

**Boone Associates, L.P. v Leibovitz**

2004 NY Slip Op 30204(U)

July 22, 2004

Supreme Court, New York County

Docket Number: 0117650/2003

Judge: Bernard J. Fried

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

PRESENT: BERNARD J. FRIED  
J.S.C. Justice

PART 60

01 1765012003

BOONE ASSOCIATES, L.P.  
VS  
LEIBOVITZ, A W E

SEQ 1

SUMMARY JUDGMENT

INDEX NO. 117650-03  
MOTION DATE 5-13-04  
MOTION SEQ. NO. 1  
MOTION CAL. NO. 4

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

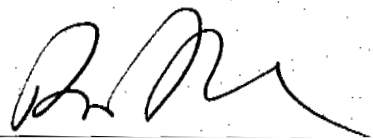
Upon the foregoing papers, it is ordered that this motion

This Motion by DEFENDANT ANNIE LIEBOVITZ for an order dismissing the complaint is GRANTED in accordance with the memorandum decision filed herewith,

SO ORDERED

FILED  
JUL 23 2004  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 7/22/04



Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate: NOT POST  
Check if appropriate: DO NOT POST

J. FRIED

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 60

-----X  
BOONE ASSOCIATES, L.P. d/b/a  
THE MARY BOONE GALLERY,

Index No.: 117650/03

Plaintiff,

-against-

-----X  
ANNIE LEIBOVITZ,

Defendant.  
-----X

FRIED J.:

Defendant, Annie Leibovitz (“Leibovitz”), moves for summary judgment, pursuant to CPLR §3212, asserting that the action was not commenced within the limitations period set forth in CPLR §213. Plaintiff opposes defendant’s motion **and** cross-moves for summary judgment.

Plaintiff, Boone Associates, L.P. d/b/a The Mary Boone Gallery (“Boone”), is a domestic limited partnership that purchases and sells works of fine **art**. Plaintiff also operates the **Mary** Boone Gallery, an **art** gallery with two locations in New York City. This action has been brought against Leibovitz, a New York-based portrait photographer, for breach of contract and unjust enrichment.

On or about August 1, 1990, an oral contract was entered into between Boone and Leibovitz, obligating Leibovitz to take five photographic portraits of specific subjects in exchange for \$197,000. According to the complaint, a lump sum of \$197,000, instead of a per-portrait **price**, was paid in advance to ensure that all five portraits “be taken **and** delivered promptly.” Four portraits were taken and delivered within a month of the contract signing. The final portrait was never taken because the subject, who was ill on

the day of the shoot, later died. Plaintiff now alleges that Leibovitz promised to take a portrait of plaintiffs principal, Mary Boone, and her young son, as a substitute for the fifth portrait.

It is claimed that defendant, Leibovitz, has continually refused to ~~fulfill~~ this obligation and in the last eighteen months before the action was begun, had scheduled and ~~inexplicably cancelled seven firm appointments to take this final portrait.~~ In support of this claim, submitted are three communications with Leibovitz: a letter dated December 18,2001 from James Moffat of Art + Commerce, Leibovitz's agency, to Mary Boone ("It is my understanding that you are owed a portrait by Annie Leibovitz, **As** soon as Ms. Leibovitz returns, at the beginning of January, I will confirm this with her..."); an e-mail dated June 18,2003 from Anna Quimby of **Art + Commerce** to Mary Boone ("I wanted to write to let you know that although we can offer no statements promising a shoot will take place on a given day..., we are making every effort possible to make the shoot happen at a time agreeable to you. We will ~~try~~ to set a date for Max to come in to meet *Annie*...I should have some information on Monday and will call you then..."); and **an** undated, handwritten note from **Annie** Leibovitz to Mary Boone written after plaintiff already commenced the action ("...I never meant for this situation to get out of hand - I was shocked when you decided to sue me...I really was looking forward to doing our session...My wish is that we could work this out between us...").

Defendant moves for **summary** judgment on the grounds that: (1) she performed all her obligations under the agreement,' (2) the breach of contract and unjust enrichment claims are barred by the statute of limitations; and (3) plaintiffs claims are barred by laches. Because the statute of limitations claim is persuasive, for the reasons stated below, the motion is granted.

CPLR §3212 provides that a motion for summary judgment should be granted if, upon all the papers and proofs submitted, the cause of action or defense is established sufficiently to warrant the court, as a matter of law, in directing judgment in movant's favor. It is well established that summary judgment should not be granted where triable issues of fact are raised which cannot be resolved based on conflicting affidavits. (e.g., Talansky v. Schulman, 2 AD3d 355,357 [1<sup>st</sup> Dept., 2003]). The initial burden therefore is on the moving party to prove with admissible evidence, that as a matter of law, no material issue of fact exists; the burden then shifts to the opposing party to demonstrate, by admissible evidence, the existence of a factual issue requiring a trial. The motion should be scrutinized in the light most favorable to the opposing party. (See Zuckerman v. The City of New York, 49 NY 2d 557 [1<sup>st</sup> Dept., 1980]; McKinnon v. Bell, 268 AD 2d 220 [1<sup>st</sup> Dept., 2000]).

With these familiar principles in mind, I turn to the issue of whether the claims for breach of contract **and** unjust enrichment are barred by the applicable six year statute of

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Leibovitz states that her long-standing cancellation policy, customary of photographers of her stature, is that a client **will** receive a **fifty** percent refund if more than two days notice of cancellation is given. If the session is cancelled with less than two days notice, no refund is given. Defendant claims that only one or two hours notice of cancellation was given the day of the final shoot; thus, her fee was fully earned.

limitations, CPLR §2 13, which begins to ~~run~~ when a contract is breached or when one party omits the performance of a contractual obligation. (See e.g., Squeri v. Moriches, 307 AD2d 260 [2<sup>nd</sup> Dept., 2003] citing Airco Alloys Div. v. Niagara Mohawk Power Corp., 76 AD2d 68, 80 [4<sup>th</sup> Dept., 1980]). If the “duration of a contract is ambiguous, courts will imply a ‘reasonable time’ based on the circumstances of the negotiations of the ~~parties to determine their intent.~~” (New Enyon Associates. L.P. v. Lehman Brothers Holdings. Inc., 275 AD 2d 642, 643 [1<sup>st</sup> Dept., 2000]). The cause of action accrues and the statute begins to run as soon as a reasonable time has expired. (Lituchy v. Guinan Lithographic Co. Inc., 60 AD2d 622,400 [2<sup>nd</sup> Dept., 1977]). Here, a reasonable time is presumed because no fixed time period for the completion of the portraits ~~was~~ given. Because it was material to plaintiff in entering into the agreement that the photographs be “taken and delivered promptly,” and because Leibovitz delivered four photographs within approximately one month of the execution of the August 1990 agreement, it can be inferred that the reasonable time for completion of the five portraits would be by late summer or early autumn 1990. Thus, any claim plaintiff may have against Leibovitz expired sometime in 1996.

Plaintiff argues that what is considered a “reasonable time” presents an issue of fact and claims that the statute of limitations has not run because Leibovitz continually promised to take the fifth portrait during the past 13 years. This claim that Leibovitz scheduled photo shoots, but invariably cancelled them is allegedly supported by the submitted documents. These documents are said to constitute either a continuous contract or a new one. However, no evidence of any communications regarding a

continuous or new contract between the parties within the six year period following the alleged breach has been submitted. The earliest evidence of any communication is the 2001 letter from Leibovitz's representative, James Moffat, to Mary Boone, a letter sent more than eleven years after the contract **was** entered into **and** long after the statute of limitations would have expired.

~~In addition, these documents do not comply with the requirement of New York~~  
 General Obligations Law § 17-101, which provides that “an acknowledgment or promise contained in a writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract” to restart the statute of limitations. The writing must recognize the existing obligation, contain nothing inconsistent with the intention on the part of the obligor to honor it, and be more than a hint, reference, or discussion of the old obligation. (Lew Morris Demolition Co., Inc. v. Board of Ed. of the City of New York, 40 NY2d 516, 521 [1<sup>st</sup> Dept., 1976]). If it is an offer to settle the claim, such an offer does not constitute an acknowledgment where it does not acknowledge liability, but merely recognizes that there is a dispute and offers a compromise to resolve that dispute. (Nagle v. Herold, 30 F.Supp. 905,909 [W.D.N.Y., 1939]). Here, the first two communications are from Leibovitz's representatives, not Leibovitz herself, and neither is an unequivocal recognition of an obligation to take a fifth portrait, nor has it been signed by the obligor as required by §17-101. This handwritten note from Leibovitz obviously relates to trying to settle the dispute and was transmitted after the filing of this suit. It does not explicitly acknowledge the 1990 obligation or contain a new promise to take the fifth photograph. Thus, it cannot be concluded that the statute of limitations was

renewed.

Moreover, even if the communications were transmitted within the six-year statute of limitations, they are offers to resolve the dispute, and are not admissible pursuant to CPLR 54547 which, in part, provides:

Evidence of (a) furnishing, or offering or promising to furnish, or (b) accepting, or offering or promising to accept, any valuable consideration in ~~compromising or attempting to compromise a claim which is disputed as~~ to either validity or amount of damages, shall be inadmissible as proof of liability for or invalidity of the claim or the amount of damages. Evidence of any conduct or statement made during compromise negotiations shall also be inadmissible...

The purpose of this statute is to allow parties the freedom to discuss resolution of their disputes, whether they are legitimate or not, without being exposed to those negotiations being used against them.<sup>2</sup> (Barker & Alexander, Evidence in New York State and Federal Courts, §408.1 [1996]).

Accordingly, it is

ORDERED that the cross-motion for summary judgment is denied;<sup>3</sup> and it is further

ORDERED that the motion to dismiss is granted and the complaint is dismissed

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Defendant cites a fourth written letter, dated January **10,2002**, from James Moffat of Art + Commerce to Mary Boone, which states that Leibovitz offered to schedule a shoot in March **2002** and that Boone should “note that this offer is a courtesy. Because of the long passage of time, Annie Leibovitz is under no legal obligations to do this shooting or to refund the money.” Defendant contends that the 2003 e-mail from Anna Quimby regarding the timing of a **shoot** is an extension of Leibovitz’s courtesy offer.

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In light of the dismissal of the action, there is no need to discuss plaintiffs cross-motion for summary judgment.

with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 7/22/04



J.S.C.  
**BERNARD J. FRIED**  
J.S.C.

**FILED**

10 5 2004

CCU  
OFFICE