

Edson v Marrinan

2019 NY Slip Op 34259(U)

May 3, 2019

Supreme Court, Suffolk County

Docket Number: Index No. 18-618460

Judge: Sanford Neil Berland

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E-FILE

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. SANFORD NEIL BERLAND
Acting Justice of the Supreme Court

-----X
LISA EDSON and EVANS EDSON, individually and
on behalf of the ESTATE OF LEWIS L. EDSON,
a/k/a LEWIS LEFFERTS EDSON,

Plaintiff(s),

- against -

JOAN MARRINAN,

Defendant(s).
-----X

ORIG. RETURN DATE: October 16, 2018
FINAL RETURN DATE: April 2, 2019
MOT. SEQ. #: 001 MotD

ORIG. RETURN DATE: December 12, 2018
FINAL RETURN DATE: April 2, 2019
MOT. SEQ. #: 002 MD

ORIG. RETURN DATE: April 23, 2019
FINAL RETURN DATE: April 23, 2019
MOT. SEQ. #: 003 WDN

ORIG. RETURN DATE: April 23, 2019
FINAL RETURN DATE: April 23, 2019
MOT. SEQ. #: 004 MotD

ORIG. RETURN DATE: May 14, 2019
FINAL RETURN DATE: May 14, 2019
MOT. SEQ. #: 005 MG

PLAINTIFFS' ATTORNEY:
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Upon the reading and filing of the following in this matter: (1) Motion brought by Order to Show Cause, by plaintiffs, granted October 2, 2018, and supporting papers; (2) Affirmation in Opposition, by defendant, filed February 20, 2019, and supporting papers; (3) Reply by plaintiffs, filed February 25, 2019; (4) Notice of Motion, by defendant, filed November 15, 2018, and supporting papers; (5) Notice of Cross-Motion, by plaintiffs, filed April 2, 2019, and supporting papers; (6) Affirmation in Opposition, by defendant, filed April 22, 2019; (7) Notice of Motion, by defendant, filed April 10, 2019, and supporting papers; it is

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ORDERED that plaintiffs' motion (seq. #004)¹ pursuant to CPLR § 602(a), for an order consolidating the instant action with the action entitled *Lisa Edson and Evans Edson et al - against - Matthew Marrinan and Channing Edson Marrinan*, and appearing under index number 7803/2016 is granted to the extent that the actions are joined for purposes of joint discovery and joint trial, and is otherwise denied; and it is further

ORDERED that plaintiffs' motion (seq. # 001) for an order enjoining defendant from engaging in certain activities described *infra* is granted to the limited extent indicated herein, and is otherwise denied; and it is further

ORDERED that defendant's motion (seq. # 005) seeking a stay of these proceedings is granted to the extent that this matter is stayed immediately following the conference currently scheduled for June 4, 2019 until after the disposition of the matter currently pending before the Honorable Theresa Whelan, Surrogate entitled *In the Matter of the Estate of Lewis L. Edson a/k/a Lewis Lefferts Edson*, and appearing under file number 2013-2792/E/F/G, except to the extent that the court may entertain an application for relief from any violation of the preliminary injunction granted herein; and it is further

ORDERED that defendant's motion (seq. # 002) for an order disqualifying Anthony H. Palumbo, Esq. and his firm The Law Firm of Palumbo & Associates, P.C. from representing the plaintiffs in this action is denied, without prejudice; and it is further

ORDERED that the parties, or their attorneys-of-record if represented by counsel, shall attend a previously scheduled conference on **June 4, 2019 at 9:30am** before the undersigned.

This action arises out of an ongoing and unfortunate, intra-familial dispute between the plaintiffs², Lisa Edson and Evans Edson and their sister Channing Edson Marrinan, who is a defendant in a related action, over the formers' allegedly improper administration of their late father's estate. Lisa and Evans commenced the instant action against Joan Marrinan, Channing's mother-in-law, and a related action against Channing and Channing's husband, Matthew Marrinan, entitled *Lisa Edson and Evans Edson et al - against - Matthew Marrinan and Channing Edson Marrinan*, and bearing index number 7803/2016. Although the complaints in both actions are not identical, each essentially alleges that the defendants Joan and Matthew have defamed and disparaged plaintiffs, and continue to do so, with malicious internet posts on various

¹ A prior motion seeking identical relief and sequenced # 003 was withdrawn due to a drafting error by plaintiffs.

² The Court has taken notice of an order dated May 20, 2019 by the Honorable Theresa Whelan, Surrogate, *In the Matter of the Estate of Lewis L. Edson a/k/a Lewis Lefferts Edson* and bearing file number 2013-2792/E/F/G suspending Lisa and Evans Edson from acting as fiduciaries of the estate "pending a hearing on their removal" and appointing "the Public Administrator of Suffolk County [as] temporary administrator for the limited purpose of selling and collecting the proceeds of sale of the Farm . . ." Accordingly, all references in this order to the "plaintiffs" refer to Lisa and Evans Edson for their individual claims and not to the Estate of Lewis L. Edson.

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internet platforms. Plaintiffs claim that as a result of these allegedly defamatory and disparaging posts, they have suffered emotional distress and have been damaged by the defendants, and that the defendants have tortiously interfered with their management of an asset of Lewis Edson's Estate, a business named Christmas Tree Farm Inc., which is commonly known as "Santa's Christmas Tree Farm." The matter has quickly escalated, resulting in substantial motion practice.

Plaintiffs now move for an order in this action granting a preliminary injunction preventing defendant from engaging in certain activities described in this decision and for an order consolidating this action with the above mentioned related action. Defendant, who is self-represented, moves for an order disqualifying plaintiffs' attorney Anthony Palumbo, Esq., and his firm from representing them, and staying these proceedings until after the disposition of the Surrogate's court matter. Each motion is discussed in turn.

Turning first to plaintiffs' motion for an order consolidating the instant action with the related action, CPLR § 602(a) provides that consolidation among actions should be granted where there are common questions of law and/or fact absent a showing of prejudice to a substantial right by a party opposing the motion (*see also Oboku v New York City Transit Auth.*, 141 AD3d 708, 35 NYS3d 710 [2d Dept 2016]; *Cieza v 20th Avenue Realty Inc.*, 109 AD3d 506, 970 NYS2d 311 [2d Dept 2013]). Whether to grant the relief requested in a motion to consolidate actions, made pursuant to CPLR 602(a), rests within the sound discretion of the trial court (*see Alizio v Perpignano*, 78 AD3d 1087, 912 NYS2d 132 [2d Dept 2010]; *RCN Constr. Corp. v Fleet Bank, N.A.*, 34 AD3d 776, 825 NYS2d 140 [2d Dept 2006]). Consolidation or a joint trial is appropriate "where it will avoid unnecessary duplication of trials, save unnecessary costs and expense and prevent the injustice which would result from divergent decisions based on the same facts" (*Horn Constr. Co. v City of New York*, 100 AD2d 824, 825, 474 NYS2d 763 [1st Dept 1984]). Consolidation gives rise to a new action that displaces the actions affected thereby (*Pigott v Field*, 10 AD2d 99, 101, 197 AD2d 648 [1st Dept 1960]; *see Kelley v Galina-Bouquet, Inc.*, 155 AD2d 96, 552 NYS2d 305 [1st Dept 1990]).

Where, as here, common questions of law and fact exist and none of the parties would be appreciably prejudiced, if at all, by consolidating the actions, consolidation would ordinarily be appropriate.³ However, notwithstanding the fact that the defendant and her son each allegedly spend substantial amounts of time assailing their family members on the internet, it cannot be said at this time that the conduct by Joan Marrinan and Matthew Marrinan are so similar or concerted as to warrant consolidation of the actions against them. In any event, particularly where one defendant is self represented and where the other is represented by counsel, and where litigation has already proceeded separately in each action over the course of years, the court exercises its discretion to join these actions for discovery and trial rather than to consolidate them.

The court next turns to plaintiffs' motion for a preliminary injunction against defendant. Plaintiffs seek an order, in pertinent part:

³ The defendant has not shown, or even made a serious attempt to show, how she would suffer prejudice if the actions were consolidated.

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Directing the defendant and all persons acting under her authority, control and/or in concert or privity with her, or any associates, agents, employees and assigns to immediately remove all internet postings relative to Santa's Christmas Tree Farm, employees of Santa's Christmas Tree Farm, LEWIS EDSON, LISA EDSON, EVANS EDSON, the immediate family members of EVANS EDSON and the ESTATE OF LEWIS L. EDSON and their attorneys, accountants, and realtors, and any variation thereof from their accounts, including, but not limited to, Facebook, Instagram, Twitter, and all other social media, search engines or websites;

Enjoining the defendant and all persons acting under her authority, control and/or in concert or privity with her, or any associates, agents, employees and assigns from any further use of the names or references to Santa's Christmas Tree Farm, employees of Santa's Christmas Tree Farm, LEWIS EDSON, LISA EDSON, EVANS EDSON, the immediate family members of EVANS EDSON and the ESTATE OF LEWIS L. EDSON and their attorneys, accountants, and realtors, and any variation thereof to any individual or entity, including, but not limited to, email, ordinary mail, Facebook, Instagram, Twitter, and all other social media search engines or websites, with the exception of communication with attorney(s) who defendant seeks to retain in this action;

Directing defendant to stay away from the Santa's Christmas Tree Farm property located at 30105 Main Road, Cutchogue, New York;

Ordering defendant, Joan Marrinan, to refrain from disclosure to any natural person or entity, any information relative to Santa's Christmas Tree Farm, employees of Santa's Christmas Tree Farm, LEWIS EDSON, LISA EDSON, EVANS EDSON, the immediate family members of EVANS EDSON and the ESTATE OF LEWIS L. EDSON, and their attorneys, accountants, and realtors including but not limited to[,] any information provided to her by CHANNING EDSON MARRINAN or MATTHEW MARRINAN including, but not limited to accounting information, with the exception of communication with attorney(s) who defendant seeks to retain in this action.

It is well settled that a preliminary injunction is a drastic remedy which will not be granted unless the movant establishes "a clear right thereto . . . under the law and the undisputed facts upon the moving papers" (*Abinanti v. Pascale*, 41 A.D.3d 395 [2d Dept. 2007] [internal quotations omitted]). The party moving for a preliminary injunction must establish a likelihood of success on the merits, irreparable injury in the event the injunctive relief is denied and that a balancing of the equities favors the granting of the injunction (*Aetna v. Capasso*, 75 N.Y.2d 860 [1990]; *W.T. Grant Co., v. Sgroi*, 52 N.Y.2d 496 [1981]). Where the moving party has an adequate remedy at law by "which his or her rights can be protected and properly conserved," an injunction will not be granted (67A NY Jur 2d, Injunctions §24; *Gaynor v. Rockefeller*, 15 N.Y.2d 120 [1965]). "As to the likelihood of success on the merits, a prima facie showing of a right to relief [may be] sufficient; actual proof of the case should be left to further court proceedings" (*McLaughlin, Piven, Vogel, Inc. v W.J. Nolan & Co., Inc.*, 114 AD2d 165, 172-73 [2d Dept 1986]). As to the balancing of the equities, "'it must be shown that the irreparable injury to be sustained ... is more burdensome [to the plaintiff] than the harm caused to defendant through imposition of the injunction'" (*Destiny USA Holdings, LLC v Citigroup Glob. Markets Realty Corp.*, 69 AD3d 212, 223 [4th Dept 2009],

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quoting *McLaughlin*, 114 AD2d 165).

"While a plaintiff alleging defamation generally must plead and prove that he or she has sustained special damages . . . any written article is 'actionable without alleging special damages if it 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'" (*LeBlanc v Skinner*, 103 AD3d 202, 214 [2d Dept 2012], quoting *Sydney v MacFadden Newspaper Pub. Corp.*, 242 NY 208, 211 [1926]). "Our society has long recognized that when statements fall within one of these established categories of per se defamation, 'the law presumes that damages will result, and they need not be alleged or proven'" (*LeBlanc*, 103 AD3d 202, quoting *Liberman v Gelstein*, 80 NY2d 429, 435 [1992]). "Damages will likewise be presumed for statements that charge a person with committing a serious crime" (*Geraci v Probst*, 15 NY3d 336, 344 [2010]; see *Knutt v Metro Intern.*, S.A., 91 AD3d 915, 916 [2d Dept 2012]). "Indeed, important social values underlie the law of defamation, as '[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation'" (*LeBlanc*, 103 AD3d 202, quoting *Rosenblatt v Baer*, 383 US 75, 86, 86 S Ct 669, 676, 15 L Ed 2d 597 [1966]).

Based upon a review of the arguments and evidence presented, plaintiffs sufficiently established a potential for irreparable harm, likelihood of success on the merits, and a balance of the equities in their favor, satisfying their burden for the granting of a preliminary injunction during the pendency of this action. Defendant's social media posts state that the plaintiffs, and their counsel, engage in "payroll fraud . . . among other crimes" and, in not so many words, violations of various provisions of Articles 175, 195 and 200 of the Penal Law. These accusations, which plaintiffs vehemently deny, are serious crimes, and damage to plaintiffs is presumed. Plaintiffs have thus established a *prima facie* defamation claim sufficient to show a likelihood of success on the merits and presumed damages that are sufficient to show irreparable injury to their reputations. With respect to a balancing of the equities, it is clear that the injury to plaintiffs' reputations is more burdensome than any harm that could occur to defendant by requiring her to refrain from making defamatory or otherwise damaging postings on the internet. Accordingly, plaintiffs' motion for a preliminary injunction is granted to the limited extent that defendant and all persons acting under her authority, control and/or in concert or privity with her, or any associates, agents, employees and assigns are:

Directed to immediately remove all internet postings referring or otherwise relating to Santa's Christmas Tree Farm, employees of Santa's Christmas Tree Farm, Lisa Edson, Evans Edson, or their immediate family members, attorneys (in their capacity as attorneys for plaintiffs), accountants, and realtors, and any variation thereof from their accounts, including, but not limited to, Facebook, Instagram, Twitter, and all other social media, search engines or websites; and

Enjoined from any further use of the names or references to Santa's Christmas Tree Farm, employees of Santa's Christmas Tree Farm, plaintiffs Lisa Edson, Evans Edson, or their immediate family members, attorneys (in their capacity as attorneys for plaintiffs), accountants, and realtors, and any variation thereof to any individual or entity, including, but not limited to, email, ordinary mail, Facebook, Instagram, Twitter, and all other social media search engines or websites, with the exceptions of communication with attorney(s) who defendant seeks to retain in this action and directly with appropriate law enforcement entities; and

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Ordered to refrain from disclosure to any natural person or entity, any information relating to Santa's Christmas Tree Farm, employees of Santa's Christmas Tree Farm, plaintiffs Lisa Edson, Evans Edson, or their immediate family members, attorneys (in their capacity as attorneys for plaintiffs), accountants, and realtors, including but not limited to any information provided to her by Channing Edson Marrinan or Matthew Marrinan including, but not limited to, accounting information, with the exceptions of communication with attorney(s) who defendant seeks to retain in this action and directly with appropriate law enforcement entities.

Turning next to defendant's motion to stay these proceedings until after the disposition of the matter currently pending before the Honorable Theresa Whelan in Surrogate's Court, defendant persuasively argues that the issue of whether and to what extent the plaintiffs engaged in improper conduct as fiduciaries of their late father's estate is now before the Surrogate's Court and is more appropriately decided in that court, which has jurisdiction over the administration of the estate. Accordingly, further proceedings in this action will be stayed immediately following the conference currently scheduled for June 4, 2019 and except to the extent that the court may entertain an application for relief from any violation of the preliminary injunction granted herein.

The Court last turns to defendant's motion for an order disqualifying Anthony H. Palumbo, Esq. and his firm, The Law Firm of Palumbo & Associates, P.C., from representing the plaintiffs in this action. Defendant avers that it will be necessary for Mr. Palumbo to testify in this action concerning his assistance in the preparation of various business documents on behalf of Santa's Christmas Tree Farm and alleged improper conduct by the plaintiffs in the administration of their late father's estate.

"The disqualification of an attorney is a matter that rests within the sound discretion of the court" (*see Matter of Town of Oyster Bay v 55 Motor Ave. Co., LLC*, 109 AD3d 549 [2d Dept 2013]; *Albert Jacobs, LLP v Parker*, 94 AD3d 919 [2d Dept 2012]; *Columbus Constr. Co., Inc. v Petrillo Bldrs. Supply Corp.*, 20 AD3d 383 [2d Dept 2005]). "A party's right to be represented by counsel of his or her own choosing is a valued right which will not be superseded absent a clear showing that disqualification is warranted" (*see Mediaceja v Davidov*, 119 AD3d 911 [2d Dept 2014]; *Zutler v Drivershield Corp.*, 15 AD3d 397 [2d Dept 2005]). "An attorney should be disqualified once it is determined that he or she ought to testify at trial . . . However, a determination as to whether an attorney 'ought' to testify, and therefore, should be disqualified, is to be based upon whether his or her testimony is 'necessary'" (*Morgasen v Federated Consultant Serv., Inc.*, 174 AD2d 656, 656 [2d Dept 1991], *citing S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp.*, 69 NY2d 437, 445-46 [1987] [other internal citation omitted]). "Testimony may be relevant and even highly useful but still not strictly necessary. A finding of necessity takes into account such factors as the significance of matters, weight of the testimony, and availability of other evidence" (*Morgasen*, 174 AD2d 656, 656). "The party seeking to disqualify a law firm or an attorney bears the burden on the motion" (*see Solow v Grace & Co.*, 83 NY2d 303[1994]; *Aryeh v Aryeh*, 14 AD3d 634 [2d Dept 2005]).

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Here, the defendant has failed to meet her burden, at this stage, of showing that testimony by Mr. Palumbo is necessary in this action alleging defamation and tortious interference with a business, particularly in view of the valued right of plaintiffs to have an attorney of their choosing and where discovery is far from complete. Accordingly, defendant's motion is denied, without prejudice to a subsequent motion after discovery has been completed at a later stage in the proceedings.

The foregoing constitutes the decision and order of the Court.

Dated: 5/31/2019



SANFORD NEIL BERLAND
A.J.S.C.