[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------X

RICKY SPICER,

Index No. 153735/2014

Plaintiff,

-against-

Motion Seq. 001

CONDE NAST ENTERTAINMENT, LLC,

Defendant.

----------X

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action alleging a violation of New York City Civil Rights Law ("CRL") § 51, defendant Conde Nast Entertainment, LLC ("defendant")[1] moves pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss the Complaint of Ricky Spicer ("plaintiff").[2]

Factual Background[3]

In 1968, plaintiff (age 11 or 12 at the time), after a performance with his friends at a high school talent show, was approached by Tony Wilson ("Wilson") of Saru Records ("Saru") for an opportunity to record songs with members of "The Ponderosa Twins." They later formed the group, "The Ponderosa Twins plus One," with plaintiff representing "plus One." Chuck Brown ("Brown"), the owner of Saru, initially managed The Ponderosa Twins plus One.

The Ponderosa Twins plus One toured and recorded several songs, including one in or about 1970 called "Bound," in which plaintiff was the lead vocalist. Plaintiff enjoyed success in

---

[1] Defendant asserts that it is an unincorporated division of Advance Magazine Publishers Inc., and is incorrectly sued herein as "Conde Nast Entertainment, LLC."

[2] This action is related to a previously-filed action entitled *Ricky Spicer v Roc-A-Fella Records, Inc., et al.*, Index No. 161761/2013, which is also assigned to this Court.

[3] The Factual Background is taken from the complaint.

the music industry, releasing several popular songs and performing with Gladys Knight and James Brown. Yet, plaintiff allegedly never received payments promised by Brown for his performances, due to his age, and lack of parental oversight.[4] Brown attempted to become plaintiff's legal guardian to facilitate the execution of documents allegedly in plaintiff's best interest. However, such executed documents were allegedly declared invalid in an Ohio State probate court order issued in 1972 (the "1972 Ohio Probate Order").

In 2013, while listening to the radio, plaintiff heard his voice in Kanye West's ("West") musical recording entitled "Bound 2." The 'hook' in "Bound 2" contains plaintiff's lead vocals, is heard at least four times throughout the song, and is sampled exactly as plaintiff recorded it.

Thereafter, *Vogue*, which is published by defendant, featured an article in its April 2014 print issue about Kim Kardashian ("Kardashian") and West's relationship and careers (the "Article"). A video containing behind-the-scenes footage of the Article is prominently featured on *Vogue*'s website (the "Video"). An edited version of "Bound 2" is used as the background music for the Video, and plaintiff's voice is used substantially throughout the Video, comprising approximately 44% of the vocals.

Plaintiff alleges that defendant knowingly used his voice on its website for advertising purposes and for purposes of trade and commercial benefits, without his authorization or consent, and failed to compensate him accordingly. As such, plaintiff seeks damages under CRL § 51 (Count I) (which prohibits the use of a name, portrait or picture of a living person "for advertising purposes, or for the purposes of trade" without written consent) and for unjust enrichment (Count II).

---

[4] Plaintiff was living in an Ohio State group home at this time.

Arguments

In support of dismissal of the CRL § 51 claim, defendant argues that even accepting plaintiff's allegations as true, plaintiff cannot show that the use of his voice was for "advertising purposes or for the purposes of trade" as required. Instead, plaintiff's voice was used in connection with an article on a matter of public interest. The Article of Kardashian and West concerns a matter of public interest to many people, the Video contained behind the scenes footage of the cover photo shoot of the couple for the Article, and the photos were shot by world renowned photographer Annie Leibovitz ("Leibovitz"), who was also featured in the Video. Therefore, both the Video and the Article were matters of public interest. Moreover, the hit song, "Bound 2" by West, bore a reasonable relationship to the Article and Video, as the lyrics "Bound to fall in love" tie perfectly to the Article discussing the upcoming wedding of the couple.

Defendant argues that plaintiff's claim that his voice was used for advertising and trade purposes and commercial benefits because defendant profited from "Bound" through its sales of its magazines and advertisements on its website is insufficient under caselaw. And, the fact that *Vogue* is produced for profit or that "Bound 2" could increase sales or advertisements is irrelevant. The use of plaintiff's voice bore a reasonable relationship to a matter of public interest and the Article is not an advertisement in disguise. Thus, defendant is not liable under CRL § 51.

Defendant further argues that documentary evidence contradicts plaintiff's claim of unauthorized use of his voice, and shows that defendant's use was authorized, in that plaintiff agreed to surrender his ownership rights in "Bound" to Saru. Defendant contends that "Bound"

was created pursuant to two agreements dated October 12, 1970 -- a Personal Services Contract and a Recording Agreement -- entered into between plaintiff (and all other members of the singing group) and Saru (collectively, the "Agreements"). The Recording Agreement, which was signed by plaintiff, his father Richard Spicer, and Brown (as plaintiff's legal guardian), provided that "Bound" was the sole property of Saru, and vested Saru with the exclusive rights to license or otherwise use all records embodying the performances of plaintiff. Saru granted a license for UMG Recordings, Inc. and Roc-A-Fella Records (collectively, "UMG") and West to use a sample from "Bound" in "Bound 2." UMG then granted defendant permission to use an edited version of "Bound 2" as background music to the Video. Thus, plaintiff has no rights in and to his vocal performance in "Bound," and lacks standing to interfere with defendant's right to exploit same.

In addition, documentary evidence belies plaintiff's claim that the Agreements were invalid. First, the 1972 Ohio Probate Order relied upon by plaintiff reveals that Saru filed an "Application for Approval and Affirmance of the Agreements with Ohio Probate Court," which was denied. The Order does not hold that the Agreements are "invalid" or disaffirmed. Rather, in denying the application, the Court noted that the Agreements were entered into prior to the inception of Brown's guardianship over plaintiff, and that Brown/Saru failed to account for funds received by way of plaintiff's services. Also, later in 1979, when plaintiff filed a proceeding to vacate an order approving of Brown's accounting on the ground of fraud, plaintiff executed an affidavit whereby he admitted to having made 11 performances under the Agreements for two years after the Agreements were purportedly declared invalid (the "Affidavit"). Such Affidavit likewise belies plaintiff's claim that the Agreements were invalidated in 1972. Defendant also

notes that absent from the complaint is any allegation that plaintiff disaffirmed the Recording Agreement.

Additionally, defendant argues that plaintiff's unjust enrichment claim fails, as there is no common law right of privacy in New York. Plaintiff's claim of property interest in his voice is subsumed under the CRL, and may not be maintained. And, if such claim is not subsumed by the CRL, it is contradicted by the above-noted documentary evidence.

In opposition, plaintiff contends that his complaint sufficiently alleges a claim under CRL § 51 in that defendant's use of his voice without his consent was for advertising purposes. Defendant produced and distributed the Video in order to promote the sale of defendant's product, *to wit*: the April 2014 issue of *Vogue*. The Video displays *Vogue's* logo prominently in the right corner throughout the video's duration, and expressly sets forth "*Vogue* Presents," a solicitation of patronage. Plaintiff asserts that directly below the Video is the following phrase: "To read the full article from the April issue, get it at newsstands or download the digital edition here." Plaintiff claims that after clicking the link to download the digital edition of the magazine, he was immediately redirected to a page to purchase a subscription to *Vogue*, and that he could not access the complete Article unless he paid for same. Thus, plaintiff maintains, the Video is an advertisement for the Article and photo shoot contained therein. Moreover, since plaintiff's voice was used for advertising purposes without his written consent, whether the content of the Video was newsworthy is irrelevant. The Video is a separate work, constitutes an advertisement for the sale of its magazine, and did not need to contain plaintiff's voice. As such, defendant's caselaw in support of its motion is distinguishable.

Nor does the documentary evidence support defendant's contention that plaintiff

surrendered any ownership rights in "Bound." At the time the Recording Agreement was signed, plaintiff was a minor under Ohio law, a ward of the State of Ohio, and no representative of Ohio executed said Agreement on plaintiff's behalf as required. Also, neither Brown, nor his father, were his legal guardians at the time said Agreement was executed. Thus, the Agreements upon which defendants rely are not legally binding upon him. Further, the 1972 Ohio Probate Order confirms that the Agreements were never valid, as they were entered into prior to the inception of Brown's guardianship and without court approval. Further, plaintiff's musical performances were not made pursuant to any agreement binding upon him, and he lacked the capacity to ratify the Agreements. Thus, plaintiff's continued performance after the Ohio Probate Order was issued and through 1974 (before he became an adult) does not entail that the Agreements are valid. The failure to comply with requisite laws concerning service contracts with minors will result in a declaration that the contract is not binding.

Further, plaintiff contends that defendant failed to submit any evidence that UMG obtained the rights to license the sample of "Bound" to defendant.

As to his unjust enrichment claim, plaintiff argues that he adequately alleged that defendant was enriched at plaintiff's expense when defendant improperly used his voice in the Video for advertising and trade purposes. Thus, it is against equity and good conscience to permit defendant to retain any profits its derived from the use of plaintiff's voice.

In reply, defendant argues that plaintiff concedes that the Article itself is newsworthy, and there is no legal support for plaintiff's claim that the Video should be treated differently because it is introduced with the phrase "*Vogue* Presents" and features *Vogue's* logo. The Video itself is a newsworthy report on a matter of public interest, as it depicts the photo shoot by Leibovitz of

Kardashian, West and their daughter for one of the most prestigious fashion magazines in the world. The Video is intended to be an extension of the Article, and is thus, also newsworthy.

Also, it is uncontested that there is a "real relationship" between the use of "Bound 2" and the Video. The lyrics "Bound to fall in love" are heard repeatedly throughout "Bound 2" and tie perfectly to the Video of West, his future wife, and their child, being photographed in wedding attire for the Article, which discusses the pair's upcoming nuptials. And, plaintiff's claim that the Video did not "need" to contain plaintiff's voice to achieve its goal of providing behind-the-scenes video of a photography session is unavailing, as the controlling test is not one of necessity.

Moreover, defendant argues, plaintiff ignores caselaw holding that the fact that a publication is produced for profit or the use of someone's voice, even if to increase circulation of a newsworthy article, does not covert the use into an actionable claim. Plaintiff's cited cases do not pertain to use in the context of journalism or newsworthy articles on matters of public interest. And, that the Video begins with "*Vogue* Presents" and features the *Vogue* logo in the corner thereof is irrelevant. The Video is the property of *Vogue*, and just as the *Vogue* logo is featured on the cover of the magazine itself or on the bottom of every page, the Video similarly features the *Vogue* name.

And, even assuming the Video is deemed a separate work and advertisement for the April 2014 issue, the Video would be protected under the "incidental use" exception to CRL § 51 for advertisements of newsworthy media. Such incidental use is protected even if the particular voice used does not appear in the protected media in question. Here, the Article is newsworthy and the Video illustrates the content of the Article. Thus, the Video, and thereby use of

plaintiff's voice, is sufficiently illustrative of the magazine's content to qualify as an incidental use.

As to the Agreements, plaintiff does not assert that he disaffirmed the Agreements at or around the time he reached the age of majority as required under Ohio law. And, there is no requirement that the Agreements be signed by a representative of Ohio on behalf of a "ward of the State" as plaintiff claims. Ohio caselaw is clear that an agreement signed by a minor is voidable, not void, and thus is entirely enforceable if not disaffirmed within a reasonable time of the minor reaching the age of majority. The failure to disaffirm constitutes ratification as a matter of law. Since there was no such disaffirmance, plaintiff cannot now sue regarding any alleged unauthorized use of "Bound."

Moreover, the documentary evidence shows that plaintiff ratified the Agreements in 1979, years after he reached the age of majority, when he filed the Affidavit claiming his entitlement to monies owed for appearances he made under the Agreements through March 1974. Thus, plaintiff's delay in disaffirming the Agreements and his performance thereunder preclude his attempts to avoid his obligations under the Agreements.

And, plaintiff mischaracterizes the 1972 Ohio Probate Order. The Ohio Court did not state that the Agreements were no longer binding on plaintiff, or that Brown and Saru lacked ownership rights over any of the subject work created during the life of the Agreements.

Defendant further notes that plaintiff failed to address its cited caselaw regarding the claim for unjust enrichment.

Discussion

Pursuant to CPLR 3211(a)(l), a party may move for judgment dismissing one or more

causes of action asserted against him on the ground that "a defense is founded upon documentary evidence." A motion to dismiss on the basis of a defense founded upon documentary evidence may be granted "only where the documentary evidence utterly refutes [the complaint's] factual allegations, conclusively establishing a defense as a matter of law" *(DKR Soundshore Oasis Holding Fund Ltd. v Merrill Lynch Intern.*, 80 AD3d 448 [1st Dept 2011], *citing Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

Defendant's documentary evidence fails to establish that defendant's use of plaintiff's voice in "Bound" was "authorized" by plaintiff or that plaintiff surrendered his rights to Bound so as to deprive plaintiff of standing to maintain his CRL § 51 claim.

As to defendant's claim that its use of plaintiff's voice in "Bound" was authorized, defendant did not submit evidence proving the *entirety* of the purported chain of ownership and/or licensing. The chain, as asserted, is as follows: plaintiff relinquished his rights to "Bound" to Saru; Saru licensed "Bound" to UMG to produce "Bound 2"; and UMG licensed "Bound 2" to defendant to produce the Video. It is uncontested that the Recording Agreement signed by plaintiff provides that Saru Records shall own all "master recording embodying performance" of plaintiff, and that Saru Records' right of ownership shall include the sole and exclusive right to . . . license . . . records embodying the performances of" plaintiff. However, while defendant only provides evidence indicating that plaintiff relinquished his rights regarding "Bound" to Saru, purportedly under the Recording Agreement, the remaining licenses of Bound from Saru to UMG to produce "Bound 2", and from UMG of "Bound 2" to defendant to produce the Video, are not provided. Therefore, defendant's claim that it is authorized to use plaintiff's voice is unsupported by the record.

Next, the court finds that the documentary evidence submitted by defendant (namely, the Agreements, 1972 Ohio Probate Order, and Affidavit of plaintiff) fails to establish, under CPLR 3211(a)(1), that plaintiff surrendered his rights to Bound so as to defeat his first cause of action.

First, defendant failed to establish the enforceability of the Agreements.

It is undisputed that plaintiff executed the Agreements, and that the Ponderosa Twins plus One recorded "Bound" subject thereto. Pursuant to the Recording Agreement, Saru shall own the master recording of "Bound" and have the sole and exclusive right to license same. The Recording Agreement is also signed by his "Parent" "Ricky Spicer" and "Brown" as plaintiff's "Legal Guardian," and the Service Agreement demonstrates that plaintiff was a minor at the time of their signing.[5]

In regard to contracts signed by a minor, Ohio law[6] provides that "Except for a limited class of contracts considered binding, as for necessaries, etc., the contract of an infant is *voidable*, and this is so as to both executed and [merely] executory contracts, but with different applications of the term, 'voidable'" (*Cassella v Tiberio*, 150 Ohio St 27, 30 [Ohio 1948] (emphasis added)).

In determining whether to enforce a note signed by a defendant while he was a minor, the Court in *Cassella* ruled that such a "written and signed promise to pay money comes within the classification of an 'executory contract' so far as the promisor is concerned." An executory contract "is one in which a party binds himself to do, or not to do, a particular thing," and

[5] The parties do not dispute that if the Agreements are deemed enforceable, plaintiff has no legal rights to "Bound."

[6] It is undisputed that the Recording Agreement, its validity, construction and effect shall be governed by Ohio State law.

"requires affirmative action for its establishment" (*id.* at 30). Therefore, such an "executory contract of [the] infant is voidable," meaning "that it is capable of being confirmed or avoided, although, *until there is a definite ratification or confirmation by the infant after he becomes of age, it may not be enforced against him*" (*Cassella*, 150 Ohio St at 30, citing 12 Am. Jur. 507, § 9 (*citing Nichols & Shepard Co. v Snyder*, 78 Minn 502, 81 NW 516 [1900] (the infant "may always interpose his infancy as a defense in an action for its enforcement, and he is not bound by such a contract unless he has affirmed or ratified it, after he has arrived at maturity, *by some sufficient act or deed.*'(emphasis added)). Notwithstanding the above however, "*when an infant receives something of value under a contract* which is executory as to him," the infant is bound by the contract "if he 'retains the thing and does nothing by way of disaffirmance for an appreciable length of time after reaching legal age'" *(Cassella*, 150 Ohio St at 32) (emphasis added)). However, "where the contract is wholly executory and it is apparent the infant has received no benefits," it is not binding (*id.*). And, the failure to disaffirm within a reasonable time does not ratify an executory contract, provided the former infant does not retain possession of the consideration (*Cassella*, 150 Ohio St at 30, citing 12 Am. Jur. 507, § 82).

On the other hand, an "executed contract is one in which the object of the agreement is performed and everything that was to be done is done" (*id.* at 150 Ohio St at 30, citing 12 Am. Jur. 507, § 9). The executed contract "remains in force until disaffirmed" and (unlike an executory contract under which the infant retained no consideration) is "deemed to be ratified by the failure of the former infant to disaffirm it within a reasonable time after reaching majority (*Cassella*, 150 Ohio St at 30-31, *citing* 27 Am Jur, 808, § 82). The Court in *Cassela* affirmed the lower court's judgment in favor of the defendant/former minor, and rejected plaintiff/creditor's

claim that defendant/former minor's failure to disaffirm within a reasonable time after reaching majority constituted ratification. Defendant/former minor received no benefits under the loan he (along with his parents) signed, which was an executory contract.

Here, defendant failed to demonstrate that plaintiff was required, under Ohio law, to disaffirm the Agreements within a reasonable time after reaching the age of majority such that his failure to so disaffirm constitutes a ratification of same. Specifically, defendant failed to show, by any documentary evidence, that the Agreements constituted "executory" contracts under which plaintiff received a benefit or retained consideration thereunder. In this regard, defendant fails to provide any evidence indicating that plaintiff was compensated for his services under the Agreements, and fails to refute plaintiff's allegations in paragraphs 16 and 18 of the complaint, respectively, that "Brown and Saru failed to make any payments to [plaintiff] for his performances" and that, "[plaintiff] was not fairly compensated" with respect to his career under Brown (*see Cassella*, 150 Ohio St at 30). Furthermore, defendant failed to demonstrate that plaintiff affirmed and/or ratified the Agreements by his conduct in the period after the 1972 Ohio Probate Order was issued.

Likewise, defendant failed to demonstrate that the Agreements constituted "executed" contracts, to be deemed ratified by plaintiff's alleged failure to disaffirm the Agreements within a reasonable time after reaching majority.

Accordingly, in light of *Cassella* -- which, although cited by defendant, supports plaintiff's position at this juncture -- defendant has not demonstrated that the Agreements were ratified and/or made enforceable by plaintiff's alleged failure to attempt to disaffirm them until now. This is the case even assuming that the period between the Agreements' execution in 1970

and the filing of this action constituted an unreasonable length of time (*Cassella*, 150 Ohio St at 32, *citing* 43 Corpus Juris Secundum, Infants, page 169 § 74 ("In our opinion the executed contract of an infant is and should be binding upon him by his failure to disaffirm it within a reasonable time after attaining majority, *but where the contract is wholly executory and it is apparent the infant has received no benefits, a different conclusion is in order*" (emphasis added) (*citing Brownell v Adams*, 121 Neb. 304 [Neb 1931] ("Where an infant has received some benefit during infancy, he must repudiate the contract within a reasonable time after attaining majority . . . But not having received any benefit, and not having ratified the contract after his arrival at majority, he is not bound by the same'")).[7]

Second, defendant's reliance on plaintiff's 1979 Affidavit for the proposition that plaintiff ratified the Agreements by his continued performances (at various concert appearances) under the Agreements through March 1974, is misplaced.[8] The Affidavit does not indicate that plaintiff's appearances were undertaken pursuant to any agreements (*see* Defendant's Memorandum of Law, Exhibit "F"). Indeed, the Affidavit is silent as to any agreement. Defendant did not provide any further documentation or affidavit from anyone with personal knowledge of plaintiff's purported appearances referenced in the Affidavit. And, plaintiff, in

---

[7] Defendant's other cases cited in support of their contention that the mere failure of plaintiff to disaffirm the Agreements within a reasonable amount of time are not controlling (*see Muller v CES Credit Union*, 161 Ohio App 3d 771 [Ohio App 2005] (defendant's attempt to disaffirm the loan when he was sued 14 years after reaching the age of majority ineffective to avoid liability for his sister's loan for which he cosigned where his automobile loan was satisfied in connection with the loan made to his sister); *McKenzie v Tellis*, 47 NE2d 253 [Ohio App 1942] (defendant signed a note for a $200.00 payable to plaintiff; whether defendant retained a benefit under the note not at issue); *Lemmon v Beeman*, 45 Ohio St 505 [1888] (plaintiff permitted to disaffirm a stock purchase agreement entered into while plaintiff was a minor)).

[8] It is noted that "prior statements or averments of parties or their agents in the course of litigation that refute an essential element of a plaintiff's present claim may constitute documentary evidence within the meaning of CPLR 3211(a)(1)" (*Warshaw Burstein Cohen Schlesinger & Kuh, LLP v Longmire*, 106 AD3d 536, 965 NYS2d 458 [1st Dept 2013]).

opposition, attests that the 1979 litigation was "completely unrelated to the Agreements." Thus, defendant failed to demonstrate that plaintiff sought "to enforce the terms of the Recording Agreement for personal appearances he made well after the alleged 'invalidation' in 1972."

And, even assuming plaintiff performed under the Agreements through March 1974, defendant fails to show how such performance alone would constitute affirmance or ratification. Plaintiff asserts that he was still a minor in 1974, and as such, his alleged performances would have occurred in furtherance of a voidable contract. Defendant provides no authority for the proposition that a minor can affirm or ratify a voidable agreement simply by performing under same while still a minor.

Therefore, defendants failed to establish that the Agreements are binding upon plaintiff.[9]

Accordingly, the branch of defendant's motion seeking dismissal pursuant to CPLR 3211(a)(1) is denied.

Notwithstanding the above, plaintiff's complaint must be dismissed under CPLR 3211(a)(7), even assuming that defendant used plaintiff's voice without his consent.

In determining a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court's role is deciding "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204 [1st Dept 2013]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401

[9] As pointed out by defendant, and contrary to plaintiff's contention, the 1972 Ohio Probate Order did not hold that the "executed" Agreements were "invalid." Instead, the 1972 Ohio Probate Order denied Saru's application for "Approval, and Affirmance of Personal Services Contracts." It stated that the Agreements were entered into "prior to inception of guardianship and without approval of the Court" and that "Chuck Brown and Saru Records have failed to account for funds received by way of Services of said minors, all to the detriment of said minor ward."

[1st Dept 2013]). On a motion to dismiss, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, *supra; Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

Nevertheless, the court may consider evidentiary material in evaluating a motion made under CPLR 3211; when such material is considered, "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate" (*Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]). In other words, "dismissal results only if the movant demonstrates conclusively that the plaintiff has no cause of action, or that 'a material fact as claimed by the pleader to be one is not a fact at all'" (*Laquila Group, Inc. v Hunt Const. Group, Inc.*, 44 Misc 3d 1203(A), 2014 WL 2919334 [Sup Ct New York Cty 2014], *citing Sokol v Leader*, 74 AD3d 1180, 1181-1182 [2d Dept 2010]). Thus, a defendant may submit evidence in support of the motion attacking a well-pleaded cognizable claim, and under such circumstances, "the standard morphs from whether the plaintiff stated a cause of action to whether it has one" (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 980 NYS2d 21 [1st Dept 2014] *citing* John R. Higgitt, CPLR 3211 [A] [7] and [A] [7] Dismissal Motions—Pitfalls and Pointers, 83 NY St BJ 32, 33 [2011] [emphasis omitted]; John R. Higgitt, CPLR 3211 [A] [7]: Demurrer or Merits-Testing Device?, 73 Albany L Rev 99, 110 [2009]).

CRL § 51 provides, in pertinent part:

> Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade[10] without the written consent first obtained as above provided may . . . sue and recover damages for any injuries sustained by reason of such use if the defendants shall have knowingly used such person's . . . voice in such manner as is forbidden or declared to be unlawful by section fifty of this article . . . .

"To state a claim under § 51, plaintiff must show that: (1) defendant used his name, portrait or picture [or voice], (2) for purposes of trade or advertising, (3) without his written consent" *(see Stern v Delphi Internet Services Corp.*, 165 Misc 2d 21, 626 NYS2d 694 [Supreme Court, New York Cty 1995]).

Plaintiff's complaint alleges that defendant used his voice recording in "Bound," in the Video (advertisement) containing behind-the-scenes footage of a photo shoot of *"Kim Kardashian and Kanye West*," without his consent, in order to generate revenue through sales of defendant's *Vogue* magazine featuring the couple in its April 2014 issue (emphasis added).

While plaintiff's complaint asserts facts to support the section 51 cause of action, the complaint's express reference to two celebrities and an online Video, coupled with the documentation submitted by defendant, demonstrates that CRL § 51 does not afford plaintiff the relief he seeks.

Courts "have narrowly interpreted the meanings of 'advertising' and 'trade' [in CRL § 51] to apply only to commercial misappropriation *and to exclude anything "newsworthy*" (*Kane v Comedy Partners*, 2003 WL 22383387 [SDNY 2003] *citing Messenger v Gruner & Jahr*

---

[10] In opposition, plaintiff argues only that his voice was used for advertising purposes. He does not contend that his voice was used "for the purposes of trade." Thus, the court will only evaluate the issue of whether plaintiff's voice was used for advertising purposes.

Printing and Publishing, 94 NY2d 436, 441, 706 NYS2d 52, 727 NE2d 549 [2000] (emphasis added) ("a newsworthy article is not deemed produced for the purposes of advertising or trade")). This broadly construed "newsworthiness" exception extends to "any subject of public interest," including "entertainment and amusement, concerning interesting phases of human activity in general" (*Kane v Comedy Partners, supra, citing Messenger* 94 NY2d at 441 (newsworthiness includes "not only descriptions of actual events . . . but also articles concerning political happenings, social trends, or any subject of public interest") and *De Gregorio v CBS, Inc.*, 123 Misc 2d 491, 493, 473, NYS2d 922, 924 [Supreme Court, New York Cty 1984]; *see also Myskina v Conde Nast Publications, Inc.*, 386 FSupp2d 409 [SDNY 2005] (newsworthy and public interest construed to include entertainment and amusement); *Stern v Delphi Internet Services Corp.*, 165 Misc 2d 21, *supra* (issue of celebrity's candidacy was newsworthy)). This exception should be liberally applied (*see Finger v Omni Publications Intern., Ltd.*, 77 NY2d 138 [1990]; *Stephano v News Group Publications, Inc.*, 64 NY2d 174 [1984]; *Creel v Crown Publishers, Inc.*, 115 AD2d 414 [1st Dept 1985]). Thus, a person's picture or voice "illustrating an article on a matter of public interest is not considered used for the purpose of trade or advertising within the prohibition of the statute" *unless* "it has no real relationship to the article" (*Dallesandro v Henry Holt & Co.*, 4 AD2d 470, 166 NYS2d 805 [1st Dept 1957]), "or unless the article is an advertisement in disguise" (*Velez v VV Pub. Corp.*, 135 AD2d 47, 524 NYS2d 186 [1st Dept 1988]; *LaForge v Fairchild Publications, Inc.*, 23 AD2d 636, 257 NYS2d 127 [1st Dept 1965]; *Griffin v Medical Soc. of State of N.Y.*, 7 Misc 2d 549, 11 NYS2d 109 [Supreme Court, New York Cty. 1939] (article, even in a scientific publication, may be nothing more than someone's advertisement in disguise; therefore, as it may be inferred from the complaint that, the

subject article, with its accompanying (non-consensual) photographs of plaintiff, "was published by the moving defendants to advertise the defendant physicians and their handiwork," dismissal was unwarranted); *cf. Beverley v Choices Women's Med. Ctr.*, 78 NY2d 745, 587 NE2d 275 [1991] (calendar with defendant medical service provider logo was advertisement in disguise)). "[O]nce it is determined on a CRL § 51 claim that the published article is newsworthy [or a matter of public interest], the only query at that point becomes whether the article is an advertisement in disguise or whether its use of plaintiff's name and/or image [or in this case, voice] bears any real relationship to the article" (*Bement v N.Y.P. Holdings, Inc.*, 307 AD2d 86, 760 NYS2d 133 [1st Dept 2003] ("where either the article is found to be an advertisement in disguise or the use of the plaintiff's identity is found to bear no real relationship to the article, the statutory provisions will apply")).

Here, defendant established that its use of plaintiff's voice, heard in "Bound 2" in the Video, illustrates "an article on a matter of public interest" and is thus, not used for the purpose of trade or advertising within the prohibition of the statute.

First, it is uncontested that the Article, entitled "Keeping up with Kimye," is 15 pages long, was written by *Vogue* editor Hamish Bowles, and contains photographs taken by Leibovitz during the couples' photo shoot. The Article focuses on the lives and artistic pursuits of the couple, including references to the couple's upcoming wedding and West's music career. It is undisputed that a photograph of Kardashian and West appears on the cover of the April 2014 issue of *Vogue,* which contains the headline "Kim & Kanye Their Fashionable Life and Surreal Times #WorldsMostTalkedAboutCouple." Thus, the Article, which reports on the careers and upcoming wedding of the celebrity couple, two of the world's most currently-publicized

individuals, is newsworthy, as "newsworthiness is to be broadly construed" (*Messenger*, 94 NY2d at 441; *Dominguez v Vibe Magazine*, 21 Misc 3d 1122(A), 873 NYS2d 510 [Supreme Court, New York Cty 2008] (article on career and famous party of Sean "Diddy" Combs found newsworthy as it "undeniably concerns a matter of public interest to many people")).[11] Further, upon review of the Video, the Court finds that plaintiff's voice, which is heard singing "Bound to love,"[12] fully illustrates a matter of public interest or newsworthy content. The sampled portion and lyrics of "Bound" ("Bound to fall in love") relate to the Video's depiction of West and Kardashian embracing each other and their child, naturally, in a blossoming relationship (*see Murray v New York Mag. Co.*, 27 NY2d 406 [1971]; *see also Dominguez v Vibe Magazine*, 21 Misc 3d 1122(A), *supra* (photograph of attendees at highly publicized party of celebrity, which included plaintiff topless, deemed reasonably related to newsworthy article concerning celebrity); *Finger*, *supra* (photograph of plaintiffs, a large family, had sufficient relationship to "theme" of newsworthy article discussing research that *in vitro* fertilization rates may be enhanced by exposing sperm to high concentrations of caffeine, even though plaintiffs' names were not mentioned in article and none of the children were produced through *in vitro* fertilization)).

The use of plaintiff's voice singing "Bound to fall in love" bears a reasonable relationship

---

[11] In *Dominguez*, in which the court dismissed plaintiff's Section 51 claim, a photograph of plaintiff taken at one of Sean "P. Diddy" Combs' parties was included in a *Vibe* magazine cover profile and feature article on Mr. Combs, which detailed Mr. Combs' life, career, and social endeavors.

[12] As to the Court's authority to consider the online Article and Video in question, see *Sondik v Kimmel*, 33 Misc 3d 1237(A), 941 NYS2d 541 (Table), fn. 3 [Supreme Court, Kings County 2011]). In *Sondik*, the Court opined that as to its "'consideration of a DVD or similar copy of the alleged offending show or article in the context of a CPLR 3211(a)(7) motion' the Court noted that in "federal court, the clip at issue would be considered as part of the pleadings in deciding the motion to dismiss-even though plaintiff did not append it-since it is referred to in the complaint, central to plaintiff's claims, and plaintiff did not object to its authenticity.' This issue need not ultimately be decided, since, even if the clip cannot be deemed part of the pleadings or constitute documentary proof . . . it is, in the absence of an objection from plaintiff . . . evidence that conclusively shows that plaintiff has no cause of action" (internal citations omitted)).

to the Article. Like the photograph at issue in *Dominguez v Vibe Magazine*, which depicted attendees at a highly publicized party of Sean "Diddy" Combs, the Video herein depicts a photo shoot for the Article about Kardashian and West, who currently enjoy the same celebrity status and public interest as that of Combs. The Video depicts the couple (and their daughter) "on the set of the April cover shoot"- an issue containing an Article this Court deems as newsworthy as the article concerning Combs in Vibe Magazine in *Dominguez.* And, the sampled portion of plaintiff's voice and lyrics relates to, and illustrates, the underlying themes of defendant's newsworthy Article and photo shoot: namely, Kardashian's and West's intimate relationship.

Similar to the defendant's use of plaintiff's topless photograph in *Dominguez v Vibe Magazine*, defendant's use herein of plaintiff's voice recording as part of its Video illustration of the Article"bears a reasonable relationship to an article on a matter of public interest" (*see Dominguez v Vibe Magazine*, 21 Misc 3d 1122; *Murray v New York Mag. Co.*, 27 NY2d 406, *supra*; *Nussenzweig v DiCorcia*, 11 Misc 3d 1051, *supra* (a "catalogue" of photographs which included a non-consensual photograph of plaintiff, which was published and distributed to the public in connection with an art exhibition, was a permitted use under CRL § 51)).[13]

"[T]he fact that [defendant] may have included [the plaintiff's voice] in a [newsworthy

---

[13] In *Murray*, plaintiff was photographed without his consent while wearing traditional Irish clothing at the annual St. Patrick's Day Parade in Manhattan. The photograph later appeared on the front cover of defendant's magazine; directly above the photograph appeared the title of a feature article in bold green print: "The Last of the Irish Immigrants, by Jimmy Breslin." (*Murray*, 27 NY2d at 408). The Court of Appeals dismissed the section 51 claim, finding that the photograph related to the subject matter contained in the article (which was deemed newsworthy), as the article "dealt with the contemporary attitudes of Irish-Americans in New York City, referred to the gaiety of the St. Patrick's Day festivities and included comments about the parade" (*Murray*, 27 NY2d at 409). Moreover, the Court reached this holding despite the fact that the use of the photograph may have "stimulated magazine sales." The Court stated that the picture was published "in connection with the presentation . . . of a matter of legitimate public interest to readers" and that since it bore a reasonable relationship to such presentation, its use on the magazine's cover was not actionable (*id.*).

publication] to increase the circulation of its magazine, and therefore profits, does not mean that [defendant] used plaintiff's [voice] for trade or advertising purposes within the meaning of the statute" (*Dominguez*, 21 Misc2d 1122(A) at * 4). Thus, similarly, that plaintiff's voice is heard as background music to the newsworthy Video, even if used to increase the circulation of the subject issue of *Vogue*, does not entail improper use.

Finally, it cannot be said that the Article (as illustrated by the Video in which plaintiff's voice is heard) is an advertisement in disguise, as the subject and content of the Article focus almost entirely on Kardashian and West.

And, inasmuch as plaintiff contends that the *Video* (and thus his voice) is an advertisement in disguise, the use of plaintiff's voice under the circumstances herein does not violate CRL § 51, as defendant is a media source advertising its own goods (*see Groden v Random House, Inc.*, 61 F3d 1045, 1049 [2d Cir 1995]; *Alfano v NGHT, Inc.*, 623 FSupp2d 355, 359 [EDNY 2009] ("Turning to the question of advertising, a media publication with newsworthy content may use an individual's image in an advertisement that reproduces that content -- for instance, the reproduction of a magazine cover depicting a famous actress in an advertisement for subscriptions to the magazine -- without violating Section 51. Courts have reasoned that Section 51 must permit this kind of 'incidental use' to allow a publication to 'prove its worth and illustrate its content'"); *Booth v Curtis Publishing Co.*, 15 AD2d 343, 349, 223 NYS2d 737 [1st Dept 1962]; *cf. Marshall v Marshall*, 2012 WL 1079550, * 2 [EDNY 2012] ("However, [the decisions finding incidental use] share a key element clearly lacking here - the defendants are media sources advertising their own wares . . . this is simply not the case of a media source seeking to advertise its own goods. Defendant's use of plaintiff's image to

advertise those videos does not fall under the purview of an 'incidental use'")). Moreover, "Courts have recognized [the] additional exception to section 51 for the 'incidental use in ads or other promotional items of material that prove the worth and illustrate the content of the works being advertised" (*Kane v Comedy Partners, supra, citing Groden v Random House, Inc.*, 61 F3d at 1049, *supra*). Thus, even assuming the Video is considered an "advertisement in disguise," defendant's use of plaintiff's voice, which illustrates the content of *Vogue* magazine, is not actionable under Section 51.

Accordingly, defendant's use of plaintiff's voice is not violative of Section 51, and the first cause of action is dismissed (*see Nussenzweig v DiCorcia*, 11 Misc 3d 1051, 814 NYS2d 891 [Supreme Court, New York Cty 2006] (the recognized categories of uses, *to wit*: newsworthy and incidental, are not actionable under CRL § 51)).

As to plaintiff's unjust enrichment claim, plaintiff fails to address defendant's argument that the unjust enrichment claim is subsumed by his Section 51 claim (*see also Zoll v Jordache Enterprises, Inc.*, 2002 WL 31873461 [SDNY 2002] (noting that "common law claims premised on the unauthorized use of a plaintiff's name, image or likeness as privacy claims" must proceed under the statutory cause of action created by §§ 50 and 51 of the Civil Rights Law")). And, New York does not recognize a common-law right of privacy (*see Messenger*, 94 NY2d at 441). As such, plaintiff's second cause of action must also be dismissed.

Conclusion

Based on the foregoing, it is hereby

ORDERED that defendant's motion to dismiss the complaint is granted pursuant to CPLR 3211(a)(7), and the complaint is dismissed with prejudice; and it is further

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

This constitutes the decision and order of the Court.

Dated: December 3, 2014

Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD