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Deadline

agreement and thus may not seek to enforce it here. For these reasons Plaintiffs' Complaint against AMI should be dismissed with prejudice.

BACKGROUND

The Underlying Claims

In March 2005, Defendant Andrea Constand filed a civil lawsuit against Plaintiff William H. Cosby, Jr. ("Plaintiff" or "Cosby"), a world-famous entertainer, alleging battery, sexual assault, emotional distress, defamation, and invasion of privacy. *See Constand v. Cosby*, 112 F. Supp. 3d 308, 309 (E.D. Pa. 2015). In that lawsuit, Constand alleged that Cosby drugged and then sexually assaulted her. *See Green v. Cosby*, No. 16-00002, 2016 WL 1086716, *1 (E.D. Pa. Mar. 21, 2016). She also claimed that after she reported the assault, Cosby defamed her in statements he made to the media. *See id.* Shortly thereafter, Constand filed another lawsuit in the same court against the *National Enquirer*, published by Defendant AMI, and Cosby's attorney, Marty Singer, arising from those statements. *Id.*; *see also* Stracher Decl. Ex. A ("Bill Cosby Gave Interview to Keep Charges Secret") (reporting that Constand brought suit against Cosby for remarks he made stating that her objective was "exploit [him] because of [his] celebrity status.").¹ The two lawsuits were subsequently consolidated before this Court (collectively, the "Constand Litigation"). *Green*, 2016 WL 1086716 at *1. On November 4, 2005, the court temporarily sealed the parties' motions related to the discovery issues out of concerns for the parties' privacy interests (the "November 2005 Order"). *Id.* On November 23,

¹ This Court may take judicial notice of the newspaper articles attached to the Stracher Decl. *See Benak ex rel. Alliance Premier Growth Fund v. Alliance Capital Management L.P.*, 435 F.3d 396, 401 n.15 (3d Cir. 2006) (court may take judicial notice of newspaper articles under Fed. R. Evid. 201(b)(2) "to indicate what was in the public realm at the time"); *Peters v. Delaware River Port Authority of Pennsylvania and New Jersey*, 16 F.3d 1346, 1357 (3d Cir. 1994) (taking judicial notice of newspaper accounts highlighting controversies over defendant's actions).

2005, the Court denied a motion made by the Associated Press to lift the sealing order pending resolution of the discovery motions. *Constand*, 112 F. Supp. 3d at 310.

The Settlement

In October 2006, the parties to the Constand Litigation entered into a Confidential Settlement Agreement and General Release (the “Agreement”). *See* Compl. ¶ 20. In exchange for valuable consideration, Constand released Cosby and AMI from any and all claims. *Id.* ¶ 28.

The Agreement also required all parties to maintain its confidentiality (the “Confidentiality Clause”). In relevant part, it acknowledged the parties’ shared interests:

in not permitting others (a) to know (i) the outcome or the underlying facts of the [Constand Litigation], or (ii) the terms of this Confidential Settlement Agreement and General Release, (b) to learn more about CONSTAND’s allegations or their defenses other than what is already a matter of public record, via their pleadings, or published press reports (c) to learn the information gathered and generated in the course of discovery in the [Constand Litigation], or (d) to gain access to the motions and briefs currently filed under seal in the [Constand Litigation]. They also acknowledge that CONSTAND, COSBY, SINGER, and AMERICAN MEDIA enter into this Confidential Settlement Agreement and General Release to protect those interests....

Id. ¶ 23 (quoting Agreement ¶ 14). Accordingly, the Agreement recited that the parties would not disclose “any aspect of this [Constand Litigation],” including the “events or allegations upon which the [Constand Litigation] was based,” the “allegations made about [Mr. Cosby] or [Andrea Constand] by other persons,” and information learned during discovery or during the criminal investigation of Cosby. *Id.* ¶ 24 (quoting Agreement ¶ 14(A) & (B)). In addition the Confidentiality Clause provided that all documents produced in the Constand Litigation and all papers filed under seal would be deposited with a secured depository, so that confidential litigation materials would remain confidential. Stracher Decl. ¶ 4.

Subsequent Claims Against Cosby

In 2014, “more than a dozen women” accused Cosby of having raped or molested them. Stracher Decl. Ex. B (“Here’s Everything We Know (and Don’t Know) About the Bill Cosby Rape Allegations”). Following these additional allegations of “similar misconduct” by Cosby, on December 29, 2014, the Associated Press sought to unseal the documents that had been sealed by this Court’s November 2005 Order. *Constand*, 112 F. Supp. 3d at 311. On July 6, 2015, the Court granted that motion and unsealed the documents, including excerpts of Cosby’s deposition in the *Constand* case. *Id.* at 319. This Court found that, “as it relates to the claims in this case, the allegations (which are just that, and have not been proven) are already in the public domain” and “[a] number of other persons have publicly alleged similar conduct on the part of [Cosby] in the media and in at least two pending civil actions.” *Id.* The Court further found that Cosby “has responded publicly with denials as to the veracity of the claims and questioned the possible motives of his accusers” and that Cosby had “join[ed] the debate about the merits of the allegations against him...” *Id.* Subsequently, Cosby’s entire deposition in the *Constand* Litigation was released to the public. Compl. ¶ 51. On December 30, 2015, Cosby was charged with aggravated indecent assault in Montgomery County, Pennsylvania, for his alleged assault of *Constand*. *Green*, 2016 WL 108671 at *3.

Plaintiff’s Complaint

Plaintiff filed his Complaint on February 17, 2016. Cosby claims that AMI breached the Settlement Agreement by publishing articles that repeat *Constand*’s allegations, describe Cosby’s deposition testimony in the *Constand* litigation, and describe allegations made by other women against Cosby. Compl. ¶¶ 31-35. Although AMI’s breaches of the Settlement Agreement “are

to voluminous to comprehensively enumerate,” Plaintiff cites snippets of five articles all published after December 1, 2014, as “representative examples.” *Id.* ¶ 30.

ARGUMENT

In evaluating a motion to dismiss under Rule 12(b)(6), courts must “accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief.” *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008) (internal quotation marks and citation omitted). “A motion to dismiss [under Rule 12(b)(6)] should be granted if the plaintiff is unable to plead ‘enough facts to state a claim to relief that is plausible on its face.’” *Malleus v. George*, 641 F.3d 560, 563 (3d Cir. 2011) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The complaint must contain sufficient “factual content” to allow “the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). To survive dismissal, a plaintiff must provide “factual allegations” in her complaint sufficient “to raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555.

For the reasons that follow, Cosby’s breach of contract claim against AMI fails as a matter of law and should be dismissed.

I. PLAINTIFF HAS FAILED TO STATE A CLAIM FOR BREACH OF CONTRACT

Under Pennsylvania law, a plaintiff must show the three elements of a breach of contract: “(1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract, and (3) resultant damages.” *Morrin v. Torresdale Frankford Country Club*, No. CIV. A. 07-5527, 2008 WL 2389469, at *2 (E.D. Pa. June 11, 2008). “The fundamental rule in interpreting the meaning of a contract is to ascertain and give effect to the intent of the

contracting parties.” *Murphy v. Duquesne University Of the Holy Ghost*, 777 A.2d 418, 429 (Pa. 2001) (citing *Felte v. White*, 302 A.2d 347, 351 (Pa. 1973)). The intent of the parties to a written agreement is to be regarded as being embodied in the writing itself. *Steuart v. McChesney*, 444 A.2d 659, 661 (Pa. 1982). In construing the parties’ intent, the whole instrument must be read together. *Felte*, 302 A.2d at 351. Individual clauses in a contract “should not be read as independent agreements thrown together without consideration of their combined effects.” *Trombetta v. Raymond Jones Financial Servs., Inc.*, 907 A.2d 550, 560 (Pa. Super. Ct. 2006). The interpretation of a contract is a question of law for the court. *Tuscarora Wayne Mut. Ins. Co. v. Kadlubosky*, 889 A.2d 557, 560 (Pa. Super. Ct. 2005).

Plaintiff’s contention that the Settlement Agreement prohibits publication of information that is a matter of public record is without merit and contradicted by the language of the Agreement itself. The Agreement clearly evinces the parties’ intent to maintain the confidentiality of non-public litigation materials and documents filed under seal in the Constand Litigation. Paragraph 14 of the Agreement recites the parties’ interest in “not permitting others” to “learn more about” and “to gain access” to information in the litigation. It acknowledges the parties’ interest:

in not permitting others to (a) to know (i) the outcome or the underlying facts of the [Constand Litigation], or (ii) the terms of this Confidential Settlement Agreement and General Release, (b) to learn more about CONSTAND’s allegations or their defenses other than what is already a matter of public record, via their pleadings, or published press reports (c) to learn the information gathered and generated in the course of discovery in the [Constand Litigation], or (d) to gain access to the motions and briefs currently filed under seal in the [Constand Litigation].

Agreement ¶ 14. The timing of this agreement also accords with this clear meaning. In November 2005, the Court sealed motions filed by the parties and denied the AP’s motion for access to those documents. *Constand*, 112 F. Supp. 3d at 310. Shortly thereafter, the parties

entered into the Agreement with its confidentiality provision. *See id.* at 311 (noting that the Constand Litigation “settled before the parties depositions were concluded, and thus the Court never revisited the sealing of the Documents.”). To maintain the confidentiality of those documents, the Agreement also provided that all documents produced in the Constand Litigation and all papers filed under seal would be deposited with a secured depository. *See Stracher Decl.* ¶ 4. Thus, it is clear that the parties’ intention in entering into the Agreement was to prevent the disclosure of non-public litigation materials and other materials filed under seal.

Plaintiff claims that AMI breached the Agreement by publishing articles that described his deposition testimony in the Constand Litigation, the allegations made against him by Constand, and allegations made against him by other women. *See Compl.* ¶¶ 31-35. Plaintiff’s allegations acknowledge that the information allegedly published by AMI was a matter of public record. *See Compl.* ¶¶ 16 & 51; *see also Constand*, 112 F.Supp. 3d at 316 (noting allegations of “similar conduct” by Cosby against other women); *Green*, 2016 WL 1086716, at *3 (“the majority of Plaintiffs allege that Cosby drugged them in order to carry out the [sexual] assault.”). The Agreement however, does not prohibit the publication of information that is in the public record; therefore, Plaintiff fails to state a claim against AMI.

To read the Agreement to prohibit publication of information that is a matter of public record would not only effectively act as a contractual gag order on AMI, but would ignore (and contradict) other provisions in the Agreement that limit the scope of the Confidentiality Clause to information which is not already publically available. *See In re Binenstock’s Trust*, 190 A.2d 288 (Pa. 1963) (terms in one section of contract should not be interpreted in manner that nullifies other terms in the same agreement). The Agreement cannot be read to prohibit AMI from publishing *any* information about the Constand Litigation or *any* allegations raised against Cosby

by other women, as Plaintiff contends. *See* Compl. ¶ 37. Thus, Plaintiff's breach of contract claim against AMI, which is based on an implausible and incorrect interpretation of the Agreement, must be dismissed with prejudice.

II. PLAINTIFF CANNOT ENFORCE A CONTRACT HE HAS BREACHED.

Plaintiff's wrongful interpretation of the Agreement also cannot be the basis of a claim against AMI because a defaulting party to a contract cannot demand subsequent adherence to the terms of the contract by the other party. *U.S. ex rel. E. C. Ernst, Inc. v. Curtis T. Bedwell & Sons, Inc.*, 506 F. Supp 1324, 1327 (E.D. Pa. 1981); *Geller v. Decosta*, 1990 WL 116787 at *7 (E.D. Pa. 1990). Cosby agreed to be bound by the confidentiality provisions in the Agreement. As this Court has already found, Cosby has publicly responded to the claims of his accusers, questioned their motives, and "join[ed] the debate about the merits of the allegations against him." *Constand*, 112 F. Supp. 3d at 316. Thus, this Court has already determined that Cosby engaged in behavior he now alleges violated the Agreement: publically discussing the allegations made by Constand and other allegations made against him by other women. Having violated the Agreement as he now interprets it, Cosby may not bring a claim for breach of contract against AMI. Plaintiff's Complaint should be dismissed with prejudice.

CONCLUSION

For the foregoing reasons, Plaintiff's claim against AMI should be dismissed with prejudice.

Dated: April 18, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Daniel Segal, certify that on April 18, 2016, I caused a copy of the foregoing Motion to Dismiss to be served via the Court's CM/ECF System where it is available for viewing and downloading.

/s/ Daniel Segal

Daniel Segal

Deadline