371 N.Y.S.2d 10
1 Media L. Rep. 1843
48 A.D.2d 487, 371 N.Y.S.2d 10

Joseph W. NAMATH, a/k/a Joe Namath, Plaintiff-Appellant,

v.

SPORTS ILLUSTRATED, a Division of Time Incorporated, and Time Incorporated, Defendants-Respondents.

Supreme Court, Appellate Division, First Department.

July 10, 1975.

Professional athlete brought action against magazine publisher for violation of his right of privacy under Civil Rights Law. The Supreme Court, Special Term, Harold Baer, J., 80 Misc.2d 531, 363 N.Y.S.2d 276, granted defense motion to dismiss, and plaintiff appealed. The Supreme Court, Appellate Division, Capozzoli, J., held that where use of professional athlete's photograph was merely incidental to advertising of publisher's magazine in which athlete had earlier been properly and fairly depicted, and language of advertisement did not indicate athlete's endorsement of the magazine, there was no invasion of athlete's right to privacy in violation of Civil Rights Law.

Affirmed.

Kupferman, J.P., filed a dissenting opinion in which Murphy, J., concurred.

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Where use of professional athlete's photograph was merely incidental to advertising of publisher's magazine in which athlete had earlier been properly and fairly depicted, and language of advertisement did not indicate athlete's endorsement of the magazine, there was no invasion of athlete's right to privacy in violation of Civil Rights Law. Civil Rights Law §§ 50, 51.

***488 **11** Martin E. Silfen, New York City, of counsel (Stephen Gillers, New York City, with him on the brief, Carl R. Sloan, New York City), for plaintiff-appellant.

Harold R. Medina, Jr., New York City, of counsel (Kenneth M. Kramer, New York City, with him on the brief, Cravath, Swaine & Moore, New York City), for defendant-respondent Time Incorporated.

Before KUPFERMAN, J.P., and MURPHY, CAPOZZOLI, LANE and NUNEZ, JJ.

CAPOZZOLI, Justice:

Plaintiff sought substantial compensatory and punitive damages by reason of defendants' publication and use of plaintiff's photograph without his consent. That photograph, which was originally used by defendants, without objection from plaintiff, in conjunction with a news article published by them on the 1969 Super Bowl Game, was used in advertisements promoting subscriptions to their magazine, Sports Illustrated.

The use of plaintiff's photograph was merely incidental advertising of

defendants' magazine in which plaintiff had earlier been properly and fairly depicted and, hence, it was not violative of the Civil Rights Law (Booth v. Curtis Publishing Co., 15 A.D.2d 343, 223 N.Y.S.2d 737, aff'd, 11 N.Y.2d 907, 228 N.Y.S.2d 468, 182 N.E.2d 812).

Certainly, defendants' subsequent republication of plaintiff's picture was 'in motivation, sheer advertising and solicitation. This alone is not determinative of the question so long as the law accords an ****12** exempt status to incidental advertising of the news medium itself'. (Booth v. Curtis Publishing Co., supra, p. 349, 223 N.Y.S.2d p. 744). Again, it was stated, at 15 A.D.2d p. 350, 223 N.Y.S.2d p. 744 of the cited case, as follows:

'Consequently, it suffices here that so long as the reproduction was used to illustrate the quality and content of the periodical in which it originally appeared, the statute was not violated, albeit the reproduction appeared in other media for purposes of advertising the periodical.'

Contrary to the dissent, we deem the cited case to be dispositive hereof. The language from the Namath advertisements relied upon in the dissent, does not indicate plaintiff's endorsement of the magazine Sports Illustrated. Had that been the situation, a completely different issue would have been presented. Rather, that language merely indicates, to the readers of those advertisements, the general nature of the contents of what is likely to be included in future issues of the magazine.

The order of the Supreme Court, New York County, entered ***489** on February 5th, 1975, granting defendants' motion for summary judgment dismissing the complaint herein, and the judgment entered thereon on February 10th, 1975, should be affirmed, with costs.

***490** Order, Supreme Court, New York County, entered on February 5, 1975, and judgment entered thereon on February 10, 1975, affirmed. Respondents shall recover of appellant $60 costs and disbursements of this appeal.

All concur except KUPFERMAN, J.P., and MURPHY, J., who dissent in a dissenting opinion by KUPFERMAN, J.P.

***489** KUPFERMAN, Justice (dissenting).

It is undisputed that one Joseph W. Namath is an outstanding sports figure, redoubtable on the football field. Among other things, as the star quarterback of the New York Jets, he led his team to victory on January 12, 1969 in the Super Bowl in Miami.

This feat and the story of the game and its star were heralded with illustrative photographs in the January 20, 1969 issue of Sports Illustrated, conceded to be an outstanding magazine published by Time Incorporated and devoted, as its name implies, to the activities for which it is famous. Of course, this was not the first nor the last time that Sports Illustrated featured Mr. Namath and properly so.

The legal problem involves the use of one of his action photos from the January 20, 1969 issue in subsequent advertisements in other magazines as promotional material for the sale of subscriptions to Sports Illustrated.

****13** Plaintiff contends that the use was commercial in violation of his right of privacy under ss 50 and 51 of the Civil Rights Law. See, in general, 'The Muddled State of Law of Privacy' by J. Irwin Shapiro, N.Y.L.J., May 16 and May 19, 1975, p. 1, col. 3. Further, that because he was in the business of endorsing products and selling the use of his name and likeness, it interfered with his right to such sale, sometimes known as the right of publicity. Haelan Laboratories v. Topps Chewing Gum, 202 F.2d 866 (2nd Cir. 1953). Defendants contend there is an attempt to invade their constitutional rights under the First and Fourteenth Amendments by the maintenance of this action and that, in any event, the advertisements were meant to show 'the nature, quality and content' of the magazine and not to trade on the plaintiff's name and likeness.

Initially, we are met with the determination in a similar case, Booth v. Curtis Publishing Co., 15 A.D.2d 343, 223 N.Y.S.2d 737 (1st Dept.) Aff'd without op., 11 N.Y.2d 907, 228 N.Y.S.2d 468, 182 N.E.2d 812 (1962) relied on by Baer, J., in his opinion at Special Term dismissing the complaint.

The plaintiff was Shirley Booth, the well-known actress, photographed at a resort in the West Indies, up to her neck in the water and wearing an interesting chapeau, which photo ***490** appeared in Holiday Magazine along with photographs of other prominent guests. This photo was then used as a substantial part of an advertisement for Holiday.

Mr. Justice Breitel (now Chief Judge Breitel) wrote:
'Consequently, it suffices here that so long as the reproduction was used to illustrate the quality and content of the periodical in which it originally appeared, the statute was not violated, albeit the reproduction appeared in other media for purposes of advertising the periodical.' 15 A.D.2d at p. 350, 223 N.Y.S.2d at p. 744.

However, the situation is one of degree. A comparison of the Booth and Namath photographs and advertising copy shows that in the Booth case, her name is in exceedingly small print, and it is the type of photograph itself which attracted attention. In the Namath advertisement, we find, in addition to the outstanding photograph, in Cosmopolitan Magazine (for women) the heading 'The Man You Love loves Joe Namath', and in Life, the heading 'How to get Close to Joe Namath.' There seems to be trading on the name of the personality involved in the defendants' advertisements.

This distinction between actual advertising use and use to inform, Cf. Bigelow v. Virginia, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975) means that cases like Time, Inc. v. Hill, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967) and Cantrell v. Forest City Publishing Co., 419 U.S. 245, 95 S.Ct. 465 (1974) involving so-called 'false light' portrayal are of only incidental interest. It is also a distinction ****14** accepted by Mr. Justice Breitel in that he recognized a right 'to have one's personality, even if newsworthy, free from commercial exploitation at the hands of another . . .' Booth v. Curtis Publishing Co., supra, 15 A.D.2d at p. 351, 223 N.Y.S.2d at p. 745.

The complaint should not have been dismissed as a matter of law.

MURPHY, J., concurs.