

Talker v Talker
2012 NY Slip Op 31622(U)
June 14, 2012
Supreme Court, New York County
Docket Number: 105127/11
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____
Justice _____

PART _____

Index Number : 105127/2011
TALKER, NATALIE
vs.
TALKER, ALBERT
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

RECEIVED

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MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

FILED

JUN 19 2012

NEW YORK, J.S.C.
COUNTY CLERK'S OFFICE

Dated: 6/17/12

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
NATALIE TALKER,

Plaintiff,

-against-

ALBERT TALKER,

Defendants.
-----X

HON. CYNTHIA S. KERN, J.S.C.

Index No. 105127/11

DECISION/ORDER

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Cross-Motion and Affidavits Annexed.....	<u> </u>
Answering Affidavits to Cross-Motion.....	<u> </u>
Replying Affidavits.....	<u> </u>
Exhibits.....	<u>3</u>

Plaintiff commenced the instant action to recover damages stemming from the publication of a book written by defendant in violation of a Final Restraining Order (FRO) against defendant. Defendant now moves pursuant to CPLR § 3211(a)(1), (a)(2), (a)(4), (a)(7) and (a)(8) to dismiss plaintiff's complaint on the grounds that (1) a defense is founded upon documentary evidence; (2) this court lacks subject matter jurisdiction over the instant matter; (3) there is another action pending between the same parties for the same cause of action in another court; (4) the complaint fails to state a cause of action; and (5) this court lacks personal jurisdiction over defendant. Additionally, defendant moves pursuant to CPLR § 3126(3) to strike

plaintiff's complaint for failure to disclose certain discovery. For the reasons set forth below, defendant's motion is denied.

The relevant facts are as follows. On December 3, 2008, plaintiff was awarded an FRO against defendant which allegedly prohibited defendant from either acquiring or disseminating information about plaintiff. Plaintiff's complaint alleges that on or about February 14, 2011, defendant published a book titled "Psychologists With No God" which plaintiff alleges contains "extensive and intimate details of [her and her two children's] lives." The book is currently available on Amazon.com and at Barnes & Noble.

As an initial matter, defendant's motion to dismiss plaintiff's complaint pursuant to CPLR § 3211 (a)(7) and (a)(2) for failure to state a cause of action and lack of subject matter jurisdiction is denied as this court has already denied defendant's motion to dismiss the complaint on those grounds in a decision and order dated March 2, 2012. To the extent that defendant moves to reargue this court's previous decision denying his motion to dismiss on those grounds, this court denies such reargument as defendant has not alleged that the court overlooked or misapprehended matters of fact or law, as required by CPLR 2221(d)(2).

Defendant's motion to dismiss the complaint pursuant to CPLR § 3211 (a)(1) on the ground of documentary evidence is likewise denied as the book, on which this action is based, does not dispose of plaintiff's claim. In order to prevail on a defense founded on documentary evidence pursuant to CPLR § 3211 (a)(1), the documents relied upon must definitively dispose of plaintiff's claim. See *Bronxville Knolls, Inc. v. Webster Town Partnership*, 221 A.D.2d 248 (1st Dept 1995). Additionally, the documentary evidence must be such that it resolves all factual issues as a matter of law. *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314 (2002).

Defendant asserts that the book, on which this action is based, stems from an imaginary short story that was written at the end of 2007 during therapy sessions before the FRO was awarded to plaintiff and that the content of the book does not mention any real names and has a disclaimer clause printed on its cover. However, the book was written after the issuance of the FRO. Further, the FRO issued to plaintiff prohibited defendant from either acquiring or disseminating information about plaintiff. It did not merely prohibit defendant from mentioning plaintiff's real name. Therefore, the documentary evidence on which defendant relies does not dispose of plaintiff's claim at this time. Thus, defendant's motion to dismiss the complaint on the ground of documentary evidence must be denied.

Defendant's motion to dismiss the complaint pursuant to CPLR § 3211 (a)(4) on the ground that there is another action pending between the same parties for the same cause of action in a court of any state or the United States is also denied. Defendant asserts that there is a matrimonial case involving custody of the parties' children in the family court of New Jersey, Union County, a criminal action filed by the State of New Jersey against the plaintiff and an appeal pending on the Judgment of Divorce. However, defendant has not shown that any of these actions were brought for the same relief or involve the same cause of action as the instant action. Thus, defendant's motion to dismiss the complaint pursuant to CPLR § 3211 (a)(4) must be denied.

Defendant's motion to dismiss the complaint pursuant to CPLR § 3211 (a)(8) on the ground of lack of personal jurisdiction is also denied. Defendant asserts that this court lacks personal jurisdiction over him because plaintiff lives in New Jersey and defendant lives in Pennsylvania and that defendant only maintains an office in New York while he resides in

Pennsylvania. However, it is clear that at the start of this action, defendant resided in New York. While defendant may have bought property in Pennsylvania after the action was commenced, as evidenced by a mortgage agreement produced by defendant, that does not preclude this court from maintaining personal jurisdiction over defendant as he resided in New York at the start of this action. Moreover, the papers attached to defendant's motion, such as his Memorandum of Law, the Note of Issue, defendant's Demands for Bills of Particular and defendant's Request for the Production of Documents all show that defendant's address is 375 South End Avenue, Suite 14R, New York, New York as that is the address defendant has been providing to the court all along. Nowhere does defendant provide his alleged Pennsylvania address. Thus, defendant's motion to dismiss the complaint pursuant to CPLR § 3211 (a)(8) must be denied.

Finally, defendant's motion pursuant to CPLR § 3126(3) to strike plaintiff's complaint on the ground that she failed to respond to defendant's demand for a bill of particulars is also denied. Pursuant to CPLR § 3126(3),

If any party...willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:

3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

Plaintiff has shown that she has, in fact, responded to defendant's demand for a bill of particulars and has attached said response to her opposition papers. Moreover, a compliance conference was scheduled in this case for March 26, 2012 to discuss any outstanding discovery in this matter but defendant failed to appear. Plaintiff only filed the Note of Issue after said conference came and went without any word from defendant. Thus, as defendant has not shown that plaintiff wilfully

failed to disclose any discovery in this case, defendant's motion pursuant to CPLR § 3126(3) to strike plaintiff's complaint is denied.

Accordingly, defendant's motion is denied in its entirety. This constitutes the decision and order of the court.

Dated:

6/14/12

Enter: _____

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