At the term of the Supreme Court of the State of New York, held in and for the County of Dutchess, at 10 Market Street, Poughkeepsie, 12601 on December 17, 2021

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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KENNETH M. STENGER, PAUL ACKERMANN, MATTHEW D. KENNEDY, and DAVID A. SEARS,

Plaintiffs,

-against-

Index No.: 2020-50731

DECISION AND ORDER
Motion Sequence 2

DOUGLAS D. DEMASI, SR. and PATRICIA A. DEMASI,

Defendants

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Greenwald, J.

The following documents NYSCEF Doc. Nos. 1-98 were considered by the Court in deciding Plaintiff's Notice of Motion for Default Judgment:

RELEVANT BACKGROUND

By Decision and Order (Greenwald, J.) dated October 8, 2020, Defendant Patricia DeMasi, was directed to submit opposition to Plaintiff's Notice of Motion for Default Judgment and this matter was scheduled for conference on October 29, 2020. It was perceived that this matter may have been able to be resolved through conference. However due to protocols limiting in-person court appearances, the matter was repeatedly adjourned and having no future date it is best to resolve the pending matter by decision.

Plaintiffs commenced the instant action against Defendants alleging claims in defamation, nuisance, prima facie tort for incidents during December 2018 through January 2020. Plaintiffs allege that in December 2018 Defendants began to publish false statements by way of affixing billboards onto the Defendants car in public places. Thereafter, approximately in April 2019 Defendants also added pictures of the Plaintiff to the signs. On or about October 2019, Plaintiff's

allege Defendants added more false statements to the signs. Plaintiff labels the following statements as "False Statements" and are found in Plaintiff's Exhibits A -C:

"FACT THESE PEOPLE SEVERELY ABUSED MY & HURT MY WIFE, stating the names of the Plaintiffs with the following words beside them "ATTORNEY-ABUSIVE-LIAR-CORRUPT-COMMITTED FRAUD or ATTORNEY-LIAR-CORRUPT." *See Exhibit A.*

"100% CERTIFIED DOCUMENTED FACT, RIPPED US OFF-$291K, KEN STENGER-OUR ATTORNEY SOLD US OUT TO PAUL ACKERMAN-BEEKMAN ATTY, DAN O'NEAL SELECTIVE INS ATTY" (See Exhibit B)

"100% CERTIFIED DOCUMENTED FACT, LYING-CROOKED DIRTBAG ATTYS MATTHEW D. KENNEDY, DAVID A. SEARS 100% CERTIFIED DOCUMENTED FACT, RIPPED US OFF-$291K, KEN STENGER-OUR ATTORNEY SOLD US OUT TO PAUL ACKERMAN-BEEKMAN ATTY, DAN O'NEAL SELECTIVE INS ATTY" (See Exhibit C)

The public places which Plaintiffs allege Defendants published these signs were on Market Street, in the downtown area of Poughkeepsie, New York; on Route 9 at the Old State Road intersection in Wappingers Falls, New York near Kenneth Stenger's office; and other highly visible locations in Dutchess County.

Plaintiffs filed a Notice of Motion for Partial Summary Judgment (Motion Sequence 2) for summary judgment on the first cause of action: defamation/libel per se; the second cause of action: nuisance and third cause of action: prima facie tort and to enjoin Plaintiff from publishing "False Statements." Plaintiffs also seek legal damages, special damages and attorneys' fees, disbursements and costs.

Plaintiffs assert that they are entitled to partial summary judgment as there are no clear triable issues of fact that exist. Plaintiffs claim that Defendants False Statements are libel per se, as the statements are obviously false, and Defendants supposed facts are completely removed from reality. Plaintiffs argue that since Defendants admit to publishing these statements via billboard, there is no dispute. Plaintiffs argue that there is no privilege or permission afforded to Defendants to publish said statements. Plaintiffs contend that Defendants statements are not an opinion but unqualified statements purporting accuracy, and not protected free speech.

Defendant, Douglas DeMasi, adamantly states that Patricia DeMasi, should not be named or involved in this action, as he asserts Mrs. DeMasi was not involved and Plaintiffs do not submit

proof that Mrs. DeMasi was present at any site where the billboards were seen. Defendant admits that the billboards were affixed to his vehicle and that his presentment of such was his peaceful protest against the attorneys who were involved in the matter relating to a drainage easement and his property. Defendant contends that the signs were with him in various places in Poughkeepsie, Wappingers, Town of Beekman, Fishkill, Lagrangeville and Pleasant Valley. Defendant does not deny his statements and asserts that his perspective is that his attorney conspired with the other attorneys to pay him the least amount and obtain the most benefit for the Town of Beekman and the other parties involved. Defendant argues that he started his protest with the signs in March 2019 and that after February 24, 2020, he no longer had the signs up anywhere. Defendant names Kenneth Stenger, Esq. (referred to as Kne) as his prior attorney which he believes sold him out. Defendant names Paul Ackerman, Esq. as the Town of Beekman's attorney involved when the issue occurred, and Dan O'Neal is named as the attorney for Selective Insurance, the insurance company also involved in the matters concerning his property.

It is unclear from Defendant's account the roles that Matthew Kennedy or David Sears had in the drainage easement issue. In fact, Plaintiff, Kenneth Stenger asserts that the issue he represented Defendants was related to and erroneous tree-cutting on the Defendants property by the Town of Beekman, and that Kennedy and Sears had no roles in this matter. Plaintiff contends that Kennedy, was the Beekman Town Supervisor at that time and David Sears were involved with Defendant on another unrelated matter as Town Attorney. In reply, Plaintiffs decline to respond to Defendant's opposition. However, Stenger, denies the allegation of inappropriately touching Mrs. DeMasi.

DISCUSSION

It is well settled that to succeed on a motion for summary judgment, the movant must demonstrate with sufficient proof the absence of any material issues of fact, establishing its entitlement to judgment as a matter of law. Upon meeting this burden of proof, the burden shifts to the opponent to demonstrate that the existence of triable issues of fact through legally sufficient evidence. If there are triable issues of fact present, summary judgment must be denied. *See,* Winegard v. New York Med Ctr. 64 N.Y.2d 851, 853; *see also,* Alvarez v. Prospect Hosp. 68 N.Y.2d 320, 324(1986). The drastic remedy of summary judgment should be granted only if there

are no triable issues of fact. The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. Additionally, in determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmovant. *See,* Pearson v Dix McBride, LLC, 63 A.D.3d 895, 895 (2d Dept 2009) (internal citations omitted).

Libel Per Se

The elements of a cause of action to recover damages for defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se. The complaint must set forth the particular words allegedly constituting defamation, and it must also allege the time when, place where, and manner in which the false statement was made, and specify to whom it was made. *See,* Epifani v Johnson, 65 A.D.3d 224, 233 (2nd Dept 2009) *citations omitted.*

The elements of libel are: [1] a false and defamatory statement of fact; [2] regarding the plaintiff; [3] which are published to a third party and which [4] result in injury to plaintiff. Certain statements are considered libelous *per se.* They are limited to four categories of statements that: [1] charge plaintiff with a serious crime; [2] tend to injure plaintiff in its business, trade or profession; [3] plaintiff has some loathsome disease; or [4] impute unchastity. Where statements are libelous *per se,* the law presumes that damages will result, and they need not be separately proved. *See,* Penn Warranty Corp. v DiGiovanni, 10 Misc. 3d 998, 1002-03 (Sup. Ct. 2005).

Whether particular words are defamatory presents a legal question to be resolved by the court in the first instance. The words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader, and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction. *See,* Aronson v Wiersma, 65 N.Y.2d 592, 593-94 (1985).

Since falsity is a necessary element of a defamation cause of action and only facts are capable of being proven false it follows that only statements alleging facts can properly be the subject of a defamation action. It is the libel plaintiff's burden to show the falsity of factual assertions. Thus, an expression of pure opinion is not actionable, no matter how vituperative or unreasonable it may be. In distinguishing between facts and opinion, the factors the court must

consider are (1) whether the specific language has a precise meaning that is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether the context in which the statement appears signals to readers or listeners of that the statement is likely to be opinion, not fact. The essential task is to decide whether the words complained of, considered in the context of the entire communication and of the circumstances in which they were spoken or written, may be reasonably understood as implying the assertion of undisclosed facts justifying the opinion. *See,* Greenberg v Spitzer, 155 A.D.3d 27, 41-42 (2nd Dept. 2017); *see also,* Immuno AG. v Moor-Jankowski, 77 N.Y.2d 235, 245 (1991).

The court will not pick out and isolate particular phrases but will consider the publication as a whole. The publication will be tested by its effect upon the average reader. The language will be given a fair reading and the court will not strain to place a particular interpretation on the published words. The statement complained of will be read against the background of its issuance' with respect to 'the circumstances of its publication. It is the duty of the court, in an action for libel, to understand the publication in the same manner that others would naturally do. The construction which it behooves a court of justice to put on a publication which is alleged to be libelous is to be derived as well from the expressions used as from the whole scope and apparent object of the writer. *See,* James v Gannett Co., Inc., 40 N.Y.2d 415, 419-20 (1976).

Plaintiffs fails to meet its burden of proof, to demonstrate the falsity of the statements published by the Defendants, which are needed to prove libel per se and to grant summary judgment in its favor. Plaintiffs each provide an affidavit giving their account of their involvement or interaction with Mr. DeMasi, as well as a portion of an uncertified transcript, as proof that Mr. DeMasi's claims are false. However, it fails to do so.

First, there is a triable issue of fact just in regard to whether the parties are referencing the same incident which these published statements are based. Plaintiffs assert that this has to do with erroneous tree-cutting on the DeMasi property, but Mr. DeMasi appears to argue that this is more about the resolution regarding the drainage easement. It is unclear whether the two issues are indeed the same or related, thus creating a triable issue of fact. Nonetheless there is no evidence demonstrating that Mr. DeMasi's statements regarding the attorneys' involvement as to the tree-cutting issue or the drainage easement are false. Plaintiff does not present any stipulation of settlement, demonstrating the terms of the agreement or proof that Defendants understood and agreed to the terms of the resolution of the tree cutting or the drainage easement, or give a basis

why the Court should deem Mr. DeMasi's statements about the attorneys, at least in regard to their dealings regarding the tree-cutting or drainage easement, to be false. While Plaintiff asserts that the statements, are obviously false, nothing is presented to demonstrate that the issue was handled fairly by the attorneys, for this Court to conclude or use to draw that conclusion. There is no proof demonstrating that Defendants statements that they were "ripped off," "sold out," or "abused or hurt" or any other statements made by Defendants are false. This not to contend that the statements published by Defendants are true, but merely a matter of fact that the burden has not been met to establish the falsity of the statements.

Although Plaintiffs allege that Kennedy and Sears are not involved in the tree-cutting or drainage easement issue, both parties assert that there were other dealings with Mr. DeMasi, regarding a fence and there is no proof to demonstrate who that issue was resolved fairly, so as to prove the falsity of the statements of the Defendants. As to Plaintiff's first cause of action, libel per se, Plaintiffs fail to eliminate all triable issues of fact on this issue.

Nuisance

Plaintiffs fail to articulate the theory of nuisance which their claims are based. However, both private and public nuisance require an element of interference that is caused by the conduct of another and either causes damage to or affects the public or public place or interferes with the use or enjoyment of one's land. Plaintiffs fail to demonstrate what they claim to be the interference, or that it caused damage or affected the public or one's use or enjoyment of the land. Even as these signs were in public places such as the roadways, thoroughfares of Dutchess County and courthouses where the attorneys' practice, Plaintiffs do not address or demonstrate the elements of nuisance, so as to maintain this cause in the action or warrant a grant summary judgment on this issue.

Prima Facie Tort

The requisite elements for a cause of action sounding in prima facie tort include (1) intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, (4) by an act or series of acts which are otherwise legal. An element of a prima facie tort cause of action is that the complaining party suffered specific and measurable loss, and central to a cause

of action alleging prima facie tort is that the plaintiff's intent was motivated solely by malice. *See,* Diorio v Ossining Union Free School Dist., 96 A.D.3d 710, 712 (2nd Dept 2012).

Upon review Plaintiffs have not articulated any individual or corporate harm, if any, suffered by Defendants' conduct. Plaintiffs are fully aware of the circumstances and facts, as this ordeal about the published statements initiated from the erroneous cutting of Defendants' trees, a wrong against the Defendants, which in their eyes did not get properly rectified. Even when considering that Defendants' perspective may be jaded, this Court is prevented from labeling the conduct to be solely malicious, especially in light of the fact that Defendants assert that they have not posted the signs anywhere since late February 2020, around the same time this action was initiated. Without a demonstration of harm, or basis to prove malice, the elements of prima facie tort are not met. Thus, Plaintiff has not established a basis to be granted summary judgment on this issue.

Permanent Injunction

To establish, prima facie entitlement to a permanent injunction, a plaintiff must demonstrate: (a) that there was a violation of a right presently occurring or threatened and imminent; (b) that he or she has no adequate remedy at law; (c) that serious and irreparable harm will result absent the injunction and (d) that the equities are balanced in his or her favor. *See,* Intl. Shoppes v At the Airport, 131 A.D.3d 926, 938 (2nd Dept. 2015).

Plaintiffs do not specifically identify the harm suffered, violation or the serious or irreparable harm, especially in light of the billboards no longer being posted, at least according to Defendants since February 24, 2020, and there is no proof to contradict the statement. As such, this issue is deemed moot.

CONCLUSION

For clarity, Plaintiffs' Motion Sequence 1, for default judgment is deemed moot, as it remained open, only as to Patricia Demasi, who thereafter submitted a response. As to Motion Sequence 2, for partial summary judgment, Plaintiffs have not met the burden of proof to establish that there are no triable issues of fact, as to the first cause of action: libel per se; the second cause of action: nuisance, the third cause of action: prima facie tort and for permanent injunction. Thus,

partial summary judgment as to the first, second and third causes of action in the Plaintiff's complaint is **denied.** The issue for permanent injunction is deemed moot.

Accordingly, it is hereby,

ORDERED, that Plaintiff's Motion for partial summary judgment as to the first, second and third causes of action in the Plaintiff's complaint is denied; and it is further

ORDERED, that Plaintiff's application for a permanent injunction is deemed moot

Any relief not specifically granted herein is denied.

The foregoing constitutes the decision and order of this Court.

Dated: December 17, 2021
Poughkeepsie, New York

ENTER:

Hal B. Greenwald

Hon. Hal B. Greenwald, J.S.C.

CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

When submitting motion papers to the Honorable Hal B. Greenwald's Chambers, please do not submit any copies. Please submit only the original papers.

cc: Michael V. Caruso, Esq.
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