Chanti Nieves, Plaintiff, against Home Box Office, Inc., STICK FIGURE PRODUCTIONS INC., TIME WARNER INC., STEVEN CANTOR, DANIEL LAIKIND, PAX WASSERMAN, MATTHEW GALKIN, JULIE GOLDMAN, CAROLINE STEVENS and KRYSANNE SATSOOLIS, Defendants.

100966/2005

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

11 Misc. 3d 1058(A); 815 N.Y.S.2d 495; 2006 N.Y. Misc. LEXIS 365; 2006 NY Slip Op 50275(U); 34 Media L. Rep. 1953; 235 N.Y.L.J. 28

January 10, 2006, Decided

NOTICE: [***1] THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

SUBSEQUENT HISTORY: Affirmed by Nieves v. Home Box Office, Inc., 30 A.D.3d 1143, 817 N.Y.S.2d 227, 2006 N.Y. App. Div. LEXIS 7298 (N.Y. App. Div. 1st Dep't, June 6, 2006)

HEADNOTES

[**495] [*1058A] Civil Rights--Commercial Use of Photograph.

COUNSEL: Plaintiff's Counsel: Arshack & Hajek, PLLC, New York, NY.

Defendant's Counsel: Davis Wright Tremaine, LLP, New York, NY.

JUDGES: Debra A. James, J.

OPINION BY: Debra A. James

OPINION

Debra A. James, J.

Defendants move pursuant to CPLR 3211 (a) (7) to dismiss this action brought pursuant to Civil Rights Law §§ 50, 51. The court shall deny the motion because the pleading is valid and there are factual issues requiring assessment.

Plaintiff alleges that the defendants used plaintiff's likeness in a derogatory manner on an episode of a television shown on the Home Box Office (HBO) cable television network without permission or authorization. As conceded by the defendants, "in New York privacy claims are founded solely upon sections 50 and 51 of the Civil Rights Law. The statute protects against the appropriation of a plaintiff's name or likeness for defendants' benefit. Thus, it creates a cause [***2] of action in favor of any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without * * * written consent.' The action may be brought to enjoin the prohibited use and may also seek damages for any injuries sustained including exemplary damages for a knowing violation of the statute." *Cohen v Herbal Concepts, Inc*., 63 N.Y.2d 379, 383, 472 N.E.2d 307, 482 N.Y.S.2d 457 (1984).

"On a motion to dismiss a complaint, made pursuant to CPLR 3211 (subd a, par 7), for failure to state a cause of action every fact alleged must be assumed to be true and the complaint liberally construed in plaintiff's favor." *European American Bank and Trust Co. v Strauhs & Kaye*, 102 A.D.2d 776, 777, 477 N.Y.S.2d 146 (1st Dept 1984) (citation omitted). Therefore, the only question is whether assuming the truth of the facts alleged in the complaint the plaintiff sets forth a prima facie case of a statutory violation. The court concludes that plaintiff has surmounted the CPLR 3211 hurdle.

Plaintiff first alleges, and defendants concede, that plaintiff's image was used in their television program and broadcast. Plaintiff [***3] next alleges that the use of plaintiff's likeness was for defendant's business and

commercial purposes. Finally, plaintiff alleges that the use was unauthorized without any consent of the plaintiff. Therefore, assuming the facts alleged in the complaint to be true, plaintiff would be able to establish a prima facie case of the violation of Civil Rights Law § 51.

The defendants' central argument is that their use of plaintiff's likeness was not for advertising or trade purposes under the statute. The court notes that in this case the determination cannot be made as a matter of law because there is a dispute at to the purpose for which plaintiff's likeness was employed. That is, unlike the case of *Arrington v New York Times Co.* (55 N.Y.2d 433, 441, 434 N.E.2d 1319, 449 N.Y.S.2d 941 [1982]) where it was conceded that the plaintiff's image was being used to demonstratively illustrate the broader editorial message of a newspaper article, in this action the plaintiff alleges that the participants in the program directly commented on her image in a derogatory and degrading manner utilizing what can best be described as scatological terminology.

"It is settled that a picture [***4] illustrating an article on a matter of public interest is not considered used for the purposes of trade or advertising within the prohibition of the statute unless it has no real relationship to the article or unless the article is an advertisement in disguise." *Stephano v News Group Publications, Inc.*, 64 N.Y.2d 174, 185, 474 N.E.2d 580, 485 N.Y.S.2d 220 (1984). Even accepting defendants' assertion that the television show here was a "documentary," there are still issues of fact regarding whether the use of plaintiff's image and accompanying commentary bears a real relationship to a "documentary" about a "bounty-hunting" family. The critical difference between this action and the authorities cited by the defendants is that in those case the courts determined based on uncontested facts that it was clear as matter of law that the use of person's image related to the subject matter of the published work. On this motion the defendants' only proffered relationship between the use of plaintiff's image and the television show is that the plaintiff was standing on a New York street corner while the defendants were filming. Clearly the court will have to make a factual determination based upon the use of the [***5] plaintiff's image and the content of the program in order to determine whether the defendants meet the "real relationship" standard.

Accordingly, it is

ORDERED that the defendants' motion is DENIED; and it is further

ORDERED that the parties are directed to attend a preliminary conference on January 31, 2006, at 9:30 A.M., at the Courthouse, IAS Part 59, Room 1254, 111 Centre Street, New York.

This is the decision and order of the court.

Dated: *January 10, 2006*