SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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MARTHA G. FOSTER and MATTHEW FOSTER, Individually and on behalf of their minor children, DELANEY FOSTER and JAMES FOSTER,

Plaintiffs,

- against -

ARNE SVENSON,

Defendant.

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Index No. 651826/2013
Mot. Seq.: 001
DECISION/ORDER

HON. EILEEN A. RAKOWER, J.S.C.

Defendant is a photographer, who, using a telephoto lens and shooting from his own apartment in Manhattan, took photographs of the interiors of apartments in a neighboring building. The neighboring building boasted a mostly glass facade, with large windows into each unit. The photographs were taken over a period of time and included still life photographs as well as photographs of people living in those apartments. Some photographs included children. The photographs were assembled into an exhibit entitled "The Neighbors." Defendant did not have permission to photograph the "neighbors."

Plaintiffs move by Order to Show Cause for a preliminary injunction, seeking to prevent the dissemination and display of certain photographs. Further, plaintiffs seek to prevent current dissemination, display or sale in any and all media of such photographs and images. Specifically, Plaintiffs seek "an immediate end to the dissemination of two photographs showing the Fosters' children's faces and partially-clad bodies."

Plaintiffs became aware that they and their minor children were being photographed by way of an article that appeared in a local newspaper. Images of their children appeared in the paper, and an article attributed the following explanation to Defendant: "The Neighbors don't know they are being

photographed; I carefully shoot from the shadows of my home into theirs." More particularly, a photograph of one of the Foster children, shows the child's face, and is "clearly identifiable." This image has appeared on television programs and in the media featuring Defendant. Plaintiffs claim the location of the Fosters' apartment has been made known as well, which Plaintiffs allege compromises the security and safety of the children.

Plaintiffs never consented to the use of these images of their children, and did not want them used, disseminated or sold. Plaintiffs engaged an attorney and demanded, in writing, that Defendant stop showing the photographs of the children. Thereafter, Plaintiffs filed and served the instant action and application for a Preliminary Injunction, pursuant to New York's Civil Rights Law §§ 50 and 51 and CPLR §§ 6311 and 6313.

New York's Civil Rights Law §50 states, in pertinent part:

> 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 having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

New York's Civil Rights Law §51 states, in pertinent part:

> Any person whose name, portrait, picture or voice is used within this state . . . for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person . . . so using his name, portrait, picture or voice, to prevent and restrain the use thereof . . . But . . . nothing contained in this article shall be so construed as to prevent any person, firm or corporations practicing the profession of photography, from exhibiting in or about his or its establishment specimens of the work of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed.

The Court of Appeals has stated basic principles concerning the right of

privacy.

> First, recognizing the legislature's pointed objective in enacting sections 50 and 51, we have underscored that the statute is to be narrowly construed and "strictly limited to non consensual commercial appropriations of the name, portrait or picture of a living person." . . . Second, we have made clear that these sections do not apply to reports of newsworthy events or matters of public interest . . . This is because a newsworthy article is not deemed produced for the purposes of advertising or trade. Additionally, these principles reflect "constitutional values in the area of free speech." . . . Third, this Court has held that "newsworthiness" is to be broadly construed. . . . includes . . . social trends or any subject of public interest. . . . Significantly, the fact that a publication may have used a person's name or likeness "solely or primarily to increase the circulation" of a newsworthy article – and thus to increase profits – does not mean that the name or likeness has been used for trade purposes within the meaning of the statute. *Messenger v. Jahr Printing and Publishing*, 94 NY2d 436 at 441 (2000)(Internal citations omitted).

It is uncontested that the images taken by Defendant were taken without consent. Additionally, there is no view that the individuals photographed were themselves of public interest. The question then, is whether the photographs used by the photographer in a show or as examples of his art qualified as a commercial use or for the purpose of advertising or trade.

To establish entitlement to a preliminary injunction, a movant must establish (1) a likelihood or probability of success on the merits, (2) irreparable harm in the absence of an injunction, and (3) a balance of the equities in favor of granting the injunction. (*See, CPLR §6301; Doe v. Axelrod*, 73 NY2d 748, 532 NE2d 1272, 536 NYS2d 44 [1988]).

"Irreparable injury, for purposes of equity, has been held to mean any injury for which money damages are insufficient." (*Matter of Walsh v. Design Concepts*, 221 AD2d 454, 633 NYS2d 579 [1995]. Conversely, "[e]conomic loss, which is compensable by money damages, does not constitute irreparable harm" *(EdCia Corp v. McCormack*, 44 AD3d 991, 845 NYS2d 104 [2007]).

New York's Civil Rights Law Sections 50 and 51 were passed to protect against the commercial appropriation of a plaintiff's name or likeness. (*Cohen v. Herbal Concepts, Inc.*, 63 N.Y.2d 379, 472 N.E.2d 307 [1984]). However, the legislature also sought to protect the constitutional right of freedom of expression. (*Arrington v. N.Y. Times Co.*, 55 N.Y.2d 433, 449 N.Y.S.2d 941, 434 N.E.2d 1319 [1982]). In order to avoid a conflict between an individual's right to be free from unwarranted intrusions and the First Amendment, the statute has a limited application. (*Id.*; *see also Time, Inc. v. Hill*, 385 U.S. 374, 87 S. Ct. 534 [1967] ["Ever mindful that the written word or picture is involved, courts have engrafted exceptions and restrictions onto the statute to avoid any conflict with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest."][internal citations omitted]). Thus, while the privacy laws prohibit non consensual use of a person's image for advertising [or trade] purposes, advertising [or trade] that is undertaken in connection with a use protected by the First Amendment falls outside the statute's reach." (*Hoepker v. Kruger*, 200 F. Supp. 2d 340 [S.D.N.Y. 2002]).

Art is considered free speech and is therefore protected by the First Amendment. (*Hoepker*, 200 F. Supp. 2d 340; *see also Bery v. City of New York*, 97 F.3d 689 [2nd Cir. 1996] ["[V]isual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection."]). Accordingly, an artist may create and sell a work of art that resembles an individual without his or her written consent. (*Hoepker* 200 F. Supp. 2d 340, *citing Simeonov v. Tiegs*, 159 Misc. 2d 54, 602 N.Y.S.2d 1015 [N.Y. Civ. Ct. 1993]). The use of an individual's name or likeness in artistic expression is more than a use for the purposes of advertising or trade, and "[p]art of the protection of free speech...is the right to disseminate the 'speech,' and that includes selling it." (*Hoepker,* 200 F. Supp. 2d 340, *quoting Tiegs*, 159 Misc. 2d 54 [internal citations omitted]).

Further, privacy rights yield to free speech rights in the context of newsworthy events. (*Messenger v. Gruner Jahr Printing and Publishing*, 94 N.Y.2d 436, 727 N.E.2d 549, 706 N.Y.S.2d 52 [2000]). "Newsworthiness" is interpreted broadly and includes reports of political happenings, social trends and articles of consumer and public interest (*Id.; Stephano v. News Group Publications, Inc.*, 64 N.Y.2d 174, 474 N.E.2d 580, 485 N.Y.S.2d 220 [1984]; *Arrington* ,55 N.Y.2d 433). This provides news agencies who publicize

newsworthy events with immunity from right of privacy claims. (*Hoepker* 200 F. Supp. 2d 340). In accordance with the values of free speech and free press, "where a plaintiff's picture is used to illustrate an article on a matter of public interest, there can be no liability under sections 50 and 51 unless the picture has no real relationship to the article or the article is an advertisement in disguise." (*Id.*).

Plaintiffs allege that Defendant used the photos in local and national media to promote "The Neighbors," an exhibition that included photos of other individuals taken under the same circumstances as those featuring Plaintiffs. Plaintiffs further allege that the photos were for sale at the exhibition and on a commercial website. Therefore, they contend that Defendant's actions constitute advertising and trade under New York's Civil Rights Law Sections 50 and 51. Defendant alleges that "The Neighbors is protected under the First Amendment as expressive art and exempt from the requirements of [the statutes]."

Plaintiffs cannot establish a likelihood of success on the merits. Defendant's photos are protected by the First Amendment in the form of art and therefore shielded from New York's Civil Rights Law Sections 50 and 51. (*Hoepker*, 200 F. Supp. 2d 340). Through the photos, Defendant is communicating his thoughts and ideas to the public. (*Bery v. City of New York*, 97 F.3d 689). Additionally, they serve more than just an advertising or trade purpose because they promote the enjoyment of art in the form of a displayed exhibition. (*Hoepker*, 200 F. Supp. 2d 340). The value of artistic expression outweighs any sale that stems from the published photos. (*Id.*).

Further, since art is protected by the First Amendment, any advertising that is undertaken in connection with promoting that art is permitted. (*Id.*). Defendant and the art gallery used Plaintiff's photos to advertise "The Neighbors;" and the advertising is beyond the limits of the statute because it related to the protected exhibition itself. (*Id.*). Further, "The Neighbors" exhibition is a legitimate news item because cultural attractions are matters of public and consumer interest. (*Id.*). Therefore, news agencies and television networks are entitled to use Defendant's photographs of Plaintiffs, which have a direct relationship to the news items - the photos are the focus of the newsworthy content. (*Id.*).

Plaintiffs face no immediate irreparable harm in the absence of an injunction. Defendant states in his affidavit that he removed photos of Plaintiff

from his website and Facebook page, he will not take any new pictures relating to "The Neighbors", and does not intend to "print, exhibit or publish any of [Plaintiffs'] images in the future." Additionally, the exhibit has ended and the galleries have taken down and ceased sale of the photos. Therefore, Plaintiffs' photos are not being disseminated, displayed, or sold.

Lastly, a balance of the equities does not favor granting the injunction. While it makes Plaintiffs cringe to think their private lives and images of their small children can find their way into the public forum of an art exhibition, there is no redress under the current laws of the State of New York . Simply, an individual's right to privacy under the New York Civil Rights Law sections 50 and 51 yield to an artist's protections under the First Amendment under the circumstances presented here. Accordingly, Plaintiffs motion for a preliminary injunction is denied.

The cross motion to dismiss is granted for the reasons stated above. The relief sought is unavailable under the undisputed facts presented here.

Wherefore, it is hereby

ORDERED that the Order to Show Cause is denied; and it is further

ORDERED that the cross motion to dismiss is granted, and the action is dismissed and the Clerk is to enter judgment accordingly.

Dated: August 1, 2013

Eileen A. Rakower, JSC