

Kim v Park

2014 NY Slip Op 30190(U)

January 21, 2014

Sup Ct, New York County

Docket Number: 650770/2012

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. EILEEN A. RAKOWER

PRESENT: _____
Justice

PART 15

Index Number : 650770/2012
KIM, ANDREW U-SHIN
vs
PARK, KEN
Sequence Number : 005
DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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

Dated: 1/21/14


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

- 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 15

-----X
ANDREW U-SHIN KIM,

Plaintiff,

Index No.
650770/2012

Mot. Seq. 005

- against -

Decision and
Order

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

Defendants.

-----X

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.”

Presently before the Court is defendant Innovative Artists Talent and Literary Agency, Inc.’s (“Innovative Artists”) motion to dismiss, pursuant to CPLR §§3211(a), 3013 and 3016(b).¹ Plaintiff does not oppose.

Specifically, Innovative Artists seeks to dismiss (a) Count One, which

¹Defendants Wunderman Advertising Agency, Citibank, N.A., and Citigroup, Inc., Defendant Wunderman Worldwide, LLC, improperly sued as Wunderman Advertising Agency, previously moved to dismiss the Complaint, and the Court granted their motions by Orders dated May 22, 2013 and June 19, 2013.

alleges a violation of New York's "rights of privacy and publicity statutes" as barred by the statute of limitations, (b) Count Two, which alleges a "common law right of publicity claim" on the basis that New York does not recognize such a claim; (c) Counts Three through Eight, which allege claims based on privacy and publicity laws of other states, (d) Count Nine, which alleges fraud; and (2) Count Twelve, which alleges breach of contract as barred by the statute of limitations and statute of frauds.

Innovative Artists is identified in the Complaint as "a talent agency with offices at 235 Park Avenue South, 10th Floor, New York, NY 10003."

As alleged in the Complaint, in early 2003, Plaintiff was introduced to defendant Ken Park ("Park"), a "talent manager" for models, and that Plaintiff was subsequently a model in a photo shoot which was conducted on March 31, 2003 at the E.H. Harriman Estate in Harriman, NY. Plaintiff alleges that he was told verbally that the images were for use by "Citibank" and 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.

Plaintiff alleges on March 31, 2003, the same day as the shoot, Park completed "an information sheet which ('New Client Information Sheet') which purported to be completed by the Plaintiff," a form that is alleged to have been required by Innovative. Plaintiff further alleges that Park "forged Plaintiff's signature on that form" and "also forged the Plaintiff's signature on Innovative Artists' form giving authority to Defendant Innovative Artists to accept payments on Plaintiff's behalf."

Plaintiff alleges that on or about March 21, 2011, Plaintiff was contacted by Patricia Widyn, of defendant Wunderman Advertising Agency, who called to inquire whether Plaintiff would consent to continued use of his image by "Citibank." Plaintiff alleges that he had "no knowledge up to 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 that payment, and Widyn advised

Plaintiff that he should follow up with the talent agency. Plaintiff was then offered \$7,500 for an “additional” one-year usage of the image in Asia.

Plaintiff alleges in response to his conversation with Widyn, Plaintiff 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” from defendant Innovative Artists that authorized payments to be submitted to defendant Ken Park Management) was not, in fact, signed by him and that this information was known to Defendants.

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:
 - (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]).

Count One of Plaintiff’s Complaint asserts breach by all 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 [NY 2007] (“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.”)

Here, the image of Plaintiff at issue was first shot to be used by Citibank around March 2003 and 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.” As Plaintiff’s claims against Innovative Artists stem from the alleged unauthorized use of his image in 2003, Plaintiff’s New York State privacy claim against Innovative Artists is barred by the one year statute of limitations.

Count Two of Plaintiff’s Complaint asserts breach by all 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 as against Innovative Artists.

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 as against Innovative Artists.

Count Nine of the complaint asserts fraud against all defendants except the Citibank defendants. "A cause of action for fraud requires plaintiff to plead: (1) a material misrepresentation of a fact, (2) knowledge of its falsity, (3) an intent to induce reliance, (4) justifiable reliance and (5) damages" (*Nicosia v. Bd. of Mgrs. of the Weber House Condominium*, 2010 NY Slip Op 7254, *2 [1st Dept. 2010], citing *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]) "A cause of action alleging fraud does not lie where the only fraud claim relates to a breach of contract." *WIT Holding Corp. v. Klein*, 282 A.D. 2d 527, 528 [2001])(citation omitted).

The alleged acts giving rise to fraud include: "(a) forging the Plaintiff's signature on several forms by Defendants Park and Ken Park Management; (b) forging the Plaintiff's signature on checks made payable to the Plaintiff; (c) Adopting the fraudulent acts of another by attempting to cover them up; (d) Attempting to deceive the Plaintiff as to the use of his image, permissions to use such image, availability of evidence related to such use, etc., by Defendants Wunderman and Innovative." Even accepting the factual allegations as true, the Complaint fails to state a claim for fraud as against Innovative because there are no factual allegations that Innovative made any misrepresentations to him. The Complaint alleges only that Innovative Artists was aware of fraud engaged by others; however, this is insufficient to support a claim of fraud.

Count Twelve of the Complaint asserts breach of contract by defendants Innovative Artists, Wunderman, and Citibank. 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, Innovative Artists breached its purported agreement with Plaintiff in March 2005 by continuing to use his image; however, 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 Innovative Artists, 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 defendant Innovative Artist Talent and Literary Agency, Inc.'s motion to dismiss the Complaint is granted without opposition, and the Complaint is dismissed in its entirety as against defendant Innovative Artist Talent and Literary Agency, Inc. with costs and disbursements to said defendant, and the Clerk is directed to enter judgment accordingly in favor of said defendant; 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: JANUARY 21, 2014



EILEEN A. RAKOWER, J.S.C.