(2004)

JOHN JORGENSEN, Plaintiff,

v.

EPIC/SONY RECORDS, FAMOUS MUSIC CORPORATION, FOX FILM MUSIC CORPORATION, BLUE SKY RIDER SONGS, Defendants.

No. 00 Civ. 9181 (JFK).

United States District Court, S.D. New York.

December 15, 2004.

John Jorgensen, Pro Se, Brooklyn, New York, Attorney for Plaintiff.

Sony Music Entertainment Inc., Fox Film Music Corporation, Famous Music Corp., Fox Film Music Corp. and Blue Sky Rider Songs:, LOEB & LOEB LLP, New York, New York, Of Counsel: Jonathan Zavin, Esq., Attorney for Defendants.

OPINION and ORDER

JOHN KEENAN, Senior District Judge.

Procedural Status

Pro se plaintiff John Jorgensen ("Jorgensen") originally brought this copyright infringement action claiming that two songs, *My Heart Will Go On* ("*Heart*"), performed by Celine Dion on the soundtrack to the film *Titanic,* and *Amazed,* performed by the country music group Lone Star, infringed upon his copyrighted work *Long Lost Lover* ("*Lover*"). Plaintiff filed the original complaint on December 1, 2000, and filed an amended complaint on January 17, 2001. The amended complaint contained one count of copyright infringement under 17 U.S.C. § 101 alleging infringement by both songs. See Amend. Compl. ¶ 10. Defendants moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

On September 23, 2002, I granted summary judgment to all defendants as to both songs. Jorgensen v. Epic/Sony Records, No. 00 Civ. 9181, 2002 WL 31119377 (S.D.N.Y. Sept. 24, 2002). On December 3, 2003, the Court of Appeals affirmed the grant of summary judgment relating to *Amazed* and in favor of defendants Careers BMG Music Publishing, Songs of Nashville Dreamworks, and Warner-Tamerlane Publishing Corporation. Jorgensen v. Epic/Sony Records, 351 F.3d 46, 56-57 (2d Cir. 2003). Concerning defendants Famous Music Corporation, Fox Film Music Corporation, Blue Sky Rider Songs and Sony Music

Entertainment Inc. ("*Heart* defendants"), the grant of summary judgment was vacated and the case remanded for further proceedings. Id. at 57.

The *Heart* defendants now renew their motion for summary judgment based primarily on declarations of James Horner, Will Jennings (the writers of *Heart*) and David Jacoby of Sony.

Background

Plaintiff, a musician who sings, plays guitar, piano and bass guitar, is also a songwriter. Mr. Jorgensen has registered several copyrights for his works with the Copyright Office, including registering *Lover* (registration number PAU-2-013-382) on October 2, 1995.

Heart was written in 1997 by James Horner and Will Jennings. It was included on the soundtrack of the movie hit, *Titanic.* Horner wrote the music, and Jennings wrote the lyrics to *Heart,* which was recorded by the singer, Celine Dion. *Heart* won several awards including an Oscar for Best Original Song in 1998, and four Grammy awards.

Defendant Sony Music Entertainment ("Sony") manufactures and distributes CDs and audio tapes of sound recordings. The producers of *Titanic* and Sony agreed for Sony to manufacture and distribute the film's soundtrack album and also distribute a single of the song and other albums containing the song. Sony was not involved with the writing of *Heart,* but only its distribution. Defendant Famous Music Corporation ("Famous") is a music publishing company affiliated with Paramount Pictures Corporation ("Paramount"). Paramount, with Twentieth Century Fox Film Corporation ("Fox Film"), co-produced *Titanic.* Fox Film Music Corporation ("Fox Music") is a music publishing company affiliated with Fox Film. Defendant Blue Sky Rider Songs ("Sky Rider") is a music publishing company owned by Jennings.

The three co-publishers of *Heart* are Famous, Fox Music, and Sky Rider.

Neither songwriter, Mr. Horner or Mr. Jennings, has been sued in this action.

After the Court of Appeals remand, the remaining theories of access on which the plaintiff relies are that Messrs. Horner and Jennings may have had the opportunity to hear *Lover,* through the Artists and Repertoire ("A & R") Department of Sony if they were "affiliated" with Sony. Mr. Jorgensen had sent the *Lover* tape to Sony, and Harvey Leeds, a Vice President at Sony, acknowledged at deposition receiving a few tapes from plaintiff. The Court sees no need to further amplify the facts in this decision because they are more than adequately explained in the Court of Appeals decision and my earlier ruling.

Jorgensen, in his deposition, testified concerning several conversations he had with "Leeds and Leeds's assistants. . . regarding . . . tapes that Jorgensen sent to Leeds, including at least one tape that contained . . . `Lover.'" Jorgensen, 351 F.3d at 50.

In its remand decision, the Court of Appeals wrote:

According to Jorgensen, during every one of these conversations, Leeds or his assistants confirmed that Leeds had received Jorgensen's tapes (including, in particular, the "Lover" tape) and told Jorgensen that his tapes had been forwarded to Sony's Artist and Repertoire ("A & R") Department, the department responsible for helping the company "find, sign and guide new talent." In addition, in response to Jorgensen's Requests for Admissions, Sony indicated that "on limited occasions, writers, producers or musicians affiliated with Sony may have been shown some material solicited by the A & R Dept. at some point during 1995, 1996 and 1997 . . . ."

Id. (alteration in original). The Court of Appeals ruled that this undercut the defense claim that plaintiff "failed to adduce even a scintilla of evidence" of Leeds supplying the *Lover* song to anyone else. Id.

The Court of Appeals further wrote that "it would be well within the District Court's discretion to permit limited discovery into the question of the timing of the songwriters' affiliation with Sony and to entertain a renewed motion for summary judgment, as may be appropriate." Id. at 56.

Plaintiff was afforded the opportunity to engage in additional discovery, but opted not to do so.

Defendants have submitted five new Declarations on the issues raised by the remand.

Discussion

It is axiomatic, as I ruled in the September 23, 2002 decision, that: "A motion for summary judgment may be granted under Fed. R. Civ. P. 56 if the entire record demonstrates that `there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.'" Jorgensen, 2002 WL 31119377, at *2 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). When viewing the evidence, the Court must "assess the record in the light most favorable to the non-movant and . . . draw all reasonable inferences in its favor." Delaware & Hudson Ry. Co. v. Consol. Rail Corp., 902 F.2d 174, 177 (2d Cir. 1990); McLee v. Chrysler Corp., 109 F.3d 130, 134 (2d Cir. 1997). Courts should "take care not to abort a genuine factual dispute prematurely and thus deprive a litigant of his day in court." Donahue v. Windsor Locks Bd. of Fire Comm'rs, 834 F.2d 54, 57 (2d Cir. 1987). The moving parties bear the burden of proving that no material facts are in dispute. Id. Once the movants show there are no genuine issues of material fact, the opposing party must produce sufficient evidence to permit a reasonable jury to return a verdict in its favor, identifying "specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 248, 256. The non-movant "must do more than simply show that there is some metaphysical doubt as to the material

facts." Repp v. Webber, 132 F.3d 882, 889 (2d Cir. 1997) (citation omitted). Conclusory allegations will not suffice. Id.

Also, since Mr. Jorgensen is proceeding pro se, I must judge his pleadings more leniently than I would submissions by lawyers. Haines v. Kerner, 404 U.S. 519, 520, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972); see also Ortiz v. Court Officers of Westchester County, No. 95 Civ. 1194, 1996 WL 531877, at *1 (S.D.N.Y. Sept. 19, 1996). This application of the different standard does not relieve the plaintiff of his duty to meet the requirements necessary to defeat a motion for summary judgment. See Lee v. Coughlin, 902 F. Supp. 424, 429 (S.D.N.Y. 1995).

In the remand decision, Judge Straub wrote for the Court of Appeals:

Access means that an alleged infringer had a "reasonable possibility" — not simply a "bare possibility" — of hearing the prior work; access cannot be based on mere "speculation or conjecture." [citations]; 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.02[A], at 13-19 to 13-20 (2002) ("[R]easonable opportunity. . . does not encompass any bare possibility in the sense that anything is possible. Access may not be inferred through mere speculation or conjecture."); but cf. id. at § 13.02[A], at 13-22 (noting that "[a]t times, distinguishing a `bare' possibility from a `reasonable' possibility will present a close question"). In order to support a claim of access, a plaintiff must offer "significant affirmative and probative evidence." Scott v. Paramount Pictures Corp., 449 F.Supp. 518, 520 (D.D.C. 1978), aff'd, 607 F.2d 494 (D.C. Cir. 1979) (table), cert. denied, 449 U.S. 849, 101 S.Ct. 137, 66 L.Ed.2d 60 (1980); see also Tisi v. Patrick, 97 F.Supp.2d 539, 547 (S.D.N.Y. 2000).

Jorgensen, 351 F.3d at 51.

Attempting to follow these standards, I turn to the question of whether Messrs. Horner and Jennings were affiliated with Sony at any point during 1995, 1996 or 1997 (the time between when Mr. Jorgensen sent tapes to Sony and the date of *Heart's* publication). Both James Horner and Will Jennings submitted Declarations addressed to this issue and both unequivocally denied affiliation with Sony. Mr. Horner in his Declaration of January 21, 2004 stated:

11. I composed the music for *Heart* based upon my understanding of the story of the film [*Titanic*] without ever having heard of Plaintiff or his song. In fact, I never heard of Plaintiff or his song until this litigation.

12. I was not affiliated as a songwriter with Sony in 1995, 1996 or 1997, and did not have any other contractual relationship with Sony during that time. I have never had any contact with Sony's A&R Department, do not know anyone at Sony's A&R Department and have never received anything from Sony's A&R Department. I have never even been in Sony's offices.

13. I have a strict policy of never accepting unsolicited musical works from any music, record or publishing company. Accordingly, I never received Plaintiff's tape or any other

material containing Plaintiff's song from anyone, including Sony's A&R Department, Harvey Leeds, or any other department at Sony. I do not know, nor had I ever heard of, Harvey Leeds before this litigation. To my knowledge, I have never received recorded music of any kind from Mr. Leeds or anyone from his office or under his direction.

14. Therefore, any claim that I had access to Plaintiff's song prior to composing *Heart,* or that *Heart* is not my original composition, is absolutely untrue. *Heart* was created without access to, knowledge of or inspiration by any musical work written, performed or otherwise created by Plaintiff.

Mr. Jennings in his Declaration of January 21, 2004 stated:

8. I understand that Plaintiff in this action claims that *Heart* was copied from a song which he wrote called *Long Lost Lover* ("*Lover*"). Specifically, I understand Plaintiff alleges that I may have received or heard recordings of *Lover* because Plaintiff sent a tape recording of his song to a Mr. Harvey Leeds, an employee of defendant Sony Entertainment, Inc. ("Sony"), who is alleged to have forwarded the tape to Sony's Artists and Repertoire ("A&R") Department. Plaintiff then claims, I understand, that I had access to his song through some sort of affiliation with Sony's A&R Department. This is utterly baseless.

9. I composed the lyrics for *Heart* based upon my understanding of the story of the film as told to me by Mr. Horner, without ever having heard of Plaintiff or his song. In fact, I never heard of Plaintiff or his song until this litigation.

10. I am not affiliated as a songwriter with Sony, have never had any other contractual relationship with Sony, and in fact, have never had any dealings personally with anyone at Sony. I have never had any contact with Sony's A&R Department, do not know anyone at Sony's A&R Department and have never received anything from Sony's A&R Department. I have not even been in New York since 1992, and I have never been in Sony's offices.

11. As a member of the Motion Picture Academy, I received submissions of works under consideration for Academy Awards which have previously been commercially released, including submissions of music by Sony. Apart from any such submissions, I have never at any time received any recorded music from Sony, and was never shown any recorded music by Sony. I was never shown and never received Plaintiff's tape or any other material containing Plaintiff's song from any source, including Sony's A&R Department or any other department at Sony.

12. I do not know, nor had I ever heard of, Harvey Leeds before this litigation. To my knowledge, I have never received recorded music of any kind from Mr. Leeds or anyone from his office or under his direction.

13. *Heart* was created without access to, knowledge of or inspiration by any musical work written, performed or otherwise created by Plaintiff.

David Jacoby, the Senior Counsel for Sony and their in-house counsel who oversees this litigation, has also submitted a Declaration dated January 20, 2004. It states:

4. I have searched Sony's and Sony/ATV's records and confirmed that neither Horner nor Jennings was affiliated as a songwriter with Sony or Sony/ATV in 1995, 1996 and 1997. In fact, neither Horner nor Jennings had *any* contractual relationship with Sony or Sony/ATV during those years. As such, Horner and Jennings would not have had access to *Lover* (even assuming that a copy of *Lover* was sent to a Sony A&R Department) or any other material through an A&R Department at Sony or Sony/ATV.

5. Based on my investigation, Sony had no involvement with the creation of *Heart. Heart* was created to be part of the soundtrack for the motion picture *Titanic,* which was produced by Twentieth Century Fox and Paramount Pictures. Sony's role was to distribute a sound recording of the soundtrack (i.e., soundtrack album), and single recordings of various songs contained on the soundtrack. It had no role in the creation or composition of the music for the film.

Plaintiff has submitted nothing on this instant motion to contradict these sworn submissions from Horner, Jennings and Jacoby. What he has done is submit website printouts which he claims show some "long term `Affiliation with Sony'" (p. 5, Jorgensen memo in opposition to this motion) and contend that the key portions of the Horner, Jennings and Jacoby are "untrue."[1]

To clear up any possible confusion concerning the printouts and their import, Sony, in its reply papers on the motion, submitted two additional Declarations: one from Dee Hale, Sony's Vice President of Film and TV Music Administration, and the second from Palisa R. Kelley, Sony's Director of Business Affairs. The Hale Declaration of March 15, 2004 states:

3. I have searched Sony and Sony/ATV's records and confirmed that, in the years 1995 through 1997, neither Sony nor Sony/ATV had a contractual relationship with James Horner or Will Jennings, and certainly, neither engaged Horner or Jennings as affiliated writers. *See* Exh. A, which lists the musical works identified in Plaintiff's ASCAP and BMI printouts and indicates the party with whom Sony or Sony/ATV contracted in order to become publisher or administrator of each listed work.

4. In fact, the only contract Sony/ATV had with James Horner was in 2002—well after the time period relevant to this action—when Sony acquired publishing rights to the background music to the movie *Iris* from James Horner. Again, this contract was not to engage Horner as a writer for Sony or Sony/ATV, but to acquire the rights to that specific work from him.

5. Accordingly, any attempt to rely on the ASCAP and BMI website printouts to support the theory that the *Heart* writers were affiliated writers of Sony or Sony/ATV in 1995 through 1997 is baseless.

The Kelley Declaration, dated March 16, 2004 states:

3. The printouts relied upon by Plaintiff do not support that contractual relationships exist between the listed authors of the registered musical work, *i.e.,* James Horner or Will Jennings, and Sony or Sony/ATV. Rather, the printouts merely reflect the identity of the author and publisher/administrator, and contain no information about the ownership of the musical work or the chain of title with respect to the work.

4. Generally, writers of music for motion pictures (such as Horner and Jennings) assign all or some portion of the ownership of the copyright to, or create music as works for hire for, the motion picture company producing the motion picture. The motion picture company then contracts with a publishing company, such as Sony/ATV, to administer the musical work. In certain circumstances, there may be several intervening assignments of the rights to a song among any number of companies unrelated to Sony prior to Sony/ATV's involvement.

5. The fact that Sony or Sony/ATV may be listed on the ASCAP or BMI websites as publisher/administrator for music written by Horner or Jennings does not signify any contractual relationship between the writers and Sony or Sony/ATV, let alone an "affiliated" relationship.

6. Therefore, any attempt to rely on the ASCAP and BMI websites printouts to support the theory that the *Heart* writers were affiliated writers of Sony or Sony/ATV in 1995 through 1997 is baseless.

Because plaintiff is pro se and because this matter is on remand, on April 27, 2004, I took the very unusual step of granting plaintiff's request to submit a surreply brief on this motion. In it, he took the position that the Hale "declaration sets forth no qualifications of the declarant to undertake a comprehensive search and sets forth no statement concerning the integrity of the records searched or that all applicable records reside in the place searched," (p. 2, plaintiff's surreply) (emphasis in original), and that the Kelley Declaration does not set forth her "qualifications" enabling her to comment "on how the `Heart' writers assigned their rights." (p. 3, plaintiff's surreply). Neither observation creates any material factual issue concerning "access" in this case.

The defendants have shown that there is no material evidence in support of plaintiff's copyright infringement claim and plaintiff has done nothing except to "rely simply on conclusory allegations [and] speculation." Morris v. Lindau, 196 F.3d 102, 109 (2d Cir. 1999) (quoted in Jorgensen, 351 F.3d at 51).

Mr. Jorgensen, as the evidence developed on this motion clearly demonstrates, has shown no possibility, certainly not a "reasonable" one and not even a "bare" one that the authors of *Heart* ever had access to *Lover.* It is now crystal clear from the record on this motion that neither Horner nor Jennings were "affiliated" with Sony during the relevant period of 1995-1997. In the words of the Second Circuit, defendants have "demonstrate[d] a lack of evidence supporting an essential element of plaintiff's claim." Jorgensen, 351 F.3d at 55 (citing Repp v. Webber, 132 F.3d 882, 890 (2d Cir. 1997)).

As the Court of Appeals noted, there is "nothing to support [an] allegation of a striking similarity" between *Heart* and *Lover* in this case. Jorgensen, 351 F.3d at 56.

The motion for summary judgment is granted. The case is closed and ordered removed from the docket of this Court.

SO ORDERED.

[1] Mr. Jorgensen, as noted in the Court of Appeals decision, Jorgensen, 351 F.3d at 50 n.3, has full knowledge of the import of a summary judgment motion as demonstrated by his submissions here. It should further be noted that he was advised on this subject at conferences in the District Court in this case.