UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CADY NOLAND,
Plaintiff,

-v-

GALERIE MICHAEL JANSSEN, et al.,
Defendants.

17-CV-5452 (JPO)

OPINION AND ORDER

J. PAUL OETKEN, District Judge:

Plaintiff Cady Noland, an artist, initiated this copyright action in connection with the display and attempted sale of what she alleges to have been an unauthorized copy of one of her wooden sculptures. Defendants are two German art galleries, the owner of one of the galleries, and a German art collector. Noland's allegations are largely based on Defendants' replacement of the sculpture's wooden parts after years of outdoor exposure had caused the sculpture to begin to rot. (Dkt. No. 71 ("SAC") ¶¶ 28–34, 38–40.) Before the Court now is Defendants' motion to dismiss the operative Second Amended Complaint. (Dkt. No. 74.) For the reasons that follow, Defendants' motion is granted.

I. Background

Plaintiff Cady Noland is a visual artist. (SAC ¶ 1.) This suit is about Noland's 1990 sculpture called "Log Cabin Façade." (SAC ¶ 4.) The artwork ("the Log Cabin") resembles the front facade of a log cabin in size and structure, with two short side walls for support. (SAC ¶ 5.) The facade's discernible features include a door-shaped opening, two window-shaped openings with American flags hung below them, and a triangular-shaped top. (*Id.*) Noland included the following photograph of the artwork as part of her Second Amended Complaint:

(SAC at 3.)

Noland claims to own a copyright to the Log Cabin. (SAC ¶ 8.) However, when she applied to the Copyright Office for registration of a copyright in the artwork, the Copyright Office denied her application. (*Id.*) Noland has requested reconsideration of the Copyright Office's denial of her registration application, and her request remained pending at the time the Second Amended Complaint was filed. (SAC ¶ 8.)

In 1990, Defendant Wilhelm Schurmann, a German art collector, bought the Log Cabin. (SAC ¶ 11.) Schurmann exhibited the Log Cabin at various locations in Germany, including a ten-year stint at a museum in Aachen, Germany. (SAC ¶¶ 25, 28, 46, 51.) With Noland's permission, the Aachen museum displayed the Log Cabin outdoors. (SAC ¶¶ 26–29.) Prior to displaying the work outdoors, Schurmann obtained Noland's leave to stain the wood a darker

color. (SAC ¶¶ 26–27.) Noland alleges that this newly stained artwork constituted a derivative work as defined by Section 101 of the United States Copyright Act. (SAC ¶¶ 6, 27.)

In displaying the artwork outside, the Aachen museum placed the work directly on the bare ground without a protective foundation, causing some of the wood to rot and deteriorate. (SAC ¶¶ 30–31, 33.) After hiring an art conservator in December 2010 to inspect the damage to the artwork, Schurmann and Defendant KOW, a German art gallery, replaced all of the sculpture's original wooden components with new wooden parts. (SAC ¶¶ 12, 36–40.)[1]

Sometime after the wood was replaced, Schurmann and KOW recruited the Galerie Michael Janssen ("the Janssen Gallery") to help sell the work. (SAC ¶ 50.) The Janssen Gallery is also a German art gallery, located in Berlin. (SAC ¶ 9.) Defendant Michael Janssen owns the gallery. (SAC ¶ 10.) After being engaged by Schurmann and KOW, Janssen subsequently displayed the work at his gallery in Berlin. (SAC ¶¶ 52, 67.)

Acting on behalf of Schurmann, in July 2014 the Janssen Gallery found an American collector willing to purchase the work for $1.4 million. (SAC ¶ 55.) The resulting contract of sale included a New York choice-of-law provision and called for delivery of the sculpture to Ohio, but it also provided that if Noland "refuses to acknowledge or approve of the legitimacy of the Work," or "seeks to disassociate her name from the Work," or "claims that her moral rights, rights under the Visual Artists Rights Act or other similar legislation have been violated," the American buyer could elect to have Janssen buy back the work.[2] (SAC ¶¶ 56–57.) After Noland

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[1] The Second Amended Complaint refers to the sculpture with all new wooden components as the "Log Cabin Copy." (SAC ¶ 43.) Without deciding whether the replacement of the wood did create a copy under the law, the Court refers to the work resulting from the wood replacement as the "work," "artwork," or "Log Cabin."

[2] Noland attaches a copy of the contract of sale to her Second Amended Complaint. (Dkt. No. 71-1.)

disavowed the legitimacy of the refurbished Log Cabin, the American buyer elected to have Janssen buy back the artwork. (SAC ¶ 58.) Noland does not allege that the work was ever actually transferred out of Germany to the United States.

Noland claims that the refurbished Log Cabin that Defendants displayed and offered for sale was not her artwork but an unauthorized copy. (*Id.*) She asserts claims against Defendants under the following legal theories: (1) violations of her moral rights under the Visual Artists Rights Act ("VARA"), 17 U.S.C. § 106A, and the German Copyright Act (SAC ¶¶ 24–41); (2) copyright infringement in violation of the U.S. Copyright Act and the German Copyright Act (SAC ¶¶ 42–59), as well as attendant claims of contributory infringement and vicarious liability for infringement (SAC ¶¶ 60–68); and (3) negligence on the part of Schurmann for breach of his duty to maintain the work (SAC ¶¶ 69–78). Noland seeks a declaratory judgment (SAC ¶¶ 79–80), as well as injunctive relief and damages (SAC at 16–18).

II. Legal Standard

"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)). In ruling on a motion to dismiss, a court must "accept as true all factual allegations" in the complaint. *Nielsen v. Rabin*, 746 F.3d 58, 62 (2d Cir. 2014) (citation omitted). And while "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," *Iqbal*, 556 U.S. at 678, courts must "draw all inferences in the light most favorable to the non-moving party[]," *In re NYSE Specialists Sec. Litig.*, 503 F.3d 89, 95 (2d Cir. 2007). In addition to the complaint, courts considering a Rule 12(b)(6) motion may also rely on "documents that are referenced in the complaint, documents that the plaintiff relied on in bringing suit and that are either in the plaintiff's possession or that the plaintiff knew of when

bringing suit, or matters of which judicial notice may be taken." *Jovani Fashion, Ltd. v. Cinderella Divine, Inc.*, 808 F. Supp. 2d 542, 545 (S.D.N.Y. 2011).

III. Discussion

A. Territorial Limitations of the U.S. Copyright Act

All of the conduct underlying the Copyright Act violations alleged by Noland—including Defendants' "destruction" of her original work, their "copying" of that work by replacing all of its wooden logs, their continued display of the "copied" work, and their efforts at effectuating a sale of the "copied" work—are alleged to have been performed by Defendants exclusively in Germany. Defendants assert, therefore, that Noland cannot properly bring claims in this Court for violations of U.S. copyright law. (Dkt. No. 75 at 5.)

"It is well established that copyright laws generally do not have extraterritorial application." *Update Art, Inc. v. Modiin Publ'g, Ltd.*, 843 F.2d 67, 73 (2d Cir. 1988). There are, however, some exceptions to the territorial limitations on the applicability of the U.S. Copyright Act. Most relevant here is the "predicate act" exception, which provides that "an individual, who commits an act of infringement in the U.S., which permits further reproduction outside of the U.S. . . . is liable for infringement under the U.S. Copyright Act." *Levitin v. Sony Music Entm't*, 101 F. Supp. 3d 376, 384–85 (S.D.N.Y. 2015); *see also* 5 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 17.02 (2018).

Importantly, in order for a "predicate act" to render a foreign infringer "liable for infringement under the U.S. Copyright Act . . . , the copyright infringement plaintiff 'must first demonstrate that the domestic predicate act was itself an act of infringement in violation of the copyright laws.'" *Levitin*, 101 F. Supp. 3d at 385 (quoting *Fun–Damental Too, Ltd. v. Gemmy Indus. Corp.*, No. 96 Civ. 1103, 1996 WL 724734, at *5 (S.D.N.Y. Dec. 17, 1996)). Courts in this Circuit have strictly adhered to this requirement, refusing to apply the U.S. Copyright Act to

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