SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY **PART** IAS MOTION 56EFM

Justice

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ROBERT ANDERSON,

Plaintiff,

- v -

AHA (AT HOME SOLUTIONS LLC) and OLGA ARONSHTEIN, SIMON ARONSHTEIN, PRINCIPALS OF AT HOME SOLUTIONS, LLC

Defendant.

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INDEX NO. 160475/2018

MOTION DATE 12/05/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 16, 17, 18, 19, 20, 21, 22, 23

were read on this motion to/for DISMISS.

In this action to recover damages for violation of Civil Rights Law § 51 and for permanent injunctive relief, the defendants move pursuant to CPLR 3211(a) to dismiss the complaint for failure to state a cause of action and because the monetary relief sought is the subject of ongoing arbitration. The motion is granted to the extent that so much of the complaint as seeks money damages is dismissed, and the motion is otherwise denied.

The plaintiff alleges that, in April 2016, he entered into written employment and compensation/commission agreements with the defendant, AHA (At Home Solutions, LLC), pursuant to which AHA hired him as its executive vice president for marketing. AHA, also referred to as AHS in the complaint, is in the business of providing home health care services. The plaintiff asserts that, on December 8, 2017, AHA wrongfully terminated his employment after falsely accusing him violating a non-competition provision in his employment agreement. He claims that he was required to surrender his cell phone and company email access upon termination. The plaintiff avers that, despite the termination of his employment, AHA continued to use a recording of his voice on the company cell phone voicemail greeting and continued to

use his name on his company email account. In his complaint, the plaintiff contends that the defendants, in violation of Civil Rights Law § 51, retained the voice recording and continued to use his name in order to take advantage of his good reputation in the industry and to solicit business from persons and companies who were familiar with him.

The plaintiff further alleges that the defendants falsely told him that they needed his voicemail passcode to change the greeting. He contends that, inasmuch as his voicemail access was cancelled, knowledge of the passcode would not permit them to erase his greeting message and that the defendants, as owners of the cell phone and voicemail account, had authority to contact AT&T to erase and reset the greeting in any event.

The plaintiff thus asserts one cause of action alleging violation of Civil Rights Law § 51, pursuant to which he seeks both a judgment permanently enjoining the defendants from using his voice or name in connection with their business and damages in the nature of disgorged profits earned by the defendants as a proximate result of the use of his voice and name. In his complaint, the plaintiff also noted that he was in the process of arbitrating his claim for breach of the compensation/commission agreement.

In their motion, the defendants contend that the complaint fails to state a cause of action for violation of Civil Rights Law § 51. They also seek dismissal on the grounds that the claim for lost profits is essentially a claim for unpaid commissions and, thus, is already the subject of the arbitration proceeding. They further argue that, in light of the pending arbitration involving, in part, their counterclaim to recover for the plaintiff's alleged misappropriation of proprietary information, they cannot reset the cell phone without destroying recorded voicemails and user data that constitute evidence relevant to the arbitration. They insist that the plaintiff provide them with the passcode so that they can access such recorded voicemails and data for use in the pending arbitration.

Civil Rights Law § 51 provides, in relevant part:

> "Any person whose *name*, portrait, picture or *voice* is used within this state *for advertising purposes or for the purposes of trade* without the written consent first obtained as above provided may maintain an *equitable action* in the supreme court of this state against the person, firm or corporation so using his name, portrait, picture or voice, *to prevent and restrain the use thereof*; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait, picture or voice in such manner as is forbidden or declared to be unlawful by section fifty of this article, the jury, in its discretion, may award exemplary damages" (emphasis added).

"[B]ased on the language of the statute, '[t]o prevail on a . . . right to privacy claim pursuant to [Civil Rights Law § 51], a plaintiff must prove: (1) use of plaintiff's name, portrait, picture or voice (2) for advertising purposes or for the purposes of trade (3) without consent and (4) within the state of New York'" (*Lohan v Take-Two Interactive Software, Inc.*, 31 NY3d 111, 120 [2018], quoting *Lohan v Perez*, 924 F Supp 2d 447, 454 [ED NY 2013] [internal quotation marks omitted]). A person's name 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]). The term "trade purposes," although "not susceptible to ready definition" (*Davis v High Socy. Magazine*, 90 AD2d 374, 379 [2d Dept 1982]) requires, at the very least, proof of "use which would draw trade to the [defendant's] firm" (*Kane v Orange County Publs.*, 232 AD2d 526, 527 [2d Dept 1996]; *see Davis v High Socy. Magazine*, 90 AD2d at 379 [to constitute a "trade purpose," the use of the plaintiff's name must be spurred by the profit motive or used to encourage sales or distribution of the publication])

Although the defendants contend that the recording of the plaintiff's voice was not used "for advertising purposes or the purpose of trade" because the voice was not "published" or "distributed" beyond those who placed telephone calls to the defendants, dismissal at the pleading stage is not warranted (*see generally Barrows v Rozansky*, 111 AD2d 105 [1st Dept 1985]). The issue of whether a voicemail greeting may constitute the use of a plaintiff's voice for advertising purposes or the purpose of trade seems to be one of first impression. Because

there has been no discovery here, facts have yet to be developed as to how the defendants conducted their business and whether the plaintiff's voicemail greetings were employed, or intended to be employed, as sales devices, in the same fashion as many businesses employ voicemail and telephone "hold" greetings to market their products and services. The defendants also contend that the plaintiff consented to their use of his voice and name. The plaintiff vigorously denies that he consented to their use after his employment was terminated. Hence, there appears to be no basis to dismiss the cause of action for injunctive relief at this stage of the litigation.

To the extent that the complaint seeks damages for a violation of the Civil Rights Law, that claim is dismissed. The compensation/commission agreement between the parties provides that any dispute thereunder shall be submitted to the American Arbitration Association for arbitration. The Civil Rights Law itself does not specify what the appropriate measure of damages must be in any particular situation. Thus, even if the plaintiff has a claim for damages that arises from the misappropriation of his name and voice, the measure of his damages appears to be the amount of the commissions he should have been paid in connection with the business wrongfully obtained by the defendants through the use of his name and voice.

A broad arbitration provision, such as the one here, "creates a presumption of arbitrability which is only overcome if it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute" (*Bank Julius Baer & Co. Ltd. v Waxfield Ltd.*, 424 F3d 278, 284 [2d Cir 2005], quoting *WorldCrisa Corp. v Armstrong*, 129 F3d 71, 74 [2d Cir 1997] [internal quotation marks omitted]). Parties must arbitrate claims if their underlying factual allegations touch issues encompassed by the contract (*see Brown v V & R Advertising, Inc.*, 112 AD2d 856, 861 [1st Dept 1985], *affd* 67 NY2d 772 [1986]). "Once the courts have determined that there is a reasonable relationship between the arbitration . . . clause and the subject matter of the dispute . . . the court's inquiry ends" (*id.*).

Claims to recover damages for violations of Civil Rights Law § 51 may be arbitrated, and it cannot be said with positive assurance that the arbitration clause in the commission/ compensation agreement does not cover the dispute (*see Hannafin v Universal Pictures Co.,* 234 AD2d 24, 24, [1st Dept 1996]; *Brown v V & R Advertising, Inc.*, 112 AD2d 856, 861 [1st Dept 1985], *affd* 67 NY2d 772 [1986]*; Lippolis v Farley*, 2011 NY Slip Op 30229[U] [Sup Ct, Nassau County, Jan. 21, 2011]; *Miller v Arnold Worldwide, LLC*, 2006 NY Slip Op 51849[U], 13 Misc 3d 1216[A] [Sup Ct, N.Y. County, Aug. 28, 2006]). Hence, the plaintiff's claim for money damages in this action will be resolved in the pending arbitration. The defendants, although they moved to dismiss rather than answer the complaint in this action, served and filed a "counterclaim complaint" alleging that the plaintiff breached his employment contract and conducted himself as a "faithless servant." As with the plaintiff's claim for money damages, these appear to be the very issues raised by the defendants in the arbitration.

Since the dispute over money damages and the counterclaims are subject to arbitration, so much of the complaint as seeks identical relief must be dismissed (*see Kellman v Whyte*, 129 AD3d 418 [1st Dept 2015]).

Accordingly, it is

ORDERED that the defendants' motion to dismiss the complaint is granted to the extent that so much of the complaint as seeks to recover money damages is dismissed, and the motion is otherwise denied; and it is further,

ORDERED that the parties are directed to continue their arbitration, at which the plaintiff's claims for money damages, as asserted herein, and the defendants' counterclaims, shall be resolved.

This constitutes the Decision and Order of the court.

4/12/2019
DATE

JOHN J. KELLEY, J.S.C.

HON. JOHN J. KELLEY
J.S.C.

CHECK ONE:	☐	CASE DISPOSED		☒	NON-FINAL DISPOSITION		
	☐	GRANTED	☐ DENIED	☒	GRANTED IN PART	☐	OTHER
APPLICATION:	☐	SETTLE ORDER		☐	SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN		☐	FIDUCIARY APPOINTMENT	☐	REFERENCE