

**Watson v MTV Network Enter., Inc.**

2013 NY Slip Op 32789(U)

October 30, 2013

Sup Ct, New York County

Docket Number: 156523/2012

Judge: Marcy S. Friedman

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

PRESENT: Marcy S. Friedman  
Justice

PART 60

Index Number : 156523/2012  
WATSON, TRISTAN  
vs.  
MTV NETWORK ENTERPRISES, INC.  
SEQUENCE NUMBER : 001  
DISMISS ACTION

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is granted as per  
accompanying decision/order dated 10-30-13.

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

Dated: 10-30-13

Marcy S. Friedman J.S.C.  
**MARCY S. FRIEDMAN, J.S.C.**

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER  
 DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK – PART 60

PRESENT: HON. MARCY S. FRIEDMAN, J.S.C.

\_\_\_\_\_ x  
TRISTAN WATSON and NADINE CROSBIE,

*Plaintiffs,*

Index No.: 156523/2012  
Motion Seq. 001

- against -

DECISION/ORDER

MTV NETWORK ENTERPRISES, INC. DAY  
OLD TEETH, INC. and MICHAEL CAHILL,

*Defendants.*

\_\_\_\_\_ x

In this action based on the airing of a television program, defendants MTV Network Enterprises, Inc. (MTV), Day Old Teeth, Inc. (Day Old Teeth), and Michael Cahill (Cahill) move to dismiss the complaint pursuant to CPLR 3211(a)(1), (a)(5), and (a)(7).

The complaint pleads a first cause of action for breach of contract, a second for promissory estoppel, a third for fraud, and a fourth (although denominated the fifth) for “tort.” The complaint is based on the following material allegations: Plaintiffs appeared in a television program, “True Life: I’m a Chubby Chaser,” produced by Day Old Teeth and aired on MTV. Plaintiff Watson agreed to sign an “Appearance Release,” dated September 26, 2011, permitting airing of a television program, based on repeated assurances regarding his privacy, made by Cahill, Day Old Teeth’s principal. (Complaint, ¶ 10.) Contrary to Cahill’s representations, plaintiffs’ “identity and place of abode was clearly available for viewing in the Episode” of the program that was aired. (*Id.*, ¶ 27.) As a result, threats were made against plaintiffs which caused them to limit their activities, including school attendance, and they were thereby

damaged. (Id.) As supplemented by plaintiff Watson's affidavit in opposition to the motion, plaintiff Watson claims that he was not willing to sign the Appearance Release when it was initially presented to him and signed it only because he received a written assurance, in an email from Cahill, that Watson would be identified in the program by the name "tee," not his "government name," and that Cahill would be sure "to blur [his] address." (Watson Aff., ¶¶ 3-5; Sept. 10, 2011 email.) Watson also alleges that when the program was aired, his address and apartment number were visible; that he "started receiving threats to [his] safety"; and that after receiving these threats, he "no longer felt safe leaving [his] apartment, and [he] lost [his] job as a result." (Watson Aff., ¶¶ 7-9.)

In moving to dismiss the complaint, defendants claim, among other things, that the Appearance Release is a bar to maintenance of the claims in this action. Plaintiffs claim that Watson signed a "Location Agreement" as well as the Appearance Release, and that, although the Location Agreement permitted use of identifying details about plaintiff's address, that Agreement was subsequently modified by the September 10, 2011 email. Plaintiff Watson also claims that the Location Agreement and Appearance Release are separate agreements, and that he has a breach of contract claim based on the Location Agreement as modified by the email, and a separate fraud claim based on defendants' misrepresentations that his address would be blurred in the program.<sup>1</sup>

It is well settled that on a motion to dismiss addressed to the face of the pleading, "the

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<sup>1</sup> The complaint also alleges that Cahill made misrepresentations that plaintiffs "would be involved in editing" the episode, that they would have a "sneak peak" of the episode before it aired, and that plaintiffs would be compensated for a flight to Los Angeles. (Complaint, ¶¶ 11-17.) In opposing the motion to dismiss, plaintiffs do not rest on any of these allegations, and rely only on defendants' alleged misrepresentation that their address would be blurred out.

pleading is to be afforded a liberal construction (see, CPLR 3026). [The court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (Leon v Martinez, 84 NY2d 83, 87-88 [1994]. See also 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].) However, “the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts.” (Robinson v Robinson, 303 AD2d 234, 235 [1st Dept 2003]. See also Water St. Leasehold LLC v Deloitte & Touche LLP, 19 AD3d 183 [1st Dept 2005], rearg denied 2005 NY App Div Lexis 10749, lv denied 6 NY3d 706 [2006].) When documentary evidence under CPLR 3211(a)(1) is considered, “a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (Leon, 84 NY2d at 88; Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 NY2d 300 [2001].)

As a threshold matter, the court holds that all of plaintiff Crosbie’s claims must be dismissed, as she did not sign the Location Agreement and therefore does not have a breach of contract claim based on that Agreement as modified by the email. In addition, she does not claim that she refused to sign the Appearance Release unless she received assurances from Cahill. Nor does she (or Watson) claim that the Appearance Release does not by its terms cover the subject matter of the causes of action pleaded in the complaint.

The court further holds that plaintiff Watson’s claims, even as supplemented by his affidavit (see Rovello v Orofino Realty Co., Inc., 40 NY2d 633 [1976]), must also be dismissed. As noted above, the breach of contract claim is based on the alleged modification of the Location

Agreement by the email from Cahill to Watson. The Location Agreement provides that it “may not be changed, modified, or terminated except in writing.” The email does state: “will be sure to blur address.” However, plaintiff cites authority that an email is a writing (within the meaning of the statute of frauds) only if the plaintiff’s name is at the end of the email, “signify[ing] his intent to authenticate the contents.” (Stevens v Publicis S.A., 50 AD3d 253, 255-256 [1st Dept 2008], lv dismissed 10 NY3d 930.) Plaintiff cites no authority that a writing which contains a pre-printed signature only in its heading is sufficient for purposes of the statute of frauds or for compliance with a no oral modification provision.<sup>2</sup> Moreover, there is authority to the contrary. (See Bayerische Landesbank v 45 John Street LLC, 102 AD3d 587, 587 [2013], lv dismissed 2013 NY Slip Op 88481 [counterclaim for failure to increase amount of construction loan barred by “no-oral modification” provision of loan documents, court holding that email relied upon by defendants, “which contained a pre-printed signature, was not a sufficient writing under the statute of frauds”]; cf. Parma Tile Mosaic & Marble Co. v Estate of Short, 87 NY2d 524 [1996], amend remittitur denied 88 NY2d 872 [fax transmission does not satisfy statute of frauds because fax machine automatically imprinted sender’s name on every page of document, without sender expressing specific intent to authenticate it].) The court accordingly holds that the documentary evidence demonstrates as a matter of law that the Location Agreement was not modified by the email to bar airing of the program without blurring of plaintiff’s address.

The court further holds that the remaining causes of action must be dismissed. The second cause of action for promissory estoppel is also based on defendants’ alleged promise not

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<sup>2</sup> Plaintiffs argue that the Location Agreement by its terms provides that it cannot be modified except by a writing, and does not expressly require a signed writing. However, plaintiffs fail to explain how a modification of a contract may be accomplished by a writing unless it is signed by the parties.

disclose plaintiffs' identity or address. (Complaint, ¶ 32.) It is accordingly barred as duplicative of the breach of contract cause of action.

The third cause of action for fraud is based on the allegation that defendants never intended to block plaintiffs' identity and address, "although promising to do so prior to the taping of the material for the Episode." (Complaint, ¶ 37.) "A claim for fraudulent inducement of contract can be predicated upon an insincere promise of future performance only where the alleged false promise is collateral to the contract the parties executed; if the promise concerned the performance of the contract itself, the fraud claim is subject to dismissal as duplicative of the claim for breach of contract." (HSH Nordbank AG v UBS AG, 95 AD3d 185, 206 [1st Dept 2012] [emphasis in original]. See Manas v VMS Assoc., LLC, 53 AD3d 451, 454 [1st Dept 2008]. See generally Deerfield Communications Corp. v Chesebrough-Ponds, Inc., 68 NY2d 954, 956 [1986].) The fraud cause of action is based on the same promise as the breach of contract cause of action and must therefore be dismissed as duplicative.

The fourth cause of action for tort alleges that defendants' inclusion in the program of plaintiffs' identity and address "was contrary to the custom and practice in the entertainment industry in blocking such information from view in episodes of reality shows," and that defendants "were negligent in not following such custom and practice." (Complaint, ¶¶ 41-42.) Plaintiffs do not properly allege a tort based on industry practice, as the parties' rights and obligations were governed by contract.

The complaint must be dismissed against MTV for the independent reason that MTV was not a party to the agreements between plaintiffs and Day Old Teeth. Moreover, the complaint alleges merely that MTV knew of Cahill's representations (id., ¶¶ 11, 17), and not that Cahill was

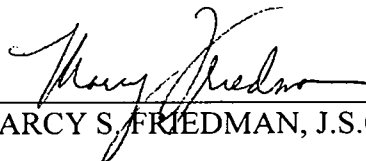
MTV's agent. Plaintiffs offer no factual allegations that would support the finding of an agency relationship. (See Meyer v Goldman Sachs & Co., 234 AD2d 129, 130 [1st Dept 1996].) The complaint must be dismissed against Cahill in his individual capacity, as plaintiffs make no allegation that Cahill sought to bind himself personally or disregarded the corporate form. (See Salzman Sign Co. v Beck, 10 NY2d 63, 67 [1961].)

The court has considered plaintiffs' remaining contentions as to the viability of plaintiffs' causes of action and finds them to be without merit.

It is accordingly hereby ORDERED that the motion of defendants MTV Network Enterprises, Inc., Day Old Teeth, Inc., and Michael Cahill to dismiss the complaint is granted to the extent of dismissing the complaint with prejudice.

This constitutes the decision and order of the court.

Dated: New York, New York  
October 30, 2013

  
MARCY S. FRIEDMAN, J.S.C.