

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

PRESENT: _____

PART 56

0602063/2002

ADAMO, JEFF
vs
CORBIS CORP.

SEQ 1

DISMISS ACTION

INDEX NO. 1012063/02

MOTION DATE 1/27/02

MOTION SEQ. NO. 00

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

SCANNED


DEC 20 2002

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Motion is decided in accordance with the attached memorandum decision.

Dated: 12/2/02



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

MOTION/ORDER IS RESPECTFULLY REFERRED TO JUSTICE

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

-----X
JEFF ADAMO,

Plaintiff,

Index no. 602063/02

-against-

OPINION

CORBIS CORPORATION, as successor in interest to
THE STOCK MARKET PHOTO AGENCY OF
NEW YORK, INC.,

Defendants.

..... X
Richard B. Lowe III, J.

Defendant moves for a dismissal of the complaint pursuant to CPLR §321 1.

BACKGROUND

Plaintiff Jeff Adamo (“Adamo”) is a professional photographer. Defendant Corbis Corporation (“Corbis”) is stock photo library engaged in the business of licensing photographs to third parties. On or about October 1,2000 Corbis purchased the Stock Market Photo Agency of New York Inc., (“SMP”) which was also a stock photo library. SMP first contracted with Adamo to reproduce Adamo’s original works on or about September 15, 1983. The original agreement was for a period of three years. The parties renewed the agreement several times and the relationship continued over the following seventeen years until April 23,2000 when the parties did not renew the agreement. Over the seventeen year relationship, Adamo submitted over 2,000 photographs to SMP for their use and collected approximately \$32,000 in earnings.

According to the contract between Adamo and SMP, SMP (and later Corbis) was to use reasonable efforts to return Adamo’s photographs over a period of two years after the expiration of the agreement. Specifically, SMP had twelve months to return

photographs that were filed in New York, eighteen months to return photographs that were filed in foreign offices and two years to return photographs in possession of clients.

Adamo filed this action in May of 2002, after the expiration of the two-year window contained in the agreement. According to Adamo, 135 of his approximately 2000 photographs have not been returned. Adamo requests \$205,500 in relief, the estimated value of the photographs.

DISCUSSION

On a motion to dismiss, the Court will assume the facts alleged in the complaint as true and simply decide if those facts fit within any cognizable legal theory. Morone v. Morone, 50 N.Y.2d 481(1980). This Court will assume as true, that 135 of Adamo's 2000 photographs have not been returned.

Corbis, in the motion to dismiss this action, claim that Adamo's complaint states no cause of action that can be recognized by this court as valid. At the heart of Corbis' motion is the contract between Adaino and SMP, which states in pertinent part., "...SMP shall not be liable unless such damage, theft of loss was a result of SMP's willful or gross negligence. You agree that in no event shall SMP's liability exceed one hundred (\$100.00) dollars. (Wolff Aff., **76.**)

This Court is not limited to consider the complaint itself in a motion to dismiss and is authorized to consider extrinsic matter submitted by the parties. Rapoport v. Schneider, 29 N.Y.2d 396 (1972); 4 Weinstein-Korn-Miller, N. Y. Civ. Prac., ¶ 321 1.43. In this situation, the submitted agreement between Adamo and SMP and the affidavit submitted by Corbis of Gerry Thies, Director of Commercial Photography for Corbis are highly relevant to the underlying claims and will therefore be considered by the court.

The agreement, on its face, limits the liability of Corbis to \$100 *only if* Corbis (or prior to Corbis, SMP) was grossly or willfully negligent in allowing the photographs to be lost, damaged or stolen; simple negligence in losing or damaging a photograph brings *no liability* upon Corbis. Adamo's complaint alleges only that 135 photographs have not been returned in violation of the agreement. Adamo points to clause 8 of the agreement, which states that "SMP will use all reasonable efforts to return all of the images." (Cavallo Aff., ¶ 6.) The complaint does not allege any form of negligence, let alone willful or gross negligence.

Adamo argues in reply to Corbis's motion to dismiss that while it does not allege negligence resulting in the loss, damage or theft of the photographs, it does allege that Corbis (and before Corbis, SMP) has not taken reasonable steps to return all of the photographs. Adamo contends that this action is therefore not a negligence claim limited to \$100, but rather a breach of contract claim permitting damages above the \$100 liability limit. (Cavallo Aff. ¶ 7, 8.) This argument is flawed on two fronts.

First, Corbis states via their affidavit of Gerry Thies accompanying their motion to dismiss, that all reasonable efforts were taken to locate these photographs. These efforts included: searching domestic libraries, searching international libraries, and notifying all worldwide offices of Adamo's "not active" status which requires all outstanding photographs of Adamo's to be returned. (Thies Aff., ¶ 9, Wolff Reply Aff., ¶ 5.) In fact, *only 135* of the approximately 2000 photographs have *not been returned*. Return receipts submitted by Corbis indicate that numerous photographs have been returned both before and after Corbis' takeover of SMP. There is nothing unreasonable about the search performed by Corbis or SMP and neither Adamo's complaint nor its

response affidavit in opposition to the motion to dismiss layout an argument or claim of unreasonableness in returning the photographs. No statement by Adamo alleges that the procedures taken by Corbis to return the photographs represent anything less than what is the reasonable standard in the photo stock library industry. Indeed, no pleading or affidavit at all indicates that there is an intentional retention of the photographs on the part of Corbis as suggested by Adamo's counsel at oral argument. When pressed by this Court at argument, Adamo's counsel was able to respond to the Court's inquiry regarding reasonableness only by saying, that for all anyone knew Corbis may be sitting on the photographs. This argument is pure conjecture on part of counsel and has no evidentiary value before the court. Rodriguez v. Brown, 257 A.D.2d 563 (2d Dep't 1998) (Holding that arguments or affirmations by counsel with no personal knowledge of the facts is insufficient before the Court.) It is therefore reasonable to assume any photograph yet to be recovered and returned to Adamo by Corbis is "lost."

Secondly, Corbis' claim that it is not pursuing a tort claim of negligence (presumably barred by the agreement), but rather a breach of contract claim is an attempted end-around the valid agreement entered into between Adamo and SMP. Corbis (and SMP) made reasonable efforts to locate and return the photographs. As stated earlier, these efforts were successful the majority of the time. The contract was not breached and therefore the clause limiting the liability of Corbis is enforceable if Adamo were claiming negligence. This limited liability clause is accepted throughout the stock photo graph industry as standard practice, simply because over the course of time and shipment all over the globe, the possibility of loss, theft or damage exists to a large

extent. (Thies Aff., ¶ 12.) However, since Adamo is not claiming negligence, any argument based upon the limited liability clause is moot.

CONCLUSION

The agreement between Corbis (via SMP) and Adamo limits Corbis' liability to \$100 only if Corbis (or SMP) were grossly or willfully negligent. Adamo's complaint alleges no negligence on the part of Corbis, but rather, only claims that the photographs were not returned through reasonable efforts. Corbis has clearly demonstrated that reasonable efforts were taken to return Adamo's photographs, efforts that were successful the majority of the time. Based on this evidence, the valid agreement between Corbis and Adamo was not breached. Without any claim of negligence against the Defendant, this Court concludes that the Plaintiffs complaint fails to state a legally recognizable cause of action. Therefore, the Defendant's motion to dismiss the complaint pursuant to CPLR §3211 is granted with prejudice.

This shall constitute the decision and order of this Court.

Date: December 2, 2002

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