

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CYNTHIA RODRIGUEZ and
ELIZABETH MARIE ANNE ZWIEBACH, :

05 CV 10218 (LAP)

Plaintiffs, :

MEMORANDUM AND ORDER

-v- :

HEIDI KLUM, et al., :

Defendants. :

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LORETTA A. PRESKA, United States District Judge:

Before the Court is Defendants' unopposed motion for attorneys' fees and costs pursuant to 17 U.S.C. § 505. For the reasons set out below, the motion is granted to the extent indicated below.

Plaintiffs commenced this copyright case on December 5, 2005, asserting that Defendants' "Project Runway" infringed Plaintiffs' copyright in their treatment for a reality show entitled "American Runway" ("Plaintiffs' Treatment"). As is detailed in the Lobenfeld Declaration, executed October 31, 2008, at an early conference with the Court, Defendants' counsel asserted that Project Runway had been independently created. Accordingly, at that conference, the parties agreed, and the Court ordered, that discovery would be limited in the first instance to the issue of independent creation. Plaintiffs' then-counsel, Chris Deininger, stated that Plaintiffs would withdraw their claims if Defendants' documents reflected that Project Runway had been independently created. At another conference a few months later, Plaintiffs' counsel reiterated this undertaking.

On or about July 28, 2006, Defendants produced to Plaintiffs a Project Runway treatment which Jane Cha revised and emailed on April 8, 2003 to Benjamin Famiglietti at Miramax (the “4/8/03 treatment”). That document alone was clear evidence that Project Runway was a complete concept at least one month before Plaintiffs allege that Defendants had access to Plaintiffs’ treatment in May of 2003. Nevertheless, Plaintiffs did not withdraw their claims.

On September 15, 2006, Plaintiffs’ counsel withdrew, and Plaintiffs proceeded pro se. At a November 15, 2006 conference, the Court again reminded the parties that the purpose of the limited discovery schedule was to determine sooner rather than later if Plaintiffs’ claims had any merit. Indeed, at that conference, Plaintiffs again reiterated their willingness to withdraw the case if they saw that Project Runway had been independently created. On or about January 16, 2007, Judah Shapiro appeared as counsel for Plaintiffs, and at a conference two days later, the Court again reiterated that discovery had been limited to the issue of independent creation.

On or about May 1, 2007, Defendants’ counsel stated to Plaintiffs’ counsel that in the course of discovery, counsel had reviewed numerous documents and taken depositions demonstrating independent creation and gave counsel notice that if Defendants prevailed, they would seek attorneys’ fees. Similarly, at a July 13, 2007 telephone conference with the Court, Defendants’ counsel stated that the 4/8/03 treatment contained about sixty percent of the elements of Project Runway, and the Court noted that if that was true, the time had come to “have a conversation” about continuing the case. Nevertheless, Plaintiffs persisted, and eventually summary judgment was granted to Defendants, including on, inter alia, the issue of independent creation.

In evaluating whether Defendants, as the prevailing party in this litigation, are entitled to attorneys' fees and costs, the Court considers the various factors set out in Baker v. Urban Outfitters, Inc., 431 F. Supp. 2d 351, 357 (S.D.N.Y. 2006), aff'd, 249 Fed. Appx. 845 (2d Cir. 2007), including the non-prevailing party's frivolousness, motivation, objective unreasonableness (both in the factual and legal components of the case), together with the need in particular circumstances to advance considerations of compensation and deterrence. Objective unreasonableness has been considered one of the most significant factors and, indeed, is the most significant factor in this case.

Passing whether or not Plaintiffs' treatment was sufficiently similar to Project Runway when considering only the protectable elements, there is no question that by the time the 4/8/03 treatment was produced to Plaintiffs on July 28, 2006, it should have been clear to Plaintiffs that continuing the action was objectively unreasonable. This is so not only because the independent creation factor had been emphasized from the earliest time in the case, but the 4/8/03 treatment made it abundantly clear that Defendants had independently created Project Runway prior to the time Plaintiffs claim Defendants had access to Plaintiff's Treatment. Continuing past that date was objectively unreasonable.

An award of attorneys' fees here will advance the considerations of compensation and deterrence. Consistent with the policies behind the Copyright Act, Plaintiffs should compensate Defendants for some portion of Defendants' fees and expenses after the time pursuing this action was no longer objectively reasonable. Such an award will also deter subsequent litigants from proceeding in a similar manner.

Finally, I have reviewed counsel's rates and hours and have found them to be reasonable. Indeed, I note that the vast majority of the billings in this matter were at a

reduced rate. Similarly, I have reviewed Defendants' expenses and have found them to be reasonable as well. Accordingly, Plaintiffs shall pay to Defendants a portion of the attorneys' fees and costs incurred after July 28, 2006.

Although Plaintiffs have not been required to submit financial statements, as the Court required in Shangold v. Walt Disney Company, 2008 WL 1908908 (2d Cir. 2008), the Court notes that Plaintiffs are individuals apparently not of extravagant means and that Defendants include major corporations, individuals apparently of extravagant means and several other individuals who work in the entertainment industry. Taking into account the relative wealth of the Plaintiffs and the Defendants, a total award of fees and expenses of \$50,000, jointly and severally against both Plaintiffs, appears to be equitable. See id. at *2 ("We have noted, however, that 'fee awards are at bottom an equitable matter, [and] courts should not hesitate to take the relative wealth of the parties into account.'" (citations omitted)).

CONCLUSION

For the reasons set out above, Defendants' motion for attorneys' fees and costs pursuant to 17 U.S.C. § 505 is granted in the amount of \$50,000.00 which shall be paid jointly and severally by Plaintiffs to Defendants. The Clerk of the Court shall enter judgment forthwith.

SO ORDERED:

Dated: January 7, 2009


LORETTA A. PRESKA, U.S.D.J

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