

**Todd Layne Cleaners, LLC v Maloney**

2007 NY Slip Op 33708(U)

November 8, 2007

Supreme Court, New York County

Docket Number: 0113074/2007

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE  
*Justice*

PART 10

Todd Layne Cleaners

INDEX NO. 113074/07

MOTION DATE \_\_\_\_\_

- v -

MOTION SEQ. NO. 001

Evan Maloney

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.**

FILED  
NOV 19 2007  
CLERK'S OFFICE  
NEW YORK

Dated: 11/8/07

JUDITH J. GISCHE, J.S.C. J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10

-----X

TODD LAYNE CLEANERS, LLC,  
  
Plaintiff,

-against-

EVAN MALONEY,  
  
Defendant.

**Decision/Order**

Index No.: 113074/07  
Seq. No. : 001

Present:  
Hon. Judith J. Gische  
J.S.C.

-----X

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

<b>Papers</b>	<b>Numbered</b>
Pitf's OSC w/DMB affirm, TO affid, memo, exhs .....	1
Def's affid in opp (EM)hs .....	2

-----X

*Upon the foregoing papers, the decision and order of the court is as follows:*

This case arises out of the *pro se* defendant's actions undertaken to express displeasure with plaintiff's services and prices. The facts are more fully set forth in the decision/order of Judge Hagler, J.C.C. in Todd Layne Cleaners, LLC v. Maloney, 2007 WL 3023036, 2007 N.Y. Slip Op. 52005(U) (N.Y.City Civ.Ct., October 12, 2007), and are herein incorporated by reference.

Plaintiff moved by order to show cause for an order: [1] removing the case from the Civil Court, New York County ("Civil Court"), to Supreme Court, New York County ("Supreme Court"); [2] for leave to amend and supplement the complaint; and [3] for a preliminary injunction enjoining defendant from: [a] posting or distributing flyers; [b]

maintaining and developing a website making reference to or mentioning plaintiff; and [c] entering or preventing persons from entering plaintiff's place of business. On October 4, 2007, upon hearing plaintiff's order to show cause, the court granted plaintiff a temporary restraining order only to the extent of prohibiting defendant from entering plaintiff's place of business or preventing others from entering plaintiff's place of business, pending a determination of the underlying order to show cause.

Plaintiff originally commenced this case in the Civil Court, with the filing of a summons and endorsed complaint which asserted two causes of action (the "Civil Court Action"). The first cause of action was for libel. The second cause of action was for tortious interference with plaintiff's business and potential business "by placement of signs along East 77<sup>th</sup> Street and by being present at plaintiff's place of business and menacing employees and customers."

Defendant moved to dismiss in the Civil Court Action before the present order to show cause was brought before this court. On October 12, 2007, Judge Hagler, J.C.C.; dismissed the first cause of action for libel, but retained the second cause of action for intentional interference with business relations and/or *prima facie* tort. Todd Layne Cleaners, LLC v. Maloney, *supra*.

In his decision, Judge Hagler stated that:

"Mr. Maloney... allegedly took physical action by menacing employees and customers ." (Complaint at ¶ 2). Plaintiff alleged that "Defendant entered Plaintiff's store and simulated [lewd acts] in front of female employees and customers, which is captured on video surveillance" (Affidavit of Todd Ofsink ["Mr. Ofsink"], sworn to on August 29, 2007, at ¶ 16). In addition, plaintiff accuses defendant of standing in front of its business "staring into the window and discouraged

customers from entering the store.” Id. at ¶ 18. Mr. Ofsink then “told defendant when he was simulating [lewd acts] in front of female employees and customers, that if he did not leave the store in ten seconds, I would call the Police.” Id., at Footnote 1.

## Discussion

At the outset, the court notes that Judge Hagler’s dismissal of plaintiff’s cause of action for libel constitutes *res judicata*. To the extent plaintiff seeks to have this court transfer the libel claim to this court, the relief must be denied because the cause of action no longer exists. Moreover, Judge Hagler’s ruling has further impact on that part of the motion seeking to preliminarily enjoin defendant from [1] posting or distributing flyers or documents and/or papers making reference to or mentioning plaintiff; and/or [2] maintaining and developing a website making reference to or mentioning plaintiff.

Prior restraints on speech are strongly disfavored. Ash v. Board of Managers of 155 Condominium, --- N.Y.S.2d ----, 2007 WL 2830023 (1<sup>st</sup> Dept. 2007); Rosenberg Diamond Development Corp. v. Appel, 290 A.D.2d 239 (1<sup>st</sup> Dept. 2002).

Constitutionally protected speech shall be free from prior restraint unless it creates an imminent danger of violence which must rise above public inconvenience, annoyance or unrest. Terminiello v. City of Chicago, 337 U.S. 1 (1949), *reh. denied*, 337 U.S. 934 (1949); People v. Dietze, 75 N.Y.2d 47 (1989). “[A]ny imposition of prior restraint, whatever the form, bears a “heavy presumption against its constitutional validity.” Ash v. Board of Managers of 155 Condominium, *supra*. Prior restraints merely enjoining the publication of libel are not permissible. Rosenberg Diamond Development Corp. v. Appel, *supra*.

\* 5 ]

Judge Hagler has already ruled that defendant's speech which plaintiff herein seeks to enjoin is constitutionally protected. Plaintiff has not met its burden with respect to its attempt to enjoin defendant's exercise of his constitutionally protected speech. Accordingly, plaintiff is neither entitled to a preliminary or permanent injunction against defendant's [1] posting or distributing flyers or documents and/or papers making reference to or mentioning plaintiff; and/or [2] maintaining and developing a website making reference to or mentioning plaintiff.

This court still needs to consider whether it should remove the claim for tortious interference with business relations and/or *prima facie* tort based upon the alleged conduct. The further issue to be considered is whether plaintiff is entitled to a preliminary injunction against such conduct.

CPLR § 325(b) provides that "[w]here it appears that the court in which an action is pending does not have jurisdiction to grant the relief to which the parties are entitled, a court having such jurisdiction may remove the action to itself upon motion." Civil Court has no jurisdiction to issue an injunction pursuant to CPLR § 6301. Civil Court Act § 209; Hotel New Yorker Pharmacy, Inc. v. New Yorker Hotel Corp., 40 A.D.2d 967 (1<sup>st</sup> Dept. 1972). Plaintiff seeks both permanent and preliminary injunctive relief. Thus, removal is appropriate. Correlated is plaintiff's motion to amend its complaint. CPLR § 3025(b). To the extent plaintiff seeks to add a cause of action for a permanent injunction against behavior other than protected speech (see Todd Layne Cleaners, LLC v. Maloney, supra), it is granted.

On a motion for a preliminary injunction, the movant must prove the likelihood of ultimate success on the merits, that she will suffer irreparable harm unless the relief is

granted, and a balance of the equities in her favor. Paine v. Chriscott v. Blair House Associates, 70 A.D.2d 571 (1<sup>st</sup> Dept. 1979); Aetna Insur. Co. v. Capasso, 75 N.Y.2d 860 (1990). The purpose of a preliminary injunction is to maintain the *status quo* and prevent the dissipation of property that could render a judgment ineffectual. Moy v. Umeki, 10 AD3d 604 (2<sup>nd</sup> dept. 2004). "Likelihood of success" need only be shown from the evidence presented; conclusive proof is not required. Id. The granting of any preliminary injunction requires the posting of security. CPLR § 6312 (b).

Plaintiff has made a prerequisite showing that an order prohibiting defendant from entering plaintiff's place of business or preventing others from entering plaintiff's place of business should be ordered. Plaintiff has alleged that the defendant "entered plaintiff's store and simulated masturbation in front of female employees and customers, which is captured on video surveillance." Plaintiff also claims that "defendant stood in front of the place of business staring into the window and discouraged customers from entering the store" and has physically prevented customers from entering plaintiff's place of business.

Defendant has not denied the conduct claimed. He only states he has not been in the premises since August 1, 2007. He does not deny that he has no legitimate business purpose to be in the premises or that he interferes with plaintiff's relationships with other customers.

The court orders that a Five Hundred Dollars (\$500) undertaking by payment pursuant to CPLR § 2601(a) be paid by plaintiff as a condition of the preliminary injunction. CPLR § 6212(b). This is to secure any damages and costs that may be sustained by reason of the injunction.

\* 7 ]

Accordingly, for the reasons set forth herein, plaintiff's motion is granted to the following extent: [1] the Civil Court Action is hereby transferred to this Court; [2] plaintiff is hereby permitted leave to serve an amended complaint that otherwise conforms with this court's decision within 20 days upon defendant; and [3] defendant is preliminarily enjoined from entering or preventing persons from entering plaintiff's place of business pending a final determination in this case or further order from the court.

**Conclusion**

In accordance herewith it is hereby:

**ORDERED** that plaintiff's motion for removal is granted; and it is further

**ORDERED** that the *Civil Court Action* is hereby transferred to this court; and it is further

**ORDERED** that plaintiff is hereby permitted leave to serve an amended complaint that otherwise conforms with this court's decision within 20 days upon defendant; and it is further

**ORDERED** that defendant is preliminarily enjoined from entering or preventing persons from entering plaintiff's place of business pending a final determination in this case, or further order from the court; and it is further

**ORDERED** that a Five Hundred Dollars (\$500) undertaking by payment pursuant to CPLR § 2601(a) be paid by plaintiff as a condition of the preliminary injunction, no later than 20 days from today; and it is further

**ORDERED** that this matter is scheduled for a **preliminary conference on**

\* 8 ]  
December 6, 2007 at 9:30 a.m. at the New York County Supreme Court, 80 Centre Street, Room 122; and it is further

**ORDERED** that any requested relief not expressly granted herein is denied; and it is further

**ORDERED** that this shall constitute the decision and order of the Court.

Dated: New York, New York  
November 8, 2007

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

**FILED**  
NOV 19 2007  
COUNTY CLERK'S OFFICE  
NEW YORK