SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARY V. ROSADO** **PART** **33M**

Justice

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GRACE KLING

Plaintiff,

- v -

DAMON J. GILLESPIE,

Defendant.

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INDEX NO. 151076/2022

MOTION DATE 12/06/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 19, 20, 21, 22, 23, 24

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

Upon the foregoing documents, and after oral argument, which took place on January 17, 2023, where Valdi Licul, Esq. appeared for the Plaintiff Grace Kling's ("Plaintiff" or "Kling"), and Richard Altman, Esq. appeared for Defendant Damon J. Gillespie ("Defendant" or "Gillespie"), Plaintiff's motion to reargue/reconsider is granted. Defendant's cross-motion seeking leave to reargue is granted; and upon reargument, the Defendant's Answer is reinstated but his counterclaim alleging defamation remains dismissed.

I. Background

This action was commenced in response to the Underlying Action, wherein Gillespie sued Kling for allegedly defamatory statements made on her podcast. In the Underlying Action, Kling moved to dismiss Gillespie's Complaint pursuant to New York's Anti-SLAPP law (*see* CPLR § 3211(g); N.Y. Civ, Rights Law § 76-a). In a Decision and Order dated November 2, 2022, this Court granted Kling's motion to dismiss in the Underlying Action, and found that pursuant to the Anti-SLAPP law, she was entitled to reasonable attorneys' fees.

On February 4, 2022, while Kling's motion to dismiss in the Underlying Action was *sub judice*, she initiated the instant action. Kling sued Gillespie in this action under the Anti-SLAPP law, claiming that Gillespie was liable for attorneys' fees incurred in defending against his Complaint in the underlying action (*see* NYSCEF Doc. 1 at ¶ 65). She also sought damages for pain and suffering, and punitive damages (*id.* at ¶ 66). Plaintiff also sought declaratory relief that Defendant violated the Anti-SLAPP statute and an injunction (*id.*).

On April 11, 2022, Gillespie filed his Answer and a counterclaim alleging the statements in Kling's Complaint are defamatory (NYSCEF Doc. 4). On May 2, 2022, Kling moved to dismiss Gillespie's counterclaim (NYSCEF Doc. 5). Kling argued that the statements in her Complaint are afforded the absolute privilege given to statements to judicial proceedings (NYSCEF Doc. 7). Kling also argued that Gillespie has not pled any reason to reduce the absolute privilege afforded to judicial proceedings.

On June 5, 2022, Gillespie cross-moved to consolidate this case with the Underlying Action (NYSCEF,Doc. 10). Gillespie opposed Kling's motion to dismiss his counterclaim (NYSCEF Doc. 12). Gillespie argues that Kling's sole purpose in bringing this lawsuit was to retaliate against Gillespie, and therefore the Complaint was made in bad faith (*id.*). Gillespie argues that as the Complaint was filed in bad faith, it is not entitled to either any litigation privilege. Kling replied to Gillespie's opposition on June 27, 2022 (NYSCEF Doc. 15). Kling argued that none of the exceptions to the litigation privilege Gillespie argued applies to the facts of this case.

In a Decision and Order dated November 2, 2022, this Court dismissed the action based on *res judicata* (NYSCEF Doc. 16). The Court ruled that as Kling's motion to dismiss in the Underlying Action was granted, and she was awarded her attorneys' fees in that action, the issues in the current action had already been litigated and decided and were therefore barred by *res*

judicata. In reaching its decision, the Court did not address Kling's motion to dismiss Gillespie's counterclaim.

On December 1, 2022, Kling moved to reargue the Court's November 2, 2022 Decision (NYSCEF Doc. 19). Kling argues that the Court erred in applying *res judicata* as it overlooked the fact that Kling sought damages for pain and suffering, punitive damages, and injunctive relief in the instant action, while in the Underlying Action she is only entitled to Attorneys' Fees (NYSCEF Doc. 20). Gillespie cross-moved to reargue on December 13, 2022, arguing that his counterclaim for defamation should be reinstated (NYSCEF Doc. 22). On December 19, 2022, Kling opposed Gillespie's cross-motion (NYSCEF Doc. 24).

II. Discussion

A. Leave to Reargue and Reinstatement of the Complaint

Pursuant to CPLR § 2221(d), a motion for reargument should be granted where the Court overlooks or misapprehends issues of fact or law (*Smith v City of Buffalo*, 997 NYS2d 563, 564 [2014]). The Court agrees with Kling that it misapprehended and overlooked issues of fact or law.

Generally, *res judicata* or claim preclusion applies where there is (1) a final judgment on the merits; (2) identical parties or privity of parties from the prior action, and (3) similar claims in the two actions (*Paramount Pictures Corp. v Allianz Risk Transfer AG*, 31 NY3d 64 [2018]). To determine whether a claim is barred under the doctrine of *res judicata*, the question is whether the claim was sufficiently related to the claims in the first proceeding that it should have been asserted in that proceeding (*id.* at 78). The doctrine of *res judicata* embraces not only those matters which are actually litigated before a court, but also those relevant issues which could have been litigated (*Buechel v Bain*, 275 AD2d 65 [1st Dept 2000]).

However, as Kling points out, CPLR § 3211(g), which was the procedural mechanism by which the Underlying Action was resolved, explicitly states that "[n]o determination made by the court on a motion to dismiss brought under this section, nor the fact of that determination, shall be admissible in evidence at any later stage of the case, or in any subsequent action." (*see* CPLR § 3211[g][2]). Moreover, pursuant to N.Y. Civ. Rights Law § 70-a, a party "may maintain an action, claim, cross-claim or counterclaim to recover damages." While Kling was entitled to attorneys' fees for prevailing on her CPLR § 3211(g) motion to dismiss in the Underlying Action, she was not entitled to the injunctive relief, damages for pain and suffering, and punitive damages that she seeks in the instant action. Moreover, pursuant to CPLR § 3211(g)(2), the Court incorrectly considered the determination of the motion to dismiss in the Underlying Action when applying *res judicata* to the instant action. Thus, the Court misapprehended the nature of the damages sought as well as the application of the recently amended Anti-SLAPP suit in reaching its determination.

The First Department has recently held that a "trial court's power to dismiss an action *sua sponte* should be used 'sparingly and only in extraordinary circumstances'" (*Cooper v Broems*, ---NYS3d---, 2023 N.Y. Slip Op. 01357 [1st Dept 2023] quoting *Grant v Rattoballi*, 57 AD3d 272 [1st Dept 2008]). Thus, sufficient cause exists to grant leave to reargue and reinstate Kling's Complaint. However, while Kling's Complaint is reinstated, she remains barred from seeking attorneys' fees which have been incurred in the Underlying Action ((*O'Connell v 1205-15 First Ave. Associates, LLC*, 28 AD3d 233, 234 [1st Dept 2006]). Gillespie's Answer to Kling's Complaint is also reinstated. However, upon reargument of the underlying motion to dismiss, Gillespie's counterclaim remains dismissed.

B. The Underlying Motion to Dismiss and Cross-Motion to Consolidate

Upon re-argument, Gillespie's counterclaim for defamation remains dismissed. Gillespie's cross-motion in motion sequence 001 seeking consolidation is moot, as the Underlying Action is dismissed.

"There is a deep-rooted, long-standing public policy in favor of a person's right to make statements during the course of court proceedings without penalty" (*Denson v Donald J. Trump for President, Inc.*, 180 AD3d 446, 453-454 [1st Dept 2020] citing *Rosenberg v Metlife, Inc.*, 8 NY3D 359, 365 [2007]). "Statements uttered in the course of a judicial or quasi-judicial proceeding are absolutely privileged so long as they are material and pertinent to the questions involved notwithstanding the motive with which they are made (*Herzfeld & Stren, Inc. v Beck*, 175 AD2d 689, 691 [1st Dept 1991] citing *Wiener v Weintraub*, 22 NY2d 330 [1968]). Statements made during the course of litigation have been held to be absolutely privileged against defamation if "by any view or under any circumstances, they are pertinent to the litigation" (*Frechtman v Gutterman*, 115 AD3d 102, 106 [1st Dept 2014]). In other words, unless the offending statement is outrageously out of context, the litigation privilege will apply (*Gottwald v Sebert*, 193 AD3d 573 [1st Dept 2021]).

There is a sham-action exception to the litigation privilege (*Weeden v Lukezic*, 201 AD3d 425 [1st Dept 2022]). The sham-action exception to the litigation privilege applies where an action is brought solely to defame the defendant (*Gottwald, supra* at 580). However, where there are no alleged facts supporting a conclusion that a party initiated a sham action for the purpose of disseminating defamatory allegations against a plaintiff, the absolute privilege will apply, even if there are allegations of malice or bad faith (*Weeden, supra* at 429).

Upon review of the Complaint, the Court finds that the allegations in the Complaint are not outrageously out of context. Rather, the allegations are intertwined with Kling's Anti-SLAPP claim and the elements she must plead. Indeed, Kling discusses the context and nature of her statements to show that they were made in a public forum in connection with an issue of public interest, namely a podcast discussing domestic violence (*see* N.Y. Civ. Rights Law § 76-a[1][a]; *see also Aristocrat Plastic Surgery P.C. v Silva*, 206 AD3d 26, 30 [1st Dept 2022] citing *Carey v Carey*, 74 Misc.3d 1214[A] [Sup. Ct., NY Co. 2022]).

The standard for whether statements are pertinent to litigation is very broad (*Frechtman v Gutterman*, 115 AD3d 102, 106 [1st Dept 2014]). Kling's allegations in her Complaint, which provide context giving rise to this dispute and substantiate her allegation that she is entitled to damages under N.Y. Civ. Rights Law § 76-a[1][a], are not so outrageously out of context to bar application of the litigation privilege.

Gillespie's arguments related to the sham-litigation exception are equally unpersuasive. To plead a sham litigation, there must be facts or circumstances strongly suggesting that the lawsuit is fake with the sole intent to defame (*Manhattan Sports Restaurants of America, LLC v Lieu*, 146 AD3d 727, 727 [1st Dept 2017]). While Gillespie does not explicitly allege in his counterclaim that the instant action is a "sham", Gillespie does allege that Kling initiated this Complaint solely to inflict damage upon Gillespie "by the public airing of her imaginary private grievances" (NYSCEF Doc. 4 at ¶ 6). Gillespie also alleges that Kling's statements are "some sort of performance art or psychological therapy" (*id.* at ¶ 6). Gillespie has failed to allege facts which suggest the instant action is a sham. Instead, he only alleges conclusory assertions that Kling's grievances are "imaginary" or "performance art." Moreover, the Court already granted Kling's motion to dismiss in the Underlying Action based on the numerous affidavits and documentary

evidence she provided, including her own medical records which state she was treated at Hoboken University Medical Center in relation to Gillespie's alleged abuse. The instant action is no sham.

Finally, although Gillespie argues in opposition to the motion that the privilege should not apply pursuant to *Williams v Williams*, 23 NY2d 592 [1969], the Court finds the facts of that case inapposite. The Court of Appeals in *Williams* held that a person is not allowed to institute judicial proceedings alleging false, malicious and defamatory charges and then circulate a press release or other communication based thereon and escape liability (*id.*). However, fatally, Gillespie never alleges in his counterclaim that Kling circulated a press release circulating the allegations in her Complaint. Indeed, the counterclaim is devoid of any mention of any press release. Moreover, in the Underlying Action, Kling provided multiple affidavits, picture evidence, and medical records evidencing that her statements were not false or malicious. In the Underlying Action, although Gillepsie was required to show by clear and convincing evidence that Kling's statements were false, he failed to do so. In fact, he only submitted a nine-paragraph affidavit stating in conclusory fashion that her statements are false. Indeed, in the affidavit he refused to provide any evidence regarding the falsity of her statements, stating "I have no interest whatsoever in re-litigating the issues which were resolved once and for all in our separation agreement and divorce judgment."

Given (1) the judgment entered in the Underlying Action; (2) the lack of any evidence substantiating Defendant's claims of falsity; (3) the documentary and testamentary evidence contradicting Defendant's claims of falsity; and (4) the lack of any allegations in the Counterclaim regarding an orchestrated press release, this Court will not abrogate the "deep-rooted, long-standing public policy in favor of a person's right to make statements during the course of court proceedings without penalty" (*Denson v Donald J. Trump for President, Inc.*, 180 AD3d 446, 453-454 [1st Dept 2020]). Therefore, upon reargument, both parties' pleadings are restored, Gillepsie's

counterclaim alleging defamation is dismissed, and Gillepsie's cross-motion seeking consolidation is moot.

Accordingly, it is hereby,

ORDERED that Kling and Gillepsie's motion and cross-motion for leave to reargue are granted, and upon reargument, Kling's Complaint is reinstated, Gillepsie's Answer is reinstated, Gillepsie's counterclaim alleging defamation is dismissed, and Gillepsie's cross-motion seeking to consolidate this action with the Underlying Action is moot; and it is further

ORDERED that the Court's prior Decision and Order dated November 2, 2022 (NYSCEF Doc. 31) is vacated and superseded by this Decision and Order; and it is further

ORDERED that this action is **restored** to Part 33's calendar; and it is further

ORDERED that on or before April 26, 2023, the parties shall submit a proposed preliminary conference order to the Court via e-mail to SFC-Part33-Clerk@nycourts.gov. In the event the parties are unable to agree to a proposed preliminary conference order, the parties shall appear for an in-person preliminary conference with the Court on May 3, 2023 at 9:30 a.m. in 60 Centre Street, Room 442; and it is further

ORDERED that within ten days of entry, counsel for Plaintiff Grace Kling shall serve a copy of this Decision and Order, with notice of entry, on Defendant Damon J. Gillepsie; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

4/17/2023
DATE

Mary V Rosado
HON. MARY V. ROSADO, J.S.C.

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

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