SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS A. KAHN, III **PART** IAS MOTION 14

Acting Justice

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EVERETTE DRAUGHN,

Plaintiff,

- v -

AL ROKER, AL ROKER ENTERTAINMENT, INC, EUGENE TAT-2 THE BOUNTY HUNTER THACKER, HOOK 'EM AMD BOOK 'EM ELITE FUGITIVE RECOVERY, VIACOM MEDIA NETWORKS, SPIKE TV, JENNIFER LOPEZ, JENNIFER LOPEZ AS CEO OF JENNIFER LOPEZ ENTERPRISES, NUYORICAN PRODUCTIONS, INC.,BODEGA PICTURES, LLC,ABC DISTRIBUTORS (I-X), DEF CREATORS (I-X), JOHN DOE PRODUCERS (I-X), ABC PRODUCTION COMPANYS (I-X), and ABC AND XYZ INSURANCE COMPANYS (I-X)

Defendants.

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INDEX NO. 152934/2018

MOTION DATE

MOTION SEQ. NO. 004, 005, 008

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 62-66, 79-91, 93, 105, 121; (Motion 005) 67-72, 95-101, 106, 122; and (Motion 008) 113-117, 123

were read on this motion to/for DISMISS/VACATE DECISION/DEFAULT JUDGMENT.

Before this Court are three motions: The motion to dismiss Plaintiff's amended complaint by Defendants Al Roker, Al Roker Entertainment, Inc., Jennifer Lopez, Jennifer Lopez Enterprises, Nuyorican Productions, Inc., Bodega Pictures, LLC and Viacom International Inc. (sued herein as "Viacom Media Networks" and "Spike TV") (Motion 004); Plaintiff's motion to vacate the Court's prior order (Hagler, J.) granting Defendant's motion to dismiss the original complaint (Motion 005); and Plaintiff's motion for a default judgment against Defendants Eugene Thacker and Hook'em and Book'em Elite Fugitive Recovery (Motion 008).

These motions were held in abeyance pending the outcome of Plaintiff's motion to renew, reargue and vacate a previous Decision and Order by Justice Shlomo S. Hagler, J.S.C., dated December 10, 2018, that granted Defendants' motion to dismiss the original complaint. Justice Hagler heard oral argument on those motion on June 17, 2019 and Plaintiff withdrew that motion on the record. Thereafter, this Court lifted the stay on these motions and heard oral argument on August 20, 2019.

This matter originates in the October 10, 2011 apprehension of Plaintiff in Louisiana by Defendant Eugene Thacker a/k/a Tat-2 The Bounty Hunter, a bail enforcement agent, that was recorded and first aired on April 10, 2012 on a television program called "Big Easy Justice", which was owned/distributed by the other Defendants. Before commencing his action in New York, this matter was extensively litigated in Louisiana before it was dismissed (*see* Defendants' Exhibit 2, NYSCEF Document #71, pages 1-19).

On March 31, 2018, Plaintiff commenced this action by filing a summons and complaint asserting four causes of action: 1) Failure to Protect Plaintiff's privacy in violation of New York Civil Rights Law §§50 and 51; 2) Fraudulent Inducement and Breach of Contract; 3) Unconscionability of the Contract and 4) Vicarious Liability (*see* Original Complaint, NYSCEF Document #1).

On December 10, 2018, Justice Hagler, in a decision issued on the record, dismissed Plaintiff's complaint finding the causes of action were barred by release and the statute of limitations. In his decision, Justice Hagler noted that the Court of Appeals of Louisiana held that Plaintiff was not under duress when he signed the release and that his consent was not fraudulently obtained (*see* Defendants' Exhibit 2, NYSCEF Document #71, page 3). Before dismissing the original complaint, Judge Hagler read the pertinent aspect of release signed by Plaintiff into the record (*id.*, pages 5-6). It reads:

> "I hereby release, discharge and agree to hold harmless producer, its legal representative, and assigned and all persons acting under its permission or authority or those for whom producer is acting from any liability, from any and all claims, demands, costs, legal fees, or causes of action that it may now have or may hereinafter have whatsoever. Including, without limited to, any claims for defamation, invasion of privacy, or right of publicity, infringement of copyright, or trademark, fraud, misrepresentation, emotional distress, whether intentional or otherwise, that may incur in connection with my participation conclusion (or potential inclusion) in the program and any of the rights granted hereunder."

On December 4, 2018[1], Plaintiff filed and served an amended complaint asserting six causes of action: 1) Failure to Protect Plaintiff's privacy in violation of New York Civil Rights Law §§50 and 51; 2) Fraudulent Inducement and Breach of Contract; 3) Unconscionability of the Contract; 4) Vicarious Liability; 5) Fraud; and 6) Unjust Enrichment (*see* NYSCEF Document #44). The first four causes of action are identical to the those in the original complaint.

A comparison of the original dismissed complaint, the affidavits submitted in opposition to the previous motion to dismiss and the amended complaint reveals that any amendments pled in support of the first four causes of action were insufficient to resurrect these claims and their dismissal is required by the doctrine of law of the case. However, the newly pled causes of action, numbers 5 and 6, are ostensibly not affected by Justice Hagler's December 10, 2018 decision. Notwithstanding the foregoing, the court will address all the causes of action on their merits.

Pursuant to CPLR §§3211[a][5] and [7], Defendants move to dismiss the amended complaint on the basis that it was untimely filed, the claims are barred by the release Plaintiff signed, the causes of action are time barred and that Plaintiff has failed to state a claim (*see* Defendants' Memorandum of Law, NYSCEF Document #66, pages 1-13). In his opposition, Plaintiff counters that he signed the release under duress, Defendants' motion to dismiss the amended complaint is untimely, Defendants are "judicially estopped" from relying on the Louisiana determinations as to the release Plaintiff signed and that the cause of action for fraud is not time barred (*see* Plaintiff's Memorandum of Law, NYSCEF

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[1] During the June 17, 2019 oral argument on Plaintiff's reargument motion before Judge Hagler, the circumstances surrounding the filing of this amended pleading (NYSCEF Document #44) was discussed at length. It appears that the Court's e-file clerk had erred in requiring the amended pleading to be corrected when no correction was required. Ultimately, this amended pleading was received on the e-file system on January 8, 2019 (*see* NYSCEF Document #124, pages 2-24).

Document #80, pages 1-24). In reply, Defendants assert that the State of Louisiana already ruled on the release signed by Plaintiff and determined that it was not signed under duress or that Plaintiff's consent was obtained through fraud (*see also* Decision, NYSCEF Document #19). Defendants also assert Plaintiff abandoned his cause of action for unjust enrichment having failed to oppose that it is barred by the statute of limitations, that the claim for unjust enrichment is an "end-run" around his purportedly failed claim under New York Civil Rights Law (*see* NYSCEF Document #93).

Preliminarily, a review of the oral argument before Justice Hagler on June 17, 2019 revealed that Plaintiff's amended complaint, originally filed with the New York County Clerk on December 4, 2018, while the underlying motion to dismiss was pending, was apparently erroneously rejected. Plaintiff's precipitous amendment, the confusion concerning the clerk's error and the pending motion to dismiss the original complaint delayed Defendants motion to dismiss the amended complaint. Given these circumstances, this Court will proceed as if both the amended complaint and Defendants' motion to dismiss were timely filed.

On a motion to dismiss the complaint based on an executed release, it must be demonstrated that the release "unambiguously manifests the intent to resolve all claims between the parties, including those at issue in this action" (*see Tavoulareas v Bell*, 292 AD2d 256, 257 [1st Dept 2002]). Likewise, on a motion to dismiss on the grounds of statute of limitations, a defendant must show the time in which to sue has expired by establishing when the plaintiff's cause of action accrued (*see Lebedev v Blavatnik*, 144 AD3d 24, 28 [1st Dept 2016] citing *Benn v Benn,* 82 AD3d 548, 548 [1st Dept 2011]; *Cottone v Selective Surfaces, Inc.*, 68 AD3d 1038, 1041 [2d Dept 2009]).

Here, giving full faith and credit to the determination made by the Louisiana Court, Defendants have established that Plaintiff was not under duress when he signed the release and that Plaintiff's consent was not due to fraud. The broad language of this release shows that Plaintiff released the Defendants from "any liability, from any and all claims, demands, costs, legal fees, or causes of action" stemming from Plaintiff's October 10, 2011 apprehension (*see Philips South Beach, LLC v ZC Specialty Ins. Co.*, 55 AD3d 493 [1st Dept 2008])[A release "of any and all claims" deemed sufficient to warrant dismissal of the complaint]). In any case, as the release specifically bars claims for invasion of privacy, right of publicity, fraud and misrepresentation, it defeats Plaintiff's first, second and fifth causes of action.

Moreover, all the causes of action, to the extent they are cognizable, are time barred. A cause of action pursuant to New York's privacy statute (Civil Rights Law § 50, § 51) is subject to a one-year statute of limitations commencing from the first date of publication (*see Nussenweig v diCorcia*, 38 AD3d 339 [1st Dept 2007]; *Costanza v Seinfeld*, 279 AD2d 255, 255-256 [1st Dept 2001]). As the Plaintiff's likeness was exhibited on Big Easy Justice on April 10, 2012, the statute of limitations has lapsed.

A cause of action for fraud or fraudulent inducement has a six-year statute of limitations that begins to run from the time of the fraud or within two years from the time the fraud was discovered or with reasonable diligence, could have been discovered (*see* CPLR §213 [8]; *Epiphany Community Nursery School v Levey*, 171 AD3d 1 [1st Dept 2019]; *Norddeutsche Landesbank Girozentrale v Tilton*, 149 AD3d 152, 163 [1st Dept 2017]; *Prichard v 164 Ludlow Corp.*, 49 AD3d 408 [1st Dept 2008]). While Plaintiff attempts to extend the statute of limitations by relying on the airing of the television

program or the formal discovery response in Louisiana, that revealed that there was no arrest warrant[2], this claim is premised upon Plaintiff signing of the release, after seeing cameras, that occurred on October 10, 2011. Here, the claims accrued at the time of his arrest and expired before Plaintiff commenced this action. Likewise, the cause of action alleging the release is unconscionable, which concerns the formation process and the existence of meaningful choice, also has a six-year statute of limitations. That claim accrued at the time Plaintiff signed the release and is therefore time-barred (*see Lawrence v Miller*, 11 NY3d 588, 595 [2008]).

Concerning the unjust enrichment claim, the six-year statute of limitations generally accrues upon "the occurrence of the alleged wrongful act giving rise to restitution" (*see Swain v Brown*, 135 AD3d 629, 632 [1st Dept 2016] *quoting Kaufman v Cohen,* 307 AD2d 113, 127 [1st Dept 2003]; *see also Maya NY LLC, v Hagler*, 106 AD3d 583, 585 [1st Dept 2013]; *Bd. of Managers of Chelsea 19 Condo. v Chelsea 19 Assocs.*, 73 AD3d 581 [1st Dept 2010] [There is no identified statute of limitations period within which to bring a claim for unjust enrichment rather, the statute of limitations takes the form of the claim to which it is pled in the alternative]). Here, the wrongful act pleaded was Plaintiff's recorded apprehension that occurred on October 10, 2011 and, therefore, that claim is untimely.

Plaintiff's motion to vacate Judge Hagler's December 10, 2018 decision is denied. Plaintiff moved to vacate under CPLR §5015[4] which concerns whether the court had jurisdiction to render the order. Since Plaintiff appeared on the return date of the motion which resulted in the December 10 order, submitted opposition to the motion and participated in oral argument there can be no claim Justice Hagler lacked jurisdiction to issue the disputed order which dismissed the original complaint. Further, Plaintiff's filing of the amended complaint did not deprive Justice Hagler of jurisdiction to render his decision (*see Fownes Bros. & Co., Inc. v JPMorgan Chase & Co.*, 92 AD3d 582 [1st Dept 2012]). Plaintiff's motion for a default judgment against Defendants Eugene Thacker and Hook'em and Book'em Elite Fugitive Recovery is denied as moot.

Accordingly, based on the foregoing, Defendant's motion to dismiss (Seq. No. 4) is granted and Plaintiff's motions (Seq. Nos. 5 and 8) are denied.

10/29/2019
DATE

FRANCIS A. KAHN, III, A.J.S.C.
HON. FRANCIS A. KAHN III J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[X]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE

[2] In Louisiana, Plaintiff asserted that he was arrested because he missed a traffic court hearing for a traffic ticket and Defendants contended that Mr. Draughn was arrested for Illegal Possession of Stolen Things (*see Draughn v Thacker*, 165 So3d 1010, fn 1 [La App 5th Circuit 2014]).