Landwehrle v Bianchi
2023 NY Slip Op 30926(U)
March 27, 2023
Supreme Court, New York County
Docket Number: Index No. 155395/2020
Judge: John J. Kelley
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

----------X

VINCENT LANDWEHRLE,

Plaintiff,

- v -

TOM BIANCHI, VOGT GALLERY LLC, doing business as JOHANNES VOGT GALLERY, and DAMIANI EDITORE,

Defendants.

----------X

INDEX NO. 155395/2020

MOTION DATE 11/16/2022

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 102, 103, 104, 105, 106, 107, 108, 109, 110, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122

were read on this motion to/for DISMISSAL.

I. INTRODUCTION

In this action, inter alia, to recover damages for defamation, negligence, negligent infliction of emotional distress, common-law invasion of privacy under New Jersey and California law, and pursuant to Civil Rights Law §§ 50, 51, and 52-b, 18 USC §2252A, and N.J. Stat. 2A:58D-1, the defendant Damiani Editore (Damiani) moves pursuant to CPLR 3211(a)(7) to dismiss the first through seventh causes of action insofar as asserted against it for failure to state a cause of action. Damiani also moves to dismiss the first through seventh causes of action against him on the grounds that the action is time-barred (*see* CPLR 3211[a][5]) and based upon a defense founded upon documentary evidence (*see* CPLR 3211[a][1]). The plaintiff opposes the motion. The motion is granted to the extent that the fourth, sixth, and seventh causes of action, and so much of the second cause of action as is premised upon Restatement 2d of Torts, §§ 652C and 652D, are dismissed insofar as asserted against Damiani. The motion is otherwise denied.

II. DISCUSSION

The facts relevant to this dispute were set forth in great detail in the court's order dated June 24, 2023, which determined the motion of the defendant Tom Bianchi to dismiss the complaint insofar as asserted against him. In short, Damiani is an Italian corporation that published a glossy art book of historical photographs taken by Bianchi in the 1970s and 1980s. That book included several nude photos of the plaintiff, some of which were taken when he was 17 years old, and others after he was 18 years old.

A. CPLR 3211(a)(7) – Failure to State a Cause of Action

1. Standard Applicable to CPLR 3211(a)(7) Motions

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]). To determine whether a claim adequately states a cause of action, the court must "liberally construe" it, accept the facts alleged in it as true, accord it "the benefit of every possible favorable inference" (*id.* at 152; *see Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d 881 [2013]; *Simkin v Blank*, 19 NY3d 46 [2012]), and determine only whether the facts, as alleged, fit within any cognizable legal theory (*see Hurrell-Harring v State of New York*, 15 NY3d 8 [2010]; *Leon v Martinez*, 84 NY2d 83 [1994]; *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267 [1st Dept 2004]; CPLR 3026). "The motion must be denied if from the pleading's four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d at 152 [internal quotation marks omitted]; *see Leon v Martinez*, 84 NY2d at 87-88; *Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]).

2. First Cause of Action – N.J. Stat. 2A:58D-1

N.J. Stat. 2A:58D-1 provides, in pertinent part, that

> "An actor who, in violation of section 1 of P.L. 2003, c. 206 (C.2C:14-9), discloses any photograph, film, videotape, recording or any other reproduction of the image of another person who is engaged in an act of sexual penetration or sexual contact, the exposed intimate parts of another person, or the undergarment-clad intimate parts of another person shall be liable to that person, who may bring a civil action in the Superior Court. For purposes of this section: (1) "disclose" means sell, manufacture, give, provide, lend, trade, mail, deliver, transfer, publish, distribute, circulate, disseminate, present, exhibit, advertise, offer, share, or make available via the Internet or by any other means, whether for pecuniary gain or not."

Damani contended that the plaintiff cannot assert this cause of action because the issue, as addressed by the New Jersey statute, conflicts with the public policy of New York, as articulated in Civil Rights Law § 52-b. In particular, Damani argued that Civil Rights Law § 52-b requires the plaintiff to show that the defendant acted with the intent to cause the harm proscribed, whereas the New Jersey statute has no such requirement. Thus, according to Damiani, the plaintiff is precluded from asserting a cause of action to recover under N.J. Stat. 2A:58D-1, and is relegated to a remedy pursuant to Civil Rights Law §52-b, which includes the requirement that a plaintiff prove and plead intent.

Civil Rights Law §52-b(8), however, provides that,

> "[t]he provision of this section are *in addition to, but shall not supersede*, any other right or remedies available in law or equity"

(emphasis added). Thus, Civil Rights Law §52-b(8) allows for concurrent causes of action, regardless of whether another statute does or does not include an intent requirement. Moreover, this court has already decided, in its June 24, 2023 order, that the plaintiff can assert claims under the New Jersey statute in this action. Hence, this court does not recognize any conflict between the New York and New Jersey statutes, as asserted by Damiani.

Damani also contended that the plaintiff cannot assert this cause of action because doing so would require this court to adjudicate Damiani "notionally" as also being in violation of the criminal provisions that are incorporated into the New Jersey civil statute. Damiani maintained that the plaintiff is entitled to relief under N.J. Stat. 2A:58D-1 only if he can prove that Damiani acted "in violation of section 1 of P.L. 2003, c. 206 (C.2C:14-9)," a section that

constitutes a provision of the New Jersey Code of Criminal Justice (*see* N.J. Stat. § 2C:14-9). The New Jersey civil statute at issue, however, expressly states that "[a] conviction of a violation of section 1 of P.L. 2003, c. 206 (C.2C:14-9) shall not be a prerequisite for a civil action brought pursuant to this section" (N.J. Stat. 2A:58D-1). Nonetheless, Damiani argued that, because N.J. Stat. § 2C:14-9 is incorporated into N.J. Stat. 2A:58D-1, it would still require this court to decide a criminal issue in a civil action. This court wholly disagrees with that contention, given the explicit language of N.J. Stat. 2A:58D-1 that a criminal conviction *shall* not be a prerequisite for a civil action brought under the section. There is no other way of analyzing and interpreting such unequivocal language, even in a "notional" sense, as Damiani phrases it. Moreover, this court is limited to granting an award of civil damages only as permitted pursuant to N.J. Stat. 2A:58D-1(c), should it reach that juncture. In any event, the plaintiff is not asserting claims under New Jersey criminal law.

Moreover, inasmuch as the plaintiff seeks to recover damages pursuant to a civil cause of action created by statute, he need only prove his claim by a preponderance of the evidence (*see Liberty Mut. Ins. Co. v Land,* 186 NJ 163, 175-177, 892 A2d 1240, 1247-1248 [2006]), where a New Jersey prosecutor would be obligated to prove criminal liability beyond a reasonable doubt (*see State v Melvin,* 248 NJ 321, 342, 258 A3d 1075, 1087-1088 [2021]). In light of the differing standards of proof, even a determination of civil liability under N.J. Stat. 2A:58D-1 would not collaterally estop Damiani from disclaiming criminal liability, as collateral estoppel does not lie where a subsequent legal proceeding requires a higher burden of proof than the initial legal proceeding (*see Pivnick v Beck,* 326 NJ Super 474, 487-488, 741 A2d 655, 663 [App Div 1999]).

Thus, this court need not explore or enforce any criminal laws whatsoever. Hence, the plaintiff may assert, in a New York court, the civil cause of action created by N.J. Stat. 2A:58D-1(c) under New Jersey law.

3. Second Cause of Action – Invasion of Privacy Intrusion Upon Seclusion – New Jersey

The plaintiff's second cause of action, while titled "Invasion of Privacy Intrusion Upon Seclusion," articulates elements of the causes of action for three forms of invasion of privacy under New Jersey common law. In particular, the plaintiff pleaded that the defendants, including Damiani, violated his rights to be free from intrusion upon seclusion, publicity given to private life, and appropriation of name or likeness (*see* Restatement 2d of Torts, § 652B-D).

Restatement 2d of Torts, § 652B provides that,

> "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."

Damiani contended that the intrusion must entail either invasion of the plaintiff's physical space or intrusion upon the plaintiff's expectation of privacy by means of surveillance, deception, or other surreptitious means. Damiani further argued that, since it never had any contact with the plaintiff, it did not intrude upon his physical space or expectation of privacy by an act of surveillance or some other surreptitious conduct. Moreover, Damiani argued that its publication of Bianchi's book does not fall under any of the examples provided in comment (b) to the Restatement 2d of Torts, § 652B, and, as such, the second cause of action should be dismissed as against it.

New Jersey courts have held that, under Restatement 2d of Torts, § 652B, "while a physical, common law trespass might constitute an invasion of privacy, even lesser action without any physical contact or violation might give rise to the cause of action" (*Bisbee v John C. Conover Agency, Inc.*, 186 NJ Super 335, 339, 452 A2d 689, 691 [App Div 1982]). The importance of this aspect of the tort is that a person's private, personal affairs should not be pried into, except that a defendant may not be held liable for a wrong where he or she did not actually delve into the plaintiff's concerns, or where the plaintiff's activities are already public or known (*see id.* at 340). Thus, while Damiani did not have any contact with the plaintiff, it does

not follow that its alleged publication of photos of the plaintiff did not constitute an intrusion into his private, personal affairs. Furthermore, while Damiani is correct that the publication of a book is not included in the examples provided under comment (b) of §652(B), those examples are not exclusive or absolute. In fact, the examples are given in the context of what an invasion "*may* be," and not what they shall or must be, or what they are limited to. Since the plaintiff properly pleaded the elements of intrusion upon seclusion, the court may not dismiss, at this juncture, so much of the second cause of action as seeks to recover for common-law invasion of privacy by virtue of an intrusion upon his seclusion.

Restatement 2d of Torts, § 652D states that,

> "[o]ne who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
>
> "would be highly offensive to a reasonable person, and
>
> "is not of legitimate concern to the public."

Damiani contended that the common-law claim tracking the language of § 652D should be dismissed against it because Bianchi had the right, in telling his story, to disclose the private facts about the men with whom he had relationships. Moreover, Damiani asserted that Bianchi's account of his experience as a gay man during the time the photos were taken is a matter of legitimate public concern. Thus, Damiani argued that Bianchi is protected by the First Amendment, and so is it.

"To sustain a cause of action for giving publicity to a private life, a plaintiff must show that the matters revealed were actually private, that dissemination of such facts would be offensive to a reasonable person, and that there is no legitimate interest of the public in being apprised of the facts publicized." (*Bisbee v John C. Conover Agency, Inc.*, 186 NJ Super at 691). If the facts at issue are public information, they cannot be considered private, even though they relate to a matter of individual privacy (*see Romaine v Kallinger*, 109 NJ 282, 298, 537 A2d 284, 292 [1988]). If the facts were not already in the public domain, and therefore truly

private, publication of those facts would not constitute an actionable invasion of privacy if they are "newsworthy," and therefore a matter of legitimate public concern (*id.* at 301). The newsworthiness defense in invasion of privacy actions bars recovery where the subject of the publication is one in which the public has a legitimate interest (*id.*). Moreover, a publication is newsworthy when it contains an "indefinable quality of information that arouses the public's interest and attention" (*id.* [internal quotation marks omitted]). Finally, in such tort cases, it is for the court to determine whether a matter is of legitimate public interest (*see Hotchner v Castillo-Puche*, 404 F Supp 1041, 1045 [SD NY 1975]; *Coleman v Newark Morning Ledger Co.*, 29 NJ 357, 376, 149 A2d 193, 203 [1959]).

Here, while the photos were not otherwise in the public domain prior to the publication of Bianchi's book, they are matter of legitimate public concern and, therefore, newsworthy. Notably, the newsworthiness privilege is

> "not merely limited to the dissemination of news either in the sense of current events or commentary upon public affairs. Rather, the privilege extends to information concerning interesting phases of human activity and embraces all issues about which information is needed or appropriate so that individuals may cope with the exigencies of their period"

(*Campbell v Seabury Press*, 614 F2d 395, 397 [5th Cir 1980]). Additionally, the passage of time does not weaken newsworthiness or lessen the legitimacy of the public's concern (*see Romaine v Kallinger*, 109 NJ 282, 303, 537 A2d 284, 294 [1988]). The court is persuaded that Bianchi's documentation of his experiences as a gay man during the 1970s and 1980s provides "information concerning interesting phases of human activity," and is therefore newsworthy. Thus, that branch of the plaintiff's second cause of action that seeks recovery for common-law invasion of privacy under New Jersey law, pursuant to Restatement 2d of Torts, § 652D, must be dismissed for failure to state a cause of action.

Restatement 2d of Torts, § 652C provides that "one who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy." The branch of the second cause of action that seeks recovery for common-law

invasion of privacy under New Jersey law, pursuant to Restatement 2d of Torts, § 652C, must be dismissed for the same reason that the plaintiff's sixth cause of (statutory usurpation of publicity rights) was dismissed as against Bianchi in this court's June 24, 2023 order.

Thus, the second cause of action survives as against Damiani only to the extent that it seeks to recover for common-law invasion of privacy under New Jersey law, based upon an intrusion upon seclusion, as articulated in Restatement 2d of Torts, § 652B.

4. Third Cause of Action – California Civil Code § 1708.85(a)

California Civil Code §1708.85(a) states that,

> "[a] private cause of action lies against a person who intentionally distributes by any means a photograph, film, videotape, recording, or any other reproduction of another, without the other's consent, if (1) the person knew, or reasonably should have known, that the other person had a reasonable expectation that the material would remain private, (2) the distributed material exposes an intimate body part of the other person, or shows the other person engaging in an act of intercourse, oral copulation, sodomy, or other act of sexual penetration, and (3) the other person suffers general or special damages as described in Section 48a"

(Cal Civ Code § 1708.85). Damiani contended that this cause of action should be dismissed against it because the California statute conflicts with New York public policy, as articulated in Civil Rights Law § 52-b. Damani also argued that the plaintiff cannot assert a cause of action under California law in the courts of New York. The court rejects these arguments for the same reasons as explained above regarding the first cause of action, which was asserted under New Jersey law.

5. Fifth Cause of Action – 18 USC §2252A

18 USC §2252A governs activities relating to material constituting or containing child pornography, and states in pertinent part that,

> "Any person who knowingly
>
> "advertises, promotes, presents, distributes, or solicits through the mails, or using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains—

> "(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or
>
> "(ii) a visual depiction of an actual minor engaging in sexually explicit conduct;
>
> "shall be punished as provided in subsection (b)."

Moreover, the statute defines "sexually explicit conduct" to mean,

> "(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
>
> "(ii) bestiality;
>
> "(iii) masturbation;
>
> "(iv) sadistic or masochistic abuse; or
>
> "(v) lascivious exhibition of the anus, genitals, or pubic area of any person;"

(18 USC § 2256).

Damiani contented that the plaintiff's cause of action can only survive under the definition provided in 18 USC § 2256(v). Damiani further contended that the photographs of the plaintiff that are contained in Bianchi's book are not exhibited in a "lascivious" manner, as the federal courts have come to define the word.

Federal appellate courts utilize six factors to determine the meaning of "lascivious exhibition." Those factors are,

> "whether the focal point of the visual depiction is on the child's genitalia or pubic area;
>
> "whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
>
> "whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
>
> "whether the child is fully or partially clothed, or nude;
>
> "whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;
>
> "whether the visual depiction is intended or designed to elicit a sexual response in the viewer"

(*United States v Helton*, 302 F Appx 842, 848 [10th Cir 2008] citing *United States v Dost*, 636 F Supp 828 [SD Cal 1986]). While all six factors need not be present, more than one factor must be present to establish "lasciviousness" (*see United States v Wolf*, 890 F2d 241, 245 [10th Cir 1989]). Moreover, no single factor is dispositive (*see United States v Carroll*, 190 F3d 290, 297 [5th Cir 1999]).

The plaintiff contended that the second, third, fourth, and fifth factors apply to the photos at issue here. The plaintiff argued that the setting or backdrop of some of the photos are black and provide a stark comparison between the dark background and the plaintiff's white backdrop, bringing the viewer's focus to the white jock strap covering the plaintiff's genitalia. The plaintiff also argued that the jockstrap itself is wildly inappropriate attire for a child. The plaintiff further contended that he is completely nude in one photo, with his penis exposed. Finally, the plaintiff explained that several of the photos show him posed in such a manner as to suggest a willingness to engage in sexual activity. For example, in one photo, the plaintiff is sitting down and leaning back, with his arms supporting his torso, with his jockstrap depicted as the closest feature to the camera. In another photo, the plaintiff is simulating masturbation.

The court agrees with the plaintiff that more than one of the factors needed to define lascivious exhibition are present in the photos at issue, that is, nudity and the depiction of a willingness to engage in sexual activity. Finally, the court rejects Damiani's contention that, in allowing a claim under 18 USC § 2252A, this court would be required to address and enforce federal criminal laws. As with N.J. Stat. 2A:58D-1, the plaintiff is not seeking criminal remedies, but, rather, only those civil remedies that the statute allows for (*see* 18 USC § 2252A[f]). In any event, "unless Congress vests exclusive jurisdiction in the Federal courts, State courts are fully empowered to enforce Federal law" (*Bronson v Potsdam Urban Renewal Agency*, 82 AD2d 946, 947 [3d Dept 1981]; *see Student Lifeline, Inc. v State of NY*, 16 Misc 3d 1132[A], 2007 NY Slip Op 51663[U], *5 [Ct Cl 2007]). Thus, the plaintiff has stated a cause of action to recover under that federal law.

6. Seventh Cause of Action – Negligence as Against The Vogt Gallery and Damiani

To establish common-law negligence, a plaintiff must prove that the defendant owed him or her a duty of care and breached that duty, and that the breach proximately caused his or her injuries (*see Solomon v City of New York*, 66 NY2d 1026, 1027 [1985]). With regard to publications, a publisher has no independent duty to investigate the circumstances surrounding the publication (*see Stern v Cosby*, 645 F Supp 2d 258, 284 [SD NY 2009] [holding that a book publisher did not have an independent duty to investigate the reliability of the author's resources or the accuracy of the author's reporting unless it had actual subjective doubts as to its veracity]; *Pressler v Dow Jones & Co.*, 88 AD2d 928, 928 [2d Dept 1982] [finding that a newspaper did not have the duty to investigate each advertiser that purchased a space in its publication]; *Vaill v Oneida Dispatch Corp.*, 129 Misc 2d 477, 482 [Sup Ct, Oneida County 1985] [dismissing complaint where plaintiff failed to establish the existence of any duty owed to her by defendant newspaper to verify that she authorized the advertisement on which her action was based]).

Damiani argued that, as a publisher, it did not owe the plaintiff a duty to verify that Bianchi had obtained the plaintiff's consent to release his photos. Moreover, Damiani points to its publishing and distribution agreement with Bianchi, upon which it relied, wherein Bianchi represented that he obtained any requisite consent. The plaintiff failed to rebut Damiani's argument or provide case law that establishes that a duty of care otherwise exists. Thus, the plaintiff's seventh cause of action to recover for negligence by Damiani must be dismissed for failure to state a cause of action.

7. Fourth Cause of Action (Common-Law Invasion of Privacy) and Sixth Cause of Action (Publicity Rights – NY, NJ, CA)

For the same reasons set forth in this court's June 24, 2023 order addressing Bianchi's motion to dismiss, the fourth and sixth cause of action are dismissed as asserted against Damiani.

B. CPLR 3211(a)(1) and CPLR 3211(a)(5)

Although Damiani purported to move to dismiss the above causes of action on the ground that the action is time-barred (*see* CPLR 3211[a][5]) and based on a defense founded upon documentary evidence (*see* CPLR 3211[a][1]), Damiani made no argument in its motion papers supporting those requests for relief. Rather, Damiani's discussion of the grounds for dismissal was focused solely on an alleged failure to state a cause of action.

C. CPLR 8501(a) – Security for Costs

CPLR 8501(a) mandates the court, "upon motion by the defendant," to "order security for costs to be given by the plaintiffs where none of them is a domestic corporation, a foreign corporation licensed to do business in the state *or a resident of the state* when the motion is made" (emphasis added) (*see Clement v Durban*, 32 NY3d 337, 344-345 [2018]). The rule provides an exception where the plaintiff has been allowed to proceed as a poor person or is the petitioner in a habeas corpus proceeding (*see id.* at 344).

In the instant case, the plaintiff indicated in his summons and complaint that he resides in New Jersey, and thus is not a resident of the State of New York. Additionally, the plaintiff does not fall within any of the exceptions to CPLR 8501, as he has not been granted permission to proceed as a poor person and this is not a habeas corpus proceeding in which he is a petitioner. Hence, it is appropriate for this court to order the plaintiff to give security for costs as of right (*see Garrett v Community Gen. Hosp.*, 288 AD2d 928, 929 [4th Dept 2001]).

CPLR 8503 provides that

> "Security for costs shall be given by an undertaking in an amount of five hundred dollars in counties within the city of New York, and two hundred fifty dollars in all other counties, or such greater amount as shall be fixed by the court that the plaintiff shall pay all legal costs awarded to the defendant."

The court, in its discretion, thus may determine that an amount greater than $500 should be paid into the court by an out-of-state plaintiff, based on the facts and circumstances of the particular action (*see Beatty v Williams*, 227 AD2d 912, 912 [4th Dept 1996]; *Howell v Rothberg*,

197 AD2d 815 [3d Dept 1993]). Consequently, while the minimum security required is $500 with respect to an action in which the venue is placed in a county within the City, such as New York County, the court, in fixing the amount of the undertaking, may fix an increased amount in consideration of the amount of costs likely to be expended (*see Manente v Sorecon Corp.*, 22 AD2d 954 [2d Dept 1964] [security for costs was appropriately fixed at $4,500 where disbursements were likely to reach that amount in light of appellate printing costs and other disbursements likely to be incurred in the case]; *see also Beatty v Williams*, 227 AD2d at 912 [requiring non-resident to post security for costs in the amount of $5,000]; *Howell v Rothberg*, 197 AD2d 815 [3d Dept 1993][security for costs in the amount of $2,000 was reasonable]).

Here, Damiani argued that the plaintiff should be compelled to post an undertaking in the sum of $5,000, based on the contention that its Chief Executive Officer, Financial Director, and sales and financial records are all located in Bologna, Italy, and, as such, it may be necessary to travel to Italy to conduct depositions. Damiani also contended that parties may have to travel to California to depose Bianchi. "Costs," as defined in CPLR article 81, however, do not include an award for traveling to take a deposition. In fact, any compensation regarding taking a deposition is limited to "the reasonable compensation of *commissioners* taking depositions" (CPLR 8301[a][2] [emphasis added]) pursuant to an open commission. Although a party may be entitled to this disbursement when submitting a bill of costs to be taxed after prevailing in an action (*see* CPLR article 83), the court notes that the statute requiring a nondomiciliary to post security for costs does not, by its terms, necessarily require the nondomiciliary to post security for disbursements. As noted above, however, several courts have considered taxable disbursements in arriving at an appropriate amount for the security. Were Damiani to prevail in this action after a trial, it would be entitled to statutory costs in the sum of $300 (*see* CPLR 8201[3]). Giving Damiani the benefit of doubt by assuming that it might successfully move for summary judgment at the close of discovery, it would be entitled to costs on a motion, which the CPLR fixes at $100 (*see* CPLR 8202). The court concludes that, based on the future costs, and

disbursements, that the defendant is likely to incur, the undertaking should be fixed in the amount of $500.

The court further notes that, pursuant to CPLR 8502,

> "[u]ntil security for costs is given pursuant to the order of the court, all proceedings other than to review or vacate such order shall be stayed. If the plaintiff shall not have given security for costs at the expiration of thirty days from the date of the order, the court may dismiss the complaint upon motion by the defendant, and award costs in his favor."

Accordingly, it is

ORDERED that the motion of the defendant Damiani Editore is granted to the extent that fourth, sixth, and seventh causes of action, and so much of the second cause of action as is premised upon Restatement 2d of Torts, §§ 652C and 652D, are dismissed insofar as asserted against it, and the motion is otherwise denied; and it is further,

ORDERED that, on the court's own motion, the plaintiff shall, on or before April 28, 2023, give security for costs in the amount of $500.00 with respect to the defendant Damiani Editore, by posting an undertaking with the County Clerk of the County of New York, which undertaking may be in the form of a surety bond or a deposit of cash, money order, or bank check, and such undertaking shall remain in effect until further order of this court; and it is further,

ORDERED that, on the court's own motion, pursuant to CPLR 8502, all proceedings in this case are stayed pending the posting of the undertaking, and if the plaintiff fails to post the undertaking, at the expiration of 30 days from the date of entry of this order, the court may dismiss the complaint upon motion by the defendant Damiani Editore, and award costs in its favor; and it is further,

ORDERED that, to the extent that the stay has by then been vacated, the parties shall submit a proposed preliminary conference order on or before May 29, 2023.

This constitutes the decision and order of the court.

3/27/2023
DATE

JOHN J. KELLEY, J.S.C.

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