

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

STEPHANIE TORRES,

Plaintiff,

-against-

SHMALTZ BREWING COMPANY,

Defendant.

Index No.

COMPLAINT

Plaintiff, by her attorney, David I. Aboulafia, Esq., as and for her complaint against the defendant, alleges upon information and belief as follows:

FIRST: At all relevant times plaintiff is and was an individual with a residence at 2014 Brook Lane, Seaford, NY 11783.

SECOND: Upon information and belief, at all the times hereinafter mentioned, the defendant was and now is a unauthorized foreign corporation duly organized and existing under the Laws of the State of California, with an address located at 915 Cole Street, Ste. 338, San Francisco, CA 94117.

THIRD: Plaintiff is a well known side show performer having performed in Coney Island each year for at least eleven years, and is associated with a non-profit organization called Coney Island USA. That plaintiff, over the years, has developed a favorable reputation as a "snake charmer" and as a Coney Island attraction and has performed in public on hundreds of occasions.

FOURTH: At all the times hereinafter mentioned the defendant was and is now engaged

in the business of brewing, bottling, manufacturing, marketing, selling, and distributing a variety of beers claimed to be “brewed and bottled in New York” and which are sold, marketed and distributed in New York State. Specifically, defendant brews, bottles, manufactures, markets, sells, and distributes a brand of beer called “Coney Island – “Albino Python”.

FIFTH: That on or about the spring of 2008 the principal of the defendant corporation promised the plaintiff a to-be-negotiated sum of money in consideration for which plaintiff would allow her image to be placed on a beer to be created and sold by the defendant corporation. Defendant never issued any monies to the plaintiff despite her due demand.

SIXTH: That since or about May of 2008 an exact portrait or picture or image of plaintiff has appeared on the beer known as “Coney Island – “Albino Python”. That continuously thereafter the defendant, knowingly and without the written consent of the plaintiff, and contrary to the provisions of NY Civil Rights Law §50 & §51, has used plaintiff's image for advertising, commercial and trade purposes in the State of New York and elsewhere in connection with the defendant's said business.

SEVENTH: That upon information and belief, the beer products containing the plaintiff's exact image have been circulated to hundreds of thousands of customers in New York State and the United States, that the plaintiff's image appears on trade advertising, including but not limited to web advertising, and other promotions, and that defendant earns a significant profit for the sale of this specific beer product. Exhibit A contains a picture of the subject product. Exhibit B contains a true likeness of the plaintiff.

EIGHTH: That no individual or entity except the plaintiff has any legal, proprietary and/or commercial right to appropriate or use plaintiff's image, and that plaintiff has otherwise

not given her written consent to the commercial use of same to any such individual or entity.

NINTH: That upon information and belief, defendant has wrongfully and fraudulently caused a trademark application to be filed seeking a further "license" to permanently misappropriate plaintiff's image, and has wrongfully and fraudulently advertised that plaintiff's image is distributed "under a license agreement" or otherwise with her permission.

TENTH: The defendant has threatened to continue the wrongful use of the plaintiff's name as aforesaid, and intends to continue such use unless restrained from so doing.

ELEVENTH: The said misconduct of the defendants was and is calculated to, and in fact did and still does, actually defeat, impede, impair and prejudice the rights and remedies of the plaintiff in said action here, to the irreparable damage and injury of the plaintiff.

AS AND FOR A FIRST CAUSE OF ACTION

TWELFTH: The plaintiff repeats and realleges, as if herein fully set forth, the foregoing allegations contained in the paragraphs First through Eleventh inclusive of this complaint.

THIRTEENTH. For a Permanent Injunction, that the defendant and its agents, servants, representatives and privies and each of them be forever restrained and enjoined from brewing, bottling, manufacturing, marketing, selling, and distributing any products bearing the image and likeness of the plaintiff herein, or any counterfeit or imitation thereof, the same being the sole and exclusive property and right of the plaintiff, and that the defendant be restrained and enjoined to like effect during the pendency of this action.

FOURTEENTH: The plaintiff has no adequate remedy at law for all the wrongs hereinbefore alleged, except that for the wrongs complained of in the Second Cause of Action that plaintiff is entitled to an assessment of damages under N.Y. Civil Rights Law § 51.

AS AND FOR A SECOND CAUSE OF ACTION

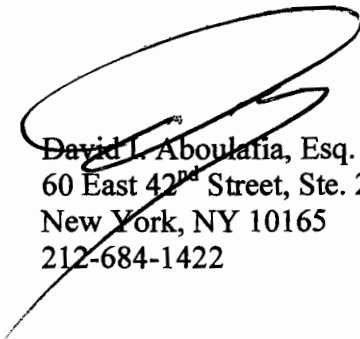
FIFTEENTH: The plaintiff repeats and realleges, as if herein fully set forth, the foregoing allegations contained in the paragraphs First through Fourteenth inclusive of this complaint.

SIXTEENTH: By reason of the forgoing premises defendant has contravened the provisions of Civil Rights Law §50 and §51; that plaintiff has had her image used for pecuniary and commercial purposes without her written consent of any kind, that plaintiff has been injured as a proximate result thereof.

SEVENTEENTH: By reason of the foregoing the plaintiff has been damaged and is entitled to recover from the defendant a sum to be determined by the Court after trial but in no event less than the sum of Two Hundred Fifty Thousand Dollars (\$250,000.00).

WHEREFORE, the plaintiff demands judgment as follows: that the defendant be enjoined and restrained from continuing to use plaintiff's name for advertising or trade purposes; and that she recover from the defendant a sum to be determined by the Court after trial but in no event less than the sum of Two Hundred Fifty Thousand Dollars (\$250,000.00) as general damages and exemplary damages in a sum to be determined by the Court, plus applicable interest, plus the cost and disbursements of this matter and for such other and further relief as to this Court seems just.

New York, NY
May 4, 2009



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