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

PRESENT: LOUIS B. YORK J.S.C. Justice LOUIS B. YORK J.S.C. PART 2

BARA DIOKANE

INDEX NO. 115652/08

MOTION DATE

-v-

57th + Irving, INC., Groovy Laboratories, INC. Youssoun Nour, Elizabeth Chai Vasarhelyi

MOTION SEQ. NO. 1

MOTION CAL. NO.

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
FEB 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 2/18/09

LOUIS B. YORK J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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BARA DIOKHANE,

Plaintiff,

Index No. 115652/2008

-against-

57TH & IRVING, INC., GROOVY GRIOT FILMS, LLC, OSCILLOSCOPE LABORATORIES, INC., YOUSSOU NDOUR, ELIZABETH CHAI VASARHELYI,

Defendants.

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LOUIS B. YORK, J.:

Plaintiff, a Senegalese artist and lawyer, has lived in New York since 1996. Plaintiff explains that he has enjoyed success as an artist in New York, a lawyer in Senegal and a legal advisor to the United Nations. In addition, plaintiff claims that he is a member of a well known Senegalese family. Based on this and other factors, he contends that he is something of a public figure.

It is also relevant that plaintiff has a longstanding relationship with defendant Youssou Ndour, the subject of the documentary film at issue here. As Ndour's adviser, plaintiff negotiated the performer's first record deal in 1987, and he was involved in negotiating various tours and casting and producing some of his music videos. Plaintiff also asserts that he traveled to London to pick up Ndour's first platinum album in 1995. Plaintiff states that around 1996, Ndour abruptly terminated their business relationship.

Defendant Elizabeth Chai Vasarhelyi, a documentary filmmaker, is the director and producer of the 2008 documentary "Youssou Ndour: I Bring What I Love" ("the

film"). The film chronicles the experiences of the acclaimed Senegalese musician, and in particular focuses on the release of and controversy surrounding Ndour's 2003 CD "Egypt." In "Egypt," Ndour, a devout Sufi Muslim, collaborates with his own band, Le Super Etoile, and with other Sufi musicians in an exploration and celebration of his faith. Ndour's goal was to promote greater tolerance of Islam. However, initially in his own country the CD's release was met with hostility by those who considered the integration of Muslim themes into popular music sacrilegious or who were offended by his decision to perform during Ramadan. Ultimately, "Egypt" became an international hit, won a Grammy award in the United States, and was embraced by many Senegalese as well. The film is approximately 102 minutes long. Plaintiff appears in a short scene which lasts approximately nine seconds. In the scene, an excerpt from a press conference, plaintiff sits near Ndour while Ndour answers questions from the press.

The film premiered at the Telluride Film Festival the weekend of August 29-September 1, 2008, and since then it has been shown at many other film festivals in the United States and abroad. After the film began to receive publicity, plaintiff learned from several friends and acquaintances that he himself appeared in the film. Plaintiff wrote to defendants in October 2008 and asked them to cease using his image. He stated that his privacy rights under New York Civil Rights Law section 50 had been violated, and he threatened legal action if defendants did not "immediately cease the use and distribution of my picture for the benefit of your trade." (Diokhane Letter dated October 21, 2008, at p 2).

Allegedly, plaintiff received three separate responses from the various defendants. Ndour left him a message indicating that if plaintiff did not want his image to appear in

the film, Ndour would request that plaintiff's image be removed entirely. Ndour's attorney and manager, Thomas Rome, left plaintiff a message attempting to identify the source of the video in which plaintiff appears. Jerry Dasti, counsel to defendant Groovy Griot LLC, wrote to plaintiff and argued that (1) plaintiff's voluntary public appearance at the press conference effectively waives his claim for invasion of privacy, (2) his image is in the film only briefly and thus this is an incidental use not actionable under the law, and (3) because the press conference was public and newsworthy, no claim exists under the Civil Rights Law. Plaintiff alleges there are inconsistencies and misrepresentations in the communications, but none of these are legally relevant. Not long after his receipt of these communications plaintiff commenced this action to enjoin defendants from including his image in the film and to obtain exemplary damages.

The Court heard argument on plaintiff's initial request for a temporary restraining order on December 15, 2008. After argument, the Court denied the application. At that time, the Court also heard argument on the cross-motion to dismiss of defendants Elizabeth Chai Vasarhelyi and Groovy Griot, LLC, s/h/a Groovy Griot Films, LLC ("defendants") and watched the film in its entirety. The Court notes that 57th & Irving, LLC made a special appearance in this matter solely to challenge service, but it has not made a motion for affirmative relief.

Finally, the Court conferenced the case on January 28, 2009 in an attempt to settle the litigation. That effort was unsuccessful. Accordingly, the Court turns to the cross-motion to dismiss. After careful consideration, the Court grants the cross-motion and dismisses the action as against the moving parties.

There is no common law right to privacy in New York. Instead, the right to privacy is statutorily created, in Civil Rights Law section 51.[1] The provision states, in pertinent part:

> Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained . . . may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait, picture or voice, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait, picture or voice in such manner as is forbidden or declared to be unlawful by section fifty of this article, the jury, in its discretion, may award exemplary damages.

The statute was designed principally "to operate in connection with the sale of goods and services." Nussenzweig v. diCorciaU, 38 A.D.3d 339, 346, 832 N.Y.S.2d 510, 516 (1st Dept. 2007).

Section 51 also emphasizes that "[n]othing contained in the foregoing sentence shall be deemed to abrogate or otherwise limit any rights or remedies otherwise conferred by federal law or state law." In particular, this refers to the constitutional protections of the First Amendment. The statute's "application to works involving literary and artistic expression protected by the First Amendment was remote from the Legislature's contemplation." Nussenzweig, 38 A.D.3d at 346, 832 N.Y.S.2d at 516 (citation and internal quotation marks omitted). Thus, the statute "is necessarily subject to constitutional limitations and accordingly the sections in question must be accorded an interpretation which avoids constitutional infirmities." Delan by Delan v. CBS, Inc., 91

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[1] Section 50 is the penal version of the statute.

A.D.2d 255, 258, 458 N.Y.S.2d 608, 612 (2nd Dept. 1983). For this reason, courts consistently refuse to construe the phrases "for advertising purposes" and "purposes of trade" to include either newsworthy events or matters of public interest. Finger v. Omni Publications International, Ltd., 77 N.Y.2d 138, 141-42, 564 N.Y.S.2d 1014, 1017 (1990); see, e.g., Ward v. Klein, 10 Misc. 3d 648, 809 N.Y.S.2d 828 (Sup. Ct. N.Y. County 2005) (dismissing right to privacy claim while finding issues of fact as to other causes of action); Gaeta v. Home Box Office, 169 Misc. 2d 500, 645 N.Y.S.2d 707 (Civ. Ct. N.Y. County 1996). Moreover, the terms "public interest" and newsworthiness" have been defined liberally, Gaeta, 169 Misc. 2d at 502, 645 N.Y.S.2d at 709, and the issue of whether something is of public interest can be resolved by the courts. Walter v. NBC Television Network, Inc., 27 A.D.3d 1069, 1070, 811 N.Y.S.2d 521, 523 (4th Dept. 2006). Among other things, the exception has been construed to include the "headlines" segment of "The Tonight Show," Walter, 27 A.D. 3d at 101, 811 N.Y. S.2d at 523, and an HBO documentary on "Real Sex." Gaeta, 169 Misc. 2d at 503, 645 N.Y.S.2d at 710.

In light of the above, the documentary at issue here clearly is a matter of public interest. It has generated widespread interest and acclaim, and it has been shown at major film festivals throughout the world. The film's subject, Youssou Ndour, is an internationally known and award winning performer. In 2007, Time magazine named him one of the 100 artists and entertainers who have shaped the world. Indeed, the great controversy over the release of the "Egypt" CD and the demonstrations its release provoked in Senegal underscore the public's interest in Ndour and his music.

Plaintiff argues that despite these facts, the documentary film has a trade purpose within the meaning of the Civil Rights Law because it was made with the goal of turning

a profit. However, in asserting this argument plaintiff has misinterpreted the applicable case law. In fact, Delan, upon which plaintiff relies for this proposition, states:

> While the very term "purposes of trade" encompasses use for the purpose of making profit (since most publications perforce are profit making and the subject matter of such publications are designed with a view to being profitable), a literal construction of the statutory provision would violate the constitutional protection of free speech and free press when such publication involves a matter of public interest . . . . The reporting of matters of public information or of legitimate public interest, therefore, is a matter of privilege and not within the ambit of the term "purposes of trade" as used in the Civil Rights Law . . . . Such matters of public interest enjoying this constitutional protection include not only current news items, both informative and entertaining . . . but also such items which, although not strictly news, are designed to be informative.

Delan, 91 A.D.2d at 259, 458 N.Y.S.2d at 613. Delan went on to find that the documentary film in question, about the effects of and possible alternatives to mental institutions, concerned a matter of public interest. Thus, it was not within the ambit of the phrase "purposes of trade" as it applies to the Civil Rights Law. Id.; see also Davis v. High Society Magazine, Inc., 90 A.D.2d 374, 379, 457 N.Y.S.2d 308 (2nd Dept. 1982)(use of name or picture in connection with newsworthy item does not fall within ambit of Civil Rights Law even when there is a profit motive). Other cases, too, have stressed that the existence of a profit motive "does not convert a newsworthy article or television show into a trade purpose, since it is the content of the material which determines whether it is newsworthy." Welch v. Group W. Productions, Inc., 138 Misc. 2d 856, 860, 525 N.Y.S.2d 466, 468 (Sup. Ct. N.Y. County 1987); see Creel v. Crown Publishing, Inc., 115 A.D.2d 414, 496 N.Y.S.2d 219 (1st Dept. 1985)(holding that appearance of plaintiff's image in guide to nude beaches was not actionable).

Thus, the profit motive of defendants is irrelevant. As the film is one of public interest, the appearance of plaintiff's image is only actionable if "the picture has no real relationship to the article or the article is an advertisement in disguise." Messenger ex rel. Messenger v. Gruner + Jahr Printing and Pub. 94 N.Y.2d 436, 442-443, 706 N.Y.S.2d 52, 56 (2000). Here, for the reasons set forth in defendants' brief in support of their motion, the press conference in which Ndour discussed his first platinum album is relevant to the musician's story. Moreover, there has been no showing that his image is an advertisement in disguise. Therefore, plaintiff's claim is not actionable and must be dismissed.

Also, as defendants note, there is another basis for dismissal. The "incidental use" of a person's name or photograph, even when it is unauthorized and fictionalized, falls outside the prohibition of the statute." Netzer v. Continuity Graphic Associates, Inc., 963 F.Supp. 1308, 1326 (S.D.N.Y. 1997). To determine whether the use is incidental, a court must examine the role of plaintiff's name or likeness in the work. There must be "a relatively direct and substantial connection between the appearance of the plaintiff's name or likeness and the main purpose and subject of the work before liability may be established." Id. (citation and internal quotation marks omitted). Using this rationale, for example, one court found that "the incidental use of plaintiff's forty-five second performance" in the documentary "Woodstock" was "surely de minimus" and therefore not actionable. Man v. Warner Bros., Inc., 317 F. Supp. 50, 53 (S.D.N.Y. 1970).

Here, plaintiff is in the film for around nine seconds in a film that is over an hour and a half long. As stated, the film was shown in the courtroom in connection with the

hearing. Based on this viewing, the Court concludes that plaintiff's presence in the film is fleeting and, indeed, might well be overlooked by the passive viewer. Moreover, plaintiff is visible at the press conference because he is seated near Ndour, but the focus of the scene is Ndour himself. Thus, there is not a direct or substantial connection between the use of plaintiff's image and the main purpose of the film or even of the scene involved. Although sometimes the issue of whether the use is incidental raises a jury question, see, e.g., Doe v. Darian Lake Theme Park & Camping Resort, Inc., 277 A.D.2d 967, 967, 715 N.Y.S.2d 825, 826 (4th Dept. 2000), in this instance it is appropriate for resolution on this motion for summary judgment. See, e.g., Preston v. Martin Bregman Productions, Inc., 765 F. Supp. 116 (S.D.N.Y. 1991)(summary judgment granted where plaintiff's image appeared in a nine-second scene in movie "Sea of Love"); De Gregorio v. CBS, Inc., 123 Misc. 2d 491, 473 N.Y.S.2d 922 (Sup. Ct. N.Y. County 1984) (summary judgment granted where plaintiff filmed holding hands with woman; image lasted for five seconds of ten-minute news segment).

Finally, as counsel has pointed out, plaintiff voluntarily appeared at the press conference and sat next to Ndour. Though this does not waive his right to privacy outright, it limits it in this context. See Murray v. New York Magazine Co., 27 N.Y.2d 406, 409, 318 N.Y.S.2d 474, 476 (1971); Man, 317 F. Supp. At 53 (plaintiff, a musician who voluntarily went on stage at the Woodstock festival, deprived himself of his right to complain when his image was used in famed documentary about the festival).

Accordingly, it is

ORDERED that the motion is granted and the action as against defendants Elizabeth Chai Vasarhelyi and Groovy Griot, LLC, s/h/a Groovy Griot Films, LLC is

severed and dismissed. The Court notes that the other defendants have not moved for dismissal and therefore the Court takes no action as to them.

Dated: 2/18, 2009

ENTER:

LOUIS B. YORK, J.S.C.

LOUIS B. YORK
J.S.C.