

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CLERK OF COURT
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JACK BUNICK,
:
Plaintiff,
:
-against-
:
UPN, a/k/a UNITED PARAMOUNT
:
NETWORK a/k/a PARAMOUNT NETWORK
:
TELEVISION, CBS TELEVISION, VIACOM
:
NETWORKS INC., FLAME TELEVISION,
:
NUYORICAN PRODUCTIONS, JENNIFER
:
LOPEZ, "JOHN DOE ENTITIES" 1-10, and
:
"JOHN DOES" 1-10,
:
Defendants.
:
-----X

06 Civ. 2833 (RMB)(HBP)

DECISION AND ORDER

I. Introduction

On or about April 11, 2006, Jack Bunick ("Bunick" or "Plaintiff") filed a complaint ("Complaint" or "Compl.") against UPN, CBS Television, Viacom Networks, Inc., Flame Television, Nuyorican Productions, Jennifer Lopez, "John Doe Entities" 1-10, and "John Does" 1-10 (collectively, "Defendants") alleging, among other things, that Defendants "infringed Plaintiff's copyright in the Original Work [a script for a television show] in direct violation and contravention of 17 U.S.C. §§ 101[-1332]." (Compl. ¶¶ 35, 42, 48, 54.) Specifically, Plaintiff asserts that "[i]n or about late 1999, Plaintiff completed writing a script [entitled 'South Beach: Miami'] for the pilot episode of an original teleplay based upon his personal exodus from Brooklyn, New York to South Beach, Miami, Florida," and Defendants "willfully and improperly began developing, producing and filming their own television show [entitled 'South Beach'] derived from Plaintiff's [script]." (Compl. ¶¶ 14, 27.)

On or about October 1, 2007, Defendants filed a motion for summary judgment (“Motion”) pursuant to Rule 56 of the Federal Rules of Civil Procedure, arguing, among other things, that (i) Bunick “cannot establish that the creators of ‘South Beach’ had ‘access’ to [Plaintiff’s script]”; (ii) “he cannot demonstrate that the works are ‘strikingly similar’”; and (iii) “undisputed evidence shows that ‘South Beach’ was independently created.” (Defs.’ Mem. of Law in Supp. of Mot. for Summ. J., dated Oct. 1, 2007 (“Defs.’ Mem.”) at 13.)¹

On or about November 8, 2007, Plaintiff responded arguing, among other things, that (i) Defendants “had (a reasonable possibility of) ‘access’ to [Plaintiff’s script]”; (ii) Plaintiff has shown “the absolute similarity in [Plaintiff and Defendants’] stories”; and (iii) the “supposed original independent story was different in many significant ways from the aired show.” (Pl.’s Mem. of Law in Opp’n to Defs.’ Mot. for Summ. J., dated Nov. 8, 2007 (“Pl.’s Opp’n”) at 15, 23–25.)²

On or about November 30, 2007, Defendants filed a reply (“Defs.’ Reply”) and the supplemental affidavit of Orin Snyder (with Exhibits A–K), dated November 30, 2007 (“Snyder Reply Aff.”). The parties waived oral argument.

For the reasons stated below, Defendants’ Motion is granted.

¹ “For purposes of this summary judgment [M]otion, Defendants assume that Plaintiff owns a valid copyright registration for his [script] and can establish the first element of his claim”—i.e., copyright ownership. (Defs.’ Mem. at 13 n.5; Bunick Aff., Ex. A.)

In support of their Motion, Defendants also filed a statement of material facts, pursuant to Local Civil Rule 56.1, dated October 1, 2007 (“Defs.’ 56.1 Stmt.”) and the affidavit of attorney Orin Snyder (with Exhibits A–O), dated October 1, 2007 (“Snyder Aff.”).

² In opposition to Defendants’ Motion, Plaintiff also filed, a counter-statement of material facts, pursuant to Local Civil Rule 56.1, dated November 8, 2007 (“Pl.’s 56.1 Stmt.”), and the affidavit of Jack Bunick (with Exhibits A–Q), dated November 8, 2007 (“Bunick Aff.”).

II. Background

Plaintiff alleges that in 1999 he “wrote an original TV work entitled ‘South Beach: Miami’ and he copyrighted this script on February 4, 2000.” (Pl.’s 56.1 Stmt. ¶ 1 (p. 12); Bunick Aff., Ex. A.) Plaintiff claims that his “script was sent [unsolicited] to UPN and was received by UPN [by Robin Gurney, then-Director of Drama Development] on February 10, 2000,” (Pl.’s 56.1 Stmt. ¶ 3 (p. 13)) as evidenced by a record of receipt, dated “10-Feb-00,” maintained in Robin Gurney’s electronic “Drama Database.” (See Bunick Aff., Ex. B at 1.) “Neither [Plaintiff] nor [Plaintiff’s] agent . . . ever received the script [back] or a letter of rejection” from UPN. (Bunick Aff. ¶ 14.) Plaintiff asserts that “UPN, along with others, produced and aired a show called ‘South Beach’ from January 11 to February 22, 2006,” which was “definitely similar to [Plaintiff’s] work.” (Pl.’s Opp’n at 6.)

Plaintiff’s allegations against Defendants rest upon the (untenable) assumptions that “UPN received and reviewed [Plaintiff’s script]” in 2000; that someone in UPN’s Drama Development Department, presumably Robin Gurney who, in fact left UPN in 2001, sent Plaintiff’s script to Matt Cirulnick, a professional independent writer; that in or about 2004 Defendants “hired [Matt Cirulnick] . . . to work over an attractive offering from Jack Bunick, which was deemed worthy of exploitation”; and that Defendants “made up an amalgam of the original copyrighted Bunick work.” (Pl.’s Opp’n at 17–18.) At the same time, Plaintiff acknowledges that “there are a multitude of differences between the UPN show, ‘South Beach,’ and [Plaintiff’s] written script.” (Snyder Aff., Ex. A (“Bunick Dep.”) at 139:3–8, Feb. 15, 2007 (“Yes. There was a lot of change to what [Defendants] did with my script.”).) And, even Plaintiff’s expert, UCLA screenwriting professor Lew Hunter, opined that “there are numerous points of dissimilarity” between the plots and subplots in Plaintiff’s script and Defendants’

television show. (Snyder Aff., Ex. I (“Hunter Dep.”) at 143:3–11, June 6, 2007; Bunick Aff., Ex. P (“Hunter Report”) at 1.)

Defendants assert that “[t]he idea for the television show ‘South Beach’ was independently originated [in 2004] by Matt Cirulnick . . . and his brother Greg Cirulnick,” (Defs.’ 56.1 Stmt. ¶¶ 30, 34); that Plaintiff “never sent his [script] to anyone involved in the creation or development of ‘South Beach’; and that [Plaintiff] has no knowledge, information or evidence showing that his [script] was received by any person with any connection to the show.” (Defs.’ 56.1 Stmt. ¶ 43.) Defendants say that Plaintiff’s “script was received and then ‘passed on’ (meaning that it was rejected),” and that “it is highly unlikely [that] an unsolicited submission would have ever made it to [Robin Gurney’s] desk.” (Defs.’ 56.1 Stmt. ¶¶ 46–47 (“It was standard practice for [Ms.] Gurney’s assistants to review her mail for her . . .”).) And, “[a]lthough written records establish that [Ms.] Gurney’s office received the [unsolicited script] in the mail,” (Defs.’ Mem. at 5), Ms. Gurney “never had any involvement or contact with anyone involved in the creation or development of ‘South Beach.’” (Defs.’ 56.1 Stmt. ¶ 49.)

III. Legal Standard

A party is entitled to summary judgment “if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). The existence of a factual dispute between the parties is only relevant if that particular fact is “material” (i.e., “[o]nly disputes over facts that might affect the outcome of the suit under the governing law”). Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247–48 (1986). While the Court must “resolve all ambiguities and draw all reasonable inferences against the movant,” N.Y. Mercantile Exch., Inc. v. Intercontinentalexchange, Inc., 497 F.3d 109, 113 (2d Cir. 2007), the

mere existence of **some** alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment.” Liberty Lobby, 477 U.S. at 247–48. The non-moving party “must do more than simply show that there is some metaphysical doubt as to the material facts.” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

To succeed “[i]n a copyright infringement case, the plaintiff must show . . . ownership of a valid copyright; and . . . unauthorized copying of the copyrighted work.” Jorgensen v. Epic/Sony Records, 351 F.3d 46, 51 (2d Cir. 2003) (citing Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991); Castle Rock Entm’t, Inc. v. Carol Publ’g Group, Inc., 150 F.3d 132, 137 (2d Cir. 1998)). “A certificate of registration from the United States Register of Copyrights constitutes prima facie evidence of the valid ownership of a copyright.” Jorgensen v. Epic/Sony Records, 351 F.3d 46, 51 (2d Cir. 2003) (citing 17 U.S.C. § 410(c)). “To satisfy the second element of an infringement claim . . . a plaintiff must show both that his work was ‘actually copied’ and that the portion copied amounts to an ‘improper or unlawful appropriation.’” Jorgensen, 351 F.3d at 51 (citing Castle Rock, 150 F.3d at 137). “Actual copying may be established by direct or indirect evidence.” Boisson v. Banian, Ltd., 273 F.3d 262, 267 (2d Cir. 2001). “Because direct evidence of copying is seldom available, a plaintiff may establish copying circumstantially ‘by demonstrating that the person who composed the defendant’s work had access to the copyrighted material,’” Jorgensen, 351 F.3d at 51 (quoting Herzog v. Castle Rock Entm’t, 193 F.3d 1241, 1249 (11th Cir. 1999)) (citing Walker v. Time Life Films, Inc., 784 F.2d 44, 48 (2d Cir. 1986)), and that “there are similarities between the two works that are ‘probative of copying.’” Id. (citing Repp & K & R Music, Inc. v. Webber, 132 F.3d 882, 890 (2d Cir. 1997)).

“In copyright infringement cases, courts have regularly granted summary judgment where it is clear that the plaintiff cannot make out essential elements of the [copyright] claim.” Favia v. Lyons P’ship, No. 94 Civ. 3277, 1996 WL 194306, at *2 (S.D.N.Y. Apr. 23, 1996) (citations omitted); see also Repp & K & R Music, Inc. v. Webber, 132 F.3d 882, 890 (2d Cir. 1997). “Because [P]laintiff has raised no issue of fact regarding access, copying may only be proven through a demonstration that the two works are “strikingly similar.” Gal v. Viacom Int’l, Inc., 518 F. Supp. 2d 526, 543 (S.D.N.Y. 2007); see also Repp, 132 F.3d at 889.

IV. Analysis

(i) Access

Defendants argue, among other things, that “Bunick has no evidence (because none exists) that the creators of ‘South Beach’ had access to Bunick’s [script] through [Robin] Gurney or anyone else [at UPN].” (Defs.’ Mem. at 14.) Plaintiff argues, among other things, that “Bunick clearly established receipt [of the script] by UPN,” and that the “person who received it at UPN was Robin Gurney.” (Pl.’s Opp’n at 2, 14.)

“[T]o support a claim of access, a plaintiff must offer ‘significant, affirmative and probative evidence.’” Jorgensen v. Epic/Sony Records, 351 F.3d 46, 51 (2d Cir. 2003) (quoting Scott v. Paramount Pictures Corp., 449 F. Supp. 518, 520 (D.D.C. 1978), aff’d, 607 F.2d 494 (D.C. Cir. 1979)). “[A]ccess cannot be based on mere ‘speculation or conjecture.’” Id. (quoting Gaste v. Kaiserman, 863 F.2d 1061, 1066 (2d Cir. 1988)).

Plaintiff has failed to provide evidence that Defendants had access to his script within the meaning of the cases cited. At her deposition on February 28, 2007, Ms. Gurney acknowledged that the record of receipt of Plaintiff’s script “indicate[s] that [she] received such a [script] [o]n or about February 10, 2000,” and “it suggests that it was passed on [i.e., rejected] at some point.”

(Snyder Aff., Ex. M (“Gurney Dep.”) at 24:6–10; 25:21 to 26:2; see also Bunick Aff., Ex. B.)

Ms. Gurney’s testimony continued:

Q Did you read [Plaintiff’s] “South Beach” [script]?

A Not to my recollection at all.

Q Who would have passed on it?

A My assistant.

* * *

Q Do you recall ever giving a copy of a “South Beach” [script] or pitch written by Jack Bunick to anybody at UPN at any time?

A No.

Q Did you have any involvement of any kind . . . with the development of the UPN show “South Beach”?

A No.

* * *

Q Prior to the broadcast of “South Beach” on UPN in 2006, did you ever have discussions of any kind about the development of “South Beach” with anyone?

A No.

(Gurney Dep. 26:22 to 27:1; 48:16–23; 49:1–4.) And, Ms. Gurney testified that she left UPN in June 2001, (see Gurney Dep. 40:6–20), “over three years before Matt and Greg [Cirulnick] pitched their show to the network.” (Defs.’ Mem. at 5.)

Most importantly, Bunick acknowledged at his own deposition that he **“can only speculate that upon receipt of [his] script, [Ms. Gurney] shared [the] script with people who were involved in the development of the UPN show, ‘South Beach.’”** (Bunick Dep. 189:6–24 (“As of now, I do not know what she did with it.”) (emphasis added).)

Plaintiff “has not adduced proof of a reasonable possibility that ‘the paths of [the “South Beach” creators] and the infringed work crossed.’” Jorgensen, 351 F.3d at 53 (quoting Towler v. Sayles, 76 F.3d 579, 582 (4th Cir. 1996)). “Bare corporate receipt of [Plaintiff’s] work, without any allegation of a nexus between the recipients and the alleged infringers, is insufficient to raise a triable issue of access.” Id. (citations omitted); see also Repp & K & R Music, Inc. v. Webber, 132 F.3d 882, 890 (2d Cir. 1997).

(ii) Striking Similarity

Defendants argue, among other things, that the “similarities alleged by Bunick either do not exist or relate to general ideas, themes or concepts . . . which do not qualify for copyright protection.” (Defs.’ Mem. at 1, 19; Defs.’ Reply at 7.) Defendants’ expert, Arnold Margolin, “a member of the Writers Guild of America, west (WGAW) since 1965 . . . [and] an arbitrator in [writing] credit disputes within the WGAW,” concluded in his May 4, 2007 report, that “there are no elements between the two [works] that could qualify as strikingly similar.” “Any similarities that exist between [D]efendants’ and [P]laintiff’s works reflect either prior art, scènes à faire or other particulars that follow from a similar genre and/or premise” (Snyder Aff., Ex. H (“Margolin Report”) ¶¶ 4, 17, 101.)

Plaintiff argues, among other things, that Defendants’ “show was definitely similar to the Jack Bunick work, (Pl.’s Opp’n at 6), and Plaintiff’s expert, Professor Hunter, concluded, among other things, in his (undated) report, that the “premise of [Plaintiff’s] ‘South Beach: Miami’ and [Defendants’] ‘South Beach’ is strikingly similar or basically the same as both scripts deal with the identical subject matter.” (Hunter Report at 9.)

“Two works are considered ‘strikingly similar’ if creation of one is so dependent on the other as to preclude the possibility of independent creation.” Gal v. Viacom Int’l, Inc., 518 F.

Supp. 2d 526, 543 (S.D.N.Y. 2007) (citation and internal quotation omitted); see also Repp, 132 F.3d at 889. “[I]t is a stringent test. The mere existence of multiple similarities is insufficient to meet the [‘strikingly similar’] test.” Gal, 518 F. Supp. 2d at 543 (citing Am. Direct Mktg, Inc. v. Azad Int’l, Inc., 783 F. Supp. 84, 95 (E.D.N.Y. 1992)).

Plaintiff has not demonstrated a “striking similarity” between the two works.³ “Summary judgment [for Defendants] is appropriate . . . where ‘the similarity concerns only noncopyrightable elements of plaintiff [sic] work or no reasonable trier of fact could find the works substantially similar.’” Hogan v. DC Comics, 48 F. Supp. 2d 298, 310 (S.D.N.Y. 1999) (quoting Williams v. Crichton, 84 F.3d 581, 587 (2d Cir. 1996)); see also Tisi v. Patrick, 97 F. Supp. 2d 539, 549 (S.D.N.Y. 2000) (“Although plaintiff’s expert opines that the [two works] are strikingly similar, an issue of fact cannot be created by merely reciting the magic words ‘strikingly similar’ and ‘no possibility of independent creation.’”) (citation omitted).

Defendants’ expert, Mr. Margolin, concluded, among other things, that “[t]here is no evidence to suggest that [D]efendants have in any way copied any of the[] characters from [P]laintiff’s work”; “a review of these works makes it clear that the plots of each work are substantially dissimilar”; “the sequences of events of the two works [are] even more dissimilar [than the plots]”; “[t]here certainly is no evidence that any dialogue has been copied from one work to the other”; “[n]one of the action that sets the pace in [D]efendants’ work is apparent in [P]laintiff’s work”; “it is clear that [the two works] have very different moods”; and “the themes of [P]laintiff’s and [D]efendants’ work . . . are in no way similar beyond a level of abstraction

³ Assuming, arguendo, that Plaintiff’s allegations were sufficient to establish that Defendants had access to Plaintiff’s script, “summary judgment [still] would be warranted because [P]laintiff cannot establish substantial similarity between the protectible elements of [P]laintiff’s and [D]efendants’ works.” Polsby v. St. Martin’s Press, Inc., No. 97 Civ. 690, 1999 WL 225536, at *4 (S.D.N.Y. Apr. 19, 1999); see also Attia v. Soc’y of the N.Y. Hosp., 201 F.3d 50, 58 (2d Cir. 1999).

that makes comparison meaningless.” (Margolin Report ¶¶ 47–48, 60, 67, 72–73, 84.) And, “protectible items do not include so-called scènes à faire”—i.e., “[m]aterial or themes commonly repeated in a certain genre.” Am. Direct Mktg., 783 F. Supp. at 95 (citing Walker v. Time Life Films, Inc., 615 F. Supp. 430, 435 (S.D.N.Y. 1985), aff’d, 784 F.2d 44 (2d Cir. 1986)).

Defendants’ expert provides numerous examples of television shows in which “South Beach, [Miami] has been a source of stories or settings both prior to the copyrighting of [P]laintiff’s work and subsequent to it.” (Margolin Report ¶ 104–07 (citing, among other titles, Kings of South Beach (2007), 8th & Ocean (2006), CSI: Miami (2002), and Miami Vice (1984).)

“[T]here is nothing original, unique, novel or protectible about [P]laintiff’s work that has been appropriated or copied in [D]efendants’ work.” (Margolin Report ¶ 108.)

Plaintiff’s expert, Professor Hunter, on the other hand, (unpersuasively) concluded that “there **could** well have been some copying involved.” (Hunter Dep. 168:2–4 (emphasis added).) Professor Hunter refused to “say one way or the other” whether “it is possible . . . that [Defendants’ television show] was the product of coincidence and independent creation.” (Hunter Dep. 168:8–12.) Professor Hunter acknowledged during his deposition that he “think[s] there’s a possibility” that “a second man, having never seen [Plaintiff’s] script,” could “independently come up with an idea [for] a show about a New Yorker moving to South Beach, [Miami] and encountering models and clubs.” (Hunter Dep. 155:4–11; 156:21 to 157:9); see also Repp, 132 F.3d at 890–91 (requiring “unequivocal opinions” about the “striking similarity” of the compared works); Cox v. Abrams, No. 93 Civ. 6899, 1997 WL 251532, at *7 (S.D.N.Y. May 14, 1997) (For two works to be “strikingly similar” they must be “so nearly alike as to preclude the possibility of independent creation.”). Plaintiff’s expert admits that “there is nothing original . . . about someone being victimized by a crime . . . and, as a result, deciding to

leave one life and find another life somewhere else.” (Hunter Dep. 75:7–13.) “Almost all of the . . . similarities between the works are unprotectable themes and concepts that flow predictably from this idea.” Hogan, 48 F. Supp. 2d at 310; see also Gal, 518 F. Supp. 2d at 547 (“[T]he presence of certain similarities . . . do not suffice to pass the ‘strikingly similar’ test, in light of the significant differences between the works and considering the two in the context of the genre . . .”).

Plaintiff, too, admits that his script includes generic ideas and commonplace elements and aspects of the South Beach, Miami club and modeling scene:

Q And you would agree that those elements, models, nightclubs, beaches, restaurants, hotels, beautiful people, are all elements that are commonly associated with South Beach, correct?

A Correct.

(Bunick Dep. 80:11–16.)

(iii) Independent Creation

Defendants also argue that there is “overwhelming evidence that ‘South Beach’ was independently created by Matt and Greg Cirulnick” in the spring of 2004. (Defs.’ Mem. at 24; Defs.’ Reply at 9.) Plaintiff responds that the Cirulnicks’ script was “a reworking of the ‘Bunick’ script that was in the hands of UPN for a long time.” (Pl.’s Opp’n at 19.)

Because Plaintiff “has not presented any circumstantial evidence from which a reasonable juror could conclude that [Defendants] actually copied [Plaintiff’s script], there is **no** need for [D]efendants to present evidence of independent creation in rebuttal,” Gal, 518 F. Supp. 2d at 547, but “evidence of independent creation introduced by defendants can serve to bolster a finding of a lack of striking similarity.” Id. at 548 (citing Vargas v. Transeau, 514 F. Supp. 2d 439, 445 (S.D.N.Y. 2007)).

In fact, there is powerful evidence of Defendants' independent creation of "South Beach." Matt Cirulnick testified that "[a]ll my TV shows that I've sold [including 'South Beach'] come from me with the exception of 'The Thomas Crown Affair' . . . which was clearly based on characters that were in [the film] 'The Thomas Crown Affair.'" (Snyder Aff., Ex. K ("M. Cirulnick Dep.") at 52:3-8, Feb. 27, 2007.) Matt Cirulnick explained "how so much of [the plot of 'South Beach'] is . . . autobiographical":

[I]t's about two guys from Brooklyn. [M]y brother and I are two guys from Brooklyn, third generation Brooklynites. . . . [T]he personalities are based on myself and my brother. A model, my fiancé[e] is a Ford model who I was able to ask . . . constant questions about how that works and have watched her over the years. . . .

I lived at the Mondrian Hotel [in Los Angeles, California] for several months [in 2003]. My brother worked there at the Sky Bar and it's a very similar situation to the Shore Club in South Beach. . . .

[G]rowing up in Brooklyn, I have tons of friends who are involved in graffiti, involved in fights, involved in all kinds of trouble and things you might want to run away from.

I have friends who are very powerful in the nightlife industry. . . . [There are] tons of things that are autobiographical about it.

(M. Cirulnick Dep. 113:10; 113:17 to 114:9; see also Snyder Reply Aff., Ex. F at 1-5.) Greg Cirulnick's testimony supported his brother's account regarding the creation of "South Beach":

Q Who got the idea about writing a story regarding South Beach?

A That was me.

Q And what prompted that?

A My experiences working at the Sky Bar out here [in Los Angeles] . . . prompted the writing of that.

* * *

Q And then what did you do with that idea?

A I had called my brother who's a screenwriter and gave him the idea that I had, and he believed there was something that we could work with so we sat down together

* * *

THE WITNESS: It was collaborative work between myself [sic] and my brother.

(Snyder Aff., Ex. L (“G. Cirulnick Dep.”) at 16:10–16; 22:14–18; 25:22–23, Feb. 27, 2006; see also Snyder Reply Aff., Ex. F at 1–5.) The sworn testimony from Matt and Greg Cirulnick “detailing the genesis of the idea in [the Cirulnicks’] personal experience . . . is evidence of independent creation.” Gal, 518 F. Supp. 2d at 548 (citing Corwin v. Walt Disney Co., 475 F.3d 1239, 1247 (11th Cir. 2007)). “[T]his evidence of independent creation further buttresses [D]efendants’ argument that there is no triable issue of fact on striking similarity.” Id.

V. Conclusion and Order

For the foregoing reasons, Defendants’ Motion for summary judgment is granted. The Clerk is respectfully requested to close this case.

SO ORDERED.

Dated: New York, New York
April 30, 2008



RICHARD M. BERMAN, U.S.D.J.