UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 83-1195-MA

RUTH TALAMO

v.

PROVINCETOWN BOARD OF SELECTMEN

MEMORANDUM AND ORDER

May 10, 1983

MAZZONE, D.J.

This matter is before the Court on the motion of the plaintiff, Ruth Talamo, for a preliminary injunction preventing the defendants, Mary Jo Avellar, George Bryant, Peter Boyle, Edward Rudd, and the Provincetown Board of Selectmen, from enforcing or seeking to enforce the penalty provisions, licensing requirements, and durational residency requirements set out in Mass. Gen. Laws c. 140 § 185I against her, her agents and employees, and her store, the "Mystic Tree of Life." [1]

The facts underlying this matter may be summarized briefly. The plaintiff, a Massachusetts resident for the last 28 years, is a professional psychic specializing in psychic consultation and advice. She

[1] The matter came in for hearing on the plaintiff's motion for temporary restraining order. Before the commencement of the hearing, and pursuant to Rule 65 of the Federal Rules of Civil Procedure, the parties consented to advancing the matter to a hearing for preliminary injunction.

is apparently well-recognized in her field, and has made several radio and television appearances in her professional capacity.

Between October of 1980 and February of 1983, the plaintiff operated a store in Randolph, Massachusetts called the "Mystic Tree of Life," where she performed card readings, gave psychic consultations, and sold various items related to these activities. In October of 1982, the plaintiff established a residence in Provincetown, where she had been a summer resident for eleven years, with the expectation that she would establish her business in the town. The plaintiff has closed her store in Randolph, and had leased premises in Provincetown for the summer season.

In March of 1983, the plaintiff applied to the town Board of Selectmen for a "fortune teller's license" as required by Mass. Gen. Laws c. 140 § 185I. This section provides, in pertinent part:

> No person shall tell fortunes for money unless a license therefor has been issued by the local licensing authority. Said license shall be granted only to applicants who have resided continuously in the city or town in which the license is sought for at least twelve months immediately preceding the date

of the application.

At a public meeting held on March 14, 1983, the plaintiff made her application to the Town Board of Selectmen, and was informed that the license would be denied unless she could demonstrate that she had been a resident of Provincetown for the twelve months immediately preceding the date of her application. No final action was taken on the plaintiff's application, and the plaintiff was directed to return to the Board when she was able to document a continuous residency of twelve months in Provincetown. The plaintiff appeared, with counsel, at the next meeting of the Board of Selectmen held on April 25, 1983, and was again denied a license. This suit was commenced two weeks later, on May 6, 1983.

Turning to the standards which control this matter, the purpose of a preliminary injunction generally is to protect the rights of the parties and to preserve the status quo between the parties pending a full hearing on the merits of their controversy. In determining whether a preliminary injunction should issue, the Court must consider four factors. These are whether the plaintiff will suffer irreparable injury if the injunction is not granted; whether such injury

outweighs any harm which granting the relief would inflict on the defendants; whether the plaintiff has demonstrated a sufficient likelihood of success on the merits; and whether the public interest will be adversely affected by granting the requested relief. Planned Parenthood League v. Bellotti, 641 F.2d 1006, 1009 (1st Cir. 1981). While each of these requirements must be satisfied in order for an injunction to issue, this Circuit has noted that "the probability-of-success component has loomed large in cases before this Court." Auburn News Co., Inc. v. Providence Journal Co., 659 F.2d 273, 277 (1st Cir. 1981), cert. denied, 455 U.S. 921 (1982). I shall consider these factors in order.

First, I must determine whether irreparable harm will result to the plaintiff if the requested relief is not allowed. The plaintiff has alleged that the Provincetown Board of Selectmen's action in denying her a fortune teller's license, based on the twelve month residency requirement contained in Mass. Gen. Laws c. 140 § 185I, violated her rights under the Equal Protection Clause of the Fourteenth Amendment. She further alleges that it places an unreasonable burden on her pursuit of her chosen

profession, without any corresponding benefit to the public safety, health, morals or general welfare; and that the requirement burdens her right to free speech as protected under the First Amendment. I accept the plaintiff's representations made in her verified complaint that if she is unable to commence her business operations in a timely fashion, she will be irreparable damaged in her efforts to establish her new enterprise.

It is imperative that a new store or service, such as Mrs. Talamo's "Mystic Tree of Life," be in full operation at or near the beginning of the summer season, in order to successfully build up goodwill in the community, to compete with other well established businesses and to maximize income potential for the season. A store which is not open during the summer months or which opens late in the season, irrevocably loses goodwill and the opportunity to establish itself in the town, as well as substantial revenue. Loss of good will and the opportunity to establish a new business cannot be compensated for in dollars.
Complaint P18.

It is the law in this Circuit that the wrongful deprivation of a business interest establishes something greater than a mere

pecuniary loss. Engine Specialties, Inc. v. Bombardier Limited, 454 F.2d 527, 531 (1st Cir. 1972); see Semmes Motors, Inc. v. Ford Motor Company, Inc., 429 F.2d 1197 (2d Cir. 1970). An injunction is proper to prevent "the threatened extinction of a business," Engine Specialties, Inc. v. Bombardier Limited, supra, 454 F.2d at 501. An injunction may also be proper to prevent probable violations of constitutional rights, for which there can be no adequate later remedy at law. An aggrieved party should not be placed "between the Scylla of intentionally flouting [the licensing ordinance] and the Charybdis of foregoing what he believes to be constitutionally protected activity." Steffel v. Thompson, 415 U.S. 452, 462 (1974); see 414 Theatre Corp. v. Murphy, 499 F.2d 1155, 1160 (2d Cir. 1974).

I am satisfied that if this injunction does not issue, the plaintiff will suffer damages in the form of a lost business opportunity that cannot be fully compensated by some future monetary award and further that she will suffer irreparable injury to the exercise of her constitutional rights. I therefore am satisfied that she has established a substantial risk of irrevocable harm.

Second, I

must consider whether this harm to the plaintiff is outweighed by the injury to the defendants should this injunction be permitted to issue. Here, it is difficult to see what harm to the Board of Selectmen will be occasioned by granting the requested relief. The plaintiff has alleged that she has been denied a license by the unconstitutional acts of the defendants. If she prevails on her claim that the statute imposes a durational residence requirement that is in violation of the Constitution, and the injunction is permitted to issue, then those unconstitutional acts will be corrected. I find that the Board of Selectmen will not be harmed if the plaintiff is permitted to operate her business until the constitutionality of the statutory residency requirement may be fully determined, and therefore conclude that the harm to the plaintiff if the injunction does not issue outweighs the harm that the defendants will suffer if it does.

Third, I must consider whether the plaintiff, who seeks this injunction, has demonstrated a sufficient likelihood of success on the merits of her claims. Although the plaintiff's complaint includes claims of violations of the First and Fourteenth Amendments

as well as section 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, I shall consider only the plaintiff's likelihood of success on the merits of her claim that the durational residency requirement as set out in Mass. Gen. Laws c. 140 § 185I is unconstitutional. I do so because at this preliminary stage in the proceedings, this claim is dispositive of the question whether the plaintiff is entitled to the injunctive relief that she seeks.

At the outset, I note that the question before the Court is a narrow one. It is not whether the Commonwealth may impose any regulation on those who would practice the trade of fortune telling. It is, rather, whether the twelve month residence requirement imposed upon those seeking to be licensed as fortune tellers violates the Equal Protection Clause of the Fourteenth Amendment.

The parties appear to be in agreement, and there can be no serious dispute, that the effect of the twelve month residency requirement is to divide applicants for fortune teller's licenses into two classes. One class is comprised of applicants who have resided in the municipality in which they wish to be licensed for more than a year. The other class consists

of applicants who have resided in the municipality for less than a year. On the basis of this difference, and this difference alone, members of the first class are granted and members of the second class are denied the right to earn a livelihood in the pursuit of their choice.

In determining whether a law is in violation of the Equal Protection Clause, the Supreme Court has evolved two basic tests, depending on the nature of the classification in question and the nature of the interest affected by the classification. When the challenged law directly affects the exercise of a fundamental personal right or creates a suspect classification, such as one based on race or alienage, the test of strict scrutiny must be met; it must be shown that the law is "necessary to promote a compelling state interest." Dunn v. Blumstein, 405 U.S. 330, 342 (1972), quoting Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (emphasis in the original). Otherwise, the traditional test applies, under which equal protection of the laws is denied only if the statutory classification is "without any reasonable basis." Dandridge v. Williams, 397 U.S. 471, 485 (1970).

I first must consider which of the standards

of analysis that has developed under the Equal Protection Clause applies to this matter. The plaintiff has argued that requiring a period of twelve months' residence as a condition to granting a fortune teller's license impermissibly burdens her right to travel. Freedom to travel throughout the United States, including the "freedom to enter and abide in any State in the Union." has long been recognized and established as a fundamental right under the Constitution. Oregon v. Mitchell, 400 U.S. 112, 285 (1970) (opinion of Stewart, J.); see Dunn v. Blumstein, supra, 405 U.S. at 338 (striking down minimum state and county residence periods as impermissible burdens on right to travel); see also Shapiro v. Thompson, supra, 394 U.S. at 629-31; United States v. Guest, 383 U.S. 745, 758 (1966); Kent v. Dulles, 357 U.S. 116, 126 (1958); Edwards v. California, 314 U.S. 160 (1941); Paul v. Virginia, 8 Wall. 168, 180 (1869); Crandall v. Nevada, 6 Wall. 35, 43-44 (1868); Passenger Cases, 7 How. 283, 492 (1849).

Describing the importance of this right, the Supreme Court has written:

Durational residence laws impermissibly condition and penalize the right to travel by imposing their prohibitions

> on only those persons who have recently exercised that right . . . Absent a compelling state interest, a State may not burden the right to travel in this way. Dunn v. Blumstein, supra, 405 U.S. at 342.

Indeed, in a context closely similar to the case at bar, the District Court of North Carolina invalidated a twelve-month residency requirement for eligibility to take the state bar exam. Finding that the requirement placed an unconstitutional burden on the exercise of the right to travel freely, the Court there stated:

> The right to work for a living in one's chosen occupation is for most people a prerequisite to the pursuit of happiness. If a [person] may be arbitrarily made to give up his lifetime endeavor -- even for a year -- in order to move his residence, it is idle to talk to him about Fourteenth Amendment protection of personal freedom. Keenan v. Board of Law Examiners of State of North Carolina, 317 F.Supp. 1350, 1362 (E.D.N.Y. 1970); see also Lipman v. Van Zant, 329 F.Supp. 391, 400-401 (N.D.Miss. 1971); Webster v. Woffard, 321 F.Supp. 1259, 1262 (N.D.Ga. 1970).

Applying the test of strict scrutiny to the one-year durational residence requirement set forth in Mass.

Gen. Laws c. 140 § 185I, it is clear that the statute must fail. As I have noted above, "durational residence laws . . . are unconstitutional unless the State can demonstrate that such laws are "necessary to promote a compelling governmental interest."" Dunn v. Blumstein, supra, 405 U.S. at 342, quoting Shapiro v. Thompson, supra, 394 U.S. at 634 (emphasis in the original). Though I acknowledge that there may be some role for the state to perform in requiring municipalities to license those who would hold themselves out to be fortune tellers, I cannot conceive of any compelling, or even legitimate, state interest in requiring one full year of residency in the municipality prior to the issuing of the license. Even if there were such an interest in requiring, for example, bona fide residence of would-be fortune tellers, the state must construct its regulation so that it closely fits the desired objectives.

The State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with "precision," and must be "tailored" to serve their legitimate objectives. And if there are other, reasonable ways

to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose "less drastic means." Dunn v. Blumstein, supra, 405 U.S. at 343 (citations omitted).I find that in its present form, section 185I is not tailored to fit any of the proposed, or indeed any conceivable, legitimate state objective.

Having found that the one year durational residency requirement established by section 185I burdens the constitutionally protected right to travel, and having further found that it is not necessary to protect or tailored to fit any compelling state interest, I recognize that I could conclude on the basis of this, and no more, that the plaintiff has demonstrated a likelihood of success on the merits of her claims. For the sake of completeness, however, I shall consider whether section 185I could withstand the lesser degree of judicial scrutiny called for under the traditional test for determining whether a statutory classification denies equal protection of the laws.

As I have noted above, under the traditional standard, the classification in question will be upheld "only if the

distinction which it draws . . . has some rational basis and is reasonably related to the promotion of a legitimate state legislative purpose." Massey v. Apollonio, 387 F.Supp. 373, 376 (D.Me. 1974). Again, it severely taxes the judicial imagination to arrive at legitimate legislative purposes behind the one-year residency requirement.

Counsel for the Board of Selectmen suggested at oral argument that the one year durational residency requirement is most closely analogous to one-year domicile requirements established by state universities as prerequisites to reclassification as a resident student for tuition purposes. However, the analogy, if it is valid, is not favorable to the Board's case. In a very recent decision in this Circuit, the imposition by the University of Maine of a similar durational residency requirement was struck down on grounds that it had no rational relationship to the general purpose served by residency requirement, and that it discriminated unconstitutionally between bona fide domiciaries on the basis of whether they had acquired their domiciliary status more or less than one year previously. Black v. Sullivan, Slip Opinion No. 80-164-P (D.Me. April 13, 1983).

It is possible that the state aims to limit the practice of fortune telling to residents of Massachusetts, and utilizes a one-year residency requirement as an administrative device to be sure that applicants are bona fide actual residents who intend to remain in the state. I assume, for the moment, that it would be proper to require applicants for fortune teller's licenses to be residents of the state. If it were, the statute would still be constitutionally infirm: the Supreme Court has consistently found similar arguments of administrative convenience to fall short of the requirements of the Equal Protection Clause. See, Dunn v. Blumstein, supra, 405 U.S. at 345-54; Shapiro v. Thompson, supra, 394 U.S. at 636; Carrington v. Rash, 380 U.S. 89, 94-97 (1965).

The state also may argue that the regulation of licensed professions is part of its plenary police and regulatory function. However, no other Massachusetts licensing statute, for any occupation or profession, contains a similar durational residence requirement. Indeed, at least two decisions of the Massachusetts Supreme Judicial Court have set definite limits on the proper scope of state regulation of an otherwise

lawful occupation. The proper test of validity, the Court has stated, is whether the regulation has "a rational tendency to promote the safety, health, morals, and general welfare of the public." Jewel Companies, Inc. v. Burlington, 365 Mass. 274, 278 (1974); and whether there may be discerned "a reasonable relation between the type of regulation undertaken and significant aspects of the public interest," Milligan v. Board of Registration in Pharmacy, 348 Mass. 491, 497 (1965). If the regulation holds out a possibility of preventing otherwise qualified persons from pursuing their chosen vocation, "it is of special importance that there be apparent the public grounds which constitutionally justify the interference with such person's freedom of employment and business activity." Milligan v. Board of Registration in Pharmacy, supra, 348 Mass. at 498. Under the standards as articulated by both the state and the federal courts, I find that section 185I fails to pass constitutional muster under the Equal Protection Clause as an exercise of the state's general police and regulatory powers.

Finally, the state may argue that it intends to discourage transients from traveling from town to

town in order to engage in the business of fortune telling. The short answer to this argument is that this simply does not appear to be a legitimate state purpose. Unless the state is able to identify a tangible threat and corresponding benefit to the "safety, health, morals, and general welfare of the public," it cannot be permitted to use the regulatory power to favor and disfavor different occupations and lifestyles.

Because I find that there is no rational basis for the one year residency requirement contained in section 185I, and because I further find that the requirement is not reasonably related to the promotion of any legitimate state purpose, I must conclude that section 185I would not withstand scrutiny under the traditional standard of review.

In summary, I find that the statute on its face jeopardizes a constitutionally protected fundamental personal right, the right to "enter and abide in any State in the Union." Therefore, I find that it must be subjected to strict scrutiny, and must be upheld only if it is necessary to protect a compelling state interest. I further find that it is not necessary to protect any such state interest, and therefore conclude that

the statute fails to satisfy the constitutional requirements of the Equal Protection Clause. In an exercise of caution, I have also viewed the one year residency requirement under the more lenient traditional test, and have nevertheless concluded that it fails to meet the requirements of the Equal Protection Clause, because it does not bear a demonstrable rational relationship to a legitimate state purpose. I therefore find that the plaintiff has demonstrated a sufficient likelihood of success on the merits of her claim that section 185I of chapter 140 of the Massachusetts General Laws is in violation of the Equal Protection Clause of the Fourteenth Amendment insofar as it establishes a twelve month residency requirement for issuance of a fortune teller's license.

Finally, I must consider whether the public interest will be adversely affected by the granting of the requested relief. This is a dispute between a private individual and a public body; and so the respective claims to the public interest differ significantly. The plaintiff, on the one hand, states that "the public interest is consistent with the Constitution," and has argued that the public interest is best served

by enjoining the operation of what she characterizes as a blatantly unconstitutional licensing statute. The defendants, on the other hand, may argue that as duly elected public representatives, they carry out the public interest by their support of and enforcement of the laws of the state. While I note that both parties appear to make their arguments in good faith, I find that the Court must take a broader view of the public interest than the defendants would suggest. Conduct, even good faith conduct, taken in furtherance of a statute that is in violation of the Constitution, does not serve the public interest. Therefore, because I have found that the plaintiff is likely to succeed in demonstrating that the residency requirement of section 185I violates the Equal Protection Clause of the Constitution, I must also find that enjoining that portion of the statute which requires an applicant for a fortune teller's license to have resided continuously for twelve months in the municipality issuing the license does not adversely affect the public interest.

Having considered all the arguments raised by the plaintiff and defendants in their briefs and in the verified complaint, and having

heard argument from counsel for both parties, I find that the plaintiff has demonstrated that she will suffer irreparable injury if the injunction does not issue, that such injury outweighs any harm to be inflicted upon the defendants, that the plaintiff has demonstrated a likelihood of success on the merits, and that the public interest will not be adversely affected by the granting of the injunction. It is hereby ordered that the defendant, the Provincetown Board of Selectmen, and all others acting in concert with it, are enjoined from enforcing or seeking to enforce the penalty provisions, licensing requirements, and durational residency requirements set out in Mass. Gen. Laws c. 140 § 185I against the plaintiff, her agents and employees, and her store, the "Mystic Tree of Life." No bond is required.

SO ORDERED.