

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE TRIAL COURT

Palmer District Court
Docket No.: 201143RO000079

PETER FREI)
)
 PLAINTIFF)
)
 v.)
)
 BRIAN JOHNSON)
)
 DEFENDANT)

DEFENDANT'S MOTION FOR INVOLUNTARY DISMISSAL
PURSUANT TO MASSACHUSETTS RULES OF CIVIL PROCEDURE 41(b)(2)
AND MEMORANDUM OF LAW IN SUPPORT THEREOF

Now comes Brian Johnson, the Defendant in the above-captioned matter, ("Johnson") and hereby moves this Honorable Court pursuant to M.R.Civ.Pro. 41(b)(2) to dismiss the Complaint for Protection from Harassment.

The basis for this Motion is as follows:

- on or about March 15, 2011, the Plaintiff, Peter Frei ("Frei") filed a Complaint for Protection from Harassment Pursuant to Mass. General Laws c. 258E ("Complaint");
- in the Complaint, in addition to allegations against individuals other than Johnson, which have no relevance to the issuance of any order in this matter (2/12/08 - Kyle Rutkowski; and 1/18/11 Alexander Haney), Frei alleged that on May 30, 2008, Johnson called him names;

- on September 30, 2009 Johnson allegedly blocked his car by standing in the road;
- on December 7, 2009, Johnson allegedly aimed his truck at Frei; and
- on February 19, 2011, Johnson allegedly yelled at Frei and “positioned himself in a way so he could kick me ...”;

The allegations and the evidence at trial at the conclusion of Frei's case fail to satisfy the legal requirements of G.L. c. 258E.

Massachusetts General Laws c. 258E, §1 defines “Harassment” as:

- (i) 3 or more acts of willful and malicious conduct aimed at a specific person committed with the intent to cause fear, intimidation, abuse or damage to property and that does in fact cause fear, intimidation, abuse or damage to property; or
- (ii) an act that: (A) by force, threat or duress causes another to involuntarily engage in sexual relations; or (B) constitutes a violation of Section 13B, 13F, 13H, 22, 22A, 23, 24, 24B, 26C, 43 or 43A of Chapter 265 or Section 3 of Chapter 272.

The only evidence proffered during the hearings was proffered in support of a complaint under G.L. c. 258E, §1(i). Frei has failed to meet his burden of proof to support the required elements under G.L. c. 258E, §1:

- May 30, 2008 incident: this allegation does not meet the statutory requirements because there was no evidence that Johnson intended to cause fear, intimidation, abuse or damage to property

and insufficient evidence that any such conduct did cause fear, intimidation or abuse;

- September 30, 2009 incident: there was no evidence that the alleged conduct was intended to cause or did cause fear, intimidation, abuse or damage to property. There was no reason that Frei, who was sitting in a Cadillac, could not simply leave by driving away. In addition, it is uncontroverted that Johnson called the police and was waiting for the police to arrive; and
- December 7, 2009 incident: Frei testified that Johnson had no business being in Town Hall. Johnson, a town employee, collects his mail at Town Hall. In addition, Frei did not know whether Johnson had even intended to aim his car at him. Therefore, there is insufficient evidence to conclude that Johnson intended to cause fear, intimidation, abuse or damage to property.

February 19, 2011 incident: several people were ice fishing and were participating in a fishing derby. Frei surreptitiously recorded all of the individuals, a violation of the wiretapping statute. Frei was cautioned about this violation by one of the responding officers. Frei's conduct does not support his allegations that he felt fear or intimidation. A reasonable person who was fearful or intimidated would have remained in the house and called the police and not confronted the individual allegedly feared.

Instead, Frei approached the individuals and recorded the conversation. Far from sounding fearful or intimidated, Frei is heard laughing on the tape. The police report confirms that Frei sounded happy on the tape.

In addition, there is no allegation or evidence that Johnson tripped Frei or threatened him in any way. Frei denied that the ice was slippery. Not only is

there no evidence that Johnson tripped or touched Frei in any way, but two other individuals (Tom Laplante and Al West) were identified by Frei as the individuals who "assaulted" Frei.

Thus, if all of the evidence is considered in the light most favorable to Frei, the following findings should be made as to each of the alleged incidents:

- February 12, 2008 - no allegations against Johnson;
- May 30, 2008 - name calling does not rise to the level of harassment as defined in the statute;
- September 30, 2009 – there was no reason why Frei could not have driven off. Feeling fearful or intimidated when sitting in his car while Johnson was standing near the car waiting for the police is objectively unreasonable;
- December 7, 2009 – Frei did not have any evidence that Johnson intended to aim his car at Frei or that Johnson intended to cause Frei to be fearful or intimidated;
- January 18, 2011 – no allegations against Johnson, other than that he called Frei at name. No evidence that Johnson dented Frei's car; and
- February 19, 2011 – Johnson was fishing on town property. There is no allegation that Johnson trespassed on Frei's property, tripped him, or touched Frei in any way. On the tape, Frei sounds neither fearful nor intimidated. Instead, he is heard laughing and sounding gleeful.

There is insufficient evidence to meet statutory standard. In examining the evidence in the light most favorable to Frei, testimony of witnesses and exhibits, at most Johnson called Frei names on two occasions, once over three years ago (May, 2008) and once on January 18, 2011. These incidents fail as a matter of law to satisfy the statutory standard.

WHEREFORE, for the foregoing reasons, Brian Johnson moves this Court to dismiss the Complaint for Protection from Harassment under G.L. c. 258E in its entirety.

Respectfully submitted,

THE DEFENDANT,
BRIAN JOHNSON,
By his attorney,

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Dated: July 28, 2011

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above document was served upon the following via hand delivery to:

Mr. Peter Frei
101 Maybrook Road
Holland, MA 01521

Dated: July 28, 2011

Tani E. Sapirstein
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