

Nolan v State of New York

2014 NY Slip Op 33619(U)

July 17, 2014

Court of Claims

Docket Number: 123283

Judge: Thomas H. Scuccimarra

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STATE OF NEW YORK COURT OF CLAIMS

AVRIL NOLAN,

Claimant,

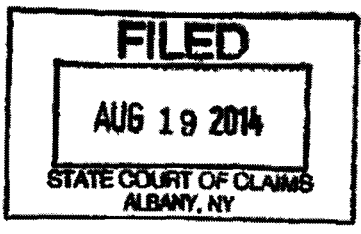
DECISION AND ORDER

-v-

THE STATE OF NEW YORK,¹

**Claim No. 123283
Motion No. M-84795**

Defendant.



**BEFORE: HON. THOMAS H. SCUCCIMARRA
Judge of the Court of Claims**

**APPEARANCES: For Claimant:
LLOYD PATEL LLP
BY: ERIN LLOYD, ESQ.**

**For Defendant:
HON. ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL OF THE STATE OF NEW YORK
BY: CHERYL RAMEAU
ASSISTANT ATTORNEY GENERAL**

The following papers were read and considered on claimant's motion to amend her claim:

- 1-3 Notice of Motion; Affirmation in Support of Claimant's Motion for Leave to Amend the Claim by Erin Lloyd, Attorney for Claimant; Memorandum of Law and attached exhibits**
- 4 Affirmation in Opposition by Cheryl Rameau, Assistant Attorney General, and attached exhibit**
- 5 Affirmation in Reply by Erin Lloyd, Attorney for Claimant**
- 6-8 Filed papers: Claim, Answer, Amended Answer**

¹ The caption has been amended to reflect the only properly named defendant.

Avril Nolan alleges in her claim that defendant's agents at the New York State Division of Human Rights unlawfully used her photographic image in a series of public service advertisements published in daily newspapers commencing, to her knowledge, on April 3, 2013. In a quarter page advertisement in a free daily newspaper AM New York, claimant was depicted with the words "I am positive (+)" and "I have rights" and the additional information that those who are HIV positive are protected by New York State Human Rights Law with contact information for the division. Three causes of action are asserted, namely, defamation, defamation per se, and violation of Civil Rights Law §§50 and 51.

A notice of intention to file a claim was served on the Attorney General's Office on June 21, 2013. The claim itself was served on October 3, 2013. Issue was joined by service of an answer on or about October 30, 2013. An amended answer² was served on or about November 25, 2013.

Claimant now moves to amend her claim to include 22 additional instances of placement for publication of the advertisement in more newspapers and websites, scheduled to run between March 31, 2013 and May 8, 2013, such instances having been discovered in the course of document discovery of department emails, contracts, and confirmation of orders placed for advertisements. Claimant asserts that each of these publications of claimant's image gives rise to a separate cause of action for defamation and/or defamation per se, as well as violation of Civil Rights Law §§50 and 51.

² Erroneously captioned "Verified Answer to Second Claim".

A pleading in the Court of Claims may be amended in accordance with the provisions of §3025(b) Civil Practice Law and Rules. *See* 22 NYCRR §206.7 (b). Although leave to amend should be freely given, the determination is left to the sound discretion of the Court. The Court should consider whether there would be any prejudice to the opposing party; any effect an amendment would have on the orderly prosecution of the action; whether the moving party unduly delayed in seeking to add the new allegations; and whether the proposed amendment is palpably improper or insufficient as a matter of law. *See generally Lucido v Mancuso*, 49 AD3d 220, 222 (2d Dept 2008). Where the proposed amendment lacks merit as a matter of law, or where amendment would be immaterial, among other things, the Court should deny leave based upon such legal insufficiency. However, “a [claimant] seeking leave to amend the [claim] is not required to establish the merit of the proposed amendment in the first instance” and “ [t]he legal sufficiency or merits of a proposed amendment to pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt’ ” (*citation omitted*). *Lucido v Mancuso*, 49 AD3d at 227.

A copy of the proposed amended claim should generally be included, as well as any factual affidavits or exhibits that “unequivocally make out a prima facie basis for the claim . . . or other matter now sought to be added . . .” [Commentary C3025:11; Civil Practice Law and Rules §3025].

Defendant opposes the motion on the limited grounds that the proposed amendment should be limited to inclusion of only those publications and websites that actually ran the public service advertisement, and that allegations that defendant violated Civil Rights Law §§50 and 51 are patently devoid of merit. No prejudice or surprise is asserted.

The deposition testimony of defendant's employee, Mannikutian Kottaram, the individual who purchased claimant's photograph from Getty Images and who, together with his supervisor Ms. Theodore-Greene and current supervisor Lourdes Centeno, were the employees who prepared the public service announcement, indicates that although initial contacts for further publication were made, not all entities contacted ran the advertisement. Accordingly, defendant argues that if amendment is allowed, the publications to be included should be limited to Metro New York City newspaper, AM New York newspaper, Newsday, the Metro website, the LoHud website and the Times Union website.

It is noted that Mr. Kottaram's deposition was taken on March 27, 2014, after the present motion was made on or about March 17, 2014, and that claimant acknowledges that the motion was made based upon the apparent purchase of publication space as expressed in emails and invoices supplied by defendant during discovery.

It is also noted that Mr. Kottaram's deposition testimony confirmed that orders were placed with multiple institutions, but that the announcements ran only in the designated publications, and were pulled from others prior to the advertisement running. Although it is not claimant's burden on the motion to amend to establish the merits of the proposed amendment, here the defendant has presented evidence from a person with knowledge establishing that any assertion that the advertisement was published in other than those limited locations is simply devoid of merit. Accordingly, the Court agrees that the amendment should only include those publications where the advertisement ran, namely, Metro New York City newspaper, AM New York newspaper, Newsday, the Metro website, the LoHud website and the Times Union website.

With regard to the asserted patent lack of merit with regard to the Civil Rights Law, defendant argues that while the statute prohibits the use of an individual's image for advertising purposes or for the purpose of trade without the individual's written consent, New York courts have held that such statutes are only applicable to unauthorized use for a commercial purpose. It is urged that because the State agency is not a commercial or for-profit enterprise, was not engaged in a trade when it published the public service announcement, and the advertisement was "not created for advertising purposes or for the purpose of trade" but rather to advise the public that people who are HIV positive are protected from discrimination, the use of claimant's photograph is not protected. [Affirmation in Opposition by Cheryl Rameau, Assistant Attorney General, ¶8].

A photograph 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 NY2d 745, 751 (1991); *c.f.* Messenger v Gruner + Jahr Print. & Publ., 94 NY2d 436 (2000).

At this phase of the litigation, and again in the absence of prejudice or surprise, particularly in light of the fact that the filed claim already asserts a cause of action alleging violation of Civil Rights Law §§50 and 51, and recognizing that claimant has the ultimate burden of proof with regard to all allegations made, there is no reason not to allow the addition of further assertions of violation of the statute.

Based on the foregoing, claimant's motion to amend her claim is granted to the extent indicated above. Claimant may serve and file her amended claim within 30 days of the filing date of this decision and order. Defendant is directed to serve and file its second amended

answer within 30 days of service of the amended claim. All pleadings and service of same are to be accomplished in accordance with the requirements of the Court of Claims Act and the Uniform Rules for the Court of Claims with respect to verification manner of service and the like.

White Plains, New York
July 17, 2014



THOMAS H. SCUCCIMARRA
Judge of the Court of Claims