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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. ANIL C. SINGH
SUPREME COURT JUSTICE

PRESENT: _____ Justice

PART 61

Index Number : 158209/2014
NIZEWITZ, JESSIE
vs
VIACOM INTERNATIONAL, INC.
Sequence Number : 001
DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance
with the decision rendered on the record of
this act.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 3/4/15

Dec 7, J.S.C.
HON. ANIL C. SINGH
SUPREME COURT JUSTICE

1. CHECK ONE: ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 61

-----x
JESSIE NIZEWITZ,

Plaintiff,

-against-

Index No.
158209-14

VIACOM INTERNATIONAL, INC., FIRELIGHT
ENTERTAINMENT, INC., and LIGHTHEARTED
ENTERTAINMENT, INC.,

Defendants.
-----x

March 4, 2015
80 Centre Street
New York, New York

BEFORE: HON. ANIL C. SINGH
Supreme Court Justice

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JACQUELINE GLASS
Senior Court Reporter

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2 THE COURT: In motion sequence 001
3 Viacom International Inc. moves pursuant to CPL
4 3211(a)(1) 3211(a)(7) to dismiss plaintiffs Jessie
5 Nizewitz's complaint with prejudice and for
6 attorney's fees and costs.

7 In motion sequence 002, defendants
8 Lighthearted Entertainment Inc. and Firelight
9 Entertainment move in essence for the same relief.
10 The motions are consolidated for decision.
11 Plaintiff Jessie Nizewitz opposes both motions.
12 So I'll mere first from Viacom.

13 MS. McNAMARA: Thank you very much, your
14 Honor. While the context of this case might be
15 somewhat unusual, it's a reality show called
16 Dating Naked. The law is applied to the
17 undisputed agreement at issue in this case are
18 well established and we submit dictates but one
19 result which is the dismissal of the action. The
20 plaintiff doesn't dispute she entered into three
21 separate agreements that are operative in this
22 case.

23 THE COURT: What about her agreement
24 that based upon your gross negligence the release
25 is essentially not valid because New York doesn't
26 recognize or does not permit a party to release

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itself from gross negligence?

MS. McNAMARA: Your Honor, there are certain circumstances where the courts have refused to enforce releases when the claims are for gross negligence or intentional tort. But first of all let me say here there really can't be claims of gross negligence or intentional tort when what is being complained of complied with the express terms of the agreement. But with regard to the basic issue of whether exculpatory releases can be applied where there are asserted claims even if unfounded we would argue, but asserted claims for gross negligence and intentional affliction, the law could not be more clear. In every single case that has looked at releases in connection with the entertainment industry or the photo industry even when in all of those cases there were claims for intentional tort and or gross negligence, the courts have uniformly enforced those releases and the plaintiff has not cited a single case to the contrary. Where courts have been loath to enforce releases in the face of claims of gross negligence or intentional torts are in circumstances where they're involving businesses open to the public, involving common

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2 carriers, involving claims of public utilities,
3 there is simply and I say this respectfully, your
4 Honor, but there is simply no public policy of the
5 state of New York that protects would be reality
6 stars from embarrassment. That's not the type of
7 public policies that is at issue in the case law
8 that is reticent in certain circumstances to
9 enforce releases. As I said before, with regard
10 to this area of law the cases have been uniform in
11 New York and they have not cited a single case to
12 the contrary. I cite but one example. Take the
13 Crumpler case versus NBC. There the plaintiff had
14 signed a release. She was photographed in a
15 bathing suit. She signed a release, a full signed
16 release that allowed the photographs to be used in
17 any and all circumstances. Years later the
18 photographer licenses the photo to NBC. NBC used
19 the photograph in what she considered to be a
20 degrading and humiliating scene where a character
21 in her film was masturbating to her photograph.
22 The court there did not hesitate to throw that
23 case out on a motion to dismiss finding that her
24 full and complete release made her claim without
25 merit and the same holds here. Her releases could
26 not be more clear. The terms of the contract

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2 could not be more express. The terms of the
3 contract make it crystal clear that not only was
4 she going to be filmed entirely in the nude in
5 front of cast and crew, but that they had the full
6 right to publish and disseminate her
7 participation. And if you look at the agreements
8 the definition of participation is the filming of
9 her in the nude. The contracts even go on so far
10 as to provide that they can be, the film can be
11 edited in a way even if it's humiliating or
12 disparaging to her also implies that they have the
13 sole discretion to determine how the show is to be
14 published. Every provision of this agreement was
15 consistent with the fact that they had the
16 discretion and the unilateral right to publish the
17 show as they saw fit. And that this inadvertant
18 and fleety moment of non blurring, clearly while
19 it was not the desires of everybody because it's
20 the practice of VH1 to blur these.

21 THE COURT: Was that negligence for that
22 moment or so that it wasn't blurred?

23 MS. McNAMARA: No, it wasn't negligence.

24 THE COURT: It was purposeful.

25 MS. McNAMARA: They have all sort of
26 business reasons why they do blurring, but they

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2 did not have a contractual obligation to do the
3 blurring. That's where her claims butt heads on
4 this.

5 And I say, if you look at any of this you
6 have the Brook Shields' case, the court of
7 appeals, report Brook Shields her mother signs
8 away nude photos of her when she's 10 years old
9 and when she's an adult she's troubled by the
10 dissemination of these nude photos. Those were
11 unequivocal releases. The court of appeals upheld
12 those releases. These are circumstances all on
13 some level sympathetic to the plaintiff, but the
14 fact of the matter is the courts hold you to the
15 strict terms of your contract and case after case
16 the Klapper decision every case that's looked at
17 reality shows has found consistently that these
18 contracts are to be upheld.

19 Briefly with regard to her oral contracts and
20 I'm going to let Mr. Rosenthal focus on that
21 because they claim that it's the -- that it was
22 the production company that made it. But here
23 again the contracts preclude the claims and it's
24 just basic contract law. She alleges first that
25 she was promised orally that there would be
26 blurring --

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2 THE COURT: But there is some
3 consistency. Most or all of it essentially is
4 blurred.

5 MS. McNAMARA: There is no question.

6 THE COURT: So probably and on the
7 motion I have to assume the truth of that.
8 Probably she was told not to worry, correct?

9 MS. McNAMARA: Even I never heard --

10 THE COURT: I have to assume that
11 getting beyond that in this case based on the fact
12 that everything was blurred except for one second
13 or so or less, couldn't I assume that in fact that
14 she was told that it was going to be blurred?

15 MS. McNAMARA: I think since she pleads
16 it, your Honor is correct to state that for
17 purposes of this motion you have to accept that
18 pleading as accurate, but I think that the key
19 distinction here and the important distinction is
20 whether she was told that or not does not make
21 that contractual obligation. And that's where her
22 claim fails. If she was told that before the
23 contracts were entered into, there were clear
24 merger provisions on those contracts. But beyond
25 the merger provision the contract expressly
26 provided and she acknowledged she wasn't promised

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2 anything and she wasn't relying on anything. She
3 wasn't relying on a promise to enter into the
4 contract. So that will knock out oral contracts
5 there. And then if this promise is made after she
6 executed this contract, the contract again speak
7 clearly. She has to have a commitment in writing
8 and that is signed by the parties. She's not
9 produced any and there is none. And the claims
10 are precluded there. And she tries to do an end
11 run around these clear basic contractual
12 provisions by arguing that this was an independent
13 contract. It was dealing with something not
14 addressed or anticipated in the contract. But the
15 contract is about nothing if not the fact that you
16 are going to be filmed in the nude and there is
17 going to be a publication called Dating Naked
18 where people are going to be portrayed in the
19 nude. That's the subject of the contract.

20 So you can't plausible, I submit your Honor,
21 argue that this was an independent agreement that
22 was a subject matter entirely divorced from the
23 agreement. I think the law could not be more
24 clear in this area, your Honor. Every court that
25 has looked at similar circumstances even when the
26 plaintiffs had claimed something they didn't

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2 anticipate, something that was embarrassing,
3 something that they believed to be degrading in
4 each and every case, the courts of New York had
5 uniformly held up, held the terms of the contract
6 and held plaintiffs to the bargain that they made
7 and the contractual provisions that they entered
8 into. And we asked this court to do the same
9 here.

10 And further with the contract we asked the
11 court to award attorney's fees. We made it clear
12 to the plaintiff before when the action was first
13 brought to us even before it was filed we spelled
14 this all out clearly to them as to why we didn't
15 think there was any merit whatsoever. We gave
16 them notice of all the case law. We explained our
17 prior, you know, cases for VH1 with Klapper, the
18 ruling there and they choose to proceed. And we
19 think that again they should be held to the terms
20 of their contract and award attorney's fees.

21 And finally, your Honor, I would note that we
22 separately in our papers make the case that their
23 causes of action don't withstand scrutiny under
24 3211(a)(7) either. There simply is not right of
25 publicity claim for use that is not within the
26 confines of trade and advertising. That's a

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2 miracle in State of New York. Nor can they state
3 a claim of gross negligence that is merely a weak
4 statement of their oral contract claims.

5 Finally, they have not begun to allege the
6 type of outrageousness that's required under the
7 clear case law in New York for an intentional
8 infliction of emotional distress claim.

9 For these independent reasons, your Honor,
10 several of which we ask the court to dismiss the
11 claim and award us attorney's fees.

12 THE COURT: Briefly address what's not
13 been touched.

14 MR. ROSENTHAL: I want to refer the
15 court to the specific language of the agreement
16 where the plaintiff agreed that the agreement she
17 signed was a participant agreement, which was
18 "the complete and binding Agreement of the
19 parties, superseding all prior understandings and
20 communications, express or implied, oral or
21 written, with respect to the subject matter
22 hereof. And this agreement shall not be modified
23 or amended except by a subsequent writing signed
24 by all parties hereto."

25 Plaintiff's complaint alleges that she was
26 told she would be blurred before she entered into

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2 any of these agreements. Assuming as your Honor
3 suggests that that was true, the subject matter of
4 her three agreements that she signed goes right to
5 the heart of the nature of her performance on the
6 show and her agreements to allow her to be filmed,
7 to be exhibited and distributed, her
8 acknowledgement she might be embarrassed or
9 humiliated, her agreement that she would not bring
10 any claims against either Viacom or the producers
11 for any violation of any of the rights that she's
12 asserted here precluded her claim and her idea
13 that there is some sort of a separate and
14 completely separate oral agreement separate and
15 apart from the three documents she signed that
16 goes right to this issue of how she's going to be
17 filmed and how she's going to be portrayed makes
18 no sense and can't possibly stand. As a matter of
19 law general obligations law 15-301 bars that kind
20 of collateral argument. There are one case
21 plaintiff cited in her brief was a case where the
22 circumstances of the alleged oral agreement where
23 things that were completely apart from the
24 original agreement. In other words, the agreement
25 was setting up a LLC to dispose of certain
26 property. As things developed the LLC couldn't

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2 operate that way. The property couldn't be
3 distributed that way, so there was a new agreement
4 dealing with how certain property was going to be
5 distributed that may have been the kind of case
6 where the new activities is completely unrelated
7 to the agreement, but here this alleged blurring
8 argument is right in the course of the agreement
9 reached.

10 THE COURT: Okay thank you. Counsel.

11 MR. BLIT: Thank you, your Honor. What
12 we have here is a lot of allegations of contracts
13 are clear, the laws are clear --

14 THE COURT: But aren't the contracts
15 clear? Didn't she sign one contract, 22 page
16 contract she initialed every page. She signed
17 every page. Doesn't it say in bold that she's
18 releasing claims that she's going to be filmed
19 nude or partially nude?

20 MR. BLIT: First, I don't think a lawyer
21 is capable of drafting a clear agreement.

22 THE COURT: Is the agreement unclear?

23 MR. BLIT: I think the agreement, the
24 problem there is an epidemic in this industry.
25 You have Viacom --

26 THE COURT: That's a question of taste.

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2 That's not what I am adjudicating here, is the
3 taste of the show, or taste of television.

4 MR. BLIT: The epidemic really is the
5 abuse of the general public by these reality T.V.
6 shows.

7 THE COURT: Let's start with that. How
8 is your client abused here where she fills out an
9 application. She solicits wanting to be on the
10 show where as I recall she says in your
11 application that sounds great to be on an island
12 or wherever it was on a beach front in the tropic.
13 Where is the abuse there?

14 MR. BLIT: A private island being filmed
15 before an infinite, a certain amount of people,
16 not the general public, not the entire country,
17 not the world.

18 THE COURT: What does she think is going
19 to happen to the film?

20 MR. BLIT: Good question. Her
21 interpretation the way it was explained to her is
22 that everything is going to be blurred and not
23 only is it going to be blurred, it's going to be
24 the viewer is not even going to be able to see
25 anything.

26 In fact, you will be able to see less than if

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2 you were in a bathing suit, less than if you were
3 in a bikini.

4 THE COURT: Couldn't she have negotiated
5 an agreement that says well I want to be in a
6 bathing suit not nude?

7 MR. BLIT: I don't think there is any
8 negotiation abilities on behalf of any --

9 THE COURT: She either is filmed in the
10 nude partially nude or she doesn't do it.

11 MR. BLIT: Correct. She did not oppose
12 being filmed in the nude. There is no objection
13 to that. But where do we end this? Will now
14 Viacom be able to take all the videos of all the
15 contestant and turn it into regular porn and take
16 out all the blurring?

17 THE COURT: I think they will say yes.

18 MR. BLIT: That's where we have to draw
19 the line here. All these reality shows whether
20 this one or --

21 THE COURT: I am not a fan with reality
22 T.V. I can only deal with what I have before me,
23 not all the reality shows, but this show involving
24 this concept which Viacom or one of the defendants
25 seem to say it's novel, but sex selling is not
26 novel. It's the oldest idea in the world by the

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2 way.

3 MR. BLIT: The point here is that
4 everybody had a reasonable expectation what was
5 going to be done and what wasn't going to be done.

6 THE COURT: Does your client have a
7 reasonable expectation of privacy?

8 MR. BLIT: Yes, yes. Why wouldn't she?
9 Specifically it's VH1. She's not signing up with
10 Spice channel, Playboy. She's signing up to be
11 on --

12 THE COURT: If she knew it was on
13 Playboy T.V. that would be different?

14 MR. BLIT: I think it would be
15 different. There is an understanding if you are
16 on Playboy T.V. everything is going to be shown.
17 If you're on VH1 nothing is going to be shown.
18 Nobody watches VH1 expecting to see what they saw.
19 That's why it went viral. You're not supposed to
20 see what they seen on VH1. Why did it happen this
21 one time? Just as you pointed out it only
22 happened this one time. It didn't happen to all
23 the other contestants and here is the interesting
24 part. Before this scene was actually filmed, they
25 asked her to do this specific scene and asked her
26 to position herself in a wrestling pose for this

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2 specific scene. So yes our belief it was
3 intentional. It wasn't negligence. It wasn't
4 purposeful, but what else is there?

5 THE COURT: Under the agreement they
6 could have filmed her nude and distributed her
7 nude as well. Under the various agreements she
8 signed.

9 MR. BLIT: Unfortunately based upon the
10 agreements that were signed the problem here is
11 that the agreements are overreaching. The
12 agreement is in violation of public policy and
13 should be in violation of public policy. These
14 are not actors or actresses with reputations.
15 These are general public the courts have to
16 protect.

17 THE COURT: What about counsel's point
18 there is a line of cases going back to the
19 unfortunate case involving Brook Shields where
20 pictures of a minor are shown which is upheld
21 where the releases upheld in those cases. So
22 where is public policy? Couldn't a better public
23 policy argument be made dealing with a minor and
24 the actions of the mother releasing those?

25 MR. BLIT: It wouldn't be the first
26 court to make a mistake. But the issue in this

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2 case has not really been addressed by the
3 Appellate Division. It's only been addressed by
4 certain Supreme Court cases and a Federal court
5 case. It's not settled law and there is the
6 opportunity to prevent the continued epidemic of
7 abusing the general public without the knowledge
8 that lawyers have, without the knowledge that
9 actors have the ability to have the type of
10 lawyers that actors have. And they are being
11 taken advantage of one by one by one. And there
12 has to be some barrier put up to protect the
13 general public, to protect people that go on these
14 reality shows. It's one thing if -- how many
15 lawyers fall victim to other lawyers. Think about
16 the general public. They want to get on T.V. Of
17 course everyone wants to be on T.V. Everyone wants
18 15 minutes of fame. They are in such a low
19 bargaining position or a low position of no power
20 and no protection out there. And the television
21 companies can fully abuse them to any extent.
22 They can't leave the island. They are stuck.
23 They are deprived of food, deprived of medication
24 on various different instances here.

25 THE COURT: That's not your claim. Your
26 claim here there was a second or less, I'm not

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2 sure how much time. It's a very short period of
3 time where her genitalia was exposed of. That's
4 the claim.

5 MR. BLIT: Correct.

6 THE COURT: Nothing to do with food or
7 medicine.

8 MR. BLIT: Yes, yes. I'm giving you
9 just the understanding of why there is a need for
10 this. Why there is a need to set this precedent.
11 Why there is a need to rule in this direction.
12 It's not settled against -- it's not against the
13 case law --

14 THE COURT: How does this agreement
15 violate public policy, the fact that she's filmed
16 in the nude or something else?

17 MR. BLIT: There is no question that she
18 knew she was going to be filmed in the nude. She
19 didn't have any objection to being filmed in the
20 nude.

21 THE COURT: Did she know, for example,
22 that the film was going to be distributed? It
23 could be exploited by the defendants.

24 MR. BLIT: She had no belief in the
25 world that it would be exploited by the
26 defendants.

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2 THE COURT: She thought she was going to
3 be filmed and not exploited. I don't mean
4 exploitation in the way you're thinking. I mean
5 in terms of --

6 MR. BLIT: The use of the video the way
7 the show was taped, of course she had an
8 understanding that it was going to be displayed to
9 the world just the way it was blurry, not
10 unblurred. That's the expectation. That's what
11 they sold to her. That's what they explained to
12 her over and over again. And to use the contract
13 to try to escape gross negligence --

14 THE COURT: And what's the gross
15 negligence?

16 MR. BLIT: Putting this clip on national
17 T.V. for ratings, to sell, to sell the show, to
18 boast ratings of the show at my client's expense.

19 THE COURT: Isn't that as counsel notes
20 in her argument there is really no difference
21 between the gross negligence and for the oral
22 breach of contract? They all arise out of the
23 same set of facts, that there was a promise to
24 blur her private parts and that for this one
25 second or so it was not done. And that's the
26 breach of contract. That's the gross negligence;

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2 isn't that?

3 MR. BLIT: It's separate duty.

4 THE COURT: Separate agreement.

5 MR. BLIT: Separate duty.

6 THE COURT: What's the independent duty?

7 MR. BLIT: Okay. The difference is that
8 it was intentional. They specifically had her do
9 this pose specifically for this moment. They had
10 weeks to edit this. They had weeks to edit all of
11 the different shows that are on there. This
12 wasn't a slip.

13 THE COURT: So that would be breach of
14 contract, right?

15 MR. BLIT: Breach of contract, gross
16 negligence. And the other point is that the
17 contract -- there is general obligations laws that
18 prevent you from contracting out your own
19 negligence for parties with -- in the construction
20 industry for example where you have --

21 THE COURT: We're not in the
22 construction industry. We're in the entertainment
23 industry.

24 MR. BLIT: Of course but the same
25 standard that you can't contract out your own
26 general negligence should apply here too.

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2 THE COURT: Okay. Anything else?

3 MR. BLIT: One second, your Honor.

4 Thank you, your Honor.

5 THE COURT: Counsel briefly.

6 MS. McNAMARA: If I may, your Honor, I
7 want to make a couple of points. One, the
8 plaintiff's counsel indicated that really what was
9 at issue here was the plaintiff's reasonable
10 expectation of privacy. And I just want you to
11 underscore here that in the State of New York
12 there is no claim of privacy. The only privacy
13 that exists in the State of New York is the
14 privacy awarded by Section 50-51 and with regard
15 to trade and advertise commercial use of
16 exploitation. And here in her agreement she fully
17 and the agreement could not be more clear, that
18 she may be disparaged, that things may happen that
19 are embarrassing, unfavorable, that may expose me
20 and my family to public ridicule, humiliation,
21 condemnation. It was spelled out clear what could
22 happen. Not the intent of the parties, but what
23 could happen. And with regard to her knowledge
24 what she was signing, I want to underscore on page
25 21 of the participation agreement in bold and
26 underlined it just says the following:

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2 Producer shall have the right to film and or
3 record me nude, partially nude, or otherwise. And
4 broadcast, distribute, exhibit, and otherwise
5 exploit such recordings and the project."

6 THE COURT: One of our counsels point
7 that time has come out to put an end to the
8 exploitation as he uses the word, not as you use
9 the word, to these kind of agreements on reality
10 T.V. where the general public contestants on these
11 shows is taken advantage of by your client.

12 MR. ROSENTHAL: A couple of comments to
13 that. This was a choice by her. People like the
14 plaintiff here often are clambering to be on this
15 show. She chose to do it. I have a suspicion
16 many in this court would not have made the same
17 choice, but this was her choice. And it was
18 clearly spelled out to her what she was getting
19 into. Everybody understand as it was said in the
20 Klapper court by the judge there, this is an
21 assumption of the risk one of the anticipated
22 outcomes being on a reality show is that there
23 might be some embarrassment from that. I think
24 that that holds true here. Where the courts have
25 stepped in and invoked public policy as I've
26 indicated before was where there is something

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2 involving the concern of the state to protect the
3 citizens generally where businesses are open to
4 the public and individuals don't have a choice but
5 to use those businesses, or common carriers, or
6 public utilities. There has been no precedent in
7 this state that I'm aware of where individual who
8 make an informed choice where the facts are
9 spelled out to them that they chose to subject
10 themselves to the vagaries of reality television.

11 The other point I want to make, your Honor,
12 it's a critical one. To rule in favor of the
13 plaintiff here would literally upend the
14 entertainment and photography industry. They rely
15 on these releases. If they could not, if every
16 contestant who goes on a show whether it be a game
17 show in the Feldman case, or the mob wives in the
18 Klapper case, or myriad of other shows, if every
19 contestant could after the fact say, you know
20 what, I was promised I was going to be star. I
21 was promised I would be picked. I was promised
22 this that and the other and sued for it, you can't
23 make this program. You just couldn't do it.
24 And similarly in the photography industry,
25 photographs are taken on a daily basis. Thousands
26 of photographs they are disseminated for decades

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2 after that in reliance on releases entered into
3 when those photographs are taken that allow the
4 photographer and there licensee to use those
5 photographs in myriad other ways many of which
6 would never have been anticipated argue at the
7 time the release was entered into. That is the
8 industry that is in place. Were this court to
9 rule those releases would be vitiated because
10 there is protection for would be reality stars, it
11 would upend an entire industry. And if the Court
12 of Appeals has made anything clear in case after
13 case after case, it recognizes that the State of
14 New York is the site of most of the media world,
15 most of the news world, and it is a state that is
16 very protective of its industry as it should be.
17 And these are the rights. These are the first
18 amendment rights which come with that and some of
19 it have come with some costs and some baggage.
20 And that's the nature of the first amendment but
21 to rule against this would literally turn this
22 industry upside down.

23 THE COURT: Thank you.

24 MR. BLIT: If I may briefly.

25 THE COURT: Very briefly.

26 MR. BLIT: I'm sure what I say is not

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2 going to change what you have on that paper that
3 you are about to read. Essentially what they are
4 saying is that the interest of their clients
5 outweighs. They should be able to be negligent,
6 grossly negligent and destroy people's lives for
7 the benefit of reality television.

8 THE COURT: I think the question what
9 resonates with me is the issue of choice. If your
10 client had no choice in the matter, that may be a
11 stronger argument. But your client had a choice.
12 She wanted to participate in this reality T.V.
13 show.

14 MR. BLIT: She wanted to participate in
15 a reality T.V. show where she was going to be
16 blurred.

17 THE COURT: Where she appeared naked.
18 Except there is nothing in the agreement, and you
19 have to concede this because you don't allege it,
20 that even says anything close to the fact that she
21 would be blurred, correct?

22 MR. BLIT: There is nothing --

23 THE COURT: The agreements themselves
24 say nothing of it. The agreements say she's going
25 to appear nude.

26 MR. BLIT: Nothing in the agreement that

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says it.

THE COURT: Assuming for the purposes of the CPLR 321(a)(7) motion the truth of the allegations of the complaint and giving plaintiff as the non moving party every favorable inference, the plaintiff alleges that in March of 2014, she submitted an application to audition for a reality dating television show. Plaintiff was advised by the casting agents that she had been selected for a skype interview. In the skype interview plaintiff was told by the casting agents that the show would be a nude dating show. However, that she was promised that all of her frontal and genital nudity would be blurred from the broadcast. In April of 2014 plaintiff was selected to appear on the show "Dating Naked." Plaintiff agreed to appear on the show, however, plaintiff alleges that she did not consent to the broadcast of her frontal nudity or her genitals. Sometime in May of 2014 the third episode of "Dating Naked" featured plaintiff and she continued to be promised that her frontal genital nudity would be blurred when the show was broadcast on VH1. Filming took place on a beach location in Panama. Plaintiff alleges that during

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2 the filming she was strongly encouraged to perform
3 a wrestling maneuver on her date. She agreed to
4 perform this maneuver after she was assured again
5 that all frontal and genital nudity would be
6 digitally blurred from the broadcast. After
7 receiving these assurances plaintiff agreed to
8 perform the maneuver.

9 On July 31, 2014, the third episode of the
10 show where plaintiff appears as a contestant was
11 broadcast on VH1. In the episode during
12 plaintiff's wrestling in a maneuver the defendants
13 failed to blur her genital area which was exposed
14 to all the viewers. Plaintiff states that after
15 the showing she was shocked and horrified and
16 outraged by this intrusion into her privacy and
17 since the showing of the episode she has suffered
18 from severe emotional distress, mental anguish,
19 humiliation, embarrassment. Further, that the
20 uncensored episode and uncensored pictures were up
21 loaded onto various websites for viewers to see.
22 Plaintiff alleges that she never consented to the
23 use of her image of her genitals by defendants and
24 that she had been expressly promised that the
25 nudity would be blurred when broadcast. The first
26 cause of action asserted for all the defendants is

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2 for breach of an oral contract. Plaintiff alleges
3 that the defendants through their agents entered
4 into an oral agreement where defendants agreed to
5 blur any frontal or genital nudity when the show
6 was broadcast. And that based on defendants
7 agreement she consented to use of her image for
8 commercial exploitation.

9 Plaintiff further alleges that she relied on
10 the promise by defendants and that the defendants
11 breached in agreement by permitting the uncensored
12 image of her genitals to be broadcast during the
13 third episode of "Dating Naked."

14 The second cause of action is for the
15 invasion of right to publicity in violation of
16 N.Y. Civil Rights violation Section 51.

17 The third cause of action is for intentional
18 infliction of emotional distress.

19 The fourth cause of action is for gross
20 negligence. Here plaintiff alleges that
21 defendants owed her a duty to use reasonable care
22 not to expose plaintiff to severe emotional
23 distress and anguish. And that defendants
24 breeched this duty by failing to blur her genital
25 area when they broadcast the show featuring the
26 plaintiff. The show plaintiff auditioned for is

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2 entitled "Dating Naked" which was broadcast on the
3 VH1 network which is owned by Viacom.

4 According to Viacom the programs was a twist
5 on the dating show formula. It took place in the
6 nude and the reason for this was this removed
7 barriers which were imposed by clothing, and that
8 the daters would be more open to interact honestly
9 with their partners if they were in the nude.

10 As I stated earlier, in my view this formula
11 is hardly new, but rather a variation of an age
12 old theme that sex sells. Defendants move to
13 dismiss in the first instance that plaintiff has
14 signed three complete and unambiguous agreements
15 which expressly permit that she will be filmed in
16 the nude or partially nude. The March application
17 referenced by plaintiff in her complaint is dated
18 March 23, 2014, and does state for an untitled
19 dating show. In the application the plaintiff
20 expresses her interest in spending a week in a
21 tropical location and that she's comfortable being
22 naked. And attached to the application is an
23 appearance release which is dated and signed by
24 plaintiff.

25 The release states in relevant part in
26 paragraph one quote, "I'm giving this release in

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2 consideration of and an inducement to company
3 allowing me to participate in the participant
4 selection process and possibly as a participant in
5 the programming, in the company's sole, absolute
6 discretion, and in consideration of the benefits I
7 will possibly receive as a participant in the
8 programming. I recognize that my signature on
9 this release is a condition of the company
10 permitting me to participate in the participant
11 selection process and possibly be a participant in
12 the programming in the company's sole, and
13 absolute discretion. I agree that the company may
14 make audio and videotaped recordings, including
15 without limitation, taking photographs of me,
16 including without limitation of me partially or
17 fully nude."

18 The phrase including without limitation of me
19 partially or fully nude is in bold and underlined.
20 In the appearance release plaintiff acknowledges
21 if she's selected as a participant she will be
22 filmed partially or fully nude and acknowledges
23 that she's fully aware of the format and the
24 concept and agrees to voluntarily participate in
25 the selection process and programming freely and
26 voluntarily and that she assumes all risks.

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2 Further, the agreement provides that the
3 defendants have the right to exploit her
4 participation quote (b) to exhibit, broadcast and
5 otherwise exploit my participation, the
6 Programming containing any such information and
7 any such appearance, depiction, portrayal or
8 actions. I understand and acknowledge that, which
9 such conduct shall otherwise constitute an
10 actionable tort, I have freely and knowingly
11 consented to such conduct, and waive any and all
12 claims I have or may have as a result of same.
13 End of quote.

14 In paragraph 7 of the release plaintiff
15 agrees not to sue and discharges the defendants
16 from all liability. In Paragraph 8 plaintiff
17 agrees to be liable for legal fees incurred by the
18 defendants for lawsuits brought in violation of
19 said release. After plaintiff was selected to
20 appear on "Naked Dating" she signed on April 2,
21 2004, a participation agreement again releasing
22 defendants from any liability in connection with
23 the project which documented her experiences.
24 Paragraph 12 of the agreement provides that
25 plaintiff acknowledges that the release claims
26 include without limitation the following quote, my

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1 participation and appearance in the project
2 including but not limited the fact that I will be
3 naked or partially naked during the filming of the
4 project or activity associated with the
5 production, post production promotion or
6 exploitation of the projection including claims
7 for any injuries, illness, damages including but
8 not limited to invasion of privacy and intentional
9 or negligence affliction of emotional distress
10 related to me being naked or partially naked
11 during the filming of the project or otherwise.
12 Again, the last phrase is in bold and underlined.

13 In paragraph 23, of this agreement plaintiff
14 acknowledges that quote producer shall have the
15 right to film and or record me nude, partially
16 nude, or otherwise and broadcast, distribute,
17 exhibit, and otherwise exploit such recordings and
18 the Project.

19 As part of the participation agreement
20 plaintiff also signed a release of liability and
21 an assumption of risks agreement. Plaintiff
22 acknowledges quote in no way have I ever been
23 subject to any coercion, pressure or undue
24 influence by producer or Viacom media networks to
25 participate in the event or to engage in any of
26

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2 the activates including but not limited to the
3 naked or partially naked during the filming of the
4 programming, nor have I been promised anything in
5 return for my participation in the event and or
6 activities. End of quote.

7 And further plaintiff in this release
8 unconditionally releases defendants from any
9 liability arising from her performance in the
10 event. Defendant's position in a nutshell as
11 expressed in the papers and argument here is that
12 plaintiff has released all her claims. Plaintiff
13 understood that she would be filmed nude or
14 partially nude and that defendants could and would
15 broadcast, distribute, and exploit the recordings
16 of the show.

17 Further, defendants contend that the releases
18 do not permit plaintiffs to claim an oral contract
19 that defendants would blur out frontal or general
20 nudity. And finally, it's defendants' position
21 that even if the releases were not given legal
22 affect by this court, the various causes of action
23 fail to state a cause of action. This court
24 agrees. Contrary to plaintiff's arguments,
25 plaintiff's first cause of action that defendant
26 breached an oral contract is not a valid separate

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2 agreement. But rather it's covered by the terms
3 of three agreements signed by plaintiff. In clear
4 and explicit terms plaintiff agreed to be filmed
5 nude or partially nude. She agreed that the
6 content depicting her nude or partially nude could
7 be distributed and exposed by the defendants at
8 their sole discretion. She expressly gives up her
9 right of any privacy. The language in the
10 agreement with respect to the matter of the
11 filming and post production distribution is in
12 bold and underlined. The oral agreement that
13 plaintiff alleges here that she had been promised
14 that her genitalia would be dubbed or blurred
15 clearly falls within the parameters of the three
16 agreements. The agreements deal with nudity
17 partial or full nudity.

18 Plaintiff further agrees in writing that the
19 contracts could not be modified or amended except
20 by writing. Plaintiff now seeks to bury the terms
21 of the agreement by offering an oral agreement
22 whereby defendants agreed to digitally block
23 nudity. Although the agreements themselves allow
24 for the filming and distribution of footage of her
25 in the nude, accordingly for these reasons, the
26 first and second causes of action are dismissed

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2 pursuant to CPLR 3211(a)(1).

3 Plaintiff argues that the releases are
4 unenforceable, as there can be no prospective
5 wavering of gross negligence, or intentional
6 torts, and is unenforceable as against public
7 policy. In this regard plaintiff cites a case
8 Abacus Federal Savings Bank versus ADT Security 18
9 NY3d 675, and Berenger versus 261 West LLC, 93 AD
10 3d NY 175. These cases, however, factual
11 scenarios that have no application to the releases
12 executed by plaintiff in this case. Abacus relate
13 to a case where a security system was installed
14 and defendant's conduct in failing to properly
15 inspect a malfunctioning equipment resulted in
16 loss to the bank. Berenger is a trespass and
17 nuisance action based on intentional and
18 misconduct by the defendants. Here the plaintiff
19 voluntarily agreed to participate in the show and
20 knew specifically what she was participating in
21 and executed releases absolving the defendants for
22 any liability for her participation in the show
23 and not just her participation but the
24 distribution of her depiction in the nude or
25 partially nude.

26 In contrast to the cases cited by plaintiff,

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there is a long line of cases cited by the defendants in their cases that have upheld such releases in the entertainment agreement. While cases such as Klapper versus Graziano 41 Misc. 3d Kings County Supreme Court 213, and Psenicska versus 20th Century Fox are not binding on this court. Their reasoning is persuasive. Plaintiff again sought to participate in the "Naked Dating" reality show. She expressly understood the nature of her participation and the manner in which the production could be exploited. The voluntarily nature of her participation with a full understanding of the production and the risks takes this case out of the line of cases that hold that agreements exempt liability for gross negligence or intentionally conduct are void. Even if the court were to explore the language in the releases, the third and fourth causes of action fail to state a cause of action. The gross negligence cause of action is a recast of breach of the oral contract agreement that defendants agreed to digitally blur her genitalia. Plaintiff simply alleges no separate duty. Just two separate causes of action based on the same set of facts. And nor is the failure by the defendants

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2 to blur for a second or less plaintiff's genital
3 parts so outrageous and extreme when in the first
4 instance plaintiff applied to be on the game show
5 or reality show where the participants would be
6 filmed in the nude and they voluntarily appeared
7 on the set to be filmed in the nude with the
8 express understanding that the content would be
9 distributed by the defendants.

10 So for these reasons the third and fourth
11 cause of action are dismissed both pursuant to
12 CPLR 3211(a)(1) and (a)(7). The complaint is
13 dismissed without leave to replead as the
14 amendment would be futile in light of the three
15 agreements.

16 And finally this court is constrained to
17 grant plaintiff's application under the appearance
18 release to set the matter down for a hearing
19 before a special referee to hear and report the
20 attorney's fees and costs incurred based on
21 plaintiff's commencement of this suit in violation
22 of the release.

23 This decision constitutes the order of the
24 court. Thank you folks.

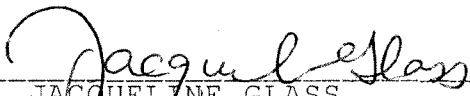
25 MR. BLIT: Thank you, your Honor.

26 MS. McNAMARA: Thank you, your Honor.

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* * *

Certified to be a true and accurate
transcript of the original stenographic
notes.


JACQUELYNE GLASS
SENIOR COURT REPORTER