

Tantaros v Krechmer
2023 NY Slip Op 34229(U)
November 20, 2023
Supreme Court, New York County
Docket Number: Index No. 650476/2018
Judge: Dakota D. Ramseur
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. DAKOTA D. RAMSEUR PART 34M

Justice

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

Plaintiff,

- v -

MICHAEL KRECHMER AKA MICHAEL MALICE,

Defendant.

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INDEX NO. 650476/2018

MOTION DATE 09/22/2023

MOTION SEQ. NO. 027

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 027) 525, 526, 527, 528, 529, 530, 531, 532, 533, 563, 564, 565, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584

were read on this motion to/for

SANCTIONS

In January 2018, plaintiff Andrea Tantaros commenced this breach of contract and defamation action against defendant Michael Krechmer over an agreement the parties entered that required him to perform certain editorial work on a book she purportedly authored. In this motion sequence (027), defendant moves pursuant to CPLR 3126 for sanctions against plaintiff for her alleged failure to comply with two court orders—one dated March 2, 2020, resolving motion sequence 013 (NYSCEF doc. no. 217, MS 013, Decision and Order; NYSCEF doc. no. 215, So-Ordered Transcript 1/24/20; NYSCEF doc. no. 241, Exhibit C: So-Ordered Transcript 2/28/20), the other dated November 9, 2020, resolving motion sequence 015 (NYSCEF doc. no. 281, MS 015, Decision and Order)—that required her to respond to defendant’s discovery requests dated October 17, 2019. Defendant seeks a Court order precluding plaintiff from using responsive documents as part of her damages trial and/or an order striking her amended complaint. Plaintiff, who is now representing herself *pro se*, opposes the motion in its entirety. For the following reasons, the Court finds sanctions against plaintiff inappropriate at this juncture. Nonetheless, it orders hers to respond to defendant’s discovery requests as consistent with this Decision and Order within thirty days; should plaintiff fail to do so, the Court may strike her pleadings, including her amended complaint.

BACKGROUND

Procedural History

In October 2019, this Court [Marin, J.] consolidated motion sequences 010, 011, and 012 for resolution (hereinafter, the “October 2019 Decision”). (See NYSCEF doc. no.’s 188, 189, and 190, consolidated decision entered 10/10/19.)¹ In relevant part, the Court’s on-the-record

¹ NYSCEF document numbers 188, 189, and 190 are all copies of the same decision.

decision denied defendant's motion for a default judgment on his breach of contract counterclaim (mot. seq. 010) and his motion to dismiss plaintiff's complaint and for sanction (mot. seq. 011) based on her failure to respond to defendant's March 2019 discovery demands. (*Id.*) At the same time, Justice Marin granted plaintiff's motion for summary judgment (mot. seq. 012) on her defamation and breach of contract claims. (NYSCEF doc. no. 190.)

Soon after, on October 17, 2019, defendant served a second discovery demand entitled "Notice for Discovery and Inspection Regarding Damages." (NYSCEF doc. no. 192, def. discovery notice). The discovery request contained 130 demands for documents. Six days later, in motion sequence 013, plaintiff moved for a protective order pursuant to CPLR 3103 to deny or limit the disclosures defendant sought. The Court resolved the motion at two hearings on January 24 and February 28, 2020. Pursuant to the so-ordered transcripts, the Court declined to issue plaintiff protective orders limiting requests 3-8, 18-24, 27-28, 35-43, 47-48, 50-51, 55-56, 60-71, 73, 74, 77, 79, 81-82, 86-107, and 118-119. (*See* NYSCEF doc. no. 215, So-Ordered Transcript 1/24/20; NYSCEF doc. no. 241, Exhibit C: So-Ordered Transcript 2/28/20.) As to discovery requests 9-10 and 14-17, the Court required plaintiff to produce communications, logs, letters, calls, and contracts related to her effort to obtain employment after her termination, any opportunities she had to publicize her book, and conversations she had with others regarding defendant; as to 57 and 58, the Court limited discovery to federal and state income tax returns from 2014-2018 (NYSCEF doc. no. 241 at 23:1-9); and as to 60-71, the Court permitted discovery of documents maintained by plaintiff "about Mr. Krechmer's view of her that is negative, that any reasonable person would think is critical or negative." (*Id.* at 32:4-7.) The Court ordered plaintiff to produce all of these documents within 60 days. (*Id.* at 73:7-10, 74:2-3.) Lastly, the Court did not address request 26 and only stated, with respect to requests 126-130, that the Court was "going to follow the CPLR." (*Id.* at 72: 9-12.) The Court struck defendant's remaining requests.

In May 2020, after the 60-day timeframe lapsed, defendant brought a motion under CPLR 3103 for sanctions over plaintiff's continued failure to answer his discovery requests. (NYSCEF doc. no. 238, mot. seq. 015, notice of motion.) On November 9, 2020, Justice Marin entered an order stating, "Motion 015 is resolved pursuant to the record, by which the parties will exchange discovery by December 1, 2020." (NYSCEF doc. no. 281, Decision and Order dated 11/9/2020.) On or before the December 1st deadline, plaintiff responded to the discovery requests (*see* NYSCEF doc. no. 528, plaintiff's discovery responses) and produced approximately 400 documents (NYSCEF doc. no. 527 at ¶ 27, Wolman affidavit).

In mot. seq. 018 and 021, defendant moved pursuant to CPL 2221 (d) for leave to reargue the Court's October 2019 Decision that granted plaintiff summary judgment in mot. seq. 012 and denied his motions for a default judgment and dismissal in mot. seqs. 010 and 011. By Decision and Order dated September 9, 2022, the Court [Ramseur, J.] granted defendant's motion for leave to reargue and vacated the branch of its decision for summary judgment on her defamation cause of action. (NYSCEF doc. no. 423 at 7-9, September 2022 Decision and Order.) However, the Court adhered to the branches of its decision that granted summary judgment on plaintiff's breach of contract claim and denied defendant's motions for a default judgment and dismissal. (*Id.* at 9-10 and 10-12.) In denying defendant's motion to dismiss based upon her failure to

respond to the *March 2019* discovery demands, the Court directed the parties “to meet and confer on the discovery remaining in this action.” (*Id.* at 12.)

The Instant Motion

In late March 2023, after reaching out to opposing counsel in January and again in February (NYSCEF doc. No. 527 at ¶40-43), defendant again moved for discovery sanctions, contending that plaintiff’s December 1, 2022 responses (1) mischaracterized certain rulings in the Court’s October 2019 Decision as being “disallowed” despite Justice Marin’s explicitly holding to the contrary, and (2) even where she did respond, she did not produce the documents required of her. In opposition, plaintiff argues that the March 2019 requests are no longer relevant, having been superseded by the October 2019 requests.² She further contends that she fully complied with Justice Marin’s rulings and submits an affidavit in support from Bruce Fein, one of her previous attorneys, who avers that he collected and produced all required discovery by the Court. (NYSCEF doc. no. 581 at ¶ 8, Fein affidavit.)

DISCUSSION

The record before the Court reveals that plaintiff’s response to the October 2019 discovery demands did not comply with Justice Marin’s January and February 2020 rulings. Her response contains several mischaracterizations of Justice Marin’s orders, where, instead of disclosing required material, she falsely asserted that Judge Marin had disallowed the request at issue. For example, Justice Marin ordered her to produce documents for requests 35 through 41. (See NYSCEF doc. no. 241 at 79: 9-18 [“35 is John Does, 36 is others...if you have any documents on these, you can produce them on 35 or 36... Then there are nicknames, Venator (request 37), Moses Couture (request 38), Warrior (request 39), Venator (request 40), Warrior (request 41), that gets us to 41. So you can produce those if you have them.”].) Yet plaintiff’s response to each was that the “request [was] disallowed by Judge Marin.” (NYSCEF doc. no. 528 at ¶ 35, 37, 38, 39, 40, and 41.)

The same applies to request 89: defendant sought communications between plaintiff and certain people, including Nomiki Konst, the person mentioned in request 89, and Justice Marin stated, “I would do all of those Let’s see what she has.” (NYSCEF doc. No. 241 at 47: 15-20.) Nonetheless, plaintiff’s reason for not providing such documents was that Marin had disallowed this request. (NYSCEF doc. no. 528 at ¶89.) Moreover, request 89 is not, as she claims, duplicative of the disallowed request 27. (*Compare* NYSCEF doc. no. 192 at ¶ 27 [“Any and all documents regarding damages You claim were caused by Nomiki Konst”] *with id.* at ¶89 [“Any and all documents regarding Michael Krechmer’s communications with Nomiki Konst as alleged in Paragraph 38 of the Amended Complaint.”]) Neither plaintiff nor her former counsel, Bruce Fein, have explained the discrepancy between Justice Marin’s rulings and her discovery

² Though technically an accurate statement, it reveals that plaintiff misunderstands the nature of defendant’s motion: as the Court has made clear, he is seeking to enforce Justice Marin’s rulings on the October 2019 requests—not, as her argument indicates, the March 2019 requests. The March 2019 requests are irrelevant to the resolution of this motion.

response.³ Indeed, in conclusory fashion, Fein merely states that he “collected and produced all required discovery in each category specified in the Court’s November 9, 2020, Order. (NYSCEF doc. no. 581 at ¶ 8.)

Even where plaintiff acknowledges that Marin required her to produce documents, the Court is not satisfied that she has produced all documents in her possession. In his detailed (and unrefuted) affidavit, Jay Wolman, counsel for defendant, avers that neither of her responses to request 3—that “responsive documents [were] previously supplied to Defendant in the SDNY Case” and “the contract between HarperCollins and Plaintiff is produced” (NYSCEF doc. no. 528 at ¶3)—are factually accurate since discovery never took place in the federal action and she did not actually produce the contract. (NYSCEF doc. no. 527 at ¶55.) Further, the request requires the production of “any and all communications with HarperCollins regarding and/or mentioning the book ‘Tied Up in Knots,’” yet the entirety of plaintiff’s discovery consists of only 24 documents and all were from 2013-2014. That she produced so few documents raises questions of its own, but plaintiff’s complaint contradicts her discovery response: in paragraph 19, she alleges that “on May 4, 2015, Plaintiffs, with the knowledge and approval of HarperCollins, entered into a Collaboration Agreement with Defendant.” (NYSCEF doc. no. 18 at ¶19.)

Upwards of twenty or more responses appear similarly deficient. In response to request 4, plaintiff asserts two contradictory positions. First, she states that “no responsible documents are in Plaintiff’s possession, custody, or control” and then follows up with “responsive documents were previously produced to Defendant in the SDNY Case.” (NYSCEF doc. no. 528 at ¶ 4.) Ultimately, plaintiff did not produce any documents that responded to this request. As to request 5, which sought “any and all communications with Fox News Channel regarding and/or mentioning [her] book,” it strains credulity that a single document amounts (NYSCEF doc. no. 527 at ¶ 57) to the totality of the responsive documents in plaintiff’s possession given how she describes being employed by Fox News as an anchor, host, political analyst, and columnist in 2015 when she signed her book contract with HarperCollins. Similarly, it defies belief that plaintiff does not have *any* responsive documents regarding her termination (request 8) the sales of her book (request 11), or the formal complaints she made against Fox News executives (request 44). Pursuant to request 9, she was required to provide logs, records of calls, and any letters evincing her efforts to obtain employment. (NYSCEF doc. no. 215 at 44: 19-20, 45: 11-15.) Yet Wolman testifies that she provided no letters or records of calls, and the log she produced failed to disclose specific dates, names of individuals or employers, and any contact information. (NYSCEF doc. no. 527 at ¶ 58.) This log—with no counterparties identified—also serves a plaintiff’s response to request 55, which sought “any and all documents regarding [plaintiff’s] current business relationship and/or opportunities. (NYSCEF doc. no. 528 at ¶ 55.) Response 10 sought “any and all documents regarding opportunities presented to [plaintiff] to

³ Defendant contends that plaintiff failed to comply with Justice Marin’s rulings on requests 128 through 130. Though the Court will order her to produce documents for those requests within 30 days, the Court recognizes that Marin’s rulings on these document requests were ambiguous, having only stated that “we’re going to follow the CPLR.” (NYSCEF doc. no. 241 at 72: 9-12.)

write a book,” to which she responded, “no such responsive documents exist after April 2016.” To the extent that there were responsive documents before April 2016, she was required to disclose them.

Requests 65-68 sought documents evidencing, respectively, the “public disgrace,” “humiliation and shame,” “permanent harm,” and “mental anguish” to plaintiff as alleged in paragraph 11 of her amended complaint. (NYSCEF doc. no. 192 at ¶ 65-68.) Request 77 sought evidence of defendant’s disclosure of confidential information to Lisa Montgomery, pictures of plaintiff recording an audio vision of her book, and evidence demonstrating defendant sent chapters of her book to Montgomery and other Fox executives. (*Id.* at ¶ 77.) Requests 106-107 sought all documents regarding plaintiff’s negotiations with Refinery29 and then Refinery29’s subsequent withdrawal of an offer as alleged in paragraph 51 of her amended complaint. (*Id.* at 106-107.) To summarize, then, the requests sought evidence of damages, confidential information, and negotiations with Refinery29. Yet plaintiff responded that (1) each request was duplicative of request 56’s demand for “any and all documents regarding [plaintiff’s] prospective business relationships and/or business opportunities,” and (2) that production was made as in request 56. Not only is it clear that none of the requests are duplicative but it, again, strains credulity that plaintiff’s production—as Wolman avers, only emails from Refinery29 sent in September 2016 (NYSCEF doc. no. 527 at ¶ 65)—constitutes the entirety of responsive documents to the seven requests. Again, neither plaintiff nor Fein disputes the content of Wolman’s affidavit and his description of the number and type of documents she produced for the requests described above.

Lastly, plaintiff’s responses to requests 60-64 directly disregard Justice Marin’s rulings. Per the so-ordered transcript dated February 28, 2020, Marin stated, “please produce documents that shows [defendant’s statements] [were] malicious, wanton, ill will, that it was willful, those are legal-view conclusions, perhaps. Just give us stuff that she has documents about Mr. Krechmer’s view of her that is negative, that any reasonable person would think is critical or negative.” (NYSCEF doc. no. 41 at 31: 25- 32: 6.) Even if one takes the view that the second half of this statement—the “just give us documents about Mr. Krechmer’s view”—modifies the first half about documents showing willfulness, plaintiff cannot ignore the order altogether and declare, as she did, “the law of the case as regards Defendant’s malicious defamation of Plaintiff makes the request moot.”

CPLR 3126 gives the trial court broad discretion to fashion appropriate discovery sanctions. (*See U.S. Bank N.A. v Sirota*, 189 AD3d 927, 929 [2d Dept 2020]; *Lopez v Maggies Paratransit Corp.*, 210 AD3d 1066, 1067 [2d Dept 2022].) Since public policy strongly favors the resolution of actions on the merits, the drastic remedy of dismissal of a complaint is not warranted unless there is a clear showing that the plaintiff’s failure to comply with discovery demands or orders was willful and contumacious. (*Lopez*, 210 AD3d at 1067, citing *Williams v Suttle*, 168 AD3d 792, 793 [2d Dept 2019].) Here, the Court’s extended discussion of plaintiff’s discovery responses clearly demonstrates that she has failed to comply with Justice Marin’s January/February 2020 and November 2020 orders. Nonetheless, in exercising discretion, the Court recognizes extenuating circumstances that militate against dismissing the amended complaint. It is aware that, as plaintiff argues, this is the first instance in which the Court has

determined her substantive responses to be deficient. Additionally, the procedural posture of this case has been exceedingly complex, with now 29 motions having been filed, and numerous stays having been entered. (See NYSCEF doc. no. 417; NYSCEF doc. no. 504.) Moreover, the public policy weighing against striking pleadings pursuant to CPLR 3126 is particularly potent in this action where the Court would be dismissing a complaint on which it has already granted plaintiff summary judgment on one of her claims. Accordingly, the Court declines to exercise its discretion in dismissing its complaint at this juncture. Instead, the Court directs plaintiff to respond to defendant's discovery demands as Justice Marin laid out in the January and February so-ordered transcripts and in line with the what the Court has explicitly found herein.⁴

Accordingly, for the foregoing reasons, it is hereby

ORDERED that defendant Michael Krechmer's motion for sanctions pursuant to CPLR 3126 against plaintiff Andrea Tantaros is granted to the extent that the Court orders her to respond to defendant's discovery demands dated October 17, 2019 (NYSCEF doc. no. 192) consistent with Justice Marin's Decision and Order dated March 2 2020, the accompanying so-ordered transcripts dated January 24, 2020, and February 28, 2020, and this Decision and Order within thirty (30) days from its entry; and it is further

ORDERED that parties shall appear at 60 Centre Street, Courtroom 341 at 9:30 a.m. on December 19, 2023, for a compliance conference with the Court, whereupon in the event plaintiff has not complied with the above order, the Court may strike plaintiff's pleadings, including the amended complaint; and it is further

ORDERED that counsel for defendant shall serve a copy of this order, along with notice of entry, on all parties within ten (10) days of entry.

This constitutes the Decision and Order of the Court.

11/20/2023				20231122161107DRAMSEURCEX13A4A99F844B7AD3AC95393C3E4AB	
DATE				DAKOTA D. RAMSEUR, J.S.C.	
CHECK ONE:	☐	CASE DISPOSED	☒	NON-FINAL DISPOSITION	
	☒	GRANTED	☐	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	☐ REFERENCE

⁴ The Court's Decision and Order does not list every issue defendant has identified with plaintiff's responses and takes no position on requests not discussed above. Nonetheless, at the compliance conference on December 19, 2023, the Court will consider whether requests not mentioned herein comply with Justice Marin's orders.