UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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JAIME KEELING,

Plaintiff,

-against- Case No. 10 Civ. 9345 (TPG)

NEW ROCK THEATER PRODUCTIONS, LLC,
EVE HARS and ETHAN GARBER,

Defendants.
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DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION PURSUANT TO FED.R.CIV.PROC. 12(b)(6) TO DISMISS THE FIRST CAUSE OF ACTION IN THE COMPLAINT AND PURSUANT TO FED.R.CIV.PROC. 12(b)(1) TO DISMISS THE SECOND AND THIRD CAUSES OF ACTION IN THE COMPLAINT

Defendants respectfully submit this memorandum of law in support of their motion to dismiss the Complaint pursuant to Fed.R.Civ.Proc. 12(b)(6) to dismiss the first cause of action and pursuant to Fed.R.Civ.Proc. 12(b)(1) to dismiss the second and third causes of action.

PRELIMINARY STATEMENT

The Complaint was filed on December 15, 2010 alleging in the first cause of action a claim based on plaintiff's purported ownership of a derivative copyright for a play that plaintiff admits is a "parody" of a 1991 movie entitled "Point Break" that is the original copyrighted work (Dkt. No. 1, Complaint, para. 1, Ex. A). Plaintiff attempts to turn copyright law upside down by alleging exclusive copyrighted ownership of a parody without ever getting permission for such derivative copyright ownership

from the owner of the work that is being parodied. There is no such thing as a parody with its own protectable copyrighted material. A "parody" is merely a fair use defense to a copyright infringement claim. See, e.g., Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994). Accordingly, plaintiff's copyright claim is completely unfounded as a matter of law.

Upon dismissal of plaintiff's first cause of action for copyright infringement, plaintiff other two causes of action based on New York State common law, a breach of contract claim and tortious interference claim, must be dismissed for lack of subject matter jurisdiction.

ARGUMENT

I. Standard of Review

When deciding a defendant's motion to dismiss under Rule 12(b)(6), the court must "accept as true all of the factual allegations contained in the complaint," Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1964 (2007), and "draw all reasonable inferences in plaintiff's favor." Ofori-Tenkorang v. American Int'l Group, Inc., 460 F.3d 296, 298 (2d Cir. 2006). However, to withstand a 12(b)(6) motion to dismiss, the allegations in the complaint must meet the standard of "plausibility." Twombly, 127 S. Ct. at 1970. The complaint need not provide "detailed factual allegations," but the complaint must sufficiently state the grounds upon which the plaintiff's claim rests "through factual

allegations sufficient 'to raise a right to relief above the speculative leve1.'" ATSI Commc'ns v. Shaar Fund, Ltd., 4~3 F.3d 87, 98 (2d Cir. 2007) (quoting Twombly, 127 S. Ct. at 1965). Thus, although the court must take the plaintiff's allegations as true, "the claim may still fail as a matter of law. . . if the claim is not legally feasible." In re Methyl Tertiary Butyl Ether Prods. Liab. Litig., 457 F. Supp. 2d 455, 459 (S.D.N.Y. 2006). Moreover, "bald assertions and conclusions of law will not suffice." Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atlantic Corp., 309 FJd 71, 74 (2d Cir. 2002) (quotation marks omitted).

In addition, the subject matter jurisdiction of the federal courts is limited. Federal jurisdiction is available only when a `federal question' is presented, 28 U.S.C. § 1331, or when the plaintiff and defendant are of diverse citizenship and the amount in controversy exceeds $75,000.00. 28 U.S.C. § 1332. "Even where the parties are satisfied to present their disputes to the federal courts, the parties cannot confer subject matter jurisdiction where the Constitution and Congress have not. The absence of such jurisdiction is non-waivable; before deciding any case we are required to assure ourselves that the case is properly within our subject matter jurisdiction." Wynn v. AC Rochester, 273 F.3d 153, 157 (2d Cir. 2001).

Stated differently, "[t]he diversity statute confers original jurisdiction on the federal district courts with respect to `all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of different States.' 28 U.S.C. § 1332(a). Federal Rule of Civil Procedure 12(b)(1) authorizes motions to dismiss for lack of subject matter jurisdiction." Scherer v. Equitable Life Assurance Society of U.S., 347 F.3d 394, 397 (2d Cir. 2003).

II. Plaintiff's Copyright Infringement Claim Must Be Dismissed Because It Is Not Entitled To Copyright Protection As A Parody.

Defendant New Rock Theater Productions, LLC is the official licensee that has been granted the exclusive right to produce a play based on the 1991 cult movie "Point Break." (Defs. Decl., Ex. A).[1] For some reason, plaintiff has taken exception with said

[1] Because the licensor/licensee relationship between the owner of the copyright of the film "Point Break" and defendant New Rock Theater Productions, LLC is integral to the issues in the Complaint, the license agreement between said parties should be deemed incorporated into the complaint by reference and should be considered on this motion to dismiss. See Blue Tree Hotels Inv. (Can.) Ltd. v. Starwood Hotels & Resorts Worldwide. Inc., 369 F.3d 212, 217 (2d Cir. 2004); accord Int'l Audiotext Network v. AT&T, 62 F.3d 69, 72 (2d Cir. 1995) ("[W]hen a plaintiff chooses not to attach to the complaint or incorporate by reference a [document] upon which it solely relies and which is integral to the complaint, the court may nevertheless take the document into consideration in deciding the defendant's motion to dismiss, without converting the proceeding to one for summary judgment.")

defendant's status as the film's official licensee and alleges that her rights are somehow superior to the rights granted to the defendant by the owners of the copyright for the movie. Plaintiff admits that her purported script at issue is merely a "parody" of the movie "Point Break" that is the original copyrighted work (Dkt. No. 1, Complaint, para. 1, Ex. A).

A finding that a work of art is a "parody" is merely a fair use defense to a copyright infringement claim. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994). There is no such thing as a parody with its own non-derivative copyright registration. See, e.g., Dr. Seuss Enterprises v. Penguin Books USA, 109 F.3d 1394 (9th Cir. 1997); Dallas Cowboys Cheerleaders v. Pussycat Cinema, Ltd., 467 F.Supp. 366 (S.D.N.Y. 1979) (Judge Thomas P. Griesa). For a parody to be copyrightable, it would have to be registered as a derivative work with the consent of the original copyright owner. See, e.g., Loew's Inc. v. Columbia Broadcasting System, 131 F.Supp. 165 (C.D.Cal. 1955) (profitable burlesque play is not a permissible parody of the film "Gaslight").

In other words, a parody can only be used as a shield to a copyright infringement claim, not as a sword to prevent another parody from being performed, let alone another parody that has

received a license to perform the parody from the actual owner of the work being parodied. Plaintiff admits that she does not own the licensed or derivative rights to the film Point Break and has only allegedly created a "parody." (Dkt. No. 1, Complaint, para. 1, Ex. A). Thus, plaintiff does not own a valid protectable interest in her alleged parody of the film "Point Break." Accordingly, plaintiff's claim for copyright infringement is without any legal basis and must be dismissed.

III. Plaintiff's Second and Third State Claims Should Be Dismissed For Lack of Subject Matter Jurisdiction.

Plaintiff admits in the Complaint that plaintiff, defendant New Rock Theater Productions, LLC and defendant Ethan Garber are all New York residents. As a result, plaintiff has not established diversity jurisdiction by the Court over the plaintiff's second and third causes of action based on New York State common law (breach of contract and tortious interference with contract). In addition, under 28 U.S.C. 1367(c)(3), the court is authorized to decline to exercise supplemental jurisdiction over those claims if the court has dismissed all claims over which it has original jurisdiction, namely the first cause of action for copyright infringement. Accordingly, plaintiff's second and third causes of action should be dismissed.

Dated: New York, NY
April 7, 2011

By:___/s/_____________
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