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Foster v. Svenson, 128 A.D.3d 150 (2015)

Mary Bessone

FOSTER v. SVENSON, 128 A.D.3d 150 (2015).

I. INTRODUCTION

The right to privacy and the right to free speech have been essential in the formation of the modern day United States.[1] As society evolves, the rights we enjoy expand and evolve with us.[2] Today, technology has blurred the lines between the right to privacy and the right to artistic expression under free speech.[3] While both are of the upmost importance, what if someone was asked to choose one to keep, and be forced to abandon the other? However, the question is far less abstract when artists aim to capture humanity through a socio-anthropological lens.[4]

Foster v. Svenson, came before the New York Supreme Court Appellate Division in 2015.[5] The Fosters, plaintiffs-appellants ("the Fosters") brought suit after they discovered photographs of their young children, which had been secretly captured, being publically exhibited, and sold.[6] The Fosters alleged that their right to privacy had been violated, and brought action pursuant to the New York State Privacy Statute.[7]

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[1] *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 197 (1890); U.S. Const. amend. I (the right to free speech as a right protected within the constitution).
[2] Warren & Brandeis, *supra* note 1, at 195-96.
[3] Foster v. Svenson, 128 A.D.3d 150, 152 (N.Y. App. Div. 2015); Technology has created tension in other areas of law relating to art as well. *See* Blanch v. Koons, 467 F.3d 244, 246 (2d Cir. 2006) (artist sued for copyright infringement after using scanned copyrighted images in his own work).
[4] Arne Svenson, *The Neighbors,* http://arnesvenson.com/theneighbors.html (last visited May 17, 2017).
[5] *Foster*, 128 A.D.3d at 150.
[6] *Id.* at 152-54.
[7] *Id.*

The defendant-respondent, Arne Svenson ("Svenson,"), a fine art photographer, took photographs of his neighbors, including the Fosters family, through their New York apartment windows without their knowledge.[8]

The photos, meant to be a social documentary series, were captured by Svenson using a powerful camera while he was inside his own apartment across the street.[9] Standing in "the shadows," he would sometimes wait hours for his subjects to appear through the glass and capture them uninhibited in their most intimate of spaces, the privacy of their own home.[10] In Svenson's promotion of the series it was stated: "for his 'subjects there is no question of privacy; they are performing behind a transparent scrim on a stage of their own creation with the curtain raised high.'"[11]

While the court was not shy about its distaste for the unsettling facts of the case, and referred to Svenson's conduct as "disturbing," the court ultimately held that Foster's had not sufficiently alleged a cause of action for a violation under the privacy statute.[12]

II. BACKGROUND

Arne Svenson is a known photographer who has shown his work both domestically and abroad.[13] In 2012, he began documenting his year-long project that would eventually become "The Neighbors," by secretly photographing residents of apartment building across the street.[14] Once completed, "The

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[8] *Id.* at 152-53.
[9] *Id.* at 152.
[10] *Id.* (recount from a reporter for the New Yorker Magazine while spending time with Svenson's while photographing for The Neighbors).
[11] *Foster*, 128 A.D.3d at 153.
[12] *Id.* at 163.
[13] *Id.* at 152.
[14] *Id.* at 152-53.

Neighbors" was exhibited in galleries in New York and Los Angeles.[15]

The Fosters heard about the series and discovered that their minor children were the un-consenting subjects of two photographs for sale.[16] Upon seeing the photographs, the Fosters demanded Svenson cease displaying and selling the images.[17] Svenson agreed to remove one image of the Foster's son in a diaper and daughter in her swimsuit, but did not commit to removing the second image from the exhibit.[18] The second photograph depicted the mother holding her daughter, with the daughter's face identifiable in the image.[19] The photograph was then shown on various popular television shows during discussions of Svenson and his exhibit.[20]

In 2013, the Fosters brought action in the Supreme Court of New York, seeking a preliminary injunction and a temporary restraining order.[21] They further moved for injunctive relief and damages under the privacy statute and common law intentional infliction of emotional distress.[22] Svenson filed an opposition to the motion for a preliminary injunction and a cross motion to dismiss.[23] He claimed the photographs were art that were protected under the First Amendment of the United States

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[15] *Id.* at 153.

[16] Svenson made an effort to "obscure his subjects' identity" in his photographs, but in these two photos the Foster children could be identified. *Id.* at 153.

[17] The Fosters through council, also contacted the gallery where the photos were being shown and online auction house demanded they take down the images as well, both complied. *Foster*, 128 A.D.3d at 153.

[18] *Id.*

[19] *Id.*

[20] One of the popular programs was the Today Show. Further, the address of the apartment building was also identified in the press coverage in print, electronic media and social media. *Id.* at 154.

[21] *Id.*

[22] *Id.*

[23] *Foster*, 128 A.D.3d at 154.

Constitution; thus, restraining their publication, sale, and use, was improper.[24]

The trial court granted Svenson's cross motion to dismiss because his conduct was not an actionable invasion of privacy under the privacy statute.[25] The trial court found that although the plaintiffs may "cringe" knowing that their private lives and photos of their children were in a public exhibition, Svenson's art was protected under the First Amendment.[26] The Fosters subsequently appealed the trial court's decision. The New York Supreme Court Appellate Division was tasked with reviewing the lower court's denial of the preliminary injunction and dismissal of the complaint, on the basis that the defendant's alleged invasion of privacy was not actionable conduct under the privacy statute.[27] The appellate court ultimately affirmed the lower court's decision.[28]

III. LEGAL ANALYSIS

On appeal, the New York Supreme Court Appellate Division was asked to review whether Svenson's conduct was actionable, or whether it fell outside the reach of the privacy statute.[29] Given that this issue was never previously presented before the court, the appellate court's decision was guided by the language and history of the statute itself, as well as previous decisions dealing with similar issues of First Amendment protection.[30]

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[24] *Id.*
[25] *Id.*
[26] *Id.*; Foster v. Svenson, No. 651826/2013, 2013 WL 3989038, at *6 (N.Y.Sup. Ct. 2013) (*aff'd by Foster*, 128 A.D.3d).
[27] *Foster*, 128 A.D.3d at 154. *See also* N.Y. Civil Rights Law §§ 50–51 (McKinney 2017).
[28] *Foster*, 128 A.D.3d at 163.
[29] *Id.* at 157.
[30] *Id.*

A. New York State's Privacy Statute

The New York State's privacy statute was a legislative response to the 1902 decision of *Roberson v. Rochester Folding Box Co.*, where a flour company printed, sold, and posted 25,000 lithograph prints and photos of the plaintiff, in public places without the her consent.[31] The plaintiff sought an injunction and monetary damages which was granted and affirmed on appeal.[32] The decision rested on the determination that the mass distribution of her image and likeness was an invasion of her right to privacy and "to be left alone."[33] The decision was subsequently reversed by the Court of Appeals of New York, which held there was no common law right to privacy.[34] The court reasoned that it was for the legislative branch to make unconsented use of one's image or likeness for the purpose of advertising, a wrong under the law.[35]

The reversal sparked public disapproval and within a year of the decision, New York's legislators enacted a statutory right to privacy.[36] The privacy statute prohibited the use of a person's "name, portrait or picture" or "name, portrait, picture or voice" for the *purposes of advertising or trade*.[37]

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[31] *Id.* at 154–55 (citing Roberson v. Rochester Folding Box Co., 64 N.E. 442 (N.Y. 1902)).
[32] *Id.*
[33] *Id.* (*citing* Roberson v. Rochester Folding-Box Co., 64 A.D. 30, 33 (N.Y. App. Div. 1901) (*rev'd sub nom Roberson*, 64 N.E. 442)).
[34] *Foster*, 128 A.D.3d at 154–55 (*citing Roberson*, 64 N.E. 442).
[35] *Id.* at 155.
[36] *Id.* at 154.
[37] The *Foster* court expressly describes the two phrases, "advertising" and "trade", used in the statute to define the unauthorized use prohibited under the statute. *Id.* at 155 (citing N.Y. Civil Rights Law §§ 50–51 (McKinney 2017)). Additionally, the court details the relief under the sections stating: Section 50 provides criminal punishment for such prohibited use, and Section 51 provides an individual victim of a prohibited "appropriation" the right to an injunction and to bring a cause of action for "compensatory and exemplary damages." *Id.* (citing N.Y. Civil Rights Law §§ 50–51 (McKinney 2017)). The court is expressly troubled that the law, while at first glance seems to provide a cause of

B. The Privacy Statute and the First Amendment

The legislative decision to use the broad terms "advertising" and "trade" as phrases for prohibited use seemed to support the Foster's claim that the sale of any item, including Svenson's photograph, fell under such use in the privacy statute.[38] However, the privacy statute was created with the First Amendment in mind and therefore courts have refused to impose a literal construction on the terms.[39] Past decisions by courts confronted with similar issues, have determined that a more narrow reading is necessary in order to find a balance between private individual rights and the rights granted under the First Amendment.[40]

Thus, the phrases used in §§ 50-51 of the privacy statute to define the prohibited use of one's image should not apply to "publications regarding newsworthy events and matters of public concern."[41] The newsworthy and public concern exception of the privacy statue was meant to protect the distribution of ideas of publically relevant importance.[42] Therefore, the *Foster* court had to address the issue of whether the newsworthy and public concern exception could be applied to Svenson's photograph.[43] The court looked to pervious decisions where the exception had been applied to different mediums of First Amendment expression.[44]

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action for the Fosters, ultimately does not; the detailed discussion of the statute and the case that sparked its creation is an intentional judicial move to get the attention of the legislators once again. *Id.* at 155, 163.

[38] *Foster*, 128 A.D.3d at 156.

[39] *Id.*

[40] *Id.* at 155-56 (*citing* Arrington v. N.Y. Times Co., 434 N.E.2d 1319, 1324 (1982)); *see Howell v. New York Post Co.*, 612 N.E.2d 699, 705 (N.Y. 1993) (Court of Appeals of New York holding that the privacy statute should not be interpreted to apply to publications regarding newsworthy events and issues of public concern).

[41] *Foster*, 128 A.D.3d at 156.

[42] *Id.*

[43] *Id.* at 156-157.

[44] *Id.* at 156.

Past decisions protected works of literature, performances, and film from violating the privacy statute, reasoning that the social interest of access to information outweighed interest in limiting such access.[45] The appellate court, guided by past decisions, determined that the newsworthy and public concern exception should apply to other mediums of expression such as works of art.[46] Therefore, works of art that present valuable ideas of public concern fall outside the scope of the privacy statute, and should be protected from liability.[47]

Although the court was "constrained to concur" that the exception to the privacy statute included works of art, the court did examine the limits of the exception,[48] and determined that the limits to the exemption apply to images where the newsworthy or public interest characteristics are simply "incidental" to the commercial purpose.[49] In other words, the exception would not apply to an image that appeared in the media, behind a façade of being newsworthy, but in reality was an "advertisement in disguise." Falling out of the exception, such an image would violate the privacy statute because under the façade, it was an advertisement that served a commercial purpose.[50] Similarly, the exception would not apply where there was no actual relationship between a use of one's photo or name and the article it

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[45] The court discussed other cases found that an artist artistic expression and creation was fully protected by the first amendment and thus shielded from an individual's right to preclude the use of their image, likeness, or an image created by them pursuant to the privacy statute. One case discussed presented the court with the same issue presented in *Foster*. While the majority dismissed the constitutional issues as time barred, the concurrence did reach the issues and fund the image at issue to be protected under the First Amendment. *Id.* at 158; *see* Nussenzweig v. diCorcia, 38 A.D.3d 339, 341 (N.Y. App. Div. 2007) (*aff'd*, 878 N.E.2d 589 (N.Y. 2007)).

[46] *Foster*, 128 A.D.3d at 159.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*; *see e.g. Beverley v. Choices Women's Med. Ctr.*, 587 N.E.2d 275, 278-280 (N.Y. 1991).

illustrated.[51] The court reasoned that with no actual relationship to the advertisement, it would be reasonable to assume that the image's only purpose was to sell the work.[52]

Although the appellate court examined the limits of the privacy statute, it ultimately held that, the newsworthy and public concern exception applied; and the Fosters did not sufficiently plead a cause of action for a violation under the privacy statute.[53] To prevail, the Fosters would have had to sufficiently allege that Svenson used the photographs "for the purpose of advertising or for purpose of trade *within the meaning* of the privacy statute."[54] Instead, the Fosters' complaint only alleged that Svenson had used their images to promote his exhibition "The Neighbors" in the media, an exhibition that included photographs taken "under the same circumstances" as the photos of their children.[55] Further, the complaint alleged that the photographs were for sale at the exhibit and online.[56] Such claims did not allege that Svenson used the photographs "*for the purpose* of advertising or *for [the] purpose* of trade within the meaning of the privacy statute."[57]

The court found that since the photographs themselves constituted the work of art that was protected by the First Amendment, any advertising Svenson done in connection with their promotion was permissible.[58] Thus, "under any reasonable view of the allegations," the court could not infer that the images of the Fosters were used for *the purpose* of advertising or trade within the meaning of the privacy statute.[59] Further, the fact that

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[51] *Foster*, 128 A.D.3d at 159.
[52] *Id.* (*citing* Thompson v. Close-Up, Inc., 98 N.Y.S.2d 300 (App. Div. 1950)).
[53] *Id.* at 161-63.
[54] *Id.* at 160 (emphasis added).
[55] *Id.*
[56] The court stated that the Fosters may have been able to raise the issue of whether the photograph should be considered a work of art, but they failed to do so. *Id.* at 159.
[57] *Foster*, 128 A.D.3d at 160 (emphasis added, quotations omitted).
[58] *Id.*
[59] *Id.*

Svenson generated a profit from the sale did not weaken the images' constitutional protection provided by the newsworthy and public concern exception.[60]

IV. FUTURE IMPLICATIONS

The court's decision demonstrates its deference to legislation when interpreting statutes.[61] The court expressly called on the New York legislative branch to address shortcomings in the privacy statute, and similar to the decision in *Roberson* which sparked the legislative branch to enact the privacy statute, the legislators listened once again.[62]

In January 2017, New York Senate Bill No. 1648 was introduced to amend §§ 50 - 51 of the Civil Rights Law.[63] The bill proposes to prohibit the recording of visual images of a person who has a "reasonable expectation of privacy while within a dwelling, when such images are recorded by another person outside the dwelling."[64]

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[60] *Id.* The Foster's further argued that just because the use of one's image or likeness is a newsworthy issues or an issue of public concern, it should not be exempt from being classified as advertising or trade if it was "obtained in an improper manner." The court states they cite no authority for the claims but the Fosters appeared to argue that the way in which Svenson took the photographs constituted "the extreme and outrageous conduct contemplated by the tort of intentional infliction of emotional distress" and should have "overcome the First Amendment protection contemplated by [the privacy statute]." The court analyzed the tort of intentional infliction of emotional distress and the "high bar" set for what would have constituted "outrageous behavior." The court ultimately found that, Svenson conduct, as "disturbing" as it might have been, it did not raise to the level of "extreme" or "outrageous" necessary under the law. *Id.* at 163.

[61] *See Id.* at 163.

[62] *Foster*, 128 A.D.3d at 154; *see Roberson*, 64 N.E. 442.

[63] S. 1648, 2017 Leg., 239 Sess. (N.Y. 2017).

[64] The proposed bill establishes a private cause of action and makes the prohibited actions a misdemeanor. S. 1648, 2017 Leg., 239 Sess. (N.Y. 2017).

Foster is mentioned in the Senate Committee Report as the justification for the proposed bill because it clearly illuminates a flaw in §§ 50 - 51. Currently, the statute does nothing to protect people in their homes from unconsented images being captured and "used in the course of artistic work."[65] While current prohibitions protect against advertising and trade purposes, the protection does not extend far enough. The proposed bill aims to fill in the gaps as technology advances and create a "zone of privacy around the home" to protect people like the Fosters, who reasonably expect privacy within their homes and freedom from being secretly photographed or recorded.[66]

If the proposed bill fails to pass, the *Foster* court mentioned an alternative option to future litigants by stating the Fosters might have been able to raise the issue of whether the photograph should be considered a work of art.[67] If injured parties situated similarly to the Fosters instead raise the issue of what art deserves protection under the First Amendment, a court would be required to define what constitutes protected expression. This would be problematic because "the law still does [not] know how to define art," and different areas of law treat the word differently.[68] For example, customs law imposes a subjective standard and favors aesthetically pleasing fine art over industrial or utilitarian arts.[69] On the other hand, copyright law provides greater protection for original works of art over derivative works.[70]

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[65] Committee Report, S. 1648, 2017 Leg., 239 Sess. (N.Y. 2017).
[66] The legislative history states that any prohibited image or recording will fall within the ambit of the amendment, "no matter the motive." *Id.*
[67] *Foster*, 128 A.D.3d at 160.
[68] Stéphanie Giry, *An Odd Bird*, LEGAL AFFAIRS, September/October, 2002, http://www.legalaffairs.org/issues/September-October-2002/story_giry_sepoct2002.msp.
[69] Giry *supra* note 69; *see* Brancusi v. United States, 54 Treas. Dec. 428 (Cust. Ct. 1928) (changing the customs standard for art).
[70] Giry, *supra* note 69.

Well known works have an established reputation within the market and are generally accepted as "art" whether aesthetically pleasing, original, or otherwise. However, modern art does not often have the same luxury, even a recognized artist, writer, or director may create works that many find shocking, offensive, or too abstract to be considered "art."[71] Justice Holmes contemplates this issue in *Bleistein v. Donaldson Lithographing Co.*: "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."[72] While *Bleistein* presents an issue of copyright protection, Justice Holmes' hesitation in considering himself artistically competent to be art's final judge, is a familiar hesitation within the judicial branch.[73] The lack of appropriate knowledge and expertise held by the courts to determine such an issue, makes them reluctant to define it, and when it is necessary to define art, courts will generally rely on expert witnesses.[74]

Most importantly, a fundamental principle of First Amendment protection is that the government may not restrict a person's speech for their particular view; doing so imposes the danger of governmental distortion of the marketplace by favoring one idea over another.[75] In *Foster*, Svenson's artistic expression was protected as "art" under the First Amendment; the alternative to the proposed bill and mentioned in the Foster opinion, would require a court to determine whether an *image itself* should be

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[71] Artists throughout time have had to defend their work as art, and have been criticized for work that pushes boundaries and evokes negative reactions and emotions. *See 10 Works Of Art That Shocked The World*, CNN Style, Jun. 29, 2015, http://www.cnn.com/2014/10/01/world/gallery/controversial-art/.

[72] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

[73] *Id.* at 251-52

[74] Justice Holmes uses Goya's etching and Manet's paintings as examples of works that would have been under appreciated as "art" that is not accepted in their time, while today are generally considered masterpieces. *Id.* at 251.

[75] DAVID L. HUDSON, JR., LEGAL ALMANAC: THE FIRST AMENDMENT: FREEDOM OF SPEECH § 2:2 (2012).

unprotected because it is disturbing or unfavorable.[76] Such a determination would come dangerously close to the governmental branch distorting the market by favoring certain ideas over others.[77]

It is a vicious cycle "[b]ecause art eludes definitions and law needs to impose them," thus the law on art always seems to be running after itself.[78] The New York legislature's proposed bill prohibits a disturbing *behavior* rather than disturbing or unfavorable *art*.

V. CONCLUSION

The holding in *Foster* was that the newsworthy and public concern exemption applied and the allegations were insufficient to show the photographs were used for *the purpose* of advertising or trade under the statute.[79] Mentioned by the court, the troubling facts of the case clearly illustrated the limited protection of the privacy statute because Svenson's photographs were found to fall outside of the privacy statute's reach during a time of "heightened threats to privacy posed by new and ever more invasive technologies."[80]

The court, in examining the limitations of the exemption, mentioned an alternative approach the Fosters could have taken. It stated that the Fosters could have raised the question of whether a particular image should be considered art, but the Fosters failed to do so.[81] The concern over such an approach is that it could be a slippery slope to governmental market distortion, and restriction of free speech and expression of ideas.

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[76] *Foster*, 128 A.D.3d at 160.
[77] DAVID L. HUDSON, JR., LEGAL ALMANAC: THE FIRST AMENDMENT: FREEDOM OF SPEECH § 2:2 (2012).
[78] Giry, *supra* note 69.
[79] *Foster*, 128 A.D.3d at 160.
[80] *Id.* at 163.
[81] *Id.* at 160.

However, reviewing only the issues brought before the court, Foster's allegations were not sufficiently pleaded to remedy, what felt like a violation of privacy, due to the limits of the statute.[82] The court instead expressly called on legislators to mend the holes and shortcoming of the statute, and just as in *Roberson,* the decision sparked the legislative branch to act.[83] In 2017, in response to *Foster*, the New York Legislative branch proposed a bill prohibiting Svenson's exact conduct.[84] This legislative approach eliminates the need for courts to unnecessarily define art and is a much less slippery slope. If the bill passes, New York's legislators will have once again quickly reacted to an unsettling shortcoming within their privacy statute; and New York "persons trained only to the law" may go another day avoiding the "dangerous undertaking" of constituting themselves the "final judges of the worth of pictorial illustrations."[85]

*Mary Bessone**

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[82] *Id.* at 163.
[83] *Id.* at 154; *see Roberson*, 64 N.E. 442.
[84] S. 1648, 2017 Leg., 239 Sess. (N.Y. 2017).
[85] *Bleistein*, 188 U.S. at 251.

* Mary Bessone will be entering her third year at DePaul University College of Law. Mary earned a Bachelor of Arts in History of Art & Architecture from the DePaul University in 2012. Before attending law school Mary worked for United States Art Fair Productions. She has externed with The Ciric Law Firm in New York and worked with the Holocaust Art Restitution Project in their efforts to halt international sales of sacred Native American objects overseas. Mary is the President of Art and Cultural Heritage Law Society and the Lead Article Editor for The Journal of Art, Technology & Intellectual Property Law for the 2017-2018 academic year.