

FILED

MAR 19 2018

Clerk, U.S. District Court
District Of Montana
Missoula

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

ERIKA PETERMAN,

Plaintiff,

vs.

REPUBLICAN NATIONAL
COMMITTEE,

Defendant.

CV 17-66-M-DLC

ORDER

Before the Court is Defendant Republican National Committee's ("RNC") motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Defendant argues that this case should be dismissed because: (1) RNC's use of Plaintiff's photograph constituted a fair use under federal copyright law; (2) Plaintiff has failed to state a claim for intentional interference with prospective economic advantage; and (3) Plaintiff's state law claim for intentional interference with economic advantage is preempted by federal copyright law. For the reasons explained below, the Court grants the motion in part and denies the motion in part.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Erika Peterman ("Peterman") is a photographer and is the author and owner of the copyright in Peterman's photograph ("Work"). Defendant RNC is a U.S. political organization responsible for developing and promoting the

Republican political platform, as well as coordinating fundraising and election strategy. RNC previously campaigned on behalf of Montana U.S. Representative Greg Gianforte in Montana's Special Election to fill its lone Congressional seat in the U.S House of Representatives in 2017.

On March 18, 2017, Peterman contracted with the Montana Democratic Party to take photographs at the annual Mansfield-Metcalf Dinner in Helena, Montana. She was asked to take photographs of Democratic Candidate Rob Quist ("Quist") who was the focus of the event. The Work depicts Quist, wearing a cattleman's hat from behind, with three bright lights in the distance. On March 21, 2017, Peterman edited and sent her photographs to the Montana Democratic Party and gave limited license to the Montana Democratic Party and Quist's campaign to use the Work. Peterman filed for registration of her Work with the U.S. Copyright Office on May 12, 2017.

On May 9, 2017, Peterman was notified that RNC had sent out mass direct mailings using her Work to negatively depict Quist. The image on the RNC mailer is a direct copy of Peterman's Work, altered with a treble clef inserted over the bottom left of the image and the text, "For Montana Conservatives, Liberal Rob Quist Can't Hit the Right Note." The back of the mailers contained standard political advertisement disclaimer language that they were paid for by RNC and were not authorized by any candidate or candidate's committee.

On May 16, 2017, Peterman filed her Complaint against RNC alleging copyright infringement and intentional interference with economic advantage based on RNC copying, using, and distributing her Work. (Doc. 1.) On September 9, 2017, RNC filed a Motion to Dismiss for Failure to State a Claim, arguing that its use of the Work constituted a fair use under federal copyright law and that Peterman failed to state a claim for intentional interference with economic advantage. (Doc. 7.) Additionally, RNC argued that Peterman’s state law claim for intentional interference with economic advantage was preempted by federal copyright law. (*Id.*)

LEGAL STANDARD

Rule 12(b)(6) motions test the legal sufficiency of a pleading. Fed. R. Civ. P. 12(b)(6). Under Federal Rule of Civil Procedure 8(a)(2), a complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim has facial plausibility when the court can draw a “reasonable inference” from the facts alleged that the defendant is liable for the misconduct alleged. *Id.* These facts need not be overly specific, but they must “give the defendant fair notice of what the . . . claim is and the grounds

upon which it rests.” *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (per curiam) (quoting *Twombly*, 550 U.S. at 555).

Under Rule 12(b)(6), the court is generally limited to the allegations of the complaint, “which are accepted as true and construed in the light most favorable to the plaintiff.” *Lazy Y Ranch LTD v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008). Nonetheless, a court may dismiss a complaint if it lacks a cognizable legal theory. *SmileCare Dental Group v. Delta Dental Plan of California, Inc.*, 88 F.3d 780, 783 (9th Cir. 1996). Dismissal for failure to state a claim is proper only “if it appears beyond doubt” that the non-moving party “can prove no set of facts which would entitle him to relief.” *Vasquez v. L.A. County*, 487 F.3d 1246, 1249 (9th Cir. 2007) (internal quotation marks and citation omitted).

The “assertion of fair use may be considered on a motion to dismiss, which requires the court to consider all allegations to be true, in a manner substantially similar to consideration of the same issue on a motion for summary judgment, where no material facts are in dispute.” *See Leadsinger, Inc. v. BMG Music Publ’g*, 512 F.3d 522, 530 (9th Cir. 2008). Fair use doctrine “presents a mixed question of law and fact” that “requires a case-by-case determination whether a particular use is fair.” *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985). However, “[i]f there are no genuine issues of material fact, or if, even after resolving all issues in favor of the opposing party, a reasonable trier of

fact can reach only one conclusion, a court may conclude as a matter of law whether the challenged use qualifies as fair use of the copyrighted work.” *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1151 (9th Cir. 1986).

While a plaintiff must plead facts sufficient to prove a justiciable cause of action, it is not necessary to plead facts that disprove fair use to survive a Rule 12(b)(6) motion to dismiss. *See Garner v. Higgins*, 2015 WL 574352, at *3 (W.D. Va. Feb. 11, 2015).

DISCUSSION

I. Copyright Infringement

Peterman claims that RNC violated 17 U.S.C. § 106 by infringing her protected copyright in her Work. (Doc. 1 at 5–7.) RNC seeks dismissal of Peterman’s copyright infringement claim on the basis of fair use. (Doc. 8 at 4.) To state a claim for copyright infringement, a plaintiff must allege: (1) ownership of a valid copyright, and (2) copying of a protectable expression by the defendant. *Baxter v. MCA, Inc.*, 812 F.2d 421, 423 (9th Cir. 1987). Under Section 501 of the Copyright Act, “[t]he legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of section 411, to institute an action for any infringement of that particular right committed while he or she is the owner of it.” 17 U.S.C. § 501(b).

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