

Doe v Wilhelmina Models, Inc.
2022 NY Slip Op 33521(U)
October 6, 2022
Supreme Court, New York County
Docket Number: Index No. 950242/2019
Judge: Laurence L. Love
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LAURENCE L. LOVE PART 63M

Justice

JANE DOE, Plaintiff, - v - WILHELMINA MODELS, INC., CAL TAN, LLC, NEW SUNSHINE, LLC Defendants. INDEX NO. 950242/2019 MOTION DATE 01/24/2022 MOTION SEQ. NO. 002 003 005 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 39, 42, 67, 69

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 003) 31, 32, 33, 34, 35, 36, 37, 38, 44, 68, 70

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 005) 46, 47, 48, 71

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 006) 50, 51, 52, 53, 54, 55, 56, 57, 58, 72, 73, 74, 75

were read on this motion to/for DISMISS

A Notice of Withdrawal of the motion to dismiss, seq. no. 002, by Defendant – Wilhelmina Models, Inc. (“Wilhelmina”) has been submitted (see NYSCEF Doc. No. 42), and a Notice of Withdrawal of the motion to dismiss, seq. no. 003, by Defendant Cal Tan, LLC (“Cal Tan”) and New Sunshine, LLC (“New Sunshine”) has been submitted (see NYSCEF Doc. No. 44).

The following read on Defendant – Wilhelmina Models, Inc.’s motion to dismiss, mot. seq. no. 005, to partially dismiss the third cause of action for negligence and breach of fiduciary

duty per New York Penal Law 263.05, to partially dismiss the fourth cause of action for sexual harassment per NYPL 263.05, dismiss the fifth cause of action for invasion of privacy, and again to dismiss the third cause of action for breach of fiduciary duty, and the fourth cause of action for sexual harassment (see NYSCEF Doc. No. 46).

Defendants – Cal Tan, LLC and New Sunshine, LLC move this Court to dismiss, mot. seq. no. 006, this action per CPLR 202, 3211(a)(5), and 3211(a)(7).

A second amended complaint states causes of action for (i) “negligence and breach of fiduciary duty against Cal Tan and New Sunshine,” (ii) “invasion of privacy against Cal Tan and New Sunshine,” (iii) “negligence and breach of fiduciary duty against Wilhelmina,” (iv) “sexual harassment against Wilhelmina,” and (v) “invasion of privacy against Wilhelmina” (see NYSCEF Doc. No. 41).

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (see *Leon v. Martinez*, 84 N.Y.2d 83 [1994]).

When considering a motion to dismiss under CPLR 3211(a)(7), a court must accept the factual allegations of the pleadings as true, affording the non-moving party the benefit of every possible favorable inference and determining “only whether the facts as alleged fit within any cognizable legal theory” (see *D.K. Prop., Inc. v. Natl. Union Fire Ins. Co. of Pittsburgh*, 168 A.D.3d 505; *Weil Gotshal & Manges LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267 [1st Dept. 2004]).

A memorandum of law in support of the motion to dismiss states,

“Plaintiff’s complaint admits that the alleged ‘sexual contact’ involving California Suncare’s make-up artist and artistic director

all occurred in the state of Quintana Roo, Mexico. The [Child Victims Act]’s application, however, is prompted by specific criminal acts within New York. Under settled law, New York only has the power to enact and enforce criminal laws within its borders. It has no territorial jurisdiction over an alleged sexual battery that occurred over 1,700 miles away. As a consequence, California Suncare could not have violated Section 130, as a matter of law, through alleged sexual contact that occurred in Playa del Carmen, Quintana Roo, Mexico. [T]he version of Section 263.05 in effect in 1993 – when the alleged events occurred – prohibited a person from ‘employ[ing], authoriz[ing] or induc[ing] a child less than sixteen years of age to engage in a sexual performance.’ Plaintiff’s amended complaint confirms, however, that she was already sixteen years of age when the alleged ‘sexual performance’ in Mexico occurred. And finally, Plaintiff does not even allege facts indicating that she engaged in a ‘sexual performance’ as defined in Section 263.00(1)” (see NYSCEF Doc. No. 58 Ps. 8 – 9).

The amended complaint states, “[o]n August 25, 2013, Doe, after visiting her parents in Miami, flew to Mexico for a five – day campaign with California Suncare shot at Play Del Carmen resort. Doe had never been asked to completely disrobe as part of a photo shoot and was hesitant about exposing her body this way. The next day, when the makeup artist came to apply makeup for the shoot, she complained about Doe’s remaining tan marks. Without Plaintiff’s consent, she proceeded to apply a California Suncare foundation over her entire body, including her breasts, back, thighs, and backside, intimate parts of her body on which Doe had never been touched as part of a photo shoot. [T]old her that the bikini top was not working for the photos and she would need to remove it. The photos included ones in which Doe was depicted topless with her back arched in a sexually suggestive pose; looking out to the sea in a sultry manner; in which she was completely topless and ‘naked in the water;’ where she is posed suggesting a willingness to engage in sexual activity; and where Doe is standing on a roof, semi- or totally naked” (see NYSCEF Doc. No. 41 Pars. 33, 36, 44, 57).

“Here, there is no express provision in CPLR 214-g, a revival statute, providing for its application to a nonresident whose injury occurred outside of New York. Moreover, as set forth above, contrary to the plaintiff’s contention, the legislative history of the CVA evinces a clear intent to benefit New York survivors of sexual abuse” (see *S.H. v. Diocese of Brooklyn*, 2022 WL 1414607 [N.Y.A.D. 2 Dept]).

The amended complaint continues with Wilhelmina. “Jane Doe signed a two – year agreement, effective November 17, 1993. Wilhelmina failed to prevent or protect Doe, a minor, from having to pose nude or from sexual abuse at the hands of photographers to whom it assigned her. Wilhelmina further sexually exploited Doe by using the nude photographs for commercial gain” (see NYSCEF Doc. No. 41 Par. 61, 102, 104).

The Child Victims Act states, “the use of a child in a sexual performance as defined in section 263.05 of the penal law.”

Section 263.05 attempts to define a “sexual performance.” “A person is guilty of the use of a child in a sexual performance if knowing the character and content thereof he employs, authorizes or induces a child less than seventeen years of age to engage in a sexual performance.”

New York Penal Law 263.00(1) Definitions, defines “sexual performance.” “[a]ny performance or part thereof which, ..., for purposes of section 263.05 ..., includes sexual conduct by a child less than seventeen years of age.”

New York Penal Law 263.00(3) Definitions, defines “sexual conduct.” “[a]ctual or simulated sexual intercourse, oral sexual conduct, anal sexual conduct, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals.”

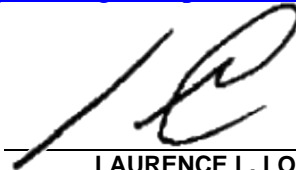
A review of the complaint presented by Plaintiff does not involve “sexual conduct” prescribed by the Child Victims Act under the New York Penal Law. Additionally, alleged acts performed in Mexico do not apply in New York State per the Child Victims Act.

ORDERED that the motion of defendants Wilhelmina, Cal Tan, and Sunshine to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).

10/6/2022
DATE


LAURENCE L. LOVE, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER
 INCLUDES TRANSFER/REASSIGN

SUBMIT ORDER
 FIDUCIARY APPOINTMENT REFERENCE

CHECK IF APPROPRIATE: