IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

PHOENIX ENTERTAINMENT PARTNERS, LLC,	)	
Plaintiff,	)	No. 2:17-cv-03327-DNC
v.	)	**ORDER**
DR FOFO, LLC *d/b/a Planet Follywood*, and ELLIOT ASHLEY KOHN *d/b/a DJ E*,	)	
Defendants.	)	

This matter is before the court on defendant Elliot Ashley Kohn's ("Kohn") motion to dismiss, ECF No. 9. For the reasons set forth below, the court grants the motion to dismiss.

I. BACKGROUND

This matter arises from Kohn's allegedly infringing use of four of Phoenix Entertainment Partners, LLC's ("Phoenix") copyrighted works. Phoenix is a North Carolina limited liability company. ECF No. 1 ¶ 6. Planet Follywood is an establishment operated by DR FOFO, LLC ("FOFO"), a South Carolina limited liability company in Folly Beach, South Carolina. Id. ¶ 7. Kohn is a DJ and entertainer who provides karaoke-related services. Id. ¶ 8.

Phoenix owns the copyright to four karaoke accompaniment tracks (the "Tracks") by virtue of an assignment instrument from Piracy Recovery, LLC.[1] Id. ¶ 27. These

[1] The four tracks are "New York State of Mind" in the style of Billy Joel, "From the Window Up Above" in the style of Wanda Jackson, "Takin' Care of Business" in the

karaoke accompaniment tracks are audiovisual works that consist of re-recorded versions of songs without lead vocals. Id. ¶ 11. The tracks also include visual components such as lyric displays and cueing information. Id. Each of the Tracks is part of a compilation of karaoke tracks that is registered as a sound recording with the United States Copyright Office. Id. ¶ 29; ECF No. 10-1.[2] Two of the Tracks are registered under the same compilation, SR0000365175, and the other two Tracks are each registered under different compilations, SR0000375893 and SR0000367547 respectively. ECF No. 10 at 2. The compilations are sold on compact discs plus graphics (CD+Gs). Id. at 4.

Phoenix alleges that FOFO contracted with Kohn to provide karaoke entertainment services at Planet Follywood. ECF No. 1 ¶ 32. Phoenix then contends that Kohn copied the Tracks and distributed the copies to FOFO's patrons for karaoke performances without Phoenix's permission. Id. ¶¶ 35–38. In addition, Phoenix alleges that FOFO had the right to control Kohn's actions on its premises, knew about Kohn's infringement of the Tracks, and did nothing to stop Kohn, making FOFO secondarily liable for Kohn's infringement. Id. ¶¶ 60–61, 67–68.

Phoenix filed the instant suit on December 8, 2017, bringing a cause of action for copyright infringement under 17 U.S.C § 501. Id. ¶¶ 74–86. Kohn filed a motion to dismiss on January 24, 2018, ECF No. 9, and Phoenix filed its response on February 7,

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style of Bachman-Turner Overdrive, and "Blue Moon of Kentucky" in the style of Bill Monroe. ECF No. 1 at 14.

[2] If a compilation of work, such as karaoke tracks, is registered, the individual works will also be registered. See Section III.B.

2018, ECF No. 10. Phoenix subsequently filed a notice of additional non-binding authority on April 11, 2018. ECF No 11.[3] The motion is ripe for the court's review.

II. STANDARD

A Rule 12(b)(6) motion for failure to state a claim upon which relief can be granted "challenges the legal sufficiency of a complaint." Francis v. Giacomelli, 588 F.3d 186, 192 (4th Cir. 2009) (citations omitted); see also Republican Party of N.C. v. Martin, 980 F.2d 943, 952 (4th Cir. 1992) ("A motion to dismiss under Rule 12(b)(6) . . . does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses."). To be legally sufficient, a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A Rule 12(b)(6) motion should not be granted unless it appears certain that the plaintiff can prove no set of facts that would support his claim and would entitle him to relief. Mylan Labs., Inc. v. Matkari, 7 F.3d 1130, 1134 (4th Cir. 1993). When considering a Rule 12(b)(6) motion, the court should accept all well-pleaded allegations as true and should view the complaint in a light most favorable to the plaintiff. Ostrzenski v. Seigel, 177 F.3d 245, 251 (4th Cir.1999); Mylan Labs., Inc., 7 F.3d at 1134. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a

[3] This notice attached pleadings and a court order from a similar case filed by Phoenix in the United States District Court for the District of Colorado. The attachments include the defendants' motion to dismiss, the defendants' reply in support of their motion to dismiss, and the District of Colorado's order denying the motion to dismiss as to the copyright infringement claim. ECF No. 11. Phoenix pointed to the copyright infringement issue in the Colorado case, which is the same issue in the instant case. Id. at 1. The court acknowledges the District of Colorado's opposite ruling in its motion but is unable to discern the reasoning underpinning the District of Colorado's decision from its brief order denying the motion to dismiss as to the copyright infringement claim. Having extensively researched the issues raised in this motion to dismiss, this court respectfully reaches a different conclusion.

claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic 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." Id.

III. DISCUSSION

Kohn alleges that the copyrights for the Tracks were not properly registered, and as a result, Phoenix may not bring a copyright infringement action for use of the Tracks. Kohn first argues that the Tracks were improperly registered as only sound recordings and not also audiovisual works. He then argues that single work registration does not exempt Phoenix from separately registering the Tracks as audiovisual works, because audiovisual work is not a class of work for which single work registration is available.

A. Registration Class

Kohn's first argument is that the Tracks are only registered as sound recordings when they should also be registered as audiovisual works. ECF No. 9-1 at 4–5. He claims that the fact that there are no copyright registrations for the audiovisual elements of the Tracks is fatal to Phoenix's claim because valid copyright registration is required to bring a copyright infringement claim, and without copyright registrations for the audiovisual elements, Phoenix's copyrights for the Tracks are invalid. Id. at 4. Phoenix does not respond directly to this argument but instead argues that the registrations are valid as single work registrations, ECF No. 10 at 3–7, which is discussed in greater detail in Section III.B.

Copyright infringement consists of two elements: (1) the ownership of a valid copyright; and (2) the copying of the original elements of the copyrighted work. Feist

Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991). In order to institute an action for infringement, the copyright must be registered with the United States Copyright Office. 17 U.S.C. § 411(a). While this requirement is not jurisdictional, Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 169 (2010), "[r]egistration is a prerequisite for a copyright infringement action," Darden v. Peters, 488 F.3d 277, 285 n.3 (4th Cir. 2007). As a result, "[f]or plaintiffs to state a claim for which relief can be granted," the copyright that was allegedly infringed must be properly registered. Jefferson Airplane v. Berkeley Sys., Inc., 886 F. Supp. 713, 715 (N.D. Cal. 1994).

Federal regulations divide copyrightable works into different classes for the purpose of registration, include "Class PA" for audiovisual works and "Class SR" for sound recordings. 37 C.F.R. § 202.3(b)(ii), (iv). The Copyright Act defines "audiovisual works" as "works that consist of a series of related images which are intrinsically intended to be shown by the use of machines . . . together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied." 17 U.S.C. § 101. Courts have found karaoke devices to be audiovisual works for the purpose of copyright registration. Leadsinger, Inc., v. BMG Music Pub., 512 F.3d 522, 527–28 (9th Cir. 2008); ABKCO Music, Inc. v. Stellar Records, Inc., 96 F.3d 60, 65 (2d Cir. 1996), abrogation on other grounds recognized by Salinger v. Colting, 607 F.3d 68 (2d Cir. 2010). The Ninth Circuit explained that "the visual representation of successive portions of song lyrics that Leadsinger's [karaoke] device projects onto a television screen constitutes 'a series of related images,'" and "its images of successive portions of song lyrics are 'intrinsically intended to be shown by the use of machine . . . together with accompanying sounds.'" Leadsinger, Inc., 512 F.3d at

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