"Public Interest" or "Purposes of Trade"? Court Rejects Privacy Claim Over Movie's Use of Plaintiff's Image

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In a recent decision that should be welcomed by artists and filmmakers, a New York court rejected the plaintiff's claim that inclusion of his image in a movie violated his right to privacy.

There is no common law right to privacy in New York. Instead, the right to privacy is statutorily created, in New York Civil Rights Law Section 51.[1] That section provides:

> 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…may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait, picture or voice, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait, picture or voice in such manner as is forbidden or declared to be unlawful by section fifty of this article, the jury, in its discretion, may award exemplary damages.

Recently, a trial court in New York rejected a claim that Section 51 had been violated in a case brought by individual who had learned that he was

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visible in a scene in a documentary movie, without his prior consent. The court's February 18 decision, in *Diokhane v. 57th & Irving Inc*.,[2] quite properly held that the plaintiff's claim to privacy was subordinate to the defendant's First Amendment rights. The court's ruling should comfort filmmakers and other artists who create works about important public issues.

BACKGROUND

The plaintiff in this case, Bara Diokhane, a Senegalese artist and lawyer, has lived in New York since 1996. In his complaint, the plaintiff explained that he had enjoyed success as an artist in New York, as a lawyer in Senegal and as a legal advisor to the United Nations. In addition, the plaintiff claimed that he was a member of a well known Senegalese family. Based on this and other factors, the plaintiff contended that he was something of a public figure.

The plaintiff had a longstanding relationship with Youssou Ndour, an acclaimed Senegalese musician and internationally known and award winning performer; in 2007, *Time* magazine named Youssou Ndour as one of the 100 artists and entertainers who have shaped the world.

As Ndour's adviser, the plaintiff negotiated the performer's first record deal in 1987, and he was involved in negotiating various tours and casting and producing some of his music videos. The plaintiff also asserted that he traveled to London to pick up Ndour's first platinum album in 1995. The plaintiff stated that around 1996, Ndour abruptly terminated their business relationship.

A 2008 documentary, "Youssou Ndour: I Bring What I Love" ("the film"), chronicled Ndour's experiences and in particular focused on the release of and controversy surrounding Ndour's 2003 CD "Egypt." In "Egypt," Ndour, a devout Sufi Muslim, collaborated with his own band, Le Super Etoile, and with other Sufi musicians in an exploration and celebration of his faith. Ndour's goal was to promote greater tolerance of Islam. However, initially in his own country the CD's release was met with hostility by those who considered the integration of Muslim themes into popular music sacrilegious or who were offended by his decision to perform during Ramadan. Ultimately, "Egypt" became an international

hit, won a Grammy award in the United States, and was embraced by many Senegalese as well.

The film was approximately 102 minutes long. The plaintiff appeared in a short scene that lasted approximately nine seconds. In the scene, an excerpt from a press conference, the plaintiff sat near Ndour while Ndour answered questions from the press.

The film premiered at the Telluride Film Festival the weekend of August 29-September 1, 2008, and since then it has been shown at many other film festivals in the United States and abroad. After the film began to receive publicity, the plaintiff learned from several friends and acquaintances that he himself appeared in the film. The plaintiff wrote to the defendants in October 2008 and asked them to cease using his image. He stated that his privacy rights under New York Civil Rights Law Section 50 had been violated, and he threatened legal action if the defendants did not "immediately cease the use and distribution of my picture for the benefit of your trade."

The plaintiff allegedly received three separate responses from the various defendants: Ndour left him a message indicating that if the plaintiff did not want his image to appear in the film, Ndour would request that the plaintiff's image be removed entirely; Ndour's attorney and manager, Thomas Rome, left the plaintiff a message attempting to identify the source of the video in which the plaintiff appeared; Jerry Dasti, counsel to defendant Groovy Griot LLC, wrote to the plaintiff and argued that (1) the plaintiff's voluntary public appearance at the press conference effectively waived his claim for invasion of privacy, (2) his image was in the film only briefly and thus this was an incidental use not actionable under the law, and (3) because the press conference was public and newsworthy, no claim existed under the Civil Rights Law. Not long after his receipt of these communications, the plaintiff filed suit in a New York court to enjoin the defendants from including his image in the film and to obtain exemplary damages.

THE PROCEEDINGS

The court heard argument on the plaintiff's initial request for a temporary restraining order on December 15, 2008. After argument, the court

denied the application. At that time, the court also heard argument on the cross-motion to dismiss of defendants Elizabeth Chai Vasarhelyi (a documentary filmmaker who was the director and producer of the film) and Groovy Griot, LLC, s/h/a Groovy Griot Films, LLC (the "defendants") and watched the film in its entirety. The court issued its decision on the cross-motion on February 18.

In its opinion, the court explained that Section 51 was designed principally "to operate in connection with the sale of goods and services."[3] It also observed that Section 51 emphasized that "[n]othing contained in the foregoing sentence shall be deemed to abrogate or otherwise limit any rights or remedies otherwise conferred by federal law or state law." In particular, the court noted, this referred to the constitutional protections of the First Amendment. Section 51's "application to works involving literary and artistic expression protected by the First Amendment was remote from the Legislature's contemplation."[4] Thus, the court pointed out, the statute was necessarily subject to constitutional limitations and accordingly had to be accorded an interpretation that avoided constitutional infirmities.[5] The court observed that, for this reason, courts consistently have refused to construe the phrases "for advertising purposes" and "purposes of trade" in Section 51 to include either newsworthy events or matters of public interest.[6] Moreover, the court continued, the terms "public interest" and "newsworthiness" have been defined liberally,[7] and the issue of whether something was of public interest could be resolved by the courts.[8] Among other things, the exception has been construed to include the "headlines" segment of "The Tonight Show"[9] and an HBO documentary on "Real Sex."[10]

"A MATTER OF PUBLIC INTEREST"

The *Diokhane* court then ruled that the documentary about Ndour was "clearly" a matter of public interest. It pointed out that the film had generated widespread interest and acclaim, and that it had been shown at major film festivals throughout the world, and it declared that the "great controversy" over the release of the "Egypt" CD and the demonstrations its release provoked in Senegal underscored the public's interest in Ndour and his music.

The plaintiff argued that despite these facts, the documentary film had a trade purpose within the meaning of Section 51 because it was made with the goal of turning a profit. The court rejected that argument. It noted that the *Delan* case, upon which the plaintiff relied, stated:

> While the very term "purposes of trade" encompasses use for the purpose of making profit (since most publications perforce are profit making and the subject matter of such publications are designed with a view to being profitable), a literal construction of the statutory provision would violate the constitutional protection of free speech and free press when such publication involves a matter of public interest…. The reporting of matters of public information or of legitimate public interest, therefore, is a matter of privilege and not within the ambit of the term "purposes of trade" as used in the Civil Rights Law…. Such matters of public interest enjoying this constitutional protection include not only current news items, both informative and entertaining…but also such items which, although not strictly news, are designed to be informative.

The *Diokhane* court noted that *Delan* went on to find that the documentary film in question in that case, about the effects of and possible alternatives to mental institutions, concerned a matter of public interest and therefore was not within the ambit of the phrase "purposes of trade" as it applied to the Civil Rights Law.[11] The *Diokhane* court also noted that other cases have stressed that the existence of a profit motive did "not convert a newsworthy article or television show into a trade purpose" because it was "the content of the material" that determined whether it was newsworthy.[12]

Thus, the *Diokhane* court decided, the profit motive of the defendants was "irrelevant." As the film was one of public interest, the appearance of the plaintiff's image was only actionable if the picture had "no real relationship to the article" or the article was "an advertisement in disguise."[13] However, the court concluded, because the press conference in which Ndour discussed his first platinum album was relevant to the musician's story, and because the plaintiff made no showing that his image was an advertisement in disguise, the plaintiff's claim was not actionable and had to be dismissed.

INCIDENTAL USE

The *Diokhane* court also found another basis for dismissal. It noted that the "incidental use" of a person's name or photograph, even when it was unauthorized and fictionalized, fell outside the prohibition of the statute.[14] To determine whether a use was incidental, the court explained, it had to examine the role of the plaintiff's name or likeness in the work. There must be "a relatively direct and substantial connection between the appearance of the plaintiff's name or likeness and the main purpose and subject of the work before liability may be established." Using this rationale, the *Diokhane* court explained that one decision found that "the incidental use of plaintiff's forty-five second performance" in the documentary "Woodstock" was "surely de minimis" and therefore not actionable.[15]

The *Diokhane* court noted that the plaintiff was in the Ndour film for around nine seconds, and that the film was over an hour and a half long. Based on its own viewing of the film, the court concluded that the plaintiff's presence in the film was "fleeting and, indeed, might well be overlooked by the passive viewer." Moreover, the court added, the plaintiff was visible at the press conference because he was seated near Ndour, but the focus of the scene was Ndour himself. Thus, it found, there was not a direct or substantial connection between the use of the plaintiff's image and the main purpose of the film or even of the scene involved. The court acknowledged that although sometimes the issue of whether a use was incidental raised a jury question,[16] it ruled that in this instance it was appropriate for resolution on this motion for summary judgment.[17]

Finally, the *Diokhane* court observed that the plaintiff had voluntarily appeared at the press conference and sat next to Ndour. It concluded that although this did not waive his right to privacy outright, it limited it in this context.[18]

CONCLUSION

New York's statutory privacy law was adopted years ago for the right reasons — to protect individuals from having their name or image used for commercial purposes without their prior consent.[19] The *Diokhane*

decision, however, strikes the proper balance between the statute's purposes and the practical need — and constitutional right — to create artistic works. The right to privacy is an important right, but it does not always trump everything else.

NOTES

[1] Section 50 is the penal version of the statute. It provides: "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."

[2] No. 115652/2008 (Sup. Ct. N.Y. Co. Feb. 18, 2009).

[3] *Nussenzweig v. diCorciaU*, 38 A.D.3d 339 (1st Dept. 2007).

[4] *Id*. (citation and internal quotation marks omitted).

[5] *See, e.g., Delan by Delan v. CBS, Inc.,* 91 A.D.2d 255 (2d Dept. 1983).

[6] *See, e.g., Finger v. Omni Publications International, Ltd.*, 77 N.Y.2d 138 (1990); *Ward v. Klein*, 10 Misc. 3d 648 (Sup. Ct. N.Y. County 2005) (dismissing right to privacy claim while finding issues of fact as to other causes of action); *Gaeta v. Home Box Office*, 169 Misc. 2d 500 (Civ. Ct. N.Y. County 1996).

[7] *See, e.g., Gaeta*, *supra*.

[8] *See, e.g,. Walter v. NBC Television Network, Inc.,* 27 A.D.3d 1069 (4th Dept. 2006).

[9] *Walter*, *supra*.

[10] *Gaeta*, *supra.*

[11] *See also Davis v. High Society Magazine, Inc.,* 90 A.D.2d 374 (2nd Dept. 1982) (use of name or picture in connection with newsworthy item did not fall within ambit of Civil Rights Law even when there was a profit motive).

[12] *Welch v. Group W. Productions, Inc.*, 138 Misc. 2d 856 (Sup. Ct. N.Y. County 1987); *see Creel v. Crown Publishing, Inc.*, 115 A.D.2d 414 (1st Dept. 1985) (holding that appearance of plaintiff's image in guide to nude beaches was not actionable).

[13] *Messenger ex rel. Messenger v. Gruner + Jahr Printing and Pub.* 94 N.Y.2d 436 (2000).

[14] *See, e.g., Netzer v. Continuity Graphic Associates, Inc.*, 963 F. Supp. 1308, 1326 (S.D.N.Y. 1997).

[15] *Man v. Warner Bros., Inc.*, 317 F. Supp. 50, 53 (S.D.N.Y. 1970).
[16] *See, e.g., Doe v. Darian Lake Theme Park & Camping Resort, Inc.,* 277 A.D.2d 967 (4th Dept. 2000).
[17] *See, e.g., Preston v. Martin Bregman Productions, Inc.*, 765 F. Supp. 116 (S.D.N.Y. 1991) (summary judgment granted where plaintiff's image appeared in a nine-second scene in movie "Sea of Love"); *De Gregorio v. CBS, Inc.*, 123 Misc. 2d 491 (Sup. Ct. N.Y. County 1984) (summary judgment granted where plaintiff filmed holding hands with woman; image lasted for five seconds of ten-minute news segment).
[18] *See, e.g., Murray v. New York Magazine Co.*, 27 N.Y.2d 406 (1971); *Man*, *supra* (plaintiff, a musician who voluntarily went on stage at the Woodstock festival, deprived himself of his right to complain when his image was used in famed documentary about the festival).
[19] *See* Victoria Prussen Spears, "The Case That Started It All: *Roberson v. The Rochester Folding Box Company*," *Privacy & Data Security Law Journal* (Nov. 2008).