Child v Renda
2012 NY Slip Op 32228(U)
August 20, 2012
Supreme Court, New York County
Docket Number: 603075/05
Judge: Debra A. James
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SCANNED ON 8/27/2012

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

NADINE CHILD,

Plaintiff,

- v -

RICHARD RENDA, RICHARD RENDA d/b/a TOTALLY COOL, RICHARD RENDA d/b/a TOTALLYCOOL.NET, RICHARD RENDA d/b/a THEORIGINALTOTALLY COOL.COM, and JOHN DOES 1-5,

Defendants.

Index No.: 603075/05

Motion Date: 12/13/11

Motion Seq. No.: 09

Motion Cal. No.:

FILED
AUG 21 2012
NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 7 were read on this motion to set aside the verdict and cross motion for sanctions.

	PAPERS NUMBERED
Notice of Motion -Affidavits -Exhibits	1, 2, 3, 4, 5
Notice of Cross Motion-Answering Affidavits - Exhibits	6
Replying Affidavits - Exhibits	7

Cross-Motion: ☒ Yes ☐ No

Plaintiff Nadine Child moves pursuant to CPLR § 4404(a) to set aside the jury verdict as a matter of law and for an order directing that judgment be entered in favor of the plaintiff, or in the alternative, for a new trial. Defendant cross moves pursuant to 22 NYCRR §130-1.1 for sanctions against plaintiff. Both motions are denied.

Plaintiff, a professional fashion model, alleges in her complaint that defendant Renda and the entities he controls used her name and image for commercial purposes, without her

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check One: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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authorization, and therefore violated her rights pursuant to Civil Rights Law §§ 50 and 51. She seeks an injunction compelling defendant to remove such photographs and her name from his website. She also claims that defendant digitally altered her image in one of the photos he posted on his electronic magazine website in such a way that defamed her, and from which she suffered damages.

The parties met each other when defendant was retained as a stylist by a now deceased world renowned photographer for a photo shoot in which plaintiff was the subject. Defendant befriended plaintiff at the completion of the shoot. With the prospects of references, plaintiff was convinced by defendant to participate in his filming of her interview for a television cable network program, hosted by him, after which they exchanged pleasantries by electronic mail for a period of time. Sometime during that period, defendant posted some photographs from the photo shoot on his electronic magazine website. When a friend contacted her some time later about the website, plaintiff became alarmed by its strangeness and commenced this action.

Defendant asserts that plaintiff agreed to his use of the photos and that he encouraged her to look at the electronic magazine, when he first mounted it on the web, and that when she viewed it, she wrote him that "The verdict is that I like it", and that, in any event, his use of the photos is exempt from the

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restrictions of the Civil Rights Law because it was newsworthy and of public interest. Plaintiff counters that without her knowledge or consent, defendant published the shoot photographs in connection with an advertisement for mosquito repellant that appeared underneath her image. She urges that defendant used her image for the purposes of advertising or trading a product, and that such use is neither newsworthy nor for a public interest purpose.

Plaintiff also argues that the photographs, one of which appears on the homepage of defendant Renda's website, do not come under any newsworthy privilege since defendants impermissibly used the images and the entire publication, for that matter, to express his views on religion and spirituality. She further alleges that a line that defendant digitally added to another photograph that he posted on the website depicted a stripper's pole, constituting a suggestion that she is a promiscuous person, which is per se defamatory.

After a trial before this court, on June 3, 2011 the jury rendered a unanimous verdict in favor of the defendants finding that (1) defendant Renda's use of plaintiff's name and/or image was a newsworthy event or a matter of public interest; (2) defendant Renda's posting or publication of the name and/or image of plaintiff on which defendant superimposed a vertical line was not defamatory.

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The statutory provisions, "Civil Rights Law §§ 50 and 51, read (§ 50 in whole, § 51 in pertinent part):

> § 50. Right of privacy.
> A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person,..., is guilty of a misdemeanor.
> § 51. Action for injunction and for damages.
> "Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes fo trade without the written consent first obtained as above provided many maintain an equitable action in the supreme court".

Creel v Crown Publs., 115 A.D.2d 414, 415 (1st Dept. 1985).

As for the definition of defamation:

> Defamation, the making of a false statement about a person that "tends to expose the p[erson] to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him [or her] in the minds of right-thinking persons, and to deprive him [or her] of their friendly intercourse in society" *Rinaldi v. Holt, Rinehart & Winston*, 42 N.Y.2d 369, 379, 397 N.Y.S.2d 943, 366 N.E.2d 1299 [1977], *cert. denied* 434 U.S. 969, 98 S.Ct. 514, 54 L.Ed.2d 456 [1977]; *see Golub v. Enquirer/Star Group*, 89 N.Y.2d 1074, 659 N.Y.S.2d 836, 681 N.E.2d 1282 [1997]), can take one of two forms---slander or libel. Generally speaking, slander is defamatory matter addressed to the ear while libel is defamatory matter addressed to the eye (2 PJI2d 3:23, at 196 [2009]; *see* Prosser and Keeton On Torts, § 112, at 786 [5th ed.];Sack on Defamation, § 2.3,at 2-9 [3d ed.]). Libel is broken down into two discrete forms---libel per se, where the defamatory statement appears on the face of the communication, and libel per quod, where no defamatory statement is present on the face of the communication but a defamatory import arises through reference to facts extrinsic to the communication (*see* 2 PJI2d 3:23, at 197, 3:24 at 275; *see also Hinsdale v. Orange County Publs.*, 17 N.Y.2d 284, 270 N.Y.S.2d 592, 217 N.E.2d 650 [1966]; *Cole Fischer Rogow, Inc. v. Carl Ally, Inc.*, 29 A.D.2d 423, 426,

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288 N.Y.S.2d 556 [Stevens, J., 1968], *affd.* 25 N.Y.2d 943, 305 N.Y.S.2d 154, 252 N.E.2d 633 [1969]).[FN3]

FN3. Where the defamatory statement is libelous per se the plaintiff can recover damages without pleading and proving "special harm" (2 PJI2d 3:23, at 197-199, 3:24, at 275-276), i.e., "the loss, usually monetary, of some gain or advantage which would have come to the plaintiff but for the defamation" (*id.*, 3:23, at 198). If, however, the defamatory statement is libelous per quod, the plaintiff can only recover damages if she pleads and proves such harm (*id.* at 197-199, 3:24, at 275-276).

Ava v NYP Holdings, Inc., 64 AD3d 407, 411-412 (1st Dept 2009).

The jury verdict in favor of defendant may not be set aside unless it plainly appears that the evidence so preponderates in favor of the plaintiff that the verdict for the defendant could not have been reached on any fair interpretation of the evidence. Ladson v The New York City Housing Authority, 31 AD2d 611, (1st Dept 1968). It may not be vacated as inconsistent and against the weight of the evidence as long as there is at least one fair interpretation of the evidence to support it. Gaston v Viclo Realty Company, 215 A.D.2d 174 (1st Dept 1995).

While the court observes that there was a plethora of evidence of defendant's extreme eccentricities, the testimony and exhibits also credibly preponderated that his web content contained articles about fashion, and that the use of plaintiff's image therewith was of public interest and/or newsworthy, no matter how otherwise bizarre. Likewise, aside from plaintiff's claim that the line superimposed on her photograph was a stripper's pole, there was no evidence that such was the case.

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Nor is there any reason in law to overturn the jury's decision (Messenger ex rel Messenger v Gruner Jahr Printing and Publishing, 94 NY2d 436 [2000]), so the jury's findings will not be disturbed.

Plaintiff seeks to compel defendants to cease publishing additional communications, which she contends are confidential and privileged, on their websites. She also argues that a new trial is warranted due to defendant Renda's misconduct during trial. She contends that the court committed reversible error, when it, inter alia, permitted defendant to commit perjury in testifying under oath that he produced at trial a full, complete and unedited set of e-mail exchanges between plaintiff and defendant and to introduce a box load of his press credentials.

This court finds none of plaintiff's arguments to be persuasive. First, it was within the province of the jury to determine issues of credibility, which included whether they believed defendant's testimony as to any material matter, such as whether such emails were important to the issues in the case, and if so, whether they were complete and unaltered. It would be error for this court to usurp the jury's function. Rizzo v Jen Cab Corp., 26 AD2d 812 (1st Dept 1966).

Second, defendant's posting of communications about plaintiff's counsel and the case on defendants' website does not implicate any privilege or confidences of plaintiff. Whether or

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not ill advised in terms of his own interests, defendant is free to decide to waive confidences and reveal his communications from and with his lawyer.

Although not argued by plaintiff, upon reflection, the court likely should not have admitted the press credentials, as defendant's testimony was insufficient to lay a foundation for same as business records, and the testimony of persons with knowledge employed by the various media outlets would have been necessary. Nonetheless, the court finds that such documents were not critical to the fact finding determination, and that their admission was therefore harmless. Matter of Lindsay N., 300 AD2d 216 (1st Dept. 2002).

Plaintiff did not come forward with any evidence to persuade the court that defendant had failed to disclose his press credentials prior to placing the action on the trial calendar, and therefore there is no evidence of willful or contumacious conduct with respect to the discovery phase of the lawsuit on the part of defendant or his attorney. The court would point out that the question of whether defendant met the definition of a "professional journalist" under Civil Rights Law § 79-h, New York's Shield Law, was never an issue at the trial [Cf. Matter of Knight-Ridder Broadcasting, Inc. v. Greenberg, 70 NY2d 151 (1987)], although the press credentials were some evidence that defendant was engaged in journalistic pursuits. Nor can

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plaintiff show surprise about defendant's position with respect to his journalistic bona fides, since at the inception of their early friendship he purported to be a cable television show host, and she allowed herself to be interviewed and filmed for broadcasting by him. Moreover, the jury rejected plaintiff's contention that defendant used her photograph to market mosquito repellant, or for other trade, implicitly accepting defendant's argument that TOTALLYCOOL.NET, however peculiar its content, was a media enterprise. Cf. Beverley v Choices Women's Med. Center, 78 NY2d 745,752 (1991).

Finally, defendants' cross-motion for an order pursuant to 22 NYCRR 130-1.1 for sanctions against plaintiff in the amount of $4665.00 is denied, since the arguments made in plaintiff's application to set aside the verdict or move for a new trial are colorable.

Accordingly, it is hereby

ORDERED, that the motion to set aside the verdict and the cross motion for sanctions against plaintiff are denied, and it is further

ORDERED that the counterclaim interposed in the answer is dismissed, as a matter of law, and it is further

ORDERED that judgment shall be entered dismissing the complaint on the verdict rendered on June 3, 2011 and dismissing the counterclaim; and it is further

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ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: August 20, 2012

ENTER:

DEBRA A. JAMES J.S.C.

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