

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

August 12, 2021

Lyle W. Cayce
Clerk

No. 20-20523

DI ANGELO PUBLICATIONS, INCORPORATED,

Plaintiff—Appellant,

versus

JENTRY KELLEY,

Defendant—Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:20-CV-115

Before HIGGINBOTHAM, SOUTHWICK, and ENGELHARDT, *Circuit Judges.*

PATRICK E. HIGGINBOTHAM, *Circuit Judge:*

This appeal brings a variation on the often-thorny question of whether a claim involving a copyright arises under federal law. If Di Angelo Publications' claim to a copyright requires a construction of copyright law, there is exclusive federal jurisdiction; but if its claim calls only upon contract law, jurisdiction lies with the Texas courts. The district court determined that only contract law applied and dismissed Di Angelo's claim for want of federal jurisdiction. Finding federal jurisdiction, we reverse and remand.

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I.

The dispute centers on a book titled “Hooker to Looker; a makeup guide for the not so easily offended” (the “Book”). Jentry Kelley, a makeup artist with her own cosmetics business, first approached Di Angelo’s principal, Sequoia Schmidt, with the idea of publishing the Book to promote Kelley’s business. In June 2015, the parties signed a publishing contract (the “Contract”) in which Di Angelo agreed to publish and distribute Kelley’s then-unwritten Book, with Kelly receiving 50 percent of the net royalties. Kelley provided Di Angelo with an initial, three-page manuscript, detailing her background in cosmetics and outlining the Book’s topics. According to Di Angelo, it then wrote the Book for Kelley while “communicating and/or collaborating with Kelley” during the drafting process. This process allegedly included Di Angelo’s creation, selection, and arrangement of the images appearing in the Book. Nonetheless, the Book Di Angelo distributed lists only Jentry Kelley as the holder of the copyright.

Di Angelo published the Book and sold the initial 1,000-copy print run. Kelley then asked Di Angelo to prepare an updated or revised version of the Book for sale. Di Angelo alleges that it had prepared the updated work for print when it discovered that Kelley was attempting to work directly with Di Angelo’s printer, in violation of the Contract, to reduce the costs she would incur selling the revised edition.

Shortly after unsuccessful overtures to the printer, in November 2018, Kelley filed a complaint in Harris County, Texas, claiming that Di Angelo intentionally misled her regarding the costs of publishing her Book and overcharged her for publishing services. Relevant here, Kelley alleged that she “is the sole owner of all copyrights, trademark rights, trade secret rights, concepts and other intellectual property . . . in the Book.” She further alleged that Di Angelo “did not develop any intellectual property or other rights in

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connection with the Book” and that Di Angelo’s contrary assertions were false. At the summary judgment stage, Kelley asked the Harris County court to rescind her Contract with Di Angelo as a penalty for the alleged misrepresentations. Di Angelo counterclaimed for breach of contract, sworn account, quantum meruit, and a judgment declaring “that Kelley failed to substantially perform under the Contract.” Among other things, Di Angelo alleged that “Kelley has prevented Di Angelo from selling the 2nd edition and making a profit therefrom.” The Harris County action is still pending.

Di Angelo filed this case in the Southern District of Texas in January 2020. According to Kelley, the filing came on the heels of a November 2019 ruling in Harris County that granted summary judgment to Kelley on certain Di Angelo counterclaims including the declaratory judgment claim. Di Angelo’s federal complaint asserts a single claim for relief, titled “Declaratory Judgment Of Authorship and Copyright Ownership of the Book and Its Update/Sequel.” Specifically, Di Angelo seeks a declaration that it “owns copyrights in the [B]ook and its update and those copyrights include among other rights, the right of Di Angelo Publications to control the printing and distribution of the [B]ook [,] its update,” and any derivative works.

Di Angelo alleges that it “acquired copyrights in the [B]ook” and its update by “writing, editing, planning and taking all photographs and making all illustrations, and planning, designing, and arranging the layout of the [B]ook.” Elsewhere in its complaint, Di Angelo alleges that it “wrote the [B]ook, planned and illustrated the [B]ook, prepared the layout for the [B]ook,” as well as “planned, took or made, and formatted all of the photographs and illustrations in the [B]ook.” Apart from these allegations, much of Di Angelo’s complaint describes the contract dispute Kelley initiated in state court. Di Angelo contends that an actual controversy has arisen between the parties because Kelley has asserted exclusive ownership

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of all rights in the Book and its update and seeks rescission of the Contract, which if granted, would give Kelley sole control over the Book's sale and distribution absent a declaration of Di Angelo's copyrights.

Kelley moved to dismiss Di Angelo's declaratory relief claim under Rules 12(b)(1) and 12(b)(6). Kelley argued that the claim did not give rise to federal jurisdiction because it was premised solely on her alleged breach of the Contract, a controversy governed by Texas law. Kelley further argued the federal filing as an end-run around rulings against Di Angelo in the Harris County case. Kelley went on to argue that Di Angelo's claim would fail on its merits because the Contract conclusively established that Kelley alone authored the Book. Di Angelo responded that its claim was distinct from any claims or counterclaims asserted in state court because it was premised on a dispute over who wrote the Book, not on the terms of the Contract. In Di Angelo's view, resolution of this authorship dispute requires the district court to interpret federal copyright law, including the definitional and ownership provisions in 17 U.S.C. §§ 101 & 201, which the state court lacks jurisdiction to address.

The district court agreed with Kelley on the jurisdictional question and granted the motion to dismiss.¹ Although the district court acknowledged that certain ownership claims require interpretation of the Copyright Act,² it determined that here "the disputed ownership and authorship of the Book hinges on the terms of the Contract."³ The district court explained that while the "Contract does not explicitly provide for ownership of copyrights," it

¹ *Di Angelo Publ'ns, Inc. v. Kelley*, No. CV H-20-115, 2020 WL 5884659, at *3 (S.D. Tex. Aug. 28, 2020).

² *Id.* at *2 (citing *Goodman v. Lee*, 815 F.2d 1030, 1031 (5th Cir. 1987)).

³ *Id.* at *2.

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“refers to Kelley as the author of the Book.”⁴ The district court further noted that Di Angelo’s complaint was heavy on contract-related allegations including that “Kelley acted ‘contrary to the terms of the contract’” and that “the Contract . . . provides Kelley a buyout option of Di Angelo’s rights.”⁵ As Di Angelo’s claim sounded in contract, the dispute did not require construction of the Copyright Act and, thus, did not arise under federal law.⁶ The district court declined to reach Kelley’s arguments that Di Angelo failed to state a claim under Rule 12(b)(6) or that the court should abstain from hearing the dispute while the Harris County case was pending.⁷ Di Angelo appealed.

II.

We review a district court’s decision to dismiss under Rule 12(b)(1) *de novo*.⁸ Di Angelo, as the party asserting federal jurisdiction, has the burden of “alleg[ing] a plausible set of facts establishing jurisdiction.”⁹ Where, as here, “the district court rules on jurisdiction without resolving factual disputes . . . we consider the allegations in the plaintiff’s complaint as true and review whether the district court’s application of the law is correct.”¹⁰ Generally, we affirm a dismissal under 12(b)(1) only if “it

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at n.10.

⁸ *In re S. Recycling, L.L.C.*, 982 F.3d 374, 379 (5th Cir. 2020).

⁹ *Laufer v. Mann Hosp., L.L.C.*, 996 F.3d 269, 271 (5th Cir. 2021).

¹⁰ *Id.* at 271-72 (internal quotations omitted).

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