

**Watters v National Football League Inc.**

2011 NY Slip Op 30924(U)

March 25, 2011

Supreme Court, New York County

Docket Number: 108819/07

Judge: Milton A. Tingling

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

PRESENT: ~~MILTON A. TRINGLING~~ Justice

PART 44

*Watters*

INDEX NO. 108819/07

- v -

MOTION DATE 10/4/10

*N.F.L*

MOTION SEQ. NO. 5

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 ...

PAPERS NUMBERED

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with annexed decisions.

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

**FILED**

MAR 29 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 3/25/11

met 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 44

-----X  
MARGARET M. WATTERS,

Plaintiff,

-against-

Index No. 108819/07

NATIONAL FOOTBALL LEAGUE INC., NFL  
VENTURES, L.P., NFL VENTURES, INC., GMR  
MARKETING LLC, RAPP COLLINS WORLDWIDE,  
INC., OMNICOM GROUP, INC., BBDO  
WORLDWIDE, INC., RADIATE GROUP, INC., and  
JOHN DOE,

Defendants.

**FILED**

**MAR 29 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
**MILTON A. TINGLING, J.:**

The defendants the National Football League Inc., NFL Ventures, L.P., and NFL Ventures, Inc. (collectively, the NFL defendants) move, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint.

The plaintiff Margaret Watters (Watters) is a 59-year-old woman living, and working as a nurse, in the State of Massachusetts. Watters entered a contest sponsored by the NFL known as "Pitch Us Your Idea for the Best NFL Super Bowl Commercial Ever. Seriously." The contest was designed to give fans the opportunity to pitch ideas for a super bowl television commercial. Pursuant to a letter agreement, the defendant GMR Marketing LLC was hired by the NFL to administer and execute the contest site. On Friday November 17, 2006, pursuant to a venue agreement, one of the contests was held at Giants Stadium in East Rutherford, New Jersey. On November 16, 2006, Watters drove down from Massachusetts, staying overnight in a New Jersey hotel. Watters was accompanied by her boyfriend, Peter Ward (Ward). According to an exhibit

submitted in support, Watters told her clinical social worker psychotherapist that Ward was a man who initially "stalked" her while he was married to a friend of hers who eventually got breast cancer and died. Watters testified that on the day of the contest she took several medications including clonazepam and paxil. Upon arrival at Giants stadium, Watters was greeted, registered, and signed a release and waiver form. The release provides in relevant part, at paragraph number 10, that Watters does

"release, discharge, and hold harmless the NFL ... and any and all others connected with the Contest ... from any and all liability or claims arising out of, or in any way resulting from, my participation in the Contest ... I agree not to make any claim whatsoever against the Released Parties as a result of my participation in the Contest..."

Watters was then directed to a lounge area to prepare to give her pitch. Upon informing a staff member that she was ready, Watters was taken to a busy corridor to be professionally miked up by a sound engineer.

Two audio engineers, one named Jay O'Hare (O'Hare) (sued herein as John Doe), were stationed outside one of the judging rooms. O'Hare is a 40-year-old man living in New Jersey with his wife, mother, and daughters, and has no record for sexual assault. O'Hare has over 15 years experience as an audio engineer and was working as an independent contractor for the NFL. O'Hare supplied his own equipment, including wireless microphones. O'Hare testified that in his career, he had miked up more 5,000 people. The method employed was to take a small condenser microphone that has a cable attached to a wireless transmitter, and adhere it with foot foam, ideally to the inside of the person's clothing near the xiphoid process, a bone below the rib cage. The foam, and the location of the microphone, are both important to prevent rubbing noise from being picked up by the microphone. O'Hare testified that on the day of the

\* 4]

contest his routine was to ask if the contestant either wanted to put the microphone on themselves, or if they wanted him to do it. If the person wanted O'Hare to place the microphone, O'Hare would explain where it was going.

Watters testified (Exhibit "D" to motion, at p 77) that when asked, she agreed to be miked up, telling O'Hare that she was familiar with these mikes (at p 78). Watters alleges that as the microphone was placed underneath her sweater, the back of O'Hare's hand rubbed up against her breasts. After performing her pitch, Watters did not win the contest. The complaint sets forth a single mixed cause of action for assault, battery and negligence, alleging that Watters was fondled by O'Hare in a sexual manner.

In support of their motion for summary judgment, the NFL defendants argue that the negligence, assault, and battery claims all fail as a matter of law. The NFL also argues that it cannot be held liable for the acts of an independent contractor, the court lacks personal jurisdiction over O'Hare, and the claims are barred by release and waiver.

In opposition to the motion, the plaintiff Watters argues that O'Hare committed a battery by intentionally putting his hand up Watter's sweater. It is also argued that the issue of whether O'Hare is either an employee or an independent contractor is a question of fact for the jury, and the release and waiver form deals with intellectual property claims.

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 issue of fact from the case (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373 [2005]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]). The failure to make such showing requires denial of the motion,

regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient for this purpose (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). It is uncommon to grant summary judgment in a negligence action even where the facts are uncontradicted (*Ugarriza v Schmieder*, 46 NY2d 471, 475 [1979]).

Preliminarily, the court notes that, absent a motion to substitute O'Hare for John Doe as a party defendant, and a motion by O'Hare to dismiss for lack of personal jurisdiction, the court will not reach the issue of whether the court lacks personal jurisdiction over O'Hare.

In order to make out a prima facie claim of battery, a plaintiff must establish that there was bodily contact, that the contact was harmful or offensive, and that the defendant intended to make the contact without the plaintiff's consent (*Wende C. v United Methodist Church N.Y. W. Area*, 4 NY3d 293, cert denied 546 US 818 [2005]). "The intent required for battery is 'intent to cause a bodily contact that a reasonable person would find offensive'" (*Cerilli v Kezis*, 16 AD3d 363, 364 [2d Dept 2005] [citation omitted]). "An offensive bodily contact is one that is done for the purpose of harming another or one that offends a reasonable sense of personal dignity" (*Jeffreys v Griffin*, 1 NY3d 34, 41 n 2 [2003], quoting PJI2d 3:3).

The NFL contends it established a prima facie entitlement to judgment as a matter of law. However, plaintiff's opposition raises a triable issue of fact in dispute concerning the alleged offensive touching.

