UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PEGGY HARLEY,

Plaintiff,

-v-

ANN NESBY, et al.,

Defendants.

08 Civ. 5791 (KBF)(HBP)

MEMORANDUM & ORDER

KATHERINE B. FORREST, District Judge:

At the April 13, 2012 conference in the above-captioned matter, the Court granted pro se plaintiff Peggy Harley's motion for summary judgment as to defendants Shanachie Entertainment Corporation ("Shanachie") and Ann Nesby ("Nesby") on her copyright infringement claim only, and denied in part and granted in part the motion for summary judgment by Shanachie, in which defendant Vaughn Harper ("Harper") joined.[1] The Court provided its reasoning, in pertinent part, at the April 13 conference, but stated that the bases for its decision would be

[1] At the January 12, 2012 status conference, the Court set a briefing schedule for dispositive motions which set the date for any such motion to be made as February 9, 2012. (Dkt. No. 71.) Shanachie filed its motion--and Vaughn filed his joinder therein--on February 8, 2012. (Dkt. No. 82, 92.) Plaintiff did not file her motion for summary judgment by February 9, 2012. However, in construing her opposition to that motion liberally as the Court must for a pro se litigant, Byng v. Wright, No. 09 Civ. 9924, 2012 WL 967430, at *6 (S.D.N.Y. Mar. 20, 2012)("A pro se party's submissions are to be read liberally, a requirement that is especially strong in the summary judgment context where claims are subject to a final dismissal") (citing Graham v. Lewinski, 848 F.2d 342, 344 (2d Cir. 1998)), the Court finds that plaintiff styled the opposition as a cross-motion for summary judgment. (See Dkt. No. 98 ("Notice of Motion . . . Against Shanachie Entertainment Corporation . . .").)

set forth in further detail in a written opinion to follow. This is that opinion.

Plaintiff commenced this action in June 2008, and filed an amended complaint on August 22, 2008. (Dkt. No. 2, 4.) This action relates to the Grammy-nominated song "I Apologize" as sung by defendant Nesby and produced by defendant Shanachie. Plaintiff alleges that her song "It Will Never Happen Again" is infringed by that song. As mentioned, plaintiff is proceeding pro se, which has carried some attendant difficulties. But this action is now at the stage where dispositive motions have been filed and this Court finds that it can rule on liability as to some defendants.

BACKGROUND

The following facts are undisputed unless otherwise noted. The facts are derived from the evidence submitted by defendants in support of their motion as well as key evidence from plaintiff. Pro se plaintiff Peggy Harley submitted a CD with both her song and "I Apologize," the alleged infringing song. Those songs were incorporated by reference into Harley's Amended Complaint--the crux of which is the substantial similarity between her song and "I Apologize"--and thus, the Court accepted for filing the CD filed in connection with her motion for

summary judgment.[2] In addition, the Court considered the allegations of plaintiff's complaint as an affidavit for summary judgment purposes because it was signed under penalty of perjury. See Colon v. Coughlin, 58 F.3d 865, 872 (2d Cir. 1995).

Plaintiff Peggy Harley composed a song entitled "It Will Never Happen Again" in 2002, which has a registered copyright dated January 7, 2008. (See Decl. of Roger Juan Maldonado in Support of Mot. for Summ. J. ("Maldonado Decl.") (Dkt. No. 83) Ex. A.) On September 26, 2006, Harley met with a radio personality named Vaughn Harper (a defendant in this action) and provided him with her press kit which comprised, inter alia, five copies of Harley's ten-song CD on which the song "It Will Never Happen Again" was contained. (Am. Compl. (Dkt. No. 4) at 4.) That meeting transpired after Harper requested to meet with Harley subsequent to hearing a sampling of her music marketed on the radio station for which he worked, WBLS. (Id. at 5.) Although Harper originally asked Harley to be part of various projects, including a tribute album, Harley declined the invitation because Harper stated that attorneys should not be

[2] Because the recordings were incorporated into the Amended Complaint, meaning that defendants were very much "on notice" that the similarity between the two songs is at the heart of this matter, the recordings themselves not "new" discovery. Accordingly, the Court's acceptance of the recordings is not at odds with the discovery ruling imposed by Magistrate Judge Pitman which precluded plaintiff from submitting documents or other discovery after February 17, 2011. (See Dkt. No. 65.)

involved in the project. (Id. at 5-6.) According to Harley (and undisputed on the record before this Court), Harper then provided defendant Ann Nesby with a copy of plaintiff's CD (and thus, a copy of "It Will Never Happen Again"). (Id. at 6, 8.) Nesby, along with her husband Timothy W. Lee, own a record company called "It's Time Child Records," which is signed to Shanachie Entertainment Corporation. (Id. at 9.)

In the early 1990s, a man named Roosevelt George composed a song entitled "Never Meant to Hurt You." (Shanachie's Rule 56.1 Statement ("Defs. 56.1") (Dkt. No. 87) ¶ 2.) George recorded that song on a cassette tape, which also contains a piano rendition of the composition. (Id. ¶ 3.) In 1998, George sang the lyrics for "Never Meant to Hurt You" for Nesby. (Id. ¶ 4.)

In 2007, Nesby recorded the song "I Apologize." That same year, Shanachie produced and distributed Nesby's CD entitled "This Is Love," which contains "I Apologize." (Defs. 56.1 ¶ 6.) On the back cover of the "This is Love" album, Nesby thanks Vaughn Harper. (Maldonado Decl. Ex. B.) She also thanks Roosevelt George as a producer only. (Id.)

In addition to those facts, the undisputed facts significant to resolution plaintiff's copyright infringement claim (the heart of this action) cannot be recited herein: it is the auditory comparison of the recordings of the songs at issue ("It Will Never Happen Again" by plaintiff, "I Apologize"

as sung by defendant Nesby, and George's "Never Meant to Hurt You"). The Court has listened to the full songs submitted by plaintiff and as well as the snippets of the songs submitted by Shanachie at the Court's request.[3] The Court has listened carefully and repeatedly to all of the songs on all of the recordings submitted to the Court.

Based upon the above facts, the auditory comparison of the lyrics and music of "It Will Never Happen Again," "I Apologize," and "Never Meant To Hurt You," and the applicable law, the Court finds there are unmistakable and substantial similarities between portions of "It Will Never Happen Again" and "I Apologize." Accordingly, the Court GRANTS summary judgment in plaintiff's favor on her copyright infringement claim only. The Court GRANTS summary judgment for defendants on plaintiff's New York state law claims for conversion, tortious interference with business relationship, intentional infliction of emotional distress, and unjust enrichment.

DISCUSSION

I. LEGAL STANDARD

Summary judgment may not be granted unless all of the submissions taken together "show that there is no genuine

[3] The Court made such a request based upon the averments in the Declaration of Roger Juan Maldonado in support of Shanachie's motion for summary judgment that copies of the recordings at issue were attached. (See Decl. of Roger Juan Maldonado in Support of Mot. for Summ. J. ("Maldonado Decl.") (Dkt. No. 83) ¶¶ 3, 5.)

issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R Civ. P. 56(c). The moving party bears the burden of demonstrating "the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). In making that determination, the court must "construe all evidence in the light most favorable to the nonmoving party, drawing all inferences and resolving all ambiguities in its favor." Dickerson v. Napolitano, 604 F.3d 732, 740 (2d Cir. 2010).

Once the moving party has asserted facts showing that the non-movant's claims cannot be sustained, the opposing party must "set out specific facts showing a genuine issue for trial," and cannot "rely merely on allegations or denials" contained in the pleadings. Fed. R. Civ. P. 56(e); see also Wright v. Goord, 554 F.3d 255, 266 (2d Cir. 2009). "A party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment," as "[m]ere conclusory allegations or denials cannot by themselves create a genuine issue of material fact where none would otherwise exist." Hicks v. Baines, 539 F.3d 159, 166 (2d Cir. 2010) (citations omitted). In addition, self-serving affidavits, sitting alone, are insufficient to create a triable issue of fact and defeat a motion for summary judgment. See

BellSouth Telecommc'ns, Inc. v. W.R. Grace & Co.-Conn., 77 F.3d 603, 615 (2d Cir. 1996). Only disputes over material facts--i.e., "facts that might affect the outcome of the suit under the governing law"--will properly preclude the entry of summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986) (stating that the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts").

II. COPYRIGHT INFRINGEMENT

As mentioned above, plaintiff and defendants Shanachie and Vaughn have each moved for summary judgment on liability as to plaintiff's claim for copyright infringement. To prevail on a claim for copyright infringement, a plaintiff must show (a) a valid copyright; and (b) unauthorized copying of the constituent elements of the original copyrighted work. Jurgensen v. Epic/Sony Records, 351 F.3d 46, 51 (2d Cir. 2003). All that is needed to establish the first element is, as plaintiff has here, a certificate of registration from the United States Register of Copyright. Id. The second element ("unauthorized copying") itself has two constituent elements--(i) that the plaintiff's work was "actually copied," and (ii) "that the portion or amount copied amounts to an improper or unlawful appropriation." Id.

(quotation marks omitted) (emphasis added). "Direct evidence" of copying is not necessary to show "actual copying"; all that is required is that the plaintiff have circumstantial evidence that the alleged infringer had "access" to the allegedly infringed work and "that there are similarities between the two works that are probative of copying." Id. (quotation marks omitted).

There is no issue of material fact that plaintiff maintains a valid copyright.[4] The questions before the Court are two-fold. First, there is a question of copying--i.e., whether defendants used plaintiff's work "as a model, template, or even inspiration." 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 13.01[B], at 13-9 (2011). Second, there is a question of access--i.e., how the allegedly infringed song got from plaintiff to Nesby.

As to copying, this Court finds there are no triable issues that some portions of the song were copied, including the key refrain. The portions of defendant Nesby's rendition of "I

[4] Defendants assert that plaintiffmwould not be entitled to statutory damages because her song was not registered prior to the alleged infringement. The effective date of Harley's registration for "It Will Never Happen Again" is January 7, 2008. (Maldonado Decl. Ex. A.) Defendants assume that plaintiff is seeking statutory damages. She is not. The Amended Complaint seeks damages for lost profits, which she is entitled to seek for a song registered in 2008 if the other elements of infringement are met (as they are here). There is no question that plaintiff's action was timely commenced--and that at the time of commencement she duly submitted a copy of her registration. The Court notes that plaintiff's claims could, however, also extend to infringement following registration.

Apologize" that the Court finds infringe plaintiff's song "I Never Meant to Hurt You," include (but are not limited to):

(1) Never meant to hurt you/Never meant to cause you pain;

(2) Sorry baby/Sorry that I hurt you; and

(3) I will never hurt you again/It will never happen again.

The Court also finds substantial similarity in certain other lyrics--not all, but that is not required--and substantial similarity in music--not all, but again, that is not required. See Jurgensen, 351 F.3d at 51 (finding that copying "portions" of a work support a copyright infringement claim). There is strong thematic likeness, as well. All of those similarities--if access is found (which, as discussed below, it is)--are certainly probative of copying.

Thus, all that is left is whether defendants had "access" to plaintiff's work such that the copying was an unlawful appropriation of plaintiff's work. There are strong, uncontroverted facts in the record before the Court supporting "access." Plaintiff avers that she met with defendant Harper in 2006--prior to the 2007 recording of "I Apologize"--and provided him with five copies of her ten-song CD which contained her rendition of "It Will Never Happen Again." (Am. Compl. at 4-5.) How a copy of plaintiff's CD made its way into defendant Nesby's hands is answered by defendants' own evidence. The copy of the CD cover for the album on which "I Apologize" is contained (see

Maldonado Decl. Ex. B) provides the link in the chain of possession. On the back cover of the album, Nesby thanks, inter alia, Harper.[5] (Id.) Given the strong averments in plaintiff's verified complaint that Harper provided her CD to Nesby (see Am. Compl. at 6, 8), the fact that defendant Nesby's affidavit does not deny that Harper provided plaintiff's song to her,[6] and that fact that Harper himself did not submit an affidavit at all--a glaring omission given his joinder in Shanachie's summary judgment motion and the weight of plaintiff's averments against him as to providing access--the undisputed fact is simply that plaintiff's rendition of the facts are correct--i.e., that Nesby (and thus, Nesby's production company which is signed by Shanachie) necessarily had "access" to plaintiff's song such that the substantially similar portions of the two works amounts to unlawful copyright infringement.

Defendants' main argument against plaintiff's copyright claim is that "I Apologize" was originally conceived and

[5] Nesby also thanks Roosevelt George on the back of album, but only in his capacity as a producer--not for any composition or influence as to "I Apologize." (See Maldonado Decl. Ex. B.)

[6] Nesby's declaration states only that Harper did not provide "recordings or other documents or materials containing any music or lyrics that are included in the Song" (Decl. of Ann Nesby (Dkt. No. 86) ¶ 7), but the "Song" as defined in Nesby's declaration is "Never Meant to Hurt You" (id. ¶ 3), not "I Apologize." That fact lends additional support against any insinuation by defendants that Harley copied her song from George. Further, George himself avers that he does not know "Vaughn Harper or Peggy Harley and have never discussed or given then any recordings of my Song" Decl. of Roosevelt George (Dkt. No. 85) ¶ 11), which is the death knell of any theory that Harley may have copied the song from George.

composed by Roosevelt George in the 1990s--and that George performed the song for Nesby in 1998, at which time she requested that he not give the song to anyone.[7] In other words, according to defendants, Nesby could not have had "access" (in the copyright infringement context) to plaintiff's work because plaintiff's song, created in 2002, came after George's composition.

The Court has compared George's song and "I Apologize" to plaintiff's song, "It Will Never Happen Again," and finds that there is no substantial similarity between the tracks submitted by George and plaintiff's song, and that there is little or no similarity between George's song and "I Apologize."[8] Thus, George's musical compositions are irrelevant to this action.

In his affidavit submitted in support of this motion, George does set forth some lyrics that are among those which are similar to Harley's. However, they are sparse and in any event, that alone would not prevent summary judgment--i.e., the lyrics are contained in a self-serving affidavit, without any additional evidentiary support. BellSouth Telecommc'ns, Inc., 77 F.3d at 615. Notably, George's declaration does not set forth all of the lyrics of his original composition--only those

[7] A copy of the lyrics from that time were not included in the materials submitted on summary judgment.

[8] Nor does the Court find substantial similarity between the piano recording of George's song and plaintiff's song, having listened to the recordings as submitted by defendants.

which bear some resemblance to a few of the lyrics from "It Will Never Happen Again." Defendant Nesby's declaration in support of the motion for summary judgment is notably silent as to the lyrics. (Those notable absences suggest that there may have been another, different song of George's that Nesby said she wanted to record.)[9]

The timing as to the creation of plaintiff's work, the copies provided to Vaughn, the unrebutted statements that Vaughn provided the CDs to Nesby, and the recording of "I Apologize" are sufficient to show "access." Defendants have failed to raise a triable issue of fact rebutting that evidence. Plaintiff composed her work in 2002, provided copies to Vaughn in 2006, and Nesby recorded "I Apologize" in 2007. Thus, there is no question of material fact that the allegedly infringing work was created after plaintiff's work.

It defies credulity that "It Will Never Happen Again" (plaintiff's work) and "I Apologize" (Nesby's work) could bear the similarity they do without unlawful copying of some portion. This Court therefore finds that there is no genuine issue for trial and judgment can be entered in favor of plaintiff as to Nesby and Shanachie Entertainment Corporation on plaintiff's copyright infringement claim.

[9] In any event, if defendants are seeking to suggest that plaintiff herself copied the music or lyrics from George, they have failed to rise or suggest any issue of material fact as to Harley's own access to that work. See supra n.6.

III. STATE LAW CLAIMS

Defendants assert that they are entitled to summary judgment on plaintiff's claims under New York law--i.e., conversion, tortious interference, intentional infliction of emotional distress, and unjust enrichment. Defendants argue, inter alia, that those claims are insufficiently pleaded under Rule 8 (and the Supreme Court precedent interpreting that Rule)--despite the liberal construction of claims accorded to pro se litigants--and in any event, are preempted by the Copyright Act. Rather than engaging in a lengthy discussion of preemption and given the procedural posture of this action (i.e., that the Court is making a merits determination and that plaintiff may not submit additional merits discovery at this stage of the litigation), the Court will examine whether plaintiff's state law claims can be maintained as a matter of law (except for the unjust enrichment claim which is clearly preempted by the Copyright Act). As discussed below, none of them can.

First, a claim for conversion of a copyrighted work may not stand as a matter of law because such a work constitutes intangible property. See Thyroff v. Nationwide Mut. Ins. Co., 460 F.3d 400, 405 (2d Cir. 2006); Sporn v. MCA Records, Inc., 58

N.Y.2d 482, 489 (N.Y. 1983)).[10] Accordingly, defendants' motion for summary judgment on the conversion claim is granted.[11]

Second, plaintiff's claim for tortious interference with business relationship (see Am. Compl. at 11) fails because there is no allegation that defendants acted "solely to harm" plaintiff. Silver v. Kuehbeck, 217 Fed. Appx. 18, 21 (2d Cir. 2007) (emphasis in original). Indeed, plaintiff clearly states that Harper engaged in the allegedly infringing acts to "capitalize from [plaintiff's] music"--i.e., for his own "financial gain." (Am. Compl. at 6.)[12] Without the singular intent to harm plaintiff, the tortious interference claim cannot stand. See Silver, 217 Fed. Appx. at 21.

Third, a claim for emotional distress must arise out of, inter alia, conduct that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of

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[10] Notably, if plaintiff sought conversion because Vaughn allegedly stole the copyright or the CD that contained the master recording for which plaintiff held the copyright, plaintiff would have a claim for conversation. See Sporn, 58 N.Y.2d at 489. However, a claim for conversion of a copyrighted work is one for conversion of intangible property, which may not lie under New York law. Id.

[11] In addition, plaintiff's claim for conversion "comprise[s] the same materials for which the plaintiff sought copyright protection" and thus, is preempted by her copyright claim. See C.A. Inc. v. Rocket Software, Inc., 579 F. Supp. 2d 355, 367 (E.D.N.Y. 2008); Logicom Inclusive, Inc. v. W.P. Stewart & Co., No. 04 Civ. 0604, 2004 WL 1781009, at *17 (S.D.N.Y. Aug. 10, 2004).

[12] Defendants' argument that the tortious interference claim also fails because the alleged "interference" arises from plaintiff's pursuit of this action is disingenuous, at best. In other words, absent the alleged infringement, no action would have to have been brought--ergo no interference with the business relationships that plaintiff says are likely irreparably damaged as a result of her bringing this action.

decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Howell v. New York Post Co., Inc., 81 N.Y.2d 115, 122 (N.Y. 1993). The behavior alleged here--i.e., knowing and purposeful copyright infringement--does not rise to that level. In an analogous case, the District of Maryland dismissed a claim for intentional infliction of emotional distress arising from copyright infringement of a screenplay--where the plaintiff allegedly entrusted the screenplay to the defendants much to his chagrin--precisely because such conduct "fail[ed] to meet the 'extreme and outrageous' test." Wharton v. Columbia Pictures Indus., Inc., 907 F. Supp. 144, 146-47 (D. Md. 1995). Although this Court in no way condones the behavior alleged in the Amended Complaint--nor the copyright infringement the Court has found to exist here--such conduct does not rise to the level of "extreme and outrageous" that New York courts contemplate to sustain an intentional infliction of emotional distress claim. Thus, the claim is dismissed with prejudice.[13]

Fourth, to the extent that the Amended Complaint can be construed to be asserting a claim for unjust enrichment, the

[13] Defendants argue that the claim was also brought outside the one-year statute of limitations for emotional distress claims. See CPLR § 215(3). However, despite the fact that plaintiff alleged that the "events giving rise to [her] claim occurred on or about September 26, 2006" (Am. Compl. at 4), plaintiff likely would not have known about the alleged results of the events until September 2007 at the earliest--when the album containing "I Apologize" was released. Plaintiff filed her original complaint in June 2008, meaning the claim was brought within the one year statute of limitations. Thus, the Court finds defendants' timeliness argument unpersuasive.

Second Circuit (and district courts therein) has found such a claim preempted by the Copyright Act. See Briarpatch, Ltd. v. Phoenix Pictures, Inc., 373 F.3d 296, 306 (2d Cir. 2004) ("we are satisfied that plaintiffs' unjust enrichment claim against [the defendant] is preempted by the Copyright Act"); Johnson v. Arista Holding, Inc., 05 Civ. 9645, 2006 WL 3511894, at *7 (S.D.N.Y. Dec. 5, 2006). Thus, summary judgment in defendants' favor is granted as to that claim.

Accordingly, defendants' motion for summary judgment on plaintiff's state law claims is GRANTED.

CONCLUSION

For the aforementioned reasons, plaintiff Peggy Harley's motion for summary judgment is GRANTED as to her claim for copyright infringement only; defendant Shanachie Entertainment Corporation's and Vaughn Harper's motion for summary judgment is GRANTED with respect to plaintiff's claims under New York and DENIED as to plaintiff's claim for copyright infringement.

Plaintiff shall submit a letter to the Court regarding whether she requests pro bono counsel (which the Court cannot guarantee) no later than May 10, 2012.

The Order regarding the trial on damages of this action and scheduled for defendants' provision of certain materials, issued April 16, 2012 (Dkt. No. 101), remains in full force and effect

and the parties shall continue to proceed under the directives set forth in that Order.

SO ORDERED:

Dated: New York, New York
April 30, 2012

K. B. Forrest

KATHERINE B. FORREST
United States District Judge

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