# 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,

Plaintiffs,

- v -

MICHAEL KRECHMER AKA MICHAEL MALICE,

Defendant.

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**INDEX NO.** 650476/2018

**MOTION DATE** N/A, N/A, N/A, N/A

**MOTION SEQ. NO.** 018 019 021 022

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 018) 293, 294, 295, 296, 297, 298, 299, 418, 419

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

The following e-filed documents, listed by NYSCEF document number (Motion 019) 300, 301, 302, 303, 304, 305, 306, 308, 309, 310, 311, 312, 313, 314, 317, 420

were read on this motion to/for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 021) 339, 340, 341, 345, 371, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 411, 412, 415

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

The following e-filed documents, listed by NYSCEF document number (Motion 022) 342, 343, 344, 346, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 413, 414, 416

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

Plaintiff, Andrea K. Tantaros (plaintiff),[1] commenced this action for defamation and breach of contract, stemming from an agreement with defendant, Michael Krechmer, (aka "Michael Malice") (defendant), to perform certain editorial work on a book purportedly authored by plaintiff. In motion sequence no. 018, defendant moves pursuant to CPLR 2221 (d) to reargue plaintiff's motion for summary judgment (NYSCEF doc. no. 177, mot. seq. 012), and the resulting October 10, 2019 decision and order granting plaintiff's motion for summary judgment on her claims for breach of contract and defamation (the underlying decision) (NYSCEF doc. no. 190). In motion sequence no. 019, plaintiff moves to compel defendant's and non-party Fox

[1] Co-plaintiff Astero LLC was dismissed as a plaintiff and defendant on the counterclaim and is no longer a party herein.

News Network, LLC (Fox) executives, Suzanne Scott, Irena Briganti, and Diane Brandi to submit to depositions concerning plaintiff's damages related to the court's determination of liability on plaintiff's claims for defamation, libel per se and breach of contract in the underlying decision. In motion sequence no. 021, defendant moves pursuant to CPLR 2221 to reargue his motion for entry of default judgment (NYSCEF doc. no. 77, motion sequence 005) and the resulting June 21, 2019 Order (NYSCEF doc. no. 141), denying defendant's motion for a default judgment, as well as defendant's renewed motion for entry of default judgment (NYSCEF doc. no. 145, motion sequence no. 010) and the resulting October 10, 2019 decision and order denying the motion for a default judgment (NYSCEF doc. no. 188). In motion sequence no. 022, defendant moves to reargue his motion to dismiss and supplemental motion for entry of default judgment (NYSCEF doc. no. 83, motion sequence no. 006) and the resulting August 23, 2019 Order (NYSCEF doc. no. 162) as well as defendant's motion for sanctions for plaintiff's failure to respond to discovery (NYSCEF doc. no. 170, motion sequence no. 011]) and the resulting October 10, 2019 Order (NYSCEF doc. no. 189).

**BACKGROUND**

Plaintiff is a former Fox News personality who, in 2015, had a deal with non-party HarperCollins Publishers LLC (HarperCollins), a sister company of Fox News, to write a book on her take on modern feminism entitled "Tied Up In Knots." Defendant, a two-time New York Times best-selling co-author, was introduced to plaintiff to assist her with the book in March 2015.

On May 4, 2015, plaintiff and defendant executed a written "Collaboration Agreement" (Collaboration Agreement), wherein defendant would be paid a series of base payments totaling $40,000 for his efforts in getting the book to publication. Defendant's responsibilities under the Collaboration Agreement were to edit and rewrite the book: "Specifically, [defendant's] duties shall include, but not be limited to: writing original material with attribution from all other sources; making revisions in response to editorial changes requested by [plaintiff] and by publisher; and assuring that the Work is grammatically correct, unified, coherent and clear in content" (NYSCEF doc. no. 111, Wolman affirmation, ex 3, ¶ 2). The Collaboration Agreement contained clauses regarding payment:

> "The Compensation shall be payable as follows: (i) $5,000 payment upon execution of the Collaboration Agreement; (ii) $10,000 once Harper Collins [Publisher] and I were satisfied with one chapter of the Book; (iii) $10,000 upon delivery of the manuscript totaling no less than 75,000 words to Harper Collins; (iv) $15,000 upon Harper Collins' acceptance of the manuscript; plus (v) An additional $10,000 if the book was listed on the printed New York Times Bestseller List"

(*id.*, ¶ 3).

The Collaboration Agreement also contains a "Confidentiality" clause, which states, in relevant part, as follows:

> "[plaintiff] confidentiality is essential to this agreement [defendant] may not discuss or mention his involvement in the work in any venue without prior approval, in writing, from [plaintiff] Confidential information means any non-public information disclosed by [plaintiff] to [defendant]. [Plaintiff's] confidential information will be held in confidence by [defendant] and will not be disclosed to any third-party or otherwise made public."

(*id.*, ¶ 10).

According to plaintiff, defendant claimed that he was the author of the book. Plaintiff states that she learned that defendant claimed the Collaboration Agreement had been terminated when defendant filed a lawsuit in the United States District Court for the Southern District of New York falsely claiming defendant was the author of the book (federal action); that the parties entered into a superseding "oral ghostwriting agreement;" and that defendant owned the copyright of the book. Plaintiff further states that defendant's then-counsel sent plaintiff a letter stating that the federal action was filed under a provisional seal, and that the seal would expire in seven days and be lifted if plaintiff did not pay defendant $120,000.00.

Plaintiff states that she is the true author of the book, not defendant, and that when she initially sent him her drafts of the book, "on March 27, 2015, [defendant] told me during a telephone call that he believed that the book was '65% done' and that, with his help, we could finish the book 'within a few months' " (*id.*, ¶ 8). According to plaintiff, the Collaboration Agreement has been the one and only lawful agreement between the parties" (NYSCEF doc. no. 179, pla aff, ¶ 3).

Plaintiff further states that defendant posted pictures of plaintiff to his social media without plaintiff's written consent including recording of the audio version of the book. Plaintiff further states that she discovered on or around that same date that defendant had advertised he was my "writing coach" on his business website, which plaintiff asserts was a material breach of the Collaboration Agreement's confidentiality provision.

Plaintiff states that defendant breached the "essential" confidentiality provision of the Collaboration Agreement multiple times (*id.*, ¶ 21), and that defendant admitted in his own answer and counterclaims to this court that he did, in fact, post pictures of plaintiff to his social media account without consent, and on his business website and that he refused to respond to plaintiff's demands to remove them" (*id.*, ¶ 22; NYSCEF doc. no. 20, answer with counterclaims, ¶ 29]).

According to plaintiff, defendant admitted that his first attorney sent a letter to HarperCollins, breaching the confidentiality provision and committing defamation by alleging he was the true author of the book and owner of the copyright. Defendant also demanded HarperCollins remove all copies of the book in publication, cease publishing and pay him $500,000.00. Plaintiff avers: "[defendant] did not know HarperCollins' contract with me required the publisher to secure the copyright and assign it to me, as they do with all authors."

In April of 2016, plaintiff asked defendant to sign an additional non-disclosure document, but he refused. In May of 2016, defendant was terminated in writing by plaintiff's attorney for

breach of contract for repeatedly violating the essential confidentiality provision. Defendant's attorney was informed that defendant would not be receiving the remaining $10,000 owed under the Collaboration Agreement because of these breaches.

Plaintiff contends that defendant's "[r]epeated violations of confidentiality claiming publicly and falsely without merit or evidence that he authored my book about challenges of modern-day women and feminism have irreparably harmed my reputation" (*id.*, ¶ 37). Plaintiff further claims that defendant breached the Confidentiality Provision by filing the federal action. Plaintiff argues that defendant did not seal the case or keep the case sealed. Instead, plaintiff asserts that District Judge Katharine Forrest *sua sponte* sealed the record. On this point, plaintiff relies on a footnote written by Judge Forrest in her July 27, 2017 Opinion and Order:

> "The Court finds it difficult to account for third-party [Fox News'] knowledge of this matter and of the parties involved without concluding that defendant or plaintiff's counsel may have violated this Court's sealing order, and the violation may have been deliberate"

(*Under Seal v Under Seal*, 273 F Supp 3d 460 [SDNY 2017]).

Plaintiff additionally alleges that defendant's appeal of Judge Forrest's decision, the motion to dismiss in this court, failing to file either under seal; and falsely claiming to be the ghostwriter of the book breached the confidentiality clause and constituted defamation. According to plaintiff, "[t]hese breaches of confidentiality and defamation continued during hearings on the motions on January 15, 2019, May 16, 2019, June 20, 2019 and August 22, 2019. In August of 2019, [defendant] filed an appeal of this court's dismissal of all but one of his counterclaims and proceeded to file with the New York State Supreme Court Appellate Division without filing under seal."

In the amended complaint, plaintiff alleges that defendant defamed her by telling Fox executives and colleagues, including, but not limited to, Lisa Kennedy Montgomery that defendant was plaintiff's ghostwriter and by telling D. L. Hughley, a fellow journalist, and Ken Kurson, the "Editor-In-Chief" of the New York Observer, and Bo Dietl, a private investigator for Fox News, that defendant wrote the Book (NYSCEF doc. no. 122, amended complaint, ¶ 81).

According to defendant, on or about July 22, 2015, defendant and plaintiff orally agreed to terminate the Collaboration Agreement and entered into an "oral Ghostwriting Agreement" (NYSCEF doc. no. 184, def aff in opp, ¶ 4). Defendant further states that:

> "Although the written agreement required me to 'edit and rewrite the work,' it did not require me to write it from scratch, as per the Ghostwriting Agreement. The book was published on April 26, 2016 due to my efforts. I was specifically paid only $15,000 through the explicit terms of the written agreement. That is, I was not paid the last two payments totaling $25,000 per the literal terms of the written agreement"

(*id.*).

According to defendant, he did co-write the book, stating that,

> "[o]n July 21, 2015, [plaintiff] informed me that she was too busy to do any additional writing on Tied Up in Knots and asked me to ghostwrite it; the factual content would be based upon my interviews with her, but the prose itself, being the creative elements of the book, would be authored by me"

(*id.*, ¶ 7).

In his affirmation in opposition, defendant denies that he violated the confidentiality clause and specifically, in paragraphs 21 through 26, he denies speaking to the New York Times, Bo Dietl, Lisa Kennedy Montgomery of Fox News, William Shine, Nomiki Konst, D. L. Hughley or Ken Kurson about his ghostwriting the book. During oral argument on plaintiff's motion for summary judgment, defendant argued that because the defamation claim is undermined by truth, and because it is the truth that defendant authored the book, the defamation claim must fail. Defendant asks the Court to consider his authorship of the book as a question of fact that would bar plaintiff's motion for summary judgment.

On January 30, 2018, plaintiff commenced this action asserting claims against defendant for breach of contract, breach of fiduciary duty, breach of implied covenant of good faith & fair dealing, defamation and libel per se, conspiracy to commit defamation, and offering a false instrument.[2] On May 10, 2018, plaintiff filed an amended complaint. Defendant answered and filed counterclaims for nonpayment on May 29, 2018.

Judge Marin granted plaintiff's motion for summary judgment as to liability, dismissed defendant's counterclaim, and directed a trial on damages only: "I'm going to grant [plaintiff's] motion 12 for summary judgment, for breach of contract and defamation, which inherently dismisses defendant's breach of contract counterclaim for the $35,000, items three, four and five" (Wolman aff, ex B at 20). Judge Marin notes that at some point, plaintiff gave defendant permission to publicly identify himself as her editor (*id.*, 3). Judge Marin additionally found that, "[t]he real issue here is so clear that because [defendant] keeps trying to turn an editorial agreement into a ghostwriting agreement changes the language, changes the terminology, that that's the way he can protect what he said. . . Not, but it wasn't done as a ghostwriting. Nobody thought that" (*id.*, 14).

On defendant's appeal of the dismissal of his counterclaims, the Appellate Division, First Department, in its February 11, 2020 decision made the following findings:

> "In the parties' collaboration agreement, plaintiffs retained defendant to provide editing and writing services for plaintiffs' book. Plaintiffs agreed to compensate defendant upon

[2] Plaintiff voluntarily withdrew her claim for intentional infliction of emotion distress. During oral argument on motion sequence no. 012, on October 10, 2019, plaintiff's attorney said they would withdraw the breach of fiduciary duty claim, if they were to prevail on the defamation and breach of contract claims: "We could abandon it if we prevail on the other claims, like we think we should today, but the damages may be superfluous. But we're asking for summary judgment with regard to breach of contract and defamation" (NYSCEF doc. no. 201, 10/102019 tr. at 7, []).

> the completion of certain stages of those services, and an additional payment if the book was listed on the New York Times bestseller list. Since the agreement contained a "no oral modification" clause, defendant is precluded from claiming that plaintiffs orally agreed to pay him for additional writing services not included in the contract (*see* General Obligations Law § 15-301[1]; *Israel v Chabra*, 12 NY3d 158, 167 [2009]). Defendant's claim that the oral agreement effectively terminated, not modified, the contract is similarly unavailing. Defendant's counterclaim for breach of the implied covenant of good faith and fair dealing was properly dismissed as redundant of the counterclaim for breach of contract."[3]

(*Tantaros v Krechmer*, 180 AD3d 481, 481 [1st Dept 2020]).

In motion sequence no. 018, defendant seeks leave to reargue plaintiff's motion for summary judgment on her claims of defamation and breach of contract and on his counterclaim for breach of the written Collaboration Agreement. Defendant argues that Judge Marin "erred as a matter of law in determining that [defendant's] statement in pleadings filed under seal constituted actional defamation and breached contractual confidentiality and that his purported liability precluded his recovery against [plaintiff] for her own prior admitted breach" (def. memo in support at 1). In motions sequenced 021 and 022, defendant reargues the dismissal of his second counterclaim and in motion sequence 019, plaintiff moves for depositions of three Fox Executives.

**DISCUSSION**

*1. Failure to annex pleadings to motion pursuant to 3212 (b)*

Defendant initially argues that plaintiff's motion for summary judgment should have been denied for failure to include a copy of the pleadings as required by CPLR 3212 (b). While "3212 (b) requires that a motion for summary judgment be supported by copies of the pleadings, the court has discretion to overlook the procedural defect of missing pleadings when the record is 'sufficiently complete' " (*Washington Realty Owners, LLC v 260 Wash St., LLC*, 105 AD3d 675 [1st Dept 2013]). Here, the Court finds that the record is sufficiently complete and declines to deny the motion on that basis.

*2. Reargue (motion sequence 018)*

A motion to reargue pursuant to CPLR 2221 (d) "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221 [d] (2)). A motion to reargue "lies within the sound discretion of the court" (*Ahmed v Pannone*, 116 AD3d 802, 805 [2d Dept 2014]).

*a. Defamation*

[3] The First Department also dismissed defendant's copyright claim as it was dismissed on the merits in the federal action.

Plaintiff asserts that her defamation claim is based on defendant's complaint in the federal action and on the contention that defendant identified himself as her ghostwriter in a New York Times article, claimed that he authored the book, and stated that her claim to authorship was false to a number of individuals, including Fox executives and colleagues (NYSCEF doc. no. 122, Wolman aff, ex 1, ¶ 81).

Defendant argues that the underlying decision was "narrow," in that the decision "limited the finding to [defendant's] assertion, contained solely in sealed legal pleadings until unsealed by a Federal Judge, that he was the ghostwriter of 'Tied Up in Knots,' defamed [plaintiff] and, as a result, violated the confidentiality clause of the written agreement" (NYSCEF doc. no. 294, mem in support of motion to reargue at 5). According to defendant, the underlying decision "conflated the issues of whether [defendant] ghostwrote the book, a question of fact in dispute, with whether [defendant] was the author of the book under copyright law, a question dispensed of when the declaratory judgment claim was dismissed" (*id.*, 5).

Defendant argues that any statements he made in his federal lawsuit in support of his claims are entitled to absolute privilege. Defendant further argues that plaintiff has no proof to support her claims that defendant defamed her by making statements to various individuals that he was the author of her book. With respect to the New York Times article discussing Bo Dietl, defendant contends that he did not have any conversation with Dietl (defendant aff, ¶ 21) or tell the New York Times reporter he was plaintiff's ghostwriter (*id.*).

Further, defendant denies that he made any statements that he was the ghostwriter for the book. Defendant denies plaintiff's claim that in November or December of 2015, defendant told Montgomery that he was the ghostwriter of the book (*id.*, ¶ 25). Moreover, defendant argues that plaintiff offers no evidence for her claims that he also referred to himself as her ghostwriter to William Shine (former Fox co-president), Nomiki Konst (Fox guest) and other Fox executives in mid-2016 (amended complaint, ¶ 38). Defendant denies making any such statements as alleged (defendant aff, ¶ 25).

Defendant denies that he told D.L. Hughley and Ken Kurson (Editor-in-Chief of the New York Observer) that he was the ghostwriter of her book (*id.*, ¶ 25). Defendant acknowledges that in November 2015 he stated that he was working with plaintiff, per her authorization (defendant aff, ¶ 25). Defendant repeatedly argues that calling oneself a ghostwriter is not defamatory and plaintiff has offered no proof of damages caused by such alleged statements. Defendant denies plaintiff's claim that he asserted he was her ghostwriter to her Fox News colleagues and executives, resulting in repetition in Variety Magazine and the Hollywood Reporter. Defendant states that he did not make such assertions to Fox personnel (*id.*, ¶ 25). Not only is the speech nonactionable for its truthfulness, according to defendant, but the articles referenced in the amended complaint actually only discussed his federal lawsuit (Wolman aff, ¶ 45), and those statements are protected by the litigation privilege. Those articles were released when the federal action was made public. Finally, plaintiff claims that defendant's attorney's letter to HarperCollins on June 7, 2016, claiming ownership of copyright and related rights, defamed her (amended complaint, ¶ 43). Defendant argues that his letter is also protected under the prelitigation privilege, in addition to being true and causing her no damage.

To prove a claim for defamation, a plaintiff must show: (1) a false statement that is (2) published to a third party (3) without privilege or authorization, and that (4) causes harm, unless the statement is one of the types of publications actionable regardless of harm (*3P-733, LLC v Davis*, 187 AD3d 626, 628 [1st Dept 2020] [internal quotation marks and citation omitted]). An absolute privilege immunizes a communicant from liability in a defamation action: "it is well settled that statements made in the course of litigation are entitled to absolute privilege" (*Front, Inc. v Khalil*, 24 NY3d 713, 718 [2015]). This absolute privilege is reserved for communications made by individuals participating in a public function, such as executive, legislative, judicial or quasi-judicial proceedings. This protection is designed to ensure that such person's "own personal interests—especially fear of a civil action, whether successful or otherwise—do not have an adverse impact upon the discharge of their public function" (*id.; see also Park Knoll Assoc. v Schmidt*, 59 NY2d 205, 209 [1983] [participants are granted immunity "for the benefit of the public, to promote the administration of justice, and only incidentally for the protection of the participants"]).

With respect to statements made during litigation, and to those statements made prior to litigation, there is a privilege:

> "Although statements made during the course of a judicial or quasi-judicial proceeding are clearly protected by an absolute privilege 'as long as such statements are material and pertinent to the questions involved,' we have indicated that the absolute privilege can extend to preliminary or investigative stages of the process, particularly where compelling public interests are at stake"

(*Rosenberg v Metlife, Inc.*, 8 NY3d 359, 365 [2007] [internal citations omitted]).

The Court finds that defendant has established that in granting plaintiff's summary judgment motion on her claim for defamation, the underlying decision misapprehended questions of fact or law. Accordingly, this Court grants defendant's motion for reargument on this claim. Essentially, this Court finds that the underlying decision erred by improperly omitting an analysis of the alleged statements and whether they are entitled to a privilege, and by not considering the factual dispute concerning whether defendant made any of the alleged defamatory statements.

First, the underlying decision considered whether the Civil Rights Law protects defendant's statements made in the federal litigation, but not those statements made outside the litigation. Second, and notably, the underlying decision did not expressly find that any of the statements made by defendant, whether in the litigation, or outside of the litigation, were entitled to the privilege. Pursuant to Civil Rights Law Section 74:

> "A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published."

It is well established that "[t]he privilege under [the] statute is absolute and applies even in the face of allegations of malice or bad faith" (*Panghat v New York City Div. of Human Rights*, 89 AD3d 597, 597 [1st Dept 2011]).

Here, the underlying decision did not find that defendant's statements outside of the litigation were or were not "a fair and true report" of the judicial proceeding. The underlying decision does not address which alleged defamatory statements were in consideration. Further, the underlying decision did not consider whether the statements made in the federal litigation were material and pertinent to the questions addressed in the lawsuit and, thus, entitled to the immunization of privilege. Because the parties' dueling affidavits contain numerous statements that defendant allegedly made, and his denials of such statements, the parties' affidavits create questions of fact as to whether defendant made any of the defamatory statements as alleged by plaintiff. Further, the statements themselves must be assessed to determine whether they qualify for any privilege at all, including the privilege under Civil Rights Section 74.

Based upon the submissions of the parties, there is a factual dispute as to what statements are at issue and whether defendant "published" any of those "false" statements to the press, or anyone else, and, additionally, whether those statements were reports about the litigation. By granting summary judgment to plaintiff, the underlying decision misapprehended both the strictures of CPLR 3212 and those of the Civil Rights Law.

Finally, this Court takes notice of the footnote contained in Judge Forrest's Decision, in which she expresses her suspicions of defendant's actions. Yet that footnote merely raises questions of fact about defendant's statements and does not make a finding as a matter of law.

In light of the above, the Court grants leave to defendant to reargue Judge Marin's decision concerning plaintiff's defamation claim, and in so doing grants the motion, and vacates this portion of the underlying decision. Accordingly, the Court denies summary judgment to plaintiff on the defamation claim.

*b. Breach of Contract*

As an initial matter, the underlying decision and the First Department's decision already determined that there was no "ghostwriting agreement." The First Department found: "[s]ince the [Collaboration Agreement] contained a 'no oral modification' clause, defendant is precluded from claiming that plaintiffs orally agreed to pay him for additional writing services not included in the contract" (*Tantaros* 180 AD3d at 481). The First Department further found no validity to defendant's argument that the ghostwriting agreement terminated the Collaboration Agreement. Thus, the only legally enforceable agreement between the parties is the Collaboration Agreement.

The Court grants the defendant's motion pursuant to CPLR 2221(d) to reargue, and upon reargument adheres to the underlying decision granting plaintiff summary judgment on plaintiff's motion for summary judgment on the breach of contract claim.

As a preliminary matter, the Court finds that defendant's motion is timely. Pursuant to CPLR 2221 (d) (3), a motion to reargue "shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry." Here, as the notice of entry was never served upon any party to this action, the time to make this motion has not passed, and the motion is, therefore, timely.

"In New York, agreements negotiated at arm's length by sophisticated, counseled parties are generally enforced according to their plain language pursuant to our strong public policy favoring freedom of contract" (*159 MP Corp. v Rebridge Bedford LLC*, 33 NY3d 353, 356 [2019]). The parties negotiated the Collaboration Agreement through counsel and entered the contract through "apparent care and specificity" (*id.* at 358). The parties agreed that confidentiality was essential to their contractual relationship and that defendant may not discuss or "mention" his involvement in the book without plaintiff's prior consent in any venue. Thus, according to the plain language of the Collaboration Agreement, when defendant commenced the federal action, mentioning his involvement in her book, including that he was the ghostwriter of her book, he breached the Collaboration Agreement.

The Court therefore denies the relief that defendant seeks on his motion to reargue Judge Marin's decision, granting plaintiff summary judgment on her breach of contract claim.

*c. Default Judgment (motion sequence 021)*

In motion sequence no. 021, defendant moves to reargue his motion for entry of a default judgment on his counterclaim against plaintiff and the resulting June 21, 2019 Order), as well as defendant's renewed motion for entry of a default judgment and the resulting October 10, 2019 Order.

The orders of June 20, 2019 and of October 10, 2019 denied defendant's motion sequence nos. 005 and 010 for a default judgment for "reasons stated on the record." In motion sequence no. 005, defendant argues that plaintiff has not timely answered the one counterclaim for breach of contract for failure to pay him $35,000 due under the Collaboration Agreement. Judge Marin previously dismissed each of the other counterclaims, and that decision was affirmed by the First Department (*Tantaros*, 180 AD3d at 481). On June 20, 2019, at oral argument, Judge Marin denied defendant's motion for default (motion sequence no. 005) and directed plaintiff to file an answer within 30 days. Judge Marin further stated that he wanted the parties to work out the discovery and the conflicts: "I am not going to default the case. . . Like I said, I'd rather see a peace treaty. I'm going to deny all five. Let's count this as a status conference" (NYSCEF doc. no. 173, 6/20/2019 Tr. at 7 and 9).

In motion sequence no. 010, defendant asked the Court to enter a default judgment as to the remaining counterclaim, the second counterclaim for breach of contract, in the amount of $35,000, plus attorneys' fees.

At oral argument on October 10, 2019, Judge Marin decided plaintiff's motion for summary judgment, granting it on the breach of contract and defamation claims, and dismissed defendant's one remaining counterclaim—the claim for breach of contract—thus denying defendant's motion for a default. On the record, Judge Marin found:

> "I think if I granted summary judgment it would obviously comprehend handling the cross-motion. It would be inconsistent with it. I'm going to deny motions 010, 10 [sic] and 11, and I'm going to grant motion 12 for summary judgment, for breach of contract and defamation, which inherently dismisses defendant's breach of -- defendant's breach of contract counterclaim for the $35,000, items three, four and five"

(NYSCEF doc. no. 201, 10/10/2019 tr. at 20).

The second counterclaim, for "Breach of Contract – Collaboration Agreement," states that plaintiff agreed to pay defendant "[f]or editing and rewriting a book Counterclaim [sic] [plaintiff] was writing entitled 'Tied Up in Knots' " (answer, ¶ 90). It further states that while defendant completed his contractual duties, plaintiff did not compensate defendant according to the terms of the Collaboration Agreement. Defendant seeks $35,000.00 in damages from plaintiff based on this claim.

As the Court has found above that it was proper for Judge Marin to grant plaintiff's motion for summary judgment on the breach of contract claim, the Court finds that Judge Marin's determination to dismiss defendant's second counterclaim was also proper. After breaching the confidentiality clause of the Collaboration Agreement, which the parties themselves described as "essential to [the] agreement," defendant may not seek specific performance, payment, on that contract.

> "When a party materially breaches a contract, the non-breaching party must choose between two remedies: it can elect to terminate the contract or continue it. If it chooses the latter course, it loses its right to terminate the contract because of the default"

(*Awards.com, LLC v Kinko's Inc.*, 42 AD3d 178, 188 [1st Dept 2007]).

"Stated differently, '[a] party may unilaterally terminate a contract where the other party has breached and the breach is material'" (*Lanvin Inc. v Colonia Inc.*, 739 F Supp 182, 195 [SD NY 1990]; *see Jawara v Araka*, 74 Misc3d 1212[A], 2022 NY Slip Op 50107[U] *4 [Sup Ct, Bronx County 2022] ["Notably, a party who has breached an agreement is not entitled to specific performance"] [internal citations omitted]).

Here, the Court finds that Judge Marin properly dismissed defendant's breach of contract counterclaim for payment on the Collaboration Agreement as he breached a critical term of the Collaboration Agreement, confidentiality, and, therefore, could no longer properly seek plaintiff's' compliance with this contract, i.e., payment for his services.

*d. Default Judgment and Sanctions (motion sequence 022)*

In motion sequence no. 022, defendant moves to reargue his motion to dismiss and supplemental motion for entry of default judgment (motion sequence no. 006. In motion

sequence no. 006, defendant moved to dismiss pursuant to 22 NYCRR 202.27 claiming plaintiff was unprepared for the preliminary conference, and pursuant to CPLR 3126 (3), for sanctions due to plaintiff's failure to respond to discovery.

Defendant contends that he served written discovery demands upon plaintiff on March 20, 2019 but received no response. At the May 2019 preliminary conference, counsel for defendant indicated an intent to move pursuant to CPLR 3126 based on plaintiff's failure to respond. On multiple occasions, the parties met and conferred in good faith to resolve these issues, and on August 22, 2019, plaintiff pledged to respond within a week thereof, yet served "no meaningful response" (def mem in support at 7).

In a written decision dated August 23, 2019, Justice Marin denied defendant's motion to dismiss and for a default judgment on the counterclaim "for reasons stated on the record" (NYSCEF doc. no. 162). During oral argument, Judge Marin denied motion sequence no. 006 essentially because the delays may have been caused by "some reasons back and forth," since "[i]t's a complicated case . . . . I think we have the authority to deny 006" (NYSCEF doc. no. 174, 8/22/2019 tr. at 4-5).

Defendant additionally moves for sanctions, pursuant to CPLR 3126, for plaintiff's failure to respond to discovery (NYSCEF doc. no. 170, motion sequence no. 011). Defendant contends that the Court must dismiss the amended complaint and grant judgment by default on the counterclaim for plaintiff's failure to answer discovery.

Defendant's motions are denied, as defendant is not entitled to a default on the second counterclaim, or any other. As discussed above, the second counterclaim has been properly dismissed by the court, and the First Department affirmed the dismissal of the other four counterclaims. As to the discovery related issues, the Court directs the parties to meet and confer on the discovery remaining in this action.

*3. Motion to Compel (motion sequence 019)*

In motion sequence 019, plaintiff moves to compel defendant and non-party Fox News Network, LLC (Fox) executives, Suzanne Scott, Irena Briganti and Diane Brandi to submit to depositions in contemplation of plaintiff's damages trial on plaintiff's claims of libel per se and breach of contract (motion sequence no. 019). On February 27, 2020, Judge Marin determined that the testimony of these three witnesses is critical to plaintiff's proof of damages and ordered their depositions. Plaintiff then served subpoenas upon these three potential witnesses in March and April of 2020. There was no response to the subpoenas. Plaintiff made additional requests for these depositions on March 31, 2021.

Defendant opposes the motion on three grounds. First, defendant argues that plaintiff failed to meet and confer with defendant prior to moving to compel. Second, defendant argues that plaintiff's motion must be denied as such a motion is only proper after "a person failed to respond or comply with a discovery request. Neither defendant nor the Fox executives failed to respond or comply" (NYSCEF doc. no. 306, mem in opp at 2). According to defendant, no discovery request was made. In other words, defendant argues that plaintiff served no notice for

the depositions, only subpoenas for documents. Further, according to defendant, the justice previously presiding over this matter did not issue any ruling permitting plaintiff to notice and take the Fox executives' depositions. Instead, defendant argues, the court ordered that defendant had the right to depose "the current and former Fox executives in order to determine whether the damages that plaintiff claims were actually caused by the actions of Fox News and not by [defendant]" (*id.* at 3). Yet, defendant argues that the testimony of these witnesses is not relevant to plaintiff's claims herein. According to defendant, the discovery requests made by plaintiff of the Fox Executives seeks information that supports her claims against Fox News and not those against defendant. Finally, defendant argues that this motion is premature, and that the court should first determine the motion to reargue plaintiff's motion for summary judgment.

The Court grants plaintiff's motion to depose the three Fox executives. Based upon the statements made in both plaintiff's motion and defendant's opposition, these depositions are relevant to a determination of the damages in this matter. Moreover, at a January 24, 2020 hearing, Judge Marin stated: "[w]hy don't we do Scott, Briganti, and Brandi. We'll do their depositions . . . . We're trying to find out whether the stuff that [defendant] did caused her termination and trying to find out what she lost, what her damages were" (NYSCEF doc. no. 215, 1/24/20 tr. at 32-34). Thus, 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.

Accordingly, it is hereby

ORDERED that defendant's motion pursuant to CPLR 2221 (d) to reargue plaintiff's motion for summary judgment (motion sequence no. 018) is granted to the extent of denying plaintiff's motion for summary judgment on the defamation claim and is otherwise denied; and it is further

ORDERED that defendant's motion, pursuant to CPLR 2221 (d), to reargue, his motion for entry of default judgment (motion sequence no. 021) is denied; and it is further

ORDERED that defendants' motion, pursuant to CPLR 2221 (d), to reargue his motion to dismiss, as well as his motion for sanctions for plaintiff's failure to respond to discovery (motion sequence no. 022) is denied; and it is further

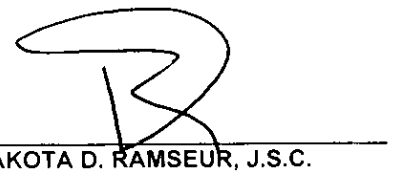
ORDERED that plaintiff's motion to compel depositions of Fox Executives, Suzanne Scott, Irena Briganti, and Diane Brandi (motion sequence no. 019) is granted; and it is further

ORDERED that the parties are directed to appear for a conference in this matter on November 1, 2022 at 12:00 p.m.; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that plaintiff shall serve a copy of this order upon defendant, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.



9/9/2022
DATE

DAKOTA D. RAMSEUR, J.S.C.

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| CHECK ONE: | | CASE DISPOSED | | | X | NON-FINAL DISPOSITION | |
| | | GRANTED | | DENIED | X | GRANTED IN PART | OTHER |
| APPLICATION: | | SETTLE ORDER | | | | SUBMIT ORDER | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | | FIDUCIARY APPOINTMENT | REFERENCE |