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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 ANNIE FARMER,

4 Plaintiff,

5 v.

19 Civ. 10475 (LGS)

6 DARREN K. INDYKE, RICHARD D.
7 KAHN, GHISLAINE MAXWELL,

8 Defendants.

Premotion Conference
(Via Teleconference)

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9 January 14, 2021
10:39 a.m.

10 Before:

11 HON. LORNA G. SCHOFIELD,

12 District Judge

13 APPEARANCES

14 BOIES, SCHILLER & FLEXNER LLP

15 Attorneys for Plaintiff

16 BY: SIGRID S. McCAWLEY, ESQ.

ANDREW VILLACASTIN, ESQ.

17 TROUTMAN PEPPER HAMILTON SANDERS LLP

18 Attorneys for Defendants Indyke, Kahn

BY: BENNET J. MOSKOWITZ, ESQ.

19 HADDON, MORGAN AND FOREMAN, P.C.

20 Attorneys for Defendant Maxwell

BY: LAURA A. MENNINGER, ESQ.

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(Case called)

THE DEPUTY CLERK: Before we begin, I'd like to remind the parties and the press that recording or rebroadcasting of this proceeding is prohibited. Violation of this prohibition may result in sanctions.

Counsel's appearances have been noted for the record. I'm just going to ask counsel to state your name before you speak each time you speak, as we have a court reporter present.

We're here before the Honorable Lorna G. Schofield.

THE COURT: So good morning again, everyone. Before we get started, I wanted to make full disclosure. I'm not sure if I did this on the one other occasion we met. Looking at the docket, I realized that one of the plaintiff's lawyers is a former law clerk of mine, Mr. Villacastin. He clerked for me for a year beginning in the fall of 2015. We're still in touch, as is the case with many of my former law clerks. His appearance, as you know, is as one of several lawyers from the Boies Schiller firm, which is representing plaintiff, and his appearance here is not grounds for recusal and also will not affect my adjudication of the case. I would also note that I understand Ms. McCawley is speaking today on behalf of plaintiff.

So I wanted to turn to the possible motion here. The way this started out is that plaintiff seeks to dismiss the case under Federal Rule of Civil Procedure 41(a)(1)(A)(ii),

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1 meaning pursuant to stipulation. But Ms. Maxwell does not
2 consent absent certain conditions, which, as I understand it,
3 the plaintiff refuses.

4 And so I'll hear from the parties in just a moment,
5 but what I would like to observe is that it seems to me that
6 dismissal under that provision is probably not appropriate
7 because there is no agreement between the parties to dismiss,
8 and it may be more appropriate for us to proceed construing
9 this as plaintiff's motion to dismiss pursuant to
10 Rule 41(a)(2), the other subsection, which is pursuant to a
11 court order. And so let me hear from Ms. Maxwell. I
12 understand the plaintiff simply wants to be able to execute on
13 and collect on the settlement with the Epstein estate, and she
14 can't do that until this case, I gather, is dismissed. But you
15 can correct me if I'm wrong after I hear from Ms. Maxwell. So
16 counsel? Ms. Menninger?

17 MS. MENNINGER: Good morning, your Honor.

18 THE COURT: Good morning.

19 MS. MENNINGER: I think that's correct, your Honor.
20 We have not been able to reach an agreement to stipulate to a
21 dismissal. And so I think at this point it appears that
22 plaintiff would be intending to move under 41(a)(2) for
23 dismissal by court order. Pursuant to that provision, it is up
24 to the Court to order dismissal on any terms that the Court
25 considers proper or just, and we have set forth the terms that

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1 we think, if a motion under Rule 41(a)(2) is brought or an
2 order by the Court is entered, should include striking the
3 portion where each party should bear its own costs and fees and
4 also requiring that plaintiff disclose to Ms. Maxwell, as she
5 and the estate defendants all have, a copy of her signed
6 release, unredacted, authentic, for use in any future court
7 proceedings. Those are the terms that we submit would be just
8 and proper, as we were unable to find any precedent for
9 refusing to provide a release to the purportedly released
10 party. And we think the -- Ms. Maxwell has been forced not
11 only to pay for her own fees and costs in this case, which
12 included, I might add, discovery that plaintiff pressed to
13 occur early on in the case -- responses to document requests,
14 interrogatories and the like -- but she also filed a motion to
15 dismiss, as your Honor is aware. So unless we're able to reach
16 a stipulated dismissal, we think an order by this Court under
17 41(a)(2) should include both of those provisions.

18 We are prepared to submit full briefing on this topic,
19 your Honor.

20 I did bring to the Court's attention in my
21 December 23rd letter, I think it was -- sorry, December 30th
22 letter -- that we had a similar proceeding in front of Judge
23 Koeltl recently. He asked the parties to go back and try to
24 reach a stipulation. I don't know yet whether we will be able
25 to do so in that case, but in the absence of such a

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1 stipulation, he's asking for briefing from the parties to
2 commence on January 15th. I also had requested --

3 THE COURT: Could I just interrupt you for a second.
4 There are a couple things I wanted to follow up on --

5 MS. MENNINGER: Sure.

6 THE COURT: -- and I don't want to get too far in our
7 discussion before I ask you about them.

8 First of all, it seems to me a little bit of a moving
9 target as to what you're actually asking for. First, in your
10 original request, you asked that you be provided with a copy of
11 the signed and executed release, and as I understand it, the
12 plaintiff had agreed to provide that but simply with the dollar
13 amount of the settlement redacted. And what I understood from
14 the discussion at great length in your letter is that that was
15 unacceptable because what you were very much interested in was
16 the dollar amount, and it wasn't just a matter of having an
17 authentic release because, as Judge Freeman pointed out, you
18 could simply put the release language in another document, have
19 that signed, and you would have an authentic ink copy, if
20 necessary, of the release. So it seems to me that what you're
21 really trying to get at is the dollar amount here. I
22 understand why you might be interested in that, particularly
23 for the criminal action, but I'm not sure why it's appropriate
24 to hold up the settlement here to serve an interest in another
25 case. So do you want to address that first.

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1 MS. MENNINGER: Certainly, your Honor. I think it has
2 been plaintiff herself who has long taken the position that
3 everything related to her and this case is a matter of public
4 interest. And I think there has not been sufficient
5 justification for keeping the amount of the settlement secret
6 when she's the one who has, for example, gone on Netflix and to
7 *The New York Times*, etc., with her story, and then now is
8 asking to keep the fact that she's receiving sums of money -- I
9 don't know the amount, but I imagine substantial sums of
10 money -- from the estate secret from the public.

11 So yes, your Honor, you are correct that at the outset
12 we would have agreed to a stipulated dismissal with just the
13 executed, unredacted, signed release, but if we're not able to
14 reach that as a matter of agreement, then it's our position, in
15 asking this Court under Rule 41(a)(2) for terms, that the
16 amount should be public and should be available not just to
17 Ms. Maxwell, who's the purportedly released party, but also to
18 the press, who has shown great interest in plaintiff's story.

19 THE COURT: Okay. So I understand your position
20 there.

21 The other issue or matter that was a condition is you
22 wanted to strike the provision that said that each party would
23 bear its own costs and fees, and as I understand it, the
24 counsel for the estate as well as counsel for plaintiff in this
25 case had agreed to certain language preserving your ability to

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1 seek indemnification from Mr. Indyke and Richard Kahn, who are
2 the executors of the Epstein estate, and so it strikes me that
3 that is no longer an issue; is that correct?

4 MS. MENNINGER: Your Honor, again, we would have
5 signed a stipulated dismissal with that language in exchange
6 for the other terms that we were seeking. It is, as a
7 practical matter, more likely that if your Honor orders
8 dismissal under 41(a)(2) that we will pursue simply our
9 indemnification request that is the subject of a, you know,
10 lawsuit that has been filed in the Virgin Islands from the
11 estate. But plaintiff is asking us to agree not to seek fees
12 and costs against her, and we are not in agreement to do that.
13 If the Court orders it, then the Court orders it. But it seems
14 to me that to the extent there are perhaps somewhat limited
15 avenues for seeking fees and costs from plaintiff herself for
16 choosing to bring this lawsuit against Ms. Maxwell, we don't
17 see a reason why we should be precluded from doing so.

18 THE COURT: Well, so let me just preface that by
19 saying that I think your legal position is not as strong as the
20 very substantial demands you are making suggest. I'm not
21 prejudging this, but I did take a look at the applicable law
22 last night, and I did see that courts have generally subjected
23 motions for voluntary dismissal, with prejudice, to far less
24 scrutiny than motions for voluntary dismissal without
25 prejudice, and the reason is obvious, and that is that the case

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1 will go away with finality and cannot be alleged, or the same
2 claims cannot be brought in some other court, and so for that
3 reason, there simply isn't as in-depth an inquiry as you might
4 have when the dismissal is without prejudice.

5 Furthermore, it seems to me that under the law, the
6 question is, here, if it were simply a motion for a court order
7 dismissing the case coming from the plaintiff, the question
8 would be, what is the prejudice to the defendant from the
9 dismissal of the case, and what we're talking about here is
10 legal prejudice. So my question to you, Ms. Menninger, is:
11 What is the legal prejudice your client suffers that flows from
12 the dismissal of this case?

13 MS. MENNINGER: One, your Honor, she's had to expend
14 fees and costs to get to this point, and some of it was in what
15 we believe were frivolously opposed motions -- for example, our
16 original motion to stay discovery. And we think that, you
17 know, her having to incur tens of thousands of dollars to
18 defend herself against this is prejudicial, and for her to be
19 asked to bear those costs and not obtain any relief at the
20 conclusion of the case is one.

21 Secondly, and with all candor, it precludes us from
22 taking discovery from plaintiff, and so we would otherwise, in
23 a civil suit, have the ability to clear Ms. Maxwell's name in
24 this civil suit by confirming what we already suspect, which is
25 that plaintiff does not have information concerning Ms. Maxwell

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1 to back up her claims and she would be vindicated at the
2 conclusion of that civil case with, you know, a public airing
3 of Ms. Farmer's false claims against her.

4 THE COURT: Well, I guess my reaction to that is that
5 having to incur expenses in litigation is the way the American
6 system works, and it's only in the exceptional case when there
7 is explicit authorization for fee shifting that that is not the
8 case.

9 And then with respect to discovery, discovery is
10 supposed to be in aid of claims, and there's no right to
11 discovery if there are no claims. So I guess I'm not
12 persuaded, but I know I in some way put you on the spot by
13 asking you this question, so here's the way I would like to
14 proceed. What I would like is, I would like -- well, first,
15 maybe I should hear from the plaintiff, because I haven't given
16 you a chance to say anything at all.

17 So Ms. McCawley, could I hear from you, please.

18 MS. McCAWLEY: Yes, your Honor.

19 Just to highlight a few points that you raised to make
20 sure that the procedural background is well known, and that is,
21 obviously, you know, we initiated this case, and we were
22 referred by you to Magistrate Freeman, and there has been
23 significant letter practice, as you've seen, in front of her,
24 as well as a very fulsome hearing, at which time Maxwell said
25 that the two items that she needed was the authentication, a

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1 statement from us authenticating the document, and then the
2 agreement, the release, which Judge Freeman had said we would
3 be allowed to redact that amount. When we tried to follow up
4 with both of those things, that didn't happen, and then she
5 issued her order to show cause, which now brings us here.

6 So just to highlight a couple other points,
7 Ms. Maxwell has raised the issue of fees and costs. As your
8 Honor well cited, the *Colombrito v. Kelly* case, which is the
9 Second Circuit case, makes very clear that under the rule of
10 dismissal with prejudice, that attorney's fees are almost
11 "never awarded" in that instance. As well, Ms. Maxwell has the
12 protection of seeking indemnification for her fees and costs
13 from the estate, and in the proposed order that we submitted to
14 Judge Freeman, it sets forth that agreement that the estate
15 agreed to where that issue is still left open, and Ms. Maxwell
16 has that means to seek that, as well as the stipulation with
17 respect to us providing the general release with only the
18 amount redacted and the authentication of that release, which
19 we agreed to.

20 So your Honor, I don't see an issue for this being
21 held up any further. We sought this dismissal back on
22 October 14th, initially, and we're now in January, and we would
23 hope that the Court would allow us to move this forward to
24 conclusion. Thank you.

25 THE COURT: Okay. So let me just make one comment

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1 about a motion under Rule 41(a)(2). And you may know this, or
2 would you know it, and that is that there's a relatively recent
3 Second Circuit case that says that basically the Court rules on
4 the terms of dismissal as presented and doesn't have the
5 authority to force the parties to accept other terms, that the
6 Court could simply accept it and grant the dismissal or deny
7 it. Of course, in denying it, I could say I'm denying it for
8 XY reason and therefore, if you change it, I would grant it.
9 But I don't have the power to simply impose conditions.

10 I would also say that if your latest offer, as you
11 just described it, is what you would propose as the terms of
12 dismissal, I suggest you just make that very clear and attach
13 copies of anything that you would be proposing to your motion.

14 I am aware that this has been held up for some time,
15 so what I would like to do is I will take simultaneous letters
16 from the parties in five days, and that is plaintiff's motion
17 to dismiss pursuant to Rule 41(a)(2), in other words, pursuant
18 to court order, not pursuant to stipulation. I think that
19 everybody knows what the issues are. So I would look to
20 hearing from Ms. Maxwell's counsel what the legal prejudice is
21 that would be suffered, with case citations as to why that's
22 appropriate, and I would also appreciate, of course, case law
23 citations from the party seeking dismissal. So let's do that.
24 I'll issue an order today that makes clear what I'm asking for,
25 but I think it's relatively clear now.

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1 And if there's nothing else, I think we're finished.

2 Is there anything else from Ms. Maxwell?

3 MS. MENNINGER: No. Thank you, your Honor. It's

4 clear.

5 THE COURT: Okay. And anything else from Ms. Farmer?

6 MS. McCAWLEY: No. Thank you, your Honor. We

7 appreciate it.

8 THE COURT: Okay. Thank you, counsel. This matter is

9 adjourned.

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