

ERL PARTNERS LLC and ERIC LEARNER,	:	
	:	Index No. 602710/2017
Plaintiffs,	:	(Galasso, J.)
	:	
- against -	:	
	:	NOTICE OF APPEAL
JESSICA N. PELLETIER,	:	
	:	
Defendant.	:	
	:	

PLEASE TAKE NOTICE that non-party Daily News, L.P. (the “Daily News”) hereby appeals to the Appellate Division of the Supreme Court of the State of New York, Second Department, from an Order of the Supreme Court, Nassau County (Honorable John M. Galasso), dated April 11, 2017 (the “Order”), which granted a temporary restraining order on behalf of plaintiffs ERL Partners LLC and Eric Lerner enjoining Daily News from publishing and ordering Daily News to remove certain news reporting from its website. Attached is a true copy of the Order and a transcript of the hearing relating thereto, which was held on April 11, 2017 before Justice Galasso. Since the Order purports to seal the file in the above-captioned action, the copy of the Order attached hereto will be filed under seal in an abundance of caution and since the scope of that portion of the Order is unclear.

Dated: New York, New York
April 12, 2017

DAVIS WRIGHT TREMAINE LLP

By: /s/ Laura R. Handman

Laura R. Handman
John M. Browning
1251 Avenue of the Americas
New York, New York 10020
(212) 489-8230
Attorneys for Non-Party Daily News, L.P.

TO: Clerk
Supreme Court of the State of New York
Nassau County
Mineola, New York 11501
(516) 493-3401

Jonathan I. Edelstein, Esq.
Edelstein and Grossman
501 Fifth Avenue, Suite 514
New York, New York 10017
(212) 871-0571
*Attorneys for Plaintiffs ERL Partners LLC
and Eric Lerner*

Daniel J. Kaiser, Esq.
Kaiser, Saurborn & Mair, P.C.
111 Broadway
New York, NY 10006
(212) 338-9100
Attorneys for Defendant Jessica N. Pelletier

AFFIRMATION OF SERVICE

The undersigned, an attorney admitted to practice before the Courts of the State of New York and this Court, affirms that on April 12, 2017, I caused to be served a true and correct copy of the foregoing Notice of Appeal and Request for Appellate Division Intervention, with the Clerk of Court via the NYSCEF electronic system for the following:

Jonathan I. Edelstein, Esq.
Edelstein and Grossman
501 Fifth Avenue, Suite 514
New York, New York 10017
(212) 871-0571
*Attorneys for Plaintiffs ERL Partners LLC
and Eric Lerner*

In addition, I caused to be served a true and correct copy of the foregoing Notice of Appeal and Request for Appellate Division Intervention on the following via U.S. Mail, postage prepaid:

Daniel J. Kaiser, Esq.
Kaiser, Saurborn & Mair, P.C.
111 Broadway
New York, NY 10006
(212) 338-9100
Attorneys for Defendant Jessica N. Pelletier

Dated: April 12, 2017

/s/ John M. Browning
John M. Browning

Supreme Court of the State of New York
Appellate Division : Second Judicial Department

Form A - Request for Appellate Division Intervention - Civil

See § 670.3 of the rules of this court for directions on the use of this form (22 NYCRR 670.3).

Case Title: Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.

ERL PARTNERS LLC and ERIC LEARNER,

Plaintiffs,

-against-

JESSICA PELLETIER,

Defendant.

For Court of Original Instance

Date Notice of Appeal Filed

For Appellate Division

Case Type	Filing Type	Transferred Proceeding	CPLR 5704 Review
<input checked="" type="checkbox"/> Civil Action <input type="checkbox"/> CPLR article 75 Arbitration	<input checked="" type="checkbox"/> Appeal <input type="checkbox"/> Original Proceeding	<input type="checkbox"/> Transferred Proceeding	<input type="checkbox"/> CPLR 5704 Review
<input type="checkbox"/> CPLR article 78 Proceeding <input type="checkbox"/> Special Proceeding Other <input type="checkbox"/> Habeas Corpus Proceeding			
Nature of Suit: Check up to five of the following categories which best reflect the nature of the case.			
A. Administrative Review	D. Domestic Relations	F. Prisoners	I. Torts
<input type="checkbox"/> 1 Freedom of Information Law <input type="checkbox"/> 2 Human Rights <input type="checkbox"/> 3 Licenses <input type="checkbox"/> 4 Public Employment <input type="checkbox"/> 5 Social Services <input type="checkbox"/> 6 Other	<input type="checkbox"/> 1 Adoption <input type="checkbox"/> 2 Attorney's Fees <input type="checkbox"/> 3 Children - Support <input type="checkbox"/> 4 Children - Custody/Visitation <input type="checkbox"/> 5 Children - Terminate Parental Rights <input type="checkbox"/> 6 Children - Abuse/Neglect <input type="checkbox"/> 7 Children - JD/PINS <input type="checkbox"/> 8 Equitable Distribution <input type="checkbox"/> 9 Exclusive Occupancy of Residence <input type="checkbox"/> 10 Expert's Fees <input type="checkbox"/> 11 Maintenance/Alimony <input type="checkbox"/> 12 Marital Status <input type="checkbox"/> 13 Paternity <input type="checkbox"/> 14 Spousal Support <input type="checkbox"/> 15 Other	<input type="checkbox"/> 1 Discipline <input type="checkbox"/> 2 Jail Time Calculation <input type="checkbox"/> 3 Parole <input type="checkbox"/> 4 Other G. Real Property <input type="checkbox"/> 1 Condemnation <input type="checkbox"/> 2 Determine Title <input type="checkbox"/> 3 Easements <input type="checkbox"/> 4 Environmental <input type="checkbox"/> 5 Liens <input type="checkbox"/> 6 Mortgages <input type="checkbox"/> 7 Partition <input type="checkbox"/> 8 Rent <input type="checkbox"/> 9 Taxation <input type="checkbox"/> 10 Zoning <input type="checkbox"/> 11 Other	<input type="checkbox"/> 1 Assault, Battery, False Imprisonment <input type="checkbox"/> 2 Conversion <input checked="" type="checkbox"/> 3 Defamation <input type="checkbox"/> 4 Fraud <input type="checkbox"/> 5 Intentional Infliction of Emotional Distress <input type="checkbox"/> 6 Interference with Contract <input type="checkbox"/> 7 Malicious Prosecution/Abuse of Process <input type="checkbox"/> 8 Malpractice <input type="checkbox"/> 9 Negligence <input type="checkbox"/> 10 Nuisance <input type="checkbox"/> 11 Products Liability <input type="checkbox"/> 12 Strict Liability <input type="checkbox"/> 13 Trespass and/or Waste <input type="checkbox"/> 14 Other
B. Business & Other Relationships	E. Miscellaneous	H. Statutory	J. Wills & Estates
<input type="checkbox"/> 1 Partnership/Joint Venture <input type="checkbox"/> 2 Business <input type="checkbox"/> 3 Religious <input type="checkbox"/> 4 Not-for-Profit <input type="checkbox"/> 5 Other	<input type="checkbox"/> 1 Constructive Trust <input type="checkbox"/> 2 Debtor & Creditor <input type="checkbox"/> 3 Declaratory Judgment <input type="checkbox"/> 4 Election Law <input type="checkbox"/> 5 Notice of Claim <input type="checkbox"/> 6 Other	<input type="checkbox"/> 1 City of Mount Vernon Charter §§ 120, 127-f, or 129 <input type="checkbox"/> 2 Eminent Domain Procedure Law § 207 <input type="checkbox"/> 3 General Municipal Law § 712 <input type="checkbox"/> 4 Labor Law § 220 <input type="checkbox"/> 5 Public Service Law §§ 128 or 170 <input type="checkbox"/> 6 Other	<input type="checkbox"/> 1 Accounting <input type="checkbox"/> 2 Discovery <input type="checkbox"/> 3 Probate/Administration <input type="checkbox"/> 4 Trusts <input type="checkbox"/> 5 Other
C. Contracts			
<input type="checkbox"/> 1 Brokerage <input type="checkbox"/> 2 Commercial Paper <input type="checkbox"/> 3 Construction <input type="checkbox"/> 4 Employment <input type="checkbox"/> 5 Insurance <input type="checkbox"/> 6 Real Property <input type="checkbox"/> 7 Sales <input type="checkbox"/> 8 Secured <input type="checkbox"/> 9 Other			

Appeal

Paper Appealed From (check one only):

- | | | | |
|---|---|---|---|
| <input type="checkbox"/> Amended Decree | <input type="checkbox"/> Determination | <input checked="" type="checkbox"/> Order | <input type="checkbox"/> Resettled Order |
| <input type="checkbox"/> Amended Judgment | <input type="checkbox"/> Finding | <input type="checkbox"/> Order & Judgment | <input type="checkbox"/> Ruling |
| <input type="checkbox"/> Amended Order | <input type="checkbox"/> Interlocutory Decree | <input type="checkbox"/> Partial Decree | <input type="checkbox"/> Other (specify): |
| <input type="checkbox"/> Decision | <input type="checkbox"/> Interlocutory Judgment | <input type="checkbox"/> Resettled Decree | |
| <input type="checkbox"/> Decree | <input type="checkbox"/> Judgment | <input type="checkbox"/> Resettled Judgment | |

Court: Supreme Court of the State of New York

County: Nassau County

Dated: April 11, 2017

Entered:

Judge (name in full): John M. Galasso

Index No.: 602710/17

Stage: ☒ Interlocutory ☐ Final ☐ Post-FinalTrial: ☐ Yes ☒ No If Yes: ☐ Jury ☐ Non-Jury

Prior Unperfected Appeal Information

Are any unperfected appeals pending in this case? ☐ Yes ☒ No. If yes, do you intend to perfect the appeal or appeals covered by the annexed notice of appeal with the prior appeals? ☐ Yes ☐ No. Set forth the Appellate Division Cause Number(s) of any prior, pending, unperfected appeals:

Original Proceeding

Commenced by: ☐ Order to Show Cause ☐ Notice of Petition ☐ Writ of Habeas Corpus

Date Filed:

Statute authorizing commencement of proceeding in the Appellate Division:

Proceeding Transferred Pursuant to CPLR 7804(g)

Court:

County:

Judge (name in full):

Order of Transfer Date:

CPLR 5704 Review of Ex Parte Order

Court:

County:

Judge (name in full):

Dated:

Description of Appeal, Proceeding or Application and Statement of Issues

Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of the proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.

This appeal is from an Order issued pursuant to Plaintiffs' Order to Show Cause granting an temporary restraining order instructing non-party Daily News, L.P. to remove plaintiff Eric Lerner's name from an online article reporting on an ongoing civil lawsuit in which Mr. Lerner is a named defendant.

Amount: If an appeal is from a money judgment, specify the amount awarded.

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review.

This appeal will raise the following issues: (i) whether the Order is an unconstitutional prior restraint, (ii) whether the Order is barred under the equitable principle that libel cannot be enjoined because there is an adequate remedy at law, (iii) whether laches precludes enforcement of the Order, (iv) whether Plaintiffs met the required threshold of demonstrating likelihood of success on the merits, irreparable harm and a balance of hardship in favor of Plaintiffs, (v) whether the Order should be stayed pending a hearing on a related

Issues Continued:

preliminary injunction, (vi) whether the preliminary injunction hearing should be stayed pending appeal, (vii) whether the order sealing the action below was proper absent any filings, (viii) whether it is proper to issue an injunction against a non-party who is not affiliated with or controlled by any party to the action.

Use Form B for Additional Appeal Information

Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

Examples of a party's original status include: plaintiff, defendant, petitioner, respondent, claimant, defendant third-party plaintiff, third-party defendant, and intervenor. Examples of a party's Appellate Division status include: appellant, respondent, appellant-respondent, respondent-appellant, petitioner, and intervenor.

No.	Party Name	Original Status	Appellate Division Status
1	ERL Partners, LLC	Plaintiff	Respondent
2	Eric Lerner	Plaintiff	Respondent
3	Jessica N. Pelletier	Defendant	Appellant
4	Daily News, L.P.	Non-Party	Appellant
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Attorney Information

Instructions: Fill in the names of the attorneys or firms of attorneys for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be

provided.

In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

Attorney/Firm Name: Edelstein and Grossman

Address: 501 Fifth Avenue, Suite 514

City: New York State: NY Zip: 10017 Telephone No.: 212-871-0571

Attorney Type: ☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

Party or Parties Represented (set forth party number[s] from table above or from Form C): 1 2

Attorney/Firm Name: Kaiser Sauerborn & Mair, P.C.

Address: 111 Broadway

City: New York State: NY Zip: 10006 Telephone No.: 212-338-9100

Attorney Type: ☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

Party or Parties Represented (set forth party number[s] from table above or from Form C): 3

Attorney/Firm Name: Davis Wright Tremaine LLP

Address: 1251 Avenue of the Americas, 21st Floor

City: New York State: NY Zip: 10020 Telephone No.: 212-489-8230

Attorney Type: ☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

Party or Parties Represented (set forth party number[s] from table above or from Form C): 4

Attorney/Firm Name:

Address:

City: State: Zip: Telephone No.:

Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

Party or Parties Represented (set forth party number[s] from table above or from Form C):

Attorney/Firm Name:

Address:

City: State: Zip: Telephone No.:

Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

Party or Parties Represented (set forth party number[s] from table above or from Form C):

Attorney/Firm Name:

Address:

City: State: Zip: Telephone No.:

Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

Party or Parties Represented (set forth party number[s] from table above or from Form C):

Use Form C for Additional Party and/or Attorney Information

The use of this form is explained in § 670.3 of the rules of the Appellate Division, Second Department (22 NYCRR 670.3). If this form is to be filed for an appeal, place the required papers in the following order: (1) the Request for Appellate Division Intervention [Form A, this document], (2) any required Additional Appeal Information Forms [Form B], (3) any required Additional Party and Attorney Information Forms [Form C], (4) the notice of appeal or order granting leave to appeal, (5) a copy of the paper or papers from which the appeal or appeals covered in the notice of appeal or order granting leave to appeal is or are taken, and (6) a copy of the decision or decisions of the court of original instance, if any.

Hard Copy Filing

At an Special Term of the Supreme Court of the State of New York, County of Nassau, 100 Supreme Court Drive, Mineola, NY 11501, Part _____, Room _____, on the 11th day of April, 2017

HON. JOHN M. GALASSO

PRESENT:

Justice of the Supreme Court

ERL PARTNERS, LLC and ERIC LEARNER,

Plaintiffs,

- against -

JESSICA N. PELLETIER,

Defendant.

MOTION SEQUENCE # 1ORIGINAL RETURN DATE 5-16-17RELIEF OPI

SUBMISSION DEADLINE _____

Index No. 602710/17

**ORDER TO
SHOW CAUSE***Special Term 2*

Upon reading and filing of the annexed Affirmation of JONATHAN I. EDELSTEIN, attorney for the plaintiff in the above captioned action, dated April 10, 2017, upon the Affirmation of Compliance dated April 10, 2017, upon the Affidavit in Support of Eric Lerner sworn to on April 10, 2017, upon the exhibits annexed hereto, and upon all other prior papers and proceedings heretofore had herein, and it appearing via the Affirmation of Compliance that proper notice has been given pursuant to 22 NYCRR § 202.7 to the defendant and to non-party New York Daily News, and due deliberation having been had, and sufficient cause appearing therefor,

LET THE DEFENDANT AND THE DAILY NEWS SHOW CAUSE before this Court at a term Special IAS Part _____, (room _____), before the Hon. _____ at the Nassau County Supreme Court, located at 100 Supreme Court Drive, Mineola, NY 11501, on

the 16th day of May, 2017, at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, or as soon as counsel can be heard,

WHY AN ORDER SHOULD NOT ISSUE granting the following relief pursuant to CPLR Article 63 *et. seq.*:


1. Directing the Daily News, pending the resolution of this action, to remove plaintiff Eric Lerner's name and/or photograph from an article entitled "Conn. woman sues drug store in sexual harassment case" ("the Article") and its associated keywords and Facebook posts;
2. Directing defendant to request that the Article be taken down from the Internet;
3. Enjoining defendant and/or anyone acting on her behalf, from republishing the Article; and
4. Granting such other and further relief to the plaintiffs as it may deem just and proper; and it is further

ORDERED that pending the hearing and determination of this motion: (1) the Daily News shall remove plaintiff Lerner's name and/or photograph from the Article and its associated keywords and Facebook posts; (2) defendant shall request that the Article be taken down from the Internet; and; (3) defendant and/or anyone acting on her behalf is enjoined and restrained from republishing the Article; and (4) the file of this action is sealed; and it is further

ORDERED that service by personal ^{Service} or overnight delivery of this Order and the papers ^{including the Summons & Complaint} **With Index Number and Filing Date Endorsed Thereon** on which it is based upon Daniel Kaiser, Esq., attorney for the defendant, and the Daily News ^{on or before the 13th day of April 13 2017} General Counsel's Office/Legal Department, shall be deemed good and sufficient service thereof.

Dated: Mineola, NY
April 11, 2017

ENTER:

2 
HON. JUDGE CONASSO

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU: TRIAL TERM: PART 22

-----X
ERL PARTNERS, LLC and ERIC LEARNER,

Index No.
602710-17

Plaintiffs,

-against-

JESSICA N. PELLETIER,

Defendant.
-----X

April 11, 2017

Mineola, New York

B E F O R E: THE HONORABLE JOHN M. GALASSO,

Justice of the Supreme Court

A P P E A R A N C E S:

EDELSTEIN & GROSSMAN, ESQS.
Attorneys for Plaintiffs
501 Fifth Avenue, Suite 514
New York, New York 10017

BY: JONATHAN EDELSTEIN, ESQ.

KAISER SAURBORN & MAIR, P.C.
Attorneys for Defendant
111 Broadway
New York, New York 10006

BY: DANIEL J. KAISER, ESQ.

Dorothy H. London, RPR - 516 493-3366

2

A P P E A R A N C E S :

DAVIS WRIGHT TREMAINE LLP
Attorneys for The Daily News
1251 Avenue of the Americas
21st Floor
New York, New York 10020
BY: JOHN M. BROWNING, ESQ.

ALSO PRESENT:

ERIC LEARNER

DOROTHY H. LONDON, RPR
OFFICIAL COURT REPORTER

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Proceedings

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1 THE CLERK: Come to order. Part 22 of the
2 Nassau County Supreme Court is now in session, the
3 Honorable John M. Galasso is now presiding.

4 Good morning, Judge.

5 THE COURT: Good morning.

6 THE CLERK: This is an Order to Show Cause
7 that came up for special term. Is it ERL or Erl?

8 MR. EDELSTEIN: ERL.

9 THE CLERK: ERL Partners, LLC, Eric
10 Learner and Jessica Pelletier, also non-party on the
11 case from New York Daily News.

12 Counsel, your appearances, please?

13 MR. EDELSTEIN: For the plaintiff,
14 Jonathan Edelstein of Edelstein & Grossman.

15 Good morning, your Honor.

16 THE COURT: Good morning.

17 MR. KAISER: For the defendant, Jessica
18 Pelletier, Daniel Kaiser, your Honor.

19 MR. BROWNING: For non-party Daily News,
20 John Browning, Davis Wright Tremaine.

21 THE COURT: This is an Order to Show
22 Cause. Does the petitioner wish to be heard?

23 MR. EDELSTEIN: Yes, your Honor. This
24 is -- relates to a defamation action by Eric
25 Learner, who is with me at counsel table, against

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Proceedings

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1 Jessica Pelletier. They used to be co-workers.
2 Ms. Pelletier was terminated. The reason for her
3 termination is widely disputed. The company says
4 that it's absenteeism, incompetency, says that it's
5 retaliation. She has sued the company and various
6 individuals in the company for inter alia,
7 harassment and retaliation. That lawsuit is being
8 litigated in the New York County Supreme Court.

9 The way it hinges here is that after
10 filing the lawsuit, it is our allegation that
11 Ms. Pelletier and her counsel went to Barbara Ross,
12 a reporter at The Daily News, tipped her off about
13 the lawsuit, gave her a copy of the complaint, gave
14 her various quotes, photographs, other materials and
15 that as a result of that, The Daily News published
16 an article containing false allegations against
17 Mr. Learner, including but not limited to, that he
18 was a drug addict, that he harassed Ms. Pelletier
19 for pills, that he stole pills from Ms. Pelletier
20 and other individuals.

21 It is Ms. Pelletier's position via her
22 counsel that she didn't talk to the press, that the
23 reporter picked this up all on her own. Our
24 position is we believe that there is a likelihood
25 that we will prove otherwise, given some of the

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Proceedings

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1 documentation in the complaint, including
2 Ms. Pelletier bragging about her press connections,
3 Ms. Pelletier mentioning a friend, that she had
4 taken a screen shot of an embarrassing photograph of
5 the third party and is going to use it for
6 blackmail, the fact that Ms. Pelletier's attorney
7 has previous other -- or the same reporter at The
8 Daily News has previously reported on two other
9 lawsuits filed by Ms. Pelletier's counsel. So
10 there's a relationship there.

11 In addition, there are text messages from
12 Ms. Pelletier which we do not have at this time but
13 which we know to exist and which we believe can be
14 obtained through discovery in which she's informed
15 Scott Levinson (ph.) and Chris Byron (ph.) that this
16 article was published as a result of her efforts and
17 her contact with the press.

18 Now, that's critical in that of course a
19 lawsuit is privileged from defamation; however,
20 contact with the press regarding the lawsuit is not.
21 And we've cited case law from the Appellate Division
22 and the Court of Appeals, and we believe based on
23 that, that case law and on the documentation that's
24 attached to the complaint which is very detailed
25 regarding all of these allegations and all of these

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Proceedings

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1 contacts with the press, that we've shown a prima
2 facie likelihood which is what has to be shown for a
3 preliminary injunction that we will prevail at the
4 end of the day on the defamation action. In
5 addition, by the way, there are allegations in the
6 complaint that Ms. Pelletier had explicitly
7 threatened Mr. Learner to ruin his career.

8 THE COURT: What stage is the litigation
9 in?

10 MR. EDELSTEIN: The underlying litigation
11 or this litigation?

12 THE COURT: The underlying.

13 MR. EDELSTEIN: Issue has been joined. I
14 believe Mr. Kaiser could speak to that because he's
15 counsel in the underlying litigation and I'm not;
16 but my understanding is issue has been joined, the
17 discovery is being taken, and there are discussions
18 of settlement.

19 THE COURT: All right, the other side wish
20 to be heard?

21 MR. KAISER: Good morning, your Honor. In
22 terms of the procedural posture in the other case,
23 issue has been joined, written discovery demands
24 have been exchanged. The parties are now in the
25 process of producing written discovery with the

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Proceedings

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1 anticipation that depositions could be scheduled
2 sometime in May of the defendant, of Ms. Pelletier.

3 I would just say in terms of the
4 underlying case, and I don't want to dwell on that
5 because I don't think it's really relevant to this
6 TRO, these are very serious sexual harassment
7 allegations. I've been in employment law for 25
8 years, and this is among the most serious I've ever
9 seen.

10 It is gross harassment on a daily basis in
11 terms of comments about her body, an overture of --
12 sexual overtures to her constantly. She was a
13 cancer victim, her diagnosis, making fun of what
14 would happen to her breasts because of the cancer
15 surgery.

16 I mean, this is really bad stuff that we
17 expect will be corroborated by a witness who I've
18 spoken to, another woman who sued them for sexual
19 harassment and settled. But in terms of this TRO,
20 your Honor, the truth is, and if we had to, we'd put
21 in affidavits, we didn't contact the press.

22 As your Honor may know, Daily News has
23 reporters down in court. And it was an interesting
24 story. They do a story about the filed pleadings.
25 I didn't initiate any story about this.

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1 Ms. Pelletier had no conversations with
2 the press. In fact, I have an e-mail where she's
3 saying, don't do a story about this, I don't want a
4 story about this in the newspaper. She just wanted
5 to litigate it, but none of that is even relevant
6 because there is a privilege, an absolute litigation
7 privilege on the complaint.

8 THE COURT: It sounds like she --
9 according to you, it sounds like she wants what the
10 petitioner wants, no publication of the dirty
11 laundry in public.

12 MR. KAISER: Right, but that may be true,
13 your Honor, but what she also doesn't want, which is
14 what the petitioner seems to be asking for, is an
15 order saying when she communicated about it and when
16 she republished the story and when she communicated
17 about it.

18 There is the First Amendment in this
19 country, and she's allowed to speak about her
20 allegations in any manner in which she wants to
21 speak about them. She has no present intention of
22 republishing anything. I think she wants to have
23 her story told in a courtroom ultimately and have
24 that resolved; but at the same time, she is not
25 going to acquiesce in any kind of gag order on how

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1 she could speak about what happened to her,
2 including getting publishing of a story that
3 happened to appear in The Daily News. She's
4 absolutely -- that would be --

5 THE COURT: The issue should be resolved
6 in court, not in the public atmosphere.

7 MR. KAISER: Correct, the courts have been
8 very clear about that, you cannot have -- the courts
9 cannot impose a prior restraint about how we are to
10 speak about anything except in certain circumstances
11 involving actual security. That's certainly not an
12 issue here.

13 And so yes, she wants to resolve it in the
14 court, but she is certainly not going to acquiesce
15 about how she could speak about this lawsuit. In
16 fact, your Honor, the lawsuit, the article that was
17 published was only on the complaint, meaning, she
18 didn't speak -- although she had every right to --
19 by the way, your Honor, if she wanted to speak to
20 the press, she could have, and there could be no way
21 to restrain her ability to do that; but in fact,
22 here she didn't.

23 And the underlying defamation claim is
24 premised upon a filed lawsuit in which there's a
25 litigation privilege. You can't sue someone for

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Proceedings

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1 defamation based on what they put into a filed
2 lawsuit. If there were communications from her
3 separate and apart from that filed lawsuit that they
4 are basing this on, that's a whole other matter.
5 They could prove they're false.

6 I don't believe that there is anything
7 else, so I didn't do the opening before they dismiss
8 just as a matter of law on the defamation claim as
9 it relates to the filed pleading; but here this is
10 asking the Court to ask The Daily News and asking
11 her -- they're asking her to direct The Daily News
12 to take it down. They're asking Ms. Pelletier to
13 direct The Daily News to take the story down.

14 She obviously can't dictate to what The
15 Daily News or any media outlet says about her story.
16 She doesn't have the authority to do it nor the
17 support as per the First Amendment to cover anything
18 about it. They can do what they want, and she could
19 do what she wants in terms of communicating with the
20 press.

21 We're involved in settlement discussions
22 now, as he rightly points out. I made a
23 counteroffer to their last demand. I haven't heard
24 back from them. If they want to settle this case
25 in -- if they want to settle this case for a number,

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Proceedings

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1 that's acceptable. In the context of an overall
2 resolution as to directing her what she can say and
3 not say in terms of not disparaging,
4 confidentiality, that's another matter.

5 we could have those discussions, but in
6 terms of a court ordering her what she could speak
7 about with respect to her allegation, that's a whole
8 other matter that both the Federal Constitution and
9 the State Constitution have clearly spoken about.
10 That's all I have, your Honor.

11 THE COURT: You wish to speak?

12 MR. BROWNING: Good morning, I represent
13 The Daily News. Whereas the underlying dispute
14 between the parties here is very complicated, but
15 the First Amendment issues are quite simple. Simply
16 put, Mr. Learner is seeking a primary injunction
17 that would have The Daily News remove his name from
18 the article about the ongoing lawsuit and perhaps
19 make other changes, if not, take it down; and that
20 is a remedy that the First Amendment will not allow.

21 I'd just like to set the table a little
22 bit here, if you wouldn't mind, with regard to the
23 article. This hasn't been made clear yet, but the
24 article reports entirely on the complaint
25 Ms. Pelletier filed against Mr. Learner. As such,

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1 it is absolutely protected by Section 74 of the New
2 York Civil Rights Law which grants leeway for the
3 press to report on ongoing civil litigation,
4 particularly in matters of great importance such as
5 workplace harassment and discrimination as was
6 alleged here.

7 Another important detail to note is that
8 this article was published on October 7, 2016,
9 nearly six months or more than six months ago. The
10 Daily News is therefore perplexed as to why this
11 extraordinary relief and Order to Show Cause has
12 been brought because it's not apparent how there
13 could be the kind of immediate and irreparable harm
14 that would warrant preliminary injunctive relief for
15 defendant -- for plaintiff. Plaintiff in this case
16 has been aware of the article for six months.

17 That notwithstanding and notwithstanding
18 the fact that this issue clearly implicates the
19 Daily News' First Amendment interests, my client was
20 informed of this temporary restraining order
21 yesterday. We have had less than 24 hours to
22 prepare for it. Frankly, I saw these papers at
23 4:30 in the afternoon on the day before Passover
24 when many of my colleagues -- I hadn't yet spoken
25 to.

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1 And a final general point, before, your
2 Honor, I get to the law on the merits, the purpose
3 of a temporary restraining order and this kind of
4 drastic relief is to maintain the status quo before
5 trial. However, compelling The Daily News to censor
6 its article before a finding can be made as to
7 whether these statements are defamatory -- and I
8 take the position that they are not -- runs squarely
9 contrary to that, the purpose of a temporary
10 restraining order, because it would radically change
11 the status quo in this case. And I've been able to
12 find no precedent for making that kind of
13 alteration.

14 I will go through the law as quickly as I
15 can. I apologize if I go on a little bit. There
16 are a lot of issues to be addressed.

17 THE COURT: That's all right. There's
18 going to be a hearing in the future.

19 MR. BROWNING: I can accept that. The
20 First Amendment -- under the First Amendment, prior
21 restraint such as these are unconstitutional. The
22 prior restraint rule applies to any preliminary
23 injunction that would enjoin speech. So that
24 includes an injunction that would force The Daily
25 News to take down or edit its article before a

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1 finding as to the lawfulness of the statements which
2 have been issued is made.

3 A second well established principle is
4 that the law or equity will not allow an injunction
5 against a libel. I actually have binding Second
6 Department authority on point. In that case a
7 defamation case was tried. Certain statements were
8 found to be defamatory that had appeared online.
9 The Court issued an injunction ordering the
10 defendants to take the remaining statements down
11 from their web sites.

12 The Second Circuit reversed and found that
13 even though the statements had been found to be
14 defamatory by a jury, prior restraint or equity
15 would not allow an injunction of a libel absent
16 exceptional circumstances which were not present
17 there.

18 Those exceptional circumstances are also
19 not present here. The crux of Mr. Learner's
20 argument is that the article has a negative impact
21 on his professional reputation, but that is
22 precisely the kind of harm that existing libel law
23 is designed to remedy with damages. And injunctions
24 of the kind that he seeks here are simply not
25 permissible.

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1 I briefly discussed the latches issue,
2 but, your Honor, preliminary relief is not
3 appropriate here because Mr. Learner has waited six
4 months since the article was published to bring his
5 complaint. And finally, I'd just like to talk about
6 the three elements Mr. Learner would be required to
7 prove to entitle himself to a preliminary
8 injunction, the first being likelihood of success on
9 the merits.

10 Again, The Daily News is perplexed as to
11 the settlement as it is not named as a party in the
12 suit. To the extent that we might be named or could
13 conceivably be libel for the statements we have
14 published, Mr. Learner has absolutely no likelihood
15 of success on the merits.

16 As I said, Section 74, Paragraph 4,
17 privilege, absolutely protects The Daily News, any
18 libel by those with regard to its reporting on the
19 ongoing legal lawsuit between Ms. Pelletier here and
20 Mr. Learner.

21 Second element is irreparable harm, and
22 again, that goes back to the latches issue. We find
23 it difficult to believe that Mr. Learner will be
24 able to make the cognizable showing of irreparable
25 harm given that he's waited six months to bring

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1 these proceedings when the article was first
2 published if the harm was really so immediate and
3 irreparable to commence an action at any time before
4 now.

5 Third and perhaps most overwhelming --
6 third is the balance of hardships. As a threshold
7 matter, any court-enforced editing or censorship of
8 an article has been deemed to be a serious intrusion
9 on basic press proceedings.

10 THE COURT: The issue here too is that the
11 Internet has changed dissemination of information.
12 It's always there. If people want to check
13 somebody, it comes up all the time. Prior, a
14 newspaper article is printed, that was the end of
15 it. You had to go to a library or try to research
16 it to try to get that out. So all of this is in a
17 formation stage, and I think it's for appellate
18 courts to decide all of this and not me.

19 MR. BROWNING: Your Honor, if I may
20 address it because it's a very interesting and
21 perceptive question. In other countries, and I've
22 worked in the U.K. and in Europe --

23 THE COURT: Well, in the U.K. nothing is
24 published until after the trial. That's been their
25 standard. That's why we deviated from that when we

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1 came over here.

2 MR. BROWNING: Right. I think I would
3 quibble with that somewhat, but the principle in the
4 U.K. is ask permission first, publish later. Here
5 it's the other way around. Again, you're right, the
6 law as it stands gives The Daily News the right to
7 keep its defensible rights article online at the
8 very least until a judgment is --

9 THE COURT: And you know that the Court of
10 Appeals is considering a lot of things of these
11 secret docket numbers. We seal certain cases
12 because you want to try to protect people's rights
13 from not getting hurt permanently. So all it is is
14 in juxtaposition of the First Amendment.

15 MR. BROWNING: I'm not unsympathetic to
16 those rights. And it is a juxtaposition of the
17 First Amendment. Again, I'm mostly having this
18 conversation right now because it's interesting.

19 The law is very clear that the balance on
20 this side errs on the side of the First Amendment.
21 I am unaware of new decisions that would allow
22 Mr. Learner to have the kind of protection that he
23 requests, particularly, and I think this is
24 important, during the pendency of a civil action in
25 which he is involved.

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1 He is a named party in that suit. He's
2 entering discovery. We will see whether it's proven
3 or not, the allegations against him, but even if
4 those allegations are ultimately proven to be false
5 and Mr. Learner is found not libel, The Daily News
6 still has a right under existing law to keep its
7 article that was accurate at the time it was
8 reported on a libel legal issue online.

9 The applicable court will need to change
10 the law if that stage is closed. In a brief
11 summation, The Daily News --

12 THE COURT: Even on other aspects,
13 Facebook, something gets published on Facebook or
14 Twitter or something like that, even if it's false,
15 people are harassed out of their houses, they are
16 chanted in stores. This is not what America is
17 about, and it has to be decided by a higher
18 authority, all of this set aside. Nobody wants to
19 limit the First Amendment rights from freedom of
20 speech, but you don't want chaos either.

21 MR. BROWNING: Just to tie things up,
22 though, a temporary restraining order is not
23 appropriate in this case. That would change the
24 status quo. We would argue that a preliminary
25 injunction is also not appropriate.

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1 THE COURT: It's temporary until things
2 are decided.

3 MR. BROWNING: But the status quo is that
4 The Daily News has the right under the First
5 Amendment under section 74 to report what it does.
6 I am aware of no decision to take down a defendant's
7 libel suit action name pending the outcome of this
8 case. If your Honor would like, and I think this
9 might be a good idea, this seems to be the kind of
10 issue that we write for briefing or not or --

11 THE COURT: Oh, absolutely.

12 MR. BROWNING: -- summary disposition
13 here. So we could negotiate a reasonable briefing
14 schedule when we go down that route. Thank you.

15 THE COURT: Anyone else wish to be heard?

16 MR. EDELSTEIN: Your Honor, if I may
17 briefly address the latches and speech aspects of
18 this which I didn't have a chance to get to before.
19 With regard to the six months, there are a number of
20 reasons why this application is being brought now.

21 First of all, Mr. Learner was hoping he
22 wouldn't have to go to court. He was hoping that
23 this would become old news, that the underlying
24 lawsuit would settle and that this would no longer
25 affect him; but as your Honor observed, in these

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1 days of the Internet, once an article is up, the
2 article is up forever.

3 And recently -- the trigger for this
4 action actually is that recently, his company
5 attempted to raise money and because of this article
6 was unable to raise a great deal of money. It is
7 facing licensing applications. This is a medical --
8 this is an article that is continuing to damage him,
9 that at this point is an imminent threat to his job.
10 It wasn't an imminent threat to his job six months
11 ago because everyone was hoping it would go away,
12 but it is now. So I would submit that there's no
13 latches.

14 Second of all, as to the status quo, the
15 status quo was that Mr. Learner has a job. That
16 status quo could be preserved by a temporary
17 restraining order and a preliminary injunction.

18 Now, we have done everything we can to
19 minimize the impact on the First Amendment. I mean,
20 originally, we were planning to bring an Order to
21 Show Cause seeking an order that the article be
22 taken down from the Internet. And after discussion
23 with The Daily News general counsel's office and
24 with my client, we've agreed to -- we've decided to
25 tone it down, that all we want is the removal of

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1 Mr. Learner's name and his photograph from the key
2 words -- from the article and also from the key
3 words that enable people who search his name in
4 Google to find that article.

5 Now, we are not saying that The Daily News
6 can't report on that lawsuit. In fact, there is
7 another individual who is named in the lawsuit but
8 who is described in The Daily News article as the
9 chief operating officer. So there is certainly
10 precedent in this article for them referring to
11 people other than by name; and they certainly would
12 be entitled to do that with Mr. Learner and to leave
13 all of the other texts of the article up.

14 In addition, I would submit that there are
15 exceptional circumstances here. This case, Nann
16 versus Raimist, R-A-I-M-I-S-T, it's a Court of
17 Appeals case, 255 N.Y. 307; Bingham versus Struve,
18 S-T-R-U-V-E, 184 A.D.2d 85, which is a First
19 Department case which says that although, as counsel
20 said, equity will not ordinarily enjoin the
21 publication of libel, it will do so where the
22 publication is part and parcel of a tortious course
23 of conduct.

24 And we have documented in the complaint
25 that there is a multi-month campaign by

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1 Ms. Pelletier to ruin Mr. Learner's professional
2 life and career. So I would submit that this would
3 fall into the circumstances where an injunction can
4 lie, where a temporary restraining order can lie and
5 that in light of the fact that we are asking for
6 very narrowly tailored relief.

7 We are not asking for Ms. Pelletier not to
8 comment at all. We are just requesting an order for
9 her not to republish this article. We are not
10 asking for The Daily News to take the article down.
11 We are just asking The Daily News to remove part of
12 it, the name, the photograph and the key words that
13 damage Mr. Learner.

14 In fact, as my client just pointed out,
15 there were photographs that were initially part of
16 the article that were removed which we believe was
17 done at the request of Ms. Pelletier which is
18 actually the reason why we are seeking an order
19 asking Ms. Pelletier to make another request. We
20 would be prepared to prove that in a lawsuit.

21 For all of those reasons, I would submit
22 that the TRO should issue, that the Court set a
23 reasonable briefing schedule for the temporary --
24 for the preliminary injunction and that -- whether
25 Mr. Learner is entitled to the preliminary

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1 injunction should be decided at a later date.

2 THE COURT: All right, anything further?

3 MR. BROWNING: So a couple of points on
4 that. The relief that Mr. Learner seeks, while he
5 frames it to be narrow and reasonable, is
6 unprecedented to my mind, which is an injunction
7 ordering censorship of an otherwise defensible
8 article before a finding of defamation can be made.
9 At the very least, this issue is not ripe for a
10 temporary restraining order, and I cannot think of
11 any new precedent for it.

12 Second, I'll keep this brief, even if The
13 Daily News was to take Mr. Learner's name out of the
14 article, that runs contrary to basic principles of
15 justice in this country. Trials and civil cases are
16 not conducted in secret even at the request of those
17 on trial or those prosecuting; and removing
18 Mr. Learner's name from the article would be a
19 serious chipping away at that principle of open
20 justice. And I think I could rehash some of the
21 other factual points, but essentially, my --

22 THE COURT: I fully understand your
23 position, I really do.

24 MR. BROWNING: Right.

25 THE COURT: But I'm going to sign a

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1 temporary restraining order in the interest of
2 safety, and we'll set a hearing date. What date
3 would you want? They said April 19 but we can go
4 over to May since you're both here. I want briefs
5 submitted from both sides.

6 MR. EDELSTEIN: I know that Daily News
7 wanted some time to brief this. I'm open to that as
8 long as I have a week or so to reply to their brief.

9 THE COURT: Just set a date and I'll be
10 here in May.

11 MR. EDELSTEIN: Can we do May 16 or 17,
12 your Honor?

13 THE COURT: Is that all right with
14 everybody, a full hearing?

15 MR. KAISER: Full hearing to be set --

16 THE COURT: The 16th.

17 MR. EDELSTEIN: The 16th or 17th?

18 THE COURT: Is that all right?

19 MR. BROWNING: That's fine. I'm going to
20 have to discuss this with my client.

21 THE COURT: I understand. So that's why
22 I'm giving you time. The 16th or the 17th, is that
23 enough time?

24 MR. BROWNING: That's fine.

25 THE COURT: All right, the 16th.

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THE CLERK: May 16, Judge?

THE COURT: Yes. Stay available because
we are going to make a copy of this.

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CERTIFICATE

I, Dorothy H. London, do hereby
certify that the within transcript is a
true and accurate record of the
proceedings.

DOROTHY H. LONDON, RPR
Senior Court Reporter

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