

**Obremski v The Image Bank, Inc.**

2005 NY Slip Op 30194(U)

April 11, 2005

Supreme Court, New York County

Docket Number: 0600394/2002

Judge: Richard B. Lowe

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

HON. RICHARD B. LOWE, III

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

PART 56

George Obremski

INDEX NO. 600394/02

MOTION DATE 9/21/04

MOTION SEQ. NO. 003

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

- v -

The Image Bank Inc et al

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

**FILED**  
APR 15 2005  
NEW YORK  
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM DECISION**

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

HON. RICHARD B. LOWE, III

Dated: 4/11/05

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

-----X  
GEORGE OBREMSKI,

Plaintiff,

Index No. 600394/02

-against-

THE IMAGE BANK, INC., n/k/a GETTY IMAGES  
(US), INC., GETTY IMAGES, INC. and EASTMAN  
KODAK CO.,

Defendants.  
-----X

**RICHARD B. LOWE, III, J.:**

Motion sequence numbers 3 and 4 are herewith consolidated for disposition.

Defendants the Image Bank, Inc. n/k/a Getty Images, Inc. and Getty Images, Inc. (together, the Image Bank) and Eastman Kodak Co. (Kodak)<sup>1</sup> each moves for an order, pursuant to CPLR 3212, granting summary judgment in their favor dismissing the second amended complaint, dated April 12, 2003 (Complaint) of plaintiff George Obremski on the ground that there are no triable issues of fact.

Plaintiff opposes the Image Bank's entitlement to summary judgment, and, additionally, cross-moves for an order: (a) granting partial summary judgment to plaintiff as against the Image Bank on the issue of liability with respect to the ninth, tenth, eleventh and twelfth causes of action in the Complaint; and (b) pursuant to CPLR 3025(b), permitting plaintiff to serve a third amended complaint to add an additional cause of action for breach of contract.

Kodak's motion for summary judgment is granted without opposition. The Image Bank's motion for summary judgment is granted with respect to all causes of action set forth in

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<sup>1</sup> The Image Bank was a wholly-owned subsidiary of Kodak until approximately 1999, when the Image Bank was acquired by and/or sold to Getty.

\* 3 ]  
the Complaint, except the sixteenth cause of action. Plaintiff's cross motion is denied in all respects.

### BACKGROUND

Plaintiff is a professional photographer. The Image Bank is a photographic stock agency that acts as an agent for the sale or lease of photographers' photographic images (including, without limitation, slides and transparencies).

On or about February 24, 1977, plaintiff and the Image Bank entered into a written contract entitled "Standard Photographers Exclusive Agency Agreement" (Agreement) in which plaintiff gave the Image Bank the right to act as his exclusive worldwide agent and representative for the sale and leasing of stock images which plaintiff delivered to the Image Bank. The Image Bank promised to use its best efforts to sell and lease such materials. The Agreement was for a term of four years, beginning on February 24, 1977, and was automatically renewed every four years, for the 20 years from 1977 through 1997.

As to commissions, the Agreement provides that "[t]he Agency shall receive as its compensation a sum equal to Fifty (50%) Percent of the total net sums billed and collected by the Agency for the sale or lease of the Photographer's material" (Agreement ¶ 2).

As to the return of images, paragraph 10 of the Agreement provides that, after four years, plaintiff has the right to request a return of his materials, as follows:

The Photographer agrees that transparencies or slides submitted to the Agency, shall remain with the Agency for four (4) years from the date hereof. If, subsequent to this period, the Photographer requests a return of all such materials, then a one and a half (1½) year period from the date of the request for return shall be considered a reasonable period of time for such re-assembly and re-delivery.

Plaintiff added the following language: "I will agree to make that 4 years as the

[\* 4 ]  
term of the contract, and 1½ years as a time limit for recalling material.”

In paragraph 17 of the Agreement, plaintiff acknowledged that, through normal usage, materials may be lost or damaged over the years, without liability to the Image Bank:

The Photographer understands that photographic materials may, over the years, be lost or damaged or even fade through normal usage. Accordingly, the Photographer agrees that if at the termination of this agreement, a full return of his materials cannot be made because of the foregoing, then the Agency shall have no liability therefor.

The parties added the following language to the paragraph: “The Image Bank shall keep a numerical record of every transparency and shall have a record of how and when it was lost or damaged if such shall occur and what compensation was made for it.”

Additionally, paragraph 7 of the Agreement contains a limitation of liability provision, exculpating the Image Bank for loss or damage to plaintiff’s materials, except when caused by the Image Bank’s gross and willful negligence:

The Photographer agrees that the Agency shall not be liable to him, his heirs and assigns, for any loss or damage to the materials submitted to the Agency during the term hereof, unless caused by the agency’s gross and willful negligence.

The following language was added to paragraph 7: “[o]f course there will be no gross and willful negligence by the Agency but all efforts will be taken by the Agency to secure the minimum value of \$1,500 for each photo and legal proceedings.”

The Agreement further provides that, “[i]n the event of damage, destruction, loss or unauthorized use of [plaintiff’s materials] by the Agency’s customer, the Photographer hereby grants the Agency full and complete authority to make claims or institute suits in his name. . . . All settlements shall be at the Agency’s sole and complete discretion” (Agreement ¶ 3).

\* 5 ]

According to plaintiff, during the twenty-year period from February 24, 1977 to February 23, 1997, he delivered more than 167,000 original slides to the Image Bank, of which the Image Bank retained 114,292.<sup>2</sup>

In November 1996, the Image Bank notified plaintiff that the Agreement would terminate as of February 23, 1997. On or about February 23, 1997, plaintiff requested in writing that the Image Bank return to him all of his approximately 114,000 slides that were still in the Image Bank's possession.

The Image Bank's termination of plaintiff's Agreement was part of a corporate decision to decrease the images in its stock. Thus, at or about the same time as the Image Bank terminated the Agreement with plaintiff, it terminated many other photographers' contracts too. The Image Bank had guidelines in place governing the return of images from its offices upon termination of a photographer's agreement, and, among other things directed its offices to return the released photographer's images to the main office as soon as possible, and in so doing, to comply with its packaging, shipping and sorting procedures. According to the Image Bank, it employed "sorting" personnel, who were trained at identifying the various photographers' images, differentiating between original and duplicate slides, and processing the return of such images. Various employees of the Image Bank attest to the fact that the Image Bank employed its customary return procedures with respect to the return of plaintiff's images. Nevertheless, based on the high volume of images the Image Bank was processing for return to its many released photographers at the same time, a backlog in processing and returning the slides ensued.

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<sup>2</sup> In other contexts, plaintiff states that the Image Bank retained 90,382 of the 167,000 slides he submitted.

According to plaintiff, by August 23, 1998, 18 months after he requested the return of his materials from the Image Bank, he received only about 31,000 slides, many of which were duplicates and/or damaged. In the following four years he alleges that he received another 41,000 slides, many of which were also duplicates or damaged, and that, on or about January 30, 2002, when he commenced this action, approximately 42,000 of his slides were still missing. After this action was begun, approximately 25,000 more slides were located and returned to plaintiff. At present, plaintiff calculates that approximately 16,500 slides have still not been returned to him. According to plaintiff, these unaccounted for slides contain a disproportionately high number of his better and more recent slides. The Image Bank submits that, despite diligent efforts, it has been unable to locate or recover these 16,500 slides, and that these slides should now be considered lost.

The first, third, fifth, seventh and eighth causes of action in the Complaint all relate to plaintiff's claim that the Image Bank sold or leased a number of his slides, duplicates and/or original color transparencies during the term of the Agreement, but paid a commission to him of less than the 50% called for by the Agreement. He claims that he was underpaid by approximately \$200,000.<sup>3</sup>

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<sup>3</sup> The "commission-related" causes of action are as follows: (first cause of action) breach of contract - for underpayment of commissions due under the Agreement for the sale or lease of his slides and/or duplicates for the period February 24, 1996 to February 23, 1997; (third cause of action) breach of contract - for underpayment of commissions due for slides and/or duplicates under the Agreement from February 23, 1997 to January 29, 1998; (4); (fifth cause of action) breach of contract - for underpayment of commissions due for slides and/or duplicates under the Agreement from January 30, 1998 to present; (seventh cause of action) breach of contract - for underpayment of commissions due under the Agreement for the sale or lease of plaintiff's slides - original color transparencies - for the period February 24, 1997 to January 29, 1998; and (eighth cause of action) breach of contract - for underpayment of commissions due under the Agreement for slides - original color transparencies - for the period January 30, 1998 to present.

The ninth cause of action is based on the "late" return of plaintiff's slides. In this cause of action, plaintiff claims that he is entitled to damages for the Image Bank's failure to return 40,466 slides by August 23, 1998 (i.e., eighteen months after the date he requested the return of his photos). Specifically, paragraph 97 of the Complaint states:

97. In defendant Image Bank failing, through its willful and gross negligence, to return a total of at least 40,466 slides to Obremski by August 23, 1998, the defendants breached the Agreement and damaged Obremski in the amount of \$19,885,000 (nineteen million eight hundred eighty-five thousand dollars) in lost earnings plus interest accruing from August 23, 1998 until the date of return of each slide.

In the tenth and eleventh causes of action, also based on breach of contract, plaintiff seeks damages for a number of slides that were returned to him in an "irretrievably damaged" condition, which he alleges was caused by the Image Bank's negligence and/or gross and willful negligence (Complaint ¶¶ 98 - 105).

The twelfth cause of action, likewise for breach of contract, seeks damages for the Image Bank's failure to return 41,688 slides to plaintiff, which he alleges was caused by defendants' negligence and/or gross and willful negligence (Complaint ¶¶ 106 - 109). As previously mentioned, the unreturned (and presumed lost) slides presently numbers about 16,500.

The thirteenth cause of action seeks damages for the Image Bank's alleged improper storage of plaintiff's slides, as well as its alleged failure to use its best efforts to sell or lease plaintiff's slides (Complaint ¶¶ 110 - 111).

In the fifteenth cause of action, plaintiff alleges that the Image Bank improperly packaged slides for shipment to plaintiff, resulting in the loss of 1,439 slides during the shipping

process, and that same was caused by defendants' negligence and/or gross and willful negligence (Complaint ¶¶ 114 - 117).

In the sixteenth cause of action, plaintiff alleges that, in breach of the Agreement, plaintiff did not receive payment from the Image Bank for its sale or lease of one of plaintiff's slides to DK Publishing of London (which printed plaintiff's photograph on the cover of a book it published) (Complaint ¶¶ 118 - 119).<sup>4</sup>

Defendants' answer to the Complaint, dated May 9, 2003 (Answer), contains general denials as well as a number of affirmative defenses, including the fifth affirmative defense, which states:

43. Because Plaintiff expressly consented to and acknowledged that The Image Bank could disseminate his original images to clients and licensees throughout the world, Plaintiff expressly assumed the risk of loss of, and damage to, his images unless such was caused by said Defendant's gross and willful negligence.

44. Any loss of, or damage to, Plaintiff's images was not a result of The Image Bank's gross and willful negligence.

Similarly, in the eighth affirmative defense, defendants allege that "[a]ny loss, damage or injury Plaintiff has suffered is a direct result, not of The Image Bank's gross and willful negligence, but of normal usage, for which Plaintiff released said Defendant of any liability" (Answer ¶49).

Discovery is complete and a Note of Issue has been filed.

### DISCUSSION

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<sup>4</sup> Plaintiff has withdrawn all of the causes of action for fraud (second, fourth, and sixth causes of action), one of the causes of action for improper packaging of slides (fourteenth cause of action), and all of the causes of action based on alleged violations of New York Arts and Cultural Affairs Law (seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second and twenty-third causes of action).

\* 9 ]

In the first, third, fifth, seventh and eighth causes of action, plaintiff claims that the commissions he received from the Image Bank were not calculated in accordance with the applicable provision in the Agreement, i.e., paragraph two, which provides that “[t]he Agency shall receive as its compensation a sum equal to Fifty (50%) Percent of the total net sums billed and collected by the Agency for the sale or lease of the Photographer’s material.”

The Image Bank contends that, as a matter of law, it is entitled to summary judgment dismissing the commission claims. The Image Bank maintains that the term “net sums,” in paragraph two of the Agreement, reflects the parties’ agreement to utilize the Image Bank’s procedure, customary in the industry, whereby its licensees took their own commissions (generally 40%) from sales before remitting payment to the Image Bank. The balance remitted to the Image Bank, generally 60% of the fee paid by the customer, constituted the Image Bank’s “net sums billed and collected,” from which, the Image Bank would pay the photographer 50% of that net sum, and pay itself the remaining 50%. Stated otherwise, after deducting the 40% commission paid to the licensee, plaintiff and the Image Bank split the remaining 60%, and, thus, each receiving 30% of the gross fee paid.

Plaintiff, however, contends that summary judgment should be denied because it was the parties’ intent that he was to receive a 50% share of the gross proceeds, without any reduction for sums or percentages paid to licensees or agents.

Plaintiff’s claim finds no support in the record. The language of the Agreement provides for payment, based not on the “gross” sums collected, but rather on the “net” sums collected. Thus, the language of the Agreement supports the interpretation offered by the Image Bank. Moreover, even if there is any merit to plaintiff’s position, for twenty years he accepted

payment calculated in the manner urged by the Image Bank, and thus ratified the Image Bank's interpretation. Accordingly, summary judgment is granted to the Image Bank with respect to the first, third, fifth, seventh and eighth causes of action.

The remaining viable causes of action (except the sixteenth cause of action) all concern the loss of, damage to, or late return of, plaintiff's slides.

The Image Bank contends that summary judgment should be granted dismissing these causes of action because: (a) the limitation of liability provision in the Agreement is applicable to plaintiff's claims, and exonerates the Image Bank from any liability for the loss of, or damage to, plaintiff's slides unless "caused by [the Image Bank's] gross and willful negligence" (Agreement ¶ 7); and (b) the Image Bank's actions were neither grossly nor willfully negligent.

Plaintiff argues that the Image Bank's motion should be denied, and that the court should instead grant his cross motion for partial summary judgment against the Image Bank for the late return of 43,000 slides (ninth cause of action), the loss of 16,500 slides (twelfth cause of action), and the damage to 299 slides (tenth and eleventh causes of action). Plaintiff argues, among other things, that: (a) the Image Bank breached the Agreement which required it to return all of plaintiff's slides within a strict deadline of one and one-half years; (b) the limitation of liability provision in paragraph seven of the Agreement pertains only to lost or damaged slides, not to the "late" return of slides; and (c) in any event, the Image Bank's conduct was grossly and wilfully negligent.

A contractual provision absolving a party of liability for ordinary negligence is generally enforceable (Sommer v Federal Signal Corp., 79 NY2d 540, 553 [1992]; Farhardi v

Albany Ins. Co., 137 AD2d 429, 431 [1<sup>st</sup> Dept 1988]), but public policy forbids a contractual waiver of liability for grossly negligent conduct (Colnaghi, USA, Ltd. v Jewelers Protection Services, Ltd., 81 NY2d 821, 823 [1993]; see also Lubell v Samson Moving & Storage, Inc., 307 AD2d 215, 216 [1<sup>st</sup> Dept 2003]). Gross negligence is “conduct that evinces a reckless disregard for the rights of others or ‘smacks’ of intentional wrongdoing” (Colnaghi, USA, Ltd. v Jewelers Protection Services, Ltd., *supra*, 81 NY2d at 823-824, citing Sommer v Federal Signal Corp., *supra*, 79 NY2d at 554).

The Image Bank relies on Rivkin v Brackman (167 AD2d 239 [1<sup>st</sup> Dept 1990]), which as in this case, involved a photographer’s claim against a stock photography agency for lost images. In Rivkin, as here, the contract anticipated that the agency would circulate plaintiff’s images worldwide, and protected the agency against liability in the event all images were not returned:

The agency was authorized to submit any pictures on consignment to prospective agents or clients anywhere in the world and to seek to obtain the safe return of all material submitted. However, the agency was not to be held liable to the photographer for the failure of the consignee to return material so submitted.

(Id. at 241).

The First Department recognized that “[t]hese types of provisions are clearly valid . . . and they have repeatedly been upheld by the courts” (id.). Finding that the plaintiff presented no evidence approximating the gross and willful negligence “required to avoid operation of the exculpatory and limitation of liability clauses,” the First Department affirmed the grant of summary judgment to the agency (see also Adamo v Corbis Corp., NYLJ, Dec. 30, 2002 at 19, col 2 [Sup Ct, NY County, Lowe, J.] [“(t)his limited liability clause is accepted throughout the

stock photograph industry as standard practice, simply because over the course of time and shipment all over the globe, the possibility of loss, theft or damage exists to a large extent”)).

These cases thus stand for the proposition that courts will apply an exculpatory provision limiting a stock photography agency’s liability to gross and willful negligence under the same circumstances as are presented here. Furthermore, the Rjvkin and Adamo cases illustrate the application of the “gross and willful negligence” standard in this business context, and show that the loss of some images does not, without more, demonstrate gross and willful negligence. Applying the holding in those cases to this action, the court holds that plaintiff cannot recover for his alleged losses, whether caused by loss, damage, delay (including “late return” of slides), or otherwise, unless it is shown that the Image Bank’s actions were wilfully and grossly negligent.

In response, plaintiff points to another case involving a photographer’s claims for lost transparencies, Roth v Black Star Publishing Co., Inc. (239 AD2d 484 [2d Dept 1997]). In Roth, the Second Department applied the rule that, in the case of a bailment, the failure to return the object bailed, is prima facie evidence of gross negligence requiring the bailee to come forward with an explanation (id. at 485, citing Voorhjs v Consolidated Rail Corp., 60 NY2d 878 [1983]).

In support of its contention that plaintiff’s images were subjected to “normal usage,” and that its handling of the images was responsible and reasonable, the Image Bank submits evidence showing that: (a) it marked plaintiff’s originals with tracking numbers and packaged them before sending them to its offices and/or customers worldwide; (b) instructed its employees in its offices, and the offices of independent licensees, to store and handle all originals

with care; (c) following plaintiff's request for the return of his images, instructed all offices to gather and return the images; (d) trained personnel on the protocol for sorting and handling images returned from its offices; (e) sorted images at the main office as they were returned from the other offices, making adjustments along the way in staffing and procedures so as to continue improving the return process; and (f) returned plaintiff's images to him as they were received by the main office from the satellite offices and customers.

In opposition, plaintiff asserts that the loss of, and damage to, his slides was caused by inadequate staffing of the Image Bank's returns department, and that the Image Bank's conduct, in this regard, amounted to willful and gross negligence. He argues that the Image Bank's alleged efforts to return his images were nothing more than meaningless gestures to placate him.

The Image Bank contends that it has shown, and plaintiff has failed to rebut, that it reasonably handled plaintiff's images. It further contends that the evidence establishes that the damage and loss in question resulted from "normal usage," and that plaintiff has not come forward with a factual basis to support his claim that the damage to, or loss of, his images was caused by something other than "normal usage" and, that such usage, constituted gross or willful negligence.

While the Image Bank's decision to release many photographers at the same time, and then to attempt to collect and return the photographers' slides during the same time frame, without sufficient staff to handle this allegedly daunting task, may have been irresponsible - or even negligent - the evidence does not support a finding that the Image Bank's behavior was careless to the point of exhibiting a complete disregard for plaintiff's rights (see Sommer v

Federal Signal Corp., *supra*, 79 NY2d at 554). Thus, regardless of whether plaintiff's claims are analyzed from a bailment perspective or from a contract perspective, the result is the same - - plaintiff has failed to come forward with evidence to rebut the Image Bank's showing that its actions were neither grossly nor wilfully negligent. As such, plaintiff has failed to raise a triable issue of fact with respect to the lost and damaged slides.

The court also rejects plaintiff's assertion that the language of paragraph 10 of the Agreement, which provides that one and one-half years is a "reasonable time" for the Image Bank's reassembly and re-delivery of plaintiff's slides, constitutes a "time limit." The eighteen month period is not a strict deadline, nor a basis in and of itself to claim a breach of contract, but rather a benchmark of reasonableness for image returns. This provision does not foreclose the possibility that, in appropriate circumstances, a period longer than one and one-half years might be considered reasonable for the assembly and re-delivery of images.

The court likewise rejects plaintiff's argument that, pursuant to paragraph 7 of the Agreement, the Image Bank was responsible for obtaining \$1,500 for every lost image, and, having failed to obtain such compensation, is itself liable to plaintiff for that amount. The evidence shows that the Image Bank complied with the record-keeping obligations imposed by the Agreement - - it maintained records of images lost or damaged by customers, and frequently resolved lost image claims for various amounts with customers on plaintiff's behalf. In those instances, the Image Bank, in its judgment, sought and obtained compensation from the customer responsible for the loss. This is consistent with paragraph three of the Agreement which authorizes the Image Bank to pursue claims against customers for "damage, destruction, loss or unauthorized use" of plaintiff's images, and vests the Image Bank with "sole and complete

discretion" concerning the settlement of any such claims.<sup>5</sup>

To conclude, the court holds that: (a) the limitation of liability provision in the Agreement is valid and enforceable; (b) the limitation of liability provision is applicable not only to plaintiff's claims of loss and damage, but also to his claim for the late return of slides; (c) no showing of gross or willful negligence has been made; (d) the one and one-half year term in paragraph 10 of the Agreement does not create a firm deadline for the return of plaintiff's slides; and (e) the evidence does not support a claim that the Image Bank violated that aspect of paragraph seven of the Agreement requiring it to take efforts to secure compensation for lost images.

Therefore, the court grants the Image Bank's motion for summary judgment with respect to the ninth, tenth, eleventh, twelfth, thirteenth, and fifteenth causes of action in the Complaint, and denies plaintiff's cross motion for partial summary judgment with respect to the ninth, tenth, eleventh and twelfth causes of action.<sup>6</sup> This holding, however, does not affect any responsibility the Image Bank may owe plaintiff under the Agreement to return any images which may subsequently be located.

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<sup>5</sup> To the extent that the Image Bank does not have a record of the loss of many of the unreturned slides at issue here, it submits that it could not keep a record of losses it did not know about. It maintains that the presumed lost images were probably not lost by customers, but were instead misplaced at some point during the parties' 20- year relationship, which necessarily involved the handling of the images by the Image Bank's personnel in various offices, as well as its licensees and customers.

<sup>6</sup> In reaching this conclusion, the court has not given considerable weight to the percentage of plaintiff's slides that were lost. Focusing on the percentage of slides lost (by comparing the number of plaintiff's slides lost to the total number of slides he submitted to the Image Bank), should not be employed to trivialize the daunting number of plaintiff's slides that the Image Bank cannot account for.

The sixteenth cause of action regards the Image Bank's alleged failure to pay plaintiff for the use of an image by DK Publishing on the cover of a book. Plaintiff has raised triable issues of fact with respect to whether this customer's alleged prior payment for the use of this image covered its subsequent use of this image on a cover of a book.

The court denies plaintiff's cross motion for leave to serve a third amended complaint. Plaintiff claims that the Image Bank revealed, for the first time, in its papers in conjunction with this motion, that the non-returned slides should be considered "lost." However, plaintiff fails to explain why this revelation supports the assertion of a new cause of action against the Image Bank. While it is true that leave to amend a pleading shall be freely granted absent prejudice or surprise resulting from the delay (see Thomas Crimmins Contracting Co., Inc. v City of New York, 74 NY2d 166, 170 [1989]), plaintiff is not entitled to the proposed amendment, because, among other things: (a) the proposed amended pleading is not appended to plaintiff's moving papers; and (b) the proposed claim lacks merit and is palpably insufficient as a matter of law (*id.*, Ancrum v St. Barnabas Hosp. ( 301 AD2d 474, 475 [1<sup>st</sup> Dept 2003], citing Davis & Davis, P.C. v Morson, 286 AD2d 585, 585 [1<sup>st</sup> Dept 2001] and Bencivenga & Co. v Phylfe, 210 AD2d 22, 22 [1<sup>st</sup> Dept 1994]).

### CONCLUSION

It is ORDERED that the motion by defendant Eastman Kodak Co. for summary judgment dismissing the complaint is granted without opposition; and it is further

ORDERED that the complaint is dismissed as against defendant Eastman Kodak Co.; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of

defendant Eastman Kodak Co. with costs and disbursements as taxed by the Clerk; and it is further


ORDERED that the action is severed and the remainder shall continue against the remaining defendants; and it is further

ORDERED that the motion by defendants the Image Bank, Inc. n/k/a Getty Images, Inc. and Getty Images, Inc. for summary judgment dismissing the complaint is granted with respect to the first, third, fifth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, and fifteenth causes of action in the complaint, and denied with respect to the sixteenth cause of action; and it is further

ORDERED that the cross motion by plaintiff George Obremski for partial summary judgment against defendants the Image Bank, Inc. n/k/a Getty Images, Inc. and Getty Images, Inc. with respect to the ninth, tenth, eleventh and twelfth causes of action in the complaint, and for leave to serve an amended complaint, is denied in all respects.

Dated: April 11, 2005

ENTER:

  
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J.S.C.

HON. RICHARD B. LOWE, III

**FILED**  
APR 15 2005  
NEW YORK  
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