

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

MAUREEN TOFFOLONI,)
as Administratrix and Personal)
Representative of the)
ESTATE OF NANCY E. BENOIT,)
)
Plaintiff,)

v.)

CIVIL ACTION
FILE NO. 1:08-CV-0421-TWT

LFP PUBLISHING GROUP, LLC,)
d/b/a Hustler Magazine,)
MARK SAMANSKY, an Individual,)
and other distributors and sellers of,)
Hustler Magazine, as)
Defendants X, Y, and Z,)
)
Defendants.)

**PLAINTIFF’S REPLY TO
DEFENDANT’S OBJECTIONS TO PLAINTIFF’S RESPONSE TO
DEFENDANT’S STATEMENT OF UNDISPUTED MATERIAL FACTS**

COMES NOW, Plaintiff, Maureen Toffoloni, as Administratrix and
Personal Representative of the Estate of Nancy E. Benoit (“Plaintiff”), through
counsel, and files this her Response to LFP Publishing Group, LLC’s (“Defendant”
or “Hustler”) Objections to Plaintiff’s Response to Defendant’s Statements of
Undisputed Material Facts as follows:

I. INTRODUCTION

On July 30, 2010, Defendant filed its Motion for Summary Judgment, as well as its accompanying Statement of Undisputed Material Facts, requesting once again that this Court ignore and contradict the Eleventh Circuit Court of Appeals' conclusive finding that the photographs of Nancy Benoit published by Defendant were not newsworthy. Plaintiff filed her Response to Defendant's Motion for Summary Judgment on August 31, 2010 and also filed a Response to Defendant's Statement of Undisputed Material Facts as required by Local Rule 56.1(B)(2)(a).

As detailed in several of Plaintiff's responses to Defendant's Statement of Undisputed Material Facts, many of Defendant's assertions are not material to Defendant's Motion for Summary Judgment, or to any other issue presented in this case. In addition, Plaintiff cited repeatedly to the Eleventh Circuit's opinion in this case, *Toffoloni v. LFP Publishing Group, LLC*, 572 F.3d 1201 (11th Cir. 2009), to dispute Defendant's assertions in its Statement of Undisputed Material Facts that the images of Nancy Benoit published by the Defendant are "newsworthy."

Defendant filed its Objections to Plaintiff's Response to Defendant's Statement of Undisputed Material Facts on September 17, 2010, claiming that several of Plaintiff's Responses do not comply with Local Rule 56.1(B)(2)(a)(2) because,

Defendant alleges that they do not provide any specific citations to evidence. Plaintiff now files her Response to Defendant's Objections.

II. ARGUMENT AND CITATION TO AUTHORITY

Rather than list Defendant's statement of material fact, Plaintiff's response, and Plaintiff's objection to each statement of material fact, Plaintiff instead will address the broad objections cited by Defendant in relation to several of Plaintiff's responses.

The Local Rules state that the Court:

will deem each of the movant's facts as admitted unless the respondent: (i) directly refutes the movant's fact with concise responses supported by specific citations to evidence (including page or paragraph number); (ii) states a valid objections to the admissibility of the movant's fact; or (iii) points out that the movant's citation does not support the movant's fact or that the movant's fact is not material or otherwise has failed to comply with the provisions set out in LR 56.1B.(1).

United States District Court, Northern District of Georgia, Local Rule 56.1(B)(2)(a)(2).

Each of Plaintiff's responses either provides specific citations to the evidence that contradicts Defendant's statement of fact, or points out that Defendant's "fact" is not material to the issues in this case.

A. Defendant's "Facts" Are Not Material To This Case.

Despite Defendant's assertion in its Objection, Plaintiff complied with Local Rule 56.1(B)(2)(a)(2) in its responses to Defendant's Statement of Undisputed Material Facts. Specifically, Plaintiff responded to several of Defendant's "facts" showing that Defendant's statements are not material to the issues to be decided by this Court, and therefore are not admitted. *See* Plaintiff's Response to Defendant's Statement of Undisputed Material Facts 34, 47, 66, 67, 68, and 69. Such response by Plaintiff is in accordance with Local Rule 56.1(B)(2)(a)(2)(iii).

There is no requirement within Local Rule 56.1 that Plaintiff must cite to a source in the record to support its position that the statement given by Defendant is not material or relevant to this case. The immateriality of Defendant's "facts" is evident from a review of the purported statement of fact itself and the resolution of any such fact by the decision of the Eleventh Circuit. Defendant's objection would require the Plaintiff to prove a negative. Pursuant to Local Rule 56.1(B)(2)(a)(2)(iii), the Court will determine whether a statement of fact is material to the issues before the Court. No citation to show lack of materiality is required other than a citation to the appellate decision in this case. *Toffoloni v. LFP Publishing Group, LLC*, 572 F.3d 1201 (11th Cir. 2009).

B. Citation To Evidence That Contradicts Defendant's "Facts".

In addition, Defendant repeatedly asserts in its Objections that Plaintiff fails to provide a citation to evidence to support her denial of Defendant's statements. *See* Defendant's Objections 20, 25, 38, 40, 59, 64, 65, 66, 67, 68, 69, 71, 72, 73, 74, 75, 76, 77 and 86. This assertion is simply untrue.

Defendant's Statement of Undisputed Material Facts 59, 64, 65, 66, 67, 68, 69, 71, 72, 73, 74, 75, 76, and 77 attempt to relate to the Court's determination of whether the images of Nancy Benoit published by Defendant fit within the newsworthiness exception to the law of the right of publicity. As held by the Eleventh Circuit, the images of Nancy Benoit published by Defendant are not newsworthy. *Toffoloni* at 1213 ("We hold that these photographs do not qualify for the newsworthiness exception to the right of publicity"). In response to each of these statements of "fact," as argued by Defendant, regarding newsworthiness, Plaintiff cited to the *Toffoloni* Order, which directly contradicts each of Defendant's statements.

Defendant claims in its objections that Plaintiff is mistaken that the *Toffoloni* Order is binding in this case, and that Plaintiff must provide a citation to evidence to support its denial. Both assertions are untrue. This Court and the parties

to this lawsuit are bound by the findings of the Eleventh Circuit. *See* Plaintiff's Reply to Defendant's Response to Plaintiff's Renewed Motion for Partial Summary Judgment (D.I. 167 at pp. 10-13). Furthermore, Plaintiff's citation to the Eleventh Circuit's Order satisfies Local Rule 56.1(B)(2)(a)(2). Defendant's objections are unfounded.

In addition, even though Defendant claims that "Plaintiff fails to provide a relevant citation to evidence to support her denial," Plaintiff cites extensively to the record in this case. *See* Defendants Objections, pp. 4, 5, 8, 9, and 28. Defendant's objections are without merit.

III. CONCLUSION

Because Plaintiff complied with Local Rule 56.1(B)(2)(a)(2) by showing that Defendant's "facts" were not material to the issues to be considered, and/or by citing to specific evidence contradicting Defendant's "facts," Defendant's objections should be OVERRULED.

Respectfully submitted October 1, 2010.

/s/ Richard P. Decker

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CERTIFICATE OF SERVICE

This is to certify that on October 1, 2010, I have electronically filed the foregoing Reply to Defendant's Objections to Plaintiff's Response to Defendant's Statement of Undisputed Material Facts with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorney(s) of record:

James Clifton Rawls, Esq.
S. Derek Bauer, Esq.
Barry J. Armstrong, Esq.
Darrell Jay Solomon, Esq.
Jeffrey F. Reina, Esq.
Paul J. Cambria, Esq.

and by placing a copy of same in the United States Mail in a properly addressed envelope with adequate postage thereon to:

William M. Feigenbaum, Esq.
Lipsitz, Green, Scime, Cambria, LLP
42 Delaware Avenue, Suite 120
Buffalo, NY 14202

/s/ Richard P. Decker
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