

2019 NY Slip Op 29136

Phillip Champion, Plaintiff,
v.
Take Two Interactive Software, Inc.,
Defendant.

158429/2018

Supreme Court, New York County

Decided on May 10, 2019

Attorney for Plaintiff

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Francis, A. Kahn III, J.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 were read on this motion to/for DISMISS.

Upon the foregoing documents, the motion is determined as follows:

Plaintiff pleads in his complaint a single cause of action alleging Defendant violated Civil Rights Law sections 50 and 51 by using Plaintiff's name, portrait and/or picture without his permission in a videogame, NBA2K18, it created, advertised and sold. Sections 50 and 51 of the Civil Rights Law criminally prohibit and make civilly actionable the use in New York State of a person's "name, portrait or picture" for "advertising" or "trade" purposes without prior written

Page 2

permission. Plaintiff claims in his complaint that he is and has been for the past 20 years a "celebrity basketball entertainer" who is "ubiquitously" known as "Hot Sizzle" and "Hot Sauce". Plaintiff asserts he is regularly depicted in "television, blogs, movies, YouTube videos, sports magazines and half-time shows" performing skilled displays of basketball acumen.

Defendant is a well-known developer of video games that are played across multiple gaming platforms including the PlayStation 4 and Xbox One. In addition to the video game in dispute, Defendant developed and sold the highly successful Grand Theft Auto series of video games.

NBA2K18, released on September 19, 2017, is the nineteenth iteration in a series of video games that, boiled down to its essence, permit the user to play basketball as an avatar in a virtual world. Jeff Thomas ("Thomas"), an executive level employee of the Defendant, describes the game in an affidavit submitted in support of the motion as "massive" in scope and capable of "a thousand" hours of playing time in multiple "story modes". The avatars in the game can be categorized into two broad groups of "playable" and "non-playable" ("NPC") characters.

The dispute in this action centers on one of the NPCs in the game. The NPC at issue depicts a young, African-American male with a "mohawk" hairstyle and beard who wears matching black shorts and tank-top with white piping and waistband. The avatar also sports all-white hi-top sneakers. On the tank-top and shorts are identical apparently human figures that appear to be a person leaping to "dunk" a basketball. Centrally located on the front and rear of the tank-top is the numeral "1" and on the rear are the words in capital letters "HOT SIZZLES". The "Hot Sizzles" character is one of hundreds NPCs in the game which are incapable of

being controlled by the game user and appear as either a member of a user's team or on a team opposing that of the user.

NBA2K18 has various "story modes" and "game modes" in which the user can engage. "Game modes" are twofold, single-player and multi-player. In multi-player mode, the user can interact both locally and on the internet. In both "game modes," the user can participate in multiple "story modes" which include MyCAREER, MyGM, MyTEAM and MyLEAGUE.

Of note to the issues raised in this motion is the MyCAREER mode. In that setting, the goal of the user is to take their self-created avatar through the process of becoming a National Basketball Association ("NBA") player. The development of the user's avatar includes obtaining representation, sponsorship and getting drafted by an NBA team. Contained in the MyCAREER mode is an environment called "the Neighborhood" which is a virtual urban world containing structures, open spaces and basketball courts which can be accessed by the user via their avatar. The "Hot Sizzles" NPC is encountered in the game while the user plays pick-up three-on-three basketball games on the street courts. Numerous other NPCs appear in this setting as both players and spectators.

Defendant submitted various evidence in support of the motion. Attached to the Thomas affidavit were two copies of NBA2K18, a USB drive that contained various media, and printed screen shots of the "Hot Sizzles" NPC. Also submitted by Defendant was an attorney affirmation annexed to which were printouts of a Google search of "Philip Champion", Wikipedia and IMBD pages for "Philip Champion", and four printed photos of Philip Champion, two with him in action and two while still. In opposition to the motion, Plaintiff submitted an attorney affirmation with printouts of a YouTube page, a Google search of the term "Hot Sizzle" and a

Wikipedia auto search suggestion and results for the term "Hot Sizzle". In addition,

Page 3

Plaintiff, like Defendant, submitted a USB drive containing certain media.

Defendant moved, pre-answer, to dismiss Plaintiff's complaint based on documentary evidence under CPLR 3211[a][1] and for failure to state a claim under CPLR 3211[a][7].

On a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211[a][7], the allegations contained in the complaint must be presumed to be true and liberally construed (*Palazzolo v Herrick, Feinstein, LLP*, 298 AD2d 372 [2d Dept 2002]; *Schulman v Chase Manhattan Bank*, 268 AD2d 174 [2d Dept 2000]). In determining such a motion, "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

In certain situations, however, the presumption falls away when bare legal conclusions and factual claims contained in the complaint are flatly contradicted by evidence submitted by the defendant (*see Guggenheimer*, supra; *Kantrowitz & Goldhamer, P.C. v Geller*, 265 AD2d 529 [2d Dept 1999]; *Meyer v Guinta*, 262 AD2d 463 [2d Dept 1999]). When in the uncommon circumstance the evidence reaches this threshold (*see Lawrence v Miller*, 11 NY3d 588, 595 [2008]), the court "must determine whether the proponent of the pleading has a cause of action, not whether she has stated one" (*Kantrowitz & Goldhamer, P.C. v Geller*, supra; *see also Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]). Stated differently, "[w]here the facts are not in dispute, the mere iteration of a cause of

action is insufficient to sustain a complaint where such facts demonstrate the absence of a viable cause of action" (*Allen v Gordon*, 86 AD2d 514, 515 [1st Dept 1982]).

A motion to dismiss pursuant to CPLR §3211[a][1] may only be granted where "documentary evidence" submitted decisively refutes plaintiff's allegations (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 590-91 [2005]) or "conclusively establishes a defense to the asserted claims as a matter of law" (*Held v Kaufman*, 91 NY2d 425, 430-431 [1998]; see also *Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]). The scope of evidence that is statutorily "documentary" is exceedingly narrow and "[m]ost evidence" does not qualify (see Higgitt, *CPLR 3211[a][1] and [7] Dismissal Motions—Pitfalls and Pointers*, 83 New York State Bar Journal 32, 34-35 [2011]).

At the outset, Plaintiff asserts the entire motion must be denied as Defendant failed to annex a copy of the complaint to the moving papers. Since the pleadings were electronically filed and available to all concerned, it is appropriate to overlook this error (see *Studio A Showroom, LLC v Yoon*, 99 AD3d 632 [1st Dept 2012]; see also *Leary v Bendow*, 161 AD3d 420 [1st Dept 2018]).

Plaintiff also argues that certain of the evidence submitted by Defendant should not be considered by the court since it is not "documentary". In particular, Plaintiff points to the affidavit, affirmation, the printouts of internet web pages, the digital media on USB drive and the games themselves. It is true that affidavits and internet pages are not documentary evidence (see eg *Eisner v Cusumano Constr., Inc.*, 132 AD3d 940 [2d Dept 2015]; *Fontanetta v John Doe 1*, 73 AD3d 78 [2d Dept 2010]). However, the court could find no authority to support the proposition that images, printed or digital, could not be considered documentary. Indeed, if the general defining parameters of

what constitutes documentary evidence are considered, it would seem authentic images could qualify (see *Fontanetta*, supra at 86 ["to be considered 'documentary' evidence must be unambiguous . . . of undisputed authenticity" and contain information that is "essentially undeniable"]). Irrespective of limitations inherent in

Page 4

documentary evidence, no such qualifications apply on a motion to dismiss under CPLR 3211[a][7] and a court may consider all evidentiary submissions (see CPLR 3211[c] ["either party may submit any evidence that could properly be considered on a motion for summary judgment"]; see also *Rovello*, supra at 635). As such, all the parties' submitted evidence was reviewed and considered by the court in making its decision.

Defendant posits three general arguments to support its claim that Plaintiff's complaint should be dismissed. First, the name and image of the "Hot Sizzles" avatar in NBA2K18 does not sufficiently resemble Plaintiff to be actionable under New York Civil Rights Law 50 and 51. Second, the "Hot Sizzles" avatar's use in NBA2K18 is not actionable as it falls within the incidental use exception. Lastly, NBA2K18 is protected speech and expression such that it does not fall under the definitions of "advertising or trade" contained in the statute.

The history of New York's Civil Rights Law sections 50 and 51 is well known and its regurgitation for the purposes of this decision is inconsequential (see *Cohen v Herbal Concepts, Inc.*, 63 NY2d 379, 383 [1984]) except to note that in creating a statutory right that did not exist at common law "it is more restricted than that right in States where it is recognized without legislation." (*Wojtowicz v Delacorte Press*, 58 AD2d 45 [1st Dept 1977]). Peculiarly, courts have alternatively held the statue has been "liberally" (see *Brinkley v Casablancas*, 80

AD2d 428, 432 [1st Dept 1981], citing *Flores v Mosler Safe Co.*, 7 NY2d 276, 280-281 [1959] and "strictly" construed (*Allen v Nat'l Video, Inc.*, 610 F Supp 612 [SDNY 1985], citing *Shields v Gross*, 58 NY2d 338 [1983]). Nevertheless, there does appear to be consensus for construction which avoids conflict with the First Amendment (see eg *Namath v Sports Illustrated*, 80 Misc 2d 531, 535 [Sup Ct NY Cty 1975], *aff'd*, 48 AD2d 487 [1st Dep't 1975], *aff'd* 39 NY2d 897 [1976])

By prohibiting the unauthorized use of a person's "name", "portrait" or "picture", these sections are designed to protect both an individual's identity and their right to publicity, with the latter representing the proprietary aspect of a person's public persona (see, *Cohen v Herbal Concepts, Inc.*, supra; *DeClemente v Columbia Pictures Indus.*, 860 F Supp 30, 52 [EDNY 1994]). To be actionable, a person's "name", "portrait" or "picture", in addition to being without written consent, must be used for "advertising" or "trade" purposes within the state of New York (Civil Rights Law 50 and 51). Only consequential, not incidental, commercial uses of a person's identity are actionable (see *D'Andrea v Rafla-Demetrious*, 972 F Supp 154, 156-57 [EDNY 1997]). Uses that are matters of public interest or protected constitutionally are also not within the ambit of the statutes (see eg *Groden v Random House, Inc.*, 61 F3d 1045 [2 Cir 1995]).

An application of the foregoing principles to the present case raises two initial issues: [1] did Defendant use Plaintiff's portrait or picture by including the disputed avatar in the video game and [2] did Defendant use Plaintiff's name by labeling the avatar "Hot Sizzles".

The terms "portrait" or "picture" used in section 51 of the Civil Rights Law are not interpreted literally and, therefore, the reach of the section is not restricted to photographs (see *Binns v Vitagraph Co.*, 210 NY 51, 57 [1913]). Actionable images constitute "those

representations which are recognizable as likenesses of the complaining individual" (*Ali v Playgirl, Inc.*, 447 F Supp 723 [SDNY 1978]; see also *Allen v Nat'l Video, Inc.*, supra ["any recognizable likeness . . . may qualify as a "portrait or picture.""] [emphasis added]). To contrast, references, suggestions or evocations of certain characteristics or aspects amounting to nothing more than personifications are not actionable under the statute (see *Burck v Mars, Inc.*, 571 F Supp 2d 446, 453 [SDNY 2008]; *Allen v Nat'l Video, Inc.*, supra). Put another way, there must be a "close and purposeful resemblance to reality" of the claimant (*Onassis v Christian*

Page 5

Dior-New York, Inc., 122 Misc 2d 603, 611 [Sup Ct NY Cty 1984]). Although determining whether an image qualifies as a recognizable likeness of a person is generally a jury question, the court may summarily decide the matter in an appropriate case (see *Cohen v Herbal Concepts, Inc.*, supra at 384).

In 2018 and 2016 respectively, the Court of Appeals and the Appellate Division, First Department issued decisions involving unusually similar factual and procedural circumstances to those presented here (see *Lohan v Take-Two Interactive Software*, 31 NY3d 111 [2018] and *Gravano v Take-Two Interactive Software, Inc.*, 142 AD3d 776 [1st Dept 2016]). In *Lohan*, the actress Lindsay Lohan commenced an action claiming the same defendant in this case appropriated her portrait and voice in violation of Civil Rights Law sections 50 and 51 by including an avatar named "Lacey Jonas" in a video game "Grand Theft Auto V" and in their advertising thereof (*Lohan*, supra at 118). Lohan claimed the avatar was her "look-a-like" not only visually and auditorily, but also by appropriating her background, fashion sense and physical poses (*Gravano*, supra at 777). Similarly, in *Gravano*, Karen Gravano, the daughter of noted organized crime figure Sammy Gravano (aka The Bull) claimed that defendants in that

case incorporated her "image, portrait, voice and likeness" in "Grand Theft Auto V" through the inclusion of an avatar named "Andrea Bottino". (*id* at 776-777). Like Lohan, Gravano claimed defendants appropriated her visual likeness, patterns of speech and elements of her life story as the child of governmental cooperating witness (*id* at 777).

In *Gravano*, the Appellate Division, First Department reversed the trial court's denials of the defendant's motions to dismiss pursuant to CPLR 3211[a][1] and [7] in both the Lohan and Gravano cases. The First Department held, *inter alia*, that both plaintiffs' causes of action failed because defendant did not use plaintiffs' names, portraits or pictures (*id*). In *Lohan*, the Court of Appeals offered considerably more judicial gloss on the subjects presented. It held that video game generated avatars could, conceptually, "constitute a 'portrait' within the meaning of the Civil Rights Law" (*Lohan* supra at 122). On the most salient issue, the court determined that despite the "deferential rules germane to a motion to dismiss" the images of the avatar in the game were not recognizable as Lohan (*id*). The court reasoned that the disputed images were "a generic artistic depiction of a 'twenty something' woman" and "indistinct, satirical representations of the style, look, and persona of a modern beach-going young woman" (*id* at 122-123). Ultimately, the Court of Appeals concluded the images were "nothing more than cultural comment" which is not actionable (*id* at 123).

In both *Lohan* and *Gravano*, the courts described the plaintiffs, their alleged avatars and the claimed visual similarities between same in notable detail. With both cases having been electronically filed in Supreme Court, New York County, certain of the images contained in the record on appeal in those cases were available for this court to review to obtain a fuller understanding of the basis for those courts' determinations.

In this case, the avatar in NBA2K18 Plaintiff claims is an appropriation of his likeness bears no resemblance to Plaintiff whatsoever. The only reasonable commonalities which may be noted between Plaintiff and the avatar are that both are male, African-American in appearance, and play basketball. In *Lohan* and *Gravano*, the images of those Plaintiffs and their purported avatars were distinctly closer in appearance than here and, yet, were still not actionable as a matter of law. In those cases, there were also similarities in clothes, hair, poses, voice, and back stories of the avatars that are not presented here. Thus, at least from a visual perspective, the avatar in NBA2K18 is not recognizable as Plaintiff as a matter of law.

Unlike, *Lohan* and *Gravano*, where it was noted that neither plaintiffs' names were appropriated, Plaintiff here claims Defendant's use of "Hot Sizzles" on the avatar's jersey was, in and of itself, a violation of the Civil Rights Law because Plaintiff is "ubiquitously" known as "Hot Sizzle". If correct, appellate authority also supports the prospect that use of a persons' publicly recognized stage name with an image can be considered in evaluating whether it is recognizable as a claimant (*see Cohen v Herbal Concepts*, supra at 385 ["it is also reasonable to assume that . . . something in the advertising copy may aid recognition"]; *Ali v Playgirl, Inc.*, supra at 727). Both the name use and its potential affect on the recognizability of the avatar as Plaintiff beg the question: For the purposes of the Civil Rights Law, is Philip Champion "Hot Sizzle"?¹

The definition of a person's "name" under the statute has been construed nearly literally such that only use of a "full" name, not just a surname, is actionable (*see Lombardo v Doyle, Dane & Bernbach, Inc.*, 58 AD2d 620, 622 [2d Dept 1977]; *see also Costanza v Seinfeld*, supra). It must be the "true" name of the claimant, not a business, partnership or assumed name (*see People v Charles Scribner's Sons*, 205 Misc 818, 822 [Mag. Ct.

Kings Cty 1954]). Nicknames also fail to qualify for protection under the statute as a matter of law (*see Duncan v Universal Music Group Inc.*, F Supp, 2012 U.S. Dist. LEXIS 75998 [EDNY 2012]). A limited expansion has been recognized for stage, theatrical or fictitious names that have "become known to the public and identifies its bearer virtually to the exclusion of his true name" (*People v Charles Scribner's Sons*, supra; *see also DeClemente v Columbia Pictures Indus.*, supra at 52; *Gardella v Log Cabin Products Co.*, 89 F2d 891, 894-95 [2 Cir 1937])[Plaintiff "had become *exclusively* identified by the name 'Aunt Jeima'"] [emphasis added]).

In the present case, no claim is made by Plaintiff that Defendant used his actual name, Philip Champion. In support of his claim to being known as "Hot Sizzle", Plaintiff only pleads that he is "known ubiquitously" as same. Accepting, as the court must in this procedural context, this claim as true, and further assuming this fleeting conclusory reference sufficiently pleads that "Hot Sizzle" is Plaintiff's stage or theatrical name, the inquiry becomes whether Defendant has proffered enough evidence that "plaintiff's public personality as ["Hot Sizzle"] simply has not reached the magnitude of public notoriety necessary to be actionable under the statute as a matter of law" (*DeClemente v Columbia Pictures Indus.*, supra at 53). While proving a negative is customarily a daunting task, refuting a contention of public ubiquity in this, the Information Age, is not. An absence in the public information repositories of the day of support to a person's claim of renown would, in the court's opinion, be satisfactory and the Defendant has proffered such evidence meeting their burden. The printed copies of the Google, Wikipedia and IMBD searches, all conducted approximately two months after commencement of Plaintiff's action, reveal no reference to Plaintiff as "Hot Sizzle". Indeed, only his other claimed nickname "Hot Sauce" is noted in any of the evidence submitted by Defendant.

In opposition, Plaintiff's proffered evidence only establishes, at most, "Hot Sizzle" is his

Page 6

"aka" or "nickname" and a secondary one at that. The evidence submitted by both parties supports that Plaintiff's primary performance persona is "Hot Sauce", which is entirely distinct from the name in the video game (*see Costanza v Seinfeld*, supra). Further, the internet searches and the media files submitted provided little to no support that Plaintiff's claim to being "Hot Sizzle" is known in the public at large as opposed to just the sporting and gaming spheres (*see People v Charles Scribner's Sons*, supra; *see also DeClemente v Columbia Pictures Indus.*, supra). In the end, a known, if not noted, basketball entertainer Plaintiff may be, "the Greatest" he is clearly not (*Ali v Playgirl, Inc.*, supra at 727). Absent any tenable connection or claim to Plaintiff being recognizably known as "Hot Sizzle", naming the avatar similarly also does not aid in the visual recognition of it as Plaintiff.

Even if Defendant's use of the avatar and/or name "Hot Sizzles" were recognizable as Plaintiff, and consequentially within the Civil Rights Law, it would still not be actionable as the use was definitively incidental in nature (*see e.g. Namath v Sports Illustrated*, supra). Contrary to Plaintiff's assertions, a review of the game and advertising media for NBA2K18, the avatar lacks a "direct and substantial connection between the appearance of the plaintiff's name or likeness and the main purpose and subject of the work." (*Preston v Martin Bregman Productions, Inc.*, 765 F Supp 116, 120 [SDNY 1991]). The avatar is a peripheral non-controllable character. Other than playing basketball with or against the avatar, there is no further interaction possible and its presence adds nothing of true substance to a user's experience in the game (*see Man v Warner Bros., Inc.*, 317 F Supp

50, 53 [SDNY 1970]; see also *D'Andrea v Rafla-Demetrious*, supra at 157).

Defendant argues that NBA2K18 does not fall under the statute's definitions of "advertising" or "trade" since the game is a work of fiction or satire protected under the First Amendment. Contrary to the Defendant's assertion, while video games may conceptually qualify for protection under the Free Speech Clause (see *Brown v Entertainment Merchants Assn.*, 564 US 786, 790 [2011]), not every video game constitutes fiction or satire which removes it from the province of the Civil Rights Law. The holding in *Gravano* that "Grand Theft Auto V" was a qualifying work was premised on the "unique" nature of the game in that it contained a "story, characters, dialogue and environment" (*Gravano* supra at 777). Certainly, games entirely lacking these qualities—for example Pong and Pac-Man—do not meet this literary standard. It is apparent from the *Lohan* and *Gravano* decisions that "Grand Theft Auto V" contains a detailed plot created by the game designers through which the user proceeds and acts as a pre-defined character (*Lohan* supra at 117). By contrast, Defendant admits in its memorandum of law, and it is clear from the gameplay, in NBA2K18 the users create the plot, storyline and completely define their character. Based on these fundamental differences, a determination that NBA2K18 is protected fiction or satire as a matter of law is untenable.

Accordingly, based on the foregoing, Defendant's motion to dismiss is granted and Plaintiff's complaint is dismissed.

\$\$SIG\$

DATE: 5/10/2019

FRANCIS A. KAHN, III, A.J.S.C.

Footnotes:

¹ Defendant's attempt to draw a meaningful distinction between "Hot Sizzle", Plaintiff's claimed moniker, and "Hot Sizzles", the presumptive name of the disputed avatar in NBA2K18 would, if its use were otherwise actionable, be of no moment as each permutation is unmistakably identifiable as the other (*cf, Marriott Corp. v Ramada, Inc.*, 826 FSupp 726, 728 fn 3 [SDNY 1993]).
