

Marandi v Mc Dermott
2009 NY Slip Op 32918(U)
December 2, 2009
Supreme Court, New York County
Docket Number: 112035/09
Judge: Marilyn Shafer
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SHAFFER
Justice

PART 8

MARANDI, KIVAN, ETAL.

INDEX NO. 112035/09

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

- v -
JOHN McDERMOTT

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

*decided
pursuant to attached item*

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

FILED
DEC 16 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/8/09

MARILYN SHAFER
J.S.C.

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 8

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KIYAN MARANDI, HARRY JEANTY, ROOMS
RENTAL REFERRAL SERVICES and
WILSON REALTY,

Plaintiffs,

INDEX
NO.112035/09

-against-

JOHN Mc DERMOTT,

Defendant.

FILED
DEC 16 2009
NEW YORK
COUNTY CLERK'S OFFICE

SHAFER, J.:

Plaintiffs in this defamation action, Kiyani Marandi (Marandi), Harry Jeanty (Jeanty), Rooms Rental Referral Services and Wilson Realty (Plaintiffs), move by Order to Show Cause (OSC), for a preliminary injunction, enjoining defendant John McDermott (McDermott), a competitor in the business of finding rooms to rent in the New York metropolitan area for many years, "from playing any type of recorded message on his business telephone answering system concerning all Plaintiffs in this action."

In a separate application, plaintiffs also seek leave to amend the complaint to add a cause of action of libel per se, based upon allegedly defamatory e-mails.

A careful review of the record reveals that both plaintiffs

and defendant have apparently operated or worked for several different corporations that supply housing information to prospective New York City renters, advertise the availability of rooms for rent, and, in exchange for a non-refundable fee, identify and provide information about those rooms to prospective tenants. They have been competitors for many years and have been engaged in several federal and state lawsuits against each other throughout the years, many which have been dismissed in part for lack of merit.

Plaintiffs commenced this action in August 2009 alleging that they are being slandered (first, second, third, fourth causes of action) and harassed by allegedly slanderous statements made (fifth cause of action) in a recorded message on defendant's answering machine, which states, in pertinent part, that plaintiffs are currently "in a federal lawsuit because they got engaged in deceptive business practices, fraud and illegal discriminatory housing practices against their Black and Puerto Rican clients." (Verified Complaint ¶ 41). Plaintiffs also allege that defendant has been making "defamatory statements" against "his competitors for the last at least seven years" (Verified Complaint ¶76). Plaintiffs seek millions of dollars in both compensatory and punitive damages for the injuries to

business relations caused by defendant's allegedly intentional false and defamatory statements" (Verified Complaint).

Plaintiffs' request for a temporary restraining order (TRO), pending a determination on the OSC, was denied in September 2009, upon the signing of the OSC.

Arguing that the allegedly defamatory statements are "absolutely true" and a defense to plaintiffs' claims, defendant submits a copy of a verified complaint filed in the Southern District of New York in 2008, which alleges that plaintiffs herein are engaged in "racial steering in violations of federal and State Housing Laws" (McDermott Affidavit in Opposition, Ex 1) and defendant also submits copies of several housing related complaints against Jeanty and Mirandi (*id.*, Ex 2). In addition, defendant argues that the relief sought constitutes a prior restraint on speech, which is strongly disfavored.

A preliminary injunction pursuant to CPLR 6301, is "drastic relief" and thus is appropriate only where a party has established (1) a likelihood of success on the merits of the pending action, (2) irreparable injury absent such relief, and (3) a balancing of the equities in favor of the relief sought" (*New York Auto. Ins. Plan v New York Schools Ins. Reciprocal*, 241 AD2d 313, 314 [1st Dept 1997]) (citations omitted). The decision

to grant a preliminary injunction is committed to the sound discretion of the court (see *Bergen-Fine v Oil Heat Inst.* 280 AD2d 504 [2d Dept 2004]), and will be granted only when "a clear right to relief" is plain and is established from undisputed facts (*Gagnon Bus Co., Inc v Vallo Transportation, Ltd.*, 13 AD3d 334 [2nd^d Dept 1998]). The burden of showing an undisputed right to the injunction rests with the movant (*Doe v Poe*, 189 AD2d 132 [2^d Dept 1993]).

Here, plaintiffs have failed to meet their heavy burden in showing a clear right to relief on their underlying claims. The elements of a cause of action for slander are a (i) defamatory statement of fact, (ii) that is false, (iii) published to a third party, (iv) of and concerning the plaintiff; (v) made with the applicable level of fault on the part of the speaker; (vi) not protected by privilege (*Dillion v City of New York*, 261 AD2d 34, 37-38 [1st Dept 1999]). Defendant's affidavit in opposition raises substantial issues of material fact as to the truth of defendant's allegedly defamatory statement regarding plaintiffs' involvement in a federal lawsuit concerning racial steering. Also, plaintiffs appear to have an adequate remedy at law as they are seeking only monetary damages for their claims.

Nor do the equities support such a broad prior restraint on speech enjoining defendant from "playing any type of recorded message" "concerning all plaintiffs" (OSC at 1) since prior restraints on speech are strongly disfavored due to their potential to chill permissible speech (see *Vance v Universal Amusement Co., Inc.*, 445 US 308, 316 [1980]; (*Ramos v Madison Sq. Garden Corp.*, 257 AD2d 492 [1st Dept 1999])). A prior restraint is considered "the most serious and the least tolerable infringement on First Amendment rights ... " (*Ash v Board of Mgrs of the 155 Condominium*, 44 AD3d 324,324 [1st Dept 2007], [internal citations omitted]) and thus, free speech is protected from censorship unless there is a likely to produce "a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest" (*Rosenberg Diamond Dev Corp. et al., v Appel*, 290 AD2d 239,239 [1st Dept 2002] [internal citations omitted]).

Specifically, prior restraints on speech are not permitted where, as here, they are sought merely to enjoin the publication of libel (*id.*).

Thus, any party seeking the imposition of a prior restraint on speech bears a heavy burden of demonstrating justification for the imposition (*id.*).

While it is true that a prior restraint on speech may be appropriate if the alleged statements are "made as part and parcel of a course of conduct deliberately carried on to further a fraudulent or unlawful purpose" (*Trojan Elec. & Mach. Co. v Heusinger*, 162 AD2d 859, 860 [3rd Dept 1990]), plaintiffs, at least at this juncture, clearly fail to meet this heavy burden of proof.

In addition, that part of plaintiffs' application which seeks to amend the complaint to include a purported cause of action for libel per se, based upon alleged "e-mail[s] to prospective customers of plaintiffs to defame the plaintiffs in any possible way" is denied as vague and deficient on its face, because it fails to meet the pleading requirements of CPLR 3016 (a). In view of the above, it is

ORDERED that plaintiffs' motion for a preliminary injunction is denied; and it is further

ORDERED that the remainder of this action shall continue; and it is further

ORDERED that a preliminary conference shall be held in Part 8 on January 13th, 2010, at 10:30 am/pm.

Dated:

FILED

MAHILYN SHAFER
J.S.C.



1/13/10

JANUARY 13th

DEC 16 2009
NEW YORK
COUNTY CLERK'S OFFICE