Kellman v Mosley
2008 NY Slip Op 30509(U)
February 22, 2008
Supreme Court, New York County
Docket Number: 0104238/2007
Judge: Jacqueline W. Silbermann
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SCANNED ON 2/27/2008

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. HON. JACQUELINE W. SILBERMANN Justice PART 50C

Joy Kellman, Plaintiff,

- v -

Walter Mosley, Defendant.

INDEX NO. 104238/07

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 7 were read on this motion ~~to~~/for partial summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-6
Replying Affidavits	7

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum decision

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

DATED: J.S.C.

Dated: February 22, 2008

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 50L
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JOY KELLMAN,

Plaintiff,

Index No. 104238/07

-against-

WALTER MOSLEY,

Defendant.

----------X

Jacqueline Silbermann, J.:

In this action for breach of contract, the parties dispute, among other things, the meaning of a provision which gives certain rights to plaintiff, as defendant's ex-wife, in various published works written by defendant. Plaintiff requests partial summary judgment on her complaint, leaving the issue of damages for a later date.

I. Background

Plaintiff Joy Kellman (Kellman)and defendant Walter Mosley (Mosley) were married for over 13. During that time, Mosley commenced a career as a well-known and respected novelist, famous for, among other works, a series of detective stories starring an African-American detective named Easy Rawlins, and his friend and sidekick, Mouse.

The parties entered into a settlement agreement (Agreement) in tandem with their divorce in 2001. At that time, Mosley had written seven books in the Easy Rawlins series: Devil in a Blue

Dress, A Red Death, White Butterfly, Black Betty, A Little Yellow Dog, Bad Boy Brawley Brown, and Gone Fishin'. He had also written four other books not involving Easy Rawlins or Mouse: RL's Dream, Always Outnumbered, Always Outgunned, Eddie, Cleo and Arn, and Lost Soul.

Kellman brings this action to recover sums allegedly owed her for (1) breach of a provision in the Agreement allowing her to share in a percentage of the exploitation of a disputed type of Mosley's work, and (2) interest on certain yearly payments owed to her under the Agreement, which while paid, were, allegedly, untimely when made.

Paragraphs 4.1 (b) and 4.1 (c) involve certain cash payments Mosley agreed to make to Kellman. Paragraph 4.1 (b) of the Agreement states that:

> [t]he Husband shall pay the Wife the sum of $300,000 for her interest in the Husband's literary career and enhanced earning capacity, subject to the provisions of subparagraph (d) immediately below. Payments shall be made in annual installments of $50,000 for no more than six consecutive years, payable no later than May 1 in each year, commencing on or before May 1, 2001 and concluding no later than May 1, 2007.

Paragraph 4.1 (c) continues:

> [n]otwithstanding anything in the preceding paragraph to the contrary, if the Husband's total income less alimony deduction as reported on page 1 of the Husband's Form 1040 is in excess of $450,000 in any year prior to May 1, 2007 (the "Acceleration Year"), the Husband shall accelerate his payments to the Wife by making an additional payment of $50,000 no later

> than May in the year following the Acceleration Year. For example, if the Husband's total income less alimony deduction as reported on page 1 of the Husband's Form 1040 is $500,000 as set forth in his 2001 tax return, the Husband shall pay the annual $50,000 payment provided in subparagraph (b) above by May 1, 2002, as well as an additional $50,000 on May 1, 2002, for a total of $100,000 payable on May 1, 2002.

Paragraph 4.1 (d) is concerned with Kellman's right to share in income which her husband may receive as a result of future literary ventures. Initially, paragraph 4.1 defines the books Devil in a Blue Dress, A Red Death, White Butterfly, Black Betty, A Little Yellow Dog, Bad Boy Brawley Brown, Gone Fishin', Always Outnumbered, Always Outgunned and RL's Dream as "Marital Books." Eddie, Cleo and Arn and Lost Soul are labeled "Literary Works" (Marital Books). Despite the labels, both categories are treated alike in the applicable provision which follows.

Paragraph 4.1 (d) states that:

> [i]n addition to the provisions of paragraph (b) above, as and for equitable distribution, the Wife shall receive 25% (twenty-five percent) of any funds (net of agency fees and commissions, legal and accounting fees, *e.g.* in connection with negotiating or enforcing the licensing agreement) paid to the Husband on account of Marital Books/Literary Works, any copyright of Marital Books/Literary Works, or any part thereof, and any use of Marital Books/Literary Works ("Future Use"), whether in the United States or any other place in the world, in written, verbal and visual communications, whenever produced after the date of the execution of this Agreement, including but not limited to, future publishing of Marital Books/Literary Works, screenplays (produced and not produced, written by the Husband in whole or in part, or sold to and written by another person or entity), motion picture rights, fiction and

> non-fiction, magazines, records, tapes (audio and video), disks (audio, video, CD, DVD, computer), theatrical productions of any kind, movies, television, television movies and radio productions, and any spin-off from any of the foregoing, including but not limited to any television series based on Easy Rawlins and Mouse.

Although Kellman is concerned with her rights under paragraphs 4.1 (b) and (c) (which will be dealt with further on), the greater dispute between the parties involves the interpretation of paragraph 4.1 (d). Kellman claims that Mosley has published at least three new Easy Rawlins novels since the execution of the Agreement, and that a motion picture of one post-divorce title, Little Scarlet, is set to be released. She maintains that there have been numerous other Easy Rawlins projects, including a collection of short stories and a project to make a television series based on Easy Rawlins. She claims that she has, however, received only the merest approximation of an accounting of these post-divorce projects, and little cash, and so, suspects that she has not received her full contractual share of the net proceeds Mosley has realized on his writing. The gist of Kellman's complaint is that she is entitled to 25% of any future book or project in which Mosley participates, or realizes income from, which are based on Easy Rawlins and Mouse, regardless of the fact that these new projects are not listed as Marital Books. She claims, essentially, that paragraph 4.1 (d)

entitles her to a share of any new works or projects which involve, in any way, Easy Rawlins and Mouse, including new novels and projects, written after the execution of the Agreement; that is, books which continue the Easy Rawlins series begun in the Marital Books.

With regard to the $300,000 payment under paragraphs 4.1 (b) and (c), Kellman contends that Mosley is in breach of these provisions because, while he eventually made all of the payments, he was late on each occasion, including the payments made in 2001, 2002, and 2003, years in which he made more than $450,000. Consequently, Kellman seeks an award of interest due on each payment, at the rate of 9%, from the date each payment was due until it was paid, and interest on those sums from that time until the present. Her attorney has offered his calculations as to the sums due.

Kellman also claims that, since this action was commenced, Mosley has also failed to make his final alimony payment of $6,000, pursuant to paragraph 5.2 of the Agreement.[1]

Mosley, in response, argues that Kellman is not entitled to any percentage of monies he has earned on new books in the Easy Rawlins series which were written after the execution of the

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[1]This claim is not alleged in the complaint, as it arose after the complaint was filed. Kellman has not moved to amend her complaint to include a claim for the last alimony payment.

Agreement, and that questions of fact exist as to the interpretation of paragraph 4.1 (d). He also claims that only one of the yearly payments was late, and that he owes no interest to Kellman. Finally, Mosley avers that he made his final alimony payment.

II. Discussion

"'[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.'" *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993), quoting *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 (1986); *see also Winegrad v New York University Medical Center*, 64 NY2d 851 (1985); *Kesselman v Lever House Restaurant*, 29 AD3d 302, 303 (1st Dept 2006). Upon the presentation of a prima facie case by the movant, the burden then shifts to the motion's opponent to offer evidentiary facts sufficient to raise a triable issue of fact. *See Alvarez v Prospect Hotel*, 68 NY2d 320, *supra*; *Kesselman, supra*.

"The fundamental neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent." *Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 (2002). "[W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced

according to its terms [interior quotation marks and citations omitted]." *R/S Associates v New York Job Development Authority*, 98 NY2d 29 (2002); *see also Greenfield v Philles Records, Inc.*, 98 NY2d 562, *supra*; *Reiss v Financial Performance Corporation*, 97 NY2d 195 (2001]), because the best evidence of the parties' intent will be found within the writing itself. *See Greenfield v Philles Records, Inc.*, 98 NY2d 562, *supra*; *Slamow v Del Co*, 79 NY2d 1016 (1992).

"'[E]xtrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous on its face'" (*Reiss v Financial Performance Corporation*, 97 NY2d at 199, quoting *W.W.W. Associates v Giancontieri*, 77 NY2d 157, 163 [1990]), and extrinsic evidence of the parties' intent may only be considered if the agreement is ambiguous. *Greenfield v Philles Records, Inc.*, 98 NY2d 562, *supra*. Whether or not an agreement is ambiguous is an issue of law for the court to determine. *Id.*; *see also W.W.W. Associates v Giancontieri*, 77 NY2d 157, *supra*. The rules of contract interpretation do not differ for agreements entered into as part of a divorce. *Rainbow v Swisher*, 72 NY2d 106 (1988).

A. Paragraph 4.1 (d)

The court finds that the Agreement is ambiguous with regard to whether paragraph 4.1 (d) is meant to apply to all instances

where the characters of Easy Rawlins and Mouse are used from the date of the Agreement's execution onward, for the reasons which follow.

While Kellman chides Mosley for insisting on a reading of the Agreement which would only allow her to obtain a percentage of works that "slavishly copy the Marital Books" (Kellman Aff. in Support of Motion, at 4), the main words in paragraph 4.1 (d) upon which she hangs her argument are "fiction and non-fiction" in the "encyclopedic litany" of examples of Future Uses. Kellman Aff., at 4. Thus, she claims that "[t]he list adds, not only 'future publishing' of the Marital Books themselves, but 'fiction and non-fiction,' generally, as yet other examples of derivative works that might eventuate after the divorce." Plaintiff's Memorandum of Law in Support of Motion, at 10. In Kellman's rendering, "fiction and non-fiction" includes all future installments of the Easy Rawlins series. She insists that "[Mosley] cannot wish away these two nouns." *Id.*

Kellman also focuses on the inclusion of the word "spin-off" in paragraph 4.1 (d), arguing that its common dictionary meaning would make any book containing Easy Rawlins and Mouse written after the Marital Books, and in continuation of the series, a spin-off, in which she is entitled to share.

Although Kellman claims that she is not seeking a share of the copyrights Mosley has obtained in his works, but only a share in the profits earned from those copyrights, copyright law looms large in her analysis of the present situation. Kellman first cites *Suntrust Bank v Houghton Mifflin Co.* (268 F3d 1257 [11 Cir 2001]), a case in which the copyright holder of the book Gone With the Wind fought the authors of a parody entitled The Wind Done Gone (the story told from the point of view of the plantation's slave population). In *Suntrust*, the Court determined that the copyright holder of Gone With the Wind owned the right to the characters and settings taken from the books, as well as the book in its entirety, and thus, any use of these elements in a future book was an infringement of the original copyright.

Suntrust offers little support to Kellman. The present case does not involve copyright infringement, and *Suntrust* does not involve the interpretation of contract language such as that in the present case. Whether Kellman has an interest in further use of the characters of Easy Rawlins and Mouse depends only on the disputed contract language, and not on the unasked question of the extent of Mosley's copyright protection for his works.

Kellman also relies fruitlessly on the case *Burnett v Warner Brothers Pictures, Inc.* (113 AD2d 710 [1st Dept 1985], *affd* 67

NY2d 912 [1986]), which she claims stands "four-square" with the present case. Plaintiff's Memorandum of Law, at 15. In that case, the author of a play entitled Everyone Comes to Rick's assigned all rights to the play to the defendant, which used the play as the basis for the classic film Casablanca. The assignment purported to "'give, grant, bargain, sell, assign, transfer and set over now or hereafter existing rights of every kind and character whatsoever pertaining to the said work, whether or not such rights are now known, recognized or contemplated, and the complete and unconditional and unencumbered title in and to said work of all purposes whatsoever." *Burnett v Warner Brothers Pictures, Inc.*, 113 AD2d at 711. Regardless of this broad language, the play's original authors objected to the use of the Casablanca characters in a television series, which aired some years later. The Court determined that "it is beyond question that plaintiffs failed to retain any rights, copyrightable or otherwise, which [defendant] could infringe" because "[t]he very words of the agreement between plaintiffs and [defendant] unequivocally demonstrate plaintiffs' intent to assign all their rights 'of every kind and character whatsoever pertaining to said work, whether or not such rights are now known, recognized or contemplated ... for all purposes

whatsoever." *Burnett v Warner Brothers Pictures, Inc.*, 113 AD2d at 712.

In *Burnett*, the Court found that the copyright assignment was so broad, and contained "no clauses specifically enumerating any rights retained by plaintiffs or enumerating any rights excluded to [defendant]." The Court held that the general clauses in the assignment transferred "all imaginable rights" to the defendant, such that "[t]he assignment was very obviously designed to grant the assignee the broadest of rights with respect to plaintiffs' play." *Id.* at 712. The Court reasoned that "[i]n instances where the assignment clauses were drafted in the broadest of terms, courts have concluded that had the plaintiff intended to retain certain rights, specific clauses to that effect should have been included in the agreement." *Id.*

The present case does not, of course, involve an assignment of a copyright, but the grant of a percentage of the profits from copyrighted works. To the extent that copyright law can be used analogously, unlike in *Burnett*, paragraph 4.1 (d), although quite broad, is not so clearly all-inclusive as the *Burnett* assignment clause. The Agreement does not, for instance, as clearly cover the future use of the entirety of elements, characters or settings in the Marital Books, as does the copyright assignment

in *Burnett*. Such meaning, if it exists, must be teased from the language of paragraph 4.1 (d).

The language of the Agreement is ambiguous as to the extent to which Kellman's interest follows Mosely's exploitation of Easy Rawlins in future works of "fiction and non-fiction," as those words appear in paragraph 4.1 (d). Paragraph 4.1 (d) is very broad as to the future uses which may be made of the Marital Books, but does include the words (if distilled down to basics), future "fiction and non-fiction," which might be interpreted to mean future Easy Rawlins fiction, i.e., future installments in the series, as well as future instances where non-marital Easy Rawlins fiction appears in works of non-fiction.

Mosley explains that the term "fiction and non-fiction" refers to two different possible uses of the Marital Books: the use of portions or chapters of the Marital Books in anthologies or books of short stories, or the use of portions of the Marital Books in works of non-fiction used as examples of writing style. However, Mosley's explanation, while plausible, does not cement the issue; it merely offers a different view as to the meaning if the ambiguous terms "fiction and non-fiction."

With the recognition of an ambiguity comes the right to offer extrinsic evidence. *See Greenfield v Philles Records, Inc.*, 98 NY2d 562, *supra*. In the opening created by the

Agreement's ambiguity, Mosley introduces a copy of an earlier draft of paragraph 4.1 (d), which contains language which Mosley claims shows the parties' intent that Kellman was not to have a share in any books containing the characters Easy Rawlins and Mouse other than the Marital Books, such as would be the case if the series continued.

In the draft, Kellman's attorney sought to add to the paragraph 4.1 (d) language, immediately following the words "paid to the Husband on account of Marital Books," which reads "Books/Literary Works, any copyright of Marital Books/Literary Works, or any part thereof, *and any characters therefrom* ... [emphasis added]." Aff. of Susan Bender, Ex. 5. Such language would entitle Kellman to receive a percentage of any works containing characters from the Marital Books, i.e., all further books in the Easy Rawlins series.

Mosley's attorney refused to accept the new language. Instead, she sent Kellman's attorney a letter which stated "[y]our changes are, in my opinion, substantial and do not reflect what I understood to be the agreement entered into between Walter and Joy." Aff. of Susan Bender, Ex. 2. The changes ware never incorporated into the Agreement.

Mosley concludes that the failure of the parties to include the expansive language into the final Agreement is proof that the

parties never agreed to allow Kellman a percentage in post-marital Easy Rawlins books. Kellman counters that the unaccepted language was left out of the final draft because it was "mere surplusage." Reply Memorandum of Law, at 8.

Kellman's response to the question of the import of the excluded language should have been made by a party with knowledge of the negotiations, not merely stated in a memorandum of law. *See e.g. Guzman v Mike's Pipe Yard*, 35 AD3d 266 (1st Dept 2006)(on summary judgment, evidence should be provided by person with knowledge). However, Kellman has already argued, based on the copyright cases quoted above, that the express use of the word "characters" was not necessary, due to the broad scope of paragraph 4.1 (d). Therefore, this court recognizes that Mosley's extrinsic evidence does not resolve the matter, but merely underscores the ambiguity.

Kellman also tries to press for a share of Mosley's profits based on the word "spin-off" in the laundry list of Easy Rawlin's by-products to which she claims a right. However, the matter is not furthered by Kellman's attempt to define "spin-off" as meaning any new works in the Easy Rawlins series which post-date the Agreement.

Kellman directs this court's attention to the definition of "spin-off" in the American Heritage Dictionary of the English

Language (4th Ed.), which defines spin-off as, among other things, "something derived from an earlier work, such as a television show starring a character who had a popular minor role in another show." Kellman adopts this definition by reference to *Preminger v Twentieth-Century Fox Film Corporation*, NYLJ, Apr. 24, 1982, at 12 col 2 (Sup Ct, NY County0 in which the television show Trapper John, M.D. was found to be a spin-off of the film M*A*S*H. Kellman appears to be making the point that a spin-off need not be in the same medium as the original source for the spin-off.

This court, by adopting Kellman's own definition of the term spin-off, finds that books written as a continuation of the Easy Rawlins series beyond the Marital Books do not equate to a series of spin-offs; rather, the Easy Rawlins books are the potential source, such as the film M*A*S*H, from which a spin-off might generate. By the language of the Agreement, Kellman would have the right to share in the profits of such a venture, should the event occur. However, this language does not suffice to grant her a right to a percentage of post-marital Easy Rawlins books.

As a result of the foregoing, the single question of fact existing to support Kellman's complaint, with regard to paragraph 4.1 (d) of Article IV of the Agreement, is whether the words "fiction and non-fiction" contained in that paragraph entitle her

to a percentage of all profits realized from the exploitation of any type of media exposure or project (such as is listed in that paragraph), stemming from post-marital projects in the continuing series starring Easy Rawlins and Mouse.

Mosley complains that Kellman cannot pursue her paragraph 4.1 (d) claim because of laches, in that she could have complained long ago that she was being excluded from receiving monies due her. However, the action was brought within the statute of limitations, and so, laches does not apply. *See In re Liquidation of American Druggists' Insurance Company*, 15 AD3d 268, 268 (1st Dept 2005)("[t]he defense of laches is unavailable in an action at law commenced within the period of limitation").

B. Paragraphs 4.1 (b) and (c)

Kellman claims that Mosley made the yearly payments required by paragraphs 4.1 (b) and (c) "chronically late" and that Mosley "disdains" to pay interest which Kellman claims she is due as a result. Plaintiff's Memorandum of Law, at 6. She maintains that Mosley made over $450,000 in 2001, 2002, and 2003, requiring him to accelerate his payments in those years. Kellman postulates that she is entitled to the sum of $17,017.85 in lost interest through May 18, 2007, as calculated by her attorney, interest which continues to accrue. Mosley, in response, maintains that only one payment was late, because the Agreement calls for a cure

period for defaults, and that, except for the single occasion, he either paid within the cure period, or Kellman failed to send a default notice at all, making Mosley's payment timely whenever it was made.

Article IX, paragraph 9.2 of the Agreement provides that

> [i]n the event that either party defaults with respect to any obligation under this Agreement and said default is not remedied within 15 (fifteen) days after receipt of written notice sent by certified mail, return receipt requested, to the defaulting party specifying said default, the defaulting party agrees to indemnify the other against or reimburse him/her for any and all expenses, costs, and reasonable attorney's fees necessarily incurred, resulting from or made necessary by the commencement of any suit or other proceeding to enforce any of the terms, covenants, or conditions of this Agreement to be performed or complied with by the other, provided such suit or other proceeding results in a judgment, decree, or order in favor of the other.

Kellman, in her reply, simply ignores Mosley's claim that most of the contractual payments were made either within a cure period, or that, in some instances, no letter claiming a default in payment was ever sent (although Kellman did complain of other various defaults in writing). *See e.g.* Opposition, Ex. 12.

Taking into account the cure periods available to Mosley, it appears that only two of the payments were untimely: the yearly payment due May 1, 2002, and the accelerated payment due on the same day. The evidence shows that Kellman sent Mosley notices to cure on May 30, 2002 and November 24, 2002, yet payment was not made until December 10, 2003. Mosley does not deny this default.

However, there is a second default. While Mosley claims that the yearly payment due May 1, 2002 was timely made at the end of a cure period, it appears that this is not the case. Kellman's notice to cure is dated June 10, 2002. Mosley's attorney says that "assuming the letter arrived in three days," Mosley's payment on June 28, 2002 would fall within the 15-day cure period. However, Kellman's default letter is date stamped June 12, 2002, only two days after the notice was sent. Assuming that the notice was stamped on arrival, as is a usual practice, Mosley's payment was one day late, as the cure period ended May 27, 2002, 15 days after June 12, 2002.

Having established the untimeliness of two of Mosley's payments, it is necesary to decide from what date Kellman's claim for damages for lost interest accrues, in order to determine the amount of damages to which she is entitled. Kellman claims that she is owed interest on late payments harking back to the date upon which each payment was due. However, CPLR 5001 (b) states that "[i]nterest shall be computed from the earliest ascertainable date the cause of action existed." In the present case, Kellman had no cause of action against Mosley until he failed to cure within 15 days of a notice of default under the Agreement. As such, Mosley is only liable for the period following his failure to cure a default in those cases in which

he received notice. Any other result would allow Kellman to withhold, or otherwise fail to serve, a notice of default, which would cause interest to accrue unnecessarily before Mosley was required to pay under paragraph 9.2.

As a result of the foregoing, Kellman is only entitled to damages equivalent to the amount of interest on the accelerated payment of $50,000 from May 30, 2002 until December 10, 2003, at the statutory rate of 9% (CPLR 5004), and interest accruing thereafter at the same statutory rate, until the entry of judgment, and damages equivalent to the interest accruing on the yearly payment of $50,000 from June 27, 2002 until June 28, 2002, and interest at the statutory rate thereafter, until judgment is entered. Damages in the form of interest on each late payment, and interest accruing on those damages, is to be computed by the Clerk of the Court, upon entry of judgment. CPLR 5002.

The complaint does not deal with the alleged failure to make the final alimony payment due under paragraph 5.2 of the Agreement. However, to the extent that the parties have raised the issue, the evidence merely creates a question of fact which cannot be resolved herein. Mosley contends that he made all 72 payments due Kellman by making a payment in March 2001, a few days before the Agreement was signed. Kellman does not recognize that check as a payment under the Agreement (because of its

date), but also does not say what that payment was for, or even if she received it. She only alludes to Mosley's tax form for that year[2] which appears to show that only six payments were made that year, for a total of $48,000, rather than the seven which were due. Thus, a question of fact is raised which is unanswerable at this time.

Pursuant to paragraph 9.2 of the Agreement, Kellman is entitled to attorney's fees for the part of her complaint seeking interest on late payments, as limited above. However, determination of the amount of attorney's fees to which she is entitled for this relatively small part of her action is deferred until the conclusion of the trial.

Settle Order.

Dated: February 22, 2008

E N T E R :

Jacqueline W. Silbermann
Justice of the Supreme Court

[2]Kellman has withheld producing Mosley's tax return until the court calls for it, in deference to Mosley's privacy.