UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 15-24442-CIV-MARTINEZ/LOUIS

JAIME FAITH EDMONDSON, et al,

Plaintiffs,

v.

VELVET LIFESTYLES, LLC, f/k/a VELVET LIFESTYLES, INC., d/b/a MIAMI VELVET, JOY DORFMAN, a/k/a JOY ZIPPER, PRESIDENT OF VELVET LIFESTYLES, LLC, and MY THREE YORKIES, LLC,

Defendants.

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VELVET LIFSTYLES, LLC, f/k/a VELVET LIFESTYLES, INC., d/b/a MIAMI VELVET, JOY DORFMAN, a/k/a JOY ZIPPER, PRESIDENT OF VELVET LIFESTYLES, LLC, and MY THREE YORKIES, LLC,

Third Party Plaintiffs,

v.

JLFL CONCEPTS, LLC, a Florida Limited Liability Company, JESSICA L. SWINGER, An individual, and JESSE SWINGER, an Individual,

Third Party Defendants.

_____/

DEFENDANTS' MOTION
FOR JUDGMENT AS A MATTER OF LAW

Defendants, VELVET LIFSTYLES, LLC, JOY DORFMAN, and MY THREE YORKIES,

LLC, by and through the undersigned counsel and pursuant to Rule 50(b), Fed. R. Civ. P., hereby move this Court for entry of judgment as a matter of law in their favor, and in support state as follows:

Introduction

This case involved Plaintiffs' Lanham Act claims against the Defendants for False Advertising and False Endorsement relating to the use of Plaintiffs' images in advertising for a night club. The Court granted summary judgment as to liability only against the Defendants. [D.E. 174]. Trial in this case commenced on Monday, September 9, 2019 at 9:30 a.m., as to damages only.

On September 13, 2019, after Plaintiffs rested their case-in-chief, Defendants made an *ore tenus* motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a). Under Rule 50(a), the court may enter judgment as a matter of law after having "been fully heard on an issue during a trial and the court finds that a reasonable jury would have a legally sufficient evidentiary basis to find for the party on that issue." Fed. R. Civ. P. (50)(a). Defendants argued, *inter alia*, that: 1) Plaintiffs did not introduce *any*, let alone sufficient evidence relating to damages which could be attributable to Defendant Joy Dorfman; and 2) Plaintiffs did not introduce sufficient evidence to support a finding of any damages as to any of the Defendants because Plaintiffs' only evidence of damages was founded on the purely speculative, hypothetical and unreliable opinions of their expert Stephen Chamberlin and, as a corollary, that eleven (11) of the thirty-two (32) Plaintiffs – *comprising more than 1/3* of the Plaintiffs – could not be bothered to show up and testify as how they have been damaged.

In lieu of ruling on Defendants' 50(a) motion from the bench, the Court stated that it would take the motion under advisement and permit the trial to continue with Defendants' case. Thereafter, the Court did not enter a ruling on Defendants' 50(a) motion, but on November 8,

2019, the Court entered Final Judgment [D.E. 315] adopting the Jury Verdict which came back on September 17, 2019 [D.E. 305].

Defendants now renew their motion for judgment as a matter of law pursuant to Rule 50(b), Fed. R. Civ. P.

A. Plaintiffs did Not Introduce a Single Shred of Evidence as to Defendant Joy Dorfman's Involvement in the Club, let alone its Marketing or Involvement in Using the Plaintiffs' Images, Sufficient to Permit the Jury to Award any amount of Damages against Her.

1. Pursuant to the Court's June 5, 2019 Order [DE 257], trial commenced on Monday, September 9, 2019 at 9:30 a.m. at Wilkie D. Ferguson, Jr. United States Courthouse, 400 North Miami Avenue, Courtroom 10-1, Miami, Florida 33128, and concluded the following week. During the trial term, Joy Dorfman testified and was subject to cross-examination.

2. Neither the testimony of Joy Dorfman, nor the testimony of any other witness, supported the inclusion of Joy Dorfman as a personally liable defendant against whom damages could be assessed. To the contrary, the trial testimony unequivocally established that Joy Dorfman had no participation whatsoever in the day-to-day management of Miami Velvet, the subject Club, and likewise did not participate, influence, weigh in on, select, or approve the advertising which forms the sole basis of the liability and damages in this case.

3. Despite possessing all of Club's financial records, including tax returns, and internal correspondence relating to its operation and management, Plaintiffs could not and did not muster any evidence throughout the years' long duration of this case that could establish any personal liability as to Joy Dorfman or responsibility for Plaintiffs' damages as found by the Jury.

4. It is no surprise then that the Plaintiffs did not even bother to depose Ms. Dorfman during the pendency of the case or call her as a witness on their case-in-chief (despite calling other non-Plaintiff or Plaintiff-expert witnesses during their case-in-chief).

5. The standard to apply in assessing motions under Rule 50 are as follows:

> The standard for judgment as a matter of law mirrors that of summary judgment in that the non-movant must do more than raise some doubt as to the existence of facts but must produce evidence that would be sufficient to require submission of the issue to a jury. *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Although we look at the evidence in the light most favorable to the non-moving party, "the non-movant must put forth more than a mere scintilla of evidence suggesting that reasonable minds could reach differing verdicts." *Abel*, 210 F.3d at 1337. Therefore, a substantial conflict in the evidence is required before a matter will be sent to the jury, and the grant of a Rule 50 motion is proper when the evidence is so weighted in favor of one side that that party is entitled to succeed in his or her position as a matter of law. *Id.*

Thorne v. All Restoration Servs., 448 F. 3d 1264, 1266 (11th Cir. 2006).

6. Given the total lack of evidence relating to Ms. Dorfman, no reasonable jury could assess damages against her.

7. Further, under the applicable law, in order for Joy Dorfman to be held individually responsible for any alleged wrongdoing, Plaintiffs must show that they have sufficient facts to pierce the corporate veil or that she participated in the wrongdoing. *Supercase Enter. Co. v. Marware, Inc.*, No. 14-61158-CIV, 2014 WL 12495261 (S.D. Fla. Nov. 24, 2014).

8. In the instant case, no trial testimony whatsoever showed personal liability on the part of Joy Dorfman, and Plaintiffs' myriad filings contain no more than mere conclusory statements as to Joy Dorfman's personal liability that were supported neither by evidence nor trial testimony. Even focusing on Plaintiffs' conclusory allegations, they fail to provide any legitimate basis to show that Ms. Dorfman's actions support any liability against her individually, or that she committed or participated in any alleged wrongdoing permitting damages to be attributed to her conduct.

9. Absent extraordinary factors, Courts are appropriately reluctant to "pierce the corporate veil." See *Dania Jai-Alai Palace, Inc.* 450 So.2d at 1121 (Fla.1984); *Johnson Enters. of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1320 (11th Cir.1998) (quoting *State ex rel. Cont'l Distilling Sales Co. v. Vocelle*, 158 Fla. 100, 27 So.2d 728, 729 (Fla.1946)). Only in exceptional cases where there has been extreme abuse of the corporate form do they find a basis to do so. *See North American Clearing, Inc. v. Brokerage Computer Sys., Inc.*, 2009 WL 1513389 (M.D. Fla. May 27, 2009). Under Florida law, to pierce the corporate veil a plaintiff must show that the corporation was organized or employed as a mere device or sham. *See Gov't of Aruba v. Sanchez*, 216 F.Supp.2d 1320, 1362 (S.D.Fla.2002); *see also North American Clearing, Inc., supra.* Absolutely none of those factors is present in the instant action.

10. As to the Lanham Act claims that Plaintiffs raise in the instant case, it is clear that "Natural persons, like corporations, may be liable for trademark infringement under the Lanham Act." *Chanel, Inc. v. Italian Activewear of Fla., Inc.*, 931 F.2d 1472, 1477 (11th Cir. 1991). That being said, it is **only where** the "corporate officer ... directs, controls, ratifies, participates in, or is the moving force behind the infringing activity, [he or she] is personally liable for such infringement without regard to piercing of the corporate veil." *Babbit Elecs., Inc. v. Dynascan Corp.*, 38 F.3d 1161, 1184 (11th Cir. 1994). In addition, only "[I]f an individual actively and knowingly caused the infringement, he is personally liable" under the Lanham Act); *Rolex Watch U.S.A., Inc. v. Bonney*, 546 F.Supp.2d 1304, 1306 (M.D.Fla.2008).

11. Other than holding a "position" with the corporate Defendants, which is a matter of public record, the Plaintiffs, having conducted extensive discovery and cross-examination during Joy Dorfman's trial testimony, have absolutely no evidence that Joy Dorfman "directed, controlled, ratified, participated in, or was the moving force behind the infringing activity" at issue in the instant action.

12. Joy Dorfman: 1) had no relationship with the operation of the subject Club; 2) had no participation in the advertising for the subject Club; and, therefore 3) could not be individually liable for anything related to any issues with said advertising or Plaintiffs' damages.

B. Plaintiffs Generally Failed to Submit Sufficient Evidence to the Jury to Permit the Jury to Assess Damages against the Defendants.

13. Plaintiffs pursued two (2) forms of damages, actual damages and compensatory damages, the latter of which they premised upon the value of the images used. For the latter, Plaintiffs sought to grossly inflate the value based upon the testimony of their expert, Stephen Chamberlin.

14. As to actual damages, *e.g.*, lost jobs, lost clients, costs to rehabilitate brand, or the like, of the Plaintiffs who did attend the trial, exactly zero (0) of them testified to suffering any actual damages.

15. As to the value of the images used, most of the Plaintiffs testified that they were paid, on average, between $2,500 and $5,000 for a day-long (or more) shoot generating dozens of images, one (typically) of which was used for advertising the Club, while at least one image – Plaintiff Moreland's – was a "selfie" taken in her house used for a calendar containing dozens of images that she sold for less than $100.00. Of course, these amounts, or "day-rates," are not the value of the digital images themselves, but rather represent recompense for the Plaintiffs' time, brand and, among other things, likeness, in participating in the photo shoot and allowing use of their images.

16. Other than those "day-rates," Plaintiffs could not introduce any hard, direct evidence establishing the value of the actual images that were used by the Defendants. Of course, eleven (11) of the Plaintiffs did not attend and provide their day-rates, and judgment as a matter of law should awarded in favor of the Defendants as to those Plaintiffs for that reason alone.

17. To supplement the total dearth of actual evidence as the value of the images, Plaintiffs relied upon the opinion of their expert, Stephen Chamberlin.

18. Mr. Chamberlin's opinion regarding the value of the images, however, was textbook speculation, which was the conclusion reached by the Court in *Gibson v. BTS North, Inc.*, 2018 WL 888872, *10-11 (S.D. Fla. February 14, 2018):

> **After reviewing Mr. Chamberlin's report, I do find his calculations of the total actual damages per Plaintiff to be problematic. For example, Mr. Chamberlin valued Plaintiff Alicia Whitten's "working day rate" at $5,000. Chamberlin Rep., 16. Mr. Chamberlin does not explain what "working day rate" means, but presumably it represents the fair market value for the use of each image. Defendants used one image of Plaintiff Whitten three times. *Id.* Mr. Chamberlin then calculated Plaintiff Whitten's actual damages as $30,000 rather than the expected $15,000. *Id.* Mr. Chamberlin provides no explanation as to where the $30,000 came from.** Another example is Plaintiff Ashley Vickers. Mr. Chamberlin valued her "working day rate" at $100,000. *Id.* at 19. Defendants used three different images of Plaintiff Vickers; two images were used three times and one image was used twice. ECF No. 1-5. Mr. Chamberlin noted that Defendant BTS South Miami "used three images (One shoot day)," Defendant Booby Trap Doral "used three images (One shoot day)," and Defendant Booby Trap Pompano used one image. *Id.* at 19. Mr. Chamberlin then calculated Plaintiff Vickers' actual damages at $900,000. *Id.* It is unclear whether a "shoot day" equals a "working day" and it is again unclear how Mr. Chamberlin calculated the total actual damages. If the $100,000 "working day rate" was per use, the total would presumably be $800,000. If "one shoot day" equaled a "working day," then Plaintiff Vickers would presumably be entitled to slightly over $200,000. There is no explanation as to how the $900,000 was calculated. **Similar confusion exists as to the calculation of the remaining Plaintiffs' actual damages. *Id.* at 20–46.**
>
> **Even if I could rely on Mr. Chamberlin's report for the fair market valuation of the use of each Plaintiff's image, assuming that is what "working day rate" even means, Mr. Chamberlin has not sufficiently explained how he came up with his calculations for the total actual damages in his report. I therefore have to agree with Defendants that his calculations are speculative.** While Mr. Chamberlin could further flesh out these inconsistencies at trial, at the summary judgment stage his expert

> report is insufficient to show the damages sustained by Plaintiffs as to Counts III and IV.

Gibson, 2018 WL 888872, *10-11.

19. Mr. Chamberlin did nothing at trial to flesh out how he achieved the seemingly random, astronomical (relative to the actual day-rates) valuations for the images used. Mr. Chamberlin's opinion relied upon day-rates for jobs the Plaintiffs took at random dates, *i.e.* not correlated to when the images were taken and/or used; for random end-users, *i.e.* not for entities similar to Defendants; and without explanation and/or account for the end-product resulting from the particular day-rate, *i.e.* video as opposed to print as opposed to digital-only as opposed to billboard, etc.

20. Mr. Chamberlin's purely hypothetical approach led to absurd contradictions such as the use of Plaintiff Krupa's relatively staid image being valued at $900,000, when she was paid only $5,000.00 for use of her Face and Name on huge billboard in Las Vegas advertising a Gentlemen's Club there (despite not even appearing at trial to testify as to her own damages, the jury awarded Ms. Krupa $65,000.00).

21. However, the best indication that Mr. Chamberlin's testimony was too speculative to go to the jury is that the damages the jury assessed for each Plaintiff bore absolutely no relation Mr. Chamberlin's testimony and opinions, other than that they exceeded the Plaintiffs' actual day-rates for the actual photos used.

22. Given the purely speculative nature of Mr. Chamberlin's opinion, it must be concluded that the jury's damages assessment for each Plaintiff is also speculative, and therefore, subject to relief under Fed. R. Civ. P. 50(b). *See, generally, Hard Candy, LLC v. Anastasia Beverly Hills, Inc.*, 921 F. 3d 1343, 1353 ("the primary limiting principle is that the [Lanham Act] damages may not be speculative") quoting *Ramada Inns, Inc. v. Gadsden Motel, Co.*, 804 F. 2d 1562, 1564

(11th Cir. 1986) ("a trademark infringement award must be based on proof of actual damages and that some evidence of harm arising from the violation must exist"); *See also Nature's Earth Products, Inc. v. Planetwise Products, Inc.*, 2010 WL 4384218, *5 (S.D. Fla. October 28, 2010) ("Defendant does not allege how it was harmed, and therefore its entitlement to any damages from Plaintiff, is pure speculation").[1]

23. Accordingly, for the foregoing reasons, judgment as a matter of law should be granted in favor of the Defendants and against the Plaintiffs.

WHEREFORE, Defendants, VELVET LIFSTYLES, LLC, JOY DORFMAN, and MY THREE YORKIES, LLC, respectfully request entry of judgment as a matter of law against the Plaintiffs, together with an Oder vacating the Jury Verdict and Final Judgment, and for such other and further relief as this Court deems just and proper.

Date: December 6, 2019.

Respectfully submitted,

LUKE LIROT P.A.

/s/ Luke Lirot

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[1] While not the focus of the damages trial, Plaintiffs also alleged damages based upon the Club's profit disgorgement. However, Plaintiffs presented no evidence on how the Club's gross revenues over a period of five (5) years bore any relation to the value of images used one (1) time for one (1) event over that timeframe; there was no evidence on profits the Club earned from the actual events advertised using the Plaintiffs' images; and there was no evidence juxtaposing profits or revenues from events which were promoted with and without Plaintiffs' images. Accordingly, any damages based upon profit disgorgement would also be pure speculation. *See Id.* For this reason, among others, Defendants also sought judgment as a matter of law as to damages based upon profit disgorgement and, to the extent the Final Judgment is based upon same, renew that motion here.

and

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 6, 2019, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all parties in this case.

/s/ Joshua Zipper
Joshua L. Zipper