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

PRESENT: HON. JUDITH J. GISCHE J.S.C. PART 10

Index Number : 116010/2009

BOSTWICK, SARA

VS.

CHRISTIAN OTH, INC.

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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
OCT 04 2010
COUNTY CLERK'S OFFICE
NEW YORK

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

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

Dated: 9/27/10

HON. JUDITH J. GISCHE 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: PART 10

----------x

SARA BOSTWICK,

Plaintiff,

-against-

CHRISTIAN OTH, INC., CHRISTIAN OTH and CAROLYN MONASTRA,

Defendants.

----------x

DECISION/ORDER
Index No.: 116010/09
Seq. No.: 001

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this/these motion(s):

Papers	**Numbered**
Defs n/m (3212) w/TAC affirm, CO affid, exhs	1
Pltf x/m (amend/strike) w/REB affirm, SB affid, exhs	2
Defs reply W/TAC affirm	3

Upon the foregoing papers the court's decision is as follows:

This is an action by plaintiff, Sara Bostwick ("Bostwick"), to recover damages for, *inter alia*, fraud and concealment, breach of contract, and negligent infliction of emotional distress. The court has before it defendants' motion for summary judgment dismissing the complaint. Defendant, Christian Oth, Inc. ("Christian Oth"), is a corporation that provides photography-related services and produces photography-related products. Christian Oth ("Mr. Oth") is the sole owner of Christian Oth, and defendant, Carolyn Monastra ("Monastra") provides photographic services as a subcontractor for Christian Oth. Plaintiff opposes the motion and cross-moves to amend the complaint and strike defendants' "Exhibit G" from the record.

Since issue has been joined and the note of issue has not yet been filed, this motion is timely and will be considered and decided on the merits. CPLR § 3212; Brill v. City of New York, 2 N.Y.3d 648 (2004).

Arguments and Facts Presented

Christian Oth and, specifically, Monastra, were hired by plaintiff and plaintiff's husband to take photographs on their wedding date, September 20, 2008, pursuant to a Wedding Photography Contract (the "Contract"). Plaintiff alleges that she forbade Monastra from taking pictures of her in an undressed state while she was preparing for the wedding, but that Monastra took pictures of plaintiff in her underwear, despite Monastra's assurances that she would not do so. It is undisputed that all of the wedding photographs, including the pictures of plaintiff in her underwear, were then posted online in the "Sara Striclic and Sean Bostwick" gallery, provided by the Christian Oth website. The gallery was accessible online, but with a password, which was e-mailed only to plaintiff on October 23, 2008. The purpose of the gallery was so plaintiff could view the wedding pictures, share them with family and friends, and order prints directly from the gallery.

Plaintiff alleges that she suffered from emotional pain and feared for her own physical safety upon seeing the photographs of her in her underwear on the gallery website. On November 13, 2008, plaintiff e-mailed Kathleen Murphy ("Murphy"), an employee of Christian Oth, stating ". . . is it possible to take down the pictures of me undressed in my preparation shots? I would like our family to have access to the website

and do not want them seeing these shots." Murphy replied, "I will remove the images that you requested from your gallery and let you know once that is done." Later that same day, Murphy sent an e-mail to plaintiff stating, "I have taken those images off of your wedding gallery."

It is undisputed that the photographs of plaintiff getting dressed were removed from one part of the gallery, but were still present in a different part of the gallery website. Plaintiff alleges that, after she was told the pictures were down, she gave the password to her family and friends, who then had access to the pictures of her in her underwear. On February 19, 2009, plaintiff mailed Mr. Oth, expressing her concerns and demanding him to "immediately take down all photographs of me undressed from the photo gallery, return all printed images of me undressed to me and destroy all electronic images taken of me while I was undressed." Murphy replied by e-mailing plaintiff, "[it] was completely human error on my part and I take full responsibility for the matter. This morning I have removed these images from the website and would ask that you confirm this with me."

Plaintiff asserts five causes of action against defendants in her verified amended complaint, to wit: (1) fraud and concealment; (2) negligent infliction of emotional distress ("NIED"); (3) intentional infliction of emotional distress ("IIED"); (4) breach of contract; and (5) defamation. Plaintiff withdraws her 3rd and 5th causes of action for IIED and defamation. Plaintiff also cross-moves to add a cause of action for violation of the New York State Civil Rights Law ("NYSCRL") §§ 50 and 51 in a proposed second amended complaint.

Defendants contend that plaintiff has failed to state a claim for fraud and concealment because she has failed to show reasonable reliance and should have exercised due diligence to verify that the images were completely removed from all sections of the gallery. Defendants also contend that plaintiff's claim for fraud and concealment cannot stand, as they are duplicative of a right to privacy claim.

Defendants further contend that plaintiff has failed to state a claim for NIED because the conduct was not extreme and outrageous and is duplicative of a claim for right to privacy. Defendants also argue that the contract is unambiguous, had not been breached, and there was no separate consideration for the alleged oral agreement between plaintiff and Monastra.

Defendants oppose plaintiff's cross-motion to amend the complaint on the grounds that a cause of action under NYSCRL is barred by the one-year statute of limitations.

Discussion

Cross-Motion

The court first addresses plaintiff's cross-motion to amend the complaint. In the absence of prejudice or surprise resulting directly from the delay, leave to amend a pleading is freely given, pursuant to CPLR § 3025(b). Fahey v. County of Ontario, 44 N.Y.2d 934 (1978). Moreover, leave should be granted when the denial of the motion would create a greater prejudice than granting it. Murray v. City of New York, 43 N.Y.2d 400 (1977); Adams Drug Co. v. Knobel, 129 A.D.2d 401 (1st Dept. 1987). However, an

order allowing the amendment should not be granted without considering the validity of the claim sought to be asserted. Thus, "the sufficiency or meritoriousness of a proposed pleading or matter" should be resolved at the outset "to obviate the possibility of needless time consuming litigation." Sharapata v. Town of Islip, 82 A.D.2d 350, 362 *aff'd* 56 N.Y.2d 332 (1982). The moving party is required to show that the new claims have a colorable basis. NAB Construction Corp. v. Metropolitan Transportation Authority, 167 A.D.2d 301 (1st Dept 1990). Where the proposed claim is clearly barred by the statute of limitations, the amendment should not be allowed.

NYS Civil Rights Law §§ 50 and 51

The NYSCRL provides in relevant part:

> **§ 50. Right of privacy.** A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.
>
> **§ 51. Action for injunction and for damages.** 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 as above provided 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 . . .

Pursuant to CPLR 215 (3), "an action to recover damages for . . . a violation of the right of privacy under section fifty-one of the civil rights law" must be brought within one year. Under the single publication rule, which applies to claims brought pursuant to

NYSCRL §§ 50 and 51, a cause of action based on a right to privacy accrues on the date the offending material was first published. Nussenzweig v. diCorcia, 9 N.Y.3d 184 (2007).

It is undisputed that the photographs were first placed in the online gallery on October 23, 2008, which is also the same date that plaintiff first viewed the photographs. Since this action was initiated on November 12, 2009, which is more than one year after the date of first publication, plaintiff is time-barred from asserting a cause of action under §§ 50 and 51 of the NYSCRL. The court is unpersuaded by plaintiff's argument that the clock should start running from November 13, 2008 (the date that plaintiff e-mailed defendants to remove the pictures from the gallery), as this argument is contrary to the single publication rule. *See* Nussenzweig, *supra*; Costanza v. Seinfeld, 279 A.D.2d 255 (2001). Accordingly, plaintiff's cross motion for leave to serve a second amended complaint is denied.

Motion for Summary Judgment

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). The evidentiary proof tendered, however, must be in admissible form. Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 (1979). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986);

Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

When issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. *See* Hindes v. Weisz, 303 A.D.2d 459 (2d. Dept. 2003).

Plaintiff agrees to withdraw the causes of action for IIED and defamation. The motion for summary judgment dismissing the 3rd and 5th causes of action are, therefore, granted on consent. The court separately considers the remaining causes of action.

Breach of Contract

In order to state a cause of action for breach of contract, the pleading must allege the existence of a valid and enforceable agreement, due performance by plaintiff, and a failure of performance by defendant, resulting in damages. *See* Furia v. Furia, 116 A.D.2d 694, 695 (2d Dept. 1986).

The Contract provides, in relevant part:

> 3. Copyright and Reproductions. The Studio shall own the copyright in all images created. The Studio shall make reproductions for the Client or for the Photographer's own purposes including, but not limited to, portfolio samples, self-promotions, entry in photographic contests or art exhibitions and editorial use. If the Studio desires to make other uses, the Studio shall not do so without first obtaining the written permission of the Client.
>
> . . .
>
> 10. Miscellany. This Agreement incorporates the entire understanding of the parties. Any modifications of this Agreement must be in writing and signed by both parties. Any waiver of a breach or default hereunder shall not be deemed a waiver of a subsequent breach or default of either the same provision or any other provision of this Agreement. This Agreement shall be governed by the laws of the State of New York.

"[W]hen parties set down their agreement in a clear, complete document, their

writing should as a rule be enforced according to its terms" (W.W.W. Associates, Inc. v. Giancontieri, 77 N.Y.2d 157, 162 [1990]) and where the language of a contract is unambiguous, the parties' intent is determined within the four corners of the contract (In re Matco-Norca, Inc., 22 A.D.3d 495, 496 [2d Dept. 2005]).

The court finds that the underlying contract is unambiguous. The Contract clearly states that Christian Oth owns the copyright to all images created and that it is entitled to make reproductions for the plaintiff or the photographer's own purposes. Here, defendants posted the pictures in a password-protected gallery maintained on defendants' website so plaintiff could view the wedding pictures, share them with family and friends, and order prints directly from the gallery. This falls directly within the ambit of the Contract terms.

Moreover, the Contract includes a merger clause which states that the Contract "incorporates the entire understanding of the parties" and "any modifications of this Agreement must be in writing and signed by both parties." The court is, therefore, unpersuaded by plaintiff's argument that on September 20, 2008, plaintiff and Monastra entered into an oral agreement that modified the terms of underlying Contract. *See* Bank v. Leumi Trust Co. of New York v. D'Evori Intern., Inc., 163 A.D.2d 26 (1st Dept. 1990). Accordingly, defendants' motion for summary judgment dismissing plaintiff's 4th cause of action for breach of contract is granted.

Fraud and Concealment

To state a cause of action for fraud, plaintiff must show: (1) that defendants

intentionally made a misrepresentation or material omission of fact; (2) that the misrepresentation or material omission of fact was false or known to be false to defendants; (3) plaintiff's reliance; and (4) that the misrepresentation resulted in some injury to plaintiff. Held v. Kaufman, 91 N.Y.2d 425 (2d Dept. 1998).

A cause of action for fraudulent concealment requires, in addition to the four foregoing elements, an allegation that the defendant had a duty to disclose material information and that it failed to do so. P.T. Bank Central Asia v. ABN AMRO Bank N.V., 301 A.D.2d 373 (1st Dept. 2003). In the absence of a fiduciary relationship, an affirmative duty to disclose arises where one party's knowledge of the facts renders the transaction inherently unfair unless those facts are disclosed. Swersky v. Dreyer & Traub, 219 A.D.2d 321 (1st Dept. 1996).

Where the facts represented are not matters peculiarly within defendants' knowledge, and plaintiff has the means available to her of knowing, by the exercise of ordinary intelligence, the truth, or the real quality of the subject of the representation, she must make use of those means, or she cannot claim justifiable reliance. *See* Danann Realty Corp. v. Harris, 5 N.Y.2d 317 (1959); Stuart Silver Associates, Inc. v. Baco Development Corp., 245 A.D.2d 96 (1st Dept. 1997).

Plaintiff alleges that defendants committed fraud by taking photographs of plaintiff in her underwear after assuring plaintiff that they would not do so and by failing to remove all of the photographs from the website after being asked to do so. Plaintiff argues that she reasonably relied on Murphy's confirmation that the photographs had been removed from the website before providing her family and friends with the password.

The court finds that defendants did not commit fraud or concealment. The facts presented on this motion indisputably demonstrate that Murphy's failure to remove the photographs from one part of the website was an "oversight" and not "concealment." Furthermore, defendants have established their *prima facie* case that there was no reasonable reliance. Plaintiff had access to the gallery and had the means of discovering the photographs on her own, prior to giving the password to her family and friends. Plaintiff has not come forward with any facts that prove reliance.

The court also finds that plaintiff's claim for fraud duplicates her breach of contract claim. Although a fraud claim related to a breach of contract can be properly stated if the allegations in support of the claim concern representations collateral or extraneous to a contract (Morgan v. A.O. Smith Corp., 221 A.D.2d 422 [2d Dept. 1995]), a fraud claim should be dismissed as redundant when it merely restates a breach of contract claim (First Bank of Americas v. Motor Car Funding, Inc., 257 A.D.2d 287 [1st Dept. 1999]).

Here, plaintiff's claim for fraud merely restates her breach of contract claim, as both claims arise from the alleged verbal contract between plaintiff and Monastra, in which Monastra assured plaintiff that she would not take any pictures of plaintiff in her underwear. Defendants' motion for summary judgment dismissing plaintiff's 1st cause of action for fraud and concealment is granted.

Negligent Infliction of Emotional Distress

A plaintiff asserting a claim for the negligent infliction of emotional distress must establish that: (1) the defendant owed a duty to her; (2) the duty was breached; and (3)

that the breach of the duty owed exposed her to an unreasonable risk of bodily injury or death. Bovsun v. Sanperi, 61 N.Y.2d 219, 223 (1984). The tort of negligent infliction of emotional distress does not require extreme and outrageous conduct, as does a claim for intentional infliction of emotional distress. *See* Howell v. New York Post Co., Inc., 81 N.Y.2d 115 (1993). Instead, negligent infliction of emotional distress cause of action is generally premised upon the breach of a duty owed directly to the plaintiff, which either unreasonably endangers a plaintiff's physical safety, or causes the plaintiff to fear for his or her own safety. Daluise v. Sottile, 40 A.D.3d 801 (2d Dept. 2007).

It is well-settled that a person "to whom a duty of care is owed . . . may recover for harm sustained solely as a result of an initial, negligently-caused psychological trauma, but with ensuing psychic harm with residual physical manifestations." Johnson v. State of New York, 37 N.Y.2d 378 (1975). A breach of the duty of care "resulting directly in emotional harm is compensable even though no physical injury occurred" (Kennedy v. McKesson Co., 58 N.Y.2d 500, 504 [1983]) when the mental injury is "a direct, rather than a consequential, result of the breach" (Kennedy, *supra* at 506) and when the claim possesses "some guarantee of genuineness." Ornstein v. New York City Health and Hospitals Corp., 10 N.Y.3d 1 (2008); Ferrara v. Galluchio, 5 N.Y.2d 16, 21 (1958).

The court finds that the events plaintiff describes, even when viewed cumulatively, do not support a claim for negligent infliction of emotional distress. Defendants actions do not involve any threat to physical safety, nor are plaintiff's allegations predicated on any fear of her physical safety. While the court is sympathetic to plaintiff's situation based on her prior experiences, and even accepting that the publication of the photos

may have been upsetting and embarrassing to her, there is nothing that would cause her to fear that she was exposed to physical harm. Defendants' motion for summary judgment dismissing plaintiff's 2nd cause of action for negligent infliction of emotional distress is, therefore, granted.

Motion to Strike

Under the Uniform Rules of the Trial Courts § 216.1, the court may seal a court record upon a written finding of good cause, taking into account the harm to the parties and the interest of the public. Good cause is not defined in the court rule. It has been held, however, to amount "to nothing more than a legislative recognition that a sealing order should clearly be predicated upon a sound basis or legitimate need to take judicial action." Gryphon Domestics VI, LLC v. APP International Finance Company BV, 28 A.D.2d 3d 322 (1st Dept. 2006). Generally, the courts have been reluctant to allow the sealing of court records. This is, in part, due to the constitutional presumption that the public is entitled to access to court proceedings. Thus, any order denying access must be narrowly tailored to serve compelling objectives, such as a need for secrecy that outweighs the public's right to access. Gryphon Domestics VI, LLC, *supra* at 113.

Although redaction is not expressly mentioned in the court rule regarding sealing, the same kinds of considerations have been held to apply to redaction of records before the court. Danco Laboratories Limited v. Chemical Workers of Gedeon Richter, Limited, 274 A.D.2d 1, 8 (1st Dept. 2000). While redaction is generally considered a less restrictive alternative to sealing an entire court record, it still requires appropriate legal

justification before it is permitted. *See Carpinello*, Pubic Access to Court Records in New York: The Experience Under Uniform Rule 216.1 and the Rule's Future in a world of Electronic Filing, 66 ALBANY LAW REVIEW 1089, 1119 (2003).

The burden of showing the right to sealing or redaction of a record rests with the proponent. Once the burden is satisfied, then the court must balance the competing interests of the parties and the public. Mancheski v. Gabelli Group Capital Partners, 39 A.D.3d 499, 502 (2d Dept. 2007).

Here, plaintiff moves to strike defendants' "Exhibit G" and purge it from the court's record on the grounds that the photographs contained in "Exhibit G" were altered by defendants, are prejudicial, are not probative, and are irrelevant. Defendants do not object to plaintiff's motion to strike the photographs, on condition that the original, unredacted photographs are considered by the court under seal.

The court finds that there is good cause shown that, in this particular situation, "Exhibit G" should be stricken from the record. There is no identifiable public interest in the photographs. The photographs are the offending photographs underlying this action, but with certain self-styled redactions. They still show plaintiff getting dressed for her wedding. The photographs are irrelevant to the motion and a decision can be reached without even looking at them. Furthermore, defendants, not plaintiff, placed the photographs in the record, thereby risking plaintiff's right to privacy.

Contrary to defendants' contention, there is no need to look at the pictures at all to consider and resolve the legal issues raised in this motion. Consequently, the court denies defendants' request that original, un-redacted photographs should be reviewed in

camera.

Conclusion

It is hereby:

ORDERED that defendants' motion for summary judgment, dismissing the complaint, is granted for the reasons set forth in the foregoing decision; and it is further

ORDERED that plaintiff's cross-motion is granted in part, to the extent that defendants' "Exhibit G" shall be stricken from the court's record; and it is further

ORDERED that defendants shall serve a copy of this order upon the Office of the County Clerk with two (2) copies of their motion for summary judgment without "Exhibit "G;" and it is further

ORDERED that once served on the Office of the County Clerk, defendants' originally filed motion for summary judgment in the County Clerk's office shall be returned to the defendants; and it is further

ORDERED that the part of plaintiff's cross-motion seeking leave to amend the complaint is denied; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED this constitutes the decision and order of the Court.

Dated: New York, New York
September 27, 2010

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.