Velon v Di Modolo Intl. LLC
2014 NY Slip Op 31313(U)
May 16, 2014
Supreme Court, New York County
Docket Number: 653485/2013
Judge: Ellen M. Coin

[* 1]

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

STELLA VELON,

Plaintiff,

-against-

DI MODOLO INTERNATIONAL LLC, AM PUBLIC RELATIONS, INC. d/b/a ANA MARTINS PR & SHOWROOM, BLOOMINGDALE'S, LLC d/b/a BLOOMINGDALE'S NEW YORK, and BLOOMINGDALE'S, INC.,

Defendants.

Index No. 653485/2013
DECISION AND ORDER
Motion Seq. Nos. 001, 002

ELLEN M. COIN, A.J.S.C.:

Plaintiff Stella Velon, a professional model and actress, brings this action seeking compensation and other damages arising from a national advertising campaign using photographs of her. Defendants Bloomingdale's, Inc. and Bloomingdale's, LLC (the Bloomingdale's Defendants) move to dismiss the common law causes of action asserted against them in the complaint (Sixth and Eighth Causes of Action)(Motion Sequence 001). Defendant Di Modolo International LLC (Di Modolo) seeks dismissal of the entire complaint (Motion Sequence 002). The motions are consolidated for determination.

Plaintiff alleges that in the summer of 2011 she attended a casting call for models at the premises of defendant AM Public Relations, Inc. (AM). She alleges that shortly thereafter non-party Mani Zarrin, a professional photographer, contacted her to

schedule a test shoot. According to the complaint, photographers use test shoots to pitch marketing ideas to "relevant decision makers" in preparation for future planning or upcoming advertising campaigns. (Compl, ¶12 at 3). Plaintiff appeared for the shoot on September 24, 2011 at a studio on Spring Street in New York County. There Mr. Zarrin took numerous photographs of plaintiff, a male model, Stacey Cooper (wife of Di Modolo's President) and a little girl. (Compl., ¶¶12, 13 at 3).

Plaintiff alleges that at no time before or during the shoot was she informed that the photos taken were anything more than a test. She admits that no one from Di Modolo ever communicated with her directly. (Compl., ¶14 at 3-4). At the end of the shoot, Mr. Zarrin gave plaintiff $400 in cash, an amount normally paid for a test. (Compl., ¶15).

Five days after the shoot, Ana Martins, principal of defendant AM, contacted plaintiff by email and told her to execute a release in conjunction with the photos taken during the shoot. The release, with the typewritten date September 29, 2011, is on stationery bearing the address of AM. It states, "In exchange for consideration received, I hereby give permission to DiModolo (sic)to use my photographic likeness in visual forms and media for advertising campaigns, magazine or billboard, magazine editorial, lookbook, print, and any other lawful purposes ONLY for Dimodolo (sic)." (Ex A to Complaint). Plaintiff concedes

that she executed the release and sent it back as an email attachment a few days later. (Compl. ¶18 at 5, ¶19 at 6). The release bears the handwritten date "10/03/2011." (Compl., Ex A).

Plaintiff alleges that she, friends and acquaintances later found ads featuring her image on billboards in Miami and on New Jersey highways, in ad placards in the U.S. Virgin islands, in print ads in publications, on phone booths and kiosks throughout New York City, and on postcards given to customers at Di Modolo kiosks in major department stores. In addition, Di Modolo has prominently featured the ads on social media sites it owns or controls, including Facebook, Twitter and Pinterest. Di Modolo has created a second version of the ad which prominently displays its name with that of Bloomingdale's. (Compl. ¶¶28, 31, 32, 35 at 9-10).

Plaintiff asserts causes of action against Di Modolo for violation of her right of privacy and publicity (First and Second Causes of Action), fraudulent inducement (Third Cause of Action), negligent misrepresentation (Fourth Cause of Action), unjust enrichment (Fifth and Sixth Causes of Action) and conversion (Seventh and Eighth Causes of Action). Her claims against the Bloomingdale's Defendants are for violation of her right of privacy and publicity (Second Cause of Action), unjust enrichment (Sixth Cause of Action) and conversion (Eighth Cause of Action).

The Bloomingdale's Motion

The Bloomingdale's Defendants seek dismissal of plaintiff's common law claims against them for unjust enrichment and conversion, both of which are predicated on the alleged unauthorized use of plaintiff's image and likeness. They contend that under New York law the sole remedy for a plaintiff who claims that her likeness has been used without her consent is an action pursuant to Civil Rights Law §§ 50 and 51. Thus, they argue that the Civil Rights Law precludes common law claims for conversion and unjust enrichment based on the alleged unauthorized use of plaintiff's image or likeness.

Plaintiff, in opposition, notes that her common law claims are asserted for use of her image not in New York, but "in various U.S. states and territories." (Compl., ¶¶78, 87). She contends that these common law claims are separate and distinct from, and not precluded by, Civil Rights Law §51, which creates a cause of action for the unauthorized use of a person's picture "within this state."

The Court must determine what law applies in analyzing defendants' contention. "Choice of law does not matter...unless the laws of the competing jurisdictions are actually in conflict." (*IBM v Liberty Mutual Ins. Co.*, 363 F3d 137, 143 [2d Cir. 2004]). "In the absence of substantive difference, a New York court will dispense with choice of law analysis; and if New

York law is among the relevant choices, New York courts are free to apply it." (*IBM*, 363 F3d at 143).

Here the complaint and plaintiff's Memorandum of Law in Opposition fail to allege what other jurisdictions' laws should apply and how they conflict with the law of this state. Even were plaintiff to demonstrate an existing conflict, the result would not be different.

"In the context of tort law, New York utilizes interest analysis to determine which of two competing jurisdictions has the greater interest in having its law applied in the litigation." Two separate inquiries are required to determine the greater interest: (1) what are the significant contacts and in which jurisdiction are they located; and (2) whether the purpose of the law is to regulate conduct or allocate loss. (*Padula v Lilarn Props. Corp.*, 84 NY2d 519, 521 [1994]; *Elmaliach v Bank of China Ltd.*, 110 AD3d 192, 202 [1st Dept 2013]).

Plaintiff resides in Queens County, New York (Compl. ¶1 at 1). The complaint alleges that the Bloomingdale's Defendants are foreign corporations that maintain offices and conduct business in the County and State of New York (Compl. ¶4 at 2). The photo shoot at which plaintiff's pictures were taken was in New York County (Compl. ¶13 at 3). Plaintiff herself alleges, "The services for which plaintiff seeks to be compensated in this case were procured and performed in the county of New York in the

State of New York." Clearly the significant contacts are located in New York.

The torts pled here are conduct-regulating, not loss-allocating. (*See, e.g., Keehfus Ltd. Partnership v Fromkin Energy, LLC*, 2007 WL 2454217, *5 [ND NY 2007][conversion in category of torts governing appropriate standards of conduct]; *Gerloff v Hostetter Schneider Realty*, 2014 WL 1099814, *9 [SD NY 2014][unjust enrichment a conduct-regulating tort]; *Meszaros v Klick*, 2011 WL 5238488, *9 [WD NY 2011][same]; *Burns v Delaware Charter Guar. & Trust Co.*, 805 F Supp2d 12, 22-23 [SD NY 2011]["The locus of the tort tends to be where the alleged victim resided, as that is the locus of their economic loss."]

Thus, under both prongs of the interest analysis New York law applies to plaintiff's conversion and unjust enrichment claims. Under this state's law, common law claims for conversion and unjust enrichment related to unauthorized use of a person's image or likeness are subsumed under Civil Rights Law §§50 and 51. (*Lemerond v Twentieth Century Fox Film Corp.*, 2008 WL 918579,*3 [SD NY 2008][unjust enrichment]; *Grodin v Liberty Cable*, 244 AD2d 153, 153-154 [1st Dept 1997][unjust enrichment]; *Hampton v Guare*, 195 AD2d 366, 367 [1st Dept 1993][conversion and unjust enrichment]. The motion of the Bloomingdale's Defendants to dismiss the Sixth and Eighth Causes of Action is granted.

The Di Modolo Motion

Di Modolo's motion to dismiss the First and Second Causes of Action, both alleging violations of the New York Civil Rights Law, is predicated on the release plaintiff signed. Sections 50 and 51 of the New York Civil Rights Law create a private right of action for the use of a living person's picture for advertising or trade purposes within the State of New York without that person's written consent. (*Molina v Phoenix Sound Inc.*, 297 AD2d 595, 597 [1st Dept 2002]).

The complaint refers to the release[1] as a "Bogus Release" and alleges that it bears the printed address of defendant AM PUBLIC Relations Inc. The release is in favor of "DiModolo," failing to refer to the company by its full name (Di Modolo International LLC). It is broad, including use "in visual forms and media for advertising campaigns, magazine or billboard, magazine editorial, lookbook, print, and any other lawful purposes." The release contains no territorial or temporal limitation.

Plaintiff argues that Di Modolo's motion to dismiss her Civil Rights claims must be denied, contending that this case is determined by the holding in *Harlock v Scott Kay, Inc.* (14 AD3d 343 [1st Dept 2005]). There plaintiff Harlock, a model, and her management company sued for breach of contract and violation of

[1]The release is attached to the complaint as Exhibit A.

her rights under Civil Rights Law §51. The defendant moved for summary judgment dismissing the complaint, relying on a Model's Release Harlock executed in connection with each of two modeling sessions. The Model's Release was a printed form that granted the right "to copyright and/or use and/or publish **one photograph or likeness**" of Harlock, and contained many blanks, including the name of the advertising agency, publication and client of advertiser in whose favor the release was executed; the territory in which the one photograph or likeness was permitted; the nature of the use (print advertising, packaging, point of purchase, etc.); the vendors; and the number of months for which the Release would extend. (*Harlock v Scott Kay, Inc.*, Brief for Plaintiffs-Appellants, 2004 WL 5476489, *5, *8; emphasis added).

Here, in contrast, the release is unlimited, giving permission to DiModolo to use plaintiff's "photographic likeness" in myriad specified forms "and any other lawful purposes [sic]." While the complaint alleges that plaintiff understood this document to be "a purely ministerial piece of paperwork" necessary for Di Modolo to use the photos for test purposes, nothing in the release is so qualified. Under the statute, written consent is all that is required. (*Cory v Nintendo of Am.*, 185 AD2d 70, 73 [1st Dept 1993]; *Noble v Town Sports Intl., Inc.*, 271 AD2d 367, 367 [1st Dept 2000]). Accordingly, so much of the First Cause of Action as is predicated on the Civil Rights

Law claim is dismissed.

In her First Cause of Action plaintiff also asserts a claim for unauthorized use of her likeness in violation of the laws of other states and territories. Di Modolo seeks dismissal of such claims, contending that New York law applies to her claim under New York's choice of law rules.

As defendant correctly notes, right of publicity claims are deemed personalty, and therefore are governed by the substantive law of the plaintiff's domicile. (*Southeast Bank v Lawrence*, 66 NY2d 910, 912 [1985]; *Rogers v Grimaldi*, 875 F2d 994, 1002 [2d Cir 1989]). Plaintiff Velon alleges that she resides in Queens, 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 jurisdictions as against Di Modolo. (*See, e.g., Kim v Park*, 2014 WL 255718 [Sup Ct, New York County 2014]).

However, plaintiff's Second Cause of Action alleges that Di Modolo and Bloomingdale's created an advertisement which bears the names of both Di Modolo and Bloomingdale's. "[A] defendant's immunity from a claim for invasion of privacy is no broader than the consent executed to him." (*Dzurenko v Jordache, Inc.*, 59 NY2d 788, 790 [1983][internal quotation marks deleted]). The complaint alleges that Di Modolo and Bloomingdale's made

unauthorized use of plaintiff's image and likeness for purposes of advertising and trade without obtaining her written consent. (Compl., ¶52 at 13). The release plaintiff executed was in favor of Di Modolo "ONLY", and for Di Modolo's direct use and not for joint use by Di Modolo and any one else through whom it may market its product. Accordingly, it cannot serve to insulate Di Modolo from the Second Cause of Action, to the extent that such cause is predicated on violation of New York's Civil Rights Laws. However, for the reasons stated *supra*, so much of the Second Cause of Action as relies upon the laws of other states and territories is dismissed.

Plaintiff's Third Cause of Action alleges fraudulent inducement. The elements of a claim for fraudulent inducement are representation of a material fact, falsity, scienter, deception and injury. (*Dalessio v Kressler*, 6 AD3d 57, 61 [2d Dept 2004]). Plaintiff alleges that the principal of AM, Ana Martins, sent her an email and told her to execute the release in conjunction with the photos taken during the photo shoot. Plaintiff does not allege that Ms. Martins made any representation to her about the release. Nor does she allege that Di Modolo communicated with her. Instead, she contends that "she had every reason to conclude that the release request was just an afterthought, a ministerial piece of paperwork that someone had forgotten to secure at the time of the test shoot and

to be used in conjunction with the test shoot." (Compl. ¶16 at 4). Moreover, she concedes that she did not sign the release immediately, but sent it back in executed form a few days later. (Compl. ¶¶18, 19 at 5-6).

Absent from plaintiff's complaint is any allegation that anyone, much less any agent or employee of Di Modolo, made a misrepresentation of any material fact to her in connection with the execution of the release. Indeed, she cannot claim that there was any omission of material fact, because the release plainly states that it permits "DiModolo" to use her photographic likeness for, among other things, advertising campaigns, magazine or billboard, magazine editorial, lookbook, print and any other lawful purposes. It is well settled that parties who sign a document are bound by its terms unless they present a valid excuse for failing to read it. (*Lodhi v Stewart's Shops Corp.*, 52 AD3d 1084 [3d Dept 2008]; *Morby v Di Siena Assoc.*, 291 AD2d 604, 605 [3d Dept 2002]). Plaintiff presents no such excuse, and suggests that she did not read this four-line, one paragraph document ("had Ms. Velon scrutinized it very carefully prior to signing it...." [Compl. ¶21 at 6]). Thus, her Third Cause of Action for fraudulent inducement must be dismissed as against Di Modolo.

Di Modolo's motion to dismiss the Fourth Cause of Action for negligent misrepresentation is granted. The elements of such a

claim are: "(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information." (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]; *Hudson Riv. Club v Consolidated Edison Co. of N.Y.*, 275 AD2d 218, 220 [1st Dept 2000]).

This complaint fails to allege that Di Modolo made any representation to plaintiff, much less the requisite element of the existence of a special or privity-like relationship imposing a duty on Di Modolo to impart correct information to her. Accordingly, the Fourth Cause of Action is dismissed as against Di Modolo.

Relying on the release, Di Modolo moves to dismiss the Fifth and Sixth Causes of Action for unjust enrichment and the Seventh and Eighth Cause of Action for conversion.

Generally, a valid release constitutes a complete bar to an action on a claim which is the subject of the release. If the language of a release is clear and unambiguous, the signing of a release is a jural act binding on the parties. (*Centro Empresarial Cempresa S.A. v America Movil, S.A.B. de C.V.*, 17 NY3d 269, 276 [2011]). A signed release shifts the burden of going forward to the plaintiff to show that there has been fraud, duress or some other fact which will be sufficient to void the

release. (*Id.*). Here the complaint fails to allege any fact constituting fraud, duress or any other basis for voiding the release. Accordingly, the claims for unjust enrichment and conversion are dismissed as against Di Modolo.

It is therefore

ORDERED that the motion of defendants Bloomingdale's, Inc. and Bloomingdale's, LLC is granted and the Sixth and Eighth Causes of Action of the complaint are dismissed as against those defendants; and it is further

ORDERED that the motion of defendant Di Modolo International LLC is granted to the extent that the First, Third, Fourth, Fifth, Sixth, Seventh and Eighth Causes of Action are dismissed as against said defendant, and the Second Cause of Action is dismissed as against said defendant to the extent that it asserts claims arising under the laws of other jurisdictions, and the balance of the motion is denied; and it is further

ORDERED that the moving defendants are directed to serve answers to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 311, 71 Thomas Street, on July 23, 2014 at 2:00 PM.

ENTER:

Dated: May 16, 2014

Ellen M. Coin, A.J.S.C.