

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

DIETZ DEVELOPMENT, LLC, et al.)	
)	
Plaintiff,)	
)	
v.)	CL 2012-16249
)	
JANE PEREZ,)	
)	
Defendant.)	

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 JOHN T. STANTON
 CLERK, CIRCUIT COURT
 FAIRFAX, VA

OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

COMES NOW the Defendant, by counsel, and for her Opposition to Motion for Temporary Injunction states as follows:

FACTUAL BACKGROUND

In 2011, Jane Perez (“Ms. Perez”) bought a townhouse. As is often the case, the house needed some work after she bought it. She talked to several contractors about doing the work. The Plaintiff, Mr. Dietz, happened to have gone to high school with Ms. Perez. They were not close friends, but reconnected through Facebook. Mr. Dietz had his own contractor’s business and offered to do the work. Although no formal contract was signed by the parties, the parties agreed on a scope of work and a price, and Mr. Dietz and his company started on the job in June, 2011.

Ms. Perez became dissatisfied with the work that Dietz and his workers did and the amount of time it was taking. She did not feel that the work was being done professionally, and Dietz and his workers actually damaged some things in her house. As a result, she terminated Dietz.

The next day, she found that some of her jewelry was missing. Dietz was the only other person with a key. She reported the matter to the police, who investigated. No charges have been filed at this time. She also reported the theft to her insurance company, which paid her pursuant to her policy.

Because of the poor work done by the Plaintiff, Ms. Perez paid other contractors thousands of dollars to repair the work and damage caused by the Plaintiff and finish the work that the Plaintiff did not do. Nevertheless, Mr. Dietz individually filed suit against Ms. Perez in general district court for \$9,340 for work that he claimed he did. However, he neglected to file his bill of particulars on time, and summary judgment was entered in favor of Ms. Perez.

Ms. Perez also reported the matter to the Virginia Department of Professional and Occupational Regulation ("DPOR"). DPOR investigated, and Mr. Dietz admitted to the investigator that he did not have a contractor's license in Virginia. DPOR ruled that he did not have a license and ordered him to comply with the law. At the end of August, 2012, Mr. Dietz sent his application to DPOR for his license, which was granted. He also sent his paperwork to the State Corporation Commission to register his business, Dietz Development, LLC, to do business in Virginia. The certificate was granted on August 31, 2012.

As many people do, Ms. Perez made online postings about her experience so that other people would not have to go through it. She posted reviews on Angie's List and Yelp. Everything that she posted she reasonably believed to be true at the time it was posted. The reviews were mostly identical. She made an initial review in February of 2012, and then updated her reviews in the middle of August. On Yelp, she also added an update on August 27. The Plaintiff has filed this suit alleging that the contents of those reviews are defamatory.

After this lawsuit was filed, she took down the review on Yelp when she found out that the Defendant's posts on Yelp in reply to her posts was the first thing shown on a Google search of her name. The review on Angie's List requires membership, and is not available to the general public.

ARGUMENT

With the current trend towards online reviews, there have been a number of lawsuits referred to as SLAPP – Strategic Lawsuits Against Public Participation. These lawsuits are filed in retaliation for speaking out on a public issue of controversy. Lawsuits targeting individuals who post on the Internet, usually because those messages criticize the actions of companies or individual representatives are sometimes called “cyber-SLAPPS.” Like a regular slap, a “cyber-SLAPP” aims at chilling free speech by intimidating critics with the prospect of defending an expensive lawsuit. The point of the SLAPP is to silence the critic through the threat of an expensive lawsuit. Since a winning defendant is typically not awarded attorney's fees, the process of defending a SLAPP through the legal system can be a daunting and expensive prospect. As a result, twenty-seven states, including Maryland and the District of Columbia, have “anti-SLAPP” laws. However, Virginia is not one of those states. Nevertheless, this case is an instance of a SLAPP lawsuit – the Plaintiff is suing because he does not like the fact that the Defendant posted a negative review online.

As the Plaintiffs state in their memorandum, the court must weigh (1) the likelihood of irreparable harm to the Plaintiff if the injunction is denied, (2) the likelihood of irreparable harm to the Defendant if the injunction is granted, (3) the likelihood that the Plaintiffs will succeed on the merits, and (4) the public interest. When considering those factors, the Plaintiffs' request for an injunction must fail.

I. LIKELIHOOD OF IRREPARABLE HARM TO THE PLAINTIFF

As stated above, the Yelp review has already been removed, and the Angie's List review requires a membership to be able to view. A person doing a casual Google search would not find the reviews.

II. LIKELIHOOD OF IRREPARABLE HARM TO THE DEFENDANT IF THE INJUNCTION IS GRANTED

Ms. Perez has a right to free speech, and, as part of that right, she can post negative reviews online if she has bad experiences with certain companies. While the Defendant may not be directly harmed by not being able to post specifically about the Plaintiff, the granting of an injunction does limit her right to free speech and implies that she is not allowed to post negative reviews about a company, regardless of the truth of the review.

III. LIKELIHOOD THAT THE PLAINTIFF WILL SUCCEED ON THE MERITS

The Plaintiffs' cause of action is one for defamation. To recover for defamation, a private individual must prove that the publication was false and that the defendant either knew it to be false, or believing it to be true, lacked reasonable grounds for such belief, or acted negligently in failing to ascertain the facts on which the publication was based. Askew v. Collins, 283 Va. 482, 485-486. True statements do not support a cause of action for defamation. Jordan v. Kollman, 269 Va. 569, 575. Additionally, statements of opinion are generally not actionable because such statements cannot be objectively characterized as true or false. Id. at 576. Finally, even "slight inaccuracies of expression are immaterial provided the defamatory charge is true in substance, and it is sufficient to show that the imputation is 'substantially true.'" Id.

The Plaintiffs lists the statements from the online posts that they consider defamatory in Paragraphs 15-18 of their Complaint. In Paragraph 19, the Plaintiffs list why those statements were false. In response to that Paragraph 19, Ms. Perez will introduce the following evidence:

- Neither Christopher Dietz, nor Dietz development were licensed with Virginia's DPOR at the time that Ms. Perez made those posts. Mr. Dietz did not even send the paperwork in until August 29, 2012, and that was only after DPOR did an investigation, found that he had performed work without a license, and required him to comply.
- Ms. Perez did not find out that DPOR had closed its file until September 10, 2012, after the last of her posts.
- Dietz Development, LLC, is a District of Columbia limited liability company and was not certified to do business in Virginia until August 31, 2012.
- Dietz' invoice included nearly \$3,000 of work that was not performed.
- Ms. Perez has photographs showing the damage that was done by the Plaintiffs.
- Ms. Perez had to pay other contractors to fix and complete the work of the Plaintiffs.
- Mr. Dietz did not file his bill of particulars in his General District Court case. The result was summary judgment entered in favor of Ms. Perez. Summary judgment is only appropriate "when no genuine issue of material fact remains in dispute, and the moving party is entitled to judgment as a matter of law." Campbell County v. Royal, 283 Va. 4, 15 (2012).
- Around the day after Dietz was terminated from the job, Ms. Perez found that some of her jewelry was missing. Dietz was the only other person with a key to her home, which key provided access for Dietz and his work crew.

- Ms. Perez filed a report with the police regarding the theft. She also made a claim with her insurance company, and was reimbursed. At the time that she made posts about the theft, she did not know the status of the police investigation.
- Dietz went to her house, uninvited, on or about January 31, 2012. Ms. Perez did not let him in the house and called the police. She subsequently sent him a “no trespassing letter,” installed an alarm system, and got a dog.
- At all times, her neighborhood had a sign saying “No Trespassing.”
- A complaint was previously filed with the Office of the Attorney General in the District of Columbia in 2011 claiming that Dietz and his company tried to extort another customer for money for work not performed.
- Dietz and his company were sued by the Office of the Attorney General in the District of Columbia for not paying his workers.
- Dietz has also been sued several times in the District of Columbia in connection with a property that he rents.

Finally, any claims regarding the work done at Ms. Perez’ house are barred by collateral estoppel. In order for collateral estoppel to apply, “the parties to the two proceedings, or their privies, must be the same; the factual issue sought to be litigated actually must have been litigated in the prior action and must have been essential to the prior judgment; and the prior action must have resulted in a valid, final judgment against the party sought to be precluded in the present action.” Transduller Center, Inc. v. Sharma, 252 Va. 20, 22-23, (1996). The General District Court case was between Christopher Dietz and Ms. Perez. According to Paragraph 9 of the Complaint Dietz is the owner and primary point of Contact for Dietz Development, and his reputation and business image overlap with that of Dietz Development, such that the success of

his business and of himself professionally relies on both the company's reputation and Mr. Dietz's. Furthermore, the invoice which Mr. Dietz sued on in his individual capacity, states Dietz Development at the top. Since Mr. Dietz has not separated himself from his company for purposes of either case, Dietz Development is in privity with him. Whether or not Ms. Perez owed Mr. Dietz for the work in the invoice was a factual issue that was decided by virtue of the summary judgment order. The order in the General District Court case was a valid, final judgment against Mr. Dietz, who is the party sought to be precluded in this action. A judgment in a court not of record may be invoked by a plea of collateral estoppel as a bar to further litigation between the same parties of the identical issues litigated and decided in that court. Petrus v. Robbins, 196 Va. 322, 329 (1954).

Given that the statements made by Ms. Perez were either true at the time, slight inaccuracies of the truth, or statements she believed to be true at the time with reasonable grounds for such belief, the Plaintiff is certainly not likely to succeed on the merits.

IV. PUBLIC POLICY

As stated previously, other states have enacted legislation to prevent SLAPP lawsuits. There is obviously a benefit to the public for consumers to be able to write reviews of companies that they did business with, so that other consumers can make a fully educated choice when making decisions. If consumers can be sued for writing negative reviews of a company, then consumers will be less likely to post such reviews for fear of reprisals, and other consumers will have less information at their disposal. The anti-SLAPP legislation in other states was put in place to prevent such intimidation. Clearly, public policy favors consumers, such as Ms. Perez, to be able to freely make Internet posts about their experiences with companies, and not companies that would use the court system to stifle information.

CONCLUSION

For the reasons set forth above, Defendant asks that the Court deny the Motion for Preliminary Injunction and grant such further relief as the Court deems appropriate.

Respectfully submitted,
JANE PEREZ
By counsel

ALLRED, BACON, HALFHILL & YOUNG, P.C.

By: _____
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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of December, 2012, a true copy of the foregoing was mailed, first-class, postage prepaid to:

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James T. Bacon