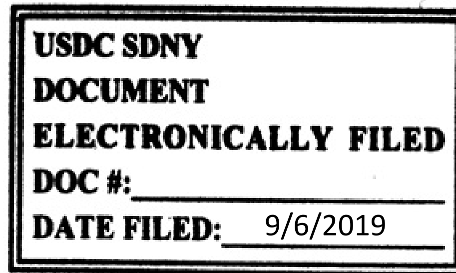


**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

**Dara L. DAddio,**

**Plaintiff,**

**-against-**

**Bernard B. Kerik et al.,**

**Defendants.**

**1:15-cv-05497 (JGK) (SDA)**

**REPORT AND RECOMMENDATION**

**STEWART D. AARON, UNITED STATES MAGISTRATE JUDGE.**

**TO THE HONORABLE JOHN G. KOELTL, UNITED STATES DISTRICT JUDGE:**

On May 14, 2019, District Judge Koeltl entered an Order granting judgment on default in favor of Defendant/Counterclaim Plaintiff Bernard B. Kerik ("Kerik") against Plaintiff/Counterclaim Defendant Dara L. DAddio ("DAddio") on Kerik's claims for defamation, intentional infliction of emotional distress and intentional interference with prospective economic advantage. (Order, ECF No. 137.) Judge Koeltl then referred the case to me for an inquest on damages and any other appropriate relief. (*Id.*) For the reasons set forth below, I recommend that the Court enter an injunction requiring DAddio to remove two blog posts identified in Kerik's counterclaims (Counterclaim, ECF No. 59), but that the Court award no damages.

## PROCEDURAL HISTORY

On July 15, 2015, DAddio filed this action seeking a declaratory judgment and damages related to her alleged co-authorship of the book *From Jailer to Jailed: My Journey from Correction and Police Commissioner to Inmate #84888-054*, for which Kerik holds the copyright

as the sole author.[1] (*See* Am. Compl., ECF No. 15.) DAddio filed an Amended Complaint on October 19, 2015. (*Id.*)

On December 20, 2015, Kerik filed an Answer and Counterclaim against DAddio and her twin sister, Donna DAddio, bringing claims for defamation, intentional infliction of emotional distress and intentional interference with prospective economic advantage.[2] (Answer, ECF No. 58; Counterclaim, ECF No. 59.) Kerik alleged that the DAddio sisters engaged in a "personal terror campaign" in which they "publicly targeted, stalked, threatened, and harassed [Kerik], his family, business associates and friends (including his two young daughters), through the use of dozens of anonymous social media and Internet accounts, that [were] used for the sole purpose of alarming, frightening, and harming Mr. Kerik personally, professionally and financially." (Counterclaim ¶ 16.) Kerik sought compensatory damages, punitive damages, an award of costs and disbursements and a permanent injunction restraining DAddio from further publishing any communication between her and Kerik and restraining DAddio from any and all communication with Kerik and any members of his family, business associates, or company. (*Id.* at 18-20.)

On November 26, 2018, Kerik filed a motion for a default judgment. (Mot., ECF No. 124.) As part of his motion, Kerik's attorney referred to two blogs entitled "Doing Time with Bernie" and "Parlatore is a Payne" that DAddio created "with thousands of posts attacking Mr. Kerik" that were still active. (Decl. of Timothy Parlatore in Support Mot. For Default J. ("Parlatore Decl."), ECF No. 124-1, ¶ 17.) Kerik asserted that "an injunction by this Court will assist Google

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[1] The Court refers to the Report and Recommendation filed on April 25, 2019 (ECF No. 136) for the complete background of this action.

[2] Donna DAddio was served on January 22, 2016, but never has appeared in this action. (*See* Proof of Service, ECF No. 81-1.) However, Kerik only sought and obtained a default judgment against Plaintiff Dara DAddio.

in removing them.” (*Id.*) DAddio filed a response on December 17, 2018. (Response, ECF No. 127.) The Court held a hearing regarding Kerik’s motion on March 6, 2019. DAddio did not appear for the hearing.

On April 25, 2019, after giving DAddio a final chance to resolve this action (*see* Order, dated March 6, 2019, ECF No. 135), the Court entered a Report and Recommendation recommending to District Judge Koeltl that the Amended Complaint be dismissed with prejudice and a default judgment be entered against DAddio on Kerik’s counterclaims. (ECF No. 136.) On May 14, 2019, District Judge Koeltl dismissed the Amended Complaint with prejudice and entered a default judgment against Plaintiff on Kerik’s counterclaims. (Order, ECF No. 137.) Judge Koeltl then referred the case to me for an inquest on damages. (*Id.*)

On May 15, 2019, the Court entered an Inquest Scheduling Order directing that Kerik serve Plaintiff and file Proposed Findings of Fact and Conclusions of Law concerning all damages, and any other monetary relief permitted under the entry of default judgment, no later than June 14, 2019. (Scheduling Order, ECF No. 138.) No submission was received by that date. On June 19, 2019, the Court entered an Order directing Kerik to file the required submissions no later than June 26, 2019. (Order, ECF No. 139.) The Court warned Kerik, who is represented by counsel, that if he failed to file the required submissions by the extended deadline, the Court may recommend to the District Judge that no damages be awarded on his counterclaims. (*Id.*) As of the date of this Report and Recommendation, Kerik has not filed the required submission nor requested an extension of time to do so.

## DISCUSSION

### A. Damages

"Although a default judgment entered on well-pleaded allegations in a complaint establishes a defendant's liability, it does not reach the issue of damages." *Louis Hornick & Co. v. Darbyco, Inc.*, No. 12-CV-05892 (VSB) (DCF), 2015 WL 13745787, at *3 (S.D.N.Y. Aug. 19, 2015), *report and recommendation adopted*, 2015 WL 9478239 (S.D.N.Y. Dec. 29, 2015) (internal citations and quotation marks omitted). "A plaintiff must therefore substantiate [his] claim with evidence to prove the extent of damages." *Id.* (citing *Trehan v. Von Tarkanyi*, 63 B.R. 1001, 1008 n.12 (S.D.N.Y. 1986) (plaintiff must introduce evidence to prove damages suffered and the court will then determine whether the relief flows from the facts) (internal citation omitted)). "A plaintiff bears the burden to introduce sufficient evidence to establish the amount of damages with reasonable certainty." *Id.* (internal citation omitted). "Although a plaintiff is entitled to all reasonable inferences in its favor based upon the evidence submitted, if a plaintiff fails to demonstrate its damages to a reasonable certainty, then the court should decline to award any damages, even where liability has been established through default." *Id.* (citing *U.S. ex rel. Nat. Dev. & Const. Corp. v. U.S. Envtl. Universal Servs., Inc.*, No. 11-CV-00730 (CS), 2014 WL 4652712, at *3 (S.D.N.Y. Sept. 2, 2014); *Lenard v. Design Studio*, 889 F. Supp. 2d 518, 538 (S.D.N.Y. 2012)).

Here, Kerik has not introduced any damages evidence in response to two Court Orders and the Court is unable to establish the amount of damages with reasonable certainty. Thus, I recommend that no damages be awarded to Kerik on his counterclaims.

## II. Injunctive Relief

In addition to damages, Kerik seeks "[a] permanent injunction restraining the Plaintiff from further publishing any and all communication between the Plaintiff and Defendant, in written, typed or emailed format; and restraining the Plaintiff from any and all direct, indirect or third party communication with the Defendant, or any members of his family, business associates, or company[.]" (Counterclaim at 19.) However, in his motion for default judgment, Kerik also appears to seek an injunction aimed at removing all blog posts from two blogs entitled "Doing Time with Bernie" and "Parlatore is a Payne." (Parlatore Decl. ¶ 17.)

According to well-established principles of equity, a plaintiff seeking a permanent injunction "must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). "Generally, '[a]n injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course.'" *E.E.O.C. v. KarenKim, Inc.*, 698 F.3d 92, 100 (2d Cir. 2012) (quoting *Winter v. Natural Res. Defense Council Inc.,* 555 U.S. 7, 32 (2008)).

In the defamation context, "courts have long held that equity will not enjoin a libel." *Metro. Opera Ass'n, Inc. v. Local 100, Hotel Employees & Rest. Employees Int'l Union*, 239 F.3d 172, 177 (2d Cir. 2001) (citing cases). "Indeed, for [more than] a century the Second Circuit has subscribed to the majority view that, absent extraordinary circumstances, injunctions should not ordinarily issue in defamation cases." *Id.* (*citing American Malting Co. v. Keitel,* 209 F. 351,

354 (2d Cir. 1913)) ("Equity will not restrain by injunction the threatened publication of a libel, as such, however great the injury to property may be.") Moreover, when the relief sought takes the form of a prior restraint on expression, there is a "'a heavy presumption' against its constitutional validity." *Metro. Opera Ass'n, Inc.*, 239 F.3d at 176 (citing *Org. for a Better Austin v. Keefe,* 402 U.S. 415, 419 (1971)). "Indeed, prior restraints are the most serious and the least tolerable infringement on First Amendment rights[,]" and "[w]hen a prior restraint takes the form of a court-issued injunction, the risk of infringing on speech protected under the First Amendment increases." *Id.* (citing *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976); *Madsen v. Women's Health Ctr.,* 512 U.S. 753, 764 (1994)) (internal quotation marks omitted).

In light of these principles, the court recommends that Kerik's request for a permanent injunction limiting future communication be denied. However, the same concerns do not apply to the blog posts that DAddio previously has posted. Nonetheless, the Court finds that Kerik is not entitled to the broad relief he seeks. Notably, the default judgment supports a finding that DAddio is liable only with respect to the well-pleaded facts in Kerik's counterclaims. *See Robertson v. Doe*, No. 05-CV-07046 (LAP) (RLE), 2009 WL 10676484, at *2 (S.D.N.Y. Dec. 17, 2009), *report and recommendation adopted*, 2010 WL 11527317 (S.D.N.Y. May 11, 2010), *aff'd sub nom. Robertson v. Dowbenko*, 443 F. App'x 659 (2d Cir. 2011). The counterclaims contain specific allegations with respect to two blog posts from the blog "Doing Time with Bernie" from April and October 2015. (Counterclaim ¶¶ 24(i), 24(k).) Thus, I recommend that the Court grant Kerik's request for injunctive relief requiring DAddio to remove these two blog posts, which are

specifically identified in Paragraphs 24(i) and 24(k) of his Counterclaim.[3]

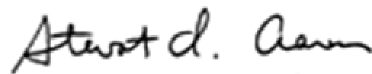
## CONCLUSION

For the reasons set forth above, I recommend that the Court enter an injunction requiring DAddio to remove the two blog posts identified in Paragraphs 24(i) and 24(k) of Kerik's Counterclaim, but that the Court award no monetary damages.

The Clerk of Court is directed to mail a copy of this Order to the *pro se* Plaintiff.

**SO ORDERED.**

DATED: New York, New York
September 6, 2019



STEWART D. AARON
United States Magistrate Judge

* * *

**NOTICE OF PROCEDURE FOR FILING OBJECTIONS TO THIS REPORT AND RECOMMENDATION**

The parties shall have fourteen (14) days (including weekends and holidays) from service of this Report and Recommendation to file written objections pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure. *See also* Fed. R. Civ. P. 6(a), (d) (adding three additional days when service is made under Fed. R. Civ. P. 5(b)(2)(C), (D) or (F)). A party may respond to another party's objections within fourteen days after being served with a copy. Fed. R. Civ. P. 72(b)(2). Such objections, and any response to objections, shall be filed with the

[3] The Court notes that the Counterclaim indicates that the date of the blog post regarding Kerik's college degree was April 15, 2015, but the website shows that the entry was posted on April 14, 2015. *See* http://www.doingtimewithbernie.com/2015/04/felon-fraudster-liar-bernard-keriks-bs.html (last visited Sept. 4, 2019).

Clerk of the Court. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72(b). Any requests for an extension of time for filing objections must be addressed to Judge Koeltl.

**THE FAILURE TO OBJECT WITHIN FOURTEEN (14) DAYS WILL RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW.** *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72(b); *Thomas v. Arn,* 474 U.S. 140 (1985).