

11-3333-cv
Marvel Characters, Inc. v. Kirby

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2012

4 (Argued: October 24, 2012 Decided: August 8, 2013)

5 Docket No. 11-3333-cv

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7 MARVEL CHARACTERS, INCORPORATED, MARVEL WORLDWIDE,
8 INCORPORATED, MVL RIGHTS, LLC,

9 Plaintiffs-Counter-Defendants-Appellees,

10 WALT DISNEY COMPANY, MARVEL ENTERTAINMENT, INCORPORATED,

11 Counter-Defendants-Appellees,

12 - v -

13 LISA R. KIRBY, NEAL L. KIRBY, SUSAN N. KIRBY, BARBARA J.
14 KIRBY,

15 Defendants-Counter-Claimants-Appellants.

16 -----
17 Before: CABRANES, SACK, and CARNEY, Circuit Judges.

18 Appeal by the defendants-counter-claimants from a
19 judgment of the United States District Court for the
20 Southern District of New York (Colleen McMahon, Judge)
21 granting summary judgment in favor of the plaintiffs-
22 counter-defendants on their claim for declaratory relief and
23 denying the defendants-counter-claimants' cross-motion for
24 summary judgment. Plaintiffs-counter-defendants commenced

1 this lawsuit in response to notices sent by the defendants-
2 counter-claimants, the children of comic book artist Jack
3 Kirby, purporting to terminate alleged assignments in
4 certain of their father's works pursuant to
5 section 304(c)(2) of the Copyright Act of 1976. We conclude
6 that: (1) the district court incorrectly determined that it
7 had personal jurisdiction over Lisa and Neal Kirby; (2) Lisa
8 and Neal Kirby were not indispensable parties to the action
9 under Rule 19(b) of the Federal Rules of Civil Procedure;
10 and (3) the district court correctly determined that the
11 works at issue were "made for hire" under section 304(c),
12 and that Marvel was therefore entitled to summary judgment.

13 Affirmed in part; vacated in part.

14 R. BRUCE RICH (James W. Quinn, Randi
15 W. Singer, Gregory Silbert, on the
16 brief), Weil, Gotshal & Manges LLP,
17 New York, New York; David Fleischer,
18 Haynes and Boone, LLP, New York, New
19 York for Plaintiffs-Counter-
20 Defendants-Appellees and Counter-
21 Defendants-Appellees.

22 MARC TOBEROFF, Toberoff &
23 Associates, P.C., Malibu,
24 California, for Defendants-Counter-
25 Claimants-Appellants.

26 SACK, Circuit Judge:

27 This appeal requires us to revisit our case law
28 applying the work-for-hire doctrine in the context of
29 section 304 of the Copyright Act of 1976 (or, the "1976

1 Act"), 17 U.S.C. § 304. Defendants-counter-claimants-
2 appellants Lisa, Neal, Susan, and Barbara Kirby
3 (collectively, the "Kirbys") are the children of the late
4 Jack Kirby. Kirby is considered one of the most influential
5 comic book artists of all time. At various times throughout
6 his career, he produced drawings for Marvel Comics, a comic
7 book publisher that has since grown into the multifaceted
8 enterprise reflected in the case caption: Marvel
9 Characters, Inc., Marvel Worldwide, Inc., MVL Rights, LLC,
10 and Marvel Entertainment, Inc. (collectively, "Marvel"). At
11 issue here are the rights to drawings Kirby allegedly
12 created between 1958 and 1963.

13 The Kirbys appeal from the district court's grant
14 of summary judgment to Marvel, which was based on the
15 conclusion that all of the works at issue are "works made
16 for hire" within the meaning of section 304(c), and that the
17 Kirbys therefore have no rights to the works. Two of the
18 Kirbys, Lisa and Neal, also challenge the district court's
19 conclusion that it had personal jurisdiction over them under
20 New York's long-arm statute. They further argue that they
21 are indispensable parties under Rule 19(b) of the Federal
22 Rules of Civil Procedure, such that their absence from this
23 lawsuit (by virtue of the district court's lack of personal

1 jurisdiction over them) requires that the suit be dismissed
2 in its entirety.

3 We conclude that the district court was without
4 personal jurisdiction over Lisa and Neal. We therefore
5 vacate the judgment as against them. We also find, however,
6 that Lisa and Neal are not indispensable parties to this
7 lawsuit, and that the district court was correct in
8 concluding that the works at issue are "works made for hire"
9 under section 304(c). We therefore affirm the judgment as
10 to defendants Barbara and Susan.

11 BACKGROUND

12 In this appeal from the grant of summary judgment,
13 we view the evidence in the light most favorable to the
14 nonmovants, the Kirbys for present purposes, and draw all
15 reasonable inferences in their favor. See, e.g., Singer v.
16 Ferro, 711 F.3d 334, 339 (2d Cir. 2013).

17 Jack Kirby

18 Jack Kirby, born Jacob Kurtzberg in New York
19 City's Lower East Side in 1917, began his career in the
20 comic book business in the late 1930s. In the summer of
21 1940, a young woman named Rosalind moved into the apartment
22 above his with her family. The day they met, Kirby asked
23 Rosalind if she "[w]ould like to see [his] etchings[.]" She
24 thought he wanted "to fool around"; he only wanted to show

1 her his drawings for a new comic book series called Captain
2 America. John Morrow, "Would You Like to See My Etchings?":
3 Rosalind Kirby Interviewed (conducted Dec. 12, 1995), THE
4 JACK KIRBY COLLECTOR, April 1996, at 6. Kirby and "Roz" were
5 married in 1942. After Kirby's military service in World
6 War II, the couple had four children: Susan, Neal, Barbara,
7 and Lisa.

8 Kirby's career in comic book illustration spanned
9 more than half a century. His influence was substantial.
10 An obituary marking his death in 1994 quoted Joe Simon,
11 Kirby's creative partner for fifteen years: "He brought the
12 action drawing to a new level. His style was imitated all
13 over and still is today to a certain extent." Jack Kirby,
14 76; Created Comic Book Superheroes, N.Y. TIMES, Feb. 8, 1994,
15 at D22.

16 Kirby was prolific, too. In 1951 alone, 308 pages
17 of Kirby's work appeared in published comic books. This
18 output was typical for him in the years between 1940 and
19 1978.

20 Marvel Comics and Stan Lee

21 Marvel was founded as Timely Comics in 1939 by one
22 Martin Goodman. In 1940, Marvel purchased the first ten
23 issues of Captain America from Kirby and Joe Simon. But

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