

EXHIBIT E

Plaintiff,

-against-

DECISION AND ORDER

Sequence Nos. 40, 41, 42

Index No. 14070/2007

ELENA McMAHAN,

Defendant.

-----X
RUDERMAN, J.

The following papers were considered in connection with Motion Sequence Nos. 40, 41, and 42:

Sequence No. 40

Defendant's Order to Show Cause, Affirmation, Exs. A – DD 1

Affirmation in opposition, Exs. A – J 2

Reply, Exs. EE – HH 3

Sequence No. 41

Plaintiff's Order to Show Cause, Cunningham Affirmation, Exs. A – C,

Belowich Affirmation, Exs. A – C; Wallack Affirmation, Ex. A, Ransom

Affidavit, Ex. A 1

Affirmation in opposition, Affidavit, Exs. A – DD 2

Affirmation in further support, Exs. A – D 3

Sequence No. 42

Plaintiff's Notice of motion, Affirmation, Exs. A – D 1

Affirmation in opposition, Exs. A – X 2

Reply, Ex. A, Exs. A – E 3

The plaintiff brought this action in August, 2007, against his former wife for damages as a result of a breach of a confidentiality agreement contained in a March 20, 2005 “so-ordered” stipulation of settlement of a matrimonial action. (Motion Seq. No. 40, Ex. A.) The stipulation of settlement provided that in the event of a “material breach” of the confidentiality agreement,

In 2006, the *Village Voice* published an article alleging that the plaintiff had committed incest with his adult daughter from a relationship prior to his marriage with the defendant. Similar articles appeared in the *New York Post*. Subsequently, in 2007, the *Village Voice* published a follow-up article entitled *Daddy's Dog*, in which the defendant was interviewed, and confirmed her understanding of the truth of the allegations of incest (hereinafter, “*Daddy's Dog*” or “*Daddy's Dog* article”). The allegations made by the defendant in the 2007 *Daddy's Dog* article formed the basis of the present action for breach of the confidentiality agreement.

On November 19, 2009, the defendant made a written offer to liquidate damages under CPLR 3220, agreeing to judgment in the amount of \$250,000 “with costs accrued thus far in this action as defined in CPLR Section 3220, if the Defendant’s Defenses fail.” (Motion Seq. No. 40, Ex. B.) The offer was not accepted by the plaintiff.

After nine years of litigation, the case was assigned to this court for trial. At the commencement of the trial, after the jury had been selected, the defendant conceded liability on the record. (Motion Seq. No. 40, Ex. L.) Defense counsel stipulated that the defendant had “materially breached” Article III of the stipulation of settlement, “entitling Mr. McMahan to counsel fees, which is \$1,000,000.00 as of today’s date” (Motion Seq. No. 40, Ex. L, at 2.) Further, defendant agreed to liability for additional attorney’s fees, stating, “And we’re consenting to \$1 million as of today. Going forward, he [plaintiff] will incur future counsel fees under that particular paragraph, which will be dealt with when he produces invoices, and when

Neither party mentioned the existence of the offer under CPLR 3220.

At trial, plaintiff sought to establish that the *Daddy's Dog* article damaged the plaintiff, who was a general partner and Chief Executive Officer of McMahan Securities, and the President and Chief Executive Officer of Argent Funds Group ("Argent"). Plaintiff contended that an entity known as Access International Advisors (AIA) stopped marketing the plaintiff's investment funds after the publication of *Daddy's Dog*, resulting in the loss of millions of dollars in fees. (Trial Transcript, Motion Seq. No. 42, Ex. A, at 40 – 43.) In his opening statement, plaintiff's counsel conceded that the allegations of incest had surfaced and been published in 2006, but nevertheless argued that these articles were "different" because they did not contain pictures of the defendant or statements attributed to her. (Trial Transcript, Motion Seq. No. 42, Ex. A, at 43.) Defendant's counsel countered in his opening that the plaintiff would not be able to establish that the *Daddy's Dog* article alone, as opposed to the other numerous publications which contained allegations of incest, caused plaintiff's alleged damages. (Trial Transcript, Motion Seq. No. 42, Ex. A, at 47 – 49.)

At trial, defendant admitted into evidence New York Post articles dated September 28, September 29, and October 1, 2006, which contained numerous photographs and detailed allegations of the alleged incestuous relationship between the plaintiff and his daughter. (Motion Seq. 42, Affirmation in opposition, Ex. A.)¹

¹None of these articles contain any statements by the defendant, and there is no allegation that the defendant contributed to these articles.

any damages.

Defendant's Motion for Attorney's Fees and Other Expenses (Motion Sequence No. 40)

Defendant moves to preclude legal fees on the ground that this action was baseless, and to recover legal fees as “expenses” under CPLR 3220. The court rejects defendant’s arguments that plaintiff is not entitled to any additional attorney’s fees because no actual damages were awarded. While the actual results may be considered in determining the amount of reasonable attorney’s fees, this action was not frivolous, or so lacking in merit as to suggest that no award of fees is warranted. Indeed, the defendant freely stipulated to pay attorney’s fees in the amount of \$1 million to the extent that fees had accrued in the action, up to the time of the commencement of the trial. Nor did defendant suggest at that time that additional fees were not warranted.

Defendant made a written offer to liquidate damages under CPLR 3220, agreeing to the entry of judgment against her in the amount of \$250,000. This offer was rejected. Defendant accordingly argues that the plaintiff is liable for the defendant’s expenses “necessarily incurred . . . for trying the issue of damages from the time of the offer.” (CPLR 3220; *see, Weinstein, Korn & Miller, New York Civil Practice*, § 3220.03; *Abreu v. Barkin & Assoc. Realty, Inc.*, 115 A.D.3d 624 [1st Dept. 2014] [granting a hearing on attorney’s fees where plaintiff failed to obtain a more favorable judgment than the offer].) Plaintiff maintains that because plaintiff recovered at least \$1,000,000.00 in attorney’s fees, which will eventually be reduced to a judgment, the plaintiff in fact recovered more than the amount which was offered under CPLR

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