UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IAN SCHLEIFER,

Plaintiff,

-against-

KITTEE BERNS,

Defendant.

MEMORANDUM DECISION AND ORDER

17 Civ. 1649 (BMC)

COGAN, District Judge.

Plaintiff brings this copyright infringement action alleging that defendant's Ethiopian cookbook violates the copyright that plaintiff has on his own previously published Ethiopian cookbook. Before me is defendant's motion to dismiss the amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), as well as her motion for attorney's fees and sanctions. For the reasons that follow, defendant's motion to dismiss is granted. Moreover, because plaintiff's complaint has no legal or factual basis, defendant's motions for attorney's fees under the Copyright Act and for sanctions against plaintiff's attorneys are granted.

BACKGROUND

Plaintiff Ian Schleifer published his Ethiopian cookbook, Ethiopian-Inspired Cooking: Vegetarian Specialties, in May 2007 under the pen name "Ian Finn" (the "2007 Schleifer Cookbook"). The 2007 Schleifer Work included 17 pages of written content, including 11 recipes, and three pages of photographs, for a total of 20 pages. The 2007 Schleifer Work's thirteen-digit international standard book number ("ISBN-13") is 9780979627101. It appears that there are two versions of the cookbook bearing this ISBN-13. The second version is being sold on Amazon (the "2007 Amazon Schleifer Cookbook"), and it indicates that it was published in 2007. However, this may not be accurate because the 2007 Amazon Schleifer Cookbook

DOCKET ALARM
Find authenticated court documents without watermarks at docketalarm.com.

references a cookbook plaintiff published in September 2008, so it appears that the 2007 Amazon Schleifer Cookbook was published after that date. Moreover, the 2007 Amazon Schleifer Cookbook is almost twice as long: The 2007 Amazon Schleifer Cookbook is 46 pages, including 11 recipes, as compared to the original 2007 Schleifer Cookbook, which is 20 pages, including 11 recipes.

Defendant published her cookbook, Teff Love: Adventures in Vegan Ethiopian Cooking, on January 15, 2015, under the pen name "Kittee Berns" (the "Berns Cookbook"). The Berns Cookbook contains more than 185 pages, including over 140 recipes, commentary, instructions, ingredient descriptions, and shopping guides. The Berns Work also includes black-and-white, color, and monochrome illustrations.

In July 2016, plaintiff published a second edition of his 2007 Schleifer Cookbook (the "2016 Schleifer Cookbook"). The second edition bears the same name as the 2007 Schleifer Cookbook and is itself identified as the "2nd Edition" of the 2007 Schleifer Cookbook. The ISBN-13 is different for the 2016 Schleifer Cookbook, as well: ISBN-13 9781535215299. The 2016 Schleifer Cookbook includes 82 pages of content, including 12 recipes and several black-and-white photographs. Moreover, in terms of finish, the 2016 Schleifer Cookbook looks more professionally composed, whereas the 2007 Schleifer Cookbook seems more amateur in comparison, as it appears to have been composed with a word processing program and bound with a plastic spiral.

The 2007 Schleifer Cookbook bears the Registration Number TX 8-281-274. However, a search of the U.S. Copyright Office's public search record – which the Court can consider because it is both an exhibit to the amended complaint and an integral element on which plaintiff's claim rests – indicates that plaintiff registered the 2007 Schleifer Cookbook at TX 8-

DOCKET ALARM Find authenticated court documents without watermarks at docketalarm.com.

281-274 on December 28, 2016. On January 30, 2017, plaintiff supplemented his Registration and registered the 2016 Schleifer Cookbook at TX 6-250-394.

Notwithstanding the differences in pages and number of recipes, plaintiff alleges that "there are no substantive differences between" the 2007 Schleifer Cookbook and the 2016 Schleifer Cookbook, and that "[a]ll infringements and copied texts can be found in both the 2007 and 2016 edition of the books." Plaintiff argues that both the 2007 and 2016 Cookbooks "are identical in content notwithstanding certain grammatical upgrades, a preface, and the addition of colored photos." Moreover, plaintiff alleges that, based on defendant's responses to interview questions in which she stated that she read a lot of recipes and books as part of her effort to write her own cookbook, one can infer that defendant was familiar with plaintiff's cookbook.

DISCUSSION

I. Motion to Dismiss Copyright Infringment

A. Standard of Review

In deciding a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court should "draw all reasonable inferences in Plaintiff['s] favor, assume all well-pleaded factual allegations to be true, and determine whether they plausibly give rise to an entitlement to relief." Faber v. Metro. Life Ins. Co., 648 F.3d 98, 104 (2d Cir. 2011) (internal quotation marks omitted). A court is not, however, "bound to accept conclusory allegations or legal conclusions masquerading as factual conclusions." Id. Thus, "threadbare recitals of the elements of a cause of action[,] supported by mere conclusory statements, do not suffice." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)). Although "legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." Id. at 679. Determining whether a complaint plausibly states a claim for relief is "a

DOCKET ALARM Find authenticated court documents without watermarks at docketalarm.com.

context specific task that requires the reviewing court to draw on its judicial experience and common sense." Id.

"In addition to the text of the complaint, the Court may consider documents attached as exhibits, incorporated by reference, or that are 'integral' to the complaint." McDonald v. West, 138 F. Supp. 3d 448, 453 (S.D.N.Y. 2015) (citing DiFolco v. MSNBC Cable LLC, 622 F.3d 104, 111 (2d Cir. 2010)). In a copyright infringement action, "the works themselves supersede and control [any] contrary descriptions" that the parties offer in the pleadings. Peter F. Gaito Architecture, LLC v. Simone Dev. Corp., 602 F.3d 57, 64 (2d Cir. 2010).

B. Copyright Infringement

To state a claim for copyright infringement, a plaintiff must allege "(1) ownership of a valid copyright and (2) copying of constituent elements of the work that are original." Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991). "In the absence of direct evidence, copying is proven by showing (a) that the defendant had access to the copyrighted work and (b) the substantial similarity of protectible material in the two works." Williams v. Crichton, 84 F.3d 581, 587 (2d Cir. 1996) (internal quotation marks omitted); see also Walker v. Time Life Films, Inc., 784 F.2d 44, 48 (2d Cir. 1986) ("[c]opying may be inferred where a plaintiff establishes that the defendant had access to the copyrighted work and that substantial similarities exist as to protectible material in the two works.").

Not all copying constitutes copyright infringement, and as the Second Circuit has repeatedly stated, "[i]t is an axiom of copyright law that the protection granted a copyrightable work extends only to the particular expression of an idea and never to the idea itself." Reyher v. Children's Television Workshop, 533 F.2d 87, 90 (2d Cir. 1976). Furthermore, "[s]imply because a work is copyrighted does not mean every element of that work is protected." Boisson

DOCKET ALARM Find authenticated court documents without watermarks at docketalarm.com.

v. Banian, Ltd, 273 F.3d 262, 268 (2d Cir. 2001). Therefore, dismissal is appropriate where the similarity concerns only non-copyrightable elements of plaintiff's work or if no reasonable factfinder could find the works substantially similar.

District courts may evaluate substantial similarity at the pleadings stage on a motion to dismiss. See Peter F. Gaito Architecture, 602 F.3d at 64 (In ruling on a motion to dismiss, "no discovery or fact-finding is typically necessary, because what is required is only a visual comparison of the works." (internal quotation marks omitted)); Effie Film, LLC v. Pomerance, 909 F. Supp. 2d 273, 290-91 (S.D.N.Y. 2012) ("Although substantial similarity analysis often presents questions of fact, where the court has before it all that is necessary to make a comparison of the works in question, it may rule on substantial similarity as a matter of law on a Rule 12(b)(6) motion to dismiss." (internal quotation marks omitted)).

"The standard test for substantial similarity between two items is whether an ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard [the] aesthetic appeal as the same." Yurman Design, Inc. v. PAJ, Inc., 262 F.3d 101, 111 (2d Cir. 2001) (alteration in original and internal quotation marks omitted). However, "a more refined analysis is required where [the allegedly copied] work is not wholly original, but rather incorporates elements from the public domain," in which case a court must look for "substantial similarity between those elements, and only those elements, that provide copyrightability to the allegedly infringed [work]." Boisson, 273 F.3d at 272 (internal quotation marks omitted). The Second Circuit has called this latter test the "more discerning" test, and in applying it, the Circuit has cautioned courts "not to dissect the works at issue into separate components and compare only the copyrightable elements," but rather to be "guided by comparing the total concept and feel of the contested works." Id. (internal quotation marks omitted).

DOCKET ALARM Find authenticated court documents without watermarks at docketalarm.com.

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.