2 Entertainment Law 3d: Legal Concepts and Business Practices § 12:63

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Database updated May 2011

Robert Lind, Mel Simensky, Tom Selz, Patricia Acton

Chapter 12. Privacy
V. Appropriation
B. Defenses

References

§ 12:63. Consent—Written consent required: statutory rule—Oral consent or consent by conduct as a partial defense in mitigation of damages

West's Key Number Digest

West's Key Number Digest, Torts ⇦395

Legal Encyclopedias

C.J.S., Right of Privacy and Publicity § 36

In some states recognizing the right of privacy by statute, including New York and states whose privacy statutes are modeled after New York's statute, oral consent or consent by conduct does not protect a defendant against liability for a privacy violation, regardless of any injury the defendant might have suffered in reliance upon a complainant's oral promises.[FN1] At most, oral consent or consent by conduct constitutes a partial defense in mitigation of damages.[FN2]

Durgom v. Columbia Broadcasting System[FN3] was an action to restrain the broadcast of a television program starring the well-known actor, Jackie **Gleason**. In the program the plaintiff was depicted as a character who had the same name as the plaintiff. The plaintiff objected to the televising of the program on the ground that the use of his name and portrayal had been made without his written consent. The program, which had been recorded on tape more than eight months prior to the plaintiff's initiation of suit, could not be altered prior to its scheduled airing because **Gleason** was then unavailable for additional taping.

The defendants conceded that the plaintiff's written consent, required by New York's privacy statute, had never been obtained. Nevertheless, they argued that the

plaintiff, without objection, had known for seven or eight months prior to the commencement of suit that a character depicting him and bearing his name was being portrayed in a program for subsequent telecast.

The court rejected the defendants' argument and granted the plaintiff's motion for an injunction. The court reasoned that even if the plaintiff had had seven or eight months advance notice that a television program in which he was being portrayed was to be televised, he would still be entitled to an injunction restraining its exhibition. The court noted that New York's privacy law gave plaintiff

> the right to enjoin the use of his name for trade purposes without his written consent. Oral consent, or conduct which would create the inference of consent or acquiescence and spell out what would otherwise be an estoppel would be no defense to an action for damages for violation of the statute and would at most constitute a partial defense in mitigation of damages … .[FN4]

The court stated that the right to enjoin a proposed use of a person's name without his written consent was, under New York law, "absolute, regardless of the detriment resulting to the defendant."[FN5] The court reasoned that, "[r]egardless of what the equities of the situation may be and the damage to defendants from the granting of the injunction, a denial of injunctive relief for a conceded violation of the statute would emasculate" the law.[FN6] Concluding, the court noted that "[t]o deny the injunction sought would permit a clear violation of [New York's privacy statute] and deprive plaintiff of one of the statutory remedies, thus limiting him to the less satisfactory remedy of a damage suit."[FN7]

[FN1] See § 12:62.
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[FN2] See Caesar v. Chemical Bank, 106 A.D.2d 353, 483 N.Y.S.2d 16 (1st Dep't 1984), order aff'd as modified, 66 N.Y.2d 698, 496 N.Y.S.2d 418, 487 N.E.2d 275 (1985).
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[FN3] Durgom v. Columbia Broadcasting System, Inc., 29 Misc. 2d 394, 214 N.Y.S.2d 752 (Sup 1961).
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[FN5] Durgom v. Columbia Broadcasting System, Inc., 29 Misc. 2d 394, 395–96, 214 N.Y.S.2d 752, 754 (Sup 1961).
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[FN6] Durgom v. Columbia Broadcasting System, Inc., 29 Misc. 2d 394, 396, 214 N.Y.S.2d 752, 754 (Sup 1961).
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[FN7] Durgom v. Columbia Broadcasting System, Inc., 29 Misc. 2d 394, 396, 214 N.Y.S.2d 752, 754 (Sup 1961). See also Sidney v. A.S. Beck Shoe Corp., 153 Misc. 166, 167, 274 N.Y.S. 559, 560 (Sup 1934) (rejecting defendant's defense "that a general custom exists in the theatrical profession whereby persons in it permitted and encouraged the use of their pictures in trade advertisements without compensation, and without their written consent being obtained"); Adrian v. Unterman, 281 A.D. 81, 88, 118 N.Y.S.2d 121, 127, 96 U.S.P.Q. 100 (1st Dep't 1952), judgment aff'd, 306 N.Y. 771, 118 N.E.2d 477 (1954) ("Estoppel is insufficient as a defense to … a [privacy] cause of action, in view of the express statutory requirement of written consent"); Schneiderman v. New York Post Corp., 31 Misc. 2d 697, 698, 220 N.Y.S.2d 1008, 1009 (Sup 1961) (rejecting defendants' contention "that although no written authorization or consent was obtained from plaintiffs, the latter were agreeable to and acquiesced in the use of their names as guests, and that the plaintiffs 'have known for years of the custom and practice featuring the names of guests in such fashion' "); Brinkley v. Casablancas, 80 A.D.2d 428, 434, 438 N.Y.S.2d 1004, 1009, 7 Media L. Rep. (BNA) 1457, 212 U.S.P.Q. 783 (1st Dep't 1981) ("Oral consent is not a defense and is relevant only on the question of damages"); Lomax v. New Broadcasting Co., 18 A.D.2d 229, 229, 238 N.Y.S.2d 781, 782 (1st Dep't 1963) ("Neither oral consent nor estoppel is a complete defense; they are available only as partial defenses in mitigation of damages"); Caesar v. Chemical Bank, 118 Misc. 2d 118, 460 N.Y.S.2d 235 (Sup 1983), order aff'd, 106 A.D.2d 353, 483 N.Y.S.2d 16 (1st Dep't 1984), order aff'd as modified, 66 N.Y.2d 698, 496 N.Y.S.2d 418, 487 N.E.2d 275 (1985) (oral consent is only partial defense in mitigation of damages).
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In some states recognizing the right of privacy by statute, including New York and states whose privacy statutes are modeled after New York's, consent to the use of one's name or likeness must be in writing.[FN1]

In *Brinkley v. Casablancas*,[FN2] the plaintiff, an internationally known fashion model, sued for damages and to restrain the unauthorized publication and sale of a poster bearing her photograph. The plaintiff had agreed to participate in a project to produce a series of posters featuring photographs of some of the world's top models. To that end, the plaintiff chose a hairstylist, make-up artist, and bathing suit, and then participated in a photographic session from which a photograph was to be selected for use as her poster. Subsequently, the plaintiff reviewed color transparencies and discussed the selection of the most suitable print for her poster. She also reviewed poster proofs that the defendant poster manufacturer had developed. Thereafter, the plaintiff selected the photograph for use on her poster.

After some final retouching of the photograph, undertaken at the plaintiff's request, the defendant poster manufacturer commenced printing and selling the poster, but without the plaintiff's written consent.[FN3] Upon learning of the sale of her poster, the plaintiff commenced litigation, alleging, among other claims, an unauthorized exploitation of her name and picture was actionable appropriation.

The defendants moved to dismiss the plaintiff's appropriation claim for failure to state a cause of action. The trial court granted the defendants' motion, holding that New York's privacy law was "never intended to afford a cause of action for invasion of privacy to one who, with the legitimate expectation of sharing in the profits, willingly and knowingly participates in a project which will publicize her name and picture."[FN4]

The appellate court reversed, reasoning that the failure of the defendant poster manufacturer to obtain the plaintiff's written consent prior to its sale of the poster was dispositive of the issue of liability under New York's privacy law. In addition, the court held that the plaintiff was entitled to summary judgment on her privacy claim. The court stated that under New York's privacy statute, "written consent is required before a person's name or photograph may be used for trade or advertising."[FN5]

[FN1] The privacy statutes of some states require proof of an absence of written consent to support a privacy claim. See, e.g., Va. Code Ann. § 8.01-40; Mass. Gen. Laws Ann. ch. 214, § 3A; R.I. Gen. Laws § 9-1-28; N.Y. Civ. Rights Law §§ 50 to 51; Wis. Stat. Ann. § 895.50(2)(b). In contrast, the California privacy statutes requires an absence of consent, but does not state that the consent must be written. Cal. Civ. Code §§ 3344 and 3344.1. The Florida Statute requires "express written or oral consent." Fla. Stat. Ann. § 540.08(1) (emphasis added).

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[FN2] Brinkley v. Casablancas, 80 A.D.2d 428, 438 N.Y.S.2d 1004, 7 Media L. Rep. (BNA) 1457, 212 U.S.P.Q. 783 (1st Dep't 1981).

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[FN4] Brinkley v. Casablancas, 80 A.D.2d 428, 431, 438 N.Y.S.2d 1004, 1007, 7 Media L. Rep. (BNA) 1457, 212 U.S.P.Q. 783 (1st Dep't 1981).

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Hustler in amateur photograph section without adequate verification of the validity of the fraudulent release submitted with the photograph, was thus obtained without consent violating New York's privacy statute); Durgom v. Columbia Broadcasting System, Inc., 29 Misc. 2d 394, 214 N.Y.S.2d 752 (Sup 1961); Schneiderman v. New York Post Corp., 31 Misc. 2d 697, 220 N.Y.S.2d 1008 (Sup 1961); Sidney v. A.S. Beck Shoe Corp., 153 Misc. 166, 274 N.Y.S. 559 (Sup 1934); Genesis Publications, Inc. v. Goss, 437 So. 2d 169, 9 Media L. Rep. (BNA) 2149 (Fla. Dist. Ct. App. 3d Dist. 1983). Cf Andretti v. Rolex Watch U.S.A., Inc., 56 N.Y.2d 284, 452 N.Y.S.2d 5, 437 N.E.2d 264 (1982) (factual issue existed as to whether acknowledgment in writing of membership in defendant's "Rolex Club" constituted written consent required by New York privacy statute).
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