SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Kornreich **PART** 54

Justice

Luxe Weil

INDEX NO. 119431/02

MOTION DATE 9/19/02

- v -

MOTION SEQ. NO. 001

Jamie Johnson, Bingo Gubelmann, Nick Kurzon, ~~Dirk Wittenborn~~

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits	

SCANNED OCT 28 2002

Cross-Motion: ☐ **Yes** ☒ **No**

Upon the foregoing papers, it is ordered that this ~~motion~~ Order to Show Cause is decided in accordance with the annexed Decision and Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 9/27/02

J.S.C.

Check one: ☐ **FINAL DISPOSITION** ☒ **NON-FINAL DISPOSITION**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----------X

LUKE WEIL,

Plaintiff,

Index No.: 119431/02

-against-

DECISION and ORDER

JAMIE JOHNSON, BINGO GUBELMA", NICK KURZON, and DIRK WITTENBORN,

Defendants

----------X

KORNREICH, SHIRLEY WERNER, J.:

While still an undergraduate at New York University, defendant Jamie Johnson ("Johnson"), an heir to the Johnson & Johnson fortune, decided to make a documentary about the lives of children who, like himself, had grown up very wealthy, to be entitled "Born Rich." He was joined in the enterprise by three co-producers, defendants Nick Kurzon, Bingo Gubelmann and Dirk Wittenborn ('Wittenborn"), Johnson's uncle.

Johnson and his companions set about to recruit subjects for their film from amongst their affluent friends and acquaintances. According to an article by Wittenbom which appeared in the September 2002 issue of "W Magazine," "[t]o qualify for [the] film, [the] 'rich kids' [colloquially dubbed 'inheritors'] had to know they could live lavishly without ever having to work a day in their lives." After signing "Releases," participants were interviewed on their experiences and perspectives, and were filmed at assorted social events. Plaintiff Luke Weil ("plaintiff" or 'Weil"), heir to the Autotote gaming empire, was one of the eleven "inheritors" featured in the film, which was scheduled for completion and distribution to movie theaters during the fall of

2002.

Before participating in the interviews and filming, Weil, who was at the time a student at Brown University and was over 18 years of age, signed three separate Release forms. The first is undated, but – according to the Complaint – was signed on or around June 15,2000. The other two are dated August 12, 2000 and September 23, 2000, respectively. All three appear under the letterhead of Black River Films, Inc., with a Beverly Hills, California address and telephone number. The text reads as follows:

> This release is made to allow Black River Films, Inc. ("Producer") to tape and photograph me and record my voice, conversation (including telephonic) and sounds, including any performance of a musical composition(s) during and in connection with the documentary film project currently titled "_____" (Picture). I agree that you shall be the exclusive owner of all copyright and other rights in and to such taping, photography and recording and will be able to use in perpetuity throughout the world and to license others to use them in any manner you wish in connection with the Picture.
>
> I further agree that Producer may use and license others to use my name, voice, likeness and any biographical facts which may have been provided to you. I confii that, to the best of my knowledge, any statements made by me will be true and will not violate or infringe upon any third party's rights. I hereby consent to such use by Producer in perpetuity and their respective subsidiaries, affiliates or assignees.
>
> To the extent that I own or control rights in any of the story material(s) or musical compositions performed by me in connection with the Picture, I hereby grant to you a royalty-free synchronization license to use such compositions in any and all manner in the Picture.
>
> I am granting these rights in exchange for good and valuable consideration, receipt of which is hereby acknowledged. I hereby waive any right to injunctive or other equitable relief in connection with the development production, distribution or other exploitation of the Picture (emphasis supplied).

On September 4th, 2002, plaintiff filed the instant lawsuit, accompanied by an Order to Show Cause. In its two causes of action, the Complaint demands, inter alia: (1) a declaration that the three Releases signed by him are nullities because they were fraudulently obtained; and (2) an injunction preventing release of the film. In his Order to Show Cause, plaintiff seeks a

preliminary injunction "enjoining the Defendants, their agents, servants, employees and attorneys pending the determination of this action from screening, broadcasting, disseminating, distributing, printing, publishing, reproducing or otherwise conveying, in any other manner or form, the image, content, verbiage or transcript pertaining to any and all recordings, communications or filming involving and including Luke Weil, AND from advertising, promoting and announcing that the film, "Born Rich," or any other title attributed, portrays the Plaintiff....."

In order to obtain a preliminary injunction, plaintiff must demonstrate (1) the likelihood of his ultimate success on the merits; (2) irreparable injury to him, not compensable by money damages, if he is not granted the injunction; and (3) a balancing of the equities in his favor. See Paine & Chriscott v. Blair House Assocs., 70 A.D.2d 571 (1st Dept. 1979). Plaintiff has faded to meet this burden.

A. The Releases:

In the Complaint, plaintiff premises his challenge to the three Releases on the fact that when Johnson originally solicited Weil's participation in June 2000, he assured Weil that "the singular purpose and expected utilization of the interview was solely for non-commercial purposes and merely in furtherance of a school project." The Complaint continues: "without any prior notice, the defendant, Jamie Johnson sheepishly, surreptitiously and in the vein of irrelevancy flashed a document in front of the plaintiff, Luke Weil, indicating that the plaintiff Luke Weil's signature on said document was a prerequisite to the plaintiff's effectuation of the interview to be used in his project and that said executed document was an irrelevant formality that needed to be disposed of." Complaint, paras. 5 and 6. Finally, the Complaint alleges that plaintiff was not given a copy of the Release and received no money by way of consideration.

Weil's allegations are contradicted by the very face of the Release, which clearly alerted him to the fact that the enterprise was not a "student project," but rather was a commercial production being undertaken by a professional studio based in Beverly Hills, California. It is well established that a plaintiff may not avoid his obligations under a clearly worded release on the ground that the defendant falsely misrepresented the true significance of the document to him in order to secure his signature. See Morby v. DiSiena Associates, LPA, 291 A.D.2d 604 (3rd Dept. 2002) ("here, even accepting as true plaintiffs allegations concerning the misrepresentations by [defendant], a reading of the simple, straightforward document would have readily advised him that he was indeed discharging all claims against defendants .... Having failed to read the release before signing it, plaintiff simply cannot establish the essential element of justifiable reliance .... Said differently, the allegedly fraudulent misrepresentation by [defendant] could have been readily discovered upon the reading of the document, and plaintiff cannot now avoid his obligation under a release he did not read merely by asserting that he 'thought' is was something else"). See also Pimpinello v. Swift & Co., 253 N.Y.159 (1930); Shklovskiy v. Khan, 273 A.D.2d 371 (2d Dept. 2000). Indeed, here plaintiff is all the more bound because there is no allegation that he "did not, or could not, read the plain language of the release." Touloumis v. Chalem, 156 A.D.2d 230, 233 (1st Dept. 1989).

In addition, while the Complaint and Order to Show Cause purport to describe how Johnson "tricked" Weil into signing the first Release, they do not explain how Weil was "defrauded" into signing two identical Releases in August and September 2000. See Shklovskiy v. Khan, supra (where two documents signed by plaintiff indicate release, and only one is challenged as obtained by trickery, plaintiff's claim of fraud "lacks merit" as matter of law).

Nor is there any merit to plaintiff's suggestion that his Releases are invalid because he received no consideration therefor. GOL 15-303 provides that a release which is in writing and is signed by the plaintiff cannot be invalidated for the absence of consideration alone. See Matter of Estate of O'Hara, 85 A.D.2d 669, 671 (2nd Dept. 1981); Pratt Plumbing and Heating, Inc. v. Mastropole, 68 A.D.2d 973 (3rd Dept. 1979). Parenthetically, plaintiff's demand for adequate "consideration" suggests that in fact plaintiffs true remedy lies in a suit for money damages.

In short, the three Releases signed by plaintiff appear valid and binding on their face. Plaintiff's request for injunctive relief based upon the invalidity of these contracts, thus, is unlikely to succeed – inter alia because the Releases expressly provide that plaintiff "waive[s] any right to injunctive or other equitable relief in connection with the development, production, distribution or other exploitation of the Picture."

B. Demand for iniunctive relief based on alleged violations of Plaintiff's privacy rights:

In his second cause of action, and in his Order to Show Cause, plaintiff argues that he will be irreparably damaged if the film featuring footage of and about him is shown, publicized, or otherwise exploited by defendants "for advertising and trade purposes," because the video- and audio-tapes of and concerning Weil portray him "directly and indirectly, in an inaccurate, inappropriate and undignified manner and tend[] to hold [him] up to public ridicule and contempt." Complaint, paras. 25-26.

New York does not recognize a common law right of privacy. Roberson v. Rochester Folding Box Co., 171 N.Y. 538 (1902); see also Woitowicz v. Delacorte Press, 43 N.Y.2d 858, 860 (1978). Rather, in 1903 the Legislature created a limited statutory right of privacy by

enacting complementary Civil Rights Law provisions 50 and 51. Section 50 makes it a misdemeanor for any "person, firm or corporation" to use a living person's "name, portrait or picture" for advertising or trade purposes "without having first obtained the written consent of such person." Section 51 provides for civil damages, in pertinent part as follows:

> 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 as above provided [in section 50] may maintain an equitable action in the supreme court of this state ... to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use....

Although plaintiff nowhere invokes Sections 50 and 51 of the Civil Rights Law in his complaint or Order to Show Cause, these provisions must be read into his pleading because they represent the sole vehicle for redressing alleged invasions of the right of privacy in New York State. See Messenger v. Gruner, 94 N.Y.2d 436 (2000), cert. denied 531 U.S. 818 (2000). As a preliminary matter, plaintiff's claims under these statutes must fail because, as discussed above, plaintiff provided three valid written consents to be filmed.

However, even were plaintiff's Releases to be discounted, if only for the sake of argument, defendants' documentary film on the lives of wealthy young adults would be exempt from the statute. As most recently elaborated by the Court in Messenger, supra, at pp. 144-142, the application of Civil Rights Law 50 and 51 is subject to several guiding principles. Firstly, the legislation "is to be narrowly construed and 'strictly limited to nonconsensual commercial appropriations of the name, portrait or picture of a living person." Secondly, the provisions "do not apply to reports of newsworthy events or matters of public interest ... 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.'' Thirdly, "newsworthiness" is to

be broadly construed to encompass "not only descriptions of actual events ..., but also articles concerning political happenings, 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. Indeed, 'most publications seek to increase their circulation and also their profits' .... Whether an item is newsworthy depends solely on 'the content of the article' – not the publisher's 'motive to increase circulation.' Id. at 442.

See also Howell v. New York Post Co., 81 N.Y.2d 115, 123 (1993); Beverley v. Choices Women's Med. Ctr., 78 N.Y.2d 745,752 (1991); Finger **v.** Omni Publs. Int'l., 77 N.Y.2d 138, 141-142 (1990); Freihofer v. Hearst Corp., 65 N.Y.2d 135, 141 (1985); Stephano v. News Group. Publs., 64 N.Y.2d 174, 184 (1984).

Courts have extended "newsworthiness~protection to a wide variety of publications in the name of "public interest." For example, in Stephano v. News Group Publs., supra, at 179-186, the Court exempted from suit a picture of plaintiff wearing a leather bomber jacket, as illustrative of "new and unusual products and services"; in Abdelrazig v. Essence Communications, 225 A.D.2d 498 (1996), leave denied 88 N.Y.2d 810 (1996), the First Department ruled that the picture of the plaintiff in "African garb" constituted a protected illustration of "newsworthy fashion trends in the Black community; and in Delan **v.** CBS. Inc., 91 A.D.2d 255 (2nd Dept. 1983), the Court found that the depiction of plaintiff, a mental patient, in a documentary film on mental hospitals, was constitutionally protected as informative "speech" under the First Amendment.

Indeed, what plaintiff seeks here is a prior restraint on defendants' First Amendment right to distribute an informative sociological documentary of considerable "public interest." Prior

restraints of the sort requested here are presumptively unconstitutional. See Nebraska Press Ass'n v. Stuart, 427 **U.S.** 539,449 (1976). To prevail on such an application, a plaintiff must demonstrate that his privacy interests outweigh First Amendment concerns. See Bartnicki v. Vopper, 532 U.S. 514, 534 (2001). Plaintiff cannot make such a demonstration here, where he himself "released" his privacy rights on three occasions, and where all of his appearances and self-presentations in the film appear to have been voluntary. See Organization for a Better Austin v. Keefe, 402 U.S. 415, at 418-420 (1971) (prevention of embarrassment due to offensive characterization of plaintiffs business activities not sufficient to support prior restraint against dissemination of protected speech).

With all of the foregoing concerns in mind, the Court turns to a consideration of the requirements that plaintiff would have to meet in order to obtain the preliminary injunction that he seeks. Plaintiff is not likely to succeed on the merits on his invasion of privacy claims under prevailing law. Moreover, aside from suggesting that he and his family will be "embarrassed" by the film, plaintiff has not indicated how he is in imminent danger of suffering "irreparable damage" from the issuance of "Born Rich." Rather, plaintiffs proper remedy against defendants for their alleged abuse of their free speech rights is a civil claim for monetary damages. Finally, the equities tip emphatically in favor of defendants' First Amendment rights.

Accordingly, it is

ORDERED that plaintiff's application for a preliminary injunction is denied in all respects.

The foregoing constitutes the Decision and Order of the Court.

Date: September 27,2002
New York, New York

SHIRLEY WERNER KORNREICH