

<b>Nelson v Rosenkranz</b>
2016 NY Slip Op 31027(U)
May 26, 2016
Supreme Court, New York County
Docket Number: 161624/2014
Judge: Gerald Lebovits
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: PART 7**

KATHERINE NELSON,

Plaintiff,

-against-

ROBERT ROSENKRANZ,

Defendant.

Index No.: 161624/2014  
**DECISION/ORDER**  
Motion Seq. No. 4, 6, and 7

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendant’s motion to disqualify plaintiff’s counsel; motion for contempt; motion for summary judgment or, in the alternative, for reverse summary judgment; and plaintiff’s cross-motion to strike defendant’s verified answer and to impose sanctions.

<b>Papers</b>	<b>Numbered</b>
Defendant’s Notice of Motion .....	1
Defendant’s Affirmation .....	2
Plaintiff’s Notice of Cross-Motion .....	3
Plaintiff’s Affirmation in Opposition and in Support of Cross-Motion .....	4
Plaintiff’s Affidavit in Opposition .....	5
Defendant’s Affirmation in Reply .....	6
Plaintiff’s Affidavit in Opposition .....	7

*Law Office of William S. Beslow* (William S. Beslow of counsel), for plaintiff.  
*Bronstein Van Veen, LLC* (Peter E. Bronstein of counsel), for defendant.

Gerald Lebovits, J.

The court consolidates motion sequence numbers 4, 6, and 7 for disposition.

Plaintiff and defendant were involved in a personal relationship that lasted until early 2014. On April 25, 2014, the parties signed an agreement by which plaintiff agreed (1) to release all claims against defendant; (2) not to contact defendant and his family by any means; and (3) not to discuss with anyone their relationship or anything plaintiff learned about defendant during their relationship. In return, defendant agreed to pay plaintiff \$100,000. Defendant paid \$54,500 when the agreement was signed.<sup>1</sup> The parties agreed that defendant would pay the remaining

<sup>1</sup> Although plaintiff’s affidavit alleges that the \$54,500 in the agreement referred to a prior loan, the law of the case is found in Justice Paul Wooten’s decision dated August 3, 2015, at page 11, which states that “Nelson does not dispute her receipt of \$54,500.00 upon her execution of the Agreement.” Plaintiff could have brought a motion to renew or reargue if she disputed this finding.

\$45,500 on or before July 15, 2014. On July 15, 2014, defendant tendered a check for \$32,500 to plaintiff. The memo line of this check stated that it is for “Final payment under agreement sex dated April 25, 2014.”<sup>2</sup> Plaintiff cashed this check and retained the proceeds, but now alleges that the check was intended as a gift, not as payment for the agreement. Defendant also now alleges that on the same day he paid plaintiff the remaining \$13,000 in cash. Plaintiff alleges that she never received the \$13,000.

Plaintiff then began harassing and coercing defendant. On September 9, 2014, defendant obtained a temporary order of protection (TOP) against plaintiff in Family Court. The TOP enjoined plaintiff from contacting defendant by any means and from posting any material about defendant on the Internet or any other medium. Plaintiff later filed a motion in Family Court to vacate that part of the TOP that prohibited her from posting any material on the Internet or any other medium.

On November 21, 2014, plaintiff sued defendant in this action. Defendant moved to dismiss the action. (Motion sequence 2.) In that motion, defendant did not mention the cash payment of \$13,000 he allegedly tendered to plaintiff. Instead, he alleged that plaintiff received the \$32,500 check in accord and satisfaction of the full amount.

On February 10, 2015, plaintiff’s motion to vacate that part of the Family Court TOP was granted on the ground that Family Court lacked jurisdiction.<sup>3</sup> In response, defendant filed an emergency order to show cause for injunctive relief in Supreme Court, New York County on February 13, 2015. (Motion sequence 3.) On the same date, Justice Joan Lobis granted an ex parte temporary injunction pending the hearing of that motion before Justice Paul Wooten. Despite the injunction, plaintiff continued to tweet about the defendant. Several news articles were published regarding the parties’ relationship shortly after the court granted the injunction. On February 25, 2015, defendant filed a motion for contempt. (Motion sequence 4.)

In a decision dated August 3, 2015, Justice Wooten addressed motion sequences 1, 2, 3, and 4. In motion sequence 1, Justice Wooten denied defendant’s motion to seal the records. In motion sequence 2, Justice Wooten dismissed all of plaintiff’s causes of action except the fourth cause of action, her claim for breach of contract, about which Justice Wooten found that an issue of fact existed about whether the check for \$32,500 constituted full payment. In motion sequence 3, Justice Wooten granted a temporary restraining order that enjoined plaintiff from discussing with anyone the parties’ relationship. In motion sequence 4, Justice Wooten granted defendant’s motion for contempt to the extent that he directed a special referee to conduct a hearing.

Defendant now moves for summary judgment under CPLR 3212 (b) or, in the alternative, under CPLR 3212 (e), for reverse summary judgment in plaintiff’s favor by his withdrawing that

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<sup>2</sup> Defendant alleges that the word “sex” was written by someone else, without his knowledge.

<sup>3</sup> Judge Stewart Weinstein determined that Family Court did not have jurisdiction to determine whether the parties’ agreement was valid or whether the agreement was violated. Judge Weinstein further found that without the agreement, the disputed portion of the TOP was overbroad and violated plaintiff’s constitutional free-speech protections.

part of his answer denying a breach of contract. Based on defendant's counterclaim, he also seeks a permanent injunction to enjoin plaintiff from (1) contacting or otherwise communicating with defendant or with any member of his family by any means whatever and (2) telling anyone, including discussions in person, by email, on the Internet, over social media, or by publication in any form whatever, about the parties' relationship or anything plaintiff may have learned about defendant during their relationship.

Plaintiff opposes defendant's motion and cross-moves (1) to strike defendant's verified answer on the alleged ground that defendant willfully violated a preliminary-conference order and (2) to impose sanctions against defendant on the alleged ground that defendant engaged in frivolous practice by filing a meritless motion. Plaintiff also seeks attorney fees.

**A. Defendant's Motion for Summary Judgment or, Alternatively, for Reverse Summary Judgment in Plaintiff's Favor**

Defendant's CPLR 3212 motion for summary judgment is denied. A summary judgment motion "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." (CPLR 3212 [b].) A court deciding a summary judgment motion may not "make credibility determinations or findings of fact." (*Vega v Restani Constr. Corp.* 18 NY3d 499, 505 [2012].)

Defendant alleges that he paid the remaining \$45,500 by cash and check. Plaintiff contends that the check was a gift and that she did not receive the \$13,000 cash payment. Because plaintiff raises a material issue of fact, summary judgment for defendant is inappropriate.

However, the court grants defendant's alternative motion for reverse summary judgment in plaintiff's favor. In any action other than matrimonial action, "summary judgment may be granted . . . in favor of any one or more parties, to the extent warranted, on such terms as may be just." (CPLR 3212 [e].)

Defendant's motion to withdraw that part of his verified answer denying the breach of contract is granted. Defendant now agrees that he breached the contract by not paying the remaining \$45,500. Therefore, he consents to reverse summary judgment in plaintiff's favor for that sum. Defendant argues that this breach is not material and that monetary damages are the appropriate remedy. Plaintiff's complaint alleges that this breach is material and therefore that the contract should be rescinded.

A court may grant rescission of a breached contract when the breach is "material and willful, or, if not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract." (*Callanan v Powers*, 199 NY 268, 284 [1910].) A court may grant rescission only when "there is lacking a complete and adequate remedy at law and where the status quo may be substantially restored." (*Rudman v Cowles Communications, Inc.*, 30 NY2d 1, 13 [1972].)

In *Wyckoff v Searle Holdings Inc.*, the First Department affirmed the Supreme Court's decision that denied plaintiff's request to rescind the parties' contract based on a similar breach as the one in this action. (See 111 AD3d 546, 547 [1st Dept 2013].) In *Wyckoff*, the defendants agreed to pay to the plaintiff \$160,000 in return for plaintiff's releasing all claims against the defendants. Defendants paid only \$55,000. (*Id.*) Supreme Court found, and the First Department agreed, that even though the defendant materially breached the contract by failing to make the full payment, rescission was inappropriate because (1) plaintiffs had an adequate remedy at law in monetary damages; (2) defendant partly performed by paying more than a third of the contract amount; and (3) the status quo could not be restored because the parties made irreversible changes of position by entering into other agreements in reliance on the contract in dispute. (*Id.*)

Here, defendant paid plaintiff \$54,500 of the \$100,000 agreed amount. This constitutes a material breach because the payment goes to the heart of the agreement. But plaintiff has an adequate remedy at law in monetary damages. Defendant partly performed by paying over half of the contract amount, as plaintiff acknowledges. Restoring the status quo is impracticable, indeed impossible, because plaintiff's own conduct created irreversible changes in defendant's position. After signing the agreement, plaintiff contacted not only defendant and his family but also repeatedly posted information about their relationship over social media in violation of the temporary restraining order. This conduct was precisely what defendant sought to prevent in their agreement. Several news media also reported stories about the parties' relationship; the information is no longer private. Defendant can no longer be restored to pre-contract status.

Defendant's motion for reverse summary judgment in plaintiff's favor is granted for the breached amount of \$45,500.

## **B. Plaintiff's Cross-Motion to Strike Defendant's Answer and to Impose Sanctions**

Plaintiff's cross-motion to strike defendant's answer is denied. Plaintiff alleges that defendant willfully violated Justice Wooten's preliminary conference order of October 21, 2015, by failing to appear for a deposition.

The "drastic remedy of striking an answer is inappropriate absent a clear showing that the defendant's failure to comply with discovery demands was willful and contumacious." (*Polsky v Tuckman*, 85 AD3d 750, 750 [2d Dept 2011].) Whether a failure to comply was willful and contumacious may be inferred from the failing party's "repeated failure to comply with court orders directing depositions and [the party's] inadequate excuses for [the party's] defaults." (*Porreco v Selway*, 225 AD2d 752, 753 [2d Dept 1996].) To avoid a finding that a noncomplying party's conduct was willful and contumacious, the noncomplying party must provide a reasonable excuse for its noncompliance. (*Dietrick v Gutman*, 39 AD 3d 392, 392 [1st Dept 2007].)

Defendant violated Justice Wooten's preliminary conference order of October 21, 2015, because he did not appear for an examination before trial (EBT) before February 5, 2016. But defendant offers a reasonable excuse for his failure to comply: that the EBT should not be held until this court decides defendant's motion to disqualify plaintiff's counsel. (Motion sequence 6.) In defendant's letter to Justice Wooten dated December 16, 2015, defendant argued that it would

be extremely prejudicial to have his wife's former lawyer represent plaintiff at his EBT, and that the EBT should wait until that motion is decided. The hearing on that motion was not held on the initial date of January 13, 2016, because this case was reassigned from Justice Wooten to this court. Although this court does not, and need not, decide defendant's motion to disqualify plaintiff's counsel, defendant has provided a reasonable excuse for his failure to appear for his EBT, namely, fear of potential prejudice against him.

Plaintiff's cross-motion under 22 NYCRR § 130-1.1 for sanctions, attorney fees, and costs is denied. Plaintiff argues that defendant's motion is frivolous because it is a disguised motion for reargument and renewal under CPLR 2221 and therefore is procedurally improper and substantively baseless.

Conduct is frivolous when (1) it is completely meritless and cannot be supported by reasonable argument; (2) it is used to delay or prolong the litigation, or to harass or maliciously injure another; or (3) it asserts false material facts. (22 NYCRR 130-1.1 [c] [1] – [c] [3].) In determining whether conduct is frivolous, a court must consider “the circumstances under which the conduct took place, including the time . . . for investigating the legal or factual basis . . . , and whether . . . the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.” (*Id.* 130-1.1 [c].)

Plaintiff has not demonstrated that defendant's conduct is frivolous. Defendant does not seek leave to renew or reargue Justice Wooten's decision but rather admits his breach of contract. Therefore, this motion is not meritless. This motion did not delay or prolong the litigation or harass or injure plaintiff. No evidence shows that defendant asserted false material facts.

### **C. Defendant's Counterclaim for a Permanent Injunction**

What remains of defendant's answer is his counterclaim for a permanent injunction. A permanent injunction should be granted when a party shows irreparable harm and the absence of an adequate legal remedy. (*McDermott v City of Albany*, 309 AD2d 1004, 1005 [3d Dept 2003].) Plaintiff has repeatedly violated the temporary restraining order against her and caused irreparable harm to defendant and his family. Plaintiff posted several tweets about defendant and his family only a few days after the injunction. She even visited defendant's ex-wife unannounced on April 9, 2016. No adequate legal remedy exists. Plaintiff will likely continue her behavior without an injunction.

The court grants a permanent injunction. Defendant is directed to submit an order for a permanent injunction for this court to sign.

### **D. Motion Sequences 004 and 006**

Defendant consents to withdraw motion sequence 4, the motion for contempt. Motion sequence 6, the motion to disqualify plaintiff's counsel, is denied as academic and on consent because the court grants reverse summary judgment.

Accordingly, it is hereby ORDERED that defendant's motion for reverse summary judgment is granted; and it is further,

ORDERED and ADJUDGED that a judgment for \$45,500 shall be entered for plaintiff and against defendant with interest from July 15, 2014; and it is further,

ORDERED that plaintiff's motion to strike defendant's answer and for sanctions is denied; and it is further,

ORDERED that defendant's motion for contempt is withdrawn; and it is further,

ORDERED that defendant's motion to disqualify plaintiff's counsel is denied as academic; and it is further,

ORDERED that counsel for defendant is directed to serve a copy of this order with notice of entry on the plaintiff and the Clerk of the Court, who is directed to enter judgment accordingly.

This opinion is the court's decision and order.

Dated: May 26, 2016



J.S.C.

**HON. GERALD LEBOVITS**  
J.S.C.