

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

CIVIL MINUTES – GENERAL

Case No. LA CV10-08838 JAK (SSx)

Date December 15, 2011

Title Nancy Radin v. Darlene Hunt, et al.

Present: The Honorable JOHN A. KRONSTADT, UNITED STATES DISTRICT JUDGE

Andrea Keifer

Not Reported

Deputy Clerk

Court Reporter / Recorder

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Not Present

Not Present

Proceedings: (IN CHAMBERS) ORDER GRANTING DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT (Dkt. 25) JS-6

I. Introduction

Defendant, Darlene Hunt (“Hunt”), is the writer and creator of *The Big C*, a television comedy on Showtime, a cable channel owned by Defendant Showtime Networks, Inc. (“Showtime”). Plaintiff, Nancy Radin (“Radin”), is the author of *Quality of Life*, a screenplay. Plaintiff alleges that Defendants copied *Quality of Life* in creating *The Big C*, created derivative works based on her screenplay, and broadcast those works, all without authorization, in violation of 17 U.S.C. §§ 106 and 502. Defendants have moved for summary judgment as to all of Radin’s claims. Their core contentions are twofold. First, because they had no access to Plaintiff’s work prior to the completion of the development of *The Big C*, they could not have copied it. Second, *Quality of Life* and *The Big C* are not substantially similar. Defendants further contend that there is no genuine issue of material fact with respect to either of these defenses.

The Court heard oral argument in this matter on December 5, 2011, and took the matter under submission. For the reasons stated in this Order, Plaintiff cannot establish that there is a genuine issue of material fact as to Defendants’ access to her copyrighted work at the relevant time. Further, because Plaintiff has not set forth sufficient grounds to warrant a continuance of the motion and an allowance of further discovery pursuant to Federal Rule of Civil Procedure 56(d), the Court GRANTS Defendants’ motion for summary judgment.

II. Factual Background

Radin studied screenwriting at the UCLA Extension School from 2006 through 2009. Radin Decl. ¶ 3, Dkt. 44. She did so on a part-time basis. *Id.* As part of her classes, she began developing a screenplay based on her experience with breast cancer. She finished this screenplay, *Quality of Life*, in

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fall 2008. *Id.* at ¶¶ 3-7.¹ Various scenes, but not the entire screenplay, were submitted separately to certain professors during the time that Plaintiff was an extension student at UCLA. Zavin Decl., Exh. 1, 41-59, Dkt. 29. She submitted the screenplay to the UCLA Extension School screenwriting contest in March 2009. Radin Decl. ¶¶ 6-7, Dkt. 44. Prior to the screenwriting contest, Plaintiff never published the screenplay other than by submitting it to her extension school writing professors. Nor did she ever publish the screenplay, not even on the Internet. Zavin Decl., Exh. 1, 86-87, Dkt. 29.

Defendant Hunt is a screenwriter and actress. Hunt Decl. ¶ 4, Dkt. 28. In May 2008, she began working on a screenplay that ultimately became *The Big C*. *Id.* at ¶ 5. Hunt submitted the final version of her screenplay to Showtime in January 2009. *The Big C* began airing in August 2010. *Id.* at ¶¶ 9, 11. These dates are not disputed.

The Big C and *Quality of Life* share certain similarities, at least when viewed at an abstract level. They are darkly comedic accounts of middle-aged women facing terminal cancer and trying to enjoy life. The women are separated from their husbands and have difficult families. They are attracted to their physicians. They lean on other cancer patients for support. They are teachers who form special relationships with particular students. Both hide some aspect of their cancer diagnosis from their friends and family.

III. Analysis

A. Legal Standard

“A plaintiff bringing a claim for copyright infringement must demonstrate (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” *Funky Films, Inc. v. Time Warner Entertainment Co., L.P.*, 462 F.3d 1072, 1076 (9th Cir. 2006).

“Absent evidence of direct copying, proof of infringement involves fact-based showings that the defendant had ‘access’ to the plaintiff’s work and that the two works are ‘substantially similar.’” *Id.* “Proof of access requires an opportunity to view or to copy plaintiff’s work. This is often described as providing a ‘reasonable opportunity’ or ‘reasonable possibility’ of viewing the plaintiff’s work. We have defined reasonable access as ‘more than a ‘bare possibility.’” *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 482 (9th Cir. 2000).

Circumstantial evidence of reasonable access is proven in one of two ways: (1) a particular chain of events is established between the plaintiff’s work and the defendant’s access to that work (such as through dealings with a publisher or record company), or (2) the plaintiff’s work has been widely disseminated.

Id. To establish a “particular chain of events,” a plaintiff must provide some “direct evidence,” beyond

¹ Plaintiff earlier claimed that she completed the screenplay only in February 2009, Compl. ¶ 7, Dkt. 1, and then claimed she completed it only in March 2009, Zavin Decl., Exh. 1, p. 88, Dkt. 29. Even if Plaintiff did finish the screenplay in fall 2008, the analysis below is unchanged. Thus, as explained below, the UCLA screenwriting competition in which Radin participated occurred after Hunt finished her script for *The Big C*.

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the mere possibility that a defendant may have seen or accessed plaintiff's copyrighted work, in order to create more than a "bare possibility" of access. *Art Attacks Ink, LLC v. MGA Entertainment Inc.*, 581 F.3d 1138, 1144 (9th Cir. 2009).

"Absent evidence of access, a 'striking similarity' between the works may give rise to a permissible inference of copying." *Baxter v. MCA, Inc.*, 812 F.2d 421, 423 (9th Cir. 1987). "Where a high degree of access is shown, we require a lower standard of proof of [striking] similarity," *Swirsky v. Carey*, 376 F.3d 841, 844 (9th Cir. 2004), but inversely, where a low degree of access is shown, plaintiff must show a greater degree of similarity. *Three Boys*, 212 F.3d at 485. "Striking similarity simply means that in human experience it is virtually impossible that the two works could have been independently created." *Stewart v. Wachowski*, 574 F. Supp. 2d 1074, 1103 (C.D. Cal. 2005) (quoting 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.02[B] (2005)).

B. Application

1. Access

The validity of Plaintiff's copyright is not disputed. However, Plaintiff cannot establish that there is a genuine issue of material fact as to whether Defendants copied her work. Thus, in response to Defendants' motion and supporting evidence that Hunt had no knowledge of, or access to, Plaintiff's work prior to the completion of her own, Plaintiff has not provided competing evidence of access sufficient to create a genuine issue of fact on a matter on which she bears the ultimate burden of proof.

Plaintiff does not, and cannot, argue that her screenplay was "widely disseminated." Plaintiff has produced no evidence establishing that anyone other than the judges of the UCLA extension school screenwriting competition read her script as a result of her submission of it as part of that competition. Moreover, even if her evidence were more substantial, dissemination through the screenwriting competition cannot form the basis for Plaintiff's theory of access. Thus, she submitted the script to the competition in March 2009, but it is undisputed that Hunt had finished her pilot script for *The Big C* in January 2009.

Equally problematic is Plaintiff's "particular chain of events" theory of access. Indeed, the "chain of events" Plaintiff seeks to establish raises no more than the "bare possibility" of access. Plaintiff's theory of access is that Plaintiff's individual instructors gathered up and compiled Plaintiff's scenes, which had been submitted to them individually, but which did not constitute the entirety of *Quality of Life*. Plaintiff next argues that these instructors, or some of them, then passed these compilations along through unknown intermediaries, and that they ultimately found their way into Hunt's hands before she completed her own work. To make this barebones claim more plausible, Plaintiff supplements her story with these contentions: (i) That the UCLA extension school writing program advertises itself as a "hub" for the entertainment world; (ii) that prizes for the screenwriting competition, which Plaintiff did not win, included a guaranteed read by an entertainment industry professional; and (iii) that Hunt and other *The Big C* affiliates donated to a UCLA cancer foundation. See Plaintiff's Opposition to Motion for Summary Judgment, 16-17, Dkt. 43. Plaintiff further argues that because UCLA does not "secure" scripts prepared in the extension school and because pages from Plaintiff's script did not bear Plaintiff's name, anybody might have read them. *Id.* at 17. The problem with this position is that it is entirely speculative.

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There is no evidence of any of the possible steps that might theoretically have provided Defendants with access to Plaintiff's work. Mere speculation and argument are not a sufficient basis to defeat a properly supported motion for summary judgment. In short, these are arguments, and not evidence. And, even if they meet the "bare possibility" of access standard, they do not rise above it.

2. Striking Similarity

No more successful is Plaintiff's attempt to show a genuine issue of fact as to a showing of "striking similarity" sufficient to support some inference of Defendants' access to her work. Given the tenuous theory of access Plaintiff posits, Plaintiff bears a heavy burden to establish that her *Quality of Life* and Defendants' *The Big C* are so strikingly similar that *The Big C* could have come about only through copying. Plaintiff has not met this burden.

Plaintiff has identified a number of similarities between her screenplay and *The Big C*. These are described above. Although none of these is by itself a protectable, expressive element, see *Mattel, Inc. v. MGA Entertainment, Inc.*, 616 F.3d 904, 913 (9th Cir. 2010), the combination of them might rise to the level of protectable expression. However, the scripts are far from sufficiently similar to be strikingly so. Consequently, they cannot, by themselves, establish a factual dispute as to whether Hunt could have created *The Big C* only by copying *Quality of Life*. It is not at all striking that a screenplay about middle aged female teachers with terminal cancer would share certain elements, including tension with a husband and children, a close relationship with a student, a support group, and a desire to enjoy one's life. Plaintiff identifies no other expressive elements that amount to striking similarity. The insignificant appearances of certain minor visual or scenic elements -- a swimming pool, a motor scooter, a beach, a sports car -- are far from sufficient to establish that Hunt necessarily copied Plaintiff's work. Plaintiff produces a list of words that appear in both her work and that of Defendants. These include "love," "laughter," and "wine," Chodos Decl., Exh. 209, Dkt. 48. But words are, of course, not protectable. *Narell v. Freeman*, 872 F.2d 907, 911 (9th Cir. 1989). And, in any event these commonplace words are far from strikingly similar. Plaintiff cannot pluck out unrelated elements of Defendants' work to create a false impression of similarity. See *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1044 (9th Cir. 1994) ("[W]e are equally unimpressed by [plaintiff's] compilation of random similarities scattered throughout the works, such as a lawnmower scene, a sprinkler scene, the presence of an attic, danger scenes, concerned parents, and kids sleeping outside overnight.").

In short, these claimed similarities identified by the Plaintiff are not striking enough to make it "virtually impossible" that her work and Hunt's work were independently created. Moreover, there are substantial differences between the two works, undercutting any argument of striking similarity. For example, in Plaintiff's work, the protagonist's husband has abandoned her and is largely absent from the plot; in Defendants' work, the protagonist has required her husband to leave their house, but he spends a great deal of time trying to win her back. Defendant's protagonist must deal with an eccentric homeless brother, a character with no analog in Plaintiff's work. In Plaintiff's work, the "support group" is an informal group of friends to which the protagonist turns; in Defendant's work, the support group is

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a formal group against which the protagonist at first rebels.²

The cases on which Plaintiff relies in support of her theory of access are distinguishable. In *Kamar International, Inc. v. Russ Berrie & Co.*, the plaintiff was able to identify a third party with whom the plaintiff and defendant both did business, and who likely would have transmitted plaintiff's work to defendant. 657 F.2d 1059, 1062 (9th Cir. 1981). The plaintiff in *Bouchat v. Baltimore Ravens, Inc.* was able to trace his work through specific, identified parties' hands in order to show that defendant had access. 241 F.3d 350, 354 (4th Cir. 2001). Moreover, in that case, the infringing work was nearly identical to that of the plaintiff. *Id.* In *Arnstein v. Porter*, because more than a million copies of plaintiff's work had been sold, access was easily shown. 154 F.2d 464, 467 (2d Cir. 1946). None of these sets of facts is similar to those presented in this matter. Instead, Plaintiff has only a highly speculative, vague theory of how Defendants would have accessed her work, and the two works in question are far from strikingly similar.³

IV. Request for Additional Time to Conduct Discovery

Plaintiff requests additional time for discovery, particularly to take additional depositions. The Court may exercise its discretion in granting additional time to conduct discovery. *Pfingston v. Ronan Engineering Co.*, 284 F.3d 999, 1005 (9th Cir. 2002). "The failure to conduct discovery diligently is grounds for the denial" of a request for additional time to conduct discovery. *Id.*; see also *Mackey v. Pioneer National Bank*, 867 F.2d 520, 524 (9th Cir. 1989) ("A movant cannot complain if it fails diligently to pursue discovery before summary judgment"); *Landmark Development Corp. v. Chambers Corp.*, 752 F.2d 369, 372 (9th Cir. 1985) (holding that the district court properly denied a request for additional time to conduct discovery because the "failure to take further depositions apparently resulted largely from plaintiffs' own delay").

However, Plaintiff has not adequately justified her request for additional time. Discovery began in February 2011. Although Plaintiff's first counsel had unexpected heart surgery in July 2011, Zavin Decl., Exh. A, Dkt. 35-1, Plaintiff makes no explanation why she could not have taken any depositions before then, and does not explain why her counsel did not propound the necessary discovery requests in the six months before the unexpected surgery. Defendant has shown that its counsel accommodated the concerns raised by the health issues of Plaintiff's prior counsel by agreeing to extend the time for the completion of discovery. Yet, Plaintiff's prior counsel still took no action. Plaintiff claims that Defendants and other parties did not cooperate with discovery requests, but presents no evidence to support this claim. Plaintiff has also not explained what happened after former counsel's recovery from his surgery, but before the discovery deadline in this matter, that prevented Plaintiff or her new attorneys, whom Plaintiff had engaged by September 2011, Dkt. 37, from conducting discovery. Plaintiff's failure to contact, much less depose, third party witnesses further evidences her dilatory

² Moreover, in stories about people dealing with terminal cancer, support groups are at best stock elements, or "scènes à faire," and thus are not protectable. See *Cavalier v. Random House, Inc.*, 297 F.3d 815, 824 (9th Cir. 2002).

³ Defendants also argue that, because there is no substantial similarity between *The Big C* and *Quality of Life*, Plaintiff cannot establish that Defendants infringed her work. However, because Plaintiff cannot prove that Defendants had access to her work, the Court does not reach the question of substantial similarity.

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approach to discovery. Given the amount of time that this matter has been pending, the completion of discovery and filing of this motion by Defendants, it would be prejudicial to them were the matter essentially returned to the starting gate while Plaintiff's new counsel commences discovery that would consume at least several weeks. Finally, there is nothing in the materials or arguments advanced by Plaintiff that supports the reasonable likelihood that Plaintiff will develop evidence to support her theory of access. Not a single declarant with first-hand knowledge has lent any support to Plaintiff's theory -- one that assumes that Hunt falsely declared that she did not have access to Plaintiff's work.

V. Conclusion

Plaintiff has established no more than a "bare possibility" of access to her work. She has not shown a triable issue of fact as to whether her work and Defendants' work are so strikingly similar as to create an inference of access. Accordingly, Plaintiff cannot establish a violation of her copyright. Nor can Plaintiff show a reasonable basis for a deferral of this matter until Plaintiff undertakes discovery that could have been completed months ago. For the foregoing reasons, the Court GRANTS Defendants' motion for summary judgment.

IT IS SO ORDERED.

Initials of Preparer _____ : _____
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