

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

QUINCY M. NERI,

Plaintiff,

OPINION and ORDER

12-cv-600-slc¹

v.

PINCKNEY HOLDINGS, LLC;
LINDA HUGHES; JOHN HUGHES;
JOMA INDUSTRIES, INC.; DKS, LLC;
BELL LABORATORIES, INC.;
DUNLOP ASSOCIATES, INC.;
MALCOLM STACK FOUNDATION;
AMY RADSPINNER DESIGN, LLC;
AMY RADSPINNER; PAUL RADSPINNER;
LESLEY SAGER; WINCHILL SAGER;
SAGER DESIGNS;
ARCHITECTURAL BUILDING ARTS, INC.;
MELINDA MOORE; STEVE LARSON; and
ERIC FERGUSON,

Defendants.

Pro se plaintiff Quincy Neri has filed a lengthy proposed complaint with more than 100 pages of attached documents in which she contends that defendants infringed her copyright and trademark in violation of federal law and committed breach of contract, misrepresentation, tortious interference with contract and fraud in violation of state law. Plaintiff's contentions relate generally to a glass sculpture that she created and installed on the entryway ceiling of a condominium.

¹ I am exercising jurisdiction over this case for the purpose of this order.

Because plaintiff is proceeding in forma pauperis under 28 U.S.C. § 1915, I must screen her complaint to determine whether it states a claim upon which relief may be granted. In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972).

Having considered plaintiff's allegations, I find that her federal claims for copyright and trademark infringement (including allegations of false advertising, false designation and trade dress infringement under the Lanham Act, 15 U.S.C. § 1125, and violations of the Digital Millennium Copyright Act) are barred by the doctrine of claim preclusion, which prevents a party from bringing a new lawsuit asserting claims that were or could have been resolved in another lawsuit. I also decline to exercise supplemental jurisdiction over plaintiff's remaining state law claims in the absence of an actionable claim arising under federal law.

The proposed complaint sets out the following allegations of fact related to plaintiff's federal claims. Although plaintiff also includes several allegations about the discovery of a valuable mural on the ceiling of the entryway to the condominium, those allegations are irrelevant because they relate solely to plaintiff's state law claims.

ALLEGATIONS OF FACT

Plaintiff Quincy Neri is an artist who resides in Madison, Wisconsin. In October 2008, defendant Amy Radspinner contacted plaintiff about designing a glass piece for the condominium of a new client, defendant Linda Hughes. That fall, defendant Hughes had

hired defendant Architectural Building Arts, Inc. (ABA) to do the remodeling and Radspinner as the interior designer. Defendant Pinckney Holdings, LLC owns the condominium that Hughes lives in.

Defendant Melinda Monroe is the president of ABA and defendant Steve Larson was its founder. Defendants Amy and Paul Radspinner are married and are members of defendant Amy Radspinner Design, LLC.

Hughes owns several businesses in Madison, including defendants Pinckney Holdings, LLC; JOMA Industries, Inc.; Bell Laboratories, Inc.; DKS, LLC; and Dunlop Associates, Inc. She also owns defendant Malcolm Stack Foundation, which is located in Ridgeway, Wisconsin.

After viewing the condominium, plaintiff proposed a design for the artwork that Hughes approved. The sculpture contained 125 pieces of glass of varying color and density, which plaintiff named “Mendota Reflection.” She hired Fritz Schomburg to help her with the glass blowing and discussed with him plans for redesigning the ceiling of the entryway so that it would hold the art piece. (The Hughes recently had removed a large mural from the ceiling, leaving a large hole.) About a week later, however, Amy Radspinner told plaintiff that ABA had been hired to rebuild the ceiling to her specifications. Defendant Lesley Sager was hired to design the lighting for the entryway. Defendant Winchill Sager is married to Leslie Sager and together they own defendant Sager Designs, LLC.

In April 2011, plaintiff discovered pictures of “Mendota Reflection” on the websites of defendants Architectural Building Arts and Sager Designs. Both websites used pictures

of plaintiff's artwork to promote ABA's receipt of two contractor awards for the Hughes design project. Amy Radspinner and Leslie Sager claimed authorship of the artwork and ceiling design. Defendant Eric Ferguson took the pictures that appeared on the websites.

On May 4, 2011, plaintiff received a "Certificate of Registration of Copyright" for "Mendota Reflection" (number VAu-1-006-185). On May 11, 2011, she received a "State of Wisconsin Trademark" in the name Mendota Reflection. Plaintiff never gave any defendant permission to use photographs of her design.

On June 15, 2011, plaintiff and Rodney Rigsby filed a complaint alleging that defendants Melinda Monroe, Steve Larson, Architectural Buildings Arts, Inc., Lesley Sager, Linda Hughes, Amy Radspinner, Eric Ferguson, Board of Regents of the University of Wisconsin System and Rural Mutual Insurance Company had infringed Neri's copyright and trademark in the sculpture by using photographs of the entryway and artwork in their promotional materials. Neri v. Monroe, case no. 11-cv-429-slc. Plaintiff's trademark claims were dismissed at the screening stage because she failed to identify any aspect of her sculpture that was entitled to trademark protection. Id., Screening Order, dkt. #10. Also at screening, defendants Linda Hughes and Amy Radspinner were dismissed from the suit for plaintiff's failure to allege any facts showing that they were involved in the infringement. Id., Jmt., dkt. #153. Summary judgment was granted in favor of defendants Monroe, Larson, ABA, Sager and Ferguson on the ground that plaintiffs did not have a valid copyright registration in the sculpture. Id., Op. & Order, dkt. #152 at 2.

During the course of her previous lawsuit, plaintiff filed a copyright application dated February 14, 2012, registered as number Vau-001092700 and titled “Processes of Mendota Reflection.” Although she attempted to rely on that application for the first time when she was opposing defendants’ motion for summary judgment, Magistrate Judge Crocker found that it was too late for her to do so. Plaintiff never attempted to amend the complaint to include allegations of infringement regarding the new registration or to develop an argument supporting the proposition that the registration requirement of 17 U.S.C. § 411(a) can be met by the submission of a registration applied for after filing the infringement lawsuit.

OPINION

Under the federal doctrine of claim preclusion, a party may not bring a claim to court if she has litigated the same claim against the same parties or those in privity with them. Russian Media Group, LLC v. Cable America, Inc., 598 F.3d 302, 310 (7th Cir. 2010); Central States, Southeast and Southwest Areas Pension Fund v. Hunt Truck Lines, Inc., 296 F.3d 624, 628 (7th Cir. 2002). The doctrine reaches both claims that were actually asserted in an earlier lawsuit and those that could have been asserted but were not. New Hampshire v. Maine, 532 U.S. 742, 748 (2001) (doctrine applies “whether or not relitigation of the claim raises the same issues as the earlier suit”); Russian Media Group, 598 F.3d at 310. Although claim preclusion is an affirmative defense, the Court of Appeals for the Seventh Circuit has held that a court may raise an affirmative defense on its own if it is clear from the face of the complaint that the defense applies. Gleash v. Yuswak, 308 F.3d 758, 760-61

(7th Cir. 2002). Because a motion to dismiss on the ground of claim preclusion is inevitable, it is “sensible to stop the [claim] immediately, saving time and money for everyone concerned.” Id. at 761.

Under federal law, the three requirements of claim preclusion are: (1) an identity of parties or their privies; (2) an identity of causes of action; and (3) a final judgment on the merits. Central States, 296 F.3d at 628. Because Magistrate Judge Crocker reached a final judgment on the merits of plaintiff’s copyright and trademark claims with respect to each of the defendants in her previous lawsuit, the third factor is met easily in this case. I will address the other two factors in turn.

A. Identity of Parties

Plaintiff is suing many of the same defendants named in her previous lawsuit (Linda Hughes, Amy Radspinner, Leslie Sager, ABA, Melinda Moore, Steve Larson and Eric Ferguson) as well as other, new defendants. The new defendants are either the spouses of previous defendants Linda Hughes, Amy Radspinner and Leslie Sager or companies owned by those former defendants. Plaintiff is suing the new defendants based solely on their legal relationship to the old defendants. She believes that the new defendants share financial interests with the original defendants and may have benefited financially from their allegedly illegal acts. She alleges generally that “[a]ll defendants are jointly and severally liable for all their actions.” Dkt. #1 at 7. (She also states that Hughes’s companies are included as defendants because they possibly received a tax write off for the \$90,000 donation of the

mural to the Madison Children's Museum; however, those allegations relate solely to her state law claims.) The question then is whether the new defendants in this case are in privity with the defendants named in plaintiff's previous lawsuit.

The Court of Appeals for the Seventh Circuit has recognized that the definition of "privity" is difficult to pin down and has expanded over time. National Spiritual Assembly of Baha'is of U.S. Under Hereditary Guardianship, Inc. v. Schlatter, 628 F.3d 837, 848-49 (7th Cir. 2010). In Taylor v. Sturgell, 553 U.S. 880, 893-95 (2008), the Supreme Court clarified the law of nonparty preclusion by identifying six categories in which courts should apply preclusion: (1) the nonparty agreed to be bound by the litigation of others; (2) a substantive legal relationship existed between the person to be bound and a party to the judgment; (3) the nonparty was adequately represented by someone who was a party to the suit; (4) the nonparty assumed control over the litigation in which the judgment was issued; (5) a party attempted to relitigate issues through a proxy; or (6) a statutory scheme foreclosed successive litigation by nonlitigants. In this case, at least the second and third exceptions apply.

Because plaintiff is suing defendants Paul Radspinner, John Hughes and Winchill Sager solely because they are married and share community property with defendants Amy Radspinner, Linda Hughes and Leslie Sager, these defendants share identical interests and were adequately represented in the first lawsuit. As to the limited liability corporations, they are in privity with their individual owner members by their very nature. Kramer v. Stelter, 588 F. Supp. 2d 862, 867 (N.D. Ill. 2008). In contrast, corporations are treated as entities

separate from their officers, directors and shareholders for purposes of liability and preclusion, 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4460, at 628 (2d ed. 2002), but they can be sued for the individual actions of their owners under extremely limited circumstances. This is known as “piercing the corporate veil.” Torain v. AT&T Management Services, LP, 353 Fed. Appx. 37, *1 (7th Cir. Nov. 23, 2009) (unpublished) (plaintiff who previously sued ex-employer for wrongful discharge could not bring new suit against other companies under same corporate umbrella unless he could pierce corporate veil). However, once the corporate veil is pierced, the corporation necessarily is in privity with its owner. Id. (finding same); see also Flores v. Bodden, 2012 WL 2299455, *8 (5th Cir. June 15, 2012) (citing Torain and noting that courts of appeals routinely decline to allow “alter ego of corporation to force parties to relitigate otherwise precluded claims against the corporation”). Therefore, all of the new defendants are in privity with the defendants in the previous lawsuit.

I note that even if the new defendants were not in privity with the original defendants, plaintiff has failed to allege sufficient facts to state a claim against them. Plaintiff is basing all of her claims against the new defendants on the actions of the previously named defendants. She has not alleged any facts showing individual action on the part of the new defendants or identified any special circumstances that would cause these defendants to be vicariously liable for the acts of the previously named defendants.

B. Identity of Claims

A claim has identity with a previously litigated matter if it emerges from the same core of operative facts as the earlier action. Brzostowski v. Laidlaw Waste Sys., Inc., 49 F.3d 337, 339 (7th Cir. 1995). In other words, “a subsequent suit is barred if the claim on which it is based arises from the same incident, events, transaction, circumstances, or other factual nebula as a prior suit that had gone to final judgment.” Okoro v. Bohman, 164 F.3d 1059, 1062 (7th Cir. 1999). Under this test, “[o]nce a transaction has caused injury, all claims arising from that transaction must be brought in one suit or lost. A plaintiff may not avoid an earlier judgment on the merits by merely concocting a new legal theory.” Doe v. Allied-Signal, Inc., 985 F.2d 908, 913 (7th Cir. 1993) (internal citations and quotation marks omitted); see also Highway J Citizens Group v. United States Department of Transportation, 456 F.3d 734, 743 (7th Cir. 2006) (quoting same).

Both of plaintiff’s lawsuits arise from the same incident. In April 2011, she discovered that defendants or their companies had used photographs of her sculpture on their websites and in promotional materials without her permission or crediting her as the author of the work. Plaintiff alleged in her previous lawsuit, as she does in this case, that defendants’ actions infringed two copyrights and a trademark for which she had applied.

In her proposed complaint, plaintiff identifies additional theories for relief under federal law and adds more detail about what happened, particularly with respect to the conduct of Radspinner and Hughes. For example, she now attempts to assert claims under the Lanham Act, 15 U.S.C. § 1125, related to false advertising, false designation and trade

dress infringement and violations of the Digital Millennium Copyright Act. “However, the question is not whether the legal issues now presented were raised previously; rather, it is whether these matters ‘could have been raised in [the prior] action.’” Highway J Citizens Group v. United States Department of Transportation, 456 F.3d 734, 743 (7th Cir. 2006) (quoting Brzostowski, 49 F.3d at 338)).

Although plaintiff states that she discovered “new information” during the course of her previous lawsuit, the “new” facts relate solely to plaintiff’s state law breach of contract and misrepresentation claims. The events underlying the federal claims are exactly the same. Although plaintiff now alleges that defendants Radspinner and Hughes were involved in the events, it is too late to bring substantive claims against them. Plaintiff should have sought permission to amend her complaint in the 2011 lawsuit to include the allegations against defendants Radspinner and Hughes. “Simply put, the doctrine of res judicata provides that, when a final judgment has been entered on the merits of a case, it is a finality . . . not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.” Nevada v. United States, 463 U.S. 110, 129-30 (1983) (internal quotation marks omitted).

Accordingly, plaintiff’s proposed federal claims are barred by the doctrine of claim preclusion and must be dismissed.

C. State Law Claims

Plaintiff also raises several state law claims related to the discovery of a valuable mural that was existing on the ceiling of the entryway to the condominium. Federal courts may exercise supplemental jurisdiction over a state law claim that is “so related to claims in the action within [the court's] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.” 28 U.S.C. § 1367(a). However, in cases like this one in which all of the federal claims are resolved at the screening stage, the general rule is that any remaining state law claims should be dismissed without prejudice to their being refiled in state court. 28 U.S.C. § 1367(c)(3); Ridings v. Riverside Medical Center, 537 F.3d 755, 772 (7th Cir. 2008); Cadleway Properties, Inc. v. Ossian State Bank, 478 F.3d 767 (7th Cir. 2007). Accordingly, I decline to exercise supplemental jurisdiction over plaintiff's state law claims for breach of contract, misrepresentation, tortious interference with contract and fraud and will dismiss them without prejudice. Plaintiff is free to pursue those claims in state court.

ORDER

IT IS ORDERED that

1. Plaintiff Quincy Neri's request for leave to proceed on federal copyright and trademark related claims against defendants Pinckney Holdings, LLC; Linda Hughes; John Hughes; Joma Industries, Inc.; Dks, LLC; Bell Laboratories, Inc.; Dunlop Associates, Inc.; Malcolm Stack Foundation; Amy Radspinner Design, LLC; Amy Radspinner; Paul

Radspinner; Lesley Sager; Winchill Sager; Sager Designs; Architectural Building Arts, Inc.; Melinda Moore; Steve Larson; and Eric Ferguson is DENIED.

2. I decline to exercise supplemental jurisdiction over plaintiff's state law claims. Those claims are DISMISSED WITHOUT PREJUDICE to plaintiff's refileing them in state court.

3. The clerk of court is directed to enter judgment accordingly.

Entered this 25th day of October, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge