[* 1]

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

PRESENT: HON. SHIRLEY WERNER KORNREICH PART 54

Justice

Index Number : 604277/2007

"DOE, JANE"

vs

SZUL JEWELRY, INC.

Sequence Number : 002

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

...ls motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2, 3
Answering Affidavits — Exhibits	4
Replying Affidavits	5, 6, 7

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

FILED
MAY 13 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 5/8/08

HON. SHIRLEY WERNER KORNREICH

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----------X

AN INDIVIDUAL DESCRIBED HEREIN BY THE PSEUDONYM "JANE DOE",

Plaintiff,

- against -

SZUL JEWELRY, INC., d/b/a, SZUL.COM, Q2 ENTERTAINMENT & MITCHELL GOLDMAN,

Defendants.

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INDEX NO. 604277/ 07

DECISION AND ORDER

KORNREICH, SHIRLEY WERNER, J.:

Defendants in this action brought pursuant to New York Civil Rights Law §§50 and 51, seek dismissal of the amended complaint. CPLR §3211(a)(1) and (7). Alternatively, defendants ask that the action against Mr. Goldman be dismissed and plaintiff be compelled to proceed under her legal name. Plaintiff cross-moves to permanently enjoin defendants from publishing her name in connection with the video, which is the subject of this lawsuit, or identifying plaintiff in the action.

I. Amended Verified Complaint

The amended complaint, verified by plaintiff, alleges the following.

Plaintiff, a 37 year-old woman, has worked as a model, an on-air host for a cable network program, an actor and an elementary school teacher. She, at all times, "has worked hard to project a decent and wholesome image and has been extremely careful to avoid doing any work in the industry that would cheapen or tarnish her reputation, such as nudity, pornography or degrading depictions in any manner."

On November 2, 2007, plaintiff answered an advertisement on an actors' website, placed by Q2 Entertainment, Inc. (Q2), a production company. Mitchell Goldman is the principal of Q2. The ad stated it was casting for a viral web spot commercial for Szul Jewelry, Inc. and its subsidiary Szul.com (collectively "Szul"). It advertised for the following:

> Caucasian or Hispanic, 20's-30's, average joe. Young Ben Stiller type. No pretty boys, please. Good comedic actor.
>
> Caucasian or Hispanic, 20's-30's. Beautiful. Great Body. A real stunner. Good comedic skills a plus.

According to the complaint, the idea presented at the audition was that "a shy, average joe would place a necklace on the neck of a beautiful woman and – due to the special qualities of the necklace – cause the woman to get excited."

Plaintiff and a male actor were hired, and shooting for the advertisement occurred on November 9, 2007. Plaintiff alleges that the majority of the filming was comedic, but at the end, the director told plaintiff to feign excitement while lying down and without smiling, while breathing heavily and while moving her hands from her chest to the back of her neck. He explained that this portion of the filming was "merely the last piece of an extended comedic scene" and would be shown for a limited duration.

Plaintiff was paid $200 for her acting but was never asked to sign a Model's Release or authorize the use of her likeness for any advertising or trade purpose. Specifically, she did not authorize the use of her likeness "for an advertisement which depicted her exclusively simulating (or appearing to have) an orgasm in a non-comedic context." Plaintiff contends that the footage filmed was heavily edited to create a 35 second, non-comedic video depicting plaintiff alone, simulating an orgasm.

On November 21, 2007, Szul released the advertisement on You-Tube; it was entitled "Rock Her World." Plaintiff contends that she was not provided with a copy of the video, despite repeated requests, until November 26. On that same day, Szul issued a News Release regarding the video, describing it as "an aggressive viral marketing strategy targeting Generation 2.0" and featuring "a sexy. [sic] Adult storyline."

Plaintiff alleges she complained of the commercial on December 3, fearing harm to her career and reputation. Subsequently, both Goldman and Szul endeavored to obtain a Model's Release from her, consenting to use of the video. Despite drafts of a release sent to her by Goldman and Szul and threats of suit by Szul, plaintiff refused to sign such a release.

By December 30, the video had been viewed on You-Tube more than 11,000 times. After this suit was brought and plaintiff demanded that the commercial be removed, the video continued to be shown, the fact of the lawsuit was leaked and "a media frenzy occurred," transmitting the video "to millions of television viewers worldwide." Despite a subsequent cease and desist letter, Szul continued to use the video. As of January 16, 2008, the video had received more than 699,000 user hits on the Internet. Szul commenced removal of the video from circulation on January 17.[1]

Plaintiff contends that as a result of Szul's use of the video, hundreds of demeaning and insulting comments were posted about plaintiff, blacklisting was threatened by the entertainment industry and she has suffered loss of reputation, lost earnings and emotional distress. In addition, she contends that Szul has garnered a great deal of publicity and has benefitted from her services.

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[1] The parties stipulated on January 17, 2008 to cease publishing, using or disseminating the video.

Plaintiff asks for a declaration that defendants violated New York Civil Rights Law §§50 and 51, a permanent injunction and compensatory and punitive damages.

II. Motion and Cross-Motion

A. Defense Motion

Defendants move to dismiss the complaint, submitting the video's script, the cancelled check for $200 and e-mails which they allege prove that plaintiff knew of the video's sexual nature when she performed for it, that she had reviewed the video prior to its release, and that she had consented to its use and distribution over the Internet. Alternatively, defendants move for dismissal as to defendant Goldman who they argue has not been alleged to have used plaintiff's likeness for advertising or trade. Finally, defendants argue that if the case were permitted to proceed, its caption should be amended to reflect plaintiff's real name. They contend that the use of plaintiff's name is necessary to obtain meaningful discovery. Further, they claim that the use of a pseudonym by plaintiff undermines the presumption of openness inherent in judicial proceedings.

The script is little more than half of a page, outlining the action. The scene takes place in a dimly lit bedroom and features a man in boxer shorts and a woman "in the sexiest nightgown imaginable." The action calls for the man to "prematurely ejaculate[ ]" and the woman to drop her nightgown to her ankles, lay on the bed and pant "as though close to having an orgasm." Once the Szul necklace is placed around her neck, "she screams in climax."

A copy of the front and back of the November 12, 2007 $200 check is submitted. The memo portion of the check indicates "Talent for Szul.com." The back of the check is signed by plaintiff and marked for deposit, with a bank stamp of November 19, 2007. Also included are a

number of emails from plaintiff. The first, dated November 10, 2007, thanks Mr. Goldman and contains two "sexy girl headshots" of plaintiff. In a November 17 email, plaintiff asks for a copy of the commercial spot, since a film company is interested in her work and "wants to see [her] sexy side." Mr. Goldman responds that same day, a Saturday, telling plaintiff that the spot should be done by Wednesday and sends her an attachment which "gives a good idea of the 30 [second] spot." Shortly thereafter, on the same day, plaintiff asks whether she can place a laudatory quote made by Mr. Goldman, on her website. Then, on November 25, at 10:20 p.m., she writes:

> Mitchell, I'm really freaked out right now. I just did a search for my name and saw my name linked to the commercial for Szul on Dan's site. As you can imagine, this can be very dangerous for me. I can not have my name linked to the commercial at all. Please ask to have my name removed from there Mitchell. I'm really scared right now.

Defendants argue that plaintiff should be compelled to proceed in this action under her legal name and that any sensitive records can be sealed. They contend that plaintiff has not alleged a substantial privacy right – i.e., direct harm – sufficient to overcome the constitutional presumption of openness in judicial proceedings. Moreover, defendants claim that they are prejudiced in their ability to conduct discovery due to plaintiff's use of a pseudonym. And, they argue that plaintiff's counsel has repeatedly discussed the litigation with numerous media outlets, diminishing the very privacy rights plaintiff seeks to protect and using plaintiff's anonymity as a sword for the purpose of distorting the facts and defaming defendants.

B. Opposition and Cross-Motion

Plaintiff by counsel opposes the motion. He argues that plaintiff never consented in writing to the video, that his cease and desist letters to Szul were ignored, and that when he was

contacted by reporters, he asked them not to publish any stories or photographs of plaintiff. He contends that he provided some facts to the reporters to balance the stories when his pleas not to publish were ignored. Finally, counsel argues that use of plaintiff's name would pose a risk of retaliatory physical and mental harm and social stigmatization,[2] and states that plaintiff does not object to defendants' use of an investigator to obtain information regarding plaintiff or to defendants' issuance of subpoenas using plaintiff's legal name.

C. Defendants' Opposition and Reply

Defendants replied to the opposition, attaching a December 3, 2007 email from plaintiff to Goldman. The email states:

> Mitchell, I just watched the video. I thought it was well shot but to be honest, I'm devastated that it's on You Tube like that. I just thought it was going to be used on their site for customers that were interested in jewelry. No one ever mentioned it going straight to You Tube. And, unfortunately, for me, everyone who has seen it says it looks like cheap porn which is not my style at all. I just thought it was going to be differentI'm [sic] actually surprised the company would even want to use it for such a classy jewelry company ad, you know? I'm also deathly afraid of what it's going to do to my career working with children, etc.
>
> Mitchell, I don't have much money but what do you think my chances are of paying to have you guys shoot that with someone else and letting me buy the rights to that video so I can pull it off the air? I will do whatever I can to save my career. Can I pay for the shoot to happen again with someone else?
>
> I'm really worried Mitch.

Again, defendants argue that plaintiff's privacy interests would be fully protected by filing all

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[2] Counsel, by affirmation, states that the following are a small sample of comments posted on the internet as a result of the You Tube video: "A stupid whore; A dumbass; A lying, greedy, trashy slut; A hot little slut monkey; A damn whore; An idiot; A dumb bitch; This bitch is a cunt; A dickhead...and bimbo bitch; Someone should give her ass a lesson on faking orgasm; She can have my cock and eat it anytime; Speaking of 'pancakemix.',I'd like to see some hitting her across the chin at the end; The bitches need to be put BACK in their place, pussy rules the world now, should be the prick!!!; You will be known as the slut from the jewelry commercial."

papers under seal and entering a protective order governing discovery.

D. Plaintiff's Reply

Counsel responds that sealing records is more disfavored by the courts than use of a pseudonym by a party.[3]

II. Defendants' Motions

A. Motions to Dismiss

In determining a motion under CPLR 3211(a), the court must "accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994); *Morgenthow & Latham v. Bank of N.Y. Co., Inc.*, 305 A.D.2d 74, 78 (1st Dept.), *lv. Denied* 100 N.Y.2d 512 (2003). Since the court's inquiry on such a motion is narrow, it must liberally construe the complaint, accepting as true both the material allegations of the complaint and whatever can be reasonably inferred from them. *DeMicco Bros., Inc. v. Con. Ed. Co.*, 8 A.D.3d 99 (1st Dept. 2004). Factual claims in the complaint, however, if contradicted by documentary evidence, are not entitled to such consideration. *Maas v. Cornell Univ.*, 94 N.Y.2d 87, 91 (1999); *Bishop v. Maurer*, 33 A.D.3d 497, 498 (1st Dept. 2006) (grant of motion to dismiss affirmed where documentary evidence contradicted factual assertions of malpractice). A complaint may be dismissed if documentary evidence submitted by the defense resolves all factual issues as a matter of law and disposes of the plaintiff's claim. CPLR 3211(a)(1); *Ozdemir v. Caithness Corp.*, 285 A.D.2d 961, 963 (3d Dept.), *lv. denied* 97 N.Y.2d

[3] While the matter was pending and *sub judice*, 9 letters were sent to the court regarding the motions. The Court will not consider any of them in determining the motions.

605 (2001). Affidavits of the plaintiffs may be used by the court to remedy defects in an inartfully drawn complaint. *Rovello v. Orofino Realty Co., Inc.*, 40 N.Y.2d 633, 635-6 (1976). In sum, the court's inquiry should be to determine whether plaintiff has a cause of action. *Id.*

New York does not recognize a common law right to privacy. *Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 140 (1985); *Shields v. Gross*, 58 N.Y.2d 338, 344 (1983); *Arrington v. New York Times Co.*, 55 N.Y.2d 433, 440 (1982). The sole legal avenue available to protest the use of one's name, portrait or picture is Civil Rights Law §§50, 51. *Freihofer, id.* Sections 50 and 51 of the Civil Rights Law create a civil cause of action for use of an individual's name and/or photograph for advertising and trade purposes when used without written consent. *Beverley v. Choices Women's Medical Center, Inc.*, 78 N.Y.2d 745, 750-51 (1991); *Freihofer, id.*; *Shields, supra.* Since these statutes are in derogation of New York's common law, they are to be strictly construed . *Shields, id.* at 345; *Allen v. National Video, Inc.*, 610 F. Supp. 612, 620 (S.D.N.Y. 1985).

The elements of a claim brought pursuant to §§50, 51 are: 1) usage of a person's name, portrait, picture or voice, 2) in New York State, 3) for advertising or trade, 4) without the person's written consent. *Molina v. Phoenix Sound, Inc.*, 297 A.D.2d 595, 597 (1st Dept. 2002); *Allen, id.* In addition, a consent may be limited in time, form or forum; "'a defendant's immunity from a claim for invasion of privacy is no broader than the consent executed to him.'" *Dzurenko v. Jordache, Inc.*, 59 N.Y.2d 788, 790 (1983) quoting *Shields, supra* at 347. An individual may limit his consent "in any way he deemed proper or desirable." *Id. Accord Zoll v. Ruder Finn, Inc.*, 2004 U.S. Dist. LEXIS 4328 (S.D.N.Y. 2004)(defendant liable for overstepping any limitation in consent).

Relief pursuant to these statues includes compensatory and exemplary damages, as well as injunction. *Beverley*, *supra* at 750; *Freihofer, supra* at 139; *Shields*, *supra* at 344. Punitive damages are permitted "at the discretion of the jury 'if the defendant shall have knowingly used such person's name, portrait, picture or voice.'" *Hernandez v. Wyeth-Ayerst Labs.*, 291 A.D.2d 66, 70 (1st Dept. 2002). Thus, a showing of knowing use, not malice, is all that is required for punitive damages. *Id. See Beverley*, *supra* at 753(finding that defendant acted knowingly supported punitive damage award).

Here, the parties do not dispute that plaintiff's picture was used in New York State for advertising purposes. The dispute centers on whether such use was based on plaintiff's written consent. The negotiated check for a Szul talent fee does not conclusively establish that plaintiff consented to the use of her photograph and voice. *See Molina*, *supra* (executed writing for petty cash for "Model Fee" created issue of fact as to written consent). Nor does the other documentary evidence produced demonstrate the parameters of plaintiff's consent. The evidence does not refute her allegations that any consent she may have given was for use of the video in a different manner, in a different venue for a different purpose. Consequently, defendants' motion to dismiss based upon documentary evidence is denied. CPLR §3011(a)(1). However, the action brought against defendant Goldman in his personal capacity is dismissed.

B. Anonymity

This is not a case wherein plaintiff has asked to seal the record or close the courtroom. Rather, plaintiff commenced the action using a pseudonym, and defendants now move to compel the use of her legal name on court papers. Defendants know plaintiff's name, and plaintiff has consented to the use of her legal name for discovery purposes. The sole issue here is plaintiff's

anonymity on court papers.

As noted by Justice York in *Anonymous v. Anonymous*, 191 Misc.2d 707 (Sup. Ct., N.Y. Co., 2002), there is a dearth of case law in New York speaking to a party's right to proceed by pseudonym. *But see Doe No. 1 v. CBS Broadcasting Inc.*, 24 A.D.3d 215 (1st Dept. 2005)(plaintiffs not permitted to proceed by pseudonym on case alleging trespass to chattel); *Doe v. Kidd*, 2008 NY Slip Op 28111(Sup. Ct., N.Y. Co.) ((plaintiff not permitted to proceed anonymously in civil battery and assault case); *Anonymous v. Duane Reade Inc.*, 10 Misc.3d 1056A (Sup. Ct., Kings Co., 2005)plaintiff permitted to proceed anonymously in HIV case); *Doe v. N.Y.U.*, 6 Misc.3d 866 (Sup. Ct., N.Y. Co., 2004)(plaintiff permitted to proceed by pseudonym in civil sexual assault case); *Doe v. Bellmore-Merrick Cent. H.S. Dist.*, 1 Misc.3d 697 (Sup. Ct., Nassau Co., 2003)(plaintiff permitted to proceed anonymously in civil sexual abuse case). Reviewing the New York cases that do exist and the Federal cases on the subject, it is clear that courts have discretion in determining the issue [4] and do so by balancing the privacy interests of the party seeking anonymity against the general presumption favoring open trials and the risk of prejudice to the opposing party. *Doe No. 1 v. CBS Broadcasting Inc.*, *id.*; *Doe v. Porter*, 370 F.3d 558 (6th Cir. 2004); *Doe v. N.Y.U.*, *id.* at 879; *Anonymous v. Anonymous*, *supra* at 708; *Doe 1-XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000); *M.M. v. Zavaras*, 139 F.3d 798 (10th Cir. 1998); *James v. Jacobson*, 6 F.3d 233, 242 (4th Cir. 1993); *Doe v. Frank*, 951 F.2d 320, 323 (11th Cir. 1992); *Doe v. Stegall*, *id.* , 653 F.2d 186; *Doe #1 v. Von*

[4] Fed.R.Civ.P. 10(a) requires that a complaint state the names of the parties. However, in exceptional cases, the Federal courts depart from this rule to protect the privacy interests of a party. *Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. 1981). Indeed, the Supreme Court has permitted pseudonymity in several cases, i.e., *Poe v. Ulman*, 367 U.S. 497 (1961); *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

Eschenbach, 2007 U.S. Dist. LEXIS 46310 (D.D.C.); *Doe v. Hartford Life & Accident Ins. Co.*, 237 F.R.D. 545 (D.N.J. 2006); *K.D. v. City Of Norwalk*, 2006 U.S. Dist. LEXIS 42639 (D.Conn.); *Roe v. Johnson*, 2003 U.S. Dist. Lexis 25881 (S.D.N.Y.); *EW v. N.Y. Blood Ctr.*, 213 F.R.D. 108, 110 (E.D.N.Y. 2003).

Among the factors considered in permitting the use of a pseudonym are: " whether the justification asserted by the requesting party is merely to avoid the annoyance and criticism that may attend any litigation or is to preserve privacy in a matter of a sensitive and highly personal nature" (*James v. Jacobson*, *id.* at 238); whether the party seeking anonymity has an illegitimate ulterior motive; the extent to which the identity of the litigant has been kept confidential; whether identification poses a risk of mental or physical harm, harassment, ridicule or personal embarrassment; whether the case involves information of the utmost intimacy; whether the action is against a governmental entity; the magnitude of the public interest in maintaining confidentiality or knowing the party's identity; whether revealing the identity of the party will dissuade the party from bringing the lawsuit; whether the opposition to anonymity has an illegitimate basis; and whether the other side will be prejudiced by use of the pseudonym. *Does I -XXIII v. Advanced Textile Corp.*, *supra* at 1068; *James v. Jacobson*, *id.*; *Doe v. Stegall*, *supra* at 185; *Doe v. The Archdiocese of Portland in Oregon*, 2008 U.S. Dist. LEXIS 14575(D.Or.); *Doe v. St. Louis Co.*, 2008 U.S. Dist. LEXIS 2691(E.D.Mo.); *Doe v. Hartford Life Acc. & Ins. Co.*, *supra* at 549; *EW v. N.Y. Blood Center*, *supra* at 111; *Doe v. Provident Life & Acc. Ins. Co.*, 176 F.R.D. 464, 467-8 (E.D.Pa. 1997). A particularly relevant factor is whether "the injury litigated against would occur as a result of the disclosure of the plaintiff's identity. *Doe v. N.Y.U.*, *supra.* The court finds that plaintiff's privacy interest justifies her use of a pseudonym.

The instant case involves a sexually explicit tape which may still be in circulation, and will no doubt center on information about plaintiff of a sensitive and highly personal nature. Plaintiff has voiced concern for her privacy, her reputation and her livelihood prior to the start of proceedings, has kept her identity confidential throughout and has complained of harassment, ridicule and embarrassment. The case is not brought against a government entity, a factor this court believes would militate in favor of the public's right to know. Instead, defendant is a private commercial enterprise and has gained financially by the publicity. Defendant is aware of plaintiff's identity and, upon agreement of plaintiff, may proceed with discovery using plaintiff's legal name. It is not prejudiced at this time. The only purpose revelation of plaintiff's name could have would be to further discomfit plaintiff and perhaps deter her from litigating the matter. In fact, revelation of plaintiff's identity would undermine the litigation by denying a portion of the relief ultimately requested in the action. The public has an interest in seeing this case determined on the merits, after the parties have had an opportunity to fully and properly litigate the issues.

Finally, courts have recognized that a grant of anonymity impacts far less on the public's right to open proceedings than does the closing of a courtroom or the sealing of records – relief requested by defendants. *See Doe v. Bellmore-Merrick Central H. S. Dist.*, *supra* at 701(right to proceed anonymously is not equivalent to sealing records and does not prevent public from accessing records); *Anonymous v. Anonymous*, *supra* at 708; *EW v. N.Y. Blood Center*, *id.* at 111; *Doe v. Stegall*, *id.* at 185. Plaintiff's anonymity here will "will not obstruct the public's view of the issues joined or the court's performance in resolving them." *Does I -XXIII v. Advanced Textile Corp.*, *supra* at 1068-9. Accordingly, it is

ORDERED that defendants' motion to dismiss the case against Mitchell Goldman is granted and the remainder of the case is severed; and it is further

ORDERED that defendants' motion to dismiss the remainder of the case, is denied; and it is further

ORDERED that defendant's motion to compel plaintiff to amend the caption to reflect her legal name, is denied; and it is further

ORDERED that plaintiff's motion to permanently enjoin defendants from publishing her name, the relief requested in the underlying action, is denied at this time.

ENTER:

Dated: May 8, 2008

J.S.C.