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Document Type: **ORDER - SUMMARY JUDGMENT**

Receipt Number:

Plaintiff	Defendant
MASSA CONSTRUCTION INC	MEANEY, JAMES

Fees

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STATE OF NEW YORK
SUPREME COURT COUNTY OF ONTARIO
MASSA CONSTRUCTION, INC.,

Plaintiff,

-vs-

JAMES MEANEY a/k/a The Geneva Believer,

Defendants.

ORDER UPON MOTION FOR SUMMARY JUDGMENT

Index No.:126837-2020

Massa Construction, Inc. commenced this action by filing a Complaint against James Meaney, a/k/a The Geneva Believer alleging defamation and libel *per se* in connection with a series of on-line blogs published by James Meaney in The Geneva Believer. Defendant filed a Verified Answer with Affirmative Defenses and a Counterclaim for dismissal as a matter of law and costs and attorney's fees pursuant to Civil Rights Law §§70-a and 76-a. Plaintiff then filed an Amended Complaint with the same causes of action, presumably to comply with the strict pleading requirements of CPLR §3016(a). Defendant filed a Verified Answer and Counterclaim. Contemporaneously with the filing of the Amended Complaint, plaintiff requested a temporary restraining order pursuant to CPLR §6313(a) requiring defendant to remove the posts and to refrain from additional posts. That application was denied by the Decision & Order of this court dated May 13, 2020. Plaintiff filed a Notice of Appeal regarding that Decision & Order.

Defendant filed a motion for summary judgment pursuant to CPLR §3212(h). In support thereof, defendant filed a Memorandum of Law and Affidavit of James Meaney, Amended Affidavit of James Meaney. Plaintiff responded in opposition by Memorandum of Law. Defendant submitted a Reply Brief in further support of the motion for summary judgment with the Affidavit of Michael J. Grygiel, Esq. The motion was argued virtually on December 10, 2020 before the Hon. Brian D. Dennis with plaintiff represented by Sheats & Bailey, PLLC, Anthony C. Galli, Esq., of Counsel, and defendant was represented by Greenberg Traurig, LLP, Michael J. Grygiel, Esq., of Counsel, Tyler B. Valeska, Esq. and Robert Ward, third year law student associated with the Cornell Law School First Amendment Clinic. The Court reserved decision but invited additional submissions concerning the impact of the amendment to Civil Rights Law §76-a on this litigation. Defendant submitted a Sur-Reply Brief as well as additional, relevant case authority by letters dated January 4, 2021, March 2, 2021 and March 10, 2021. There were no additional submissions by plaintiff.

Massa is a well-established general contractor in Geneva, New York. It has been the successful bidder on a number of construction contracts with the City of Geneva. Payment on those contracts has been in excess of $4,000,000. James Meaney is the owner and publisher of The Geneva Believer, a self-styled watchdog blog that critically examines the actions of the City of Geneva, including the necessity of construction projects and the bidding process related to those projects. At times, Meaney's critique of the City of Geneva has extended to its working relationship with Massa. Meaney opined concerning potential conflicts of interest between members of City Council and Massa and an employee of Massa. The articles that apply to Massa are a combination of references to City Council meetings, sound bites from meetings,

articles from other traditional news sources and documents received via FOIL requests. Meaney comments on those materials, raises questions concerning issues related thereto, occasionally includes unflattering so-called memes and raises questions he has about the relationship between Massa and the City of Geneva. Massa claims that these articles individually and cumulatively suggest that Massa obtains contracts with the City of Geneva by means of collusion, bribery, undue influence and favoritism. Meaney claims he is simply compiling documents from other news sources, FOIL information and Council meeting minutes while raising the question for the readers to draw their own conclusion.

Defendant brings this motion for summary judgment pursuant to CPLR §3212(h) which states, in part: "A motion for summary judgment, in which the moving party has demonstrated that the action…subject to the motion is an action involving public petition and participation, as defined in …[CRL §76-a(1)(a)], shall be granted unless the party responding to the motion demonstrates that the action…has a substantial basis in fact and law…". Thus, the critical threshold issue is whether plaintiff's action involves "public petition and participation".

As amended effective November 10, 2020, Civil Rights Law §76-a(1)(a) states that "An 'action involving public petition and participation' is a claim based upon: (1) any communication in a place open to the public or a public forum in connection with an issue of public interest; or (2) any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition." At the time this action was commenced, the amendments to §76-a had not yet been adopted. For context, former CRL §76-a(1)(a) was more specific in that the definition was an action "brought by a public applicant or permittee, and it is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission." In keeping with that theme, former §76-a(1)(b) defined a "'public applicant or permittee' as any person who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body, or any person with an interest connection or affiliation with such person that is material related to such application or permission." Given the nature of Massa's business and the significant number of projects it has bid upon, been awarded and completed for the City of Geneva, it is clear that Massa met the more restrictive definition of "public applicant or permittee" under the former law and there is no doubt that this is an "action involving public petition and participation" under the amended law. It is equally clear that the amendment was intended to be retroactive as both state and federal courts have made that determination. See *Sackler v. American Broadcasting Companies, et al.*, Index No.: 155513/2019 (Sup Ct, NY County, March 9, 2021), *Palin v. NYT, et. al.*, 17-cv-485s (JSR), SDNY December 29, 2020 and *Coleman v. Grand*, 18-cv-5663 (ENV)(RLM) EDNY February 26, 2021.

Having established that NY's Anti-SLAPP statute applies to Massa, the burden then shifts to Massa to establish by clear and convincing evidence that its claims of defamation and libel per se "… have a substantial basis in fact and law fact…". A key component to this analysis is Massa's burden of establishing "the falsity of the factual assertions." *Immuno AG v. Moor-Jankowski*, 77 NY2d 235 at 245 (1991). This burden applies to express assertions of fact as well as implied assertions of fact. *Id* at 247.

Generally, to establish whether a statement was defamatory, plaintiff must establish that the statement tended to expose the plaintiff to public hatred, contempt, ridicule or disgrace. Moreover, would the statement lead the average person in the community to form an evil or bad opinion of the plaintiff? However, not every unpleasant or uncomplimentary statement is defamatory. See *NY Patter Jury Instr.-Civil 3:24*.

With respect to the articles referred to in the Amended Complaint, Meaney clearly sets out the facts via reference to public documents, City Council Meeting minutes, video of Council meetings, statements documented and attributable to the speakers, reputable traditional news sources, responses to FOIL requests, verifiable observations and information generally available in the community. Massa's allegations are conclusory at best and are insufficient to establish those statements are false. *Roche v. Hearst Corp.*, 53 NY2d 767, 769 (1981). In New York, truth is still a complete defense in defamation actions. *Ryan v. New York Tel. Co.*, 62 NY2d 494 (1984) and a determination that the facts are substantially true is sufficient to overcome a defamation claim. *Dibble v. WROC TV Channel 8*, 142 AD2d 966,967 (4th Dept. 1988). Taking those factual assertions at face value and in consideration of their independent basis, Massa fails to meet its threshold of establishing those factual assertions are false. Therefore, Massa cannot sustain its burden of proof.

Having found that Meaney's recitation of facts are substantially true, for arguments sake, the Court will explore whether a cause of action for defamation by implication is viable. Defamation by implication is premised not on direct statements but on false suggestions, impressions and implication arising from otherwise truthful statements. *Stepanov v. Dow Jones & Co., Inc.*, 120 AD3d 28 (1st Dept. 2014); *Martin v. Daily News L.P.*,121 AD3d 90 (1st Dept. 2014). Massa must make a "rigorous showing" that although the factual assertions are substantially true, the defamation was by implication, and that a reasonable person could read the statement as a whole and glean both a defamatory inference as well as Meaney's clear intent to intend and endorse that inference. *Stepanov v. Dow Jones & Co., Inc.*, supra. Massa's position is that the articles taken as a whole create the intended inference that it was awarded contracts by the City of Geneva by means of collusion, bribery, undue influence and favoritism. Although one could certainly argue that Meaney believes the inferences, the articles themselves do not naturally lead a reader to the same conclusion. For this reason, Massa fails to make the required "rigorous showing".

Notwithstanding any inferences Meaney may have intended, New York still finds matters of opinion to be nonactionable. More specifically, the New York Court of Appeals has held that the following factors should be considered in distinguishing between fact and opinion: (1) whether the specific language used has a precise meaning which is readily understood or whether it is indefinite and ambiguous; (2) whether the statement is capable of being objectively characterized as true or false; (3) the full context of the entire communication or the broader social context surrounding the communication, including any custom or convention that might signal to the audience that the communication is opinion. See *NY Patter Jury Instr.-Civil 3:24*; *Davis v. Boeheim*, 24 NY3d 262 (2014).

As already discussed, the factual allegations set forth in the posts are substantially true. Those facts in and of themselves are neither indefinite nor ambiguous. The real issue is whether

the questions Meaney raises concerning the relationship between City Council and Massa are matters of opinion. It is clear from the articles that Meaney is submitting facts and then asking the readers to think and draw their own conclusions. As a practical matter, like Op Ed pieces in traditional media, the articles published in The Geneva Believer involving matters of public concern serve to signal to the reader that they are expressions of opinion. *Brian v. Richardson*, 87 NY2d 46 (1995); *Immuno AG v. Moor-Jankowski*, 77 NY2d 235 at 245 (1991). This Court finds that Meaney's questions and suggestions reflect his opinion while encouraging readers to draw their own conclusions.

Slightly different from the articles themselves are several photographs included in the publications which are unflattering to City Council, then-councilman Eddington and Massa. However, in the media world in which we live, those augmented photographs are clearly hyperbole and opinion and therefore nonactionable. Statements taking the form of epithets, satire, parody and hyperbole are generally treated as opinions and therefore not actionable. *DRT Const. Co., Inc., v Lenkei*, 176 AD2d 1229 (4th Dept. 1991).

As a further consideration, Civil Rights Law §76-a(2) reads, in part, "in an action involving public petition and participation, damages may only be recovered if the plaintiff, in addition to all other necessary elements, shall have established by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false, where the truth or falsity of such communication is material to the cause of action at issue." Parsing out Meaney's nonactionable opinions leaves articles that are substantially true. Recovery would be barred by Massa's failure to establish that the statements of fact are either untrue, made with reckless disregard of the truth or with malice.

Defendant has filed a counterclaim for damages pursuant to Civil Rights Law §70-a. Considering the Court's ruling below, Meaney is entitled to an award of costs and attorneys' fees pursuant to §70-a(1)(a). However, the Court does not find that either compensatory or punitive damages are appropriate.

NOW, THEREFORE, UPON the pleadings, motions, exhibits, Memoranda of Law, oral argument of Counsel and post-argument submissions, it is hereby

ORDERED, that the Defendant's motion for summary judgment pursuant to CPLR §3212(h) is hereby granted in all respects, with costs; and it is hereby further,

ORDERED, that the Defendant's counterclaim for damages pursuant to Civil Rights Law §70-a is hereby granted as follows:

1) Plaintiff shall pay costs and disbursements pursuant to §70-a(1)(a); and

2) Defendant shall submit an itemized accounting for attorneys' fees incurred in this action directly to the Court and Plaintiff's Counsel within thirty (30) days of entry of this Order. Plaintiff shall have two weeks thereafter to comment upon the requested fees. The Court will then make a determination based upon the submissions alone.

SIGNED this 10th day of May 2021, in Canandaigua, New York.

ENTER.

HON. BRIAN D. DENNIS
Acting Supreme Court Justice