

Hill v Steinbrech

2015 NY Slip Op 31827(U)

September 28, 2015

Supreme Court, New York County

Docket Number: 157927/2014

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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DOUG HILL and JAMES MORITZ,

Plaintiffs,

-against-

Index No. 157927/2014

DECISION/ORDER

DOUGLAS STEINBRECH, M.D. and GOTHAM
PLASTIC SURGERY, PLLC,

Defendants.

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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.....	1,2
Affidavits in Opposition.....	2,3
Replying Affidavits.....	3,4
Exhibits.....	5

Plaintiffs commenced this action seeking to recover damages stemming from defendants' use of their personal images for commercial purposes. Plaintiffs now move for an Order pursuant to CPLR § 3212 granting them summary judgment against defendants or, in the alternative, pursuant to CPLR § 3211 dismissing defendants' affirmative defenses. Defendants cross-move for an order granting them summary judgment and dismissing plaintiffs' claims in their entirety. For the reasons set forth below, both motions are granted in part and denied in part.

The relevant facts are as follows. Plaintiffs Doug Hill ("Hill") and James Moritz ("Moritz") are involved in a romantic relationship and are allegedly well-known as a gay couple in Chelsea. Between January 2012 and October 2012, plaintiffs retained the medical services of

defendant Douglas Steinbrech, M.D. (“Dr. Steinbrech”) and defendant Gotham Plastic Surgery, PLLC (“Gotham”) seeking cosmetic surgery. During the course of plaintiffs’ treatment and care, defendants took several photographs of plaintiffs depicting their appearance before and after surgery. Defendants also made video recordings of plaintiff Hill depicting Hill in a post-operative state.

On or about May 5, 2014, plaintiffs allege that they discovered that their “before and after” photographs and videos of Hill’s post-operative state appeared on numerous commercial websites. On the present motion, plaintiffs provide the court with several photos and screen shots of youtube videos they allege depict their pre and post-operative states to advertise defendants’ services. Specifically, plaintiffs present the court with the following: (1) a screen shot of the website www.boyculture.com, which contains what appears to be a video advertising defendants’ work that includes a picture of Hill’s chest in a pre and post-operative state; (2) a screen shot of the website gaytube.com, which contains an advertisement for defendants’ services depicting Hill’s chest in a pre and post-operative state; (3) a screen shot of search results from google under the heading “Pec implant testimonial of NYC patient”, depicting a youtube video wherein Hill appears in a post-operative state; (4) a screen shot of the commercial website advertising defendants’ services known as Men’s Plastic Surgery Manhattan, which includes photographs of Hill’s torso in a pre and post-operative state from a front and side angle; (5) a screen shot of a video posted to youtube entitled “Pec implant testimonial of NYC patient” wherein Hill is shown in a post-operative state; (6) a screen shot of a youtube video which purportedly includes a picture of Moritz’s buttocks in a post-operative state; (7) a frontal picture of Moritz in a post-operative state; and (8) a flier advertising defendants’ services which

purportedly includes a side angle shot of Moritz's buttocks in a pre and post-operative state. In the youtube videos, Hill's face and torso tattoo are visible. In the still pictures of Hill, on the other hand, Hill's face is not visible but his tattoos on his torso and shoulder are. The pictures of Moritz buttocks include nothing further than this portion of Moritz's body. The frontal picture of Moritz depicts the front of his body from his chin to his knees:

Based on the above images, plaintiffs commenced the instant action asserting the following causes of action: (1) violation of the Civil Rights Law §§ 50 and 51; (2) unjust enrichment; (3) breach of fiduciary duty of confidentiality; (4) 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); and (5) public disclosure of private facts. Both parties now move for summary judgment.

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). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). 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." *Id.*

In the present case, as an initial matter, defendants' cross-motion for summary judgment dismissing plaintiffs' claims other than the first cause of action alleging violation of the Civil Rights Law is granted as those claims are preempted by the Civil Rights Law. "Since the

adoption of the [Civil Rights Law], [the Court of Appeals] has repeatedly held that the right of privacy is governed entirely by statute in this State.” *Stephano v. News Group Publications, Inc.*, 64 N.Y.2d 174 (1984). Indeed, “[t]he Civil Rights Law does not simply cover or define common law claims, it provides an exclusive cause of action for cases [based on the unauthorized use of a personal image].” *Zoll v. Ruder Finn, Inc.*, 2004 WL 42260 (S.D.N.Y. 2004); *see also Hampton v. Guare*, 195 A.D.2d 366 (1st Dept 1993) (“the preemptive effect of the Civil Rights Law is fatal to the . . . causes of action of the plaintiff’s amended complaint alleging common-law conversion, common-law tort and unjust enrichment where, as here, the plaintiff has no property interest in his image, portrait or personality outside the protections granted by the Civil Rights Law); *Grodin v. Liberty Cable*, 244 A.D.2d 153 (1st Dept 1997) (holding that in connection with a claim for “unauthorized reuse of his image and voice” it was “error not to dismiss plaintiff’s causes of action for negligence and unjust enrichment, there being no common-law right of privacy in New York”). Accordingly, plaintiffs cannot maintain claims for unjust enrichment, breach of fiduciary duty of confidentiality, public disclosure of facts about the plaintiff and negligence *per se* based upon the alleged unauthorized use of their personal images as such claims are preempted by the Civil Rights Law and, as such, said claims must be dismissed. To the extent *Anderson v. Strong Memorial Hospital*, 140 Misc. 2d 770 (Sup. Ct., Monroe Cty. 1988), relied upon by plaintiffs, suggests a finding to the contrary in relation to plaintiffs’ claim for breach of fiduciary duty of confidentiality, the court declines to follow the holding in that case as it is not binding on this court.

The court now turns to the respective motions for summary judgment as to liability on plaintiffs’ remaining claim for violation of the Civil Rights Law. 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 (1st Dept 2003). "In order to establish liability under New York's Civil Rights Law, plaintiff must demonstrate each of four elements: (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 (1st Dept 2002). Moreover, the Civil Rights Law "is designed to protect a person's identity, not merely a property interest in his or her 'name', 'portrait' or 'picture' and thus it implicitly requires that plaintiff be capable of identification from the objectionable material itself." *Cohen v. Herbal Concepts*, 63 N.Y.2d 379, 384 (1984). This does not mean that an action can only be maintained when plaintiff's face is visible in the picture. *Id.* Rather, the question is whether the objectionable material presents a recognizable likeness of plaintiff. *Id.* "[W]hether it presents a recognizable likeness is generally a jury question unless plaintiff cannot be identified because of the limited subject matter revealed in the photograph or the quality of the image." *Id.* "[T]o survive a motion for summary judgment, plaintiff must satisfy the court that the person in the photograph is capable of being identified from the advertisement alone and that plaintiff has been so identified." *Id.*

In the present case, as an initial matter, plaintiff Hill is entitled to summary judgment on his claim for violation of the Civil Rights Law based on the video defendants posted to youtube depicting him in a post-operative state as Hill has made a *prima facie* showing that he is capable

of being identified from the video and that the video was used in the state of New York for advertising purposes without his written consent and defendants have failed to present evidence raising an issue of fact. As an initial matter, on its face, the screen shot of the youtube video establishes that the video was used for advertising defendants' services and that Hill is recognizable from the video as Hill's face is seen in the video. Further, Hill has presented his own sworn affidavit wherein he attests that he accessed the youtube video while in New York and that he never provided written consent for the video to be used for advertising purposes.

In opposition, defendants have failed to raise an issue of fact. Defendants do not dispute that the video contains a recognizable image of Hill or that the video was an advertisement for their services. Rather, defendants argue that they did not violate the Civil Rights Law as Hill provided written consent for the use of the video depicting him in a post-operative state. In support of this contention, defendants rely on a purported release and consent allegedly signed by Hill giving defendants consent for the dissemination of photographs of himself with the exception of his bodily tattoos and a video of Hill wherein he says "I don't care" in regards to showing his tattoo in the video. These pieces of evidence are insufficient to raise an issue of fact as to whether defendants violated the Civil Rights Law by posting the video depicting Hill in a post-operative state to youtube as neither establish that Hill provided written consent for the use of a video depicting him and his tattoos for advertising purposes. As an initial matter, even assuming the purported release and consent was signed by Hill, which he disputes, it did not provide consent for the use of videos depicting his tattoo and defendants concede the video posted to youtube depicted Hill's tattoo. Further, the video recording purportedly showing Hill giving oral consent to the use of his tattoo in the video by saying "I don't care" is insufficient as

a matter of law as the statute requires "written consent." Thus, any purported statements made by Hill in the video are immaterial. Accordingly, Hill's motion for summary judgment on his first cause of action under the Civil Rights Law based on defendants posting the video of Hill in his post-operative state to youtube is granted and defendants' cross-motion for summary judgment dismissing said claim is denied.

However, the remainder of Hill's motion for summary judgment as to liability on his claim for violation of the Civil Rights Law based on the advertisements for defendants' services containing pictures of Hill's torso from a front and side angle posted to various commercial websites is denied as there remains an issue of fact as to whether Hill is capable of being identified from these advertisements alone. The advertisements do not contain Hill's face. However, the advertisements depict Hill's tattoos, which are a distinguishing feature. Thus, the court cannot say as a matter of law that Hill is or is not recognizable from these photos. Rather, such determination must be left to a jury.

Additionally, Moritz is not entitled to summary judgment on his claim for violation of the Civil Rights Law based on defendants' alleged use of pictures of him in a pre and post-operative state for advertising purposes. As an initial matter, Moritz has failed to make a *prima facie* showing that defendants used the picture depicting his front side for advertising purposes. Indeed, Moritz has failed to present any evidence that this picture was used for advertising purposes. Rather, Moritz merely includes this picture as a second page to an exhibit showing a screen shot of a youtube video. However, the picture of Moritz's front side is not shown in the context of a youtube video. Instead, it is simply a stand-alone shot of Moritz's front side. This stand-alone picture is insufficient as a matter of law to establish the photo was used for

advertising purposes. Thus, the record is devoid of any evidence that the picture was used for advertising purposes by defendants. However, the court cannot grant defendants summary judgment dismissing the claim as defendants have failed to present evidence establishing that the picture was not used for advertising purposes. Thus, on the record before the court, there remains an issue of fact as to whether this picture was used by defendants for advertising purposes.

Further, even if the picture was used for advertising purposes, summary judgment is inappropriate as there remains an issue of fact as to whether Moritz is identifiable from the picture alone. The court cannot say that Moritz is identifiable from the picture as a matter of law. Indeed, the only portion of Moritz's face depicted in the picture is the lower portion of Moritz's chin. However, the picture contains distinguishing features such as Moritz's facial and chest hair. Thus, based on these distinguishing pictures, the court finds that a jury could find that Moritz is capable of being identified by the picture alone and, as such, determination of that issue must be left to the jury.

To the extent defendants contend that even if Moritz is recognizable from the photo and it was used for advertising purposes they are still entitled to summary judgment dismissing Moritz's claim based on this picture as he gave his written consent for defendants to disseminate his picture with the exception of his face, such contention is without merit as the inclusion of Moritz's chin in the picture exceeded any purported written consent. Merriam-Webster defines "face" as "the front part of the head that in humans extends from the forehead to the chin." Thus, as the picture depicts Moritz's chin, it depicts his face and exceeds Moritz's purported written consent as a matter of law.

However, defendants are entitled to summary judgment dismissing Moritz's claim for violation of the Civil Rights Law to the extent it is based on the advertisements allegedly containing pictures of his buttocks in a pre and post-operative state as Moritz is not identifiable from these pictures as a matter of law. As an initial matter, on their face, the pictures are devoid of any distinguishing or identifying features. Further, Moritz has failed to present any evidence that he has actually been recognized from these pictures. Thus, these pictures are not actionable and defendants are entitled to summary judgment dismissing Moritz's claim for violation of the Civil Rights Law based on defendants' alleged use of these pictures for advertising purposes.

Additionally, defendants are entitled to summary judgment dismissing plaintiffs' ninth cause of action for punitive damages. It is well settled that "no separate cause of action for punitive damages lies for pleading purposes." *Paisley v. Coin Device Corp.*, 5 A.D.3d 748, 750 (2nd Dept 2004). Thus, to the extent plaintiffs plead punitive damages as a separate cause of action such cause of action must be dismissed. However, the court is making no finding as to plaintiffs' entitlement to such damages.

Finally, the court turns to the remainder of plaintiffs' motion seeking to strike defendants' twenty affirmative defenses. As an initial matter, plaintiffs' motion seeking to strike defendants' first, second, third, seventh, eighth and twentieth affirmative defenses is granted as plaintiffs have demonstrated that these affirmative defenses are without merit and defendants have provided no real opposition thereto. However, plaintiffs' motion seeking to strike defendants' fourth, fifth, ninth through seventeenth and nineteenth affirmative defense is denied as plaintiffs have failed to put forth any basis whatsoever to strike said affirmative defenses. Thus, plaintiffs have failed to demonstrate that these affirmative defenses are without merit.

Additionally, plaintiffs' motion to strike defendants' sixth affirmative defense that plaintiffs' complaint fails to a claim for punitive damages is denied as this court has already dismissed plaintiffs' cause of action for punitive damages on the ground that punitive damages is not a stand-alone cause of action. Thus, defendants' sixth affirmative defense is not without merit.

Accordingly, based on the foregoing, (1) plaintiffs' motion to strike defendants' affirmative defenses is granted in part and denied in part; (2) plaintiff Hill's motion for summary judgment as to liability under the Civil Rights Law is granted in part and denied in part; (3) plaintiff Moritz's motion for summary judgment is denied in its entirety; and (4) defendants' motion for summary judgment dismissing plaintiffs' claims in their entirety is granted solely to the extent that plaintiffs' claims other than those brought pursuant to the Civil Rights Law are dismissed and Moritz's claim for violation of the Civil Rights Law based on defendants' purported use of the pictures of his buttocks is dismissed but the motion is otherwise denied. It is hereby

ORDERED that plaintiffs second, third, fourth, fifth, sixth, seventh, eighth and ninth causes of action are hereby dismissed; and it is further

ORDERED that plaintiff Moritz's first cause of action based on the pictures of his buttocks is dismissed; and it is further

ORDERED that defendants' first, second, third, seventh, eighth, eighteenth and twentieth affirmative defenses are stricken. This constitutes the decision and order of the court.

Dated:

9/28/15

Enter: _____

COK
J.S.C.

CYNTHIA S. KERN
J.S.C.