

Simon v Time Warner Cable, Inc.

2011 NY Slip Op 30331(U)

February 10, 2011

Sup Ct, 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

PRESENT: **HON. EILEEN A. RAKOWER**

PART 15

Index Number : 108207/2010

SIMON, MARSHALL

vs

TIME WARNER CABLE

Sequence Number : 004

DISM ACTION/ INCONVENIENT FORUM

INDEX NO. 108207/10

MOTION DATE _____

MOTION SEQ. NO. 004

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

1

2

3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

FEB 14 2011

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: 2/10/11



HON. EILEEN A. RAKOWER

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.: 004

- against -

DECISION/ORDER

TIME WARNER CABLE, INC., VIACOM INC.,
IDEA VILLAGE PRODUCTS CORP., and SPARK
INNOVATORS, INC.,

FILED

FEB 14 2011

Defendants.

NEW YORK
COUNTY CLERK'S OFFICE

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

Plaintiff originally commenced this action for: violation of §§50-51 of the New York Civil Rights Law, as against defendants Time Warner Cable, Inc (“TWC”), Viacom Inc. (“Viacom”), 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. Spark, Idea village and Blue Moon previously moved to dismiss for, among other things, lack of personal jurisdiction. By Order of this Court, dated September 21, 2010, the action was dismissed as against Blue Moon only. As to Spark and Idea Village, the motion was denied without prejudice to renew after discovery was conducted on the jurisdictional issue. By Order dated November 19, 2010, the action was dismissed as to defendant Ingrid Schmerling d/b/a Meredith East Model Agency’s (“Meredith”) on jurisdictional grounds. Plaintiff filed an amended complaint, dated December 4, 2010, alleging a violation of §§50-51 of the New York Civil Rights Law only, as against the remaining defendants.

Sparks and Idea Village (“moving defendants”) now, by new and separate motion, seek to dismiss for plaintiff’s failure to join a necessary party, pursuant to CPLR 3211(a)(10), CPLR §1001(a), and CPLR §1003. The jurisdictional issue

remains unresolved. Moving defendants make this alternative motion in hopes that discovery on the jurisdictional issue will be rendered moot. Plaintiff opposes the instant motion. Neither TWC nor Viacom submit papers.

Sparks Innovators, Inc, developed and marketed the "Micro Force" electric shaver, an "As Seen on TV" product. Sparks contracted with the Blue Moon production company to create and produce an infomercial for the product. Blue Moon hired, paid and contracted with the talent appearing in the commercial. Plaintiff, represented by his agent, Meredith, entered into an agreement with Blue Moon, agreeing to the use of his image, wherein he noted "12 mo usage." Idea Village claims it became involved with this project after the commercial was already created, produced, and was aired by Defendants Time Warner Cable, Inc. and Viacom Inc..

Plaintiff's agreement with Blue Moon is dated May 29, 2008. Plaintiff alleges that his image continued to air and appear on packaging after the 12 months Blue Moon was authorized to use the image, without further written authorization. Defendants now claim that Meredith made representations to Sparks on behalf of plaintiff, by communications which began May 12, 2010. Such communications purport to extend consent to the use of plaintiff's images. Plaintiff argues that he did not retroactively give consent to the use of his images.

Defendants now urge that Meredith is a necessary party to this action. Further, they assert Blue Moon is a necessary party since it was the party that contracted with plaintiff for plaintiff's image.

Moving defendants, in support of their motion, submit: the affidavit of Raj Khubani, President of Spark; the affidavit of Lori Ann Lombardo, Vice President of Product Development for Idea Village; a photocopy of a check made out to Meredith from Spark; email correspondence; and the affidavit of Fred Vanore, President of Blue Moon. Defendants do not provide the agreement between Sparks and Blue Moon. Nor do defendants provide any agreement between Sparks and Idea Village which might clarify the nature of their joint venture.

Sections 50-51 of the Civil Rights Law, the only cause of action against the moving defendants, prohibits the use of a person's "name, portrait, picture or voice" for advertising or trade purposes without that person's written consent . . ." (*Guerrero*

v. *Carva*, 10 AD3d 105[1st Dept. 2004]). The issue turns on whether or not plaintiff has given “written consent” to the use of his images. While a contract may demonstrate such written consent, the enforceability of such contract as between the parties is not essential to a third party’s defense of a claim under §§50-51 of the Civil Rights Law. (see *Cory v. Nintendo of America, Inc.*, 185 AD2d 70[1st Dept. 1993]).

CPLR 3211(a)(10) states, in relevant part:

Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

- 10. the court should not proceed in the absence of a person who should be a party.

Initially, CPLR 1001(a) defines a necessary party as:

Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgement in the action shall be made plaintiffs or defendants.

Moving Defendants urge that Meredith is a necessary party because they relied upon Meredith’s representations, as plaintiff’s agent, that plaintiff gave written consent to use the images until June 2011. However, it is undisputed that the ads were run continuously after the alleged expiration of the talent agreement in May 2009, and Meredith did not represent that plaintiff wished to renew the contract until approximately a year later. Thus, there is a period for which no consent to the use of the images is documented.

Neither Blue Moon nor Meredith’s presence in the action is required in order for “complete relief to be accorded between the persons who are parties to the action.” Nor will Blue Moon or Meredith, who did not use the image and were never subject to the Civil Rights claim, “be inequitably affected by a judgement in the action.”(see CPLR §1001[a]).

Wherefore it is hereby

ORDERED that the motion to dismiss is denied; and it is further

ORDERED that parties shall appear for a preliminary conference on March 29, 2011 at 9:30 a.m., at 80 Centre Street, in Room 308

DATED: February 10, 2011



EILEEN A. RAKOWER, J.S.C.

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