

PRESENT: Hon. Doris Ling-Cohan

PART 36

Index Number : 112004/2007
DOMINGUEZ, MARIA KRISTINA
VS.
VIBE MAGAZINE
SEQUENCE NUMBER : 002
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

on this motion to/for _____

PAPERS NUMBERED

1, 2
3

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits reply memo

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *to dismiss is granted in accordance with the attached memorandum decision.*

FILED

SEP 17 2008

COUNTY CLERK'S OFFICE
NEW YORK

HON. DORIS LING-COHAN

Dated: 9/15/08

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 36

-----x
MARIA KRISTINA DOMINGUEZ,

Plaintiff,

- against -

VIBE MAGAZINE, SEAN COMBS a/k/a
SEAN P. DIDDY COMBS a/k/a
SEAN JEAN COMBS a/k/a PUFF DADDY,
BAD BOY ENTERTAINMENT, INC.,
JOHN DOE, JANE DOE,

Defendants.
-----x

Index No. 112004/07

Motion Sequence
Numbers 001 & 002

FILED
SEP 17 2008
COUNTY CLERK'S OFFICE
NEW YORK

HON. DORIS LING-COHAN, J.:

Motions designated Sequence Numbers 001 and 002 are consolidated for disposition.

Defendants Sean Combs a/k/a Sean P. Diddy Combs a/k/a Sean Jean Combs a/k/a Puff Daddy ("Sean Combs") and Bad Boy Entertainment, Inc. ("Bad Boy") move (Mot Seq. 001), and defendant Vibe Magazine (Vibe) cross-moves (Mot. Seq. 002), pursuant to CPLR 3211(a)(1) or (7), to dismiss the Complaint in this action for violation of privacy rights.

BACKGROUND

Plaintiff, Maria Kristina Dominguez, brings this action to recover damages for injuries she allegedly sustained based on the nonconsensual publication of her photograph in Vibe. Plaintiff alleges that in the summer of 2003, she was photographed at a party in East Hampton, New York, and that defendants published

the photograph in the November 2006 issue of Vibe, for trade or advertising purposes, without her permission.

The Vibe issue contains a cover profile and feature article on Sean Combs. The article includes, *inter alia*, an interview of Sean Combs, a segment about his music and business endeavors, and another segment about the annual "White Party" he hosts in East Hampton, New York, and other locations, with photographs taken at parties held between 1998 and 2006. The photographs depict invited guests, who typically include media celebrities and politicians. One photograph, which was taken at the 2003 White Party, bears the caption "Mermaids gone wild" and depicts three unidentified women wearing mermaid outfits. Plaintiff claims that the photograph shows her and two other women who attended the party, topless, dressed as mermaids. She further claims that she did not consent to the taking of the photograph, nor to its subsequent publication in Vibe.

In the first cause of action, plaintiff alleges that Vibe violated her right to privacy by publishing her photograph without her permission. The second cause of action alleges that defendants John Doe and Jane Doe, employees or freelance photographers for Vibe, violated plaintiff's right to privacy by photographing her without her consent and selling the photographs for a profit. The third cause of action alleges that Vibe violated New York Civil Rights Law § 50 by publishing plaintiff's

photograph in the November 2006 issue of its magazine. In the fourth cause of action, plaintiff alleges that Sean Combs violated her right to privacy by hiring a photographer and selling or profiting from her image and giving free license to Vibe for the use of the same image. The fifth cause of action alleges that Bad Boy violated Civil Rights Law § 50 by using plaintiff's likeness for trade or advertising purposes, without her express permission.

Sean Combs, Bad Boy, and Vibe now seek to dismiss the Complaint on the grounds of documentary evidence and for failure to state a valid claim for relief.

DISCUSSION

When determining a motion to dismiss pursuant to CPLR 3211, the court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (see CPLR 3026; *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570-571 [2005]). Under CPLR 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claim as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). In asserting a motion under CPLR 3211(a)(7), however, the Court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and "the

criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*id.*, quoting *Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]).

As stated, plaintiff claims that defendants violated her privacy rights and Civil Rights Law §§ 50 and 51 by publishing her photograph for trade or advertising purposes, without her consent. New York, however, does not recognize a common-law right to privacy (*see Messenger v Gruner & Jahr Print & Publ.*, 94 NY2d 436, 441 [2000]). Thus, the only remedy available to plaintiff is that created by Civil Rights Law §§ 50 and 51, which provide a limited statutory right of privacy.

Civil Rights Law §§ 50 and 51 make actionable, the commercial exploitation of an individual's name, portrait, or picture, without written consent (*see Freihofer v Hearst Corp.*, 65 NY2d 135, 140 [1985]). Section 50, entitled "Right of privacy" states:

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without first having obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

Furthermore, § 51 provides, in part:

Any 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 as ... provided [in § 50] may maintain an equitable action ... to prevent

and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use But nothing contained in this article shall be so construed as to prevent any person, firm, or corporation from selling or otherwise transferring any material containing such name, portrait, picture or voice in whatever medium to any user of such name, portrait, picture or voice, or to any third party for sale or transfer directly or indirectly to such a user, for use in a manner lawful under this article.

"[T]he prohibitions of Civil Rights Law §§ 50 and 51 are to be strictly limited to nonconsensual commercial appropriations of the name, portrait or picture of a living person (*Finger v Omni Publs. Intl.*, 77 NY2d 138, 141 [1990]). Thus, these statutory provisions prohibit the nonconsensual use of names, portraits or pictures, "for advertising purposes or for the purposes of trade" only, and nothing more (*id.*).

Here, plaintiff asserts that she is a private individual whose image is not of public interest, and that defendants published her photograph in the November 2006 issue of *Vibe*, for trade or advertising purposes, without her consent. She further asserts that the *Vibe* article is advertising or an infomercial intended to promote Sean Combs and Bad Boy.

In moving to dismiss the Complaint, however, defendants essentially argue that the use of the photograph in conjunction with the *Vibe* article does not violate the trade or advertising prohibition in Civil Rights Law §§ 50 and 51 since the article

merely reports a matter of public interest and the photograph specifically relates to the article.

It is beyond dispute that §§ 50 and 51 do not apply to reports of newsworthy events or matters of public interest (*Messenger v Gruner & Jahr Print & Publ., supra*). Although the statute does not define the terms "purposes of trade" or "advertising," courts have consistently refused to construe these terms as encompassing publications concerning newsworthy events or matters of public interest (*Finger v Omni Publs. Intl., supra* at 141-142). Additionally, the determination whether an item is newsworthy is a question of law (*Freihofer v Hearst Corp., supra*, 140-141). Furthermore, the "newsworthiness exception" should be liberally applied (*Finger v Omni Publs. Intl., supra*, at 143). The exception applies not only to reports of political happenings and social trends (see *Arrington v New York Times Co.*, 55 NY2d 433 [1982]), and to news stories and articles of consumer interest (see *Stephano v News Group Publs.*, 64 NY2d 174 [1984]), but also to matters of scientific and biological interest (see *Finger v Omni Publs. Intl., supra*).

Moreover, "[a] picture illustrating an article on a matter of public interest is not considered used for the purpose of trade or advertising within the prohibition of the statute ... unless it has no real relationship to the article ... or unless the article is an advertisement in disguise" (*id.*, at 142,

