

Simon v Time Warner Cable, Inc.

2010 NY Slip Op 33264(U)

November 19, 2010

Supreme Court, New York County

Docket Number: 108207/10

Judge: Eileen A. Rakower

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

HON. EILEEN A. RAKOWER

PART 15

Index Number : 108207/2010

SIMON, MARSHALL

INDEX NO.

108207/10

vs

TIME WARNER CABLE

MOTION DATE

003

Sequence Number : 003

MOTION SEQ. NO.

DISMISS

MOTION CAL. NO.

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

3

Cross-Motion: Yes No

FILED

Upon the foregoing papers, it is ordered that this motion

NOV 23 2010

NEW YORK COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

Dated: 11/19/10

HON. EILEEN A. RAKOWER c.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
MARSHALL SIMON,

Plaintiff,

Index 108207/10
Mot. Seq.: 003

- against -

DECISION/ORDER

TIME WARNER CABLE, INC., VIACOM INC.,
IDEA VILLAGE PRODUCTS CORP., SPARK
INNOVATORS, INC. INGRID SCHMERLING d/b/a
MEREDITH EAST MODEL AGENCY, and BLUE MOON
STUDIOS, INC.,

FILED

NOV 23 2010

Defendants.

NEW YORK
COUNTY CLERK'S OFFICE

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff brings this action for: (1) violation of §§50-51 of the New York Civil Rights Law, as against defendants Time Warner Cable, Inc, Viacom Inc., Idea Village Products Corp. ("Idea Village"), Spark Innovators, Inc. ("Spark"), and Blue Moon Studios, Inc. ("Blue Moon"); (2) breach of contract, as against Blue Moon; (3) fraud, as against Idea Village, Spark and Blue Moon; and (4) unjust enrichment, as against all defendants. Plaintiff is seeking \$100,000 in compensatory damages as against all defendants, costs (including attorney's fees) and punitive damages, as against Idea, Spark, and Blue Moon in the amount of \$250,000. By Order of this Court, dated September 21, 2010, the action was dismissed as against Blue Moon only. Defendant Ingrid Schmerling d/b/a Meredith East Model Agency ("Meredith") now moves to dismiss pursuant to CPLR 3211(a)(1),(7)&(8) and CPLR §327. Plaintiff opposes.

Plaintiff is a model and actor. Ingrid was plaintiff's talent agent at the time that the causes of action arose. Blue Moon is a production company that was hired to run an advertising campaign for one of Spark's products, an electric shaver known as "Micro Force." Blue Moon was in charge of hiring the actors and shooting an infomercial for the Microforce product. Idea Village is the developer and marketer

of several "As Seen on TV" products. Defendants Time Warner Cable, Inc. and Viacom Inc. are alleged to have aired the commercials bearing plaintiff's image after the expiration of plaintiff's contract with Blue Moon.

On May 29, 2008 plaintiff entered into a "Talent Agreement," through Meredith, with Blue Moon. The agreement states the following, in relevant part:

I Marshall Simon being of legal age, hereby give Blue Moon . . . the absolute and irrevocable right and permission to use, reproduce, edit, and assigns the absolute and irrevocable copyright, publish and/or resell photographic images. This may include moving pictures and/or videotaped images of me with or without my voice, or in which I may included in whole or in part photographed, taped, videotaped, an [sic] or recorded on 5-29-08 and thereafter, and to circulate the same in all forms and media for art, advertising, trade, competition of every description and/or any other lawful purposes whatsoever. I also consent to the use of any printed matter including but not limited to ~~advertisements, packaging, package inserts, still photographs, catalogs, in store signage, trade, consumer promotions, public relations and Internet~~ in conjunction with the Micro Force campaign.

In a handwritten note near the signature line at the bottom, plaintiff wrote "12 mo usage."

Pursuant to the Talent Agreement, plaintiff participated in an infomercial for the Microforce razor, for which he was compensated approximately \$1500.00. Plaintiff, who asserts that the agreement expired on May 29, 2009, discovered that, after that date, his image was still being used in "television commercials, on the internet, and on packaging of products being sold in New York State and throughout the country."

Thereafter, Meredith sent an invoice to Spark Innovators c/o Idea Village, dated May 12, 2010, for the following:

MICRO FORCE SHAVE renewal fee for Commercial June 2009-June 2010 . . . 400.00

same as above Renewal fee for June 2010-June 2011 . . . 400.00

Renewal fee for MICRO FORCE SHAVER-web video Jan 1, 2010-Dec 31, 2010 . . . 400.00

The invoice included Ingrid's fee of 240.00, for a total amount of \$1440.00. On June 1, 2010, Sparks issued a check to Meredith for the total amount requested.¹ Meredith claims she deposited the check and on June 15, 2010 she sent an email to "Fred" at Blue Moon stating that "Marshall has agreed to the renewal until June 2011 with the proviso that he wants to re-negotiate after that date." In another email sent to Lisa Mulligan at Blue Moon, Meredith states:

Yes- Spark Innovators has sent a check for the Micro Force commercial for Marshall Simon.

They paid a renewal fee until June 2011.

They also paid for the web site usage from January 1-December 31, 2010.

In an email sent on June 16, 2010 to plaintiff's attorney and copied to "Lori" at Idea Village, Ingrid claims that a check was sent to plaintiff on June 15, 2010. Plaintiff concedes that he received a check from Meredith but claims that he did not cash it.

Meredith, in support of its motion, submits: the pleadings; an invoice addressed to Spark, dated May 12, 2010; a Spark document noting the issuance of a check to Meredith in the amount of \$1440.00; a Meredith deposit slip²; and a Meredith check register for June 15, 2010. Meredith argues that: (1) the first, second and third causes of action should be dismissed as to her because those causes of action are not plead against her; (2) documentary evidence submitted here proves that the fourth cause of action for unjust enrichment should be dismissed; (3) she is not subject to personal jurisdiction in New York; and (4) the action must be dismissed under the theory of forum non conveniens.

¹On that same date Sparks issued another check to Ingrid in the amount of \$720.00. Under "memo" it states "Renewal fees," but there is no corresponding invoice submitted.

²The photocopy of the deposit slip appears to be blank as the handwritten information did not reproduce in the photocopy.

Plaintiff, in opposition, submits: several printouts which plaintiff purports to be from Meredith's website; several items of correspondence; and the complaint. Plaintiff asserts that "Since the first three causes of action . . . were not pleaded against Schmerling, no such claims against Schmerling exist that this Court can dismiss pursuant to CPLR 3211(a)(7).

Plaintiff asserts that Meredith is properly sued in New York because its website advertises the agency as existing in the "New York/New Jersey area." Also, plaintiff argues that Meredith has offered no compelling reason why plaintiff's choice of forum should be disturbed. Finally, plaintiff argues that the unjust enrichment claim should remain because Meredith fails to establish that it was not unjustly enriched through irrefutable evidence.

Meredith submits an affidavit in which Ms. Schmerling states:

[the agency's] only office is located at 767 Frederick Court, Wyckoff, New Jersey . . . all work relating to the operation of the Agency is performed in this office. I am the only agent and my license to operate as an agent was issued by the State of New Jersey. I do not have a license to practice as an agent from any other state . . . neither I nor the Agency maintain any bank accounts, or real or personal property in New York . . .

Despite Meredith's physical containment in New Jersey, plaintiff nonetheless contends that Meredith is subject to jurisdiction under CPLR §302(a)(1) as the result of maintaining a website for the agency. CPLR §302(a)(1) states, in relevant part:

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary . . . who in person, or through an agent:

(1) transacts any business within the state or contracts anywhere to supply goods or services in the state . . .

With the advent of the internet, courts have recognized that "technological advances in communication enable a party to transact enormous volumes of business

within a state without physically entering it.” (*Deutsche bank Securities, Inc. v. Montana Board of Investments*, 7 NY3d 65[2006]). Under a CPLR §302(a)(1) analysis, “the guiding principle which has emerged from the case law is that whether the exercise of personal jurisdiction is permissible is directly proportionate to the nature and quality of commercial activity that an entity conducts over the internet.” (*Citigroup, Inc. v. City Holding Company*, 97 F.Supp.2d 549,565[SDNY 2000]). Not all activity conducted via a company’s website rises to the level necessary to confer personal jurisdiction. In order to make such a determination courts look to such factors as “the extent of the website’s interactive nature, whether the company has substantially solicited New York business through its website, and whether defendant’s servicing of New York Customers has been “systematic and continuous.”(*Bankrate, Inc. v. Mainline Tavistock, Inc.*, 856 NYS2d 496[Sup. Ct. Kings Cnty. 2008]). For example, in *Citigroup*, the court found that defendant’s lending website:

involved more than a passive posting of information about [defendant’s] loan products and services. Customers in New York may apply for loans on-line as well as print out an application for submission by facsimile, they may click on a “hyper link” to “chat” on-line with a . . . representative, and they may e-mail [defendant] with home loan questions and receive a response from an “online representative . . . in less than an hour.”(*Citigroup* at 565).

The printout of the Meredith website submitted by plaintiff displays the following: on the first page there is the company logo with the New Jersey address. An affiliate company called “Meredith Models & Talent Agency,” which is located in Minnesota, also displays its logo on the first page of the website. The second printout contains the addresses of both the New Jersey location and the Minnesota location. At the top of the second page there are five links to separate pages. Those links are: “Agency Info,” “Talent Submissions,” “Talent Photos,” “Client List,” and “Policies.” The third page is a printout of the ‘Client List.’

First, there is no indication that the Meredith website is “interactive,” as that term is defined in *Citigroup*. None of the available links take the user to a page where they can submit information, order anything or even make a query. Nor is there any showing that Meredith “substantially solicited” New York business through its website. Plaintiff himself does not even assert in his affidavit that Meredith solicited

him through the website. Rather, he merely alleges that Meredith "contacted and corresponded" with him by email. Finally, although Meredith concedes that some of her clients live in New York (as well as other states), there is no evidence in the records that Meredith's servicing of New York customers has been "systematic and continuous." Plaintiff submits a "client list" from the website which he claims shows that Meredith contracts with "many national and Fortune 500 Clients." However, the list does not indicate where those companies are located, and there is no reason to presume that any of them are domiciled in New York.

Meredith's website can be described as "a passive posting of information," which is analogous to "an advertisement in a nationally available magazine or newspaper, and does not without more justify the exercise of jurisdiction over [Meredith]." (*Citigroup* at 565).

Wherefore it is hereby

ORDERED that defendant Ingrid Schmerling d/b/a Meredith East Model Agency's motion to dismiss the complaint is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the complaint is hereby severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers be filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall served a copy of this order with notice of entry upon the County Clerk(Room 141B) and the Clerk of the Trial Support Office(Room 158), who are directed to mark the court's records to reflect the change in the caption herein.

DATED: November 19, 2010


FILED ELLEN A. RAKOWER, J.S.C.

NOV 23 2010

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