

***Foster v. Lee*, No. 13-CV-5857(JPO), 2015 WL 786990, slip op.  
(S.D.N.Y. Feb. 25, 2015)**

Lelanie Foster, a freelance photographer, sued Lashpia Corporation doing business as JJ Eyelashes (“Lashpia”); May Lee, Lashpia’s President and CEO; and Ericka Rodriguez, a former Lashpia employee, for copyright infringement. Lashpia sells eyelash extensions and operates salons at which customers can buy the lashes and have them applied. Lashpia hired Foster to photograph a model wearing its lashes.

Foster conducted two photo shoots for Lashpia, which she understood would produce photographs to be used in Lashpia’s salons, on its website, and in a promotional calendar. Foster later agreed to allow Lashpia to use one of the photographs in an advertisement in *Allure* magazine, which she understood would be a small scale ad. Lee contended, however, that Foster “agreed that the photograph would be the property of Lashpia Corporation with the understanding that Lashpia intended to use . . . the photograph for its marketing campaign.” The terms of the agreement were not written.

When the photograph appeared in *Allure* magazine, Foster became concerned about the large scale of the advertisement. Around this time, she also became aware of a billboard in Times Square displaying her photograph. She contacted Lashpia regarding her concerns, and Lashpia indicated that it would not pay any additional fees for the use. Following this indication from Lashpia, Foster registered a copyright in the photograph and sued Lashpia, Lee, and Rodriguez for copyright infringement. Defendants asserted the affirmative defenses that the photograph was a joint work, a work for hire, or was licensed. Foster moved for summary judgment on the issue of defendants’ liability on the ground that all of these defenses must fail. Defendants conceded that “they infringed [Foster’s] copyright if the photograph [was] not a joint work, a work for hire, or the subject of an unrestricted license.” Defendants also moved for summary judgment on the issue of Foster’s entitlement to statutory damages and attorneys’ fees and on the issue of Lee and Rodriguez’s personal liability. The Court’s findings regarding Foster’s motion are discussed in more detail below.

The Court found that the photograph was not a joint work within the meaning of the Copyright Act. For a work to be a “joint work,” two requirements must be met. First, the authors must intend “that their contributions be merged into a unitary whole.” *Childress v. Taylor*, 945 F.2d 500, 505 (2d Cir. 1991). Second, each author’s contribution must be independently copyrightable. *Id.* at 507. The facts that Lee and Rodriguez were present at Foster’s photo shoots, that Lashpia supplied the space for the shoot and hired the model, and that Rodriguez helped to create the Lashpia ad from the photograph, the Court found, did not show any intent for the parties to be joint authors of the photograph. Moreover, Rodriguez asked Foster for permission to use the photograph in the *Allure* ad, which further supported the conclusion that the parties did not intend to be joint authors. Finally, Lee’s and Rodriguez’s contributions were not independently copyrightable. Thus, the defendants’ joint work defense failed, and the Court granted Foster’s motion for summary judgment on this point.

The Court also found that the photograph was not a work for hire within the meaning of the Copyright Act. The Court acknowledged that there are two categories of works-for-hire: “(1) works created by employees; and (2) works created by independent contractors under special order or commission.” The Court dismissed the second category because it requires a written agreement and does not apply to photographs. Thus, the Court considered only whether Foster’s photograph was a work for hire by virtue of Foster’s employment status. Federal courts use a multi-factor balancing test to determine whether a worker is an employee or an independent contractor. Looking at the test utilized by the Second Circuit, the Court determined that defendants offered evidence on only one of the factors, “the hiring party’s right to control the manner and means of creation.” On this factor, defendants simply offered the fact that they “‘retained’ Foster . . . and . . . told her whom to photograph.” The Court found that this fact was not enough to create a work for hire. Thus, the Court granted Foster’s motion for summary judgment on this defense, as well.

With respect to the defendants’ license defense, the Court summarily dismissed the defense because defendants failed to plead it in their answer and raised it for the first time at a late stage in the case. Thus, the Court granted Foster’s motion for summary judgment on the issue of defendants’ liability for the infringement.

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