

Martone v Breyfogle
2016 NY Slip Op 32941(U)
June 23, 2016
Supreme Court, Westchester County
Docket Number: 69304/2015
Judge: Sam D. Walker
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

-----X
MICHELE MARTONE a/k/a MIKE MARTONE,
ANTONELLO MARTONE, ROSA MARTONE,
MARIO MARTONE, SAL MARTONE, MICHELE
MARTONE JR. a/k/a MIKE MARTONE JR.,

Plaintiffs,

-against-

Index No. 69304/2015
Seq # 1
DECISION AND ORDER

EUGENE BREYFOGLE,

Defendant.

-----X
The following papers were considered on the plaintiffs' Order to Show Cause seeking a preliminary injunction and a restraining order:

<u>PAPERS</u>	<u>NUMBERED</u>
Order to Show Cause/Affidavit in Support	1-2
Memorandum of Law in Support	3
Affidavit in Opposition/Exhibits	4-5
Reply Affidavit	6

The plaintiffs seek an Order pursuant to CPLR § 6301, pending the trial of this action, granting a preliminary injunction restraining the defendant from making false or negative statements about the plaintiffs.

After reviewing the order to show cause and its supporting papers, the opposition papers of the defendant and upon hearing counsel for each party at oral argument on December 16, 2015, the order to show cause is GRANTED.

Factual Background and Procedural Background

Plaintiff Michele Martone a/k/a Mike Martone ("Mike") owns Martone Auto Collision, Inc., and Antonello Martone ("Antonello") works there. Breyfogle is alleged to have previously worked there also and as per the plaintiffs, he had made a business arrangement with the defendant concerning restoration of used cars. That arrangement ended, the relationship between the parties soured and the plaintiffs allege that Breyfogle has since gone on a rampage against all of the plaintiffs named in the action.

Plaintiffs filed a summons and complaint on November 13, 2015, alleging causes of action for libel, tortious interference with business relations, tortious interference with prospective business relations, assault, and battery. Plaintiffs then filed the instant order to show cause arguing that Breyfogle has made numerous libelous statements about the plaintiffs and that a preliminary injunction is necessary to prevent the defendant from continuing to do so. Breyfogle has opposed the order to show cause.

Discussion

To the extent relevant, CPLR 6301 provides that:

A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during

the pendency of the action, would produce injury to the plaintiff.

Further, "if on a motion for a preliminary injunction, the plaintiff shall show that immediate and irreparable injury, loss or damages will result unless the defendant is restrained before a hearing can be had, a temporary restraining order may be granted without notice" McKinney's CPLR § 6313.

It has been long held that the primary objective of a preliminary injunction is to maintain the status quo. In order to be granted preliminary injunctive relief, the movant has the burden to establish (1) a likelihood of success on the merits, (2) irreparable harm if the injunction is denied, and (3) a balance of the equities in favor of the injunction favoring the movant. See, CPLR 6312(a); W.T. Grant Co. v. Srogi, 52 N.Y.2d 496, 517, 438 N.Y.S.2d 761, 420 N.E.2d 953(1981); Livas v. Mitzner, 303 A.D.2d 381, 382, 756 N.Y.S.2d 274, 275 (2d Dept., 2003). Here, the plaintiffs assert that they are likely to prevail on the merits, since they can clearly establish that Breyfogle has made false statements, that by making such statements, he is causing irreparable harm and that the balance of equities favors a preliminary injunction.

In opposition, Breyfogle argues that the plaintiff is a corporation and therefore, must appear by an attorney, that there was improper service of process, and that the lawsuit is frivolous and part of harassment tactics on the part of the plaintiffs due to Breyfogle's termination of a business relationship, whereby Breyfogle was defrauded by the plaintiffs.

Upon review, the Court finds that the plaintiffs are all natural persons and are not suing the Breyfogle as a corporation, as asserted. Breyfogle fails to state how service of process was improper and the plaintiffs submitted an affidavit of service showing service

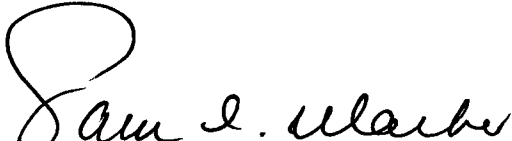
upon Breyfogle by affixing the documents to the front door of the defendant's current residence after two prior attempts at service and within twenty days, mailing the documents to Breyfogle, as required by CPLR 308(4). Further, Breyfogle has since filed an answer in the action. With regard to the lawsuit being frivolous, the Court does not find such to be the case with regard to the libel cause of action, based upon the affidavit submitted by Antonello and the documents attached to the order to show cause supporting the allegations. Furthermore, the Court finds that the plaintiffs are likely to prevail on the merits, the statements Breyfogle has allegedly published will cause irreparable harm to business if he continues to do so and that the balance of equities favors a preliminary injunction.

Therefore, the Court grants the plaintiffs' order to show cause and it is

ORDERED that Eugene Breyfogle is restrained from disseminating or stating any false information about any of the plaintiffs in this action or about Martone Auto Collision, Inc., or any information that could reasonably be considered as negative information, without a reasonable basis for doing so.

The parties are directed to appear before the preliminary conference part on July 25, 2016 at 9:30 a.m. in courtroom 811. The following constitutes the Decision and Order of this Court.

Dated: White Plains, New York
June 23, 2016


HON. SAM D. WALKER, J.S.C.