

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JOAN M. KENNEY J.S.C. Justice

PART 8

Index Number : 156443/2014 LOHAN, LINDSAY vs. TAKE TWO INTERACTIVE SEQUENCE NUMBER : 002 DISMISS

INDEX NO. MOTION DATE 1/26/15 MOTION SEQ. NO. 102

The following papers, numbered 1 to , were read on this motion to/for Notice of Motion/Order to Show Cause — Affidavits — Exhibits Answering Affidavits — Exhibits Replying Affidavits

Upon the foregoing papers, it is ordered that this motion is

In this action alleging a violation of plaintiff's right to privacy, defendants seeks a pre-answer order, pursuant to CPLR 3211(a)(1), (5), (7) and (8), dismissing the amended complaint.

The application to dismiss, pursuant to CPLR 3211(a)(1), is denied. The "documents" relied upon by movants, to assert that the images in question are not those of the plaintiff, is vehemently and factually contested by the plaintiff. These factual disputes requires a determination by the trier of facts and said documents cannot, at this juncture, support an application to dismiss based on the self-serving statements that the images are not those of the plaintiff's.

The application seeking dismissal for failure to state a cause of action, pursuant to CPLR 3211(a)(7), is denied. When deciding whether or not a complaint should be dismissed pursuant to CPLR 3211(a)(7), the complaint must be construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true, limiting the inquiry to whether or not the complaint states, in some recognizable form, any cause of action known to our law (see, World Wide Adjustment Bureau et al., v Edward S. Gordon Company, Inc., et al., 111 AD2d 98 [1st Dept, 1985]). In assessing the sufficiency of the complaint, this court must also consider the allegations made in both the complaint and the accompanying affidavit, submitted in opposition to the motion, as true and resolve all inferences which reasonably flow therefrom, in favor of the plaintiff (Joel v. Weber, 166 Ad2d 130, [1st Dept, 1991]). The sufficiency of a pleading to state a cause of action generally depends upon whether or not there is substantial compliance with CPLR 3013, which requires that statements in a pleading be sufficiently particular to give the court and parties notice of the transactions or occurrences intended to be proved and the material elements of each cause of action. Pleadings should not be dismissed or ordered amended unless the allegations therein are not sufficiently particular to apprise the court and parties of the subject matter of the controversy. Further, every pleading question should be approached in the light of CPLR 3026 requiring that

Dated: MARCH 11, 2016

JOAN M. KENNEY J.S.C. [Signature]

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

- 1. CHECK ONE: CASE DISPOSED
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

1 of 2 1 of 2

pleadings shall be liberally construed and that defects shall be ignored if a substantial right of a party is not prejudiced. Thus, the burden is placed upon one who attacks a pleading for deficiencies in its allegations to show that he is prejudiced. The test of prejudice is to be given primary emphasis. Thereby, the court disregards pleading irregularities, defects, or omissions that are not such as to reasonably mislead one as to the identity of the transactions or occurrences sought to be litigated or as to the nature and elements of the alleged cause or defense. In this case, plaintiff has alleged cause(s) of action alleging a violation of a right to privacy pursuant to New York Civil Rights Law section 50 and 51.

The application to dismiss, on grounds that this action is time barred, pursuant to CPLR 3211(a)(5), is denied and granted, in part. Defendants assert that pursuant to CPLR 215(3), plaintiff's right of publicity claim was to be commenced within a year from the publication of the offending material. Here, defendants assert that the images in question were published on June 30, 2013 (respecting alleged statements made by defendant Take Two Interactive Software, Inc. [Take Two]) and November 1, 2012 (respecting the "artworks" in question). Plaintiff asserts that the complaint was filed on July 1, 2014, within a year of the "re-publication" of the materials in question. In this case, plaintiff asserts that the material in question was re-published on September 17, 2013 and therefore the claims against defendants were timely filed. Defendants have not been able to prove, at this juncture of the litigation, that the republication exception to the one year statute of limitations is not applicable to this case because the intended audiences were the same as those of the original publication and the images consistently remained the same. Plaintiff specifically alleges facts which contend otherwise.

The application to dismiss this matter as against defendant, Rockstar North (RN), pursuant to CPLR 3211(a)(8), is denied at this juncture of the litigation. Defendants assert that RN is a foreign corporation incorporated under the laws of the United Kingdom and is not authorized to do business in New York. Plaintiff, however, provided a copy of RN's web-page wherein offices are listed as located in the United Kingdom, Canada and the United States, including New York. Based upon the submitted papers, dismissal on these grounds cannot be determined at this stage of the litigation.

Accordingly, it is

ORDERED that the within pre-answer motion to dismiss, including the application for sanctions, is denied; and it is further

ORDERED that the defendants shall answer the amended complaint within 30 days from the date of this order; and it is further

ORDERED that the parties appear for a preliminary conference on May 26, 2016 at 9:30 a.m. in Room 304 located at 71 Thomas Street, NYC 10013.


JOAN M. KENNEY 3/11/16
J.S.C.