**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 RECOMENDATION**

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

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

## INTRODUCTION

Plaintiff/Counterclaim defendant Dara L. DAddio ("DAddio" or "Plaintiff") filed this action against Defendant/Counterclaim plaintiff Bernard B. Kerik ("Kerik" or "Defendant")[1] 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 (hereinafter "From Jailer to Jailed"), for which Kerik holds the copyright as the sole author. Presently before the Court is Defendant's motion for sanctions, pursuant to Federal Rule of Civil Procedure 37(d), seeking dismissal of the Amended Complaint and a default judgment on Kerik's counterclaims due to Plaintiff's failure to respond to discovery demands. (Notice of Mot., ECF No. 124.) For the reasons set forth below, I recommend that Defendant's motion be GRANTED.

[1] Plaintiff previously voluntarily dismissed her claims as to the other named defendants. (*See* Notices of Voluntary Dismissal, ECF Nos. 47 & 48; Stipulation of Dismissal, ECF No. 72.)

**BACKGROUND**

Plaintiff filed this action on July 15, 2015 (Compl, ECF No.1) and filed an Amended Complaint on October 19, 2015. (Am. Compl., ECF No. 15.)[2] In the Amended Complaint, Plaintiff alleges that she is a statutory co-author of the book From Jailer to Jailed and a co-owner of the copyright. (Am. Compl. ¶¶ 6-10, 23, 74-76.) Plaintiff seeks, among other relief, a declaration as to her co-authorship and co-ownership; an award of her purported share of royalties; and damages in quantum meruit for expenditures and the reasonable value of services she alleges she performed in connection with the book, including writing, editing and legal research. (Am. Compl. ¶¶ 175-85.)

On December 20, 2018, Kerik filed an Answer and Counterclaims against DAddio and her twin sister, Donna DAddio, alleging claims for defamation, intentional infliction of emotional distress and intentional interference with prospective economic advantage. (Answer, ECF No. 58; Counterclaims, ECF No. 59.) Kerik alleges 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 have been used for the sole purpose of alarming, frightening, and harming Mr. Kerik personally, professionally and financially." (Counterclaims ¶ 16.) DAddio filed an Answer to the Counterclaims on January 4, 2016. (ECF No. 65.) Donna DAddio was served on January 22, 2016, but never has appeared in this action.[3] (*See*

[2] At the time she filed her pleadings, Plaintiff was represented by counsel.

[3] As Defendant's motion does not address his counterclaims regarding Donna DAddio, the Court does not address those claims in this Report and Recommendation.

Proof of Service, ECF No. 81-1.)

In January 2016, DAddio's attorney sought leave to withdraw as counsel (*see* Status Report, ECF No. 71), and the Court granted the application on January 26, 2016. (Order, ECF No. 75.) The Court then stayed the action for approximately two months to allow DAddio time to locate replacement counsel. (*Id.*) On April 4, 2016, the Court referred the action for a settlement conference, but the conference was cancelled at the request of DAddio. (Memo Endorsement, ECF No. 86.)

On July 13, 2017, Kerik filed a status report with the Court. (ECF No. 98.) The same day, DAddio sent a letter to the Court indicating that she was not interested in pursuing settlement at that time. (*See* ECF No. 100.) On July 17, 2017, the Court entered a Scheduling Order setting a deadline for the completion of discovery for September 29, 2017. (ECF No. 90.) Then, on July 19, 2017, DAddio submitted another letter to the Court asking for a voluntarily dismissal without prejudice. (*See* ECF No. 101, at 2-3.) The Court entered an Order informing DAddio that, because Kerik had filed counterclaims against her, she could not dismiss the action. (*Id.* at 1.) On August 3, 2017, Kerik responded, stating that he was willing to engage in settlement discussions or move forward with litigation. (Letter, ECF No. 102.) On August 4, 2017, DAddio submitted a letter to the Court again asking to voluntarily dismiss her claims and for dismissal of Kerik's counterclaims. (ECF No. 103.) The Court endorsed the letter, explaining to Plaintiff that there was no agreement to dismiss the counterclaims and if she could not participate in a settlement conference then the case must proceed. (*Id.*) Judge Koeltl then referred the action to Magistrate Judge Ellis for general pretrial management. (Order, ECF No. 104.)

Based on submissions from Plaintiff regarding an ongoing criminal case in which she agreed to a temporary no contact order with Kerik (*see* Letter, ECF No. 109), Judge Ellis stayed the action through March 19, 2018 and ordered DAddio to provide an update to the Court on March 26, 2018. (Order, ECF No. 110.) On November 8, 2017, Kerik filed a letter proposing a possible resolution of all claims. (Letter, ECF No. 111.) This action was reassigned to the undersigned following Judge Ellis's retirement. On December 4, 2017, the Court ordered DAddio to respond to Kerik's proposal. (Order, ECF No. 112.) On December 11, 2017, DAddio submitted a letter indicating that she was unable to agree to the terms of Kerik's proposal at that time. (Letter, ECF No. 114.)

On March 25, 2018, DAddio submitted a status report advising the Court that she "may no longer pursue this case at this time." (Letter, ECF No. 117.) The Court then scheduled a telephone conference for May 1, 2018. (ECF No. 116.) DAddio failed to appear for the conference. (*See* Order, ECF No. 118.) Defendant informed the Court that he was unable to contact Plaintiff and the Court called Plaintiff at the telephone number provided by her former counsel and left a voice message for Plaintiff asking her to call Chambers. (*Id.*) The Court then proceeded with the conference with Defendant. Based on Defendant's representation that the remaining criminal proceeding involving the parties had been resolved, the Court lifted the stay. (*Id.*) The Court also extended the discovery deadline to July 30, 2018. (*Id.*) In the May 1, 2018 Order, the Court reminded DAddio that her *pro se* status did not relieve her of her discovery obligations and ordered that she must comply with any discovery requests served by Defendant. (*Id.*) Finally, the Court advised DAddio that she could seek assistance with discovery by consulting the *pro se* legal clinic run by the New York Legal Assistance Group. (*Id.*)

On August 14, 2018, Kerik filed a letter advising the Court that DAddio had failed to respond to Kerik's document demands. (Letter, ECF No. 121.) Kerik further stated that DAddio had made no attempts to contact or communicate with him or his attorney or otherwise participate in the discovery process. (*Id.*)

On November 26, 2018, Kerik filed the instant motion seeking dismissal of DAddio's claims with prejudice and a default against DAddio in Kerik's favor on all counterclaims. (Not. of Motion, ECF No. 124.) DAddio filed a response on December 17, 2018 stating, among other things, that she had not received Kerik's document demands. (Letter, ECF No. 127.) On January 30, 2019, Kerik filed proof of service by mail of the document demands. (Letter, ECF No. 130.)

By Order dated February 1, 2019, the Court ordered the parties to appear for a hearing on Kerik's motion for a default judgment and sanctions on March 6, 2019. (Am. Order, ECF No. 133.) The Court further ordered DAddio to bring to the hearing the documents sought in items 1 through 16 of Defendant's First Demand for Production of Documents. The Court warned DAddio that, if she failed to comply with the Court's Order, sanctions would be imposed against her, pursuant to Federal Rule of Civil Procedure 37(b)(2), and included the relevant text of Rule 37. (*Id.*) A copy of the Order, along with a copy of Defendant's document demand was mailed to Plaintiff by Chambers.

On February 25, 2019, DAddio sent a letter to the Court stating that "[d]ue to ongoing disability and scant financial resources" she would be unable to appear at the March 6, 2019 hearing or "any future hearings on this matter." (Letter, ECF No. 134.) DAddio also wrote that she had "neither documents nor anything further to contribute to the Defendant's First Demand for Production of Documents." (*Id.*) The Court endorsed the letter, warning DAddio that her letter

did not excuse her from appearing at the hearing and that "failure to appear may result in a recommendation to the District Judge that a default judgment or sanctions be entered against her." (*Id.*)

DAddio did not appear for the hearing on March 6, 2019. During the March 6 hearing, Kerik stated that he remained willing to resolve this action if, as set forth in his November 8, 2017 letter (ECF No. 111), DAddio removed certain blog posts, including http://www.doingtimewithbernie.com/ and http://parlatore-is-a-payne.blogspot.com/, as well as social media accounts related to Kerik, and further agreed to post no blogs or social media accounts about Kerik or his attorney, Timothy Parlatore. Thus, the Court gave DAddio thirty days to remove the blog posts and social media accounts and agree to refrain from future posts. (Order, ECF No. 135.) The Court warned DAddio that failure to do so would result in a recommendation to the District Judge that the Court grant Kerik's motion for a default judgment and sanctions. (*Id.*) A copy of the Court's Order, along with a copy of Kerik's November 8, 2017 letter setting forth a proposed resolution were mailed and emailed to DAddio. DAddio did not respond to the March 6, 2019 Order. Moreover, as of the date of this Report and Recommendation, she has not removed the blog posts.

## DISCUSSION

### I. Rule 37 Legal Standards

Rule 37 sets forth various sanctions for a party's failure to cooperate in discovery. Several sections of Rule 37 are relevant here. Defendant's motion is brought pursuant to Rule 37(d) which

relates to a party's failure to respond to a request for inspection, among other things.[4] In addition, the Court warned DAddio that failure to comply with the Court's orders regarding discovery may result in the imposition of sanctions pursuant to Rule 37(b).[5] Under either section of the Rule, the available sanctions include directing that certain facts be taken as established, precluding the party from supporting its claims or introducing certain matters in evidence, striking the party's pleadings or portions of its pleadings, staying the action pending compliance, dismissing the party's claims in whole or in part, rendering a default judgment against the party, or holding the party in contempt. *See* Fed. R. Civ. P. 37(d)(3); Fed. R. Civ. P. 37(b)(2)(A)(i)-(vi). Both sections further provide that "the court must" require the disobedient party to "pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(d)(3); Fed. R. Civ. P. 37(b)(2)(C).

"The imposition of sanctions under Rule 37 lies within the discretion of the district court[.]" *Valentine v. Museum of Modern Art*, 29 F.3d 47, 49 (2d Cir. 1994); *see also see Doe v. Delta Airlines Inc.*, 15-3561-CV, 2016 WL 6989793 at *2 (2d Cir. Nov. 29, 2016) ("When faced with a breach of a discovery obligation that is the non-production of evidence, a District Court has

[4] Rule 37(d) states, in relevant part, that "[t]he court where the action is pending may, on motion, order sanctions if . . . a party, after being properly served with . . . a request for inspection under Rule 34, fails to serve its answers, objections or written response." Fed. R. Civ. P. 37(d)(1)(A).

[5] Rule 37(b) of the Federal Rules of Civil Procedure states, in relevant part, that "[i]f a party . . . fails to obey an order to provide or permit discovery . . . the court where the action is pending may issue further just orders." Fed. R. Civ. P. 37(b)(2)(A). In addition, the sanctions set forth in Rule 37(b)(i)-(vi) also are available under Rule 16(f), for, among other things, failure to appear at a pretrial conference. Fed. R. Civ. P. 16(f).

broad discretion in fashioning an appropriate sanction.") (internal citation and quotation marks omitted).

"[T]he Second Circuit has endorsed four factors for a district court to consider in exercising its discretion to impose sanctions pursuant to Rule 37: '(1) the willfulness of the noncompliant party or the reason for noncompliance; (2) the efficacy of lesser sanctions; (3) the duration of the period of noncompliance, and (4) whether the non-compliant party had been warned of the consequences of noncompliance.'" *Syntel Sterling Best Shores Mauritius Ltd. v. TriZetto Grp.*, 328 F.R.D. 100, 120 (S.D.N.Y. 2018) (quoting *S. New England Tel. Co. v. Glob. NAPs Inc.*, 624 F.3d 123, 144 (2d Cir. 2010)). "[T]these factors are not exclusive, and they need not each be resolved against the [sanctioned] party." *World Wide Polymers, Inc. v. Shinkong Synthetic Fibers Corp.*, 694 F.3d 155, 159 (2d Cir. 2012). A district court is free to consider "the full record in the case in order to select the appropriate sanction." *S. New England Tel. Co.,* 624 F.3d at 144. However, "[d]ismissal with prejudice is a harsh remedy to be used only in extreme situations, and then only when a court finds willfulness, bad faith, or any fault by the non-compliant litigant." *Agiwal v. Mid Island Mortg. Corp.*, 555 F.3d 298, 302 (2d Cir. 2009) (internal citation and quotation marks omitted); *see also Urbont v. Sony Music Entm't*, No. 11-CV-04516 (NRB), 2014 WL 6433347, at *3 (S.D.N.Y. Nov. 6, 2014) ("When evaluating which sanction is appropriate for such willful conduct, 'a court should always seek to impose the least harsh sanction that will remedy the discovery violation and deter such conduct in the future.'") (quoting *Silva v. Cofresi*, 13-CV-03200 (CM) (JCF), 2014 WL 3809095, at *3 (S.D.N.Y. Aug. 1, 2014)).

Finally, while *pro se* litigants are generally "entitled to 'special solicitude' before district courts," *Agiwal*, 555 F.3d at 302 (quoting *Triestman v. Federal Bureau of Prisons,* 470 F.3d 471,

475 (2d Cir.2006) (internal quotation marks omitted)), "[d]ismissal of a *pro se* litigant's action may be appropriate 'so long as a warning has been given that non-compliance can result in dismissal.'" *Id.* (quoting *Valentine*, 29 F.3d at 50) .

## II. The Court Recommends That The Amended Complaint Be Dismissed With Prejudice And A Default Judgment Be Entered In Favor Of Defendant

The Court finds that the sanctions sought by Defendant are warranted for DAddio's demonstrated failure to participate in the discovery process or comply with Court orders.

First, DAddio's conduct was willful. "A party's conduct will be deemed willful where the contravened orders were clear, the party being sanctioned understood the orders, and the non-compliance was within the party's control." *Urbont*, 2014 WL 6433347, at *2. Second, it is unlikely that lesser sanctions will be effective. While the Court is sympathetic to any health or financial issues faced by Plaintiff, the Court repeatedly has explained that she cannot simply dismiss this case because of the counterclaims filed against her. Regardless, DAddio has failed to comply with discovery requirements. Moreover, DAddio's most recent correspondence indicated that she would not appear for any future hearings in this action. Thus, the Court finds that "any lesser sanction would be an exercise in futility." *Coach, Inc. v. O'Brien*, 10-CV-06071 (JPO) (JLC), 2012 WL 1255276, at *9 (S.D.N.Y. Apr. 13, 2012) (default judgment warranted based on "repeated noncompliance with Court orders and failure to engage with both counsel and the Court[.]").

The duration of DAddio's non-compliance also counsels in favor of the sanctions requested by Defendant. DAddio failed to comply with the scheduling order entered in this action in July 2018, and also failed to respond to Kerik's July 2018 discovery demands until March 2019, when she wrote that she purportedly had no documents responsive to Defendant's demands. Thus, Plaintiff's conduct evidences a delay of at least eight months in providing any response. *See*

*Agiwal*, 555 F.3d at 303 (affirming dismissal of action where plaintiff failed to comply with discovery order for six months). Moreover, the Court finds DAddios' contention that she has no responsive documents to be implausible as the document demands include broad categories such as all communications with Defendant, and all documents concerning any blogs, websites, or social media accounts owned or operated by the Plaintiff, which the Court knows to exists. (Def.'s First Req. For Production, ECF No. 124-2, at 4-6.) Thus, DAddio's conduct evinces a deliberate refusal to produce responsive documents or engage in discovery.

Finally, the Court has warned DAddio repeatedly regarding the consequences of failing to participate in discovery and failing to comply with the Court's orders. Despite explicit warning that her claims may be dismissed and a default judgment may be entered against her, DAddio has refused either to litigate this case or to agree to the reasonable settlement terms proposed by Defendant.

Accordingly, the Court finds that the severe sanctions sought by Defendant are appropriate and recommends that the Court dismiss DAddio's claims with prejudice and enter a default judgment in favor of Defendant.[6] *See Urbont*, 2014 WL 6433347, at *4 ("'sustained and willful intransigence in the face of . . . explicit warnings from the court,' warrant[ed] sanctions in the form of default judgment and payment of fees") (quoting *Valentine*, 29 F.3d at 50); *see also*

[6] The Court notes that, in the alternative, Plaintiff's claims could be dismissed pursuant to Federal Rule of Civil Procedure 41(b) for failure to prosecute. In determining whether dismissal is appropriate under Rule 41(b), courts consider similar factors as under Rule 37, namely: (1) the duration of the plaintiff's failures, (2) whether plaintiff had received notice that further delays would result in dismissal, 3) whether the defendant is likely to be prejudiced by further delay, (4) whether the district judge has taken care to strike the balance between alleviating court calendar congestion and protecting a party's right to due process and a fair chance to be heard, and (5) whether the judge has adequately assessed the efficacy of lesser sanctions. *See Shannon v. Gen. Elec. Co.*, 186 F.3d 186, 193-94 (2d Cir. 1999).

*Bell v. Ramirez*, No. 13-CV-07916 (PKC) (HBP), 2017 WL 8941259, at *2 (S.D.N.Y. Sept. 20, 2017) ("prolonged and completely unexplained failures" to respond to discovery requests warranted entry of default judgment) *report and recommendation adopted sub nom. Bell v. Marshall*, 2018 WL 1918607 (S.D.N.Y. Apr. 19, 2018).

## III. The Court Recommends That The Court Decline To Award Attorney's Fees

Both Rule 37(b) and (d) require the Court to award costs and attorney's fees, unless one of two exceptions is met.[7] Fed. R. Civ. P. 37(b)(2) (directing that costs and attorney's fees shall be imposed unless two circumstances are present); Rule 37(d) (same). The two exceptions are "that the failure was substantially justified or that other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(b)(2). Here, DAddio faces sanctions in the form of dismissal of her claims and a default judgment being entered against her. Thus, the Court finds that "[a]warding the additional measure of costs and attorney's fees would be excessive [ ] and, therefore, unjust." *Cower v. Albany Law Sch. of Union Univ.*, No. 05-CV-924, 2007 WL 148758, at *5 (N.D.N.Y. Jan. 11, 2007). Under the circumstances, the Court recommends that the Court decline to award attorney's fees pursuant to Rule 37.

## CONCLUSION

For the foregoing reasons, I recommend that the District Court dismiss the Amended Complaint with prejudice; enter a default judgment as to liability against Plaintiff; and order a hearing as to damages and other relief.

[7] Even though Defendant does not seek attorney's fees in his motion, the Court addresses them given the language contained in Rules 37(b)(2) and 37(d).

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

**SO ORDERED.**

DATED: New York, New York
April 25, 2019

STEWART D. AARON
United States Magistrate Judge

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**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 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).