

Donahue v. Artisan Entertainment

2002 U.S. Dist. LEXIS 5930

United States District Court for the Southern District of New York

April 5, 2002

HEATHER DONAHUE, MICHAEL C. WILLIAMS, JOSHUA G. LEONARD, Plaintiffs, against ARTISAN ENTERTAINMENT, INC., ARTISAN PICTURES INC, Defendants. 00 Civ. 8326 (JGK). 2002 U.S. Dist. LEXIS 5930. April 3, 2002, Decided. April 5, 2002, Filed. Counsel: For plaintiffs: Philip R. Hoffman, Pryor, Cashman, Sherman & Flynn, New York, New York. For defendants: Andrew J. Frackman, O'Melveny & Myers, New York, New York. Before John G. Koeltl, United States District Judge.

JOHN G. KOELTL, District Judge.

Plaintiffs Heather Donahue, Michael C. Williams, and Joshua G. Leonard bring this action against defendants Artisan Entertainment, Inc., and Artisan Pictures Inc. (collectively, "Artisan") for breach of contract and violations of New York Civil Rights Law § 51, § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), and New York common law regarding unfair competition. The plaintiffs, who played the three central characters in the film "The Blair Witch Project" ("Blair Witch 1"), complain that their names and likenesses from that film, or other images of them, have been used without their approval in a sequel called "Blair Witch 2: Book of Shadows" ("Blair Witch 2"), as well as in promotions for that sequel and in other unauthorized ways. The defendants claim that each of the plaintiffs authorized these uses in their original acting contracts. The defendants now move for summary judgment on all claims.

I

The standard for granting summary judgment is well established. Summary judgment may not be granted unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

II

There is no dispute as to the following facts except where specifically noted.

In October, 1997, each of the plaintiffs entered into a separate written agreement (collectively, the "acting contracts") with Haxan Films, Inc. ("Haxan").[^] The acting contracts were prepared by Greg Hale, based on a form contract, and signed by him on behalf of Haxan.[^]

The second paragraph of Donahue's acting contract contains the following clause:

Heather shall perform the role of "Heather" in the feature film, "The Blair Witch Project" and agrees that Haxan shall have the right to use her full name as the character's name for purposes of this film.[^]

The fifth paragraph provides that:

It is agreed and understood that Haxan retains all rights to the results and proceeds of Heather's services to Haxan. Haxan retains the rights to dub into any language and to hire another actress for this purpose. Haxan retains control of all tie-ins and merchandising rights. It is understood that as long as Haxan pays Heather, Haxan is not obligated to play Heather.[^]

The sixth paragraph of Donahue's acting contract includes the following provision:

... Heather agrees to provide Haxan with at least ten photos of her ranging from age one to present day and to make a reasonable effort to secure releases from individuals in said photo's [sic] with her.[^]

Williams' and Leonard's acting contracts contain identical language, except that each plaintiff's contract substitutes his first name for "Heather," and "her" is replaced by "his" or "him."[^]

"The Blair Witch Project" (Blair Witch 1) purports to be the recovered footage of three student filmmakers named Heather Donahue, Michael Williams, and Joshua Leonard, who had traveled to the Maryland woods to investigate a local legend about the "Blair Witch" and disappeared.[^] The Blair Witch legend is a fictional "mythology" that begins in 1785 and includes multiple accounts of witchcraft, murder, and other mysterious events in the township of Blair, Maryland.

On January 25, 1999, Artisan acquired certain rights to Blair Witch 1 pursuant to a licensing agreement with Haxan. Although the license agreement refers to the licensor as "Blair Witch Film Partners, Ltd.," the plaintiffs and defendants characterize the agreement as one between Haxan and Artisan.[^] The agreement granted "to [Artisan] exclusively all rights in and to [Blair Witch 1] under copyright in any and all media ... , languages and versions ... ," and specifically included "the exclusive right to cause to finance, produce or exploit ... any and all remakes, prequels, sequels and spinoffs and any other derivative productions, whether based upon, derived from or inspired by [Blair Witch 1] or its underlying material or any part or parts thereof. ..."

Artisan released Blair Witch 1 in the summer of 1999.[^] The film has produced some \$140 million in domestic box office receipts and over \$100 million in

foreign box office receipts.[^] Blair Witch 1 cost approximately \$ 30,000 to produce.[^]

On October 27, 2000, Artisan released Blair Witch 2.[^] Blair Witch 2 portrays a group of fans of Blair Witch 1 who understand that the first movie is fiction.[^] Nevertheless, gory misfortune befalls the Blair Witch 2 characters on a visit to the Maryland woods that Blair Witch 1 made famous.[^] Blair Witch 2 includes a clip from Blair Witch 1, an audio-only clip and still image from Blair Witch 1, two scenes in which the plaintiffs' images appear on a "Missing" poster, and a joke involving the name "Heather Donahue."[^] The "Missing" poster did not appear in Blair Witch 1.[^] The defendants claim that images of the plaintiffs appear in Blair Witch 2 for a total of seven seconds.[^]

To promote Blair Witch 2, Artisan created a trailer, standard-length television commercials, and advertisements for placement in print media, none of which contained the plaintiffs' names or likenesses.[^] Artisan included a clip of the "Heather Donahue" joke among other excerpts and materials in an "electronic press kit" that it shipped to media outlets nationwide.[^]

Artisan distributed cardboard stand-up displays ("standees") to approximately 973 cinemas during the summer of 2000.[^] The standees came in two sizes: approximately four feet by four feet and six feet by eight feet.[^] The standees feature several photographs and descriptions, including a photograph of the plaintiffs accompanied by text reading: "in October of 1994 three student filmmakers, Heather Donahue, Mike Williams and Joshua Leonard, disappeared in the woods..."[^] In a letter to Artisan dated October 10, 2000, the plaintiffs objected to the use of their names and likenesses on the standees and in other media, and expressed their concern that their names and likenesses might appear in Blair Witch 2.[^]

Two Blair Witch-related television shows were released in 2000. In the summer of 2000, a national cable channel aired an hour-long program called "The Burkittsville 7," which had been developed by Artisan.[^] "The Burkittsville 7" includes clips from Blair Witch 1, as well as the photograph of the plaintiffs used on the standee.[^] In October, 2000, "Shadow of the Blair Witch," another hour-long television program developed by Artisan, was aired.[^] "Shadow of the Blair Witch" includes clips from Blair Witch 1, and some scenes incorporate a poster featuring Donahue.[^]

Artisan has also made use of the plaintiffs' images, and their names or the names of their characters, in books and on websites. The plaintiffs' images, associated with the names Heather Donahue, Mike Williams, and Joshua Leonard, appear numerous times on Artisan's blairwitch.com website.[^] A book called *Blair Witch - Book of Shadows*, published in 2000 under Artisan's copyright, contains references to Heather Donahue, Mike Williams, and Joshua Leonard, and an image of Donahue.[^] A series of books called "The Blair Witch Files," also copyrighted by Artisan, is written from the perspective of Cade Merrill, supposedly a cousin of the missing student filmmaker Heather Donahue.[^] Each of the "Blair Witch Files" books contains an introduction referring to "my cousin, Heather Donahue."[^] The "Blair Witch Files" series has an associated website, theblairwitchfiles.com, that contains references to Heather Donahue,[^]

Michael Williams, and Joshua Leonard; a photograph of Donahue; and an image of the “Missing” poster containing the plaintiffs’ photographs.

III

The defendants move for summary judgment on the basis that all of Artisan’s uses of the plaintiffs’ images, names, and voices were expressly permitted by the terms of the acting contracts. Specifically, Artisan contends that the reference to “all rights to the results and proceeds of [the plaintiff’s] services” in ¶5 of each acting contract constitutes “a broad and unlimited grant to and reservation by Haxan of all rights to the fruit of the actors’ services,” including all uses at issue in this case. (Def. Letter dated Mar. 18, 2002 (“Frackman Letter”), at 1.) Haxan in turn conveyed these broad rights to Artisan pursuant to the January 25, 1999 licensing agreement. Therefore, according to Artisan, there is no breach of contract and the plaintiffs’ other claims must fail because the plaintiffs consented to the uses at issue.

The plaintiffs do not dispute that if they authorized such uses in the acting contracts, Haxan’s rights would pass to Artisan under the licensing agreement between Haxan and Artisan. Rather, the plaintiffs argue that the grant of rights in the acting contracts only relates to Blair Witch 1 and the promotion of Blair Witch 1. Therefore, according to the plaintiffs, the defendants’ use of the plaintiffs’ images, names, and voices in Blair Witch 2, the electronic press kit associated with Blair Witch 2, the cinema standees, “The Burkittsville 7,” “Shadow of the Blair Witch,” blairwitch.com, *Blair Witch - Book of Shadows*, the “Blair Witch Files” book series, and theblairwitchfiles.com are not authorized by the acting contracts.

Under New York law, “the initial interpretation of a contract ‘is a matter of law for the court to decide.’”⁴⁴ “Included in this initial interpretation is the threshold question of whether the terms of the contract are ambiguous.”⁴⁵ A court should construe a contract as a matter of law only if the contract is unambiguous on its face.⁴⁶ A contract is unambiguous if it “has ‘a definite and precise meaning, unattended by danger of misconception in the purport of the [contract] itself, and concerning which there is no reasonable basis for a difference of opinion.’”⁴⁷

If a contract is unambiguous, a court is “required to give effect to the contract as written and may not consider extrinsic evidence to alter or interpret its meaning.”⁴⁸ Contractual language “whose meaning is otherwise plain is not ambiguous merely because the parties urge different interpretations in the litigation.”⁴⁹ Where the contractual language is subject to more than one reasonable meaning and where extrinsic evidence of the parties’ intent exists, the question of the proper interpretation should be submitted to the trier of fact.

In this case, the parties agree that the interpretation of ¶5 of the acting contracts is pivotal. It is true that, as the defendants assert, the phrase “all rights to the results and proceeds of [the plaintiff’s] services” appears to contemplate an unlimited grant or retention of rights when read in isolation, and courts often refuse to read limitations into broad grants of rights. See *Boosey & Hawkes Music Publishers, Ltd. v. The Walt Disney Co.*, 145 F.3d 481, 486-87 (2d Cir.

1998) (grant of right to use music in film includes use in film in video format); *Bartsch v. Metro-Goldwyn-Mayer, Inc.*, 391 F.2d 150, 155 (2d Cir. 1968) (grant of right to use play in film includes television broadcast of film). However, the Court should “examine the entire contract” in order to “safeguard against adopting an interpretation that would render any individual provision superfluous.”[^] The “all...results and proceeds” clause in ¶5 is immediately followed by three more specific sentences, reserving to Haxan the right “to dub into any language and to hire another actress for this purpose” and to “control...tie-ins and merchandising rights,” as well as establishing that “as long as Haxan pays [a plaintiff], Haxan is not obligated to play [that plaintiff].”

Despite these additional provisions, the defendants urge the Court to read the first sentence of ¶5 as a grant of “unlimited rights to exploit the property as the copyright owner would expect” (Frackman Letter at 1). But the defendants do not deny that such a broad grant would necessarily include all merchandising and tie-in rights. Nor do the defendants explain why such a broad grant would not also include the right to alter the soundtrack by dubbing in another voice, apart from asserting that dubbing is “different in kind” from the rights contained in a broad grant. Yet the defendants would surely agree that even without specific grants, Haxan had the right to edit the movie, add music and titles, and alter the plaintiffs’ performances in other ways after filming them.

Hence, in the defendants’ interpretation, the third sentence of ¶5 is mere “emphasis” of the effects of a grant which has already taken place.[^] The sentence, however, contains no indication that it is there to emphasize an existing grant; nor does it purport, by its terms, to further specify, explain, or give an example of the rights supposedly granted in the first sentence of the paragraph.

The plaintiffs, on the other hand, argue that the parties’ inclusion of specific supplemental grants in the contract indicates that they did not intend the first sentence of ¶5 to be a broad and unlimited grant. Since that contention is reasonable and the defendants’ interpretation would render some language in the contract superfluous, the Court cannot determine as a matter of law that the defendants’ interpretation of ¶5 is correct for purposes of a motion for summary judgment. Furthermore, both sides have presented extrinsic evidence, although of varying probative value, that they claim would illuminate the intent of the parties. Thus, the proper interpretation of the contract is a question for the finder of fact that cannot be resolved on this motion. *See Alexander & Alexander*, 136 F.3d at 86 (“If the court must resort to extrinsic evidence to ascertain the correct and intended meaning of a term, material questions of fact necessarily exist.”). Accordingly, the defendants’ motion for summary judgment is denied as to the breach of contract claim.

IV

The defendants argue that they are entitled to summary judgment on the plaintiffs' claim under § 51 of the New York Civil Rights Law because the plaintiffs consented in writing to the use of their names, images and voices when they signed the acting contracts. In addition, the defendants argue that the uses fall within a statutory exception to liability. Finally, the defendants argue that any otherwise actionable uses are *de minimis* and incidental.

A

Section 50 of the New York Civil Rights Law requires that a person using the name, portrait or picture of any living person for advertising purposes or for purposes of trade first obtain written consent. Section 51 provides that a person whose name, portrait, picture or voice is used within New York for advertising purposes or for purposes of trade without the written consent required under § 50 may "sue and recover damages for any injuries sustained by reason of such use." N.Y. Civ. Rights Law § 51[^].

Since the meaning of the acting contracts in this case is a question for the finder of fact, the Court cannot determine whether the contract terms constitute written consent to the various uses at issue. Moreover, it is clear that some of the uses involve images of the plaintiffs that do not appear in Blair Witch 1. The record is largely undeveloped as to such issues as the origin of these images; whether their use is governed by any separate contract; and whether any of them is among the photographs that the plaintiffs were required to provide by ¶6 of the acting contracts. Without such information it is impossible to determine whether any particular image could properly be considered a "result," even in the broadest sense, of a plaintiff's "services to Haxan" under the plaintiff's acting contract.

B

Section 51 provides that "nothing contained in this article shall be so construed as to prevent any person, firm or corporation...from using the name, portrait, picture or voice of any author, composer or artist in connection with his literary, musical or artistic productions which he has sold or disposed of with such name, portrait, picture or voice used in connection therewith." N.Y. Civ. Rights Law § 51. For this exception to apply, three conditions must be met: first, the objectionable use must be a use in connection "with [the plaintiff's] literary...or artistic production[]"; second, the production must have been "sold or disposed of"; and third, the sale must have been "with such name[, portrait, picture or voice] used in connection therewith."[^]

The plaintiffs in this case object to several different uses of their names, pictures and voices. Some of these are re-uses of their performances in Blair Witch 1, in the form of clips and still photos. Others are less directly connected with those performances. For example, a photo of Donahue -- the provenance of which is uncertain -- appears on theblairwitchfiles.com, which is a website associated with a book series that draws on the Blair Witch "mythology." In some circumstances, the use of a name, picture or voice may constitute a use in

sufficient “connection” with the original artistic production which has been sold or disposed of such that the subsequent use is excepted from liability under § 51, even though the use is not contained within or attached to the original production. Given the panoply of uses at issue in this case and the lack of factual information regarding some of those uses, however, the Court cannot determine as a matter of law that all of the uses are “connected with” the plaintiffs’ original performances within the meaning of § 51. Therefore, the statutory exception to liability cited by the defendants does not support a grant of their summary judgment motion with respect to the plaintiffs’ § 51 claim.

Conclusion

For the reasons explained above, the defendants’ motion for summary judgment is denied.
SO ORDERED.