

Richardson v Proctor & Gamble Co.

2020 NY Slip Op 30449(U)

February 14, 2020

Supreme Court, New York County

Docket Number: 650734/2019

Judge: Barry R. Ostrager

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. BARRY R. OSTRAGER

PART 61

Justice

-----X

INDEX NO. 650734/2019

THURAYYAH RICHARDSON,
Plaintiff,

MOTION DATE _____

MOTION SEQ. NO. 002 004

- v -

THE PROCTOR & GAMBLE COMPANY, ABRAMS
ARTISTS AGENCY, COTY, INC. - CLAIROL BEAUTY
BRAND

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 34, 35, 41, 42, 43, 68, 70, 71, 79

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 004) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 66, 67, 69, 72, 73, 74, 75, 76, 77, 78, 80

were read on this motion to/for DISMISSAL

Before the Court are two motions to dismiss the Complaint. Motion 002 is by defendants Coty Inc., Clairol Beauty Brand, and Abrams Artist Agency and Motion 004 is by defendant Proctor & Gamble. The motions are substantially identical. Following oral argument, heard on February 4, 2020 and for the reasons set forth below, Motions 002 and 004 are denied in their entirety.

The Complaint alleges that Proctor and Gamble ("P&G") and Clairol Beauty Brand ("Clairol"), which is now owned by Coty, Inc., used Plaintiff's image on a box of hair product without Plaintiff's authorization. Specifically, Plaintiff alleges that she did have a 2003 agreement with P&G to use her image on the box of a certain Clairol hair product, but that defendants continued to use her image after that agreement had expired, and in ways beyond the

scope of the original agreement, which, Plaintiff alleges, was limited to domestic, point-of-purchase advertisements. Plaintiff states three causes of action: (1) breach of contract (2) unjust enrichment (in the alternative) and (3) violation of New York Civil Rights Law §50 and 51.

Defendants P&G, Clairol and Coty move to dismiss the Complaint on the basis that it is contradicted by documentary evidence. Specifically, defendants argue that following the expiration of the original 2003 agreement, Plaintiff subsequently renewed her agreement with P&G several times, authorizing defendants to continue using Plaintiff's image. Additionally, defendants argue that Plaintiff was compensated pursuant to the purported renewal agreements. In support of their motion, defendants attach several documents (Exhibits A-M, NYSCEF Doc. Nos. 14 – 26). These documents are primarily invoices and purchase orders. Of these documents, only two appear to be somewhat contractual in nature (Exhibit A and Exhibit B, NYSCEF Doc. Nos 14 and 15). Defendants also argue that Abram Artists Agency should be dismissed from this action because it is undisputed that Plaintiff was a free-lance model, and there is seemingly no contract directly between Abram Artists Agency and Plaintiff.

Defendants move to dismiss Plaintiff's claims under N.Y. Civ. Rights Law § 50, 51 as untimely. The Complaint alleges that in 2014 Plaintiff discovered her image was being used in a television commercial without her permission. Defendants argue that this allegation is time-barred.

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction and the Court must accept the facts as alleged in the complaint as true. The plaintiff is afforded the benefit of every possible favorable inference. *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994). Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. *Id.*

The Court finds that none of the documents that defendants submitted provide such irrefutable evidence. First, the invoices and purchase orders do not even appear to be directed to Plaintiff, and instead reference an unexplained third party called “Wella Corporation.” These documents do not irrefutably rebut Plaintiff’s allegations that defendants used her image without her authorization in violation of a 2003 agreement. Second, of the two documents that appear to be contractual in nature, neither irrefutably rebuts Plaintiff’s allegations. Exhibit A is not signed by plaintiff, lays out no specific terms and conditions regarding use of Plaintiff’s image or compensation, and has several terms crossed out and handwritten terms. Indeed, Plaintiff asserts that she did not sign Exhibit A and did not authorize anyone to do so on her behalf. Exhibit B is titled “confirmation of negotiation” and is also insufficient to rebut Plaintiff’s claims. Accordingly, the Court cannot dismiss these claims on the basis of documentary evidence.

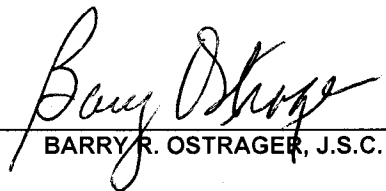
Likewise, the Court declines to dismiss the claims against Abrams Artist Agency. As an alternative to the breach of contract claim, Plaintiff asserts an unjust enrichment claim. Plaintiff alleges that Abrams Artists Agency has benefitted financially from P&G’s unauthorized use of Plaintiff’s image, and defendants have not provided any documentary evidence to refute that allegation.

With respect to the N.Y. Civ. Rights Law § 50, 51 claims, there is a one-year statute of limitations. The Complaint in this action was filed in 2019. Therefore, defendants are correct that Plaintiff is cannot recover under this section for conduct that occurred in 2014. However, this is not a basis to dismiss any cause of action. Plaintiff has alleged that defendants have repeatedly used and *continue to use* her image on Clairol hair products and in other mediums without her authorization. Because the alleged violations of N.Y. Civ. Rights Law § 50, 51 are ongoing, Plaintiff is permitted to bring these claims as limited.

Accordingly, it is hereby

ORDERED that Motions 002 and Motion 004 are denied in their entirety. All defendants to Answer the Complaint within 30 days from the date of this decision. Parties to appear for a preliminary conference on March 31, 2020 at 9:30 a.m.

2/14/2020
DATE


BARRY R. OSTRAGER, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- INCLUDES TRANSFER/REASSIGN

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

APPLICATION:

CHECK IF APPROPRIATE:

REFERENCE