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

**PRESENT:** **HON. ALEXANDER TISCH** **PART** **18**

***Justice***

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BARRY HONIG,

Plaintiff,

- v -

TERI BUHL,

Defendant.

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**INDEX NO.** 155270/2021

**MOTION DATE** 06/17/2021

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 12, 16, 17, 18, 19, 20, 21, 22, 23

were read on this motion to/for PREL INJUNCTION/TEMP REST ORDR.

Plaintiff commenced the instant action on June 1, 2021 asserting libel and slander, tortious interference with business relationships, trade libel, claims under New York Civil Rights Law §§ 50-51 and a permanent injunction.

The complaint alleges that between 2016 and 2017, defendant published articles that included false allegations about plaintiff. Plaintiff filed a lawsuit against defendant in the U.S. District Court for the Middle District of North Carolina regarding the same, which resulted in a confidential settlement agreement on or about January 3, 2018. The settlement agreement stated that defendant was to provide advance notice to plaintiff's counsel about the subject matter of any future articles about plaintiff so as to give plaintiff an opportunity to comment before the articles were published.

Plaintiff alleges that defendant published an article on her website, teribuhl.com, on October 22, 2020 entitled "Barry Honig allegedly set up Undisclosed promotion in Majesco $Cool $PTE to influence Stock price" (the October 2020 Article) (see NSYCEF Doc No. 5).

Plaintiff claims that, despite due demand for retraction, it has not been taken down.[1] Plaintiff also alleges that defendant published another article on or about May 11, 2021 entitled "Barry Honig promoted Jeff Auerbach gets Three Months Jail in stock Kickback Scheme" (the May 2021 Article) (see NYSCEF Doc No. 6).

At the same time the action was filed, plaintiff made the instant motion that moves for a preliminary injunction (1) compelling and directing the defendant to remove the articles published on or about October 20, 2020 and May 11, 2021 in which she allegedly makes false and libelous statements about plaintiff; (2) compelling and directing defendant to print a retraction for both the October 20, 2020 and May 11, 2021 articles; and (3) precluding defendant from publishing any such future libelous statements against plaintiff (see NYSCEF Doc No. 12). The Court denied a temporary restraining order when it signed the order to show cause, and now denies the application.

"A 'prior restraint' on speech is 'a law, regulation or judicial order that suppresses speech—or provides for its suppression at the discretion of government officials—on the basis of the speech's content and in advance of its actual expression'" (Ash v Board of Mgrs. Of the 155 Condominium, 44 AD3d 324, 324-25 [1st Dept 2007], quoting United States v Quattrone, 402 F3d 304, 309 [2005]). "Prior restraints on speech are "the most serious and the least tolerable infringement on First Amendment rights," and "any imposition of prior restraint, whatever the form, bears a heavy presumption against its constitutional validity" (Brummer v Wey, 166 AD3d 475, 476 [1st Dept 2018], quoting Ash, 44 AD3d at 324). "Although the prohibition against prior restraint is not absolute, any restraint on speech . . . may be imposed only in the most

[1] The complaint does not allege that defendant failed to comply with the settlement agreement.

'exceptional cases'" (Porco v Lifetime Entertainment Services, LLC, 116 AD3d 1264, 1265-67 [3d Dept 2014] [citations omitted]).

Here, the relief sought clearly constitutes a prior restraint as it would infringe upon defendant's constitutionally protected rights to publish articles about plaintiff. Plaintiff failed to demonstrate the exceptional circumstances that warrant such injunctive relief here, i.e., that "the speech sought to be restrained is 'likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest'" (Brummer, 166 AD3d at 476, quoting Rosenberg Diamond Dev. Corp. v Appel, 290 AD2d 239, 239 [1st Dept 2002]; see Porco, 116 AD3d at 1266 ["Censorship in advance of publication will be constitutionally tolerated only upon 'a showing on the record that such expression will immediately and irreparably create public injury'"], quoting People ex rel. Arcara v Cloud Books, 68 NY2d 553, 558 [1986]). The Court finds that this applies to relief sought prospectively and as to the already-published articles (see, e.g., Brummer, 166 AD3d 475; Garcia v Google, Inc., 786 F3d 733, 746-47 [9th Cir 2015]).

"In addition to the First Amendment's heavy presumption against prior restraints, courts have long held that equity will not enjoin a libel" (Metro. Opera Ass'n, Inc. v Local 100, Hotel Employees and Rest. Employees Intern. Union, 239 F3d 172, 177 [2d Cir 2001]; Brummer, 166 AD3d at 477 ["we reiterate that, although it may ultimately be determined that defendants have libeled plaintiff, '[p]rior restraints are not permissible . . . merely to enjoin the publication of libel'"], quoting Rosenberg, 290 AD2d at 239). To be sure, the element of irreparable harm in the absence of an injunction would "fail[] because plaintiff has an adequate remedy at law, i.e., post-publication damages" (Ramos v Madison Sq. Garden Corp., 257 AD2d 492, 492 [1st Dept 1999]).

Although plaintiff relies on provisions of the confidential settlement agreement in support of the injunction, arguing that defendant contractually limited her right to free speech, those arguments do not appear to have been made in the moving papers and are improperly asserted for the first time in reply (see Ritt v Lenox Hill Hosp., 182 AD2d 560, 562 [1st Dept 1992]). Indeed, there is no cause of action for breach of settlement agreement (see NYSCEF Doc No. 17 at 10, n 1). Even if the Court were to consider the settlement agreement provisions, plaintiff's requested relief appears to go beyond the agreed-upon terms, which would still constitute a prior restraint (see, e.g., Metro. Opera Ass'n, Inc., 239 F3d at 176 [noting a broad preliminary injunction may put the speaker at risk of "contempt sanctions for speech that may ultimately, after full appellate review, be found constitutionally protected"]).

Accordingly, it is hereby ORDERED that the motion is denied; and it is further

ORDERED that defendant answer or otherwise respond to the complaint within 30 days from entry of this order.[2]

This constitutes the decision and order of the Court.

11/5/2021
DATE

ALEXANDER TISCH, J.S.C.

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| CHECK ONE: | [ ] | CASE DISPOSED | | [X] | NON-FINAL DISPOSITION | | |
| | [ ] | GRANTED | [X] DENIED | [ ] | GRANTED IN PART | [ ] | OTHER |
| APPLICATION: | [ ] | SETTLE ORDER | | [ ] | SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | [ ] | INCLUDES TRANSFER/REASSIGN | | [ ] | FIDUCIARY APPOINTMENT | [ ] | REFERENCE |

[2] If/when issue is joined, the parties may e-mail SFC-Part18-Clerk@nycourts.gov to request a preliminary conference.