AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era—Democratic Rights/Free Speech/Advocacy

**Trump v. Trump, N.Y.S. 3d** (NY 2020)

*Mary Trump was a niece of President Donald Trump. In 2020, Simon & Schuster was preparing to publish a book by Mary Trump about the president and the Trump family called,* Too Much and Never Enough*. Donald Trump’s brother, Robert Trump, sought a injunction in the New York courts barring publication of the book on the grounds that it violated a nondisclosure agreement that Mary Trump had signed as part of earlier litigation involving a family estate. Mary Trump objected that the injunction would be an unconstitutional prior restraint on her writing, and the trial court ultimately agreed. If Mary Trump had violated her contractual nondisclosure agreement with other family members, the appropriate judicial relief could not be an injunction barring publication of a book of public interest. The book, which was highly critical of the president, was released to the public days later.*

JUSTICE GREENWALD.

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While the Agreement is deemed a contract, there simply are some things one cannot contract for, such as a **right to injunctive relief.** This must be determined by a court and supported by the movant sustaining all three (3) requirements for a preliminary injunction to be granted. . . .

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Generally, it would be balancing the equities between the plaintiff/ movant and the defendant to determine if the preliminary injunction were to be granted. However, there may be public policy considerations to consider when ruling on a preliminary injunction, especially in a case such as this matter before the court, when it is alleged the information, the speech contained in the Book concerns a sitting President of the United States, who incidentally is not the plaintiff. What standing does ROBERT S. TRUMP have to act on his brother's behalf, if that is how he is approaching this lawsuit. Who really stands to “lose” (or gain?), if the Book continues to be published and distributed as it is claimed by S & S? Is it plaintiff?

It is also important in this matter for the court, in balancing the equities, to be cognizant of the public's interest in the Book. As stated in Justice Scheinkman's Decision and Order on Application:

The passage of time and changes in circumstances may have rendered at least some of the restrained information less significant than it was at the time and, conversely, whatever legitimate public interest there may have been in the family disputes of a real estate developer and his relatives may be considerably heightened by that real estate developer now being President of the United States and a current candidate for re-election.

To reiterate the court's position, the Agreement was a stipulation that settled multiple lawsuits and in exchange consideration was paid out, no specific consideration was paid for confidentiality. Further, what was confidential was the financial aspect of the Agreement, which may not be so interesting now as it might have been in 2001. On the other hand the non-confidential part of the Agreement, the Trump family relationships may be more interesting now in 2020 with a Presidential election on the horizon.

If the public does in fact have an interest in the Book, but plaintiff argues it should not be published because MARY L. TRUMP's contract with S & S breaches the Agreement, in whose favor does the balancing of the equities tip? The application for injunctive relief by plaintiff consisted of his one page, 7 paragraph Affidavit that stated his residency and that he signed and has complied with the Agreement and has not consented to the Book. His counsel affirmed that he gave prior notice to MARY L. TRUMP and S & S to the application for injunctive relief. The supporting Memorandum of Law detailed the history of the Agreement, a timeline for the Book's publication and argument to support the injunctive relief application. No mention of the public interest, First Amendment or prior restraint was made at the time the TRO was granted.

Thereafter at the appellate level and in this Court in opposition, besides refuting plaintiff's application for a preliminary injunction, MARY L. TRUMP's papers contain a virtual history of First Amendment Rights and “prior restraint” caselaw. What follows herein is a brief synopsis of the law, in no way meant to be a complete recitation of all the caselaw and quotations provided by the attorneys for MARY L. TRUMP. It is proclaimed, the enjoining of the publication of the Book is classic “prior restraint” and cannot be tolerated. The Book is characterized as “political speech” *Procter & Gamble v. Bankers Trust Co.* (6th Cir. 1996). “Freedom of speech” is invoked. *New York Times v. Sullivan* (1964). Prior restraint is deemed to be unconstitutional. *Nebraska Press Association v. Stuart* (1976). . . . If the government is the one seeking to enjoin speech “public injury”, must be shown. Injunctions are seen as “state power”. There is a significant presumption against the constitutional validity of prior restraints. . . “the essence of censorship.” *Near v. Minnesota ex rel. Olson* (1931).

Besides arguing First Amendment defenses, MARY L. TRUMP also asserted the invalidity of the Agreement and questioned its terms. Further assertions are made that First Amendment prohibitions against prior restraint are not defeated by contractual agreements. *Shelley v. Kraemer* (1948). . . .

Even where litigation is involved, where injunctive relief is sought to prevent the participants from discussing a case with the news media, the relief sought has been denied. *CBS, Inc. v. Young* (6th Cir. 1975).

Speech is so important, that courts have ignored how the information has been obtained, and still denied injunctive relief. *New York Times Co. v. United States* (1971).

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The instant application herein for a preliminary injunction was made with the imperfect knowledge whether the Book had been published. Courts have held that pre-publication censorship will “ be constitutionally tolerated only upon ‘a showing on the record that such expression will immediately and irreparably create public injury’.” *Porco v. Lifetime Entertainment Services, LLC* (NY 2014); *CBS Inc. v. Davis* (1994). . . .

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In the matter entitled *Ronnie Van Zant, Inc. v. Cleopatra Records, Inc.* (2nd Cir. 2018), the United States Court of Appeals, Second Circuit vacated an injunction, reasoning that although the injunction was as a result of a private agreement (as is sought herein), what was to be enjoined was a:

“viewing of an expressive work prior to its public availability, and courts should always be hesitant to approve such an injunction. “Any *prior* *restraint* on expression comes to [the Supreme] Court with a heavy presumption against its constitutional validity.” Organization for a Better Austin v. Keefe (1971). . . .

As can be seen by the instant proceeding, a question to be answered is whether the confidentiality clauses in the 2001 Agreement, viewed in the context of the current Trump family circumstances in 2020, would “offend public policy as a prior restraint on protected speech”. Yes, it should, as it would be a prior restraint on speech.

Notwithstanding that the Book has been published and distributed in great quantities, to enjoin MARY L. TRUMP at this juncture would be incorrect and serve no purpose. It would be moot.

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Lastly, in the vernacular of First year law students, “Con. Law trumps Contracts.”

*Denied*.