

ENTERED

July 28, 2021

Nathan Ochsner, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JENTRY KELLEY,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. H-21-1666
	§	
DI ANGELO PUBLICATIONS, INC.,	§	
	§	
Defendant.	§	

MEMORANDUM OPINION AND ORDER

Plaintiff Jentry Kelley ("Plaintiff") filed this action on November 7, 2018, against defendant Di Angelo Publications, Inc. ("Defendant") in the 270th District Court of Harris County, Texas, asserting claims for (1) violations of the Deceptive Trade Practices Act ("DTPA"), (2) breach of contract, (3) common-law fraud, and (4) fraud by nondisclosure.¹ Defendant filed a Notice of Removal on May 20, 2021.² Pending before the court is Plaintiff Jentry Kelley's Motion to Remand ("Plaintiff's Motion to Remand") (Docket Entry No. 7), to which Defendant has filed Defendant Di Angelo Publications, Inc.'s Opposition to Plaintiff Jentry Kelley's Motion to Remand ("Defendant's Response") (Docket Entry

¹Plaintiff's Original Petition, Exhibit 2H to Notice of Removal, Docket Entry No. 1-10, pp. 5-9 ¶¶ 16-51. All page numbers for docket entries in the record refer to the pagination inserted at the top of the page by the court's electronic filing system, CM/ECF.

²Notice of Removal, Docket Entry No. 1.

No. 8). For the reasons stated below, Plaintiff's Motion to Remand will be granted.

I. Factual Allegations and Procedural Background

Plaintiff is the owner of a makeup line based in Houston, Texas.³ Defendant is a publishing company incorporated in Texas.⁴ This case arises from a contract (the "Contract") between Plaintiff and Defendant under which Defendant agreed to publish a book entitled "Hooker to Looker: A Makeup Guide for the Not So Easily Offended" (the "Book").⁵ Plaintiff states that she wrote the Book,⁶ while Defendant states that it ghostwrote the Book.⁷

On November 7, 2018, Plaintiff filed suit against Defendant in the 270th District Court of Harris County, Texas, asserting claims for DTPA violations, breach of contract, common-law fraud, and fraud by non-disclosure.⁸ Plaintiff claimed that Defendant had

³Plaintiff's Second Amended Petition, Exhibit 2A to Notice of Removal, Docket Entry No. 1-3, p. 3 ¶ 6; Defendant's Answer, Affirmative Defenses and Request for Declaratory Judgment in Response to Plaintiff's Second Amended Petition ("Defendant's Answer"), Docket Entry No. 3, p. 2 ¶ 6.

⁴Plaintiff's Second Amended Petition, Exhibit 2A to Notice of Removal, Docket Entry No. 1-3, p. 2 ¶ 2.

⁵Plaintiff's Motion to Remand, Docket Entry No. 7, p. 1 ¶ 1.

⁶Plaintiff's Original Petition, Exhibit 2H to Notice of Removal, Docket Entry No. 1-10, p. 4 ¶ 10.

⁷Notice of Removal, Docket Entry No. 1, p. 2 ¶ 4.

⁸Plaintiff's Original Petition, Exhibit 2H to Notice of Removal, Docket Entry No. 1-10, pp. 5-9 ¶¶ 16-51.

"concealed or otherwise failed to disclose actual costs to [Plaintiff]"⁹ and had demanded payments from Plaintiff that were not supported by any agreement or legal principle.¹⁰ Plaintiff claimed that under the Contract, "actual costs were to be deducted from gross revenue before a split of the net revenues between the parties[,]" but "Defendant materially breached the contract by concealing a markup on the costs, payable to Defendant" and deceptively treated the markup as part of the cost of publication.¹¹ In other words, Plaintiff claimed that "Defendant was not passing on actual costs but inflated costs marked up to Defendant's advantage."¹²

On January 11, 2020, Di Angelo Publications, Inc. ("Di Angelo") commenced suit against Jentry Kelley ("Kelley") in the Southern District of Texas, arguing that the court had original jurisdiction under the Copyright Act because Di Angelo was seeking a declaratory judgment as to ownership of copyrights in the Book. Di Angelo Publications, Inc. v. Jentry Kelley, Civil Action No. H-20-115, 2020 WL 5884659, at *1 (S.D. Tex. Aug. 28, 2020). On March 19, 2020, Kelley moved to dismiss the suit. Id. On August 28, 2020, the Honorable David Hittner granted Kelley's

⁹Id. at 4 ¶ 12.

¹⁰Id. at 5 ¶ 15.

¹¹Id. at 7 ¶¶ 27, 29.

¹²Id. at 8 ¶ 43.

motion to dismiss, holding that "the disputed ownership and authorship of the Book hinges on the terms of the Contract[,]" that Di Angelo's claim therefore involved a question of state and not federal law, and that the court lacked subject matter jurisdiction. Id. at *2. Di Angelo appealed the dismissal to the Fifth Circuit Court of Appeals, and oral arguments were held on April 26, 2021. A decision is pending.¹³

On May 6, 2021, Plaintiff served Defendant a Second Amended Petition,¹⁴ in which Plaintiff requested for the first time a declaration that "Plaintiff is the sole author and sole copyright owner of the Book."¹⁵ On May 20, 2021, Defendant filed a Notice of Removal, arguing that the new request for declaratory relief implicated the federal Copyright Act.¹⁶ Plaintiff filed the pending Motion to Remand on June 18, 2021;¹⁷ Defendant filed a Response on June 29, 2021;¹⁸ and Plaintiff filed a Reply on July 6, 2021.¹⁹

¹³Plaintiff's Motion to Remand, Docket Entry No. 7, p. 3 ¶ 4; Notice of Removal, Docket Entry No. 1, p. 2 ¶ 6.

¹⁴Plaintiff's Second Amended Petition, Exhibit 2A to Notice of Removal, Docket Entry No. 1-3, p. 13.

¹⁵Id. at 10 ¶ 58.C.

¹⁶Notice of Removal, Docket Entry No. 1, pp. 2-3 ¶ 7.

¹⁷Plaintiff's Motion to Remand, Docket Entry No. 7.

¹⁸Defendant's Response, Docket Entry No. 8.

¹⁹Plaintiff Jentry Kelley's Reply to Defendant's Opposition to Plaintiff's Motion to Remand, Docket Entry No. 9.

II. Plaintiff's Motion to Remand

A. Standard of Review

Except as otherwise expressly provided by Act of Congress, a defendant or defendants in a civil action brought in a state court may remove the action to federal court if the action is one over which the district courts of the United States have original jurisdiction. 28 U.S.C. § 1441(a). Federal district courts have original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. "[A] suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution." Louisville & Nashville Railroad Co. v. Mottley, 29 S. Ct. 42, 43 (1908). Generally, "[t]he presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." Caterpillar Inc. v. Williams, 107 S. Ct. 2425, 2429 (1987). "Since a defendant may remove a case only if the claim could have been brought in federal court, . . . the question for removal jurisdiction must also be determined by reference to the 'well-pleaded complaint.'" Merrell Dow Pharmaceuticals Inc. v. Thompson, 106 S. Ct. 3229, 3232 (1986).

"The removing party bears the burden of showing that federal jurisdiction exists and that removal was proper." Mangun v.

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