

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

QUINCY M. NERI,

Plaintiff,

v.

SENTINEL INSURANCE COMPANY,
LTD, and ERIC FERGUSON DBA/
WHITE SCHOOL STUDIOS,

Defendants.

OPINION AND ORDER

13-cv-382-bbc

Plaintiff Quincy M. Neri has brought this proposed action for damages against defendants Eric Ferguson and his insurer for Ferguson's alleged violation of her copyright, trademark and trade dress rights in a sculpture that plaintiff created and called Mendota Reflection. Plaintiff is proceeding pro se and has been granted leave to proceed in forma pauperis, so it is necessary to screen her complaint under 28 U.S.C. § 1915(e)(2).

Plaintiff alleges that she discovered photographs of her sculpture on defendant Eric Ferguson's website on April 12, 2011 and learned that he had given unlimited usage rights of the photographs to Lesley Sager and Architectural Building Arts, Inc. (presumably without her consent). She filed a copyright infringement claim in this court in August 2011, Neri v. Monroe, 11-cv-449-slc, naming Eric Ferguson as one of the defendants alleged to have violated her copyright and trademark rights in the sculpture.

In an order entered on August 30, 2011, I screened plaintiff's complaint in Neri v. Monroe and allowed plaintiff to proceed against some of the defendants she had named in the complaint, including Eric Ferguson. At the same time, I dismissed the complaint as to plaintiff's trademark claim because she had failed to identify any aspect of her sculpture that was entitled to trademark protection.

Subsequently, the parties consented to having Magistrate Judge Stephen L. Crocker preside over the case. In an order entered on September 21, 2012, the magistrate judge granted Eric Ferguson's motion for summary judgment together with similar motions filed by the other defendants after finding that plaintiff (and a later-added plaintiff, Rodney Rigsby) did not have a valid copyright registration in the sculpture when plaintiff filed her complaint. The magistrate judge cited 17 U.S.C. § 411(a), which bars the filing of any civil action for infringement of a copyright until preregistration or registration of the copyright has been made. Although plaintiff had alleged in her complaint that she had received a certificate of registration for her copyright of Mendota Reflection, the magistrate judge found that this copyright was not valid. Order, dkt. #152, 11-cv-449-slc, at 6-13. He found also that although plaintiff alleged in June 2012 that she had a different copyright in the sculpture, this alleged copyright did not come to light until the parties were briefing defendants' motion for summary judgment and therefore was too late to be considered. Id. at 15-16. After the entry of judgment in defendants' favor, plaintiff appealed to the Court of Appeals for the Seventh Circuit, but later sought and obtained a voluntary dismissal of the appeal. Dkt. #231.

After Neri v. Monroe was closed, plaintiff filed another suit, Neri v. Pinckney Holdings, 12-cv-600-slc, naming Eric Ferguson as one of 18 defendants, again alleging copyright and trademark infringement, as well as breach of contract, misrepresentation, tortious interference with contract, all involving the glass sculpture, Mendota Reflection. In an order entered on October 26, 2012, I denied plaintiff leave to proceed in this new suit after finding that her claims of copyright and trademark infringement were barred by the doctrine of claim preclusion and deciding against exercising supplemental jurisdiction over the other claims, which arose under state law. Order, dkt. #5 at 2, 12-cv-600-slc.

It appears that the same doctrine prevents her from pursuing this proposed complaint.

As I wrote in the October 26, 2012 order, under this doctrine,

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.

Neri v. Pinckney Holdings, dkt. #5, at 5-6.

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. Defendant Eric Ferguson is a defendant in this case, as he was in the first two trademark and copyright cases that plaintiff has filed or attempted to file in this court. In addition, this proposed action “is based upon the same incident, events, transaction, circumstances, or other factual nebula as [the] prior suit[s] that went to judgment.” Okoro v. Bohman, 164 F.3d 1059, 1062 (7th Cir. 1999), and a final judgment was entered on the merits in Neri v. Monroe, 11-cv-429-slc, dkt. #153. Plaintiff cannot pursue any further relief from defendant Ferguson for any actions he took in connection with the sculpture that either were or could have been litigated in case 11-cv-429-slc.

As for defendant Sentinel Insurance Company Ltd., it was not a named defendant in either of the two earlier cases, but plaintiff is barred from proceeding against it even so. First, it is in privity with defendant Ferguson, since it has a substantive legal relationship to him. National Spiritual Assembly of Baha’is of U.S. under Hereditary Guardianship, Inc. v. Schlatter, 628 F.3d 837, 848-49 (7th Cir. 2010) (listing categories in which courts should apply preclusion). Second, the fact is that Sentinel’s liability to plaintiff exists only if its insured is found liable for copyright or trademark infringement during the years it provided insurance. According to plaintiff’s complaint, Sentinel insured defendant Ferguson for the years 2010-11. Ferguson has been found not liable to plaintiff for any infringement during those years. It follows ineluctably that Sentinel Insurance has no liability to plaintiff for any tortious acts relating to trademark or copyright taken by defendant Ferguson before the end of 2011.

Without any valid claims against either of the defendants she has named, plaintiff has failed to state a claim in her proposed complaint on which relief could be granted. It is possible that plaintiff could have a claim against defendant Ferguson for alleged copyright infringement occurring after she obtained a valid copyright, but she has not alleged any infringing acts in 2012 or later. Ordinarily, a pro se plaintiff should be given a second chance to state a claim before judgment is entered, but in this case, plaintiff has already had at least three opportunities to state a valid claim in her previous lawsuits. Plaintiff's request for leave to proceed in forma pauperis on federal copyright and trademark related claims against defendants will be denied and judgment will be entered in favor of defendants.

ORDER

IT IS ORDERED that plaintiff Quincy M. Neri's request for leave to file in forma pauperis on her federal copyright and trademark related claims against defendant Eric Ferguson and Sentinel Insurance Company Ltd. is DENIED for her failure to state a claim on which relief may be granted. The clerk of court is directed to enter judgment in favor of defendants.

Entered this 31st day of July, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge