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Index #: 126837-2020

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONTARIO

MASSA CONSTRUCTION, INC.,
630 Pre-Emption Road, Geneva, New York 14456,

Index No. 126837-2020

Plaintiff,

**MEMORANDUM OF
LAW**

-against-

JAMES MEANEY a/k/a THE GENEVA BELIEVER,
3006 North Genesee Street, Geneva, New York 14456,

Defendants.

Defendant, Massa Construction, Inc. (“Massa”), submits this Memorandum of Law in support of its application for a Temporary Restraining Order (“TRO”), enjoining James Meaney, a/k/a, “The Geneva Believer,” from its continued publication of internet articles that state various falsehoods about Massa, which constitute defamation and libel *per se*.

PRELIMINARY STATEMENT

Massa’s application for a TRO seeks to enjoin Defendant from the continued publication of various internet publications by Mr. James Meaney a/k/a “The Geneva Believer.” The publications span the course of a few years, but the Geneva Believer has re-published all such libelous articles in one article dated January 25, 2020. Defendant’s articles have published the falsehood that Massa obtains construction contracts with the City of Geneva by means of collusion, bribery, undue influence, and favoritism. Defendant conveys this message through several different false statements, which are outlined in Massa’s Verified Amended Complaint

dated February 26, 2020, verified by Massa's President, Nicholas P. Massa. Additionally, such language is accompanied by images that clearly convey to a reasonable reader the falsehood that Massa obtains construction contracts with the City of Geneva by bribing City of Geneva Officials. For example, an image of one man stuffing cash into another man's coat. These falsehoods impute dishonesty, misconduct, and fraud to Massa's business as a general contractor. The false statements in these publications clearly have the effect of denigrating Massa's basic business integrity. Therefore, the various false statements about Massa constitute libel *per se*. This Court should grant Massa's application for a TRO, enjoining Defendant from its continued publication of these articles, as the articles are likely to cause immediate and irreparable harm to Massa; Massa is likely to succeed on the merits of its claim; and the balance of equities favor Massa.

FACTS AND BACKGROUND

The facts relevant to this motion are set forth in Massa's Verified Amended Complaint dated February 26, 2020, verified by Massa's President, Nicholas P. Massa, which is incorporated herein by reference.

STANDARD

A TRO may be granted without notice if "irreparable injury, loss or damage will result unless the [party] is restrained before a hearing can be held." CPLR 6313(a). A TRO serves the short-term purpose of maintaining the status quo while a motion for a preliminary injunction is pending. The existence of factual disputes will not preclude the granting of a preliminary injunction in order to maintain the status quo. *See U.S. Reinsurance Corp. v. Humphrey's*, 205

A.D.2d 187 (1 Dep't 1994). The requisite showing for a TRO is similar to that for a preliminary injunction. In order to obtain a preliminary injunction a party must demonstrate that, (1) there is a danger of irreparable harm if the injunction is not granted; (2) there is a likelihood of success on the merits; and (3) the balance of equities is in that party's favor. Aetna Ins. Co. v. Capasso, 75 N.Y.2d 860 (1990).

ARGUMENT

THIS COURT SHOULD GRANT MASSA'S APPLICATION FOR A TRO, AS THE CONTINUED ONLINE PUBLICATION AND RE-PUBLICATION OF DEFENDANT'S ARTICLES WILL CAUSE IMMEDIATE AND IRREPARABLE HARM TO MASSA; MASSA IS LIKELY TO SUCCEED ON THE MERITS OF ITS DEFAMATION CLAIMS; AND THE BALANCE OF EQUITIES FAVOR MASSA.

1. Absent Injunctive Relief, Massa will Suffer Immediate and Irreparable Harm.

A TRO may be granted without notice if "irreparable injury, loss or damage will result unless the [party] is restrained before a hearing can be held." CPLR 6313(a). As set forth in Massa's Verified Amended Complaint, and the exhibits attached thereto, irreparable injury, loss and damage will result to Massa's business if the Defendant is not restrained before a hearing can be held from its continued publication of the defamatory articles on its various websites.

Massa maintains an office for the conduct of its business of general contracting at 630 Pre-Emption Road, Geneva, New York 14456. (Verified Amended Complaint, ¶ 1). Massa contracts with both private and public entities to perform construction services. (Id., ¶ 4). One of the public entities Massa submits competitive bids to is the City of Geneva. (Id., ¶ 5). In order to be awarded a construction contract with a public entity (like the City of Geneva), Massa must be the lowest, responsive, and responsible bidder in a competitive bidding process. *See* General Municipal Law § 103.

Reading each article in isolation, they each convey the falsehood that Massa obtains its construction contracts with the City of Geneva by means of collusion, bribery, undue influence, and favoritism. (*See* Exhibits 1-9). In the mind of a reasonable reader, this falsehood imputes misconduct, dishonesty, and fraud to Massa's business. At the very least, these falsehoods wrongfully call into question Massa's business integrity and creditworthiness. All of which have the effect of causing immediate and irreparable harm to Massa's business.

The false statements will effect Massa's ability to qualify as a responsible bidder when it bids public projects. If and when a public owner or representative sees or is notified of the falsehoods in Defendant's articles, such public owners will doubt Massa's responsibility as a general contractor. Based on these falsehoods, public owners will assert that a general contractor that bribes local governments to obtain construction contracts is not responsible, and thus, should not be awarded public work.

If Massa is found non-responsible once, Massa will need to disclose such a finding the next time it bids public work. Therefore, such a finding will not only result in Massa losing one public construction contract, but future public construction contracts as well. *See* General Municipal Law § 103. The immediacy of this irreparable harm is all the more likely as the defamatory statements are published on multiple internet platforms, and as such, calculated to reach thousands of people. A TRO will serve the short-term purpose of maintaining the status quo while a motion for a preliminary injunction is pending.

For the aforementioned reasons, Massa will suffer immediate and irreparable harm if this Court does not grant a TRO.

2. Massa is Likely to Prevail on the Merits of its Defamation Claims, as the Articles on Defendant's Websites are Defamatory, and Otherwise Constitute Libel *Per Se*.

In order to obtain a preliminary injunction, a party must demonstrate that there is a likelihood of success on the merits. Aetna Ins. Co. v. Capasso, 75 N.Y.2d 860 (1990). When defamatory words are spoken they are called slander, when written they are called libel. Under New York law, words are *per se* defamatory if they would tend to injure a party's trade, occupation or business. Defamatory *per se* means that the defamatory nature is apparent on its face. That is, "the defamatory innuendo is apparent from the publication itself without reference to extrinsic facts by way of inducement." See Gertz v. Robert Welch, Inc., 418 U.S. 323, 374 (1974) (internal quotes omitted).

Here, Massa is likely to prevail in establishing that various statements concerning Massa in Defendant's articles constitute libel *per se*. Massa can demonstrate that Defendant's statements are false, and that on their face, the statements tend to injure Massa in its business as a general contractor. Libel *per se* is a written statement that "tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society." Sydney v. MacFadden Newspaper Pub. Corp., 242 N.Y. 208, 212 (1926). In other words, if the statement tends to tarnish the plaintiff's business reputation.

To determine whether a statement is *per se* actionable, courts look at whether the character of the language used, in the context of the entire publication, as well as the circumstances of its issuance, would naturally import one of the above mentioned charges in the mind of an average person. The elements are as follows: The plaintiff must show that, (1) the defendant communicated to a third person (2) a false statement about the plaintiff that (3) tended

to harm plaintiff's reputation in the eyes of the community or to cause others to avoid plaintiff. See Accadia Site Contracting, Inc. v. Skurka, 129 A.D.3d 1453 (4th Dep't 2015).

If an alleged defamatory statement is considered *per se* actionable, the law presumes damages and the plaintiff need not specifically allege or prove them. Liberian v. Gelstein, 80 N.Y.2d 429 (1992). Business entities may assert a cause of action for libel *per se*; however, there is a distinction in the commercial context. In the commercial context, the statement must call into question the basic integrity or creditworthiness of a business. Boehner v. Heise, 734 F.Supp.2d 389 (S.D.N.Y. 2010). The statement cannot be confined to denigrating the quality of the business' goods or services, in which case special damages would need to be proven. Ruder & Finn Inc. v. Seaboard Sur. Co., 52 N.Y.2d 663, 670–71 (1981).

Here, Defendant's statements are libelous *per se*, as the statements are false and tend to injure Massa in its business of construction. The false assertions in Defendant's articles—which when read as whole convey the falsehood that Massa obtains its construction contracts with the City of Geneva by way of bribery, undue influence, and other corrupt means—cause injury to Massa's basic business integrity and creditworthiness, as well as its reputation for honesty and fair dealing. See Gatz v. Otis Ford, Inc., 262 A.D.2d 280, 281, (2d Dep't 1999) (finding statements by vehicle owner to be defamatory *per se* that repair shop was dishonest, had committed fraud, and had “ripped off” owner by installing used parts in his vehicle as such statements imputed to its business, fraud, dishonesty, misconduct, and unfitness); see also Sachs v. Matano, 22 N.Y.S.3d 310 (Nassau Cty. 2015) (granting preliminary injunction requiring patient to take down statements posted on a website as such statements tended to injure the doctor in his business, and therefore libelous *per se*). Defendant's articles also harm Massa's reputation in the eyes of the community in which Massa operates, and cause others to avoid

Massa. See Accadia Site Contracting, Inc. v. Skurka, 129 A.D.3d 1453 (4th Dep't 2015). For example, both public and private owners are likely to avoid contracting with Massa in light of the falsehoods about bribery and other corrupt means by which Defendant asserts Massa obtains work.

As demonstrated above, Massa is likely to prevail on its defamation claims against Defendant.

3. The Balance of Equities Favor Massa.

In order to obtain a preliminary injunction a party must demonstrate that the balance of equities is in that party's favor. Aetna Ins. Co. v. Capasso, 75 N.Y.2d 860 (1990). The "balancing of equities is commonly defined as the "weighing of conveniences, hardships, and policies as would be done in a Court of Equity." Barron's Law Dictionary, p. 47 (6th ed., 2010). Here, the "weighing of conveniences, hardships, and policies" clearly favors Massa.

First, the form of relief Massa seeks is convenient, and not overly burdensome. The TRO can serve its purpose effectively by simply ordering Defendant to remove the articles from Defendant's websites until a hearing can be had on the merits. If Massa prevails, the articles will remain removed. If Massa does not prevail, the articles can be reinstated. The equities favor Massa in granting the TRO as it is convenient to do so and not overly burdensome on Defendant in the interim.

Second, the hardships and policies favor Massa. As is generally understood in Upstate New York, the construction season really launches in the early spring. Like most construction companies in Upstate New York, Massa's construction business is about to really pick up, as Massa is submitting bids on public jobs. In the meantime, Defendant's articles loom out on the internet for a public owner to see, and deny Massa's bid as a non-responsible bidder.

Lastly, Massa has sought to resolve this problem concerning the defamatory signage between the parties themselves. Defendant refused to comply with Massa's request, however, and only after Defendant refused to remove the articles did Massa file an action and seek relief from this Court in the form of an application for a TRO.

CONCLUSION

For the foregoing reasons, Massa's request for a Temporary Restraining Order should be granted.

Dated: February 26, 2020

/s/ Anthony C. Galli

Anthony C. Galli, Esq.
Sheats & Bailey, PLLC
Attorneys for Defendant
Massa Construction, Inc.
609 Vine Street
P.O. Box 586
Liverpool, New York 13088
Telephone (315) 676-7314