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

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ANDREW U-SHIN KIM,

Plaintiff,

- against -

KEN PARK, KEN PARK MANAGEMENT, WUNDERMAN ADVERTISING AGENCY, INNOVATIVE ARTISTS TALENT AND LITERARY AGENCY, INC., CITIBANK, N.A., AND CITIGROUP, INC.,

Defendants.

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Index No. 650770/2012

Mot. Seq. 002

Decision and Order

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

In this action, Plaintiff Andrew U-Shin Kim ("Plaintiff") alleges that "Defendants have used, and/or made a profit from, the image and likeness of the Plaintiff, Andrew U-Shin Kim, for over six years without permission." Plaintiff alleges that his "image and likeness were used worldwide by defendants Citibank N.A. and Citigroup, Inc., in its marketing in hundreds of locations."

As alleged in the Complaint, in early 2003, Plaintiff was introduced to defendant Ken Park ("Park"), a "talent manager" for models. Plaintiff was a model in a photo shoot which was conducted on March 31, 2003 at the E.H. Harriman Estate in Harriman, NY. Plaintiff was told verbally that the images were for use by "Citibank." Plaintiff alleges that he was never asked to, nor did he execute, a model release in connection with the use of his image and likeness in the photos. Plaintiff alleges that he understood from Park that in exchange for a fee, the photo could be used for two years.

On or about March 21, 2011, Plaintiff was contacted by Patricia Widyn, of Wunderman Advertising Agency, who called to inquire asked whether Plaintiff would consent to continued use of his image by "Citibank." Plaintiff alleges that he had "no knowledge up that time what became of the images captured at the March 2003 shoot." On March 24, 2011, in the context of negotiations with Widyn for potential continued use of his image, Plaintiff learned from Widyn that based on a 2006 purchase order, there had been $28,000 payment for a 4-year renewal for Plaintiff's prior arrangement. Plaintiff advised Widyn that he had never received compensation from that payment, and Widyn advised Plaintiff that he should follow up with the talent agency. Plaintiff was then offered a $7,500 for an "additional" one-year usage of the image in Asia. In response to his conversation with Widyn, Plaintiff alleges that he went to multiple Citibank branches and discovered the widespread use of his photograph taken in 2003. Plaintiff alleges that a review of documents provided to him in April 2011 demonstrated that no model release was executed in connection with the use of his image in the Citibank banner, and that the only documentation purporting to be signed by Plaintiff (a"New Client Information Sheet" that authorized payments to be submitted to defendant Ken Park Management) was not, in fact, signed by him.

Defendants Citibank, N.A., and Citigroup, Inc., (collectively, "Citi Defendants") for an Order dismissing the Verified Complaint pursuant to CPLR 3211(a)(1), (a)(2), (5) and (7). Citi Defendants submit the attorney affirmation of Yoav M. Griver and affidavit of John Preston Turner, an officer and Director of Citibank, N.A. Turner states, "The image at issue in this action - 'Man on unicycle' – was purchased and used by Citibank."

CPLR §3211 provides, in relevant part:

> (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
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> (1) a defense is founded upon documentary evidence; or
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> (2) the court has not jurisdiction of the subject matter of the cause of action; or

(5) the cause of action may not be maintained because .... statute of limitations, or statute of frauds; or

(7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91[1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]).

On a motion to dismiss pursuant to CPLR §3211(a)(1) "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted) "When evidentiary material is considered, the criterion is whether the proponent of the pleading *has* a cause of action, not whether he has stated one" (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]) (emphasis added). A movant is entitled to dismissal under CPLR §3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

Plaintiff's Complaint contains twelve counts - nine of which are against Citi Defendants. The following are the nine counts: violation of his Right of Publicity under New York Civil Rights 50 and 51 (Count One); violation of his Right of Publicity under the laws of California (Count Three), Florida (Count Four), Massachusetts (Count Five), Pennsylvania (Count Six), Virginia (Count Seven), and Illinois (Count Eight); and breach of contract (Count Twelve).

Count One of Plaintiff's Complaint asserts breach by all defendants, including Citi Defendants, of New York State's rights of privacy and publicity statutes.

Section 50 of the New York Civil Rights Law provides that "[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 . . . is guilty of a misdemeanor." Section 51 creates a civil cause of action for invasion of privacy. An action to recover damages under New

York Civil Rights §50 and 51 must be commenced within one year of the initial unauthorized use. CPLR §215[3] (actions to be commenced within one year include "a violation of the right of privacy under section fifty-one of the civil rights law.") *See also Nussenweig v. diCorcia*, 9 N.Y. 3d 184, 188 ("Because the publishing event giving rise to plaintiff's right of privacy claims first occurred . . . more than one year before he commenced suit, plaintiff's claims are time-barred.")

In addition, under New York's "single publication" rule, right of publicity claims accrue from the date of a first publication of an offending time, and the dissemination of that same offending item at a later date does not give rise to a new cause of action, nor toll the statute of limitations. *See Costanza v. Seinfeld*, 279 A.D.2d 255, 255-56 (1st Dept 2001) (dismissing on statute of limitation grounds and rejecting plaintiff's claim that a right of publicity violation ran anew with the airing of each new episode of Seinfeld). However, an exception to the New York's single publication rule is republication. *See Firth v. State of New York*, 98 N.Y. 2d 365, 369 [2002]) ("Republication, retriggering the period of limitations, occurs upon a separate aggregate publication from the original, on a different occasion, which is not merely 'a delayed circulation of the original edition.'").

Here, the image of Plaintiff at issue was first shot to be used by Citibank around March 2003. In his Complaint, Plaintiff alleges that use of his image after March 2005 was unauthorized. Plaintiff also contends that the entire use of the Plaintiff's image [beginning in 2003] was unauthorized because his verbal consent was a nullity, and "[a]s such, the entire use of the Plaintiff's image was without authorization."

While the Citi Defendants contend that Plaintiff's claim for breach of New York State's Right of Privacy and Publicity Statutes (Count One) is time barred by New York's single publication rule and one year statute of limitations, Plaintiff argues in his opposition that the republication exception applies in light of the fact that Plaintiff's image was used in new locales (i.e. Asia). However, Plaintiff's Complaint does not allege any factual allegations regarding any new publication of his image within the year before filing his action, let alone that his image was republished in a new format to support the application of the "republication" exception. *See Firth v. State of New York*, 98 N.Y. 2d 365, 369 [2002]). Rather, Plaintiff alleges that defendants sought to obtain his permission in March 2011 to use

his image, but there is no evidence or allegation that his in fact that image was thereafter used. Count One of Plaintiff's Complaint therefore is time barred.

Count Two of Plaintiff's Complaint asserts breach by all defendants, including the Citi Defendants, of "the common law right of publicity." New York does not recognize a common law cause of action for right of publicity. *See Maxwell v. N.W. Ayer, Inc.*, 159 Misc. 2d 454, 457 (N.Y. Sup. Ct. N.Y. County 1993) ("[T]here is no common law right of privacy or common law action for infringement of the rights of publicity in New York.") As such, Plaintiff's second cause of action is dismissed as a matter of law.

Counts Three to Eight of the Complaint assert claims based on the privacy and publicity laws of other states (Count Three- California, Count Four (Florida), Count Five (Massachusetts), Count Six (Pennsylvania), Count Seven (Virginia), and Count Eight (Illinois). The New York Court of Appeals has held that right of publicity claims are governed by the substantive law of the plaintiff's domicile because rights of publicity constitute personalty. *Rogers v. Grimaldi*, 875 F.2d 994, 1002 (2d Cir. 1989) (citing *Southeast Bank, N.A. v. Lawrence*, 66 N.Y.2d 910, 498 N.Y.S.2d 775, 489 N.E.2d 744 (1985)). *See also Zoll v. Jordache Enters, Inc.*, 2011 U.S. Dist. LEXIS 19983, *4 (S.D.N.Y. Dec. 5, 2011). In right of privacy claims, New York courts apply the substantive law of the state with the most significant relationship to the violation of the right. *See Mathews v. ABC Television, Inc.*, 1989 U.S. Dist. LEXIS 10694, No. 88 Civ. 6031, 1989 WL 107640, at *4 (S.D.N.Y. Sept. 11, 1989). Here, Plaintiff admits that he resides in New York, NY in the Complaint, and furthermore, the location of Plaintiff's model photo shoot at issue was in Harriman, New York. Accordingly, based on the Complaint, New York's right of publicity and privacy statute applies in this case, and Plaintiff is barred from asserting claims based on the privacy and publicity laws of other states.

Count Twelve of the Complaint asserts breach of contract by defendants Innovative, Wunderman, and Citibank (collectively, "Defendants"). The Complaint asserts that a contract was formed between the Plaintiff and these Defendants, that said Defendants had authority for a limited time to use Plaintiff's image and likeness, and continued to use the image without authorization. However, the only contract that Plaintiff alleges to have entered into is an oral agreement in 2003 with Park for the two year use of his image. Furthermore, according to Plaintiff's allegations, that

agreement was breached in March 2005 when Defendants continued to use his image, and such a claim would be barred by the six year statute of limitations for breach of contract claims. Plaintiff did not file this action until seven years after that alleged breach, after the statute of limitations had expired. Lastly, even if Plaintiff could establish that he entered into an agreement with defendants, his breach of contract claim would be barred by the Statute of Frauds. The Statute of Frauds requires that any obligations that cannot be performed within one year must be in writing. N.Y. Gen. Oblig. Law 5-§701(a)("Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charge therewith, or by his lawful agent, if such agreement, promise or undertaking: (1) By its terms is not to be performed within one year from the making thereof of the performance of which is not to be completed before the end of a lifetime."). Here, Plaintiff alleges that he entered into a two year oral agreement, which, by its terms, could not be performed in a year and is therefore barred by the Statute of Frauds.

Wherefore, it is hereby

ORDERED that the motion of defendants Citibank, N.A., and Citigroup, Inc.'s motion to dismiss the Complaint is granted, and the Complaint is dismissed in its entirety as against said defendants with costs and disbursements to said defendants, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the action is severed and continued against the remaining defendants.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: 6/19/13

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