

In the Matter of a Family Offense Proceeding
Under Article Eight of the Family Court Act

[REDACTED]
Petitioner,

-v-

[REDACTED]
Respondent.

On Submission
NOTICE OF MOTION TO
DISMISS PURSUANT
TO CPLR §3211
Docket Number: [REDACTED]
Family File Number: [REDACTED]

PLEASE TAKE NOTICE THAT, upon the annexed Attorney Affirmation of [REDACTED] from [REDACTED], attorney of record for Respondent, [REDACTED], and upon all other papers, pleadings and prior proceedings, Respondent will move this court before the Honorable [REDACTED], at the [REDACTED] County Courthouse, at [REDACTED] Street, [REDACTED] NY [REDACTED], on the _____ day of [REDACTED], 20[REDACTED] at _____ AM/PM, or as soon thereafter as counsel may be heard, for an order:

- 1) Dismissing the Family Offense petition pursuant to CPLR §3211, subdivision (a) (7) on the grounds that it fails to state a cause of action; and
- 2) Vacating the Temporary Order of Protection, prohibiting contact between the Respondent and his son; and
- 3) Further for whatever relief this Court may deem just and proper.

Dated: [REDACTED],
New York

Respectfully Submitted,

In the Matter of a Family Offense Proceeding
Under Article Eight of the Family Court Act

[REDACTED]

Petitioner,

-v-

[REDACTED]

Respondent.

AFFIRMATION IN SUPPORT OF
MOTION TO DISMISS
PURSUANT TO CPLR §3211
Docket Number: [REDACTED]
Family File Number: [REDACTED]

[REDACTED], an attorney admitted to the practice of law before the Courts of the State of New York, and not a party to the above-entitled cause, affirms the following to be true under the penalties of perjury pursuant to CPLR 2106:

1. I am the attorney for Respondent [REDACTED], in the above-entitled matter, which was filed by Petitioner on [REDACTED] 20[REDACTED] and scheduled for an Initial Appearance on [REDACTED] 20[REDACTED] at [REDACTED] AM, and as such I am familiar with the allegations contained therein.
2. The CPLR §3211, subdivision (a)(7) provides that a party may move for judgment dismissing one or more causes of action asserted against him on the ground that the pleading fails to state a cause of action: "On a motion to dismiss pursuant to CPLR §3211, the pleading is to be afforded a liberal construction (see CPLR 3026). We accept the facts as alleged in the [petition] as true, accord [the petitioner] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable theory." (Matter of Pamela N. v. Neil N., 93 A.D.3d 1107, 1108 [3rd Dept. 2012].)
3. Respondent contends that the facts alleged herein do not satisfy the elements of Disorderly Conduct or Harassment in the First or Second Degree as alleged in the Family Offense Petition. The petition does not allege any other grounds, nor do the facts support a family offense under any other grounds.

ALLEGATIONS

4. Petitioner alleges that on [REDACTED] 20[REDACTED], in [REDACTED], the Respondent "[REDACTED]" [REDACTED]

5.

DISORDERLY CONDUCT

6. New York Penal Law §240.20 states that a “person is guilty of disorderly conduct when, with the intent to cause public inconvenience, annoyance, or alarm, or recklessly creating a risk thereof:
- a. He engages in fighting or violent, tumultuous or threatening behavior; or
 - b. He makes unreasonable noise; or
 - c. In a public place, he uses obscene or abusive language, or makes an obscene gesture;
or
 - d. Without lawful authority, he disturbs any lawful assembly or meeting of persons; or
 - e. He obstructs vehicular or pedestrian traffic; or
 - f. He congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse; or
 - g. He creates a hazardous or physically offensive condition by any act which serves no legitimate purpose.”
7. It is well settled that the disruptive behavior which is the basis of a disorderly conduct charge must be of a public nature, rather than a private one. (*People v. Munajo*, 50 NY2d 326, 331 (1980)).
8. “If abusive words are the basis of a disorderly conduct charge, the Court must examine the context in which the abusive words were spoken, and whether the words have a public rather than merely private impact, employing the standard of the reasonable man in the same position as the complainant and evaluating the defendant’s intent as to the meaning of the words and their effect. *People v. O’Leary*, 153 Misc. 2d 641 (City Ct. of Oswego, Oswego Co. 1992).
9. Taking the allegations to be true, the Petitioner and Respondent engaged in a verbal altercation of a private nature. ~~REDACTED~~

HARASSMENT IN THE FIRST DEGREE

10. New York State Penal Law §240.25 defines “a person is guilty of Harassment in the First Degree when he or she intentionally and repeatedly harasses another person by following such person in or about a public place or places or by engaging in course of conduct or by repeatedly committing acts which places such person in reasonable fear of physical injury.”
11. The petition does not allege any circumstances which could be construed to be a repeated course of conduct. The Petitioner’s actions of following the Respondent to further the confrontation shows that she was in no “reasonable fear of physical injury”.

HARASSMENT IN THE SECOND DEGREE

12. New York State Penal Law §240.26 defines “a person is guilty of Harassment in the Second Degree when, with the intent to harass, annoy or alarm another person:
 - a. He strikes, shoves, kicks, or otherwise subjects such other person to physical contact, or attempts or threatens to do the same; or
 - b. He follows a person in or about a public place or places; or
 - c. He or she engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose.”
13. The Petitioner does not allege any physical contact, attempts, or threats of physical contact. The Petitioner does not allege that Respondent followed her; in fact, she followed the Petitioner out of the store. The Petitioner alleges a single confrontation, not a course of conduct or repeated acts. Further, the single act of telling a person to “fuck off” and “go die” does not rise to a level of “alarm” or “serious annoyance” as contemplated by the statute.

14. The instant petition does not allege facts, even if generously construed and taken to be true, which can support the elements of Disorderly Conduct or Harassment in the First or Second Degree, and therefore does not state a cause of action. Respondent requests dismissal.

WHEREFORE, your deponent respectfully requests that the Court grant the relief sought in the attached Notice of Motion to Dismiss the Family Offense Petition pursuant to CPLR §3211 (a)(7), together with any other and further relief the Court deems just and proper.

Dated: [REDACTED]
[REDACTED], New York

Respectfully Submitted,