

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 10-22203-CIV-UNGARO

CYNTHIA CLAY,

Plaintiff,

v.

JAMES CAMERON, *et al.*,

Defendants.

ORDER ON MOTION TO DISMISS SECOND AMENDED COMPLAINT

THIS CAUSE is before the Court upon Defendants James Cameron, Twentieth Century Fox Film Corp. (“Fox”) and Dune Entertainment III, LLC’s (“Dune”) Motion to Dismiss Plaintiff’s Corrected Second Amended Complaint With Prejudice. (D.E. 47). Plaintiff filed a response to the Motion on December 31, 2011 (D.E. 53) and Defendants filed a reply on January 13, 2012 (D.E. 54). Accordingly, this matter is ripe for disposition.

THE COURT has reviewed the Motion and the pertinent portions of the record and is otherwise fully advised in the premises.

I

In this action, Plaintiff Cynthia Clay claims that in creating the motion picture *Avatar*, Defendants copied elements of Plaintiff’s book, “*Zolocco: A Story of Another University*,” in violation of federal copyright law. (D.E. 40). Specifically, Plaintiff alleges that she created *Zolocco* in the mid-1980s and that it was “in wide

circulation in the entertainment industry,” in an unpublished, but complete form, prior to Defendant Cameron’s claimed date of creation *Avatar*, in the mid-1990s. According to Plaintiff, Defendant Cameron deliberately borrowed “details, plot situations, characters descriptions, and other unique elements” from *Zolocco* and, as a result, *Avatar* and *Zolocco* share “substantial, continuing, and direct” similarities. (D.E. 40 ¶¶ 10, 25).

Plaintiff Cynthia Clay filed her original complaint in this action on July 5, 2010, asserting claims against all Defendants for copyright infringement and unjust enrichment and against Defendants Fox and Dune for vicarious copyright infringement and contributory infringement. (D.E. 1.) Before Defendants could respond to the Complaint, Plaintiff filed an Amended Complaint, asserting the same causes of action as in the original Complaint but with additional factual allegations. (D.E. 6). Upon Plaintiff’s motion and after hearing arguments of counsel, the Honorable Adalberto Jordan, United States District Court Judge, dismissed the Amended Complaint for failure to state a cause of action, but granted Plaintiff leave to amend. (D.E. 37). Plaintiff timely filed the Second Amended Complaint and the case was thereafter transferred to this Court. (D.E. 40) In the instant Motion, Defendants move to dismiss the Second Amended Complaint for failure to state a claim. (D.E. 47). Defendants argue, as they did in their previous Motion to Dismiss (D.E. 26), that (1) Plaintiff fails to adequately allege Defendant Cameron had access to her work; (2) the two works are not substantially similar in

their protectable expression; and (3) Plaintiff's unjust enrichment claim fails as a matter of law. (D.E. 53.)

II

Under Rule 8(a)(2), a pleading must contain only a "short and plain statement of the claim showing that the pleader is entitled to relief." While the Court, at this stage of the litigation, must accept as true well-pleaded factual allegations contained in the complaint, it need not accept legal conclusions as true. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). Legal conclusions must be supported by "enough fact to raise a reasonable expectation that discovery will reveal evidence" of the claim. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007). A pleading which tenders "naked assertion[s] devoid of further factual enhancement," fails to meet the requirement of Rule 8(a)(2) that it show that the pleader is entitled to relief. *Iqbal*, 129 S.Ct. at 1949 (quotations omitted).

In practice, to survive a motion to dismiss pursuant to Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570). A claim has facial plausibility when the plaintiff pleads factual content that "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citation omitted). The plausibility standard requires "more than a sheer possibility that a defendant has acted unlawfully." *Id.* (citation omitted). "Where a complaint pleads facts that are

‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement to relief.’” *Id.* (citation omitted).

Determining whether a complaint states a plausible claim for relief is a “context-specific undertaking that requires the court to draw on its judicial experience and common sense.” *Id.* at 1950 (citation omitted).

III

A. The Copyright Claims (Counts I- III)

To state a claim for copyright infringement, a plaintiff must allege two elements: (1) ownership of a valid copyright; and (2) copying of the copyrighted work. *See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991); *Leigh v. Warner Bros., Inc.*, 212 F.3d 1210, 1214 (11th Cir. 2000). To establish the second element of copying, a plaintiff must allege that the defendant had access to the plaintiff’s work and that the alleged infringing work is substantially similar to the plaintiff’s. *See Beal v. Paramount Pictures Corp.*, 20 F.3d 454, 459 (11th Cir. 1982). In dismissing the Amended Complaint, Judge Jordan ruled that Plaintiff had failed to adequately allege that Defendant Cameron had access to Plaintiff’s work. (D.E. 37). This Court finds that Plaintiff has not remedied this defect in the Second Amended Complaint and, so, will grant the Motion.

As to access, the Second Amended Complaint now includes allegations that *Zolocco* was available on “various websites such as ‘bookbooters.com’” and that Plaintiff’s literary agent and “[t]he principal of bookbooters.com, Toby Emden”

circulated the work within the motion picture industry. (D.E. 40 ¶ 10.) But, as Judge Jordan explained in his Order, allegations that Plaintiff's work was widely circulated are insufficient to support an inference that there was a "reasonable possibility" that Defendant Cameron had access to Plaintiff's work. (D.E. 37) (quoting *Benson v. Coca-Cola Co.*, 795 F.2d 973, 975 (11th Cir. 1986)). To support such an inference, Plaintiff must allege a "nexus" between the circulation of her work and Mr. Cameron. *Id.* Plaintiff's new allegations lend further support to her claim that her work was in general circulation, but still do not establish the requisite nexus between her work and Defendant Cameron specifically.¹ *See Benson*, 795 F.2d at 975 (no "access" shown where plaintiff alleged only that he performed his song for the public but there was no evidence or allegation that the defendant's songwriters attended any of plaintiff's concerts).

In her response to the Motion, Plaintiff argues that because her new allegations establish that *Zolocco* was available on the Internet, Plaintiff has adequately plead access. According to Plaintiff, "[w]ith the advent of the internet, distribution is worldwide." (D.E. 53 at n.5.) The Court disagrees with Plaintiff that the availability of a work on the Internet, generally, warrants an inference that a defendant has had access to the copyrighted work. Several courts have rejected this

¹Plaintiff's allegation that *Avatar* is so "strikingly similar to significant portions of the plaintiff's work that the Defendant Cameron must have had access to a copy of the work in order to create the core of his story for [*Avatar*]" also does not support a reasonable inference of access. (D.E. 40 ¶ 25.) This is not a case where the "similarity is so great it precludes the possibility of coincidence, independent creation, or common source." *Benson*, 795 F.2d at 975 n.2 (quotation marks and citation omitted).

theory, see *Mills v. Ayala*, 2010 WL 420556, at *2-4 (E.D. La. 2009); *O'Keefe v. Ogilvy & Mather Worldwide, Inc.*, 590 F. Supp. 2d 500, 515 (S.D.N.Y. 2008), and the single, unpublished decision on which Plaintiff relies, *Green Bullion Financial Services LLC v. Money4Gold Holdings, Inc.*, 639 F. Supp. 2d 1356 (S.D. Fla. 2009), is distinguishable. In *Green Bullion*, the court noted that “anyone with access to the internet had access to Plaintiff’s website,” and went on to focus on the element of similarity. *Id.* at 1361. In that case, however, the defendant was a web-based competitor of the plaintiff who allegedly copied elements from the plaintiff’s website. Here, there are no allegations to suggest that Defendant Cameron conducts business via the Internet or would have had reason to access *Zolocco* via the “various websites such as ‘bookbooters.com,’” on which it was allegedly available. (See D.E. 40 ¶ 10.)

Plaintiff’s allegations that her literary agent and bookbooters.com’s principal circulated her work also do not raise Plaintiff’s claim of access above the speculative level. See *Twombly*, 550 U.S. at 570. The Eleventh Circuit Court of Appeals has instructed that an “inference of access based on a third party’s possession of the plaintiff’s work requires more than a mere allegation that someone known to the defendant possessed the work in question.” *Herzog v. Castle Rock Entm’t*, 193 F.3d 1241, 1252 (11th Cir. 1999) (quotation marks and citations omitted). By this standard, Plaintiff falls woefully short of alleging access based on a third party’s possession. In fact, the Second Amended Complaint is devoid of allegations that

Defendant Cameron knew or did business with the third parties who allegedly circulated Plaintiff's work. (See D.E. 6 & 40); see, e.g., *Hill v. Gaylord Enm't*, 2008 WL 115441, at *4 (S.D. Fla. 2008) (dismissing copyright claim where the complaint alleged only that the plaintiff had sent his work to "publishers and literary agents for possible publication").

Even taking all the allegations in the Second Amended Complaint as true and drawing all reasonable inferences in favor of Plaintiff, the Second Amended Complaint fails to allege a "reasonable possibility" that Defendant Cameron had access to Plaintiff's *Zolocco*. Accordingly, the Court will grant the Motion, without reaching the element of substantial similarity.

B. The Unjust Enrichment Claim (Count IV)

Defendants argue that Plaintiff's claim for unjust enrichment should be dismissed because it is inadequately plead or, alternatively, because it is preempted by the federal Copyright Act. (D.E. 47.) To state a claim for unjust enrichment, a plaintiff must allege that she has conferred a benefit on the defendant, who has knowledge of that benefit. See *Nova Information Sys., Inc. v. Greenwich Ins. Co.*, 365 F.3d 996, 1006–07 (11th Cir.2004). For the reasons set forth above, Plaintiff has failed to allege that Defendants infringed upon her work and, so, has not alleged that she conferred any benefit upon the Defendants or that Defendants knowingly accepted such a benefit. Accordingly, the Court will also grant the Motion as to Cont IV.

IV

Because this matter has been pending since July 5, 2010 and Plaintiff has already been given an opportunity to remedy her deficient allegations as to access, the Court will dismiss the Second Amended Complaint without granting leave to amend. Plaintiff has had both the time and opportunity to formulate valid claims against Defendants and has failed to do so. Granting Plaintiff yet another opportunity to amend would be futile. Accordingly, it is

ORDERED AND ADJUDGED that the Motion (D.E. 47) is GRANTED IN PART; the COMPLAINT IS DISMISSED. It is further

ORDERED AND ADJUDGED that the Clerk of the Court SHALL close this case for administrative purposes.

DONE AND ORDERED in Chambers, in Miami, Florida this 5th day of April, 2012.



URSULA UNGARO
UNITED STATES DISTRICT JUDGE

cc: Counsel of Record