

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

M271756

T/htr

ALAN D. SCHEINKMAN, P.J.

2020-05027

DECISION & ORDER ON APPLICATION

Robert S. Trump, plaintiff,
v Mary L. Trump, et al., defendants.

(Index No. 51585/2020)

Application by Simon & Schuster, Inc., and separate application by Mary L. Trump, pursuant to CPLR 5704(a) to vacate or modify a temporary restraining order contained in an order to show cause of the Supreme Court, Dutchess County, dated June 30, 2020.

Before the Court are separate applications by the defendant Simon & Schuster, Inc. (hereinafter S&S), and the defendant Mary L. Trump (hereinafter Ms. Trump), to vacate or modify, pursuant to CPLR 5704(a), a temporary restraining order granted by the Supreme Court, Dutchess County (Hal Greenwald, J.), on June 30, 2020, upon the application of the plaintiff, Robert S. Trump. The temporary restraining order provides that, pending the hearing and determination of the plaintiff's motion for a preliminary injunction, which has a return date of July 10, 2020, both Ms. Trump and S&S, "together with their respective members, officers, employees, servants, agents, attorneys, representatives and all other persons acting on behalf of or in concert with either or both of them," are restrained from "publishing, printing or distributing any book or any portions thereof including but not limited to the book entitled: 'Too Much and Never Enough, How My Family Created the World's Most Dangerous Man', in any medium containing descriptions or accounts of [Ms. Trump's] relationship with [the plaintiff], Donald Trump, or Maryanne Trump Barry."

The papers submitted in support of the underlying motion for a preliminary injunction, and upon which the temporary restraining order is based, consist of a summons and verified complaint, an affidavit of the plaintiff, an affirmation of the plaintiff's attorney, and a memorandum of law. While the affidavit of the plaintiff is brief, the complaint is verified by the plaintiff and, therefore, may be considered to be an affidavit by him (*see* CPLR 105[u]).

According to the plaintiff, the plaintiff's father, Fred Trump, died in 1999, and the plaintiff's mother, Mary Anne Trump, died slightly more than one year later in 2000. Litigation ensued, brought by Ms. Trump and by Fred C. Trump III, over the probate of the wills of Fred Trump and Mary Anne Trump. The litigation was resolved by a settlement agreement dated April 10, 2001. The parties to the settlement agreement were Ms. Trump, Fred C. Trump III, Linda C. Trump, and Lisa Trump, who were the objectants to probate, on one side, and Donald J. Trump, Maryanne Trump Barry, and the plaintiff, individually and as co-executors of the Estate of Fred C. Trump, who

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were the proponents of probate, on the other. The parties agreed to join in a motion to seal the records, agreeing that the public had no interest in the particular information involved in their resolution of their differences and that confidentiality was required in order to protect the litigants and encourage a fair resolution of the matters in controversy. The settlement agreement contains reciprocal provisions essentially barring each side from disclosing the terms of the settlement or publishing any description of the litigation or their relationships without the consent of all parties on the other side.

In particular, paragraph 2 of the settlement agreement states as follows:

“2. Without obtaining the consent of DONALD J. TRUMP, ROBERT S. TRUMP and MARYANNE TRUMP BARRY, individually and as Co-Executors of the Estate of FRED C. TRUMP, deceased, and individually and as Co-Executors of the Estate of MARY ANNE TRUMP, deceased, as well as officers and directors of APARTMENT MANAGEMENT ASSOCIATES, INC. and TRUMP MANAGEMENT, INC. (‘Proponents/Defendants’) in advance, FRED C. TRUMP, III and MARY L. TRUMP, LISA TRUMP and LINDA C. TRUMP (‘Objectant/Plaintiffs’) as well as Farrell Fritz, P.C. (their counsel) shall not disclose any of the terms of this Agreement and Stipulation, and in addition shall not directly or indirectly publish or cause to be published, any diary, memoir, letter, story, photograph, interview, article, essay, account, or description or depiction of any kind whatsoever, whether fictionalized or not, concerning their litigation or relationship with the ‘Proponents/Defendants’ or their litigation involving the Estate of FRED C. TRUMP and the Estate of MARY ANNE TRUMP, or assist or provide information to others in connection therewith. As used in the preceding sentence, the terms ‘publish’ and ‘publication’ shall be deemed to include the presentation or reproduction of written, verbal or visual material in any communication medium, including, without limitation, books, magazines, newspapers, theatrical productions of any kinds, movies, television, or radio, or the use of the internet in any language and in any jurisdiction. Any violation of the terms of this Paragraph 2 shall constitute a material breach of this agreement. In the event such breach occurs, ‘Objectants/Plaintiffs’, as well as their ‘counsel’, hereby consent to the granting of a temporary or permanent injunction against them (or against any agent acting in their behalf) by any court of competent jurisdiction prohibiting them (or their agent) from violating the terms of this Paragraph. In any proceeding for any injunction and upon any motion for a temporary or permanent injunction, ‘Objectants/Plaintiffs’ and their ‘counsel’ agree that their ability to answer in damages shall not be a bar or imposed as a defense to the granting of such temporary or permanent injunction. ‘Objectants/Plaintiffs’ and their ‘counsel’ further agree that ‘Proponents/Defendants’ will not have an adequate remedy at law in the event of any breach by ‘Objectants/Plaintiffs’ hereunder and

‘Proponents/Defendants’ will suffer irreparable damage and injury in [the] event of any such breach.’”

In support of the application for a temporary restraining order, the plaintiff asserts that Fred C. Trump, his father, was a famous figure in New York real estate, that Donald J. Trump, the plaintiff’s brother, had also become a famous real estate developer, and that their sister, Maryanne Trump Barry, had become a federal judge. According to the plaintiff, the litigation over the estate had received extensive publicity and the family made the collective decision to enter into an agreement to maintain the confidentiality of the family’s private matters. The plaintiff avers that Ms. Trump received valuable consideration for the settlement, including a substantial financial settlement, mutual releases, and a confidentiality agreement benefitting her.

The plaintiff alleges that on or about June 15, 2020, Ms. Trump announced the publication of a book entitled *Too Much and Never Enough: How My Family Created the World’s Most Dangerous Man*, which is scheduled for release on July 28, 2020. While the plaintiff has not seen the book, he alleges that Ms. Trump has stated that a major topic of the book will be her relationship with the plaintiff, Donald J. Trump, and Maryanne Trump Barry. According to the plaintiff, Ms. Trump has stated that book contains an “insider’s perspective” of “countless holiday meals,” “family interactions,” and “family events.” The plaintiff asserts that neither he, nor Donald J. Trump or Maryanne Trump Barry, have consented to the publication of the book.

The plaintiff asserts, as a first cause of action, that the settlement agreement is valid, that he has performed its terms, and that it is within Ms. Trump’s power to perform her obligations by refraining from publishing the book without the consent of the proponents. The plaintiff, pointing to the terms of the settlement agreement, states that Ms. Trump has stipulated that there is no adequate remedy at law to compensate him for the disclosures she is proposing to make. As to S&S, the plaintiff asserts that S&S “is acting at [Ms. Trump’s] direction in publishing the book on her behalf, and is acting in concert with [Ms. Trump].” The first cause of action seeks specific performance of the settlement agreement, and a permanent injunction.

The second cause of action asserts a claim for money damages against Ms. Trump for breach of contract. The third cause of action asserts a claim against Ms. Trump for a judgment declaring that the publication of the book violates Ms. Trump’s obligations under the settlement agreement.

In determining the application to vacate the temporary restraining order, it is the obligation of this Court to determine whether the issuance of the temporary restraining order was warranted on the basis of the papers submitted. While this Court has heard oral argument from counsel to Ms. Trump and S&S, the defendants have not as yet submitted opposition papers to the underlying motion and, therefore, the strength of their anticipated arguments and defenses cannot be meaningfully assessed at this time. Of necessity, the views expressed in this decision and order on motion are formed on the basis of the papers submitted by the plaintiff and do not necessarily represent opinions or conclusions as to whether a preliminary injunction should issue, much less on the ultimate determination of the matter in controversy.

Both Ms. Trump and S&S contend that the temporary restraining order should not have been issued, and should be vacated, as there is a heavy presumption against prior restraint on expression (*see New York Times Co. v United States*, 403 US 713, 714), which the plaintiff has not

overcome. S&S contends that Ms. Trump has a First Amendment right to participate in the electoral debate by writing and publishing a work concerning the character and fitness for public office of her uncle, the President of the United States (*see Citizens United v Federal Election Comm'n*, 558 US 310, 339), and that the United States Constitution independently protects the right of S&S to publish the work. This Court agrees in part and disagrees in part.

While Ms. Trump unquestionably possesses the same First Amendment expressive rights belonging to all Americans, she also possesses the right to enter into contracts, including the right to contract away her First Amendment rights. Parties are free to limit their First Amendment rights by contract (*see Trump v Trump*, 179 AD2d 201, 205-206; *Ronnie Van Zant, Inc. v Cleopatra Records, Inc.*, 906 F3d 253, 257 [2d Cir]; *see also Speken v Columbia Presbyt. Med. Ctr.*, 304 AD2d 489, 490; *Anonymous v Anonymous*, 233 AD2d 162, 163). A court may enforce an agreement preventing disclosure of specific information without violating the restricted party's First Amendment rights if the party received consideration in exchange for the restriction (*see Democratic National Committee v Republican National Committee*, 673 F3d 192, 204-207 [3d Cir]). A party may effectively relinquish First Amendment rights by executing a secrecy agreement in which the party receives significant benefits (*see Alfred A. Knopf, Inc. v Colby*, 509 F2d 1362, 1370 [4th Cir]).

Here, the plaintiff has presented evidence that Ms. Trump, in exchange for valuable consideration, voluntarily entered into a settlement agreement to resolve contested litigation. In that settlement agreement, she agreed not to publish a book concerning the litigation or her relationship with the adverse parties, the plaintiff, Donald J. Trump, and Maryanne Trump Barry, without their consent. The settlement agreement reflects that Ms. Trump was represented by counsel and, indeed, her counsel themselves also agreed to confidentiality. The Trump family was well known in New York, and the plaintiff asserts that the litigation over the family's estate had received extensive publicity. This Court perceives it to be reasonable for a well-known and prominent family to collectively agree, as part of the settlement of a highly-publicized internal family dispute, to confidentiality provisions under which all parties agree to maintain family privacy regarding intimate family matters. While the contents of the proposed book are unknown, from the title and from the statements attributed to Ms. Trump it appears that the content of the book touches upon subjects that may be within the reach of the confidentiality provision of the settlement agreement.

It bears noting that, while parties are free to enter into confidentiality agreements, courts are not necessarily obligated to specifically enforce them. Whether to issue an injunction is a matter of equity. Confidentiality agreements are alternatively enforceable through the imposition of money damages. In determining whether to grant specific performance through the use of the equitable remedy of an injunction, courts should balance the legitimate interests of the party seeking to enforce the contract with other legitimate interests, including, especially in this context, the public interest. This balancing concept takes into account whether the provisions of the confidentiality agreement are temporally and geographically reasonable and the extent to which the provisions are necessary to protect the plaintiff's legitimate interests (*see e.g. BDO Seidman v Hirshberg*, 93 NY2d 382, 389; *Delta Enter. Corp. v Cohen*, 93 AD3d 411). The confidentiality agreement here does not have any temporal or geographic limitation. The passage of time and changes in circumstances may have rendered at least some of the restrained information less significant than it was at the time and, conversely, whatever legitimate public interest there may have been in the family disputes of a real estate developer and his relatives may be considerably heightened by that real estate developer now being President of the United States and a current candidate for re-election. Drawing the appropriate balance may well require in camera review of the book sought to be enjoined. Stated differently, the

legitimate interest in preserving family secrets may be one thing for the family of a real estate developer, no matter how successful; it is another matter for the family of the President of the United States.

Ms. Trump contends that to restrain her from publishing a work concerning the character and fitness of the President in an election year would unduly infringe upon her First Amendment rights, notwithstanding her entry into the confidentiality provision of the settlement agreement. There is no need to decide this issue at this juncture, as the election at issue is still four months away. There is no compelling need for the material at issue to be published by Ms. Trump prior to the return date of the motion for a preliminary injunction, which is less than 10 days away. At this preliminary stage of the proceedings, this Court is of the view that it is appropriate, in view of the confidentiality provision of the settlement agreement and the showing made in the plaintiff's papers, for a temporary restraining order to issue as against Ms. Trump to temporarily enforce its terms pending a hearing on the preliminary injunction. The Supreme Court may revisit the restraining order upon its timely review of the defendants' submissions and its conduct of further proceedings.

S&S is not a party to the settlement agreement. The only basis offered by the plaintiff to extend the temporary restraining order to S&S are the allegations that S&S "intends to act" on Ms. Trump's behalf in causing the publication of the book and that S&S is acting at Ms. Trump's direction and in concert with her. However, these allegations are conclusory and not supported by any specific factual averments. Unlike Ms. Trump, S&S has not agreed to surrender or relinquish any of its First Amendment rights (*see Ronnie Van Zant, Inc. v Cleopatra Records, Inc.*, 906 F3d at 257). Since the predicate for the plaintiff's application for a temporary restraining order is the existence of the confidentiality provision of the settlement agreement (and no alternate basis for an injunction against Ms. Trump is either suggested or apparent), and S&S is not a party to the settlement agreement, this Court perceives no basis for S&S to be specifically enjoined. But the matter does not quite end there.

In the settlement agreement, Ms. Trump agreed that, in the event of a violation of the confidentiality provision, injunctive relief could be obtained not only against her but also against "any agent acting in [her] behalf." It is a well-established feature of injunctive practice that injunctions may be issued against an agent or employee of a party covered by the injunction (*see Rigas v Livingston*, 178 NY 20, 24-26; *Pahlavi v Laidlaw Holdings*, 180 AD2d 595, 596). If the rule were otherwise, a party could readily evade an injunction by the expedient of simply causing his or her agent or employee to undertake the action which the party is prohibited from doing. However, that an actor may be sympathetic to the desires of one properly bound by an injunction, or that by his or her conduct an actor accomplishes what the party enjoined wants accomplished is not sufficient, by itself, to impose contempt liability (*see Rigas v Livingston*, 178 NY at 24-25; *State Univ. of N.Y. v Denton*, 35 AD2d 176, 180).

The papers presented warrant the extension of the temporary restraining order against Ms. Trump to any agent of hers. While it is customary that restraining orders issue, as this one did, against employees, members, officers, attorneys, representatives of, and those acting in concert with, the enjoined person, the settlement agreement here does not reflect Ms. Trump's consent to inclusion of anyone other than her agent within the scope of the injunctive relief against her. While the plaintiff may be entitled to enforce the confidentiality provision, he is not entitled to greater relief than what the settlement agreement calls for. The restraining order issued below therefore should

be modified to accord with the settlement agreement. Since the plaintiff's application for a temporary restraining order is founded on the settlement agreement, the relief to be accorded must be consistent therewith.

Thus, the restraining order should be modified to limit its scope to Ms. Trump and any agent of hers. While the plaintiff has alleged, in effect, that S&S is Ms. Trump's agent, the evidence submitted is insufficient for this Court to determine whether the plaintiff is likely to succeed in establishing that claim. So, while the plaintiff is entitled to have the temporary restraining order bind any agent of Ms. Trump, this Court will not name S&S as being such an agent.

This Court also concludes that the duration of the restraining order should be modified such that it shall remain in effect pending the hearing of the motion for preliminary injunction, and that the restraining order should be reassessed by the Supreme Court in view of the defendants' answering papers.

ORDERED that the application by Simon & Schuster, Inc., is granted, and the temporary restraining order contained in the order to show cause dated June 30, 2020, is vacated as against Simon & Schuster, Inc.; and it is further,

ORDERED that the application by Mary L. Trump is granted to the extent that the temporary restraining order contained in the order to show cause dated June 30, 2020, is modified so as to read as follows, and the application is otherwise denied:

ORDERED, that pending the hearing of Petitioner Robert S. Trump's within motion for a preliminary injunction, Mary L. Trump, together with any agent, is hereby temporarily enjoined and restrained, pursuant to CPLR 6313, from publishing, printing or distributing any book or any portions thereof including but not limited to the book entitled: 'Too Much and Never Enough, How My Family Created the World's Most Dangerous Man', in any medium containing descriptions or accounts of Mary L. Trump's relationship with Robert S. Trump, Donald Trump or Maryanne Trump Barry."



ALAN D. SCHEINKMAN
Presiding Justice