Lanier v. President and Fellows of Harvard College

Middlesex County (MA) Superior Court, 2021.

The plaintiff, Tamara Lanier ("Lanier"), filed this action against the defendants, President and Fellows of Harvard College, also known as Harvard Corporation, Harvard Board of Overseers, Harvard University, and the Peabody Museum of Archaeology and Ethnology ("Peabody Museum" or "Peabody") (collectively, "Harvard"), concerning photographs that a Harvard professor commissioned in 1850 depicting two slaves, Lanier's alleged ancestors. The matter is presently before the court on Harvard's motion to dismiss Lanier's Second Amended Complaint. After hearing and careful review, for the following reasons, the motion to dismiss is **ALLOWED.**

BACKGROUND

The following is a brief recitation of the well-pleaded factual allegations in the complaint, which the court accepts as true. *See Sisson v. Lhowe*, 460 Mass. 705, 707 (2011). Certain additional facts are reserved for discussion below.

Harvard is a private educational institution based in Cambridge, Massachusetts. It was founded in 1636. From 1847 until his death in 1873, Harvard employed Swiss natural scientist Louis Agassiz ("Agassiz"). Agassiz primarily studied comparative zoology, which entails grouping living things together based on anatomical characteristics and placing them in hierarchical order. Agassiz also supported polygenism, which is the theory that racial groups do not share a common origin and thus are fundamentally and categorically distinct. At a time when slavery was hotly debated in the United States, Agassiz believed that white and black people had different origins. Agassiz's views purportedly gave scientific legitimacy to the myth of white racial superiority and the importance of the separation of races.

In an effort to legitimize polygenism, Agassiz focused on his perception of physical differences between white and black people. To prove that black people were biologically inferior to whites, Agassiz embarked on a tour of South Carolina plantations in search of subjects-racially "pure" slaves born in Africa to collect empirical data. Agassiz was taken to the B.F. Taylor plantation in Columbia, South Carolina, where he selected several enslaved men and women to be photographed, including an older man Renty Taylor ("Renty"), also known as Papa Renty, and his daughter Delia. Lanier is a direct descendant of Renty and Delia. Renty and Delia were stripped naked to the waist and photographed from the front, side, and back without their consent or compensation. Shortly thereafter, Agassiz published his photographs and "research" in an article entitled *The Diversity of Origin of the Human Races,* which

claimed to offer a scientific defense of racial inequality based on immutable physical characteristics.

In the years that followed, Agassiz continued his crusade of spreading polygenism by giving lectures and publishing additional papers; all the while, he remained employed by Harvard as the leader of Harvard's Lawrence Scientific School. Lanier alleges that Harvard steadfastly supported Agassiz and did not challenge or disavow his display of racist pseudoscience even after polygenism had been definitively disproven. She further claims that by supporting Agassiz and elevating him to the highest echelons of academia, Harvard promoted and legitimized white superiority.

Agassiz retained his professorship and served as director of the Harvard's Museum of Comparative Zoology until his death in 1873. However, even after his death, Agassiz's legacy at Harvard remained. As of March 20, 2019, Harvard's website continued to support and praise Agassiz as a "renowned teacher of natural history."

It was in 1976 that Harvard discovered that Agassiz's photographs of Renty and Delia were stored on its campus. This discovery made national headlines, as they were the earliest known photographs of American slaves. Lanier alleges that following the discovery, Harvard commenced a decades-long campaign to sanitize the history behind the images and exploit them for prestige and profit by displaying the photographs at the Peabody Museum.

Lanier asked Harvard to relinquish the photographs to her in a letter to then Harvard President Drew Faust ("President Faust") in October 2017, but Harvard declined. Lanier claims that by denying her possession of the photographs, Harvard is perpetuating the systematic subversion of black property rights that began during slavery and continued for a century thereafter and is sanitizing its own historical involvement and association with slavery by exploiting and profiting from the photographs.

DISCUSSION

Lanier filed this action on March 20, 2019, alleging that the photographs were taken without Renty's and Delia's consent and thereafter unlawfully retained by Harvard. Lanier asserts seven claims. Count 1 asserts a writ of replevin, seeking to reclaim possession of the photographs as Renty's and Delia's next of kin. Count 2 asserts a claim for conversion. Count 3 asserts a claim for unauthorized use of, name, picture, and/or portrait in violation of G. L. c. 214, § 3A. Count 4 asserts a Massachusetts Civil Rights claim, alleging that Harvard unlawfully advocated in favor of slavery in the nineteenth century. Count 5 alleges that Harvard's ownership and/or control over the photographs intentionally interferes with Lanier's property interest and rights.

Count 6 asserts a claim for negligent infliction of emotional distress. Finally, Count 7 asserts a claim for equitable restitution, alleging that Harvard has been unjustly enriched through its possession of the photographs.

Harvard moves to dismiss these claims. * * *

B. Propertv-Related Claims: (Counts 1, 2, 5, 6 and 7)

In support of its motion to dismiss, Harvard argues that the property-related claims fail because * * * Lanier does not have a property interest in the photographs. * * *

As briefly mentioned above, Lanier's property-related claims are based on the legal assertion that Renty and Delia had a property interest in the photographs and that Lanier, as a descendant of Renty and Delia, currently holds such property interest.[12] The existence of a property interest is a necessary element of each of these property-related claims, without which the claims fail as a matter of law. The central question before the court then is whether Renty and Delia had a property interest in the photographs. This is a question of first impression. However, for the following reasons, the court finds that Renty and Delia did not possess an interest in the photographs, and as a result, Lanier has no such interest.

It is a basic tenet of common law that the subject of a photograph has no interest in the negative or any photographs printed from the

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[12] Specifically, Count l (replevin) and Count 2 (conversion) expressly allege that Lanier's right to possess the photographs is superior to Harvard's. *See Portfolioscope. Inc. v. I-Flex Solutions Ltd*., 473 F. Supp. 2d 252, 256 (D. Mass. 2007) ("[C]onversion and replevin .... claims require an allegation of wrongful possession of tangible property."). Count 5 (intentional interference)' expressly alleges that Lanier "has a legally protected interest" in the photographs and that Harvard's ownership/control over the photographs interferes with Lanier's property interest and rights. Count 6 (negligent infliction of emotional distress) alleges that Harvard's appropriation of the photographs and denial of Lanier's claim of lineage inflicted emotional distress on her. Harvard argues and the court agrees that these actions cannot constitute a violation of a duty owed to Lanier unless she possesses a legally protected interest in the photographs. *See Jupin_ v. Kask*, 447 Mass. 141, 147 (2006) (stating every actor owes a duty to exercise reasonable care to avoid foreseeable danger to another). Finally, to prevail on Count 7 (equitable restitution), Lanier must show that "the defendant has been unjustly enriched by receiving something, tangible or intangible, that properly belongs to the plaintiff." *Santagate v. Tower*, 64 Mass. App. Ct. 324, 336 (2005).

negative, *see Thayer v. Worcester Post Co*., 284 Mass. 160, 163-164 (1933); rather, the negative and any photographs are the property of the photographer. *Ault v. Hustler Magazine*, 860 F.2d 877, 883 (9th Cir. 1988). This principle is true even where an image is taken without the subject's consent. *See United States v. Jiles*, 658 F.2d 194, 200 (3rd Cir. 1981) (holding juvenile did not show he was deprived of property interest when photograph was taken while in custody); *Berger v. Hanlon*, 1996 U.S. Dist. LEXIS 225 at *30-*32 (D. Mont. 1996) (rejecting conversion claim against CNN for images taken without consent on property raided by FBI); *Zacchini v. Scripps-Howard Broad. Co*., 47 Ohio St. 2d 224,227 (1976), *rev'd on other ground*, 433 U.S. 562 (1977) ("[I]t has never been held that one's countenance or image is 'converted' by being photographed.").

Nevertheless, Lanier asks the court to recognize a possessory interest in light of the horrific circumstances in which the photographs of Renty and Delia were taken. Fully acknowledging the continuing impact slavery has had in the United States, the law, as it currently stands, does not confer a property interest to the subject of a photograph regardless of how objectionable the photograph's origins may be. *See, e.g., Brunette v. Humane Soc'y*, 40 Fed. Appx. 594, 597 (9th Cir. 2002) (unpublished decision) (rejecting conversion claim even if photographic image was serious or offensive invasion of privacy). Unfortunately this Court is constrained by current legal principles, as it is the role of the Legislature or Massachusetts Appellate Courts to determine whether or not to recognize causes of action and to provide the redress Lanier now seeks. Accordingly, because Renty and Delia did not possess a property interest in the photographs, Lanier, likewise, does not have a possessory interest in them.

For these reasons, Harvard's motion to dismiss the property-related claims is **ALLOWED.**

C. Unauthorized Use of an Image (Count 3)

Count 3 asserts a violation of G. L. c. 214, § 3A, which states, "Any person whose name, portrait or picture. is used within the commonwealth for advertising purposes or for the purposes of trade without his written consent may bring a civil action ... to prevent and restrain the use thereof; and may recover damages for any injuries sustained by ... such use." Harvard argues that Lanier's claim fails because the right recognized in Section 3A does not survive the subject's death. The court agrees.

Nothing contained in Section 3A states that the right provided therein survives death. As Harvard notes in its memorandum, there are several states that have extended the statutory right against the unauthorized use of an image, but these states have done so expressly via statute.

(See Harvard's Memorandum at 16 n.17). Moreover, those states also have never extended that right for as long a period as Lanier would require for her claim to survive (e.g., over 100 years).

Additionally, although not binding precedent, it is noteworthy that the only Massachusetts case that has considered whether Section 3A applies after the subject's death held that it does not. *See Hanna v. Ken's Foods. Inc.*, 2007 Mass. App. Unpub. LEXIS 591 at *1-*2 n.4 (Mass. App. Ct. 2007) (Rule 1 :28 decision). Accordingly, Harvard's motion to dismiss Count 3 (unauthorized use of an image) is **ALLOWED. * * ***

ORDER

For the foregoing reasons, it is hereby **ORDERED** that Harvard's motion to dismiss the Second Amended Complaint is **ALLOWED.**

March 1, 2021