COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS. SUPERIOR COURT
CIVIL ACTION NO. 1879CV00344

RIAN WATERS,
Plaintiff
vs.

AIDAN KEARNEY,

WORCESTER DIGITAL MARKETING, LLC

TURTLEBOY ENTERPRISES, LLC

Plaintiff's Memorandum in Support of his Motion to declare notice of appeal valid

BACKGROUND

Summary Judgment decision and order in favor of the Defendants was filed June 20th, 2019, and was docketed June 27th, 2019. The Plaintiff filed a notice of appeal on July 3rd, 2019, but the John Doe defendants were not dismissed until July 8th. The Clerk's Office told the Plaintiff on October 31st that his notice of appeal was void because he filed premature, and he failed to file a timely notice of appeal.

ARGUMENT

The Plaintiff's notice of appeal was not premature, according to the Amended Appellate procedure rule 4

"In a civil case, unless otherwise provided by statute, the notice of appeal required by Rule 3 shall be filed with the clerk of the lower court within 30 days of the date of the entry of the judgment, decree, appealable order, or adjudication appealed from..." **Rule 4a**

The Plaintiff argues that Hon. Judge Mulqueen's June 20th decision and order, that was docketed June 27th, is an "appealable order." Even before the 2019 Amendment, the June 27th Judgment would have been read as final, "A 'final decision' ... means a decision which leaves nothing more open to dispute and which sets controversy at rest ... The test of the finality of a decision is whether it terminates the litigation on its merits, directs what judgment shall be entered and leaves nothing to the judicial discretion of the trial court." Jason v. Jacobson, 387 Mass. 21, 22 (1982), quoting from Real Property Co. v. Pitt, 230 Mass. 526, 527–528 (1918)

Even if it was premature, the appeal should still be granted.

"This court and the Appeals Court have recognized that a decision on the merits should not be avoided on the technicality that a premature notice of appeal was or may have been filed, where no other party has been prejudiced by that fact." **Swampscott Educ. Ass'n v. Swampscott, 391 Mass. 864, 865–66 (1984)** There is a plethora of federal cases that say premature Appeals should ripen when the case finishes shortly after, or if the remaining parties were never served. "Because determination of whether a ruling is "final" within statute authorizing appeals from any final order of a district court is frequently so close a question, it is impossible to devise a formula to resolve all marginal cases and requirement of finality is to be given a practical rather than technical construction." Gillespie v. United States Steel Corp., 379 U.S. 148, 85 S. Ct. 308, 13 L. Ed. 2d 199 (1964) "Premature appeal from orders of dismissal against some but not all defendants, which would have been appealable if certified for immediate

appeal, ripened into timely notice of appeal after entry of judgment against all defendants." Barrett ex rel. Estate of Barrett v. U.S., 462 F.3d 28 (1st Cir. 2006).

Aidan Kearney's harassment harmed the Plaintiff's ability to read and understand rules when the decision was made.

On June 23rd 2019, the Defendant Aidan Kearney hosted a live online show, and published it on itunes. After discussing 1879CV00344, Aidan Kearney said "If you fuck with me in court you will be made an example of, I'm going to ruin your life... and I'm a vindictive fuck too, I'm the guy that can be very friendly to you, and be nice. But if you poke me I am going to ruin you, I dream, I get fucking hard over it right, I come to it, when I think about, litterally I bust a fucking load thinking about punishing you. So please bring it on, I really enjoy it, I really really enjoy it." (Starting at 1.33.00 on the podcast downloaded from Itunes)

On or about July 11th 2019 the Defendant Aidan Kearney hosted a show online, and published it on Soundcloud.com. Starting at 27:00 Aidan said he was going to talk about Rian Waters, and then he discussed the Plaintiff's motion and then said various harassing statements. At 39:54 he said "your never going to get a job again, you can't, I agree with you on that, and you shouldnt because any company that hires you we're going to find them, we're going to let them know who you are, and who hired you"

THE APPEAL HAS MERIT

The Court made a clear mistake interpreting G.L. c. 156C, § 22, and ignoring the U.S. Supreme Court Precedent in the Plaintiff's opposition to dismiss brief.

"Except as otherwise provided by this chapter, the debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company; and no member or manager of a limited liability company shall be personally liable, directly or indirectly, including, without limitation, by way of indemnification, contribution, assessment or otherwise, for any such debt, obligation or liability of the limited liability company **solely by reason of being a member or acting as a manager of the limited liability company**." G.L. c. 156C, § 22

The courts sole reason for ruling summary Judgement for claim 6 was "The impact of this statute is fatal to the claims against Kearney individually." Judge Mulqueens decision. But the key word in the statute is **solely.** Aidan Kearney admitted he was the online host who said the defamatory statements, and Aidan Kearney wrote, self edited, and self published the book with defamatory statements. "A person who is an operator of a facility is not protected from liability by the legal structure of ownership... In a mechanical sense, to "operate" ordinarily means to control the functioning of; run: operate a sewing machine; to work; as, to operate a machine."United States v. Bestfoods, 524 U.S. 51, 55 (1998)

Both the Defendant and court used cherry-picked parts of common law for determining opinions.

"To determine whether a statement is defamatory, the court must decide whether it is an assertion of fact or opinion. The distinction is often subtle and difficult, particularly at the summary judgment stage. The determination is considered **a question of law only when it is unambiguous.** In contrast, the determination whether a statement is a factual assertion or a statement of pure opinion is a question of fact if the statement reasonably can be understood both ways. Therefore, in a defamation action, the defendant is entitled to summary judgment if the challenged statement cannot reasonably be construed as a statement of fact. **However, if a statement is susceptible of being read by a reasonable person as either a factual statement or an opinion, it is for the jury to determine.** In determining whether an assertion is a statement of fact or opinion, the test to be applied requires that the court examine the statement in its totality in the context in which it was uttered or published. **The court must consider all the words used, not merely a particular phrase or sentence.** In addition, the court must give weight to cautionary terms used by the person publishing the statement. Finally, **the court must consider all of the circumstances surrounding the statement, including the medium by which the statement is disseminated and the audience to which it is published.**" Downey v. Chutehall Constr. Co., Ltd., 86 Mass. App. Ct. 660, 661 (2014)

The Defendant tells the public he is a news company, and claims to check facts. So when the Defendant said "I know for a fact everything she said was true, because he had a trial and it all came out" most people would assume it was fact. The Plaintiff never even had a trial.

The Plaintiff was not fairly heard, or able to present evidence because of the witness intimidation.

Notably the Plaintiff failed to present a Rule 56(f) affidavit. But in the Plaintiff's supplemental brief, and in his brief to convert the Default judgment hearing to a TRO hearing, the Plaintiff said that the witness intimidation was preventing him from fairly deposing witnesses, or fairly arguing. The Plaintiff suffered significant cognitive decline, and was not able to think straight. Violations of G.L. c. 268, § 13B are certainly considered misconduct.

The Defendants published articles on their website on January 13, 2019, and February 3, 2019 which included images that were created with photoshop, that use the faces of the Plaintiff and his first witness Michael Gaffney, and puts them on two gay men in bed with sex toys, as well as fake homosexual movie promotions. The Defendants published at least 10 other articles or online shows harassing the Plaintiff in 2019. All of the blogs, and online shows had inaccurate, exaggerated, and slanted claims directed at the Plaintiff.

The Plaintiff had evidence but did not present it to protect witnesses.

Had the Defendant not harassed the Plaintiff he would have presented to the court evidence that proves that Samantha Cardin intentionally lied to investigators to make the Plaintiff look guilty. Additionally the Plaintiff knows of two witnesses that heard Samantha admit she was lying about the alleged incident, and the Plaintiff can prove that Samantha

committed two instances of perjury when trying to get malicious restraining orders. But the Plaintiff didn't depose Samantha, and was happy that Samantha wrote the affidavit to appease the Defendant, because Samantha is taking care of the Plaintiff's daughter, and the Plaintiff did not want her or any other witnesses to become a victim of the Defendants.

The court vacated the default without an affidavit showing a meritorious defense, and with the exhibits showing that the Defendant's excuse was perjury.

Aidan Kearney's Affidavit had a bare allegation of a meritorious defense, and the Plaintiff's opposition brief cited precedent showing that it was inadequate Carlson v. Silvia, 2002 Mass. App. Div. 190, 191. Aidan Kearney's affidavit also accused the Plaintiff of sending extorting emails after the complaint was served, and he claimed that on July 26th 2018, that the Plaintiff sent an email stating in exchange for cash the plaintiff would dismiss the lawsuit. All the emails sent and received after service of the complaint were attached to the Plaintiff's opposition brief, showing clear perjury, and that the Defendant was the one that initiated settlement negotiations. Aidan Kearney also admitted under oath and in his book that the real reason he didn't answer was because the Plaintiff was pro se.

Conclusion, The July 3rd 2019 Notice of Appeal should be declared valid, so the Appeal can be decided on the merits.

Respectfully Submitted

RW 12/9/19 November 6th, 2019

Rian Waters
199 Allen st.
East Longmeadow MA 01028
(old Address, but okay for mail)
(530)739-8951 Watersrian@gmail.com

Affidavit of Rian Waters

1. I did not know the Appeal was considered premature until October 31st 2019.
2. I have evidence that Samantha Cardin intentionally lied to investigators in an attempt to frame me.
3. The details of the July 11th 2019 and June 23rd 2019 podcasts that are cited in the memorandum are accurate.

12/9/19 RW

Signed under penalties of perjury on November 6th, 2019 Rian Waters