

<b>Manziona v Mashkevich</b>
2014 NY Slip Op 31504(U)
June 10, 2014
Supreme Court, New York County
Docket Number: 155545/2013
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

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CATHERINE MANZIONE,

Plaintiff,

-against-

GRIGORIY MASHKEVICH, M.D., GRIGORIY  
MASHKEVICH, M.D., P.C. and NSE MEDIA,

Defendants.  
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Index No. 155545/2013

**DECISION/ORDER**

HON. CYNTHIA KERN, J.S.C.

**Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for:** \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits and Cross Motion.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

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Plaintiff commenced the instant action, *inter alia*, to recover damages for an alleged violation of Civil Rights Law § 51. Plaintiff now moves for an order pursuant to CPLR § 3212 granting summary judgment as to liability against defendants Grigoriy Mashkevich, M.D. (“Dr. Mashkevich”) and Grigoriy Mashkevich, M.D., P.C. (“Mashkevich P.C.”) (collectively referred to herein as “Mashkevich Defendants”) or, in the alternative, pursuant to CPLR § 3211(b) dismissing said defendants’ affirmative defenses. Plaintiff also moves for an order granting default judgment against defendant NSE Media for its failure to answer or appear in the within action. The Mashkevich Defendants’ cross-move to dismiss all of plaintiff’s claims except the one brought under the Civil Rights Law § 51. For the reasons set forth below, plaintiff’s motion is granted in part and Mashkevich Defendants’ cross-motion is granted in part.

The relevant facts are as follows. On or about October 28, 2010, plaintiff sought the services of facial plastic surgeon Dr. Mashkevich. Thereafter, on or about January 28, 2011, Dr. Mashkevich, through his professional corporation Mashkevich P.C., performed elective rhinoplasty facial cosmetic surgery upon plaintiff. During plaintiff's treatment and care, Dr. Mashkevich took several photographs of plaintiff depicting her appearance before and after surgery. Directly prior to her surgery, plaintiff signed a "Photographic Release and Consent" form (the "Release") wherein she explicitly withheld her consent to allow the Mashkevich Defendants to use her photographs in advertisement or web publishing. Specifically, plaintiff's signature appears directly below the statement: "I do not want my photos to be used. I understand that the photographs will be placed in my confidential records only." At this same time, plaintiff also signed an "Authorization and Informed Consent" form (the "Authorization"), which stated:

I give permission to Dr. Mashkevich or a staff member to take still or motion clinical photographs with the understanding that such remain the property of the doctor. If, in the judgment of the Doctor, medical research, education, or science will benefit from their use, such photographs and related information may be published and republished in professional journals or medical books, or used for such publication or use, including as presentation material.

Sometime in 2013, plaintiff discovered that her "before and after" photographs had been posted on the Mashkevich Defendants' website, moderncontours.com, which was allegedly created, maintained and managed by defendant NSE Media. By letter dated June 13, 2013, plaintiff's attorney contacted the Mashkevich Defendants demanding that they remove the photographs. The Mashkevich Defendants complied and the photographs have since been removed.

Plaintiff now brings the instant action to recover damages stemming from the publication of her photographs's on the website. In her complaint, plaintiff asserts the following causes of action:

(1) violation of the Civil Rights Law §§ 50 and 51; (2) unjust enrichment; (3) breach of fiduciary duty; (4) public disclosure of private facts about plaintiff; and (5) negligence *per se* for violation of: (a) Civil Rights Law § 50; (b) HIPAA Privacy Rule; (c) CPLR § 4504(a); (d) Education Law § 6509(9); and (e) 8 NYCRR 60.1(d). On or about August 15, 2013, the Mashkevich Defendants answered and asserted twenty affirmative defenses.

In the present case, as an initial matter, plaintiff's motion for default judgment against defendant NSE Media is granted without opposition as said defendant has failed to answer or otherwise appear in the within action and the time do so has expired. The court will now turn to plaintiff's motion for summary judgment as to liability as against the Mashkevich Defendants.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Id.*

In the present case, plaintiff has established her *prima facie* right to summary judgment on the issue of liability pursuant to Civil Rights Law §§ 50 and 51 as against the Mashkevich Defendants. Civil Rights Law § 50 provides that the use of the "name, portrait or picture of any living person" for "advertising [or trade] purposes" absent written consent is a misdemeanor. Civil Rights § 51 authorizes a civil action for injunctive relief and damages, including exemplary damages if a defendant acts knowingly in violation of that protection. *See Bement v. N.Y.P.*

*Holdings, Inc.*, 307 A.D.2d 86 (1<sup>st</sup> Dept 2003). To make out a *prima facie* claim under Civil Rights Law §§ 50 and 51, plaintiff must establish: “(i) usage of plaintiff’s name, portrait, picture, or voice, (ii) within the state of New York, (iii) for purposes of advertising or trade, (iv) without plaintiff’s written consent.” *Molina v. Phoenix Sound, Inc.*, 297 A.D.2d 595, 597 (1<sup>st</sup> Dept 2002). “A name, portrait or picture is used for ‘advertising purposes’ if it appears in a publication which, taken in its entirety, was distributed for use in, or as part of, an advertisement or solicitation for patronage of a particular product or service.” *Beverley v. Choices Women’s Med. Ctr.*, 78 N.Y.2d 745, 751 (1991).

In the present case, the undisputed evidence presented by plaintiff demonstrates that the Mashkevich Defendants’ used plaintiff’s picture in the State of New York to advertise their services without plaintiff’s consent. Plaintiff’s “before and after” pictures undisputedly appeared on the Mashkevich Defendants’ website, which was accessed by plaintiff, a New York resident. Further, the Mashkevich defendants’ do not dispute that the website was intended to solicit patients and advertise Dr. Mashkevich’s services. Indeed, the use of plaintiff’s “before and after” photographs was surely an attempt to show the quality of Dr. Mashkevich’s work to potential patients. Finally, the Release clearly stated that plaintiff did not consent to the use of her photographs on Mashkevich Defendants’ website.

In opposition, the Mashkevich Defendants have failed to raise a triable issue of fact. While the Mashkevich Defendants’ contend that the Authorization signed by plaintiff permitting the use of her photographs for educational purposes raises an issue of fact as to whether plaintiff gave her consent in this matter, such contention is without merit as it is belied by the explicit terms of the Authorization. Under the Authorization, plaintiff’s consent to publish her photographs for educational purposes was limited to “professional journals or medical journals.” The Mashkevich

Defendants' website is neither a professional nor medical journal. Thus, even assuming the photographs were used on the website for educational purposes, the Authorization is still insufficient to raise a material issue of fact as to plaintiff's consent in this matter.

Additionally, the Mashkovich Defendants' contention that summary judgment should be denied pursuant to CPLR § 3212(f) on the ground that discovery remains outstanding is unavailing. "A determination of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence." *Ruttire & Sons Constr. Co. v. Petrocelli Constr.*, 257 A.D.2d 614 (2d Dept 1999). Here, the Mashkevich Defendants have offered no evidentiary basis to suggest that further discovery would lead to relevant evidence as to their liability under Civil Rights Law §§ 50 and 51.

Accordingly, based on the foregoing, plaintiff's motion for summary judgment as to liability against the Mashkevich Defendants is granted. However, the remainder of plaintiff's motion for summary judgment is denied and the Mashkevich Defendants' motion to dismiss the claims other than that ones brought pursuant to the Civil Rights Law is granted on the ground that plaintiff's remaining claims are merely duplicative of her Civil Rights Law claims and offer no greater relief. It is clear that the gravamen of plaintiff's complaint is an alleged invasion of privacy under the Civil Rights Law §§ 50 and 51. While plaintiff may plead alternative causes of action, she is not entitled to duplicative relief. Thus, based on this courts grant of summary judgment as laid out above, plaintiff's remaining claims are dismissed as duplicative.

Accordingly, the portions of plaintiff's motion seeking default judgment against NSE Media and summary judgment as to liability against the Mashkevich Defendants under Civil Rights Law §§ 50 and 51 is granted but the remainder is denied. Additionally, Mashkevich Defendants' cross-motion is granted to the extent that the remainder of plaintiff's causes of action, excluding her Civil

