

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CIVIL ACTION
No. 2006-1807

SCOTT KERR, et al.
Plaintiff

v.

GREGG B. SMITH
Defendant

**DECISION and ORDER RE
PLAINTIFFS' MOTION FOR ENTRY OF JUDGMENT**

Plaintiffs' motion is allowed in part and denied in part.

Trespass

As to trespass, although the jury found that Smith has trespassed and determined damages, the court finds it appropriate, given the persistent and continuing entries and occupation by Smith on the property of Katherine Hoffman Senn and Scott Kerr, to issue injunctive relief to prevent future acts of trespass by defendant Smith.

Defamation

Although there is an ongoing debate concerning whether it is ever appropriate under the First Amendment to enter an order enjoining defamation¹, this Court is of the view that following a trial there is no violation of First Amendment involved in issuing a permanent injunction where the jury has found that the statement about a person is false and defamatory, that the defamatory

¹ Erwin Chemerisky, Injunction in Defamation Cases, 57 Syracuse L. Rev. 157 (2007), Scott A. Bradt-Erickson; The Public Law; Defamation, injunctive relief and the KBA, July/August 2000.

statements are repetitive and the injunction is limited to precluding the statements found to be false and defamatory. See O'Brien v. University Community Tenants Union, Inc., 42 Ohio St. 2d 242, 327 N.E. 2d 753 (1975). The Court, therefore, will enter an order enjoining the defendant Smith from publishing the statements which, based upon the evidence, had have been the statement or statements the jury found to be defamatory of certain of the plaintiffs.

No-Contact


As to the request for injunctive relief precluding Smith from contacting any of the plaintiffs or employees of Reeb Millwork Corporation or any other Reeb Company, it is Denied. Any foundation or authorization for issuing such an order as to plaintiffs must come from the jury's determination that defendant Smith was responsible for the intentional infliction of emotional distress on plaintiffs Katherine Hoffman Senn and Elena Senn Ascencio. A finding as to these two plaintiffs only does not support a no-contact injunction as to other plaintiffs or for employees of Reeb companies. Concerning Katherine Hoffman Senn and Elena Senn Ascencio, the Court does not believe that the jury's verdict supports injunctive relief. The jury awarded zero dollars of damages for the plaintiffs. An element of the cause of action for intentional infliction of emotional distress is that the emotional distress suffered by the plaintiffs as a result of Smith's actions was "severe" and of a nature "that no reasonable [person] could be expected to endure it." Vittands v. Sodduth, 49 mass. App. Ct. 401, 410 (2000). The Court cannot reconcile such a required finding with an award of zero damages. An award of zero damages suggests an absence of such severe and unendurable emotional distress. On the face of what appears to be juror confusion, the court is unwilling to enter injunctive relief for anyone based upon the jury's finding that defendant Smith was responsible for intentional infliction of emotional distress. Of

course, if defendant Smith should engage in conduct in the future which is harassing or intimidating toward any of the plaintiffs then the person subject to any such conduct is free to then seek the order of the court in putting a stop to such conduct.

Concerning no-contact with employees of the Reeb companies, the Court is not empowered to enter such a broad order. Such a non-contact order would clearly violate Smith's First Amendment Rights as discussed above. Smith will be enjoined from repeating to anyone, including employees of the Reeb companies, those statements necessarily found by the jury to be defamatory.

Costs

The Court allows costs in the sum of \$569.90. The Court disallows the travel costs of the plaintiffs. Even if the travel costs of a non-party appearing for trial might be allowable, the Court does not believe the parties initiating litigation in Massachusetts should be allowed costs to travel to the state to prosecute the action.


Thomas R. Murtagh
Justice of the Superior Court

Dated: *January 20, 2009*