STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

VANESSA PERRY,

Plaintiffs,

-against-

JEFFREY L. ROCKMORE, M.D., ROCKMORE PLASTIC SURGERY, and JEFFREY L. ROCKMORE, M.D., P.C., PLASTIC SURGERY ASSOCIATES, L.L.P. d/b/a THE PLASTIC SURGERY GROUP; and THE PLASTIC SURGERY GROUP, L.L.P. d/b/a THE PLASCIT SURGERY GROUP a/k/a THE ALBANY PLASTIC SURGERY GROUP,

Defendants.

DECISION & ORDER
Index No.: 905281-22

(Supreme Court, Albany County, Motion Term)

APPEARANCES: Bryan J. Swerling, Esq.
Law Office of Bryan J. Swerling, P.C.
Attorneys for Plaintiff
15 Maiden Lane, Suite 2005
New York, New York 10038

Mandy McFarland, Esq.
Thorn Gershon Tymann and Bonanni, LLP
Attorneys for Defendants Jeffrey L. Rockmore, MD., Rockmore Plastic Surgery and Jeffrey L. Rockmore, MD., P.C.
5 Wembley Court, P.O. Box 15054
Albany, New York 12212

Abigail A. Dean, Esq.
O'Connor, O'Connor, Bresee & First, P.C.
Attorneys for Defendants Plastic Surgery Associates, LLP d/b/a The Plastic Surgery Group and The Plastic Surgery Group, LLP d/b/a The Plastic Surgery Group a/k/a The Albany Plastic Surgery Group.
20 Corporate Woods Boulevard
Albany, New York 12212

HON. JAMES H. FERREIRA, Acting Justice:

In this action, plaintiff seeks money damages arising from defendants alleged unauthorized use of photographs depicting plaintiff prior to and after a rhinoplasty procedure performed by defendants, which she alleges were published on commercial websites and social media platforms from June 13, 2017 through the present. Plaintiff's amended complaint asserts nine causes of action, inducing 1) a violation of plaintiff's right to privacy pursuant to §§ 50 and 51 of the Civil Rights Law; 2) unjust enrichment; 3) breach of fiduciary duty of confidentiality; 4) negligence per se violation of Civil Rights Law § 50; 5) negligence per se violation of CPLR § 4504 (a); 6) negligence per se violation of Education Law § 6509 (9) and 8 NYCRR 60.1 (d) (3); 7) public disclosure of private facts about plaintiff; 8) negligent hiring, training and supervision against defendant The Plastic Surgery Group (PSG); and 9) Punitive Damages (see NYSCEF No. 33). In lieu of an answer, defendants have each moved to dismiss the complaint pursuant to CPLR 3211(a) (5) and (7), claiming that certain causes of action are barred by the statute of limitations and that others fail to state a cause of action (see NYSCEF No. 35, 45). Plaintiff opposes the motions, and defendants have submitted a reply.[1]

Plaintiff alleges that, in June 2017, she sought rhinoplasty treatment with PSG and its principal and owner, defendant Jeffrey L. Rockmore, M.D. (Dr. Rockmore). Photographs of plaintiff's nose were taken before and after the procedure and remained under the control of PSG. Plaintiff alleges that PSG permitted Dr. Rockmore to access said photographs and also permitted Dr. Rockmore to retain plaintiff's medical records and photographs when he separated from PSG and began operating as Rockmore Plastic Surgery (RPG) and Jeffrey L. Rockmore, M.D., P.C.

[1] Defendants Jeffrey L. Rockmore, MD., Rockmore Plastic Surgery and Jeffrey L. Rockmore, MD., P.C. make similar arguments in support of their motion as those made by Plastic Surgery Associates, LLP d/b/a The Plastic Surgery Group and The Plastic Surgery Group, LLP d/b/a The Plastic Surgery Group a/k/a The Albany Plastic Surgery Group.

(JLR) (collectively, with Dr. Rockmore, the Rockmore defendants). In March 2022, plaintiff became aware that the Rockmore defendants were utilizing plaintiff's before and after photographs, which clearly depicted plaintiff's face. Plaintiff alleges that these photographs published on commercial websites and social media platforms, including Instagram, and were used for marketing purposes. Plaintiff asserts that, because of defendants' actions, she is and will continue to be distressed, humiliated, exposed to public ridicule and contempt, among other things.

Preliminarily, in opposition to defendants' motions, plaintiff has agreed to withdraw her fifth, sixth, and seventh causes of action. Accordingly, this Decision and Order will address the remaining the first, second, third, fourth, eighth, and ninth causes of action. Defendants assert that plaintiff's first and fourth causes of action are time barred, and that plaintiff's second, third, eighth, and ninth cause of action fail to state a cause of action.

"Where, as here, [the Court is] tasked with resolving a motion to dismiss pursuant to CPLR 3211, [it] must accept the facts as alleged in the complaint as true and accord the plaintiff the benefit of every possible favorable inference" (Krog Corp. v Vanner Group, Inc., 158 AD3d 914, 915 [3d Dept 2018]). " '[T]o dismiss [an action] pursuant to CPLR 3211(a)(5) on the ground that it is barred by the applicable statute of limitations, a defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the action has expired'" (Gurecki v Gurecki, 189 AD3d 1729, 1730 [3d Dept 2020], quoting Krog Corp. v Vanner Group, Inc., 158 AD3d at 915). "'If the defendant satisfies this burden, the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable'" (id., quoting Elia v Perla, 150 AD3d 962, 964 [2d Dept 2017]).

In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), "the complaint is liberally construed, the facts as alleged are accepted as true and the

plaintiff is accorded the benefit of every favorable inference" (Murray Bresky Consultants, Ltd v New York Compensation Manager's Inc., 106 AD3d 1255, 1258 [3d Dept 2013]; see Leon v Martinez, 84 NY2d 83, 87-88 [1994]; NYAHSA Servs., Inc., Self Ins. Trust v Recco Home Care Servs., Inc., 141 AD3d 792, 794 [3d Dept 2016]). The inquiry before the Court is "whether the facts as alleged in the claim fit within any cognizable legal theory" (Leon v Martinez, 84 NY2d at 87-88; see IMS Engrs.-Architects, P.C. v State of New York, 51 AD3d 1355, 1356 [3d Dept 2008], lv denied 11 NY3d 706 [2008]).

Sections 50 and 51 of the New York Civil Rights Law prohibit the "(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, 297 AD2d 595, 597 [1st Dept 2002]; see Civil Rights Law §§ 50 and 51). Pursuant to CPLR 215 (3), "an action to recover damages for . . . . a violation of the right of privacy under section fifty-one of the civil rights law" must be brought within one year. In this regard, New York State follows the "single publication rule," which provides that a cause of action for a violation Civil Right Law §§ 50 and 51 accrues on the date the offending material is first published, regardless of when the subject discovered that the material was published (Nussenzweig v diCorcia, 9 NY3d 184, 188 [2007]). The rationale underlying this rule is to prevent the "endless retriggering of the statute of limitations, multiplicity of suits and harassment of defendants" (Firth v State of New York, 98 NY2d 365, 369-370 [2002]).

Here, plaintiff's amended complaint expressly alleges that "[u]pon information and belief, from on or about June 13, 2017, to present, the Rockmore Defendants continuously, knowingly and without the written consent or authorization of [p]laintiff, published for commercial use several [p]hotographs of [p]laintiff" on commercial websites and social media platforms

(NYSCEF No. 33, ¶¶29-30). Because this action was not commenced until July 2022, defendants have met their *prima facie* burden, establishing that the time within which to commence the action based upon a violation of the Civil Rights Law has expired.

In opposition, plaintiff argues that defendants' republication of the offending material triggers a new one-year limitations period (see Firth v State of New York, 98 NY2d at 371). "Republication, retriggering the period of limitations, occurs upon a separate aggregate publication from the original, on a different occasion, which is not merely 'a delayed circulation of the original edition'" (id., citing Rinaldi v Viking Penguin, 52 NY2d 422, 435 [1981] [the publisher's decision to subsequently release a published hardback book as a paperback was a conscious attempt to reach an entirely new market of readers through a different format at a different price]). The single publication rule is applicable to allegedly defamatory statements posted on the internet (see id., at 371; see also Etheredge-Brown v Am. Media, Inc., 13 F Supp 3d 303, 306 [SDNY 2014], citing Firth v State of New York, 98 NY2d at 371-372] ["Of course, courts have overwhelmingly held ... that the mere continued availability of material on a website does not constitute an ongoing 'republication.'"]).[2]

However, in opposition to defendants' motions, counsel asserts that discovery is needed to determine "(1) the extent of the Defendants' efforts to use Plaintiff's Photographs for advertising purposes; (2) the platforms on which such Photographs were published; and (3) the date of publication of the Photographs on each such platform" (NYSCEF No. 44, ¶ 41). Counsel further states that "[d]efendants may have used Plaintiff's Photographs in books, paper advertisements,

[2] The mere hope that discovery may reveal helpful information does not warrant denial of the motion (see Cracolici v Shah, 127 AD3d 413, 413 [1st Dept 2015]). It appears in this matter, information regarding the platforms used for publication are solely within defendants' knowledge (see CPLR 3211 [d]; Cantor v Levine, 115 AD2d 453, 453 [2d Dept 1985]; compare Long Island Med. Anesthesiology, P.C. v Rosenberg Fortuna & Laitman, LLP, 191 AD3d 864, 866-867 [2d Dept 2021], lv denied 37 NY3d 908 [2021]).

educational materials, or other formats intended to reach audiences other than those viewing its Instagram account. Defendants likely also used Plaintiff Photographs to promote its services on other social media platforms and websites intended to reach different audiences" (NYSCEF No. 44, ¶42).

Pursuant to CPLR 3211 (d), the Court has the discretion to deny a motion to dismiss without prejudice to renew after discovery if it appears that "facts essential to justify opposition may exist but cannot then be stated." "If a party demonstrates that facts may exist in opposition to a motion to dismiss, discovery is sanctioned" (Amigo Foods Corp. v Marine Midland Bank-N.Y., 39 NY2d 391, 395 [1976]). A motion to dismiss is properly denied when a plaintiff has not had an opportunity to conduct disclosure regarding essential evidence that is within the exclusive knowledge or possession of defendants (see Peterson v Spartan Indus., Inc., 33 NY2d 463, 465-66 [1974]). Here, the Court finds that plaintiff has sufficiently asserted that material facts regarding defendants' republication of plaintiff's photographs may exist that would impact this Court's determination on the issue of the statute of limitations. Furthermore, this information would be in the exclusive control of defendants. Accordingly, in view of the strong public policy that favors resolution on the merits (see Gonzalez v Seejattan, 123 AD3d 762, 763 [2d Dept 2014]), defendants' motions, insofar as they seek dismissal of plaintiff's first and fourth causes of action, are denied without prejudice to renew upon completion of discovery on their statute of limitations defense.

The Court reaches a different conclusion with respect to plaintiff's second, third, and eighth causes of action alleging unjust enrichment, breach of fiduciary duty, and negligent hiring, supervision, and training. Sections 50 and 51 of the Civil Rights law preempt common-law claims based on the unauthorized use of a person's image (see Hampton v Guare, 195 AD2d 366, 366-

367 [1st Dept 1993], lv denied 82 NY2d 659 [1993] "[[T]he preemptive effect of the Civil Rights Law is fatal to the ... causes of action ... alleging common-law conversion, common-law tort and unjust enrichment where, as here, the plaintiff has no property interest in his image, portrait, or personality outside the protections granted by the Civil Rights Law."]); see also Grodin v Liberty Cable, 244 AD2d 153, 154 [1st Dept 1997] ["However, it was error not to dismiss plaintiff's causes of action for negligence and unjust enrichment, there being no common-law right of privacy in New York."]; see also Zoll v Jordache Enters., Inc., __ F Supp 2d __, ___, 2002 WL 31873461,*16 (SDNY Dec 24, 2002][**"Where a claim arises from unauthorized use of an image or likeness, plaintiffs have not been allowed to advance common law claims in addition to their statutory claims merely by recasting the statutory claim as a common law claim."**]). As plaintiff's second, third, and eighth causes of action are all based upon defendants' use of plaintiff's photographs, plaintiff's remedy is via the Civil Rights Law. Accordingly, plaintiff's second, third, and eighth causes of action must be dismissed.

Finally, punitive damages "are merely an element of the total claim for damages on ... underlying causes of action" (Jean v Chinitz, 163 AD3d 497, 498 [1st Dept 2018] [internal quotation marks and citations omitted]). Since "a demand for such damages does not constitute a separate cause of action in a complaint" (Mason v First Cent. Natl. Life Ins. Co. of N.Y., 86 AD3d 854, 854 [3d Dept 2011]), the Court agrees with defendants that plaintiff's ninth cause of action for punitive damages must be dismissed for failure to state a cause of action.

Accordingly, it is hereby

ORDERED that plaintiff's fifth, sixth, and seventh causes of action are deemed withdrawn; and it is further

ORDERED that defendants' motions, made pursuant to CPLR 3211 (a)(5), seeking dismissal of plaintiff's first and fourth causes of action, are denied, without prejudice to renew if necessary following discovery on the issue of republication; and it is further

ORDERED that defendants' motions, made pursuant to CPLR 3211 (a)(7), seeking dismissal of plaintiff's second, third, eighth, and ninth causes action, are granted; and it is further

ORDERED, that defendants shall file and serve their answer, in accordance with this Decision and Order, within thirty (30) days that this Decision is Order is served with Notice of Entry.

This constitutes the Decision and Order of the Court, which will be uploaded to the New York State Court's Electronic Filing System (NYSCEF). Counsel is advised of 22 NYCRR 202.5-b (h) (2) relating to notice of entry.

ENTER.
Dated: Albany, New York
August 22 2023

Hon. James H. Ferreira
Acting Justice of the Supreme Court

Papers Considered:

NYSCEF Documents Numbered 33-54.

08/23/2023