

At an IAS Term, Part 47 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 14th day of December, 2011.

P R E S E N T:

HON. DAVID I. SCHMIDT,

Justice.

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DANIEL EDWARD SONDIK A/K/A DOVID YEHUDA
SONDIK,

Plaintiff,

- against -

Index No. 30176/10

JAMES C. KIMMEL, A/K/A JIMMY KIMMEL; JIMMY
KIMMEL LIVE; AMERICAN BROADCASTING
COMPANIES, INC.; AND ABC, INC.,

Defendants.

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The following papers numbered 1 to 4 read on this motion :

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	<u>1, 2, 3</u>
Opposing Affidavits (Affirmations)_____	<u>4</u>
Reply Affidavits (Affirmations)_____	_____
_____Affidavit (Affirmation)_____	_____
Other Papers_____	_____

Upon the foregoing papers, defendants James C. Kimmel, Jimmy Kimmel Live, American Broadcasting Companies, Inc. and ABC, Inc., move for an order, pursuant to CPLR 3211(a)(7) dismissing the complaint for failure to state a cause of action.

The motion is granted and the complaint is dismissed.

Plaintiff alleges that he was injured by defendants' non-consensual use of a video clip of plaintiff as part of a segment on the Jimmy Kimmel Live show that aired on August 11, 2010. In the complaint, plaintiff alleges that the segment began with Kimmel telling the audience that the basketball star LeBron James had met with Rabbi Yishayahu Yosef Pinto for business advice. Defendants then showed an image¹ of this meeting between LeBron James and Rabbi Pinto, which plaintiff alleges was licensed from www.tnz.com. After showing this picture, Kimmel announced that he had also met with Rabbi Pinto, and the defendants then presented a video clip that showed Kimmel sitting in his car purportedly talking to Rabbi Pinto. However, the individual Kimmel is shown talking to was actually plaintiff, not Rabbi Pinto. This image of plaintiff had been spliced/edited from footage taken of plaintiff that someone had posted on YouTube. Plaintiff further alleges that defendants did not obtain a license or his permission or consent for the use of the YouTube clip, and that he is a private individual, not a public figure. Based on these factual allegations, plaintiff pled causes of action premised on California Civil Code § 3344, appropriation of likeness under California's common law, New York Civil Rights Law § 51, breach of YouTube's terms of use, and unjust enrichment.

Faced with this complaint, defendants have moved, pursuant to CPLR 3211(a)(7) for

¹ Although the complaint does not describe the nature of this image, the DVD copy of the Jimmy Kimmel Live episode at issue shows that Jimmy Kimmel Live presented a photograph of LeBron James meeting with Rabbi Pinto.

failure to state a cause of action. In considering such a motion, the pleading is to be afforded a liberal construction (CPLR 3026), and the court should accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory (*see Hurrell-Harring v State of New York*, 15 NY3d 8, 20 [2010]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1995]).

“Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question then becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one and, unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate” (*Young v Campbell*, 87 AD3d 692, 693 [2011][internal quotation marks omitted]). “Evidence submitted by a defendant in support of a motion pursuant to CPLR 3211(a)(7) does not warrant dismissal unless it conclusively establishes that the plaintiff has no cause of action” (*id* at 694 [internal quotation marks omitted]; *see also Lawrence v Graubard Miller*, 11 NY3d 588, 595 [2008]). Even if defendants’ evidentiary material does not, in and of itself, require dismissal, it may also be considered in determining whether the inadequacy of plaintiff’s pleading is caused by the absence of a claim as opposed to mere inartful pleading (*see Godfrey v Spano*, 13 NY3d 358, 374 [2009]).

The first issue raised with respect to the complaint is whether plaintiff’s claims are

governed by the law of New York or of California. There is, at least potentially, a conflict here, as California allows for a common-law action based on an invasion of a person's right to privacy (*see Lugosi v Universal Pictures*, 25 Cal3d 813, 603 P2d 425, 428 [1979]; *Smith v NBC Universal*, 524 F Supp2d 315, 323-324 [SDNY 2007]), while, in New York, any recovery for an invasion of a person's right to privacy or appropriation of publicity is limited to the statutory relief provided under Civil Rights Law §§ 50 and 51 (*see Stephano v New Group Publ.*, 64 NY2d 174, 183 [1984]; *Wojtowicz v Delacorte Press*, 43 NY2d 858, 860 [1978]; *Grodin v Liberty Cable*, 244 AD2d 153, 154 [1997]).

With respect to the right to publicity, that right, at least in the context of a choice of law analysis, is considered personal property, and questions relating to such intangible personal property are generally governed by the law of the domicile of the owner of the personal property (*see Southeast Bank v Lawrence*, 66 NY2d 910, 912 [1985]; *Rogers v Grimaldi*, 875 F2d 994, 1002 [2d Cir 1989]; *Cairns v Franklin Mint Co.*, 24 F Supp2d 1013, 1028 [CD Cal 1998][noting that cases under California Civil Code § 3344 have typically selected the property owner's domicile when resolving choice of law questions under California's governmental interest analysis]; *Nelson v Working Class, Inc.*, 2000 WL 420554 [SDNY 2000]; *see also Cross v United States Trust Co. of N.Y.*, 131 NY 330, 339-340 [1892]; *Deleware v New York*, 507 US 490, 503 [1993][situs of intangible personal property is domicile of owner]; *Paolino v Channel Home Centers*, 668 F2d 721, 724 n2 [3d Cir 1981][law of residence of intellectual property developer obvious starting point for

determining property rights]).

Even if both publicity and privacy rights should be determined by tort choice of law rules, they are, under New York's interest analysis, conduct regulating rules (*see Amusement Industry, Inc. v Stern*, 693 F Supp2d 301, 313 [SDNY 2010]; *see also Locke v Aston*, 31 AD3d 33, 37-38 [2006]), and, as such, the law of the place of the tort will have the strongest interest in having its laws applied (*see Padula v Lilarn Props. Corp.*, 84 NY2d 519, 522 [1994]). With respect to the right of privacy, the tort is deemed to occur where plaintiff is injured, and, as plaintiff has pled in the complaint that he resides in New York, his injury occurred in New York, and New York is thus the jurisdiction with the strongest interest in seeing the rights of its citizens vindicated (*see Locke*, 31 AD3d at 38 [invasion of privacy occurs where plaintiff is located at the time of the invasion]; *Amusement Industry, Inc.*, 693 F Supp2d at 313-314; *Nelson v Working Class, Inc.*, 2000 WL 420554 [SDNY 2000]; *Rostropovich v Koch International Corp.*, 1995 WL 104123 [SDNY 1995]; *Gifford v National Enquirer, Inc.*, 1993 WL 767192 [CD Cal 1993]; Restatement [Second] of Conflict of Laws §§ 152 and 153]; *see also Lee v Bankers Trust Co.*, 166 F3d 540, 545 [2d Cir 1999]; *Matter of Yagman*, 796 F2d 1165, 1171 [9th Cir 1986], *cert denied* 484 US 963 [1987]). Although plaintiff alleges that California law should apply because that is where the defendants allegedly downloaded the YouTube video of plaintiff and created the segment of the Jimmy Kimmel Show, these connections to California fail to overcome New York's interest in protecting its residents (*see Locke*, 31 AD3d at 38; Restatement [Second] of

Conflict of Laws § 153 comment D; *Yagman*, 796 F2d at 1171]). Accordingly, this action is governed by New York Law.

Since, as noted above, New York Law does not recognize common-law actions for violations of privacy or publicity rights (*see Messenger v Gruner & Jahr Printing & Publ.*, 94 NY2d 436, 441 [2000]; *Stephano*, 64 NY2d at 183; *Wojtowicz*, 43 NY2d at 860), the sufficiency of the complaint primarily turns on whether plaintiff has a cause of action under Civil Rights Law §§ 50 and 51.² Sections 50 and 51 are narrowly construed and recovery is “strictly limited to nonconsensual commercial appropriations of the name, portrait or picture of a living person” (*Messenger*, 94 NY2d at 441). These sections also do not apply to reports of newsworthy events or matters of public interest (*id.*). This newsworthy exception is to be broadly applied, and extends to comedic or satiric performances “even if the performance is not related to a legitimate news broadcast [or event]” (*Walter v NBC Tel. Network, Inc.*, 27 AD3d 1069, 1070-1071 [2006][internal quotation marks omitted], *lv denied* 7 NY3d 703 [2006]).

Turning to the Jimmy Kimmel Live segment here, a review of the DVD of the

² Civil Rights Law § 50, as relevant here, makes it a misdemeanor 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 . . .”. Civil Rights Law § 51 provides, as relevant here, that “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 . . . sue and recover damages for any injuries sustained by reason of such use.”

segment supplied by defendants³ demonstrates that the clip of plaintiff at issue was used as part of a comedic (or at least an attempted comedic) or satiric parody of Lebron James' meeting with Rabbi Pinto, itself undoubtedly an event that was newsworthy or of public interest.⁴ Although Kimmel, in introducing the clip, stated that he himself met with Rabbi Pinto, plaintiff looks nothing like Rabbi Pinto as seen in the image of Lebron James meeting with Rabbi Pinto shown on the segment. Viewing the segment in its entirety, it is apparent that the piece primarily makes fun of the idea that Lebron James was seeking business advice from a spiritual leader with whom he could not actually converse because Lebron James presumably only speaks English (or "only not Hebrew" as stated by Kimmel), and it was reported that Rabbi Pinto only speaks Hebrew. In the clip, the shot of plaintiff was

³ New York caselaw does not contain much discussion regarding the court's consideration of a DVD or similar copy of the alleged offending show or article in the context of a CPLR 3211(a)(7) motion. In federal court, the clip at issue would be considered as part of the pleadings in deciding the motion to dismiss - even though plaintiff did not append it - since it is referred to in the complaint, central to plaintiff's claims, and plaintiff did not object to its authenticity (*see Busch v Viacom International, Inc.*, 477 F Supp2d 764, 774 [ND Tex 2007]; *see also Curran v Cousins*, 509 F3d 36, 44 [1st Cir 2007]; *Fudge v Penthouse Intern., Ltd.*, 840 F2d 1012, 1015 [1st Cir 1988], *cert denied* 488 US 821 [1988]). This issue need not ultimately be decided, since, even if the clip cannot be deemed part of the pleadings or constitute documentary proof (*see Springer v Almontaser*, 75 AD3d 539, 540 [2010], *lv denied* 15 NY3d 713 [2010]), it is, in the absence of an objection from plaintiff (*see Santiago v Rodriguez*, 38 AD3d 639, 640 [2007]; *Scudera v Mahbubur*, 299 AD2d 535 [2002]), evidence that conclusively shows that plaintiff has no cause of action (*see Young*, 87 AD3d at 694; *Roth v United Federation of Teachers*, 5 Misc 3d 888, 895 [Sup Ct Kings County 2004]), or, at the very least, evidence that the defect with plaintiff's pleading is not the result of inartful pleading (*see Godfrey*, 13 NY3d 374).

⁴ Even if the DVD supplied by defendant's cannot be considered, defendant's comedic intent can be inferred from the description of the segment contained in the complaint in conjunction with common knowledge relating to the entertainment generally provided on late-night shows such as defendant's.

apparently filmed by a person seated inside a car and plaintiff is seen standing on the street, facing the open window of the car, davening and chanting in song or prayer in what is not in English.⁵ The shots of Kimmel show him seated in the car and are edited to make it appear that he was listening to plaintiff and Kimmel's responses imply that he understood plaintiff and accepted his advice.⁶

Particularly relevant in applying the law to the facts here is the decision in *Walter* (27 AD3d 1069). In *Walter* the Appellate Division addressed a photograph of the plaintiff that was used by Jay Leno as part of a "Headlines" segment of the Tonight Show (*id.* at 1070). The photograph was unflattering, showed plaintiff in a stern angry pose, was placed on a business card⁷ and was sent by plaintiff's employer to The Tonight Show without plaintiff's permission (*id.* at 1070-1071; *Walter v NBC Television Network, Inc.*, 7 Misc 3d 1026 (A), 2005 NY Slip Op 50754 [U] at 1-2 [Sup Ct, Monroe County 2005][trial court decision in *Walter*], *reversed* 27 AD 1069 [2006]). Given the broad reading granted the newsworthy

⁵ While not relevant, plaintiff may actually just be humming or chanting sounds, as opposed to words in any language.

⁶ After discussing Lebron James' meeting with Rabbi Pinto, Kimmel states, in introducing the clip of plaintiff, that Rabbi Pinto "is a highly paid consultant with regard to business matters. In fact at one time I consulted with the Rabbi myself." During the clip, Kimmel responds to plaintiff in substance by saying, "yeah, yeah, that's true . . . Are you done? . . . Yeah, I think your right." After the clip, Kimmel states that, "Yeah, it turned out he was right. Thanks man," and "I don't know what that was. I really don't." (It is noted that these may not be an exact transcription of the words, but the quotes convey the substance of Kimmel's statements in the segment).

⁷ The court noted that it was unclear whether this was done by plaintiff's employer to embarrass plaintiff or whether the card was one that was actually used by her employer.

exception to section 50 and 51 claims, the court found that Jay Leno's use of the photograph fell within the newsworthy exception (*Walter*, 27 AD3d at 1071). Here, defendants' use of plaintiff's clip is legally indistinguishable from Jay Leno's use of the photograph at issue in *Walter*. Moreover, the decision in *Walter* is not an anomaly, as several courts have found that similar uses of videos or pictures fall under the newsworthy exception to section 50 and 51 (see *Candelaria v Spurlock*, 2008 WL 2640471 [EDNY 2008][nonconsensual clip of plaintiff used in the film *Super Size Me*]; *Lemonrond v Twentieth Century Fox Film Corp.*, 2008 WL 918579 [SDNY 2008][nonconsensual clip of plaintiff used in the film *BORAT - Cultural Learnings of America for Make Benefit Glorious Nation of Kazakhstan*]; *Kane v Comedy Partners*, 2003 WL 22383387 [SDNY 2003][clip of plaintiff from her own television show used on *The Daily Show*], *affd* 98 Fed Appx 73 [2d Cir 2004]; see also *Messenger*, 94 NY2d at 444-448; *Gaeta v Home Box Off.*, 169 Misc 2d 500, 506 [Civ Ct New York County 1996]). Defendants' use of plaintiff's clip thus likewise falls within the newsworthiness exception to Civil Rights Law §§ 50 and 51, requiring dismissal of those claims.

Even if the newsworthy exception did not apply here, the use of the clip in this entertainment context raises serious First Amendment concerns that would likewise require dismissal of the section 50 and 51 claims (see *Nussenzweig v diCorcia*, 38 AD3d 339, 341-348 [2007][Tom, J.P., concurring][nonconsensual use of photograph in artwork], *affd* 9 NY3d 184 [2007]; *Altbach v Kulon*, 302 AD2d 655, 657-658 [2003][satiric painting covered

under First Amendment]; *Frank v National Broadcasting Co.*, 119 AD2d 252, 256-262 [1986][discussing the balancing of First Amendment concerns in a defamation case]; *Busch v Viacom International, Inc.*, 477 F Supp2d 764, 777 [ND Tex 2007][First Amendment protected nonconsensual use of video clip of plaintiff as part of a parody segment on The Daily Show]; *cf. Esposito-Hilder v SFX Broadcasting*, 236 AD2d 186, 191 [1997][First Amendment protection is not absolute and provides no protection where comedy is used as an attempt to disguise an attempt to injure]). Even though plaintiff is not a public figure, there is no allegation in the complaint or inference that can be drawn from the DVD suggesting that the use of plaintiff's clip was mean spirited or intended to injure such that its use would be excluded from First Amendment protection (*see Frank*, 119 AD2d at 257-262; *cf. Esposito-Hilder*, 236 AD2d at 191).

In the absence of a common-law privacy right, plaintiff has no cause of action for unjust enrichment, and that claim must be dismissed (*see Grodin*, 244 AD2d at 154). Plaintiff, who makes no allegation that he posted the clip used by defendants on YouTube, or that he had any other relationship with YouTube, is not a party to or a third-party beneficiary of the YouTube terms of use under both New York law (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 181-182 [2011]) and California law (*see National Union Fire Ins. Co. of Pittsburgh PA. v Cambridge*, 171 Cal App4th 35, 51, 89 Cal Rptr 3rd 473, 484 [Cal App 2009]), and his cause of action for breach of contract must also be dismissed.

Finally, even if this case should be governed by California law, plaintiff likewise has no cause of action with respect to those claims. Notably, there was no intrusion into plaintiff's private affairs, given that the clip of plaintiff was filmed on a public street (*see Gill v Hearst Pub. Co.*, 40 Cal2d 224, 230-231, 253 P2d 441, 444-445 [1953]; *Spilfogel v Fox Broadcasting Co.*, 433 Fed Appx 724, 2011 WL 2623578 [11th Cir 2011])[applying similar Florida law]); there was no public disclosure of private facts since the clip at issue had already been made public on YouTube and nothing on the clip revealed anything offensive or objectionable about plaintiff (*see Smith*, 524 F Supp2d at 328-329; *Daly v Viacom, Inc.*, 238 F Supp2d 1118, 1124-1125 [ND Cal 2002]); and there was no misappropriation or violation of the right to publicity under the common-law or California Civil Code § 3344, given that plaintiff has made no allegation suggesting that the commercial value of the Jimmy Kimmel Live segment was based on plaintiff's identity (*see Greenstein v The Greif Co.*, 2007 WL 492658 [Cal Super. 2007]; *Cohen v Facebook, Inc.*, 2011 WL 5117164 [ND Cal 2011]; *Smith*, 524 F Supp2d at 329), and, in any event, the segment is an expressive work entitled to First Amendment protection (*see Daly*, 238 F Supp2d at 1122-1123 [emphasizing that under the law of misappropriation, the First Amendment analysis is the same for celebrities and non-celebrities with respect to determining liability]; *see also Gionfriddo v Major League Baseball*, 94 Cal App4th 400, 409-417, 114 Cal Rptr 2d 307, 313-319 [Cal App 2001]). Absent a violation of any privacy or publicity rights, plaintiff cannot state a cause of action for unjust enrichment under California law (*see Jogani v*

Superior Court, 165 Cal App4th 901, 911, 81 Cal Rptr 3d 503, 511 [Cal App 2008]).

Accordingly, plaintiff does not have a cause of action, and defendants' motion to dismiss the complaint is granted (CPLR 3211[a][7]).

This constitutes the decision and order of the court.

E N T E R,



J. S. C.

HON. DAVID L. SERRANO