

Celebrity Photos, Social Media, Standing, and a Strip Club

Carmen Electra, et al. v. Idaho Business Holdings LLC, et al., (D. AZ Sep. 24, 2020)

By: Lisa Holubar & Adam Reis | October 5, 2020

State and federal claims brought by various models for unauthorized use of their images in advertisements by a strip club received mixed results on cross motions for summary judgment in the District of Arizona. Plaintiffs prevailed on their state law misappropriation claim, but their state law false light claims were outside of the statute of limitations. Issues of fact on the Lanham Act celebrity false endorsement claims precluded summary judgment, but defendants prevailed on the Lanham Act false advertising claims because the plaintiffs lacked standing.

Plaintiffs, five professional models, actresses, and social media personalities, including Carmen Electra, brought suit against Idaho Business Holdings, LLC (“Defendant”) based on Defendant’s use on Facebook and Instagram of six images of Plaintiffs to promote its strip club. Plaintiffs brought claims for misappropriation of likeness and false light invasion of privacy under Arizona law and violations of the Lanham Act under federal law.

As for the state law claims, Defendant argued that the misappropriation claim does not exist under Arizona law and that the false light claim was barred by the statute of limitations. The Court found the misappropriation claim did exist under Arizona law, noting that each Plaintiff was injured by, at a minimum, being denied the fair market revenue she would have received but for Defendant’s misappropriations. The court thus granted Plaintiffs’ motion for summary judgment. The court found the one-year statute of limitations applied to bar to the false light claim and granted Defendant’s motion for summary judgment.

The Court next considered Plaintiffs’ two claims under Section 43(a) of the Lanham Act—a false association (a.k.a. celebrity false endorsement) under subsection (A) and a false advertising claim under subsection (B). Under subsection A, the Ninth Circuit recognizes a cause of action “when [] celebrity personas are misrepresented as endorsing or associating a company or product.” Proving such a claim requires (1) use in commerce; (2) a false representation; and (3) likelihood of confusion. Finding the first two elements met, the Court focused its analysis on likelihood of confusion. The Court found most of the Ninth Circuit’s likelihood of confusion factors capable of multiple reasonable interpretations and thus presenting triable issues of fact that precluded summary judgment.

To show standing for their false advertising claim under subsection B, the Plaintiffs were required to meet the two-pronged test set forth by the Supreme Court in *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). This requires that (1) plaintiffs’ injury comes within the “zone of interest” protected by the Lanham Act; and (2) defendant’s conduct proximately caused plaintiffs’ injury. The “zone of interest” prong requires “an injury to a commercial interest in reputation or sales.” Plaintiffs argued they were deprived the fair market value they may have otherwise obtained through Defendant’s unauthorized use of their photos, the same injury that supported their state law misappropriation claim. The Court found this injury insufficient to support a federal false advertising claim, as the purpose of the Lanham Act is to protect against unfair competition: “Plaintiffs, who are not suing as consumers, may invoke the Lanham Act’s protection only as market participants seeking to protect their trade against unfair competition.” The Court also held that Plaintiffs failed to show proximate cause, because Plaintiffs failed to show Defendant’s advertisements caused consumers to withhold trade from Plaintiffs.

In sum, the Court found for the Plaintiffs on their misappropriation claims, found the false light claims barred by the statute of limitations, found triable issues of fact on the false endorsement claims, and found for the Defendant on Plaintiffs’ false advertising claims due to a lack of standing. Regarding the false advertising claim, this case highlights the *Lexmark* court’s implication that false advertising claims protect only those engaged in trade. Thus, it seems a celebrity could only sue for false advertising under the Lanham Act if that celebrity were also operating a business associated with the unauthorized advertisement and suffered resulting commercial injury.