

<b>Harlock v Scott Kay, Inc.</b>
2004 NY Slip Op 30374(U)
April 19, 2004
Supreme Court, New York County
Docket Number: 601743/03
Judge: Richard B. Lowe III
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*Supreme Court of the State of New York*

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

*00*

PRESENT: \_\_\_\_\_  
*Justice*

PART 56

*Jane HARLOCK et al.*

INDEX NO. 601743/03

MOTION DATE 1/12/04

MOTION SEQ. NO. 01

MOTION CAL. NO. \_\_\_\_\_

*- v -*  
*Scott & Co Inc.*

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

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

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

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

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

**FILED**

APR 22 2004

NEW YORK COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 1/12/04

*[Signature]*  
\_\_\_\_\_  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: PART 56

-----X  
 JAIME HARLOCK and CLICK MODEL  
 MANAGEMENT, INC.,

Plaintiffs,

-against-

Index N<sup>o</sup> 601743/03

SCOTT KAY, INC. and JOHN DOES, 1-5.

Defendants.

-----X  
 RICHARD B. LOWE, III, J.:

This is a motion by defendant, Scott Kay, Inc. (Scott Kay) for an order, pursuant to CPLR 3212, dismissing the causes of action contained in the complaint. Plaintiffs cross-move for an order, pursuant to CPLR 3212, granting partial summary judgment against defendant as to liability; for an order, pursuant to CPLR 3211, dismissing defendant's affirmative defenses; and an order, pursuant to CPLR 3124, compelling defendant to appear for a deposition.

**BACKGROUND**

Plaintiff Jaime Harlock (Harlock) is a professional fashion model, and plaintiff Click Model Management, Inc. (Click) is in the business of managing models. Scott Kay is a corporation in the business of selling, and or distributing, among other things, engagement rings and wedding bands. It is undisputed that Harlock attended two separate photo shoots for Scott Kay, the first photo shoot (Shoot 1) on June 19, 2000, and the second photo shoot (Shoot 2) on June 21, 2001, and that Harlock was represented by Click at the times of the photo shoots. On or about June 28, 2000, Click invoiced Scott Kay the sum of \$5,400.00 for Shoot 1, representing \$4,500.00 for Harlock's fee, and \$900.00 for Click's commission. On or about June 28, 2001,

Click invoiced Scott Kay, the sum of \$5,400.00 for Shoot 2, again, representing \$4,500.00 for Harlock's fee, and \$900.00 for Click's commission. Scott Kay paid both invoices in full. What the parties dispute are two written forms, printed and supplied by Click, which are filled out on top by Harlock, and signed on the bottom by both Harlock and a representative of Scott Kay. The information on top includes, among other things, the client's name and address, the date and length of time allocated for the photo shoot, the fee, and the overtime rate. Directly below this information, read the words "MODEL'S RELEASE." Approximately six spaces are left blank in the first few lines of the printed form. No other words are added, and no words are crossed out. At the bottom of the form are the signatures of the client's [Scott Kay's] representative and that of the model, Harlock. This is not disputed.

Harlock's photos from Shoot 1 appeared in bridal magazines prior to June 28, 2001 and the photos taken in Shoot 2 have appeared in bridal magazines prior to June 28, 2002. However, it is also alleged by plaintiffs, and not disputed by defendant, that the photos taken in both shoots have continued to be used by Scott Kay, in both still and videotape formats, in non-bridal magazines. The use includes InStyle magazine, Marie Claire magazine and Scott Kay's website. According to plaintiffs, not only have they not received payment for such use, but that the use itself is unauthorized. As a result, plaintiffs commenced this action seeking damages based on defendant's alleged breach of contract, invasion of privacy under section 51 of the New York Civil Rights Law, and invasion of plaintiffs' right of publicity.

Plaintiffs contend that Harlock never executed releases, and that the purported releases (Defendant's Exhibit 6) relied upon by Scott Kay, are actually vouchers, confirming her work activity, and nothing more. According to Harlock, she executed a voucher for each photo shoot

because “[i]t is my ordinary business practice to execute vouchers when I attend photographic shoots as a model because they enable me to keep a record of the jobs that I have performed and they are a signed acknowledgment by the client that I attended the shoot” (Harlock Affidavit, at 4). Harlock further explains that the payment received for each shoot entitled Scott Kay to utilize the photographs taken at each shoot, only in bridal magazines, and only for a period of one year from the date of each invoiced shoot.

### DISCUSSION

Scott Kay’s motion for summary judgment dismissing the complaint is granted.

The release states, in relevant part:

In consideration of receipt of the fee (inclusive of service fee) negotiated with my manager, I hereby sell, assign and grant to \_\_\_\_\_ and \_\_\_\_\_. The right and permission to copyright and/or use and/or publish one photograph or likeness of me in which I may be included in whole or in part of composite or reproduction thereof in color or otherwise, in the United States and \_\_\_\_\_ for \_\_\_\_\_ for \_\_\_\_\_ for \_\_\_ months to begin no later than four (4) months from this date.

Scott Kay contends that each time Harlock signed this form, as is, without adding or deleting any terms, she effectively signed releases that are unlimited as to time or medium of use. Plaintiffs contend that the failure of the signing parties to fill in the blank spaces demonstrates that the voucher was never intended to be used as a release.

It is well settled that a general release is governed by principles of contract law and that the traditional bases for setting aside written agreements, such as a release, are duress, illegality, fraud, or mutual mistake, which must be established by the party challenging the release, or the release stands (Mangini v McClurg, 24 NY2d 556, 562 - 563 [1969]). “In the absence of these factors, if the language of the waiver is clear and unambiguous, the claim by one party that it

intended something else is insufficient to vitiate the waiver's force and effect" (L & K Holding Corp. v Tropical Aquarium at Hicksville, Inc., 192 AD2d 643, 645 [2<sup>nd</sup> Dept 1993]). Harlock's claim that the release was intended only to be a confirmation that the photo shoot had occurred, contradicts the plain language of the release. Furthermore, the spaces left blank do not render vague the essential terms of the release (Express Industries and Terminal Corp. v New York State Dept. of Transp., 93 NY2d 584, 589 - 590 [1999]).

Plaintiffs' contention that the "purported release" raises "more factual questions than it resolves" (Moody Affidavit, ¶ 26), is without merit. Click does not dispute that it prepared the form, and if there exists any ambiguity in the language of the form, such ambiguity is construed against the drafter, Click (Guardian Life Ins. Co. of America, Inc. v Schaefer, 70 NY2d 888, 890 [1987]). However, the words "Model's Release" are clear, and the remaining language is equally clear, unequivocal and unambiguous. "If the signer could read the instrument, not to have read it was gross negligence; if [s]he could not read it, not to procure it to be read was equally negligent; in either case the writing binds [her]" (Pimpinello v Swift & Co., Inc., 253 NY 159, 162 - 163 [1930]).

#### CONCLUSION

Accordingly, it is


ORDERED that the motion to dismiss is granted and the complaint is dismissed with costs and disbursements to defendant Scott Kay, Inc. as taxed by the Clerk of the Court; and it is further

ORDERED that plaintiffs' cross motion is denied in its entirety; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: April 19, 2004

ENTER:



J.S.C.

RICHARD S. LOWE III

**FILED**  
APR 22 2004  
NEW YORK  
COUNTY CLERK'S OFFICE