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

ALEX SHANKLIN, LOUISA RASKE, MELISSA BAKER, INDEX NO.653702/2013

ELENI TZIMAS, MARCELLE ALMONTE,

GRECIA PALOMARES,CARINA VRETMAN, JUDGE: SHERWOOD

MICHELLE GRIFFIN TROTTER

individually and as class representatives,

Plaintiffs,

-against-

WILHELMINAMODELS,INC.,WILHELMINAINTERNATIONALLTD.,

FORDMODELS,INC.,ELITEMODELMANAGEMENT-NEWYORK LLC,CORPORATION,

CLICKMODELMANAGEMENT,INC.,MC2d/b/a Karin Modelsof NewYork,LLC.,

NEXT MANAGEMENT,LLC.,MAJORMODELMANAGEMENTINC.,QUEMANAGEMENT

INC.MCCANN-ERICKSONUSA,INC.,MCCANN-ERICKSONCORPORATION

(INTERNATIONAL),L'OREALUSA,INC.,P&G-CLAIROL,INC.

(ProctorandGamble),SAATCHIANDSAATCHI

NORTHAMERICA,INC.,OGILVY&MATHER WORLDWIDE INC.

Defendants.

PLAINTIFFS' RESPONSE TO DEFENDANT SAATCHI'S MOTION TO DISMISS

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ARGUMENT AND AUTHORITIES

I. PLAINTIFFS HAVE SUFFICIENTLY ALLEGED THE NECESSARY ELEMENTS OF ALL OF THE CAUSES OF ACTION ASSERTED IN THE COMPLAINT

The legal standard applied in determining a motion to dismiss for failure to state a cause of action is set forth in Cooper v. 620 Prop. Assoc., 242 A.D. 2d. 359 (2d Dept. 1997) which held that in determining whether a complaint is sufficient to withstand a motion to dismiss pursuant to CPLR 3211(a)(7), the sole criterion is whether the pleading states a cause of action. If from the four corners of the complaint factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion to dismiss will fail. Weiss v. Cuddy & Feder, 200 A.D.2d 665 (2d Dept. 1994); Guggenheimer v. Ginzburg, 43 N.Y.2d 268 (1977); Edison v. Viva Int.,Page, 70 A.D.2d 379 (1st Dept. 1979). The court's function is to "accept each and every allegation forwarded by the plaintiff without expressing any opinion as to the plaintiff's ability ultimately to establish the truth of these averments before the trier of the facts. 219 Broadway Corp. v. Alexander's, Inc., 46 N.Y.2d 506 (1979) citing Becker v. Schwartz, 46 N.Y.2d 401 (1978); see also, Carney v. Memorial Hosp. & Nursing Home of Greene County, 64 N.Y.2d 770 (1985); 6A Carmody-Wait 2d, N.Y.Prac. § 38:41, at 290-291).

The Court of Appeals has recently held in 2013 that:

> In this case, though, Bally has moved to dismiss under CPLR 3211 (a) (7), which limits us to an examination of the pleadings to determine whether they state a cause of action. Further, we must accept facts alleged as true and interpret them in the light most favorable to plaintiff; and, as Supreme Court observed, plaintiff may not be penalized for failure to make an evidentiary showing in support of a complaint that states a claim on its face (*see Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976] [as long as a pleading is facially sufficient, the plaintiff is not obligated to come forward with claim-sustaining proof in response to a motion to dismiss unless the court treats the motion as one for summary judgment and so advises the parties]). Miglino v Bally Total Fitness of Greater N.Y., Inc., 2013 NY Slip Op 00780 (2013)

A. PLAINTIFFS HAVE STATED A CAUSE OF ACTION FOR BREACH OF THIRD PARTY CONTRACT

In reviewing a motion to dismiss, the court must accept the facts alleged in the complaint as true and interpret them in the light most favorable to plaintiffs.

This court's decision in index no. 653619 ("hereinafter referred to as "the initial action") recognizes throughout, that the heart of the plaintiffs' claim is breach of contract for failure to pay the models. Ultimately the court held that:

> D. Other Matters
>
> ...However, plaintiff and the other models and former models that she purports to represent are not left without a remedy. If, as the complaint alleges, modeling agencies fail to pay models fees contractually owed to them, aggrieved persons may sue to enforce their contract rights and may invoke class action procedures in proper cases. If advertisers fail to obtain and pay for Usage_ extension rights, remedies may be available to aggrieved persons under New York Civil Rights Law and under the common law.
>
> September 6, 2013 pg.18 of 19

As alleged in the instant complaint, the representative plaintiffs Shanklin and Palomares both had contracts with Wilhelmina. In addition, Shanklin had a subsequent contract with QUE (Q) Models. The limited records furnished in the past to Shanklin and Palomares by Wilhelmina and Q, reflect advertising bookings from Saatchi and Saatchi (Exhibits to Taylor Affirmation, "A" Shanklin and "B" Palomares). The advertising agencies are the nexus between the clients and the modeling agencies and the models that they represent.

The instant complaint alleges and reiterates for each representative plaintiff that:

> Upon information and belief, the plaintiff has not been paid in full and there are

additional usages, domestic and foreign, unpaid by Saatchi and Proctor and Gamble and other clients due to plaintiff.

Upon information and belief, the plaintiff has not been paid in full and there are additional usages, domestic and foreign paid by Saatchi and Proctor and Gamble and other clients to the modeling agencies which the plaintiff has not received.

It logically follows that:

A. if the plaintiffs allegations must be accepted as true

B. remedies may be available under New York Civil Rights Law and under the common law for failure to pay models

equals

C. the plaintiffs have stated a cause of action

B. PLAINTIFFS' CAUSE OF ACTION FOR SAATCHI'S VIOLATIONS OF SECTIONS 50/51 AND COMMON LAW

In its initial decision, this court recognized that "If advertisers fail to obtain and pay for Usage extension rights, remedies may be available to aggrieved persons under New York Civil Rights Law and under the common law."

New York's recognition of plaintiffs' rights to their images is not new. Sections 50/51 were adopted over a hundred years ago.

B.1 HISTORICAL DEVELOPMENT

Interestingly, the right of publicity derived out of the right of privacy. In 1890, two lawyers, Warren and Brandeis, wrote an article entitled The Right to Privacy, in response to a disturbing trend involving the media publishing private information about private

citizens.They acknowledged that certain "sacred precincts of private and domestic life" were being invaded by instantaneous photographs and newspaper enterprise, and argued that the common law should recognize a right of privacy to protect every person's "right to be let alone" and "right to enjoy life"

In 1902, in Roberson Rochester Folding Box Co. the plaintiff brought an action against a flour manufacturer, claiming an in-infringement on her right of privacy due to unauthorized printing, sale and circulation of 25,000 lithograph prints of her person

The court summarized the plaintiff's complaint:

Such publicity ... is to the plaintiff very distasteful, and because of the defendant's impertinence in using her picture without her consent for business purposes, she has [suffered] mental distress where others would have appreciated the compliment to their beauty implied in the selection of the picture.

The court refused to recognize a common law right of privacy, fearful of opening the litigation floodgates. Roberson was met with "a storm of public disapproval" In 1903, the New York legislature enacted sections 50 and 51 of the New York Civil Rights Law, overruling Roberson and making it an offense and a tort to use a person's "name, picture or photograph" in advertising or trade without his or her consent.

B.2 IF ADVERTISERS FAIL TO OBTAIN AND PAY FOR USAGE EXTENSION RIGHTS, REMEDIES MAY BE AVAILABLE TO AGGRIEVED PERSONS UNDER NEW YORK CIVIL RIGHTS LAW AND UNDER THE COMMON LAW.

As to Saatchi's argument the inquiry ends with the determination that they relied upon the apparent authority of the modeling agencies for the models' "consent" for the use of their image, "consent" by the model was contingent upon payment for the use of the images. Even if the advertisers obtained "consent" that "consent" was vitiated by the plaintiffs' not receiving payment. With regard to that consent, the complaint alleges that:

> 146. Even assuming that the advertising agencies and clients justifiably relied upon the apparent authority of the modeling agencies for "consent" to use the plaintiffs' images, that "consent" and the release of the models' rights to their own images, are predicated upon the models receiving payment for the use/reuse. Any "consent" is vitiated by the plaintiffs failure to receive payment.

Moreover, for each representative plaintiff, the complaint alleges and reiterates that:

> . Upon information and belief, the plaintiff has not been paid in full and there are additional usages, domestic and foreign, unpaid by Saatchi and Proctor and Gamble and other clients due to Palomares.
>
> . Upon information and belief, the plaintiff has not been paid in full and there are additional usages, domestic and foreign paid by Saatchi and Proctor and Gamble and other clients to Wilhelmina which the plaintiff has not received.

B.3 BOTH SAATCHI AND SAATCHI AND THEIR CLIENTS ARE LIABLE

Saatchi's claim that only their clients can be held liable under sections 50 and 51 is simply a re-argument by Saatchi of its previous arguments, in the hopes of a different result.

This issue was fully briefed by both sides in the initial action:

A. Plaintiffs response to Saatchi motion to dismiss the initial action:

Document 145 1/09/2013

In addition, Saatchi and Publicis' contention that only the client defendants can be held liable under NYCRL § 50, a position not likely appreciated by their clients, lacks any legal support. NYCRL § 50 does not provide that it applies solely to parties that publish images, but applies to any party that uses the model's images for advertising purposes. In its decision in Arrington v. New York, 55 NY2d 433, 443 (1982), the Court of Appeals held that the defendant photographer and the agent that purchased the photo from the photographer on behalf of the New York Times"commercialized the photograph" in "furtherance of [his] trade". As a result, the Arrington Court held that those defendants' motions to dismiss plaintiff 's cause of action for violation of NYCRL §§ 50 and 51 should have been denied. Based on the Arlington decision, as advertising agencies, Saatchi and Publicis simply cannot argue that they did not commercialize the renewed or continued usages in furtherance of their trade and under NYCRL § 50.

In addition, Saatchi and Publicis' contention that only the client defendants can be held liable under NYCRL § 50, a position not likely appreciated by their clients, lacks any legal support.

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the Arrington Court held that those defendants' motions to dismiss plaintiff 's cause of action for violation of NYCRL §§ 50 and 51 should have been denied. Based on the A decision, as advertising agencies, Saatchi and Publicis simply cannot argue that they did not commercialize the renewed or continued usages in furtherance of their trade and under NYCRL § 50.

B. Saatchi Reply:

Document no. 236 1/18/2013

Plaintiff fails to establish that Movants are "users" of Plaintiff's images.

Plaintiff argues that the Movants are "users" under New York Civil Rights Law §50, even though they do not publish the models' images. However, Plaintiff's argument is an unwarranted extension of the Court of Appeals' decision in Arrington v. New York Times. Arrington is inapposite here because there is no allegation that the Movants either took or sold any images of Plaintiffs Moreover, Arrington was based on a separate commercial use See. eg.. Prichard v. 164 Ludlow Corp., 49 A.D.3d 408, 409 (lst Dep't. 2008) (allegations that defendants "may have received monies from the corporation that plaintiffs believe should have been used to pay them" are insufficient to maintain plaintiffs claims); Steinowitz v. Gambescia, 899 N.Y.S.2d 63, at *2 (Table) (N.Y. Sup. Ct. App. Term, 2009) ("[I]n the instant case, the factual assertions made by defendant in the second counterclaim are conclusory and speculative, and are insufficient to support her allegations .... from advertising." In Arrington, the court found that a 'photographer and his agent could be liable for selling images' because such sale was based on the fact that the complaint contained allegations that: (i) photographer Gorgoin took the picture; (ii) Contact [Press Images], in the business of buying and selling reproduction rights of photographs, had then been commissioned by Gorgoni to sell his pictures; and (iii) Pledge was the Contact officer and employee through whom Contact, acting for Gorgoni, sold the Times the picture, the proceeds being divided between Contact and Gorgoni. After considering the arguments, the court ruled that "advertisers" may be held liable.

Based on the Arlington decision, Saatchi simply cannot argue that they did not commercialize the renewed or continued usages in furtherance of their trade and under NYCRL § 50.

In light of Arrington, based upon the court's initial ruling and the predicated upon the complaints' count for breach of third party contract, Saatchi's argument that the complaint fails to state a cause of action against them is misplaced, at best.

B.4 PLAINTIFFS' ALLEGATIONS OF FAILURE TO PAY ARE SUFFICIENT

The Court's ruling found that the allegations contained paragraph 139 of the initial complaint were insufficient as to the advertising agencies and clients, because the complaint did not clearly allege that money had not been paid. This Court found that the allegation therein "any instance where payment has not been made" was insufficient.

As referenced above, plaintiffs have rectified this insufficiency in the instant complaint.
For each representative plaintiff, the complaint states and reiterates that:

> . Upon information and belief, the plaintiff has not been paid in full and there are additional usages, domestic and foreign, unpaid by Saatchi and Proctor and Gamble and other clients due to Palomares.
>
> . Upon information and belief, the plaintiff has not been paid in full and there are additional usages, domestic and foreign paid by Saatchi and Proctor and Gamble and other clients to Wilhelmina which the plaintiff has not received.

II. COLLATERAL ESTOPPEL/RES JUDICATA DOES NOT APPLY TO UN NAMED PLAINTIFFS IN A PROPOSED UNCERTIFIED CLASS ACTION

Collateral estoppel and res judicata do not apply to unnamed plaintiffs in an uncertified proposed class action. To the contrary, "every person is entitled to his day in court" Shelton, below.

In index no. 653619/2012, the court adjudicated the rights of Raske visa vie the defendants, but did not adjudicate the rights of future unidentified plaintiffs who may bring their own actions.
As set forth above, the Court's decision specifically noted that "plaintiff and the other models and former models that she purports to represent are not left without a remedy".

Moreover, the principle of collateral estoppel applies only to the parties and those in privity with them. Unnamed models in a proposed class action are clearly not "in privity" with Raske.

As the court is aware the instant class action is the second against the modeling industry within the past ten years.
What the court may not realize is that an offshoot of the models' 2005 Federal class action (FEARS) was litigated before Justice Ramos in the commercial division of the New York Supreme Court in Shelton v Elite Model Mgt., Inc.
When the Federal portion of the models' class action (FEARS) was settled for almost $23 million dollars,, Justice Ramos was charged with determining whether to apply res judicata or collateral estoppel to the state court action. Justice Ramos held:

> Judge Baer's decision is not binding on this court under theories of res judicata or collateral estoppel to the extent that the parties here are different. Rather, a fundamental underpinning of both res judicata and collateral estoppel is that every person is entitled to his day in court. (Gramatan Home Invs. Corp. v Lopez, 46 NY2d 481, 485 [1979].) Therefore, the action must be dismissed as to any plaintiffs who were plaintiffs in the federal action. Shelton, Shea and Johnson were not parties to the federal action, however, and they are entitled to their day in court.
>
> Shelton v Elite Model Mgt., Inc. 2005 NY Slip Op 25492 [11 Misc 3d 345] September 6, 2005 Ramos, J. Supreme Court, New York County

Clearly any ruling against Raske can not prevent a model from suing upon their own contractual relationship.

III. THE COMPLAINT IS SUFFICIENTLY SPECIFIC

The initial action began when Raske discovered her image being used and McCann furnished documents concerning usage renewals involving numerous modeling agencies for 28 models. McCann was able to furnish these records for both domestic and foreign usages within weeks of Raske's request.

The present complaint reiterates that the McCann documents reflect typical usage renewal transactions between the advertising agencies and the modeling agencies.

> 84. Almonte is one of the 28 models listed in the McCann documents furnished to Raske prior to the initial Class Action Complaint index no. 653619/2012. The McCann documents reflect typical usage renewal contracts between McCann and Mc2 and other agencies for L'Oreal usage renewals.

During oral argument in the initial action, plaintiffs explained to the court that there were contracts between the advertising agencies and the modeling agencies to which the models are third party beneficiaries. The Court questioned the defendants' counsel as to whether this was true. Defendants' counsel admitted that defendants conduct "commercial transactions" between themselves.

In response to Saatchi's motion to dismiss the initial action, plaintiff advised Saatchi that the models were third party beneficiaries of the contracts between Saatchi and the modeling agencies and attached copies of the McCann documents, which typify the commercial relations between them.

> DOCUMENT NO. 145 653619/2012
>
> PLAINTIFFS RESPONSE TO SAATCHI'S INITIAL MOTION TO DISMISS
>
> 1/09/2013
>
> E. Plaintiffs were intended beneficiaries to the contracts entered into between Saatchi

and Publicis and the Model Agency Defendants.

As defined in the complaint, a "Usage" consists of the use models' images, portraits and pictures, for the purposes of endorsing/selling products and services. While there is no formal contract between the models and the advertising Agency Defendants, including Saatchi and Publicis, the documents furnished to Raske by the defendant advertising agency, McCann, clearly demonstrate that the transaction regarding "Usages" contains all the elements of a contract between the advertising agency and the modeling agency. The records demonstrate: (a) an offer made to renew a Usage for a defined period and scope; (b) an acceptance of that offer and (c) the purported payment of consideration. (Mellon Aff., Exh.) Further, to the extent that the contracts were entered into between Saatchi and Publicis and the Modeling Agency Defendants, plaintiffs were clearly intended beneficiaries of those contracts. The failure of the models to receive full payment of their portion of the consideration would be a breach of the agreement, the contract would fail for lack of consideration and the continued use of the images therefore becomes unlawful.

As the party contracting for the use of the models' images, the advertising agencies have a duty to deal in good faith and insure that the images are being used within the scope of a valid agreement and with the written permission of the model. For these reasons, in the event this Court were to hold that the renewed or continue usages were covered under the models prior' contractual agreements with their respective modeling agencies, plaintiffs will seek leave to amend the Complaint to include a cause of action for breach of contract against Saatchi, Publicis and the other advertising agency defendants.

The McCann documents themselves were furnished to Saatchi and are part of the record in the initial action as document no.149. (attached to Taylor affirmation as a exhibit "C") Plaintiffs are willing to re

submit these documents as supplemental exhibits to the instant complaint.

In June 2012, the Court of Appeals clarified the law regarding determining whether the parties entered into a contractual agreement and what were its terms:

> "[i]n determining whether the parties entered into a contractual agreement and what were its terms, it is necessary to look, rather, to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds. In doing so, disproportionate emphasis is not to be put on any single act, phrase or other expression, but, instead, on the totality of all of these, given the attendant circumstances, the situation of the parties, and the objectives they were striving to attain" (*id.* at 399-400 [internal citation omitted]). We added that the "aim" of this exercise was "a practical interpretation of the expressions of the parties to the end that there be a realization of [their] reasonable expectations" (*id.* at 400 [internal quotation marks omitted]).
>
> Zheng v. City of New York, 2012 NY Slip Op 5091 (N.Y., 2012) Court of Appeals of New York, Decided June 26, 2012

Application of the Zheng standards to the documents furnished by McCann clearly demonstrates that the "commercial transactions" between the parties intended that the models were beneficiaries of the commercial activities between the advertisers and the modeling agencies.

At the very least, a factual analysis of the totality of the circumstances between the parties is required, which precludes the granting of the motion to dismiss.

IV. CONCLUSION

Based upon the foregoing arguments and authorities, the plaintiffs respectfully submit that Saatchi's motion to dismiss be denied and that the Court Order such other and further relief as the Court deems just and appropriate.

Dated: New York, New York
December 5, 2013

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