

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ROLAND PUGH,)	
)	
Plaintiff,)	
)	No. 3:16-cv-02075
v.)	Chief Judge Sharp
)	Magistrate Judge Brown
JERRY NORMAN p/k/a NORM)	
DANIELS, <i>et al.</i> ,)	
)	
Defendants.)	

To: The Honorable Kevin H. Sharp, Chief United States District Judge

REPORT AND RECOMMENDATION

Presently pending is a motion to dismiss (Doc. 18) filed by Defendants Jerry Norman p/k/a Norm Daniels, Paramountsong.com (“Paramount”), and StarTune Records (“StarTune”). Upon consideration of the motion, the Magistrate Judge **RECOMMENDS** that the motion to dismiss (Doc. 18) be **GRANTED**; the claims of copyright infringement, breach of contract, and piracy be **DISMISSED** under Rule 12(b)(6) and 28 U.S.C. § 1915(e)(2)(B)(ii); that any appeal **NOT BE CERTIFIED** as taken in good faith under 28 U.S.C. § 1915(a)(3); and that the Plaintiff’s motion to expedite the case (Doc. 25) be **TERMINATED AS MOOT**.

I. BACKGROUND

In May 2015, the Plaintiff entered into a “Songwriter Contract” with Paramount. (Doc. 1-1, p. 8). For a fee, Paramount would create a melody and produce a demo of a song written by the Plaintiff titled “Momma Is Walking With Angels” (“Song”). (Doc. 1-1, p. 8). Daniels signed the Songwriter Contract on Paramount’s behalf. (Doc. 1-1, p. 8).

On September 2, 2015, the Plaintiff entered into a “Record Contract” with StarTune. (Doc. 1-1, p. 9). Pursuant to the Record Contract, StarTune would “reproduce, master and place

in major online digital record stores, iTunes and Amazon MP3, recordings of” specified songs. (Doc. 1-1, p. 9). It is assumed the Song was the subject of the Record Contract. In exchange for StarTune acquiring nonexclusive rights to “reproduce, distribute and sell digital recordings,” the Plaintiff would receive percentages of the sales. (Doc. 1-1, pp. 9-10). StarTune would pay the Plaintiff when \$10 or more was due. (Doc. 1-1, p. 10). The term of the Record Contract was one year from September 2, 2015. (Doc. 1-1, p. 9). Norman signed the Record Contract on StarTune’s behalf. (Doc. 1-1, p. 9). The Song was registered by the United States Copyright Office effective November 6, 2015. (Doc. 1-1, p. 4).

On March 16, 2016, Paramount refunded the money the Plaintiff had paid to StarTune and provided his earnings to-date from iTunes and Amazon. (Doc. 1-1, p. 5). Representatives from Paramount stated “[p]lease be advised that we will no longer be maintaining your song on iTunes and Amazon, nor do we wish to provide any other services for you.” (Doc. 1-1, p. 5).

The Plaintiff apparently sought legal assistance, for on May 5, 2016, Daniels responded to a letter from an attorney in Texas. (Doc. 1-1, p. 6). Daniels stated the Plaintiff had received all royalties and funds due to him plus a refund of his expenditures. (Doc. 1-1, p. 6). Though the Plaintiff’s Song may be available on iTunes or Amazon, he only earns royalties when his music is paid for and downloaded from those platforms. (Doc. 1-1, p. 6).

On June 29, 2016, the Plaintiff asked Amazon’s copyright department to remove his Song from their online store and investigate piracy. (Doc. 1-1, p. 15). A screenshot of an Amazon website, purportedly dated July 28, 2016, shows the Song was for sale as part of the album “Rainbow Destiny.” (Doc. 1-1, pp. 1-3).

In August 2016, the Plaintiff filed a complaint *pro se*, alleging breach of contract, piracy, and “possible copyright infringement.” (Doc. 1, p. 1 ¶ 1). Referring to documents attached to the

complaint, summarized above, the Plaintiff's statement of the claim was: "Company only paid \$2.80 for royalties for November 2015 thru [sic] December 2015. No further royalties paid this year." (Doc. 1, p. 2 ¶ 4). He prayed for the following relief: an accounting of royalties owed and paid, removal of his Song from digital download stores, payment of fees earned and not paid after the alleged breach of contract, a fine for use of his Song after the alleged breach of contract, and closure of the "company" on account of fraudulent activity. (Doc. 1, p. 3 ¶ 5).

On initial review of the complaint, the Court concluded it pleaded a claim of copyright infringement which provided the Court subject-matter jurisdiction. (Doc. 3, p. 2). The Plaintiff was granted leave to proceed *in forma pauperis*, and the case was referred to the undersigned for disposition of pre-trial, non-dispositive motions and for a report and recommendation on all dispositive motions. (Doc. 3, pp. 1, 3).

The Plaintiff then filed a document titled "Breach of Contract/Copyright Infringement." (Doc. 5). He alleged he was not paid royalties or provided an accounting of earnings after December 2015. (Doc. 5, p. 1). Despite Paramount's notice that it no longer worked for him as of March 16, 2016, the Plaintiff complained his song was still available for download online. (Doc. 5, p. 1). He prayed for attorneys' fees, a "grievance fee," unpaid royalties, and court costs. (Doc. 5, p. 2).

The Defendants collectively moved to dismiss the suit for lack of subject-matter jurisdiction and for failing to state a claim upon which relief can be granted. (Doc. 18). The Plaintiff filed a timely response. (Doc. 23). He claimed that Norm Daniels and Jerry Norman are the same person. (Doc. 23, p. 1). Complaining he has not seen an accounting of his earnings, he challenged the Defendants' assertion that he did not earn additional royalties. (Doc. 23, p. 1). He again claimed his song was advertised for sale after he received Paramount's message that it no

longer worked for him. (Doc. 23, pp. 1-2). He requested punitive damages and alleged he is entitled to \$180,000 on account of emotional and mental damages to him and his family, as well as a ruined songwriting career. (Doc. 23, pp. 2-3).

More than one month later, the Plaintiff filed a motion to expedite this case and deny the motion to dismiss. (Doc. 25).¹ The Defendants responded to the motion to expedite. (Doc. 26).

II. LEGAL STANDARDS

Subject-matter jurisdiction is a prerequisite to suit in federal court, and it may not be waived or forfeited by the parties or the court. *Union Pac. R. Co. v. Bhd. of Locomotive Engineers & Trainmen Gen. Comm. of Adjustment, Cent. Region*, 558 U.S. 67, 81 (2009) (quoting *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006)). Challenges to a court's subject-matter jurisdiction, i.e., the court's power to hear a case may be facial or factual. Fed. R. Civ. P. 12(b)(1); *DLX, Inc. v. Kentucky*, 381 F.3d 511, 516 (6th Cir. 2004) (citations omitted). A facial attack focuses on whether the allegations in the complaint, taken as true, provide grounds for jurisdiction. *Glob. Tech., Inc. v. Yubei (XinXiang) Power Steering Sys. Co.*, 807 F.3d 806, 810 (6th Cir. 2015) (citation omitted). Where, as here,² the factual basis for jurisdiction is challenged, the allegations in the complaint are not presumed to be true, and the court may weigh evidence to determine if subject-matter jurisdiction exists. *Id.* (citations omitted). The plaintiff bears the burden of proving the court has subject-matter jurisdiction. *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1045 (6th Cir. 2015) (citing *RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1134 (6th Cir. 1996)).

¹ Notwithstanding the fact that the Plaintiff already filed a response to the motion to dismiss, this supplemental response is untimely.

² The Defendants did not clearly state whether the challenge was facial or factual. As the attachments to the complaint are integral to the Defendants' challenge, it is construed as a factual challenge.

Whereas a motion to dismiss for lack of subject-matter jurisdiction is a procedural challenge, a motion to dismiss under Rule 12(b)(6) seeks a dismissal of the suit on the merits. To progress beyond a Rule 12(b)(6) dispositive motion, the complaint must contain sufficient factual allegations, taken as true for purposes of the motion and construed in the plaintiff's favor, to state a plausible claim for relief. *Luis v. Zang*, 833 F.3d 619, 625-26 (6th Cir. 2016) (citations omitted). The facts pled in the complaint must permit "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) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). The court may consider materials attached to the complaint without turning the motion to dismiss into a motion for summary judgment as long as the attachments are referred to in the complaint and are central to the claims asserted therein. *Gavitt v. Born*, 835 F.3d 623, 640 (6th Cir. 2016) (citations omitted). Complaints filed by individuals proceeding *pro se* are held to lower standards than pleadings created by attorneys and should be liberally construed. *Luis*, 833 F.3d at 626 (quoting *Williams v. Curtin*, 631 F.3d 380, 383 (6th Cir. 2011)). *Pro se* complaints are nevertheless held to basic pleading standards. *Wells v. Brown*, 891 F.2d 591, 594 (6th Cir. 1989) (citations omitted). Stated simply,

[d]istrict courts are not required to conjure up questions never squarely presented to them or to construct full blown claims from sentence fragments. To do so would "require . . . [the courts] to explore exhaustively all potential claims of a *pro se* plaintiff, . . . [and] would . . . transform the district court from its legitimate advisory role to the improper role of advocate seeking out the strongest arguments and most successful strategies for a party."

Black v. Read, No. 3:14-1181, 2016 WL 3561731, at *1 (M.D. Tenn. June 6, 2016), *report and recommendation adopted*, No. CV 3-14-1181, 2016 WL 3460131 (M.D. Tenn. June 24, 2016) (quoting *Dixie v. Ohio*, No. 1:08 CV 0450, 2008 WL 2185487, at *1 (N.D. Ohio May 23, 2008)).

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.