

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

THE ESTATE OF JOSÉ ANTONIO
TORRES MARTINÓ, represented by
RAÚL CINTRÓN RODRÍGUEZ,

Plaintiffs,

v.

FOUNTAIN CHRISTIAN BILINGUAL
SCHOOL CAROLINA, INC.; FOUNTAIN
CHRISTIAN BILINGUAL SCHOOL,
INC.; OMAIRA GUTIERREZ; OTONIEL
FONT NADAL; THE CONJUGAL
PARTNERSHIP BETWEEN OTONIEL FONT
NADAL AND OMAIRA GUTIERREZ;
FREDDY ABDUL SANTIAGO; JANE DOE;
THE CONJUGAL PARTNERSHIP BETWEEN
FREDDY ABDUL SANTIAGO AND JANE
DOE; AND INSURANCE COMPANIES A
AND B; CORPORATIONS A, B, AND C;
JOHN DOE AND OTHER UNNAMED
DEFENDANTS,

Defendants.

CIVIL NO. 18-1509(RAM)

OPINION AND ORDER

RAÚL M. ARIAS-MARXUACH, District Judge

Pending before the Court is Defendants Fountain Christian Bilingual School, Inc. ("FCBS") and Fountain Christian Bilingual School Carolina, Inc.'s ("FCBSC") (jointly, "Defendants") *Motion to Dismiss Claims of Second Amended Complaint Based on State Law and State Constitution for Preemption* ("Motion") (Docket No. 150).¹

¹On June 18, 2021, Plaintiffs dismissed the *Complaint* against Omayra Gutierrez, Otoniel Font-Nadal and their conjugal partnership. (Docket No. 202). Partial

After reviewing the parties' submissions in support and opposition, the Court **DENIES** the *Motion to Dismiss* and *sua sponte DISMISSES* the Visual Artist Rights Act of 1990 claim.

I. FACTUAL AND PROCEDURAL BACKGROUND

On August 9, 2019, Plaintiffs filed a *Second Amended Complaint* ("Complaint"), against FCBS, FCBSC, Omayra Gutierrez and Otoniel Font-Nadal and unnamed codefendants. (Docket No. 142).² They aver claims under the Copyright Act of 1909 ("the Copyright Act"), the Visual Artist Rights Act of 1990 ("VARA"), 17 U.S.C. §§ 101-1511, the Puerto Rico Authors' Moral Rights Act ("PRMRA"), P.R. Laws Ann. tit. 31, §§ 1404i-1401ff, Article II Section 1 and Section 8 of the Constitution of the Commonwealth of Puerto Rico, P.R. Const. art. II, §1, 8, and Article 1802 of the Puerto Rico Civil Code, codified at P.R. Laws Ann. tit. 31, § 5141. Id. ¶¶ 4.1-8.4. They allege Defendants mutilated and destroyed the mural "Rio Grande de Loíza" ("the mural") created by José Antonio Torres-Martinó ("Torres-Martinó") in an interior wall of a school leased by FCBS and FCBSC. Id. ¶ 3.32. When Torres-Martinó painted the mural in 1966, the Puerto Rico Department of Transportation and Public Works

final judgment was issued on June 24, 2021. (Docket No. 204). The *Complaint* also named as defendants Freddy Abdul-Santiago, Nodelis Alin Figueroa-Andino and their conjugal partnership, but that action is stayed per an October 31, 2018 filing before the United States Bankruptcy Court for the District of Puerto Rico, case no. 18-06401-13. (Docket Nos. 85; 86; 142 at 3-4).

² Plaintiffs are members of Torres-Martinó's Estate: José Martín Torres, Jackeline Torres, Michelle Torres, and Corrine Cobb (Plaintiffs"). (Docket No. 142 at 2). Their legal representative is Raúl Cintrón-Rodríguez, allegedly chosen by Torres-Martinó as executor of his will. Id.

("DTOP") owned the school, and school visitors could access it until the school's July 2017 closure. Id. ¶¶ 3.22-3.26. On April 2, 2018, DTOP leased the school to Defendants and on April 12, 2018, Plaintiffs learned Defendants had painted over the mural with light gray paint. Id. ¶¶ 3.28 and 3.32. Thus, they seek preliminary and permanent injunctions barring Defendants from attempting to "'rescue,' 'recover,' alter, deface, modify, mutilate or destroy" the mural, statutory and compensatory damages for damage caused to the mural, and costs to restore the mural by a qualified professional. Id. ¶¶ 10.1- 10.8.

On October 4, 2019, Defendants filed the pending *Motion* seeking dismissal of the *Complaint's* third, fourth and fifth causes of action concerning Plaintiffs' state law claims. (Docket No. 150). They claim dismissal is proper because Section 301 of the Copyright Act, 17 U.S.C. §301(a-e), and of VARA, 17 U.S.C. §301(f), preempt state law-based moral rights claims. Id. at 3-6.

On November 13, 2019, Plaintiffs opposed the *Motion*. (Docket No. 159). They argue the state law causes of action invoking local laws protecting the integrity of a visual work of art fall under the exceptions in Section 106 of the Copyright Act and are not preempted by federal copyright law. Id. at 4. Further, federal copyright laws allegedly do not preempt Puerto Rico *moral* rights. Id. Defendants replied followed by Plaintiffs' sur-reply. (Docket Nos. 167 and 178). The case has been stayed repeatedly pending the

Motion's resolution. (Docket Nos. 188, 190, 195-196, 205-208 and 212 and 215).

II. LEGAL STANDARD

A. Dismissal for Failure to State a Claim Under Fed. R. Civ. 12(B)(6)

Fed. R. Civ. P. 12(b)(6) authorizes a complaint's dismissal for "failure to state a claim upon which relief can be granted." To survive this motion, a complaint must contain sufficient factual matter stating a claim for relief is "plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). The Court must find if all alleged facts, when viewed in favor of plaintiff, make plausible plaintiff's entitlement to relief. See Ocasio-Hernandez v. Fortuno-Burset, 640 F.3d 1, 14 (1st Cir. 2011). Dismissal is proper only when these facts "taken as true, do not warrant recovery[.]" Martell-Rodríguez v. Rolón Suarez, 2020 WL 5525969, at *2 (D.P.R. 2020) (quotation omitted). Non-conclusory allegations are deemed true. See Nieto-Vicenty v. Valledor, 984 F. Supp. 2d 17, 20 (D.P.R. 2013). But "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not sufficient." Prieto-Rivera v. American Airlines, Inc, 2021 WL 3371014, at *2 (D.P.R. 2020) (quotation omitted).

Even when a party has not moved to dismiss a complaint, "a district court may 'note the inadequacy of the complaint and, on

its own initiative, dismiss [it]' under Rule 12(b)(6)." Fernandez v. BRG, LLC, 2017 WL 7362729, at *4 (D.P.R. 2017) (quotation omitted) (emphasis added). *Sua sponte* dismissal is "strong medicine," and should be used sparingly. Southern Cat, Inc. v. W PR Mgmt., LLC, 2021 WL 1699226, at *2 (D.P.R. 2021) (quotation omitted). Such dismissals are erroneous unless parties "have been afforded notice and an opportunity to amend the complaint" or respond. Sanchez v. Pereira-Castillo, 590 F.3d 31, 40 (1st Cir. 2009) (quotation omitted). However, they will be upheld without prior notice when the allegations, taken in favor of plaintiff, "are patently meritless and beyond all hope of redemption." Gonzalez-Gonzalez v. United States, 257 F.3d 31, 37 (1st Cir. 2001). "Only where 'it is crystal clear that the plaintiff cannot prevail and that amending the complaint would be futile can a sua sponte Rule 12(b)(6) dismissal stand.'" Southern Cat, Inc., 2021 WL 1699226, at *2 (quotation omitted).

B. Copyright Act of 1909

The Copyright Act, as amended in 1976, offers copyright holders the exclusive rights of reproduction, distribution, performance, display, and preparation of derivative works and allows them to recover for infringement of their copyright. See Fourth Est. Pub. Benefit Corp. v. Wall-Stret.com, LLC, 139 S. Ct. 881, 887 (2019) (quoting 17 U.S.C. §106). A party "infringes a copyright 'when he or she violates one of [those] exclusive

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