

Lippolis v Farley

2011 NY Slip Op 30229(U)

January 18, 2011

Sup Ct, Nassau County

Docket Number: 022287/10

Judge: Jeffrey S. Brown

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE**

-----X **TRIAL/IAS PART 21**
THOMAS LIPPOLIS, Individually, and WOWW
RESOURCES, INC.,

Plaintiffs,

- against -

JENNIE L. FARLEY and JENNI FARLEY, LLC.,

Defendants.

**Index No. 022287/10
Mot. Seq. # 01
Mot. Date 1-5-11
Submit Date 1-5-11**

-----X
=====

The following papers were read on this motion:	Papers Numbered
Order to Show Cause, Affidavits (Affirmations), Exhibits Annexed.....	1
Answering Affidavit	2
Reply Affidavit.....	3

Defendant moves by order to show cause for the following relief: 1) pursuant to CPLR §6301, enjoining plaintiffs, their agents, servants, employees, attorneys, and all other persons in active concert or participation with them, from manufacturing, distributing, selling, offering for sale, soliciting offers for donations, promoting, transferring, using, displaying, assigning, advertising, or causing to be published, distributed, sold or reproduced video, photographs, pictures, facsimiles, other pictorial portrayals, or any other media in which the name or likeness of defendant, or any part thereof, is used herein without the written consent of the defendant pursuant to Civil Rights Law §51; and 2) compelling arbitration of the claim, which is the subject

matter of the above entitled action, upon the ground that the subject matter of the claim is arbitrable pursuant to a valid written agreement between the plaintiff and the defendants.

Defendant, JENNI L. FARLEY, an actor on the MTV reality show, "Jersey Shore," states that throughout their personal relationship, plaintiff, THOMAS LIPPOLIS, took numerous photographs and videos of her, individually and with the plaintiff, at various social and professional functions which were not for purposes of sale; nor has she ever granted permission for their sale or distribution.

Defendant further states that on or about February, 2010, plaintiff took numerous nude and/or partially nude digital images and videos of her, without her permission or knowledge, while she was under the effects of pre-surgical and post-surgical anesthesia. She indicates that on or about September, 2010, she learned for the first time that plaintiff was actively attempting to market these digital images and videos.

Defendant asserts that she never gave permission, written or otherwise, for the sale of the digital images or videos; that the sale and publication of same will cause irreparable harm to her reputation and persona; and that the sale and dissemination of these images and video may violate her contractual obligations with MTV. She argues that the equities are clearly balanced in her favor as evidenced by the fact that the plaintiff is seeking to obtain monetary benefit from the publication of the images.

Finally, defendant contends that plaintiff's actions are in contravention of Civil Rights Law §50 and, therefore, pursuant to Civil Rights Law §51, she is entitled to an injunction and damages.

In opposition, plaintiff states that he took photographs of defendant throughout the tenure of their relationship for both personal pleasure and professional use. He claims that defendant was always a willing participant and always gave consent.¹ He states that of significant import is the fact that he has owned the photos for approximately one year and defendant, aware of his ownership of same, has done nothing to dispute such ownership, or prevent him from utilizing the photos as he deems fit. Plaintiff claims that defendant now seeks to enjoin him in retaliation to a breach of contract lawsuit he commenced against her.

Plaintiff argues that defendant has not put forth a scintilla of evidence to show that she would be harmed in any way. He intimates that her actions are ironic considering she allegedly expressed her desires to pose naked in *Playboy* and expressed her sexual preferences and desires in a book soon to be released.

In reply, defendant contends it is irrelevant for the purposes of this litigation the fact that the plaintiff took her pictures, or the length of time that he claims ownership of such pictures; what is important is what he plans to do with those photos and videos. She argues that the right to enjoin a proposed use of a person's name for trade, without written consent, is absolute, regardless of the detriment resulting to her; and is a violation of the privacy law. Defendant states that she is not objecting to the ownership of the photographs, she is objecting to the use of her name or likeness for the purposes of trade without her express written consent.

Defendant disputes plaintiff's claim of retaliation and reasserts her position that she will suffer irreparable harm if the photos and/or videos are sold.

¹The Court notes that the plaintiff failed to provide documentation to establish defendant gave written consent to take the photos and/or videos.

Based on the foregoing, the decision of the Court is as follows:

The application is **GRANTED** in its entirety.

New York privacy claims are founded solely upon sections 50 and 51 of the Civil Rights Law. Section 50 of the New York Civil Rights Law makes commercial misappropriation of a person's name or likeness a misdemeanor. Thus, it creates a cause of action in favor of "[any] person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without * * * written consent". Section 51 of the Civil Rights Law also authorizes a civil action for injunctive relief and damages against a party who violates section 50. (See, Civil Rights Law § 50; *Cohen v Herbal Concepts*, 63 NY2d 379, 383 [1984].) These provisions must be construed narrowly (*Rand v Hearst Corp.*, 31 AD2d 406 [1st Dept 1969], aff'd 26 NY2d 806 [1970]), and constitute the only available relief in New York for the so-called "invasion of privacy" torts recognized at common law. (See, *Howell v New York Post Co.*, 81 NY2d 115, 123 [1993]; *Cohen v Herbal Concepts*, 63 NY2d, at 383, supra.) The action may be brought to enjoin the prohibited use and may also seek damages for any injuries sustained including exemplary damages for a knowing violation of the statute. (See, *Cohen v Herbal Concepts, Inc.*, 63 N.Y.2d 379, 383 [N.Y. 1984])

In the case at bar, defendant brings a counterclaim in the underlying action pursuant to Civil Rights Law §§50 and 51. Pending resolution of the action, defendant requests that this court issue a preliminary injunction pursuant to §6301 of the Civil Practice Law and Rules.

It is well settled that: “[to] be granted a preliminary injunction, a movant must demonstrate (1) a likelihood of ultimate success on the merits; (2) irreparable injury absent the granting of the preliminary injunction; and (3) that a balancing of equities favors his position (*Town of Porter v Chem-Trol Pollution Servs.*, 60 AD2d 987, 988; *Matter of Armitage v Carey*, 49 AD2d 496, 498; *Albini v Solork Assoc.*, 37 AD2d 835). However, it is not for this court to determine the ultimate merits of an action upon a motion for preliminary injunction; rather, the purpose of the interlocutory relief is to preserve the status quo until a decision is reached on the merits (*Moody v. Filipowski*, 146 A.D.2d 675; *Tucker v Toia*, 54 AD2d 322; *Hoppman v Riverview Equities Corp.*, 16 AD2d 631; *Weisner v 791 Park Ave. Corp.*, 7 AD2d 75, 78-79; *Peekskill Coal & Fuel Oil Co. v Martin*, 279 App Div 669, 670).

The court finds that the defendant has sufficiently met her burden of showing a likelihood of ultimate success on the merits, as it is undisputed that plaintiff has not obtained defendant’s written permission to use the photographs or videos for purposes of advertising or trade. Should these nude or partially nude photos or videos be disseminated pending resolution of the underlying action, the court finds that defendant’s reputation and persona will be irreparably harmed. Plaintiff’s unsubstantiated allegations that defendant expressed her wishes to pose nude in a magazine and expressed her sexual preferences in a book soon to be released is of no moment. Finally, considering plaintiff is seeking monetary benefits from the sale or publication of same, and defendant will suffer irreparable injury if the requested relief is not granted, the equities are clearly balanced in defendant’s favor.

Accordingly, it is

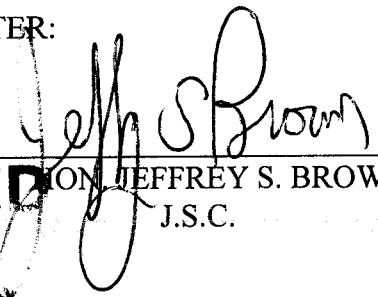
ORDERED that pursuant to CPLR §6301, pending resolution of the underlying action, plaintiffs, their agents, servants, employees, attorneys, and all other persons in active concert or participation with them, are enjoined from manufacturing, distributing, selling, offering for sale, soliciting offers for donations, promoting, transferring, using, displaying, assigning, advertising, or causing to be published, distributed, sold or reproduced video, photographs, pictures, facsimiles, other pictorial portrayals, or any other media in which the name or likeness of defendant, or any part thereof, is used herein without the written consent of the defendant pursuant to Civil Rights Law §51 and it is further

ORDERED, without opposition, the underlying claim shall be submitted to arbitration.

This constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
January 18, 2011

ENTER:



ENTERED JEFFREY S. BROWN
J.S.C.

JAN 21 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

Attorney for Plaintiff
Jeffrey I. Baum, Esq.
666 Old Country Road, Ste. 304
Garden City, NY 11530
516-747-6900
516-228-8349 Fax

Attorney for Defendant
Tarbet Lester & Schoen, PLLC
524 Montauk Highway
PO Box 2635
Amagansett, NY 11930
631-907-3500