COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
C.A. No. 2012-00963

OURWAY REALTY, LLC, d/b/a PLAINRIDGE RACECOURSE,

Plaintiff,

v.

THOMAS KEEN,

Defendant.

REPLY IN SUPPORT OF SPECIAL MOTION TO DISMISS PURSUANT TO G.L. c. 231 § 59H

Defendant Thomas Keen submits this reply in support of his special motion to dismiss this action under the Anti-SLAPP law, G.L. c. 231 § 59H. Ourway Realty, LLC sued Keen for maintaining a website, noplainvilleracino.com, that opposes Ourway's plans for a slot parlor at its racetrack, as well as a joking Facebook comment that Keen did not write and which was removed before this suit was filed. Faced with Keen's motion, Ourway now purports to be complaining only of a small slice of the conduct addressed in its complaint, and states that it merely seeks "to have the image of [a suspected burglar] removed" from the Facebook page. (Opposition at 5). That is not what the complaint alleges, and Ourway's desperate attempt to backpedal only confirms that this is a SLAPP suit.

However, even if Ourway's new position did match up with the complaint, this action could not survive anti-SLAPP scrutiny. Any claim focused on Keen's alleged "sharing" of the Plainville Police Department's photo of the suspect and its call for help in identifying him is

based solely on petitioning activities, and Ourway's affidavits fail to sustain its burden of proof to prevent dismissal under the statute.

I. OURWAY'S OPPOSITION MISCHARACTERIZES THE ALLEGATIONS IN ITS COMPLAINT.

Ourway first describes its defamation claim in terms that bear no resemblance to the complaint it filed, asserting that it brought this case merely "to seek to have the image of the individual," a person sought by the Plainville police for a burglary at Keen's home, "removed from the [Facebook page] in addition to the comment." (Opposition at 5). That is inaccurate.

The complaint nowhere states that it seeks to recover for only the "sharing" of the Plainville Police Department's photo and posting. The photograph, of course, relates to a *single* crime involving a *single* suspect, yet the complaint alleges that Keen is liable for "'publish[ing]' information that associates Plaintiff with *crimes and criminals*." (Complaint at ¶ 14). Additionally, the complaint seeks "injunctive relief to remove the offensive material from the Site *and to prohibit any further publication of information similar in nature*," meaning "references *to crime* associated with the operation of Plaintiff's operations *or intended operations*." (Complaint at 3 and ¶ 9)(emphasis supplied).[1] An injunction against any "references to crime" that are "associated with . . . Plaintiff's . . . intended operations" would, of course, enjoin Keen's arguments that a racino would lead to increased crime. (*Id.*).

[1] Injunctive relief is unavailable in libel cases as a matter of Massachusetts common law, not to mention the First Amendment. *Finish Temperance Soc'y Sovittaja v. Riavaaja Publ'g Co.*, 219 Mass. 28, 29 (1914); *see Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) ("[n]o prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court.").

II. THE "SHARING" OF THE POLICE DEPARTMENT'S REQUEST FOR HELP IN IDENTIFYING A BURGLARY SUSPECT WAS PROTECTED PETITIONING ACTIVITY.

Ourway argues that the "sharing" of the Plainville Police Department's Facebook post is not protected by the Anti-SLAPP law because it did not "advance the purported purpose" of the Facebook page, which, Ourway asserts, is to express "opinions and concerns regarding the expansion of gaming at Plainridge Racecourse."[2] (Opposition at 8). Curiously, on the next page, Ourway contradicts itself, asserting that Keen "shared" the picture in order to "make[] baseless accusations . . . in order to prevent gaming from expanding at Plainridge Racecourse." (*Id.* at 9).

Even if Ourway had it right the first time – when it argued that the "sharing" of the photograph was unrelated to opposing gaming at the Plainridge Racecourse – that "sharing" nonetheless fits squarely within the anti-SLAPP law's broad definition of a "party's exercise of its right of petition." G.L. c. 231 § 59H. As Keen argued in his memorandum, the photograph and message are "reasonably likely to enlist public participation in an effort to effect . . . consideration" of an issue before an "executive" body – namely the Plainville Police Department and its investigation into who burglarized Keen's home. *Id.*; *see Keegan v. Pellerin*, 76 Mass. App. Ct. 186, 190 (2009) (holding reporting a crime is protected by the anti-SLAPP statute). Simply put, advocating against expanded gambling, on the one hand, and appealing to the public for help in finding a burglary suspect, on the other, both constitute protected petitioning.

III. OURWAY CANNOT SUSTAIN ITS BURDEN OF PROOF.

Because Ourway's complaint is based on petitioning activity, it was required to demonstrate *by a preponderance of the evidence* that (1) "the special movant's petitioning activities lacked any reasonable factual support or any arguable basis in law," *and* (2) that

[2] At the very least, it is presumptuous of Ourway to define what the "purpose" of the Facebook page is, and to attempt to limit the Facebook participants' right to petition to that one purpose.

Ourway suffered "actual damages" from the petitioning. *Fustolo v. Hollander*, 455 Mass. 861, 865 (2009) (internal quotations omitted). Ourway has not sustained this burden.

As to the first prong, Ourway argues that the "sharing" of the police department's Facebook posting falsely "associates a direct link between Ourway and that specific crime." (Opposition at 4). In reality, it does no such thing – rather, it states only that the department was looking for the B&E suspect and was seeking information about him. (Memorandum in Support, Ex. 5). Ourway's "strained" interpretation of the post does not establish a false statement by Keen, and thus its attempt to demonstrate lack of "any reasonable factual support" for Keen's petitioning amounts to an attack on a straw man. *King v. Globe Newspaper Co.*, 400 Mass. 705, 711-12 (1987) (rejecting "strained" interpretation of cartoon, and holding that "[s]tatements alleged to be libelous must be interpreted reasonably.").

Moreover, Keen did not post the joking comment, "I wonder if they checked over at the racetrack, lol." (Keen Aff. at ¶ 12). Even if this obvious joke could reasonably be read to convey a false statement of fact, Ourway has submitted no evidence that Keen is responsible for it. As Keen pointed out in his memorandum, any claim seeking to hold him liable for the postings of another Facebook user is precluded by federal law. (*See* Memorandum in Support at 12 n. 5; 47 U.S.C. § 230(c)(1) ("No . . . user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider;" 47 U.S.C. § 230(e)(3)("No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.")). Accordingly, Ourway's purported claim based on the joking "comment" does not amount to a "*substantial* basis" for suit "other than or in addition to [Keen's] petitioning activities" that can survive this motion. *Office One, Inc. v. Lopez*, 437 Mass. 113, 122 (2002) (emphasis supplied).

Likewise, Ourway's affidavits do not satisfy their burden of proof. Officer Lamb's affidavit merely alleges that Keen's *wife* supposedly speculated that the track might have been involved in the crime – a statement that has nothing to do with whether the petitioning activity identified in the complaint was without factual basis. (Lamb Aff. at ¶ 8). Equally irrelevant is the affidavit of Gary Piontkowski, the owner of the racecourse, which is primarily intended to assure the Court that despite its retaliatory lawsuit against a Plainville resident of modest means based on his opposition website, Ourway "welcome[s] an open dialogue" with "the residents of Plainville, so that we can both exist harmoniously together. . . ." (Piontkowski Aff. ¶ 18).

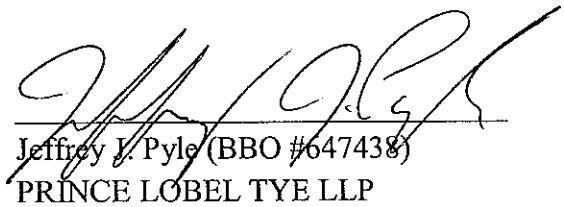
Finally, Ourway has failed to demonstrate "actual damages" by a "preponderance of the evidence." *Fustolo*, 455 Mass. at 865. The Piontkowski affidavit merely states: "Plainridge is harmed by Keen's assertions – we have recently paid the Commonwealth $400,000 in a non-refundable payment associated with our Class 2 application." (Piontkowski Aff. ¶ 32). Piontkowski does not explain what Plainridge's gambling application fee has to do with "actual damage" caused by Keen, because no such explanation is possible. Ourway obviously would have paid that fee even if Keen had never mounted his opposition to the facility. Plainridge has introduced no evidence of economic harm or damage to its reputation, the only kinds of damages a corporation may recover in an action for defamation. *Dexter's Hearthside Rest., Inc. v. Whitehall Co.*, 24 Mass. App. Ct. 217, 220 (1987).

For the foregoing reasons and those stated in his memorandum, Keen respectfully requests that his special motion to dismiss be granted.

Respectfully Submitted,

THOMAS KEEN

By His Attorneys,



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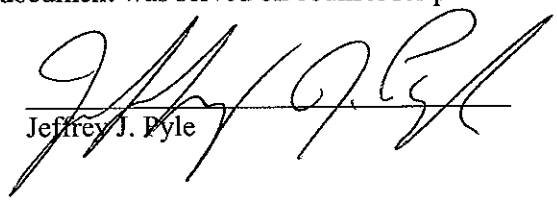

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