

21-2149-cv

Souza v. Exotic Island Enterprises, Inc.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2022

Argued: December 2, 2022 Decided: May 19, 2023

Docket No. 21-2149-cv

ALANA SOUZA, AKA ALANA CAMPOS, BROOKE BANX, BROOKE TAYLOR-JOHNSON,
JACLYN SWEDBERG, JAIME EDMONDSON-LONGORIA, JESSICA HINTON, TIFFANY
TOTTH-GRAY, URSULA SANCHEZ, AKA URSULA MAYES,

Plaintiffs-Appellants,

— v. —

EXOTIC ISLAND ENTERPRISES, INC., DBA MANSION GENTLEMEN'S CLUB &
STEAKHOUSE, KEITH SLIFSTEIN,

Defendants-Appellees,

EXCLUSIVE EVENTS & PROMOTIONS INC., DBA THINK SOCIAL FIRST,

*Third-Party-Defendant.**

* The Clerk of Court is directed to amend the caption as displayed above.

B e f o r e:

LYNCH, NARDINI, and MENASHI, *Circuit Judges*.

Plaintiffs-Appellants, a group of current and former professional models, appeal from a judgment of the United States District Court for the Southern District of New York (Karas, J.) granting summary judgment against them on a variety of claims arising from the use of their images in social media posts promoting a “gentlemen’s club” operated by Defendants-Appellees. On appeal, Plaintiffs argue, among other things, that the district court misapplied this Court’s framework for evaluating the likelihood of consumer confusion in the context of a Lanham Act false endorsement claim, misconstrued Supreme Court guidance constraining the Lanham Act’s reach in the false advertising context, and applied the wrong statute of limitations to Plaintiffs’ state law right of publicity claims. We disagree. We conclude that the district court properly granted summary judgment on Plaintiffs’ federal claims and the majority of their state law claims, and permissibly declined to exercise supplemental jurisdiction over their remaining claims. We therefore **AFFIRM** the judgment of the district court.

JOHN V. GOLASZEWSKI, Casas Law Firm, P.C., New York, NY,
for Plaintiffs-Appellants.

MICHAEL KOLB, O’Connor & Partners, PLLC, Kingston, NY,
for Defendants-Appellees.

GERARD E. LYNCH, *Circuit Judge*:

This appeal concerns several claims brought by Plaintiffs-Appellants Alana Souza (a/k/a Alana Campos), Brooke Banx, Brooke Taylor-Johnson, Jaclyn Swedberg, Jaime Edmondson-Longoria, Jessica (a/k/a Jessa) Hinton, Ursula Sanchez (a/k/a Ursula Mayes), and Tiffany Toth-Gray (together, “Plaintiffs”) – all current or former professional models – against Defendants-Appellees Exotic Island (“Exotic”) and Keith Slifstein (together, “Defendants”). Those claims arise from the basic undisputed allegation that Defendants, through a third-party vendor, used images of Plaintiffs without their permission in social media posts promoting a “gentlemen’s club” operated by Defendants.

After the parties cross-moved for summary judgment, the United States District Court for the Southern District of New York (Kenneth M. Karas, *J.*) granted summary judgment in Defendants’ favor. Specifically, it concluded that (1) Plaintiffs’ false endorsement claims, as supported by the evidentiary record on summary judgment, were foreclosed by our decision in *Electra v. 59 Murray Enters., Inc.*, 987 F.3d 233 (2d Cir.), *cert. denied*, 142 S. Ct. 563 (2021); (2) their false advertising claims were founded upon injury that either fell outside the zone of interests protected by the Lanham Act, or that was unsubstantiated by the record;

and (3) the bulk of their state-law right of publicity claims were barred by New York's one-year statute of limitations for such claims. The district court then declined to exercise supplemental jurisdiction over the few state-law claims that were not time-barred.

We agree with the district court on all counts, and therefore AFFIRM its judgment in full.

BACKGROUND

Although the parties cross-moved for summary judgment below, because this appeal concerns the district court's grant of Defendants' motion, we construe the record in the light most favorable to Plaintiffs. *See Heublein, Inc. v. United States*, 996 F.2d 1455, 1461 (2d Cir. 1993). The factual backdrop of this case, however, is simple and largely undisputed.

I. Factual Background

A. *The Parties*

Exotic and its president, Slifstein, operate Mansion Gentlemen's Club & Steakhouse ("Mansion") in Newburgh, New York. Plaintiffs are or were professional models whose pictures appeared without their consent, and without compensation, on social media sites associated with Mansion. The Instagram and

Facebook posts at issue were actually created and published to Defendants' accounts by Third-Party Defendant Exclusive Events & Promotions d/b/a Think Social First, a third-party vendor authorized by Exotic to operate those accounts on its behalf.

Each Plaintiff works or has worked as a professional model, promoting her "image, likeness and/or identity . . . for the benefit of various clients, commercial brands, media and entertainment outlets." *E.g.*, Joint Appendix (J.A.) 63. In substantially identical declarations, Plaintiffs have testified that because they "rely on [their] professional reputation[s] to book modeling and advertising jobs," their reputations are "critical" to the opportunities they are offered, and they therefore "have spent considerable time and energy" protecting and policing their images and reputations, and carefully negotiating their modeling fees based on "informed assessment[s]" of any given job's effect on their brands. *E.g.*, *id.* 63-64.

Plaintiffs have enjoyed varying levels of success and visibility in their modeling careers. Several have appeared in magazines, advertising campaigns, television episodes, and films. Some are former Playboy Playmates, including five (Swedberg, Campos, Hinton, Edmondson-Longoria, and Toth-Gray) who

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