

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION**

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| GENESIS MOVIE LLC |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | CASE NO: 3:20-cv-5097 |
| |) | |
| SEVENFOLD FILMS, LLC and |) | |
| RALPH STREAN, |) | |
| |) | |
| Defendants. |) | |
| |) | |

SECOND MOTION TO DISMISS

COMES NOW Defendants, Sevenfold Films, LLC and Ralph Strean, by and through undersigned Counsel, and move this Honorable Court to dismiss the amended complaint herein pursuant to Federal Rule of Civil Procedure 12, stating:

1. The amended complaint should be dismissed under Rule 12(b) for improper venue, as the proper venue for this action is in the Middle District Court for the State of Florida, or alternatively, transferred to that district.

2. The amended complaint should be dismissed or its initial “preamble” portion be struck therefrom, as the complaint includes and begins with a lengthy initial section or preamble prior to the first numbered paragraphs, which initial section sets forth factual allegations and accusations in a rambling fashion without numbering its paragraphs and/or allegations, does not—in doing so--allow proper response by paragraph, and is

otherwise violative of Federal Rules of Civil Procedure 8, 10 and 12. Alternatively, said section should be struck in its entirety.

3. Count I (Cybersquatting) of the complaint should be dismissed under Rule 12(b) for failure to state a claim under Federal Law upon which relief can be granted as the term “Genesis Movie” does not represent a valid trademark or name under the statute.

4. Count II (Copyright Infringement), Count VI (False Copyright Management), and Count VII (Trademark Infringement) of the complaint should be dismissed under Rule 12(b) for failure to state a claim under Federal Law upon which relief can be granted as: (a) in terms of Count II, Plaintiff does not own the copyright registration; (b) in terms of Count VI, Plaintiff does not own the copyright registration; and (c) in terms of Count VII, Plaintiff does not allege a registered trademark to infringe.

5. Count III (Copyright Ownership), Count IV (Breach of Production Agreement), Count V (Conversion), Count VIII (Interference with Contract), Count IX (Defamation), and Count X (Expulsion) of the complaint should be dismissed under Rule 12(b) for lack of subject matter jurisdiction if the counts set forth in paragraph 4 are dismissed, as Counts IV, V, VIII, IX, and X set forth Common Law and/or statutory causes of action under state law and could only be within the court’s supplemental jurisdiction due to the presence of federal jurisdiction arising under the counts set forth in paragraph 4.

MEMORANDUM OF LAW

It is the position of the Defendants that the instant case is filed in the wrong court

and in the wrong venue. This is in fact a case based on breach of contract and other related allegations and causes of action arising out of state/common law (on both sides). Plaintiff has, however, sought to have it heard in federal court by claiming the court's pendent jurisdiction over these causes of action based on a flawed attempt to raise issues justiciable under the court's federal question jurisdiction.

In this regard it is noteworthy that Plaintiff seeks ownership of the copyright arguing that it should belong to Plaintiff as a "work-for-hire" under 17 USC 101 or via contract as further discussed under subheading III, below. However, none of these touch the current state of the matter. Plaintiff admits that Defendant is owner of the copyright to the movie in question which would include rights over all derivatives thereto and use of the movie's name. Notwithstanding Plaintiff's accusations and allegations to the contrary, registration establishes a presumption of ownership and validity in Defendants favor under 17 USC 410. As stated in subsection (c) of this statute: "In any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate. . . ." (Emphasis added). This would include authorship and ownership. Thus, if anyone would have a right to the remedies sought by Plaintiff under counts sounding in copyright in the complaint, it would be Defendants, not Plaintiff. Plaintiff has sought to bolster its case with counts sounding in trademark. However, the phrase "Genesis Movie" does not represent valid subject matter for a trademark, nor has Plaintiff registered it as a trademark.

With the foregoing as a preamble, the following sections will cover, in turn, the basis for motions to dismiss and/or for a more definite statement related to:

| | | |
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| I. | Improper Venue | page 4 |
| II. | Improper Pleading Practices | page 8 |
| III. | Count I (Cybersquatting) | page 9 |
| IV. | Count II (Infringement) and Counts III (Ownership) | page 11 |
| V. | Count VI (False Management Info) and Count VII (Trademark Infringement) | page 14 |
| VI. | Counts IV, V, VIII, IX, and X (Common/State Law) | page 14 |
| VII. | Certification Under Local Rule 7.1 | page 15 |

I. The Complaint Should be Dismissed or Transferred for Improper Venue

A. Venue Allegations in the Complaint

In the complaint as originally filed, Plaintiff merely alleged that “Defendant Streaan is a resident of Florida” (Paragraph 2 of said Complaint) and that “Defendant Sevenfold Films LLC was a limited liability company with a principle place of business in Gulf Breeze, Florida.” (Emphasis added, Paragraph 3 of Complaint). Now, in its Amended Complaint, in support of venue in the Northern District, Plaintiff alleges only that:

2. Defendant Ralph Streaan is a resident of Florida.

3. Defendant Sevenfold Films LLC is a Florida limited liability company. At the time this suit was filed, Defendant Sevenfold Films’ principal place of business was 1389 Windsor Park Road, Gulf Breeze, Florida. A copy of the Florida Secretary of State’s website listing for Sevenfold Films from prior to the filing of this suit is attached hereto at Exhibit A.

Thus, its support for venue in the Northern District is now based solely on an allegation

that the defendant Sevenfold Films was located in the Northern District, which allegation is based on “A copy of the Florida Secretary of State’s website . . . from prior to the filing of this suit . . .” which, on its face, reflects that it has not been updated by filing of an Annual Report and that the LLC was, therefore, involuntarily dissolved.

However, this is grasping at straws as the Plaintiff knows quite well, and knew quite well at the time this suit was filed, that Sevenfold Films was relocated outside of the Northern District more than a year prior to filing this lawsuit. The specific facts showing this are set forth in the Verified Statement of Ralph Streaan attached hereto as Exhibit A, where it is clearly demonstrated that the principle place of business of Sevenfold Films, LLC, moved out of the Northern District of the State of Florida in August 2018, well before the filing of this law suit. At that time, all business operations at that address terminated and all of the business operations of Sevenfold Films, LLC, were moved to St. Thomas in the Virgin Islands in order to work on another production. Likewise, it is shown that this move was well known to the other principles of Genesis Movie, LLC, as demonstrated by their texts, and that after approximately one year the principle place of business of Sevenfold Films, LLC, returned to Florida at a new location in the Middle District at 5741 SW 172nd Loop, Ocala, FL 34473, once again well before the filing of this lawsuit.

In its Response to the initial Motion to Dismiss, Plaintiff states that: “After this suit was filed, Defendant Sevenfold Films changed its principal place of business to the address it now uses in an effort to avoid venue.” This is a blatant lie, as demonstrated by

the texts of its principles related to the move from that address that occurred well in advance of the filing of this lawsuit. The sole support for Plaintiff's position is an out-of-date website page from the Department of State which clearly shows that it is out-of-date by the fact that no Annual Report had been filed updating its data at the time this screenshot was taken, leading the LLC to be involuntarily dissolved.

In its prior response, Plaintiff also states that: "In determining venue, "venue must be determined based on the facts at the time of filing." *Omega Patents LLC v. Calamp Corp.*, 2017 U.S. Dist. LEXIS 186645, *5-*6 (M.D. Fla. 2017) (internal quotations omitted). . . ." Defendants agree completely with this statement, and note that the FACTS are the correct facts, not the facts as Plaintiff would like them to be and is willing to falsely allege them to be based on an out-of-date website page. In fact, the principle place of business of Defendant Sevenfold Films LLC had been 5741 SW 172nd Loop, Ocala, Florida, for approximately nine months when this case was filed as abundantly shown in the attached verified statement, and is therefore in the Middle District of the State of Florida and was there well before the time the complaint was filed or served. This is further established by the returns of service for the Defendants in this matter, which are part of the court record and also recite the above location. Moreover, the address of the resident agent for Sevenfold Films LLC was at all times relevant hereto located in Orange Park, Florida, also in the Middle District for the State of Florida. (All of the aforesaid addresses can likewise be confirmed by reference to the records of Sevenfold Films, LLC online and available at website for the Florida Department of

State).

B. Proper Venue Under the Applicable Federal Statutes

In the complaint, Plaintiff cites to the Lanham Act, 15 USC 1125(d), and the Copyright Act, 17 USC 101 et seq. in invoking the Court's jurisdiction and venue. The applicable venue statute under the Lanham Act provides that a civil action may be brought in "a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located." (28 USC 391(b)(1)). Likewise, for copyright actions 28 USC 1400(a) provides for venue "in the district in which the defendant or his agent resides or may be found."

C. Summary and Conclusion

On a Federal Rule of Civil Procedure 12(b)(3) motion, once a defendant raises the issue of improper venue, the Plaintiff has the burden to prove that the chosen venue is proper. (See, *International Truck and Engine Corp. v. Quintana*, 259 F.Supp2d 553, 558 (N.D. Tex. 2003). The Plaintiff has definitely not sustained its burden in this matter. Further, in resolving a Rule 12(b)(3) motion, "the court is permitted to look at evidence beyond simply those facts alleged in the complaint and its proper attachments," *Ambraco, Inc. v. Bossclip B. V.*, 570 F.3d 233, 238 (5th Cir. 2009); emphasis added. Thus, Defendant believes this court may take cognizance not only of the Verified Statement attached as Exhibit A, but of other relevant facts readily available and kept in the ordinary course of business in the public records of the State of Florida as well as the court records for this case. This includes Exhibit I to the said Verified Statement

showing the utility bill for Defendants' address at the time the complaint was filed, and Exhibit II showing the correct business address for the LLC. As is abundantly clear from these facts, venue under both of the cited statutes belongs in the Middle District. This action should, therefore, be dismissed under Federal Rule of Civil Procedure 12(b)(3) or, alternatively, transferred to the Middle District.

II. The Complaint Should Be Dismissed Due to Improper Pleading Practices

The complaint should be dismissed under Rule 12 or its initial "preamble" portion be struck therefrom, as the complaint includes and begins with a lengthy initial section or preamble prior to the first numbered paragraphs, which initial section sets forth factual allegations and accusations in a rambling fashion without numbering its paragraphs and/or allegations, does not—in doing so--allow proper response by paragraph, and otherwise violates Federal Rules of Civil Procedure 8, 10 and 12. Alternatively, said section should be struck in its entirety.

Federal Rule of Civil Procedure 10, titled "Form of Pleadings" provides that:

(b) Paragraphs; Separate Statements. A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances. A later pleading may refer by number to a paragraph in an earlier pleading. If doing so would promote clarity, each claim founded on a separate transaction or occurrence – and each defense other than a denial – must be stated in a separate count or defense.

The accusatory diatribe with which Plaintiff now begins its Amended Complaint precedes the numbered paragraphs of its complaint. It is not part of that numbering, and thereby violates the first clause of this subsection. Likewise, it is not possible to respond

to it by allegation/accusation in a normal fashion due to its lack of said ordered paragraphs and numbering. Finally, for the foregoing reasons it is contrary to the goal of clarity stated in the last clause of this subsection. *See, also*, Rule 8(a)(2), and (d)(1). Further, Defendants believe that said preamble constitutes a redundant, immaterial, and/or impertinent addition to the Amended Complaint, and should be struck therefrom pursuant to Rule 12(f).

III. Count I (Cybersquatting) Should be Dismissed for Failure to State a Claim

In the instant case, Count I fails to state a claim upon which relief can be granted as the statute requires and anticipates the presence of a valid “mark” that is “owned” by the plaintiff. Both of these must be present. Neither of these are presented on the facts pled.

A. Factors Required Under the Statute

The requirements for a valid claim under this statute are analyzed in *DaimlerChrysler v. The Net Inc.*, 388 F. 3d 201 (6th Circuit 2004):

In 1999, Congress passed the ACPA as an amendment to the Trademark Act of 1946 ("Lanham Act") to prohibit "cybersquatting." . . . A trademark owner asserting a claim under the ACPA must establish the following: (1) it has a valid trademark entitled to protection; (2) its mark is distinctive or famous; (3) the defendant's domain name is identical or confusingly similar to, or in the case of famous marks, dilutive of, the owner's mark; and (4) the defendant used, registered, or trafficked in the domain name (5) with a bad faith intent to profit.

Ford Motor Co. v. Catalanotte, 342 F.3d 543, 546 (6th Cir. 2003). . . .

B. Lack of a Valid or Qualifying Mark

In terms of presenting a valid trademark under 15 USC 1125(d), as defined above, the phrase “Genesis Movie” does not qualify because the phrase is merely descriptive of the product(s) which the alleged mark is said to cover, i.e., each is a “Genesis Movie.” The law related to “Descriptiveness” is well stated in the Trademark Manual of Examining Procedure TMEP 1202.09 (interpreting 15 U.S.C. §1052), where it is stated that:

Matter that "merely describes" the goods or services on or in connection with which it is used is not registrable on the Principal Register.

In the instant case, the name that Plaintiff alleges is being violated is definitely descriptive of the goods to be covered. The goods or product are/is each a “Genesis Movie.” Consequently, the alleged mark is in fact identical to and descriptive of the goods to be covered by the mark.

C. Plaintiff Does Not Own and/or Cannot Control Use of the Movie Name

As noted in Section B.1., above, the title of the movie is covered by copyright (which belongs to the Defendant Sevenfold), and notwithstanding trademark law, “others must have the right to call the work by its name”--this would include the owner/author of the copyright in its original form as well as derivatives thereof such as “Genesis Movie”.

D. Personal Name Allegations by Plaintiff

In the usual course of things the foregoing should dispose of Count I. However, 15

USC 1125(d), states in pertinent part that:

(1)(A) A person shall be liable in a civil action by the owner of a mark, including a personal name which is protected as a mark under this section,

Plaintiff discusses “Genesis Movie” as a mark in the general. However, Plaintiff also seeks to claim under the “personal name” language recited above. A corporation may be considered a person under the law, but its name is usually termed a “business name” or “corporate name” rather than a personal name. To the best of the undersigned’s knowledge and belief, the term “personal name” is also used elsewhere in the Lanham Act and in the law generally to refer to an individual’s name. For example, in TMEP 1211.01(b)(iii) it is used extensively as a term referencing and related to the names of individuals.

IV. Count II (Copyright Infringement) and Count III (Copyright Ownership) Should be Dismissed for Failure to State a Claim

A copyright infringement case as well as one seeking a declaration of Plaintiff’s ownership require proof of Plaintiff’s ownership of a valid exclusive copyright. (17 USC 501(b)). At this point, Plaintiff’s Complaint fails to allege facts supporting this requirement as to either count. As a matter of fact, it conclusively supports the fact that Defendant Sevenfold has registered the copyright and is its present owner. Plaintiff may dispute the Defendant’s right to register the copyright as a breach of contract, but that will of course be opposed by Defendants who will also be asserting Plaintiff’s own breach of contract and other bad acts—the litigation of which does not require or trigger

federal court jurisdiction.

In lieu of this, or perhaps to strengthen its claim, Plaintiff appears to pursue a work-for-hire theory as well. To be a work-for-hire under 17 U.S.C. 101, the work must be either: (1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, . . . if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

Plaintiff makes no serious attempt to prove that Defendant(s) were employed by it under (1) other than to recite that “Plaintiff paid Defendants a salary for their work on the film.” (Complaint Paragraph 15). However, despite Plaintiff’s attempted characterization of payments to an independent contractor—Defendant Sevenfold Films LLC—as a “salary,” the Defendant LLC was not an employee.

Plaintiff also cites to the contract’s statement that the results and proceeds of Defendant Sevenfold’s efforts as an independent contractor shall be a “work made for hire.” (Complaint Paragraphs 13 and 14). In combination with the subject matter of the contract, this might be seen as satisfying two of the prerequisites for a work-for-hire in the category of a “motion picture or other audiovisual work.” However, a vital ingredient is missing. This was not a “specially ordered or commissioned” work in that category. Defendant(s) had already been working on the project prior to a meeting of some of the principals (inaccurately portrayed in Complaint Paragraph 8).

Further, Defendant(s) did not receive a special order or commission at that time (nor is this key required fact alleged in the complaint). There is nothing of this type alleged and nothing of this type occurred. The closest thing to such a thing is a form recitation in the mutual contract agreement executed and made effective years later after much of the work had already been accomplished by Defendant(s) and was pre-existing (both in terms of the date of execution and the effective date of the contract). Not surprisingly given the need for the work to be produced pursuant to an advanced order/commission with a written agreement, retroactive written agreements of the type seen in the instant contract are not allowed. *Schiller v. Nordisco Corp.*, 969 F.2d 410 (7th Cir. 1992), where the court held that a “work made for hire” agreement must precede the creation of the work, because the writing requirement under the “work made for hire” doctrine is not merely a statute of frauds provision “designed to protect people against false claims of oral agreements.” Likewise, the Ninth Circuit in *Gladwell Govt. Services Inc. v. County of Marin*, 265 Fed. Appx. 624 2008 WL 268268 (9th Cir. 2008), suggested that the plain language of Section 101(2) of the U.S. Copyright Act requires that an agreement be reduced to a writing prior to the creation of the work, stating that the language of Section 101(2) “indicates that a work for hire agreement cannot apply to works that are already in existence. Works “specially ordered or commissioned can only be made after the execution of an express agreement between the parties.” (Emphasis added; *Id.* at 626).

In view of the foregoing, Defendants believe that Plaintiff’s pleading in regard to

Counts II and III, if intended to support a claim to the copyright as a work-for-hire is fatally deficient. Without copyright ownership, Count II cannot support an infringement action. Likewise, without a work-for-hire claim, Count III is merely a breach of contract claim and should be dismissed as it is no longer distinguishable from the contractual relief sought and/or available under the breach of contract claim set forth under Count IV. If Defendants' motions to dismiss Counts II and III are not sustained, Defendants hereby move the court to order a more definite statement of Plaintiff's claims in regard to the requisites for their respective cause of action, particularly for the apparent work-for-hire set forth therein.

V. Count VI (False Copyright Management), Count VII (Trademark Infringement)

Count VI (False Copyright Management), and Count VII (Trademark Infringement) of the Amended Complaint should be dismissed under Rule 12(b) for failure to state a claim under Federal Law upon which relief can be granted as: (a) in terms of Count VI, Plaintiff does not own the copyright registration and nothing incorrect is alleged in view of current copyright ownership; and (b) in terms of Count VII, Plaintiff does not allege infringement of a registered trademark.

VI. Count IV (Breach of Production Agreement), Count V (Conversion), Count VIII (Interference with Contract), Count IX (Defamation), and Count X (Expulsion)

The foregoing counts should be dismissed under Rule 12(b) for lack of subject matter jurisdiction if Counts I – III, VI and VII are dismissed, as they set forth Common Law and/or statutory causes of action normally subject to state jurisdiction and could

only be within the court’s supplemental jurisdiction due to the presence of federal jurisdiction over the previously named counts. The “Common Law” or state statutory law subject matter of Counts IV, V, VIII, IX, and X are specifically stated in the heading for each. Count III (though it cites to 17 USC 101 *et seq.*) is actually—as its title states—a cause of action related to copyright ownership based solely on contractual grounds, which are the only grounds alleged therein. (*See*, Count III). Thus, Count III also, like Counts IV, V, VIII, IX, and X states “Common Law” causes of action though not titled as such in the Complaint.

VII. Certification Under Local Rule 7.1

No conference was required in this matter as all of the motions seek to determine the outcome of a case or claim and are excepted under Local Rule 7.1(D). Nonetheless, a negotiated solution was sought unsuccessfully in regard to the venue issue.

WHEREFORE, the Defendants respectfully request that the Amended Complaint herein be dismissed in its entirety.

Respectfully submitted,

/Steven R. Scott/

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