

United States Court of Appeals
For the Eighth Circuit

No. 22-1976

Cornice & Rose International, LLC

Plaintiff - Appellant

v.

Four Keys, LLC; First Security Bank & Trust Co.; Perry
Novak Electric, Inc.; Kurt Herbrechtsmeyer; Dean Snyder
Construction Co.; Mick Gage Plumbing & Heating, Inc.;
Northern Cedar Service Co., Inc.; WWA Design, LLC,
doing business as Atura Architecture

Defendants - Appellees

Marco Technologies, LLC; Young Construction, Ltd.;
Kamm Excavating Corp.; Superior Lumber, Inc.; Brian Young

Defendants

Appeal from United States District Court
for the Northern District of Iowa - Eastern

Submitted: April 12, 2023

Filed: August 11, 2023

[Published]

Before LOKEN, SHEPHERD, and KELLY, Circuit Judges.

PER CURIAM.

The Architectural Works Copyright Protection Act of 1990 (AWCPA)¹ extended copyright protection to “architectural works,” 17 U.S.C. § 102(a)(8), defined in 17 U.S.C. § 101 as “the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings.” The principal question raised by this appeal is whether First Security Bank & Trust Company (the “Bank”), which purchased an uncompleted building in a sale approved by the bankruptcy court in the property owner’s Chapter 7 liquidation proceeding, infringed the architect’s copyright in the building by *completing* the building without the permission of the building’s architect, Cornice & Rose (“C&R”). On this record, we agree with the district court there was no actionable infringement because C&R’s infringement claims are precluded by the bankruptcy court’s order approving the sale.

I. Background

McQuillen Place Company, LLC (“McQuillen”), retained C&R, an architectural firm, to design a building to be built in Charles City, Iowa (“the Building”). C&R obtained copyright protection under the AWCPA for its technical drawings and for the building itself, the tangible embodiment of its design work product. See 17 U.S.C. § 102(a)(5) & (8). The Bank was the primary construction lender to McQuillen and obtained a first mortgage on the Building. On April 25, 2019, with the Building approximately ninety percent complete, McQuillen halted construction and filed for protection under Chapter 11 of the Bankruptcy Code.

¹Pub. L. No. 101-650, §§ 701-706, 104 Stat. 5133-34 (1990) (codified at scattered sections of 17 U.S.C.).

The bankruptcy case was later converted to a Chapter 7 liquidation proceeding. In March 2020, the United States Trustee moved to sell the Building to the Bank as high bidder under 11 U.S.C. § 363(b) and also sought “to have the sale free and clear of liens which is authorized, under certain circumstances, by 11 U.S.C. § 363(f).” C&R entered an appearance and objected to the sale on various grounds, including violation of its intellectual property rights. In response, the Bank filed a pre-hearing brief suggesting the following language in the court’s approval order to address this objection:

So long as the new owner or its architect or agents do not use the Plans or Drawings in which Cornice & Rose International, LLC claims a copyright, the new owner may use and occupy the Property, develop the Property, and complete the existing interior and exterior of the Property, free and clear of existing and future claims of C & R, including claims of copyright infringement. The new owner may not use C & R’s Plans or Drawings without first making arrangements satisfactory to C & R for their use. Nothing contained herein shall preclude future claims of copyright infringement resulting from the improper or unauthorized use of the Plans or Drawings by any new owner or third parties.

At a hearing on the Trustee’s motion to sell attended by the Trustee and by counsel for C&R and the Bank, counsel for C&R argued that its copyright protection in the Building itself would be infringed by an order authorizing the proposed sale. C&R specifically addressed the Bank’s suggested language:

“[T]hat language is just not sufficient in large part because it refers to plans and drawings. That language that’s being suggested contemplates incorrectly that the only copyright interest held by my client is simply in the plans and drawings, and it doesn’t take into consideration . . . the fact that the embodiment of the copyright is for the full structural portion of the building, configurations, components, and so forth.”

In response, Counsel for the Bank suggested that the order authorizing the sale say that the purchaser “may not use plans or drawings *or anything else in which C & R has a valid copyright*” (emphasis added). In hindsight, it seems apparent that counsel for the Bank did not sufficiently research the AWCPA, or he would have suggested language that defined the extent to which the purchaser could “use” the Building under § 120(b) and clarified that the owner’s “first sale” right to sell “a particular copy . . . lawfully made” permitted a subsequent sale. See 17 U.S.C. § 109(a).²

On April 9, 2020, the bankruptcy court entered an order authorizing sale of the uncompleted Building to the Bank. Adopting the language suggested by the Bank’s counsel, Paragraph 19 of the Order provided:

Copyright: So long as the Purchaser, or its assignee, or its architect or agents do not use the Plans or Drawings or any work in which Cornice & Rose International, LLC (“C & R”) holds a valid copyright (the C & R Intellectual Property), the Purchaser, or its assignee, may use and occupy the Property, develop the Property, and complete the existing interior and exterior of the Property, free and clear of existing and future claims of C & R, whether for copyright infringement or otherwise. The Purchaser, or its assignee, or its architect or agents may not use the C & R Intellectual Property without first making arrangements satisfactory to C & R for the use of the C & R Intellectual Property. Nothing contained herein shall preclude future claims of copyright infringement resulting from the improper or unauthorized use of the C & R Intellectual Property by the Purchaser, or its assignee, or any third parties.

C&R promptly filed a motion to reconsider, arguing that the bankruptcy court could not authorize completion of the Building due to “C&R’s exclusive right of

²See generally Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 535 (2013); Am. Int’l Pictures, Inc. v. Foreman, 576 F.2d 661, 664 (5th Cir. 1978) (“After the first sale of a copy the copyright holder has no control over the occurrence or conditions of further sales of it.”).

reproduction.” At a hearing on the motion to reconsider, citing the AWCPA, counsel for C&R explained its position:

under the contract that it had with [McQuillen] the license for the use of [the Building] was conditioned on full, complete and timely payment. That has not occurred [as] laid out in our Proof of Claim. So for that reason there is no license for the construction of the building and, therefore, the building is, indeed, an infringing copy of the architectural work.

The bankruptcy court then asked, “[s]o you’re saying any time there’s language in [the license] that says [it] is only effective upon payment in full . . . and a building is built [and] the architect is not paid in full, it can’t be sold without the architect’s permission period?” Counsel replied, “Correct. . . . I wouldn’t call it a security interest . . . it’s what it is, it’s a copyright.” The court commented, “So you’re telling me if you don’t sign off on it and everybody just walks away . . . [y]ou don’t have a security interest, you just have like a stopping measure . . . nobody can do anything until you’re paid in full? . . . I’ll just say I’ve never heard of that.” The following day, the bankruptcy court denied C&R’s motion to reconsider “for the reasons stated in the Resistances and Joinders thereto and at the hearings.”

C&R timely appealed the bankruptcy court’s order; its motion for a stay pending appeal was denied. The Trustee then sold the Building to the Bank, and the Bank assigned its interest to Four Keys, LLC (“Four Keys”), which then hired multiple companies to finish the nearly-complete Building. On September 25, 2020, Judge Williams of the Northern District of Iowa dismissed the appeal as moot because a purchaser -- the Bank -- had bought the Building in good faith and the sale was not stayed pending appeal. See 11 U.S.C. § 363(m). On December 22, 2020, a panel of this Court granted Four Keys’s motion to dismiss C&R’s appeal because the case was statutorily moot. Cornice & Rose Int’l, LLC v. Smith, No. 20-3242, 2020 WL 9349569 (8th Cir. Dec. 22, 2020).

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.