

**IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL
CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA**

CASE NO: 2022-002153-CA-01

SECTION: CA06

JUDGE: Charles Johnson

Diego R Dewar

Plaintiff(s)

vs.

Gaius International LLC

Defendant(s)

**ORDER GRANTING DEFENDANT’S MOTION FOR FINAL SUMMARY JUDGMENT
ON ALL COUNTS**

THIS CAUSE came before the Court on September 11, 2023, on Defendant Gaius International LLC’s (“Gaius”) Amended Motion for Final Summary Judgment filed on May 10, 2023 (the “Motion”). The Court, having reviewed the Court’s file, including the Motion, Plaintiff Diego Dewar’s (“Dewar”) Opposition to Defendant Gaius’ Amended Motion for Final Summary Judgment (“Opposition”), Gaius’ Reply In Support Of Its Amended Motion For Final Summary Judgment, the record evidence, and having considered the arguments of counsel during a two-hour special set hearing, and all relevant case law, and being otherwise fully advised on the premises, it is **ORDERED AND ADJUDGED** as follows:

INTRODUCTION

In April 2021, Gaius was incorporated in Florida with Dewar as its manager, who did not hold an ownership interest. (Declaration of Dewar ¶ 3, attached as Exhibit A of the Opposition). Gaius opened a commercial bank account ending in 5062 (the “Account”) in Bank of America (“BOA”), identifying Dewar as Gaius’ manager—with Dewar’s knowledge—and providing a copy of its Operating Agreement, which confirmed Dewar’s managerial role and lack of ownership.

(Motion, at 2). In December 2013, Dewar ceased his role as manager for Gaius, and the Florida Department of State's records were updated to remove Dewar as its manager. (Affidavit of Pedro Maggi ¶ 16, attached as Exhibit B to the Motion). During the second semester of 2020, BOA asked Gaius to identify its shareholders or UBOs for the first time and informed Gaius that Dewar had to authorize the update on the Account because he still appeared as Gaius' manager in BOA's internal records, which had been submitted to open the Account in 2013. (Aff. Maggi ¶ 22). On August 4, 2021, BOA closed the Account unilaterally. (Dec. Dewar ¶ 26; Aff. Maggi ¶ 17).

On February 22, 2022, Dewar filed a complaint against Gaius seeking injunctive relief for violation of Florida Statute § 540.08 in Count I, damages for violation of Florida Statute § 540.08 in Count II, damages for common law invasion of privacy in Count III, and damages for defamation by implication in Count IV. Dewar's complaint alleges that Gaius knowingly used his identity to maintain the Account opened, having millions of dollars in transactions procured through the unlawful use of his name and identity, resulting in damages. On May 20, 2023, Defendant filed the Motion seeking final summary judgment on all counts as a matter of law, alleging that no genuine dispute exists as to any material fact. Specifically, Gaius alleges that there is no material factual dispute or record evidence, as to (1) commercial use of Dewar's name or likeness, (2) invasion of privacy, (3) publication or defamation, or (4) actual damages. In accordance with the Court's Case Management Order dated January 19, 2023, all discovery was to be completed by May 15, 2023. (DE.30). The discovery deadline expired without either party seeking an extension of time before the hearing on the Motion. Moreover, there is no record evidence of any pending discovery requests, a motion to compel or a pending deposition—which would preclude the Court's entry of final summary judgment, nor was there a motion or a request to continue the hearing on the Motion. The Motion was filed on May 10, 2023, four months before the hearing.

LEGAL STANDARD FOR SUMMARY JUDGMENT

The summary judgment standard provided for under Florida Rule of Civil Procedure 1.510(c) is to be construed and applied in accordance with the federal summary judgment standard articulated in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *see also* Amendment to Fla. R. Civ. Pro. 1.510(c). Consequently, a summary judgment shall be granted when the record shows that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp.*, 477 U.S. at 323-25.

If the nonmoving party fails to make “a sufficient showing on an essential element of the case with respect to which she has the burden of proof,” the moving party is entitled to summary judgment. *Celotex Corp.* 477 U.S. at 323. Likewise, “[a] mere ‘scintilla’ of evidence supporting the [nonmoving] party’s position will not suffice; there must be enough of a showing that the jury could reasonably find for that party.” *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990) (citing *Anderson*, 477 U.S. at 1576).

FINDINGS

THE COURT FINDS that Defendant is entitled to final summary judgment on all counts against Plaintiff for the following reasons:

I. Count I for Injunctive Relief under Florida Statute § 540.08

Plaintiff alleges that Gaius is using his name without authorization with the attendant value of his U.S. citizenship vis-à-vis Merrill Lynch/BOA in violation of the Florida Statute § 540.08 (1) and seeks injunctive relief to cease the use and abuse of his identity for any purpose. **Compl.** ¶¶ 50-51. In opposition to Plaintiff’s claim, Defendant affirms that the only document where Dewar was purported as Gaius’ manager vis-à-vis Merrill Lynch/BOA is in the Account’s internal opening document, and the Account was closed on August 4, 2021. (Aff. Maggi ¶ 27; Dec. Dewar ¶ 26).

Plaintiff has not come forward with a single piece of evidence substantiating the allegation of an ongoing use of his name, identity, or U.S. citizenship, in violation of the Florida Statute § 540.08 (1). As the record is devoid of any material factual disputes as to Count I, seeking the extraordinary remedy of injunctive relief, Defendant is entitled to final summary judgment on Count I, as a matter of law. (Hearing Transcript 15:19-20).

II. Count II for damages under Florida Statute § 540.08

Plaintiff alleges that Gaius's unauthorized use of his name, with the attendant value of his U.S. citizenship vis-à-vis Merrill Lynch/BofA, is a violation of the Section 540.08, Florida Statutes. **Compl. ¶¶ 55-56.**

The Florida Supreme Court has held that the purpose of Florida Statute §540.08 is to prevent the use of a person's name or likeness to directly promote a product or service because of the way that the use associates the person's name or personality with something else. See [Tyne v. Time Warner Entm't Co., L.P.](#), 901 So. 2d 802 (Fla. 2005). This statute prohibits unconsented use of an individual's name and likeness only when such directly promotes a commercial product or service. See [Nat'l Football League v. Alley, Inc.](#), 624 F. Supp. 6 (S.D. Fla. 1983). To maintain a cause of action for this statutory right of publicity, a plaintiff must allege that his or her name or likeness was used to directly promote a commercial product or service. See [Fuentes v. Mega Media Holdings, Inc.](#), 721 F. Supp. 2d 1255 (S.D. Fla. 2010); [Lane v. MRA Holdings, LLC](#), 242 F. Supp. 2d 1205 (M.D. Fla. 2002).

In opposition, Gaius alleges that Plaintiff's claim is deficient because it lacks allegations of unauthorized use of his name to directly promote a commercial product or service or proof of damages—as none exists. (Motion ¶¶ 14-23). Plaintiff fails to plead the element of commercial use to directly promote a product or service and puts forward no record evidence in support of commercial use, as defined by Florida Statute §540.08 or actual damages. First, leaving Dewar's

name in a BOA internal document that had the sole purpose of opening the Account, is an insufficient allegation of commercial use of Dewar's name. Furthermore, BOA's internal document does not demonstrate that Gaius used Dewar's name to promote Gaius' commercial products or services, as required by Florida law. Additionally, there are no allegations in the Complaint nor was there any record evidence provided to the Court that properly showed a benefit or profit to the commercial value of Gaius, as a result of Dewar's name. Lastly, Plaintiff failed to provide any evidence of actual damages, and relied instead on speculative damages, which are insufficient for a violation of Florida Statute § 540.08. *See Gonzalez v. Citizens Prop. Ins. Corp.*, 273 So. 3d 1031 (Fla. 3d DCA 2019).

Plaintiff merely asserts speculations, "worst-scenario" hypothesis, and unsupported suspicious in a failed attempt to claim commercial use to directly promote Gaius services or products that, by no means, meet the standard set forth by the Florida Courts. (Dec. of Dewar ¶ 28-29; Plaintiff's Responses and Objections to First Set of Interrogatories from Defendant Gaius, Nos. 6 and 20, attached as Exhibit 3 of the Motion; Plaintiff's Responses and Objections to Second Set of Interrogatories from Defendant Gaius No. 2 and 20, attached as Exhibit 12 of the Motion; Plaintiff's Response and Objections to Defendant's First Request for Production of Documents, No. 6, attached as Exhibit 9 of the Motion). These allegations, in sum, are insufficient for Plaintiff to meet his burden to come forward with evidence or proper allegations for pleading commercial use to directly promote a commercial product or service as required by Florida law.

Thus, Plaintiff failed to plead the element of commercial use to directly promote a product or service and puts forward no record evidence in support of commercial use, as defined by Florida Statute §540.08 or actual damages. As the record is devoid of any material factual dispute, as to Count II, seeking damages for violation of Florida Statute § 540.08, Defendant is entitled to final summary judgment on Count II, as a matter of law. (Hear. Trans. 13:21; 14:12-22).

III. Count III for damages under common law invasion of privacy by appropriation

Plaintiff alleges that Gaius breached his duty to not make unauthorized use of his name or likeness to obtain a benefit, in violation of his right to privacy. **Compl.** ¶¶ 58-59.

Florida Courts have identified this right to privacy, as a tort [invasion of privacy] by accepting the following four general categories recognized by Prosser in his Law of Torts, p. 804–14 (4th Ed.1971): (1) Intrusion; (2) Public Disclosure of Private Facts; (3) False Light in the Public Eye; and (4) *Appropriation, i.e., commercial exploitation of the property value of one’s name*. See *Allstate Ins. Co. v. Ginsberg*, 863 So.2d 156 (Fla. 2003) (emphasis added). The Florida misappropriation statute requires the unauthorized use of a person’s name or image to directly promote a product. Florida has adopted the Restatement (Second) of Torts, which defines causes of action for invasion of privacy. See *Mayhall v. Dennis Stuff Inc.*, 31 Media L. Rep. 1567 (Fla. Cir. 2002). (“Plaintiff failed to establish that defendant used her name or likeness without her consent *for defendant’s own commercial purpose*”) (emphasis added).

Therefore, common law invasion of privacy requires the use of one’s name or likeness, without consent for commercial purposes or profit. For the same reasons discussed above in Section II, Plaintiff failed to properly allege or establish through record evidence the use of his name for commercial purposes and profit. There are no material factual disputes as to commercial use of Dewar’s name to promote a product or service, nor is there proof of actual damages. (Hear. Trans. 13:21; 14:12-22).

As there is no material factual dispute as to commercial use of Dewar’s name or likeness for a commercial purpose and for profit, nor as to actual damages, Gaius is entitled to entry of final summary judgment as to Count III, as a matter of law. (Hear. Trans. 13:21-25; 14:1-5).

IV. Count IV for damages under defamation by implication

Plaintiff alleges that Gaius breached its duty of care to Dewar by creating a false impression to BOA that Dewar was still affiliated with and authorized to conduct business

on Gaius' behalf Gaius after his departure on December 20, 2013. **Compl.** ¶¶ 63-64.

Under Florida law, the elements for defamation are: (1) publication; (2) falsity; (3) actor must act with knowledge or reckless disregard as to the falsity on a matter concerning a public official, or at least negligently on a matter concerning a private person; (4) actual damages; and (5) statement must be defamatory. See [*Jews For Jesus, Inc. v. Rapp*, 997 So. 2d 1098 \(Fla. 2008\)](#). A defamatory statement is one that tends to harm the reputation of another by lowering him or her in the estimation of the community or, more broadly stated, one that exposes a plaintiff to hatred, ridicule, or contempt or injures his business, or reputation, or occupation. *Id.*

Plaintiff is seeking damages against Gaius for defamation by implication for leaving Dewar's name in the internal BOA document that identified him as Gaius' manager, after he had ceased his role in Gaius. In opposition to Plaintiff's claim, Defendant asserts that Plaintiff fails to plead the publication of a defamatory statement that caused him damages. (Motion ¶¶ 25-27).

Plaintiff's allegations in this Count are deficient because there is no publication in the traditional sense of his name as a private and internal document reflected solely in a bank do not support a claim for defamation under Florida law. See *Hullick v. Gibraltar Private Bank & Tr. Co.*, 279 So. 3d 809 (Fla. 3d DCA 2019); *Am. Airlines, Inc. v. Geddes*, 960 So. 2d 830 (Fla. 3d DCA 2007). Moreover, the opening account document did not purport false information because Dewar was the manager of Gaius at the time of the issuance of the document in 2013 and there is no record evidence the document was used publicly, after 2013. In addition, there was no evidence of defamation or damages, as the only evidence presented was speculative in nature and not actual damages as required by Florida law.^[1]

As there is no material factual dispute as the elements of defamation nor any proof of actual damages, Defendant is entitled to final summary judgment on Count IV, as a matter of law. (Hear. Trans. 14:15-22).

Accordingly, it is hereby **ORDERED AND ADJUGED** that:

1. Gaius' Amended Motion for Final Summary Judgment filed on May 10, 2023, is **GRANTED** on all counts, for the reasons stated above and through the facts placed on the record and incorporated herein.
2. The Court retains jurisdiction for a determination of attorney's fees and costs pursuant to Florida Statute §768.79.
3. The Plaintiffs shall take nothing by this action, and Defendant, shall go hence without day.

[1] The experts' declarations presented by Plaintiff are inadmissible evidence, as they offer speculative damages the Court cannot consider in a motion for summary judgment. Hear. Trans. 13: 4-18; see further *Perez v. Citizens Prop. Ins. Corp.*, 343 So. 3d 140 (Fla. 3d DCA 2022) ("it is well established that affidavits, such as those presented by plaintiff, which are based entirely upon speculation, surmise and conjecture, are inadmissible at trial and legally insufficient to create a disputed issue of fact in opposition to a motion for summary judgment.")

DONE and **ORDERED** in Chambers at Miami-Dade County, Florida on this 2nd day of October, 2023.

2022-002153-CA-01 10-02-2023 9:43 AM


2022-002153-CA-01 10-02-2023 9:43 AM

Hon. Charles Johnson

CIRCUIT COURT JUDGE

Electronically Signed

Final Order as to All Parties SRS #: 12 (Other)

THE COURT DISMISSES THIS CASE AGAINST ANY PARTY NOT LISTED IN THIS
FINAL ORDER OR PREVIOUS ORDER(S). THIS CASE IS CLOSED AS TO ALL PARTIES.

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