SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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PHOEBE JONAS,

Plaintiff,

-against-

BAYER CORPORATION, and BAYER U.S. LLC, d/b/a/ PHILLIPS',

Defendants.

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Index No.: 155925/2018

Motion Seq. No. 001

Masley, J.:

In motion sequence number 001, defendants Bayer Corporation and Bayer U.S. LLC d/b/a Phillips' (collectively Bayer) move pursuant to CPLR 3211 to dismiss the complaint filed by plaintiff Phoebe Jonas.

Background

The following facts are alleged in the complaint unless noted otherwise. Bayer makes numerous consumer brands and consumer products such as "Phillips." (NYSCEF Doc. No. 1 at ¶ 7.) Phillips' products include colon health probiotics, milk of magnesia, laxative caplets, stool softener liquid gel tablets, and fiber gummies. (*Id.* at ¶ 8.) With respect to the promotion of these Phillips' products, Jonas appeared in numerous national commercials between June 2016 and March 2018. (*Id.* at ¶ 8.) Jonas, a professional actor, has previously appeared in major motion pictures, television shows, and commercials that aired in theatres, televisions and on the internet. (*Id.* at ¶¶ 5-6.) Because Jonas frequently appeared on commercials for Phillips' products, she became known as the Phillips' Lady. (*Id.* at ¶ 9.) Bayer's right to run the Phillips ads with Jonas as the Phillips' Lady expired on March 28, 2018. From March 28, 2018 to April 20, 2018, Bayer continued to use the commercials featuring Jonas on its website

without her consent. (*Id.* at ¶ 10.) However, Bayer negotiated a resolution with Jonas for the use of her likeness between March 28, 2018 and April 26, 2018. (*Id.* at ¶ 14.) As of April 26, 2018, Bayer, however, had not removed or replaced a video on its website that featured a certain bobblehead which started airing in January or February of 2018. (*Id.* at ¶¶ 11, 18.) The bobblehead "looks identical" to Jonas and Bayer allegedly created it to use Jonas' likeness without her consent. (*Id.* at ¶ 12.) As of June 21, 2018, Bayer continued to air the advertisements and video of the bobblehead on Phillips' website to promote the same products that Jonas had previously promoted as the Phillips' Lady. (*Id.* at ¶ 2.) Jonas never gave Bayer consent to create or air the bobblehead video portraying her likeness on the internet, television or any other form of media. (*Id.* at ¶ 24.) Accordingly, Jonas commenced this action, asserting claims for violations of Civil Rights Law §§ 50 and 51 and unjust enrichment. (*Id.* at ¶¶ 32, 42.) She now seeks monetary and injunctive relief. (*Id.* at ¶ 37, 38.)

On this motion to dismiss, Bayer argues that Jonas is not recognizable from the bobblehead. In support, Bayer submits the affidavit of its senior brand manager, Thomas Moody, who states that Bayer used advertising featuring the Phillips' Lady since 2008. (NYSCEF Doc. No. 12 at ¶ 2.) This character sometimes appeared wearing the Philips logo and was portrayed by two other actresses besides Jonas. (NYSCEF Doc. No. 12 at ¶¶ 2, 6.) From 2008 to 2014, the Phillips' Lady was allegedly portrayed by Marge Royce in approximately 18 commercials. (*Id.* at ¶¶ 2, 4.) Bayer submits various still images of Royce in these commercials. (NYSCEF Doc. No. 13.) Moody further states that Jonas portrayed the Phillips' Lady in approximately four commercials (*Id.* at ¶ 3), and Bayer submits still images of Jonas from these commercials. (NYSCEF Doc. No. 14.) Bayer further provides still images of a third actress who allegedly

portrayed the Phillips' Lady, Amy Raudenbush. (NYSCEF Doc. No. 12 at ¶ 6; NYSCEF Doc. No. 17.)

Also before the court is the affidavit of a director from the advertising agency that produced the Phillips' bobblehead advertising, Kathryn Gilson. (NYSCEF Doc. No. 18.) Gilson states that her advertising agency, Hogarth Worldwide Ltd., provided images of a Hogarth employee, non-party Haydee Shea, for the purpose of modeling the bobblehead. (*Id.* at ¶ 7.) Gilson provides a photograph of Shea (NYSCEF Doc. No. 23) and an "Image and Likeness Release" (Release) executed by Shea. (NYSCEF Doc. No. 24.) The Release provides, in pertinent part, that Shea grants to Hogarth "the absolute, unconditional, irrevocable right and permission to create [sic] and use a 'bobble head' figurine ... that is modeled on, depicts and embodies [Shea's] image and actual likeness." (NYSCEF Doc. No. 24 at 1.)

In opposition, Jonas does not address the still images of her submitted by Bayer, let alone refute their accuracy. Indeed, she appends no exhibits or affidavits but argues that the bobblehead has specific facial features and characteristics that are identical to hers. (NYSCEF Doc. No. 26.) Jonas maintains that determining whether the bobblehead "presents a recognizable likeness" to her is a question of fact, not a question of law, and therefore, Bayer's motion to dismiss must be denied. (*Id.* at 14.) Additionally, she argues that none of the exhibits submitted by Bayer constitute documentary evidence, and therefore, the motion to dismiss must be denied. (*Id.*)

Discussion

Civil Rights Law §§ 50 and 51 "create a cause of action" in favor of "any person whose name, portrait, picture of voice is used within this state for advertising purposes or for the purposes of trade without ... written consent." (*Molina v Phoenix Sound, Inc.*,

297 AD2d 595, 596 [1st Dept 2002][internal quotation marks and citations omitted].) The elements of this cause of action are (1) "usage of plaintiff's name, portrait, picture, or voice," (2) "within the State of New York," (3) "for purposes of advertising or trade," (4) "without plaintiff's written consent." (*Id.* at 597 [citation omitted].)

With respect to the first element, the term "portrait embraces both photographic and artistic reproductions of a person's likeness." (*Lohan v Take-Two Interactive Software, Inc.*, 31 NY3d 111, 121-122 [2018] [internal quotation marks and citations omitted.) The words "portrait" and "picture" include any representation, whether by photograph, painting or sculpture. (*Id.* at 122 citing *Young v Greneker Studios*, 175 Misc 1027, 1028 [Sup Ct, NY County 1941].) "[T]here can be no appropriation of [a] plaintiff's [likeness] for commercial purposes if he or she is not recognizable from the [image in question]." (*Id.* [internal quotation marks and citations omitted].) Indeed, "a privacy action [cannot] be sustained ... because of the nonconsensual use of a [representation] without identifying features." (*Id.*) Whether an image is a "portrait because it presents a recognizable likeness is typically a question of fact." (*Id.* [internal quotation marks and citations omitted].) But "before a factfinder can decide that question, there must be a basis for it to conclude that the person depicted is capable of being identified from the advertisement alone as plaintiff." (*Id.* [internal citations omitted].) That legal determination depends "on the court's evaluation of the quality and quantity of the identifiable characteristics present in the purported portrait." (*Id.* [internal quotation marks and citations omitted].) Accordingly, the court may conclude on a motion to dismiss "that the images in question do not constitute a 'portrait' of the plaintiff," "even applying the deferential rules germane to a motion to dismiss." (*Id.*)

CPLR 3211 (a) (1) provides that a "party may move for judgment dismissing one or more causes of action asserted against him on the ground that a defense is founded upon documentary evidence." "A cause of action may be dismissed under CPLR 3211 (a) (1) 'only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law.'" (*Art and Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2017][citation omitted].) "The documents submitted must be explicit and unambiguous." (*Dixon v 105 West 75th St. LLC*, 148 AD3d 623 [1st Dept 2017][citation omitted].) Photographs may qualify as documentary evidence. (*Dhamoon v 230 Park S. Apts.*, Inc., 48 AD3d 103, 114 [1st Dept 2007] ["the prior statements of plaintiff and her attorney consist of informal judicial admissions which, coupled with the remaining documentary evidence, including ... numerous photographs, present issues of fact"]; *see also Lohan v Take-Two Interactive Software, Inc.*, 31 NY3d 111, 118 [2018].)

CPLR 3211 (a) (7) provides that a "party may move for judgment dismissing one or more causes of action asserted against him on the ground that the pleading fails to state a cause of action." A motion made pursuant to CPLR 3211, requires the court to give the pleadings a liberal construction and accept the facts alleged as true. (*Leon v Martinez*, 84 N.Y.2d 83, 87 [1994].) The court will accord plaintiff the benefit of every possible favorable inference to determine if the facts as alleged in the complaint fit within any cognizable legal theory. (*Id.* at 87-88.) The court's analysis of plaintiff's claims is "limited to the four corners of the pleading." (*Johnson v Proskauer Rose LLP*, 129 AD3d 59, 67 [1st Dept 2015].) In "circumstances where legal conclusions and factual allegations are flatly contradicted by documentary evidence, they are not

presumed to be true or accorded every favorable inference," and "the criteria becomes whether the proponent of the pleading has a cause of action, not whether she has stated one." (*Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 [1st Dept 2001] [internal quotation marks and citations omitted.)

Preliminarily, as a matter of law, an image of a bobblehead on a website may constitute a "portrait" under the Civil Rights Law to the extent that the bobblehead is an artistic reproduction of a person's likeness. (*Lohan*, 31 NY3d at 121-122.) A bobblehead on a website's commercial is like a sculpture, and to some extent, like an avatar in a game or similar media. (*Id.* at 122, 117.)

Similar to *Lohan*, however, the bobblehead in question does not constitute a "portrait" of Jonas, and therefore, the first cause of action is dismissed. (*Lohan*, 31 NY3d at 122.) Here, the bobblehead "simply is not recognizable as plaintiff inasmuch as it merely is a generic artistic depiction" of a smiling woman "without any particular identifying physical characteristics." (*Id.* at 123-124.) Indeed, the bobblehead may also be categorized as "satirical representations of the style, look, and persona" of a smiling woman. (*Id.*) Because of this determination, the court need not address the remaining elements of the claim.

Additionally, Jonas' second cause of action for unjust enrichment is also dismissed. Indeed, the preemptive effect of the Civil Rights Law is fatal to a claim of unjust enrichment where the plaintiff has no property interest in her image, portrait or personality outside the protections granted by the Civil Rights Law. (*Hampton v Guare*, 195 AD2d 366, 367 [1st Dept 1993]; *see also Grodin v Liberty Cable*, 244 AD2d 153, 154 [1st Dept 1997]["it was error not to dismiss plaintiff's causes of action for ... unjust

enrichment, there being no common-law right of privacy in New York"] [citations omitted].)

Accordingly, it is

ORDERED that defendants Bayer Corporation and Bayer U.S. LLC d/b/a Phillips' motion to dismiss is granted with costs and disbursements as taxed by the Clerk of the Court upon submission of an appropriate bill of costs, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: 4/3/19

ENTER:

HON. ANDREA MASLEY
J.S.C.