 (West 2004).

The Court turns to plaintiffs' request that (1) the Court reconsider its decision denying an injunction as to the Church' sidewalk, and (2) the preliminary injunction be made permanent as to the Church staircases, and the Church sidewalk area as well. (Pl. Mem. at 37, 51) As to the Church sidewalk, Plaintiffs contend that the Court's January 2002 Order was erroneous in holding that "the Police Department does have authority to regulate those portions of the 55th Street sidewalk that are owned by the Church. The Church has not shown that the potion of the sidewalk on 55th Street that it owns is not, at the same time, a public place."

Plaintiffs first argue that at night the Church sidewalk is not a public place," because the Church allows homeless persons to sleep there, effectively making it closed to pedestrians at night, and because it does not appear on a City map. (Pl. Mem. at 38-9); (Pl. Reply Mem. at 24) However, the New York City Administrative Code includes "sidewalks" in its definition of a public place, NYC Code s 10-125(a)(2), and defendants present case law supporting that conclusion. See, e.g., People v. Lieberman, 32 Misc.2d 741, 743 (Ct. of Special Sessions of the Village of Mount Kisco 1961); Fieldston Property Owners Ass'n., Inc. v. Bianchi, 215 N.Y.S.2d 834 (Sup.Ct.1961), aff'd 16 A.D.2d 902 (App.Div.1962), aff'd, 13 N.Y.2d 699 (1963)).

Plaintiffs also argue that the City's sidewalk regulations are not applied in a neutral and generally applicable way because the Church is treated less favorably than those who receive "individual exemptions" to use sidewalks for parades and film crews, for example. (Pl. Mem. at 40-1) Plaintiffs have not shown that such uses are substantially similar, nor have they presented any other evidence to support a finding of disparate treatment. The Court is not persuaded that its original conclusion should be altered.

With respect to the staircases, Plaintiffs have made a showing of actual success on the merits of their First Amendment claim, and demonstrated that they will suffer irreparable harm, through deprivation of those rights, absent the permanent injunction sought. See, e.g., First Avenue Presbyterian Church, 293 F.3d at 574 (finding that violations of First Amendment rights are commonly considered irreparable injuries).

11

It is ORDERED that the defendants are permanently enjoined from entering onto the property of the plaintiff Fifth Avenue Presbyterian Church described below for the purposes of dispersing or arresting any person who shall be sleeping or otherwise lawfully on that property, provided that nothing in this order shall limit the authority of the New York City Police Department to arrest any person for other conduct that is unlawful, or from removing from Church property anyone who is present there without the consent of the Church, or from removing homeless persons from Church property during a winter alert officially declared by the New York City Department of Health. For the purposes of this order, the portion of the Church's property at issue constitutes the three staircases that extend from the Church building towards Fifth Avenue, and the two staircases that extend from the Church building toward 55th Street. The Clerk is directed to enter judgment in favor of plaintiffs accordingly.

SO ORDERED.