

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND: TRIAL TERM PART 9

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DOMENIC GATTO and ATLANTIC EXPRESS  
TRANSPORTATION CORP.,  
PLAINTIFF

-against-

INDEX NO.

JERRY CAPECI, individually and D/B/A  
GANG LAND NEWS and/or GANGLANDNEWS.COM,  
DEFENDANT  
-----

DATED: 2/8/08  
355 Front Street  
Staten Island, New York 10304

B E F O R E:

HONORABLE ANTHONY I. GIACOBBE, JSC

A P P E A R A N C E S:

SILVERMAN SCLAR SHIN & BYRNE PLLC  
Attorney for Plaintiff  
381 Park Avenue South  
New York, N.Y.

BY: MICHAEL J. WEINER, ESQ.,

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Staten Island, N.Y.

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Attorney for Defendant  
260 Madison Avenue  
New York, N.Y.

RICHARD ROMEO  
SENIOR COURT REPORTER

1 THE COURT CLERK: This is Dominic Gatto and  
2 Atlantic Express Transportation Corporation against Jerry  
3 Capeci and Gang Land News and Ganglandnews.com.

4 MR. WEINER: Michael Weiner, Silverman, Sklar,  
5 Shin and Byrne for the plaintiffs Dominic Gatto, Atlantic  
6 Express Transportation Corporation with my co counsel.

7 MR. RUFFINI: Anthony Ruffini, 1491 Richmond  
8 Road, Staten Island, New York 10304.

9 Good afternoon, Your Honor.

10 THE COURT: Afternoon.

11 MR. MARGULIS-OHNUMA: Zachary Margulis-Ohnuma,  
12 260 Madison Avenue New York New York 10016.

13 I am entering-- I'm hear at the request of the  
14 Court. I represent Mr. Capeci in a general-- as a general  
15 matter. I have not been retained on this case and he's  
16 not been served on this case.

17 So, I guess I'm entering a special limited  
18 appearance just for the purpose of today's proceeding so  
19 that I can express Mr. Capeci's point of view with  
20 respect to this limited application for order to show  
21 cause.

22 THE COURT: All right, this is application  
23 limited to the request for temporary restraining order in  
24 connection with an order to show cause submitted to this  
25 court for signing. And you're here after notification of

1 the court whether it's your pleasure to be here or not.

2 MR. MARGULIS-OHNUMA: Exactly, thank you.

3 THE COURT: Based on a correspondence that we  
4 were furnished with, dated January 23, 2008 between you  
5 and Mr. Silverman attorney where you indicated you  
6 represented Mr. Capeci, we notified you about this  
7 application. So you are here, you're going to speak for  
8 him; is that correct?

9 MR. MARGULIS-OHNUMA: That is correct, thank  
10 you.

11 THE COURT: All right.

12 THE COURT: All right Mr. Weiner is it?

13 MR. WEINER: Yes, Judge. As you know we are  
14 here today on-- did you want me to proceed?

15 THE COURT: Yes, I'm ready.

16 MR. WEINER: Here today pursuant to court rule  
17 to seal the file for a defamation suit brought by Dominic  
18 Gatto and Atlantic Express Transportation Corporation  
19 against the defendant Jerry Capeci for statements which  
20 Mr. Capeci admitted in his website but ia reprinted had  
21 on exhibit one of our affidavit of emergency submitted in  
22 support of this application, admitted was lifted from a  
23 court sealed affidavit. And the reason --

24 THE COURT: Excuse me, in your papers you  
25 don't indicate what court, who sealed it, anything. There

1 are no facts at all. I don't know what you're talking  
2 about.

3 MR. WEINER: Sir, if you look at the Exhibit  
4 Number 1, which is a print out from the website and in  
5 fact contains the defamatory comments that we will be  
6 suing on, Mr. Capeci says, expressly states that his--  
7 the source of his information are, in the first paragraph  
8 says, according to sealed court documents.

9 Then thereafter he refers to an affidavit of a  
10 Robert Bering, although I believe the spelling of Mr.  
11 Bering's name --

12 THE COURT: Could you tell me what court, who  
13 sealed it?

14 MR. WEINER: He also on page three, Sir,  
15 indicates that the DA's office and letters were-- I'm  
16 having difficulty finding it, but I believe he indicates  
17 it's the New York County DA's office.

18 THE COURT: What court would that be? Federal  
19 court, state court?

20 MR. WEINER: Would be state court in  
21 Manhattan.

22 THE COURT: Do you know when this sealing took  
23 place and what judge sealed it?

24 MR. WEINER: We don't have that information  
25 handy. But that is what he represented. Since the file

1 is sealed in theory no one should have that information.

2 THE COURT: Just so the record is clear you're  
3 seeking a TRO in an action that is prospective or  
4 contemplated; it's not been commenced yet.

5 MR. RUFFINI: Yes. We have --

6 THE COURT: Mr. Ruffini, one person will speak.  
7 You may stand if you're more comfortable standing, but  
8 only one person will speak.

9 MR. RUFFINI: Thank you, Your Honor.

10 MR. WEINER: We prepared a summons and  
11 complaint. We intend to file it and provide a copy to  
12 our adversary.

13 The reason that this file needs to be sealed is  
14 to maintain the status of these false statements as court  
15 sealed files. The reason that the seal needs to be  
16 maintained is so that they preserve our right to sue for  
17 defamation if as in the present case they are being  
18 repeated with reckless disregard for their truth.

19 If the litigation file is not sealed, then any  
20 other member of the press can invoke their rights under  
21 Civil Rights Law section 74 and say that they have a  
22 privilege of fair reporting. And as long as they report  
23 them accurately, more or less be protected from the duty  
24 to investigate. And that is all that we are asking.

25 The reason that the law has this particular

1 landscape, as the Court would note is the case, the  
2 Shiles case that is cited in our brief, in papers.

3 What the Court of Appeals said in Shiles was  
4 that in general in a public proceeding there is an  
5 absolute privilege to repeat statements made in court  
6 documents. However, this privilege does not extend to  
7 sealed court documents. We don't want to reward the  
8 press for recklessly disseminating this material. If  
9 they do so, they do so at their peril and under the  
10 obligation to either perform a proper investigation or  
11 face damages.

12 And the possibility of losing this right is  
13 what we contend is good cause under the applicable court  
14 rule 216, 1 sub A.

15 And I would if it please Your Honor, I would  
16 yield some time to Mr. Ruffini to supplement my comments.

17 Not necessary, I take it? Thank you.

18 Sir, do you have any questions for me? I have  
19 finished my comments.

20 THE COURT: Not yet.

21 Do you wish to be heard?

22 MR. RUFFINI: Yes, Judge. Just very briefly.

23 THE COURT: Okay.

24 MR. RUFFINI: Your Honor, in essence if we were  
25 to bring the lawsuit, the summons and complaint that we

1 attached for your viewing, if we would bring that, we  
2 have to plead with reasonable particularity the  
3 statements that would justify the liable and/or slander  
4 and/or any other cause of action that we would like to  
5 bring against quote unquote "Gannlandnews.com" and Mr.  
6 Capeci.

7 Now they have exception, they have the  
8 newsworthy exception, which would mean that, well it's  
9 news, the public can have it. It's our first amendment  
10 right.

11 In fact, as counsel for Mr. Capeci said today  
12 on Gangland News, everybody knows this. This is the  
13 first amendment. I have copies for everybody today,  
14 specifically about this hearing today and the proposed  
15 lawsuit. That is on Gangland News.

16 So what we are concerned with, Judge is two  
17 things. First off, when we plead with reasonable  
18 particularity the statements that are in there, Gatto had  
19 either-- and I cannot affirm or deny, they said these  
20 statements in support of a wiretap application which is  
21 the statement that is reported on Gangland News.

22 But if we plead with particularity that does--  
23 one thing that does, first of all gives credence to their  
24 argument, and of course the truth is absolute defense to  
25 any fraud case. But gives credence to them because hey

1 look now it's in the summons and complaint or yes, I did  
2 say this, yes I was in the wiretap application.

3 You know court documents are sealed Judge for  
4 three reasons. First being protection of innocent  
5 target, especially on wiretaps. For example, if someone  
6 wants to wiretap me and the U.S. Attorney wants to  
7 wiretap me, someone has to make application. And they  
8 listen to my phone calls, don't investigate me, I'll  
9 never know that.

10 More importantly should never be leaked that I  
11 was a subject of a wiretap, because then my reputation  
12 would be compromised.

13 The second protection are for the police  
14 officers and the U.S. Attorneys Office and the FBI  
15 agents, anybody involved in the investigation.

16 But the most important, and this is what I  
17 would submit to the Court, the most important person that  
18 protects, protects the alleged informant or the person  
19 --and I hesitate to use that word informant, the person  
20 who files affidavit or affirmation in support of the  
21 wiretap application. Because it could be anybody. You  
22 know and if there is no mechanism in place that protects  
23 that person, then we'll never have anybody who  
24 cooperates. Never have anybody who's willing to give of  
25 themselves to go to the police department or FBI and say,



1       you know what, U. S. Attorney or FBI, I have information  
2       and I think there is a wrong out there. And this is what  
3       I know. So if you need that application here it is, so  
4       protects us.

5               So back to the argument saying Judge we are  
6       asking for basically a gag on the underlying, on the  
7       summons and complaint, the proposed lawsuit because if we  
8       plead with particularity it will either substantiate  
9       their claims, justify their newsworthy exception and more  
10      importantly it will give every other newspaper the  
11      ability now to say under the civil rights law and under  
12      their newsworthy exception, look this summons and  
13      complaint is a public document filed with the court, we  
14      have access to it in this summons and complaint that we  
15      plead with reasonable particularity, have these  
16      statements Gatto admits to it, I said this, I did this, I  
17      did that.

18             Moreover down the line we have depositions, we  
19      have a trial, that transcript is public document. Once  
20      again they can say now Gatto's going to be asked  
21      questions. I'm sure counsel, if he's retained will say  
22      Mr. Gatto, didn't you talk to the FBI on such and such a  
23      date? Didn't you rat so and so out? And now it's in a  
24      transcript. Now they're going to take that transcript  
25      and atlantic express owner Dominic Gatto admits ratting

1 out mob boss whoever. I can't see the name, I'm sorry, I  
2 don't have my glasses on.

3 But that is the argument, Judge. So we are  
4 asking simply at this point for the TRO until we have a  
5 full hearing and give Mr. Capeci's attorney opportunity  
6 to submit papers in opposition and of course us reply on  
7 a permanent injunction and more importantly on the  
8 permanent injunction which would be the gag order for the  
9 proposed lawsuit we are going to wait until your ruling  
10 Judge to file that lawsuit, basically so that we do not  
11 perpetuate the harm to Mr. Gatto.

12 That's all I have Judge. If you have any  
13 questions.

14 THE COURT: Seems to me you're here because  
15 there was something on the internet under the caption  
16 Ganglandnews on December 22.

17 MR. RUFFINI: Yes, Your Honor.

18 MR. WEINER: That is correct, Your Honor.

19 THE COURT: And the complaint is that article  
20 refers to information he obtained in violation of a court  
21 order from a court record.

22 MR. WEINER: That is correct.

23 THE COURT: Affidavit in there from the DA  
24 investigator.

25 MR. WEINER: Yes.

1 THE COURT: And that is what is giving rise to  
2 why you are here.

3 MR. WEINER: That is right.

4 THE COURT: Now you wants TRO in a lawsuit  
5 that is prospective. Just seems to me you ought to be  
6 someplace else seeking some remedy for the Court order  
7 that was violated for sealed record in another court.

8 MR. MARGULIS-OHNUMA: If I may clarify, I don't  
9 think there is any court order. Simply filed under seal.  
10 Wasn't affirmative order protecting it. I think there is  
11 a difference in this case it's a wiretap affidavit that  
12 was filed under seal and has now, you know, released --

13 THE COURT: In any events it was filed under  
14 seal by a court order it was leaked. Somebody got at it  
15 shouldn't have had it.

16 MR. MARGULIS-OHNUMA: Your suggesting there  
17 should be a remedy against the person who leaked it.

18 THE COURT: That is what it seems to me. I  
19 don't know what TRO will do to cure what's been done,  
20 except for you to go to some other court to seek a  
21 remedy. Whatever the remedy may be, I don't know.  
22 Whether it's by sealing or court order must be a remedy.  
23 Why would there be a sealing if it was okay to take it?

24 MR. WEINER: Very good, yes.

25 THE COURT: I thought so, that's why I asked.

1 MR. WEINER: I think it doesn't-- your  
2 assumption does run at variance to the authority  
3 construing the publication of court sealed documents.  
4 And what that authority says is that, is that an  
5 individual's right is the right to sue for liable and  
6 that in fact the first amendment protects an individual  
7 right a press person's rights to print material from  
8 whatever source, I think that is what the Court  
9 recognized in Shiles. The Court of Appeals --

10 THE COURT: You asked if I had a question and I  
11 asked it. Thank you. I shared that with you. I'm  
12 really not going to hear, we are not going to have a  
13 bouncing ball presentation. I'm sorry, decide which one  
14 of you will continue this argument.

15 MR. RUFFINI: Yes, Your Honor I'll --

16 THE COURT: Now I'll hear from Mr. Ohnuma.

17 MR. MARGULIS-OHNUMA: Your Honor, there is a lot  
18 there. I disagree with the reading of Shiles. I don't  
19 think is correct under the current state of the law, and  
20 I'll get to that. I want to get to sort of their  
21 strongest argument. First I think Your Honor I had it.

22 THE COURT: At the outset are you opposed to a  
23 TRO?

24 MR. MARGULIS-OHNUMA: I'm opposed to TRO. There  
25 is no reason in the world to permit a secret lawsuit to

1 be filed, which is what they're asking for. And the  
2 reason for it, in our view is that they wants to bully,  
3 and push around Mr. Capeci who's the equivalent of a solo  
4 practitioner, who's written things they don't like. They  
5 figure they can out spend him.

6 But let me let me address their basis for  
7 sealing. The only one I'm hearing here that I think you  
8 know needs to be addressed, really and that is that  
9 they're saying well if we don't seal it then we have to  
10 repeat these allegations that have been made against us  
11 on the public record and anyone can walk away, any  
12 reporter can then publish those.

13 The fact of the matter is there is something  
14 under the common law I haven't researched under New York  
15 law, is something called the A. P. Rule. Once something  
16 is published by for example a wire service, the  
17 republication of that is not actionable, so that anyone  
18 can go out now say Ganglandnews says these allegations  
19 are out there. And those allegations can be, you know,  
20 can be false and defamatory. But the person who  
21 republishes it based on having published it in  
22 Ganglandnews has a privilege there.

23 So there is no additional harm in the world by  
24 him having to specify on the public record what he  
25 doesn't like about what we wrote.

1           Also, just the fact of the matter, Your Honor  
2 anyone in this room go back to internet five minutes pull  
3 up Mr. Capeci's column, I don't hear them wisely asking  
4 for prior restraint of that column, that column is being  
5 published as we speak.

6           THE COURT: The same story is still available.

7           MR. MARGULIS-OHNUMA: Still available. It's  
8 still available. So putting --the additional harm of  
9 putting it -- and this is on the incorrect assumption  
10 that it's false and defamatory, which I don't agree with,  
11 obviously, but assuming arguendo that were the case,  
12 putting it, those specific allegations in court's papers  
13 has no incremental harm, it's available already and  
14 therefore there is really no justification at all for the  
15 extraordinary relief that they're looking for.

16           And again I, you know, I hate to question  
17 Counsel's motives, but I think that the real reason that  
18 they're asking for this extraditing relief is something  
19 that's been referred to as a SLAPP suit Strategic Lawsuit  
20 Against public Participation trying to shut up Jerry  
21 Capeci and it exhibits --

22           THE COURT: What did you call it?

23           MR. MARGULIS-OHNUMA: Strategic lawsuit against  
24 public participation, S. L. A. P. P.

25           And I think there has been courts in New York,

1 again I haven't, since I got onto this had a chance to  
2 research that term, has been used as something against,  
3 which the first amendment has to protect, because if a  
4 rich guy can send lawyers down to court to push around  
5 someone then your lone pamphleteer, which is what Jerry  
6 Capeci really is doesn't have the kind of protection that  
7 the first amendment affords. A big company can afford to  
8 fight these things. And I don't see them suing, you  
9 know, the Village Voice had a story about Gatto, maybe  
10 they will. I see threats, but they don't bother because  
11 they have deep pockets that can fund it. That is what  
12 this is about.

13 Let me just very briefly and I'll answer  
14 questions, I did get a chance, because the one case that  
15 they focused on in their papers is Shiles, which they say  
16 stands for the proposition that sealed papers in court  
17 generally are not-- don't enjoy the privilege in a liable  
18 suit that unsealed or published documents in court does.  
19 That's a false reading of Shiles. Shiles is very narrow.  
20 Shiles talks about the papers under the-- papers filed in  
21 a matrimonial suit subject to a specific sealing statute  
22 under the Domestic Relations Law. That is much narrower.

23 This is a wiretap affidavit. I defy, there is  
24 no authority that says that wire tap affidavit does not  
25 enjoy the privilege. In fact Shiles was decided a

1 Supreme Court case New York State Supreme Court case  
2 Gardener V Poughkeepsie Newspaper 68 misc. Second 169 or  
3 326 NYS 2nd, 913, ruled that sealed records of juvenile  
4 proceedings which are sealed for all of the same reasons  
5 that an affidavit, that Mr. Ruffini cited for wiretap  
6 affidavit to be sealed, that juvenile proceedings, the  
7 fact that they're sealed doesn't matter and information  
8 contained in there is privileged.

9 THE COURT: 68 misc. 2nd, what was the rest?

10 MR. MARGULIS-OHNUMA: 169.

11 THE COURT: What was the supp cite?

12 MR. MARGULIS-OHNUMA: 326 NYS 2nd 913.

13 I would also commend Your Honor to the case,  
14 there is a District Court case from Pennsylvania, United  
15 States District Court case, Pennsylvania talks generally  
16 about this privilege, it's called Medico V. Time Ins.,  
17 M. E. D. I. C. O. And it's 509 F. Supp. 2nd, I'm sorry  
18 F. Supp. 268. And very heavily goes through both the  
19 Common Law and the New York case law which is more  
20 developed actually than the Common law on this issue.  
21 And also concludes that information that came out of a  
22 leak was privileged under the common law.

23 If you look at page 275 and 276 of that cite  
24 Gardner is true while Shiles and Gardner kind of  
25 reconcile that. The point being in the end they're going



1 to lose this lawsuit. And you know they have to show.

2 THE COURT: I'm sorry one thing in the end--

3 MR. MARGULIS-OHNUMA: They're going to lose this  
4 lawsuit. They're not going to prevail. We might well  
5 seek costs, probably file for sanctions as frivolous, but  
6 they know this story is supported. They know they have  
7 to show knowingly false conduct, you know reckless  
8 disregard for the truth, which they can't show. This  
9 stuff is documented and Mr. Capeci has the documents and  
10 we'll be, you know will be deposing their client about  
11 that. They want to do it in secret so there not seen as  
12 the bullies that they are, that so they're not seen as  
13 trying to stifle public participation. And I don't think  
14 you should let them do it.

15 Thank you.

16 THE COURT: Mr. Ruffini?

17 MR. RUFFINI: Mr. Weiner will continue, Judge.

18 MR. WEINER: I did want to just circle back and  
19 address your specific question. I apologize for not  
20 addressing that directly. My understanding is that an  
21 individual can't go in and file a motion to invoke their  
22 rights before a criminal court. So I am not at all sure  
23 that we have a right to go in before the criminal court  
24 to invoke a civil remedy.

25 Secondly, notwithstanding my adversary's

1 comment, this particular application has nothing to do  
2 with his client's first amendment right to speak. We are  
3 not challenging that right. The right has discrete  
4 limits. You can't defame someone. And all we are  
5 invoking is, all we are asking the Court to do is  
6 preserve our right to file a defamation suit that meets  
7 the criteria. We admit there is steep criteria. Yeah  
8 vigorously disagree that we can't show that this garbage  
9 was reckless. All we are asking is for the opportunity  
10 to sue as many people as prints this garbage recklessly  
11 for damages and have an opportunity to proffer those  
12 damages without coming up against the barrier of civil  
13 rights law section 74.

14 Thank you, Sir.

15 THE COURT: Any response?

16 MR. MARGULIS-OHNUMA: Just briefly.

17 You know, absolutely has to do with first  
18 amendment right to speak, because this is trying to make  
19 it more expensive for him to speak. It's imposition on  
20 his ability to do his job, to publish his website.  
21 They're going to go out and sue mostly threaten to sue  
22 everyone who prints what they call garbage. They have a  
23 right to sue, but they have to do it publically just like  
24 everybody else.

25 THE COURT: There are many cases that deny a

1 TRO. I mean not ever defamation is entitled to sealing  
2 order. Why would this one be?

3 MR. WEINER: Because of the unique  
4 circumstances.

5 THE COURT: What is that?

6 MR. WEINER: That we are going to loose the  
7 right to sue for defamation based on the statements in if  
8 they're contained in our court pleadings where they were  
9 originally sealed. And that we are within the universe  
10 of folks that should enjoy the protection of that seal.  
11 It will eviscerate the effect of that seal. The second I  
12 file this complaint, this summons and complaint and that  
13 is the irreparable harm here that isn't true in the  
14 universe of defamation suits that exist out there.

15 THE COURT: What do you think?

16 MR. MARGULIS-OHNUMA: I think this is a run of  
17 the mill liable suit. We published information, they  
18 don't like it. We are continuing to publish it. We have  
19 a right to publish it. They have a right not to like it.  
20 And they can oppose it and publish their own information.  
21 But there is nothing, there is nothing in the world  
22 unusual about this. And yeah I agree with what Your  
23 Honor indicated, I don't-- this is undistinguished from  
24 any other liable suit where you have to set forth what  
25 you claim are the defamatory statements. And there is

1 nothing here that indicates-- let me be more specific.  
2 The fact that originally the information was sealed and  
3 is now public is irrelevant. The information is now  
4 public. You can go right on the website now, no harm  
5 having it sit in a court file somewhere.

6 THE COURT: Go ahead want to say more?

7 MR. WEINER: Just one more point. The argument  
8 that the information is somehow out there on the website  
9 so the damage is already done is a red herring.

10 THE COURT: It's true though, isn't it? I mean  
11 it's out there.

12 MR. WEINER: That it's out there is true.

13 THE COURT: It's out there.

14 MR. WEINER: Statements are absolutely false.

15 THE COURT: Continues to be there.

16 Mr. WEINER: It's out there, yes. The  
17 information is out there. But we-- if someone repeats it  
18 recklessly we have a right to sue for defamation. The AP  
19 rule isn't this giant protection for anyone who picks up  
20 the story off the internet and just repeats it. That is  
21 an incorrect proposition of law. And once it's in a--  
22 once it's in a court's file document it's enjoys the  
23 protection of the Civil Rights Law the special protection  
24 of the Civil Rights Law. And I think I did want to just  
25 direct your attention Your Honor's attention to paragraph

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MR. MARGULIS-OHNUMA: Okay.

THE COURT: On the TRO.

MR. MARGULIS-OHNUMA: That's it. I don't think it's further necessary to file in writing reserve our right.

THE COURT: Giving you the opportunity now on this issue if you choose to. I take it you do not?

MR. MARGULIS-OHNUMA: Right.

THE COURT: Okay and you do not?

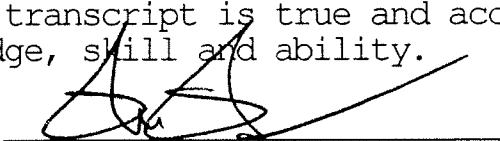
MR. WEINER: Yes.

THE COURT: All right decisions reserved.

MR. WEINER: Thank you Your Honor.

\*\*\*\*\*

I, Richard Romeo, a Senior Court Reporter, in and for the State of New York, do hereby certify that the foregoing transcript is true and accurate to the best of my knowledge, skill and ability.



Richard Romeo

(Certification valid only when signed in blue ink)