

Tantaros v Krechmer

2023 NY Slip Op 31917(U)

June 6, 2023

Supreme Court, New York County

Docket Number: Index No. 650476/2018

Judge: Dakota D. Ramseur

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. DAKOTA D. RAMSEUR **PART** **34M**

Justice

-----X

ANDREA K. TANTAROS, ASTERO, LLC, A NEW JERSEY
LIMITED LIABILITY COMPANY,

Plaintiff,

- v -

MICHAEL KRECHMER AKA MICHAEL MALICE,

Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 024) 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 486, 507, 508, 509, 512, 514, 515, 516, 517, 518, 519, 520, 523

were read on this motion to/for REARGUMENT/RECONSIDERATION.

The following e-filed documents, listed by NYSCEF document number (Motion 025) 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 485, 487, 513, 521, 522, 524

were read on this motion to/for REARGUMENT/RECONSIDERATION.

In January 2018, plaintiff Andrea Tantaros commenced this action against defendant Michael Krechmer, alleging that she suffered contractual and reputational injury from statements defendant made in which he claimed authorship of passages in the book she published with HarperCollins. By Decision and Order dated September 9, 2022, this Court found that, on reargument, the case's previously assigned justice (Marin, J.) had properly awarded plaintiff summary judgment on her breach of contract claim and dismissed defendant's counterclaims. (NYSCEF doc. no. 422, September 9, 2022 Decision and Order.) For the purpose of assessing damages, the Court then granted plaintiff's motion to compel non-parties Suzanne Scott, Irena Briganti, and Diane Brandi (all high-level executives at Fox News Network, LLC, another non-party) to submit for depositions. In the Court's view, Justice Marin had already found their testimony to be relevant to plaintiff's damages trial at a hearing that took place on January 24, 2020. Citing to the hearing transcript, the Court explained that "it was already determined that the depositions were to take place. The timing of these depositions should be discussed at the next discovery conference in this matter." (*Id.*) In motion sequences 024 and 025, Fox News¹, Scott, Briganti, and Brandi have moved pursuant to CPLR 2221 (d) to reargue the branch of the Court's order granting plaintiff's motion to compel. Accordingly, the two motions are consolidated for resolution herein.

¹ Plaintiff does not oppose Fox News' standing to bring this motion as an interested party affected by an allegedly overbroad subpoena. (*See* CPLR 3103 [a].)

Because plaintiff failed to comply with civil practice rules for deposing non-party witnesses and Justice Marin did not, as the Court now recognizes, conclusively require Scott, Briganti, and Brandi to submit to depositions, the Court grants the two motions for reargument, and upon reargument, vacates the branch of its previous Decision and Order granting plaintiff's motion to compel.

CPLR 3106 requires a party seeking to examine a non-party witness to serve a subpoena. (*See* CPLR 3106 [b] ["Where the person to be examined is not a party... he shall be served with a subpoena."].) Here, while plaintiff served *subpoenas duces tecum* on the three Fox News executives for various documents alleged to be relevant to her damages (NYSCEF doc. no. 225, 231, and 234, Document Subpoenas), she did not serve subpoenas for their deposition.² A failure to serve a prospective witness with such a subpoena precludes the Court from granting a motion to compel. (*Apple Bank for Sav. v Noah's Route 110*, 210 AD2d 277, 277 [2d Dept 1994] ["The Supreme Court properly declined to order the respondents' attorney to submit to an examination before trial, inasmuch as the appellants failed to serve this prospective nonparty witness with a subpoena"]; *Frybergh v Kouffman*, 119 AD2d 541, 541 [2d Dept 1986].) Requiring plaintiff to strictly adhere to CPLR 3106 (b), as the Court now does, is particularly important in the instant motion given that neither the non-party executives nor Fox News, as their employer, appeared before Justice Marin's at the January 24, 2020 hearing and thus could not be heard when the Court purportedly determined they must sit for depositions.

As to whether Justice Marin unconditionally required the Fox News executives to sit for depositions, a review of the hearing transcripts reveals that he did not. While Justice Marin stated "Why don't we not do [Bill] Shine [former CEO of Fox News]. Why don't we do Scott, Briganti, and Brandi. We'll do their depositions," he continued,

"I have to stick to the principles. It's better to get supporting material before we go into the deposition. People can do email searches... Why don't we just ask those three ahead of time if there are any email communications that in any way mention Mr. Krechmer. That seems like a very basic thing. We'll know what we're going after. Let's try that." (NYSCEF doc. no. 215, Jan. 24, 2020 Hearing Transcript.)

Thereafter, in a hearing on the subject of depositions held on May 11, 2020, Justice Marin reaffirmed his position that "we still have to have the exchange of basic discovery requests" before the depositions take place. (NYSCEF doc no. 258 at 44-46, May 11, 2020 Hearing Transcript.) To this day, the basic exchange of documents has not taken place as plaintiff has yet to respond to various objections that Fox News and the three executives have made regarding the scope and relevancy of the documents requested in the *subpoena duces tecum* that she served in March of 2020.³

² Plaintiff insists in its opposition papers that it served "Notices of Deposition" on the Fox News executives on June 7, 2021, approximately one month *after* she moved to compel depositions. However, she did not append the notices to her opposition and provided no other evidence of their existence. In their reply papers, Scott, Briganti, and Brandi aver that they had not been served with these notices. (NYSCEF doc. no. 524 at 6, Fox News Executives' reply memorandum of law.)

³ In the Court's September 9, 2022 Decision and Order, the Court erroneously stated that Fox News and the executives "made no response to the subpoenas." (NYSCEF doc. no. 422 at 12.) In fact, they included responses in

Given, then, that Fox News and its executives have demonstrated that the Court overlooked the procedural requirements of CPLR 3106 (b) and misapprehended Justice Marin's pronouncements at the January 24, 2020 hearing, their motion to reargue pursuant to CPLR 2221 (d) is granted. (*See* CPLR 2221 [d] ["A motion for leave to reargue... shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion"].)

Since the Court is vacating the branch of its Decision and Order dated September 9, 2022 granting plaintiff's motion to compel the non-party depositions, and since Scott, Briganti, and Brandi admit that the scope and relevance of the *subpoenas duces tecum* are not at issue on these motions, the Court finds it premature to grant a protective order limiting the scope of future discovery requests, including for any deposition subpoenas that plaintiff might serve.

Accordingly, for the foregoing reasons, it is hereby

ORDERED that non-party Fox News Network, LLC's motion to reargue pursuant to CPLR 2221 (Mot. Seq. 024) is granted, and upon reargument, the Court vacates the branch of its September 9, 2022 Decision and Order that granted plaintiff Andrea Tantaros's motion to compel Fox News executives Suzanne Scott, Irena Briganti, and Diane Brandi to appear for depositions (Mot. Seq. 019) and, as such, plaintiff's motion to compel these depositions is denied; and it is further

ORDERED that non-parties Suzanne Scott, Irena Briganti, and Diane Brandi's motion to reargue pursuant to CPLR 2221 (Mot. Seq. 025) is granted, and upon reargument, the Court vacates the branch of its September 9, 2022 Decision and Order granting plaintiff's motion to compel their depositions (Mot. Seq. 019) and, as such, plaintiff's motion to compel these depositions is denied; and it is further

ORDERED the branch of Fox News' motion for a protective order pursuant to CPLR 3103 limiting the scope of any future deposition testimony is denied; and it is further

ORDERED that the parties shall appear at 60 Centre Street, Courtroom 341 on July 18, 2023, at 10 a.m. for a conference with the Court; and it is further

ORDERED that counsel for Fox News shall serve a copy of this order, along with a notice of entry, on all parties within twenty (20) days.

This constitutes the Decision and Order of the Court.

their opposition papers and in their cross-motion for a protective order. (NYSCEF doc. no. 308, Fox News Executives' opposition to motion and in support of cross-motion [Mot. Seq. 019].)

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6/6/2023
DATE

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE