

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUAN PABLO CHAVEZ,

Plaintiff,

- against -

THE BRITISH BROADCASTING CORP. et
al.,

Defendants.

JOHN G. KOELTL, District Judge:

The plaintiff, Juan Pablo Chavez,¹ brings this action pro se under 17 U.S.C. §§ 101 & 106A, 15 U.S.C. § 1125(a), and New York General Business Law § 360-1 against The British Broadcasting Corporation ("the BBC") and its employees Craig Fancy, Anna Bressanin, and Ilya Shnitser. The plaintiff alleges claims of copyright infringement, violation of the Visual Arts Rights Act, trademark infringement, unfair competition (under both the Lanham Act and New York law), trademark dilution under New York law, and false designation of origin under New York law. The plaintiff's claims arise from the defendants' use of music composed and performed by the plaintiff in a short documentary. The defendants move to dismiss the plaintiff's amended complaint

¹ The plaintiff asserts that the real party in interest in this case is one of his companies, TSE Management LLC. (See Dkt. No. 40 at ¶ 21.) However, TSE Management is not a plaintiff in this case, and a corporation cannot be represented pro se in federal court. U.S. v. Twenty Miljam-350 IED Jammers, 669 F.3d 78, 91 (2d Cir. 2011).

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17cv9572 (JGK)

MEMORANDUM OPINION
AND ORDER

under Federal Rule of Civil Procedure 12(b)(6), arguing that (1) the plaintiff does not own a valid copyright registration for the music, (2) their use of the music was nominative fair use, (3) the unfair competition and false designation of origin claims are redundant, and (4) the plaintiff's brand is not strong enough to be diluted.²

For the reasons explained below, the defendants' motion to dismiss is **granted**.

I.

In deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the allegations in the complaint are accepted as true, and all reasonable inferences must be drawn in the plaintiff's favor. McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 191 (2d Cir. 2007). The Court's function on a motion to dismiss is "not to weigh the evidence that might be presented at a trial but merely to determine whether the complaint itself is legally sufficient." Goldman v. Belden, 754 F.2d 1059, 1067 (2d Cir. 1985). The Court should not dismiss the complaint if the plaintiff has stated "enough facts to state a

² The plaintiff initially failed to respond to the defendants' motion to dismiss his amended complaint. In an August 10, 2018, Order, the Court extended the plaintiff's time to respond to the motion and indicated that if no response was filed the Court would decide the motion on the papers that had already been submitted. (Dkt. No. 38.) Although the plaintiff submitted two additional letters, both documents merely repeat the plaintiff's prior allegations. (Dkt. Nos. 39-40.) The Court construes these papers as opposition to the defendants' motion to dismiss.

claim to relief that is plausible on its face.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

While courts should construe the factual allegations in the light most favorable to the plaintiff, “the tenet that a court must accept as true all of the allegations contained in the complaint is inapplicable to legal conclusions.” Id. A court may also consider documents incorporated by reference in the complaint as well as documents the plaintiff either had in the plaintiff’s possession or had knowledge of and upon which the plaintiff relied in bringing suit. See Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 48 (2d Cir. 1991).

Courts are to afford pro se litigants “special solicitude,” Ruotolo v. I.R.S., 28 F.3d 6, 8 (2d Cir. 1994) (per curiam), by construing their pleadings liberally “to raise the strongest arguments that they suggest,” Triestman v. Fed. Bureau of Prisons, 470 F.3d 471, 472 (2d Cir. 2006) (per curiam) (quotation marks omitted). Accordingly, courts apply a more flexible standard when evaluating the sufficiency of a pro se litigant’s complaint than when reviewing a complaint submitted by counsel. Perez v. City of N.Y., No. 14cv7502, 2015 WL

3652511, at *2 (S.D.N.Y. June 11, 2015). This liberal pleading standard, however, "does not excuse a pro se plaintiff from providing sufficient factual allegations that state a plausible claim." Tyler v. Argo, No. 14cv2049, 2014 WL 5374248, at *2 (S.D.N.Y. Oct. 10, 2014). A pro se plaintiff's complaint may be dismissed for failing to state a claim upon which relief can be granted. Id.

II.

The following facts are taken from the amended complaint and are accepted as true for purposes of the motion to dismiss.

The plaintiff, who also goes by the stage name Johnny Arco, is a violinist and performer. (Am. Compl. ¶ 16.) The plaintiff claims to be the "owner and/or exclusive United States licensee of the rights in sound recordings, visual arts works, service-marks and audio-visual works embodying such recordings and works." (Id. ¶ 2.) The plaintiff has used various entities to sell and license his work, including Johnny Arco LLC, TSE Management LLC, and GRBK Music Group. (Id. ¶ 6.) In December 2012, the defendants produced a short documentary video entitled "Seanna Sharpe on the Art of the Death-Defying Stunt" ("the Video").³ (Am. Compl. ¶ 17(a); Declaration of Jason M. Joyal

³ Defendant Anna Bressanin produced the Video and defendant Ilya Shnitser was the cameraman for the Video. (Joyal Decl. Ex. A.) Defendant Craig Fancy, who is Vice President of Technology at BBC's corporate affiliate in New York,

("Joyal Decl.") Ex. A.) The Video featured an aerial performance by Seanna Sharpe on New York's Williamsburg Bridge and featured music composed and performed by the plaintiff. (Joyal Decl. Ex. A.) The plaintiff is also seen performing in the Video on aerial silks. (Am. Compl. ¶ 17(c).)

On December 1, 2012, two days before the Video aired, the plaintiff sent the defendants a clip of his music to be used in the Video. (Id. ¶ 17(b) & Ex. C.)⁴ The plaintiff now claims that the defendants used his music in the Video without his permission. The Video includes a credit reading, "music by Johnny Arco," (id. ¶ 17(d)), and the defendants do not dispute that they used the plaintiff's music in the Video. The defendants published the Video on a BBC News website on December 3, 2012, and the Video was broadcast on the BBC World News television channel. (Id. ¶ 27; Joyal Decl. Ex. A.)

The plaintiff claims to be the owner and exclusive "U.S. licensee" of certain copyrights. (Am. Compl. ¶ 25.) He does not clearly state what copyrights he is referring to or whether the music used in the Video was copyrighted. The plaintiff does

is not referenced in the Video or the Video's credit lines and is not alleged to have any involvement in the creation or production of the Video. (Id.)

⁴ The plaintiff attached as an exhibit a screenshot of an email dated December 1, 2012, from johnnyarco@gmail.com to annbress@gmail.com and ilya.sama@gmail.com. (Am. Compl. Ex. C.) The email appears to attach an mp3 file labelled "ThisIsGoingToKillMeRnd4." (Id.) The plaintiff claims that the defendants used music from "ThisIsGoingToKillMeRnd4" in the Video. (Id. ¶ 17(b).)

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