

<b>Matsuba v Hernandez</b>
2023 NY Slip Op 30554(U)
February 17, 2023
Supreme Court, New York County
Docket Number: Index No. 156473/2021
Judge: Dakota D. Ramseur
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. DAKOTA D. RAMSEUR PART 34M

*Justice*

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TAKASHI MATSUBA,	INDEX NO. <u>156473/2021</u>
Plaintiff,	MOTION DATE <u>08/15/2022</u>
- v -	MOTION SEQ. NO. <u>001</u>

DANIEL HERNANDEZ, SHOWTIME NETWORKS INC.

**DECISION + ORDER ON  
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

Plaintiff, Takashi Matsuba (plaintiff), commenced this action against defendants, Daniel Hernandez (Hernandez) and Showtime Networks Inc., for civil rights violations and defamation. Plaintiff discontinued this matter against Showtime Networks. Plaintiff now moves pursuant to CPLR 3212 for summary judgment on the complaint and to dismiss Hernandez's counterclaim for attorneys' fees. The motion is opposed. For the following reasons, the motion is denied.

Plaintiff is a tattoo artist working out of Brooklyn, New York. Hernandez is a rapper/performing artist who has gone by the stage names Tekashi 69 or "Tekashi 6ix9ine." According to plaintiff, in 2020, he discovered a documentary entitled "69: The Saga of Danny Hernandez." Plaintiff states that he is depicted in the documentary while performing tattoo work, with the words "TAKASHI MATSUBA/ TATTOO ARTIST" superimposed on the screen. Plaintiff states that a voice speaking on the documentary states that: "Peter's roommate, a Japanese tattoo artist named Takashi would inspire Danny's new persona, Tekashi 69." (NYSCEF doc. no. 14 at ¶ 6). Plaintiff further states that he did not know about his appearance in the documentary until his friend informed him of its existence, and that he never gave Hernandez permission to use his likeness, including his name.

Plaintiff states that in March 2021, there was another documentary about Hernandez that aired on Showtime's cable channel and website, entitled "Supervillain: The Making of Tekashi 6ix9ine." According to plaintiff, Hernandez's voice is heard saying, "there was this tattoo artist named Takashi from our neighborhood. And he was this heroin addict" (*id.* at ¶ 9). Plaintiff states that Hernandez's statement that plaintiff used heroin is untrue and that he has never used heroin in his life.

Plaintiff commenced this action for defamation based upon Hernandez's false and defamatory accusation that plaintiff used heroin and Civil Rights Law §§ 50 and 51 and Section

43(a) of the Lanham Act based on Hernandez's alleged continued use of plaintiff's first name as his trade name without plaintiff's prior knowledge or consent.

In support of the branch of his motion for summary judgment on his claim pursuant to Civil Rights Law §§ 50 and 51, plaintiff contends that Hernandez took up plaintiff's name without his consent. Plaintiff further argues that he is entitled to judgement on his Lanham Act claim because of the confusion and false association which defendant Hernandez created by his use of plaintiff's first name. Plaintiff next argues that he is entitled to judgment on his defamation claim, arguing that plaintiff's statement that plaintiff used heroin in "Supervillain: The Making of Tekashi 6ix9ine" is false and defamatory. In opposition, defendant argues that Hernandez's trade name is unrelated to plaintiff. Defendant further argues that even if the name was related to plaintiff, Hernandez did not use plaintiff's full name, only his first name. Next, Hernandez argues that plaintiff's defamation and Civil Rights Law claims fail for the additional reason that the claims are untimely. As for plaintiff's defamation claim, Hernandez argues that plaintiff fails to submit any proof that it was Hernandez that made the alleged defamatory statement, and even if he did, there is no proof that the statement concerned plaintiff. Hernandez further argues that plaintiff's motion should be dismissed on the additional basis that the parties have not exchanged discovery.

## DISCUSSION

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of N. Y.*, 49 NY2d 557 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). If the moving party meets its burden, the burden shifts to the party opposing the motion to establish, by admissible evidence, the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for the failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Reslani Construction Corp.*, 18 NY3d 499, 503 [2012]).

Civil Rights Law § 51 provides in pertinent part that "[a]ny 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... may maintain an equitable action in supreme court..." "In order to establish liability under New York 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 AD2d 595, 597 [1st Dept 2002], citing Civil Rights Law § 51).

Here, plaintiff establishes his prima facie entitlement to judgment on his claim pursuant to the Civil Rights Law by establishing that Hernandez used plaintiff's first name when he adopted the trade names "Tekashisixnine" or "Tekashi6ix9ine," without plaintiff's knowledge or consent, and that Hernandez did so for advertising, commercial, and self-promotion, purposes in New York. In opposition, defendant raises an issue of fact by stating that the basis for his trade names was not inspired by plaintiff. Instead, Hernandez states that the "Tekashi" part was inspired by Japanese anime. For example, Hernandez states that "[e]arlier in my career, I

incorporated the name 'Tekashi' from the many characters using that name from Japanese anime cartoons. Many of those characters play heroes in the animation story lines. It has nothing to do with the plaintiff' (NYSCEF doc. no. 22 at ¶ 6). Additionally, Hernandez points out that the trade names preceded by "Tekashi" are distinct from plaintiff's first name, "Takashi." Accordingly, the branch of plaintiff's motion for judgment on his Civil Rights Law claims is denied.

The Federal Lanham Act prohibits, in relevant part, the "use[] in commerce [of] any word, term, name, symbol, or device, or any combination thereof...likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person" (15 USC § 1125[a][1][A]). "The elements of a false endorsement claim under the Lanham Act are that the defendant, (1) in commerce, (2) made a false or misleading representation of fact (3) in connection with goods or services (4) that is likely to cause consumer confusion as to the origin, sponsorship, or approval of the goods or services" (*Burck v Mars, Inc.*, 571 F. Supp. 2d 446, 455 [SD NY 2008]).

Plaintiff fails to establish his entitlement to summary judgment on his claim pursuant to the Lanham Act. First, as discussed in the preceding section, plaintiff fails to demonstrate that Hernandez made a false or misleading misrepresentation, i.e., that Hernandez's use of a name similar to plaintiff's first name was actually based on plaintiff. Next, plaintiff fails to demonstrate that Hernandez's use of the name "Tekashi" would result in the public associating plaintiff's name with Hernandez. Indeed, plaintiff fails to explain the basis for how Hernandez's use of the name would cause any confusion. This is especially true because Hernandez, a musical performer, and plaintiff, a tattoo artist, work in entirely different professions.

Moreover, plaintiff fails to demonstrate that he is known in the community by his first name alone. First, the webpage cited by plaintiff in his brief reveals that while the initial page references the name "Takashi," plaintiff's biography references his first and last name. Thus, contradicting plaintiff's claim that he is only referred to as Takashi (Behind the Circle, <http://behind-the-circle.com/bio-2>, last accessed February 17, 2023). And second, plaintiff does not submit an affidavit supporting his claim that he is commonly known by first name. As plaintiff fails to meet his initial burden demonstrating entitlement to relief, the branch of plaintiff's motion for judgment on his Lanham Act claim is denied.

The elements to a cause of action for defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and, it must either cause special harm or constitute defamation per se (*Dillon v. City of New York*, 261 AD2d 34, 38 [1st Dept 1999]). A false statement constitutes defamation per se when it charges another with a serious crime or tends to injure another in his or her trade, business, or profession (*Geraci v Probst*, 61 AD3d 717, 718 [2d Dept 2009], *affd as modified and remanded*, 15 NY3d 336 [2010]).

Slander as a rule is not actionable unless the plaintiff suffers special damage (*Lieberman v Gelstein*, 80 NY2d 429, 434 [1992]) The four established exceptions consist of statements (i) charging plaintiff with a serious crime; (ii) that tend to injure another in his or her trade, business

or profession; (iii) that plaintiff has a loathsome disease; or (iv) imputing unchastity to a woman (*id.* at 435).

Here, plaintiff establishes his prima facie showing entitlement to judgment on his defamation claim, by demonstrating that documentary about Hernandez "Supervillain: The Making of Tekashi 6ix9ine" began streaming on Showtime's cable channel and website, wherein Hernandez states that plaintiff used heroin, which plaintiff claims is false. Plaintiff further establishes that heroin is a controlled substance under both New York and Federal law, and possession of any amount of it is a crime (*see* New York Penal L. §§220.00-220.25; 21 USC § 841). In opposition, Hernandez raises an issue of fact by submitting his affidavit denying that he ever made the alleged defamatory statement to any of the producers or anyone else affiliated with that film. Hernandez further states that he had nothing to do with the production or publication of that alleged defamatory statement in that film. Moreover, other than plaintiff's speculation, there is no indication that Hernandez made the statement. As Hernandez rebuts plaintiff's prima facie showing, the branch of plaintiff's motion for judgment on his defamation claim must be denied.

The Court notes that Hernandez requests that the Court dismiss the complaint. Hernandez has not moved for such relief, and the Court declines to consider his opposition, including Hernandez's arguments that this action was commenced beyond the statute of limitations for plaintiff's claims sounding in defamation and pursuant to the Civil Rights Law, as a motion to dismiss the complaint.

Accordingly, it is hereby

ORDERED that plaintiff's motion pursuant to CPLR 3212 for summary judgment on the complaint s denied; and it is further

ORDERED that the parties shall appear for a preliminary conference on March 14, 2023 at 9:30 a.m.; and it is further

ORDERED that defendant Hernandez shall serve a copy of this decision and order upon plaintiff, within notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.

2/17/2023  
DATE

  
DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

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

APPLICATION:

CHECK IF APPROPRIATE: