Nolan v Getty Images (US), Inc.
2014 NY Slip Op 30564(U)
March 6, 2014
Sup Ct, NY County
Docket Number: 158540/13
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

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AVRIL NOLAN,

Plaintiff,

Index No. 158540/13

- against-

GETTY IMAGES (US), INC.,

Defendant.

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HON. ANIL C. SINGH, J.:

The defendant Getty Images (US), Inc. (Getty) moves, pursuant to CPLR 3211, for an order dismissing the complaint.

The defendant Getty is an image distributor. This is an action to recover compensatory and punitive damages based on a public service advertisement placed by the New York State Division of Human Rights (DHR), in a free, daily local newspaper AM NY, which displayed a full color image of the plaintiff Avril Nolan (Nolan) with the caption: "I am positive (+) and I have rights" and "People who are HIV positive are protected by the New York State Human Rights Law. Do you know your rights? Contact the NYS Division of Human Rights . . ."

The amended complaint makes the following allegations. DHR licensed Nolan's image from Getty, which is in the business of licensing stock photographs on the Internet. Getty obtained the image from a photographer named Jena Cumbo (Cumbo) in accordance with Getty's contributor agreement. Cumbo had no written model release from Nolan to use or sell her image. The complaint pleads a single cause of action for violating Civil Rights Law §§ 50 and 51 by using Nolan's image for trade or advertising purposes absent any written consent.

In support of its motion, Getty makes the following arguments. The complaint fails to state a cause of action because displaying and licensing a photograph are, as a matter of law, not advertising or trade uses under Civil Rights Law §§ 50 and 51, and any other interpretation contravenes the First Amendment. Getty's display of the photograph containing Nolan's image for purposes of offering the image to potential licensees and the licensing thereof are exempt from liability under Civil Rights Law §§ 50 and 51, and it is the end-user of the image whose conduct is relevant. Nolan's interpretation of Civil Rights Law §§ 50 and 51 contravenes Getty's First Amendment rights to display its images and license them to the press. Nolan's arguments lack merit because the fact that a First Amendment protected work is sold for profit does not negate the seller's First Amendment protection. The complaint fails to state a cause of action because Civil Rights Law §§ 50 and 51 do not require Getty to investigate the existence or validity of every image release on its database and because such duty would be inconsistent with the First Amendment. In addition, Getty alleges that Nolan is a model.

In opposition to the motion, Nolan argues that the law places a clear duty on those who trade in photographs and advertise photographs for commercial use, to obtain the written consent of the subject.

On a motion to dismiss a complaint for legal insufficiency, the court accepts the facts alleged as true and determines "simply whether the facts alleged fit within any cognizable legal theory" (*Morone v Morone*, 50 NY2d 481, 484 [1980]). The pleading is to be liberally construed, accepting all the facts alleged therein to be true and according the allegations "the benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). The credibility of the parties is not under consideration (*S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]).

The United States Constitution Amendment 1 provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

NY Const, art I, § 8 provides in relevant part:

"Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."

Civil Rights Law § 50 provides:

"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, or if a minor of his or her parent or guardian, is guilty of a misdemeanor."

Civil Rights Law § 51 provides in relevant part:

"Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait, picture or voice, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait, picture or voice in such manner as is forbidden or declared to be unlawful by section fifty of this article, the jury, in its discretion, may award exemplary damages. **But nothing contained in this article shall be so construed as to prevent any person, firm or corporation from selling or otherwise transferring any material containing such name, portrait, picture or voice in whatever medium to any user of such name, portrait, picture or voice, or to any third party for sale or transfer directly or indirectly to such a user, for use in a manner lawful under this article**...." emphasis supplied

Getty claims that the portion of Civil Right Law § 51 in bold above immunizes it from liability. However, by the terms of the statute, for Getty's sale of the photograph to be lawful, the "use" of the photograph by the end-user must be "lawful under this article." In this matter, it is alleged that the use of the photograph by DHR and AM NY was not lawful.

"New York does not recognize a common-law right to privacy" (*Thomas v Northeast Theatre Corp.*, 51 AD3d 588, 589 [1st Dept 2008]). The elements of a cause of action for violation of the statutory right to privacy are: "(i) usage of plaintiff's name, portrait, picture, or voice, (ii) within the State of New York, (iii) for purposes of advertising or trade, (iv) without plaintiff's written consent" (*Molina v Phoenix Sound*, 297 AD2d 595, 597 [1st Dept 2002]).

The privacy statute is interpreted within the context of the protection provided by the First Amendment (*Arrington v New York Times Co.*, 55 NY2d 433, 440 [1982], *cert denied* 459 US 1146 [1983]). Civil Rights Law §§ 50 and 51 are "to be narrowly construed and 'strictly limited to nonconsensual commercial appropriations of the name, portrait or picture of a living person'" (*Guerrero v Carva*, 10 AD3d 105, 115-116 [1st Dept 2004], quoting *Messenger v Gruner + Jahr Printing & Publ.*, 94 NY2d 436, 441 *cert denied* 531 US 818 [2000]).

"A name, portrait or picture is used for advertising purposes "if it appears in a publication which, taken in its entirety, was distributed for use in, or as part of, an advertisement or solicitation for patronage of a particular product or service" (*Beverley v Choices Women's Med. Ctr., Inc.*, 78 NY2d 745, 751 [1991] internal quotation marks and citation omitted).

Contrary to Getty's argument, a claim lies for placing Nolan's image in Getty's catalogue, especially where plaintiff's photograph is ultimately used in an advertisement, and the use of plaintiff's likeness created a false impression about plaintiff (*Messenger v Gruner + Jahr Printing & Publ.*, 94 NY2d 436). Moreover, "(k)nowledge is not an element of the cause of action for compensatory damages or injunctive relief under the statute" (*Welch v Mr. Christmas, Inc.*, 57 NY2d 143, 149 [1982]).

Also "contrary to plaintiff's contention, the New York State Constitution does not afford heightened free speech protections to commercial speech" (*OTR Media Group, Inc. v City of New*

York, 83 AD3d 451, 452 [1st Dept 2011]).

Written consent is explicitly required by the statute. The statute does not furnish any definition of trade or advertising purposes. However, it has been noted that the statute serves "to protect the sentiments, thoughts and feelings of individuals" (*Flores v Mosler Safe Co.*, 7 NY2d 276, 280 [1959]).

In *Molina v. Phoenix Sound, Inc.*, (297 AD2d 595), the Court sustained a Civil Rights Law § 51 complaint alleging that plaintiff's picture and likeness were made available on the Internet. Displaying plaintiff's image on the defendant's website, available for use on a world-wide basis, necessarily was concurrently available within New York State. Therefore, for the purposes of a motion to dismiss, plaintiff's assertion of a website's accessibility sufficiently meets the required statutory element of use within New York State.

There is conflicting authority in the State of Illinois involving a statute similar to New York's. An intermediate State appellate court found in *Brown v ACMI Pop Div.*, (375 Ill App 3d 276, 873 NE2d 954 Ill. Dec. 24 [2007]), that Internet sale of photographs violated plaintiff's right of publicity under the Illinois statute. The court held that the sale of the photographs was using plaintiff's image to sell a "product" or license without consent, and that plaintiff had sufficiently stated a claim under the statute. The court stated that it "[could] not say that the facts are undisputed that (defendant's) display of the photos . . . did not in some way constitute an improper commercial use." *Id.* at 285.

On the other hand, a Federal District Court, applying Illinois law, respectfully disagreed and dismissed, at the pleading stage, a similar claim. In *Thompson v Getty Images (US), Inc.*, (2013 US Dist LEXIS 91828, 2013 WL 3321612, [ND Ill July 1, 2013 No. C 1063]), the Court held that making the entity selling a photograph for proper purposes, strictly liable for an end-user's decision

to use the photograph improperly, would impose wide-ranging liability and would thereby chill protected speech.

In this case; whether Nolan is a model, whether in fact a written release was signed by Nolan, whether Civil Rights Law §§ 50 and 51 required Getty to investigate the existence of a release signed by Nolan, whether the First Amendment protects Getty's exploitation of Nolan's image without Nolan's written permission, whether Getty's conduct qualifies as use of the image for either advertising or trade purposes, and whether Getty is able by agreement to shift to the end-user and the photographer the burden of obtaining Nolan's written consent, all must await further development of the facts, either by way of summary judgment or trial.

Accepting the complaint's allegations as true and according plaintiff the benefit of every favorable inference *(Leon v Martinez*, 84 NY2d at 87-88), plaintiff's complaint sufficiently states a cause of action.

Accordingly, it is

ORDERED that the motion to dismiss is denied, and it is further

ORDERED that the defendant shall serve a responsive pleading within 20 days of service of a copy of this order with notice of entry.

Dated: 3/6/14

ENTER:

J.S.C. HON. ANIL C. SINGH
SUPREME COURT JUSTICE