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Board of Education & James Knox

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY  
CAMDEN VICINAGEE**

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LINDA WOODSON,	:	
	:	
Plaintiff,	:	Civil Action No.:1:19-cv-14572 (JHR/JS)
	:	
vs.	:	
	:	
ATLANTIC CITY BOARD OF	:	BRIEF IN SUPPORT OF MOTION TO
EDUCATION, JAMES KNOX,	:	DISMISS
NATIONAL ASSOCIATION OF	:	
ELEMENTARY SCHOOL PRINCIPALS,	:	
	:	
Defendants.	:	

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STATEMENT OF FACTS

The immediate, unavoidable resolution of this matter is evident from the face of the Plaintiff's Complaint, even accepting all of the Plaintiff's factual allegations as true – Plaintiff's Complaint is woefully out of time, in that the applicable statute of limitations on Plaintiff's claims for Copyright Infringement expired six years ago. In addition, all of the facts alleged in the Complaint establish that Plaintiff's work is subject to the "work-for-hire" doctrine, that the work was performed within the scope of her employment, and that her employer thereby is the owner of the Copyright. Accordingly, the Plaintiff has failed to put forth a viable claim,

requiring complete dismissal with prejudice in favor of all the Defendants, not just the nominal movant herein, the Atlantic City Board of Education (“BOE”).

On July 1, 2019, Plaintiff, Linda Woodson, filed a three-count complaint (though the Complaint lists Counts I, III, and IV and omits II), each of which asserts a claim for some sort of copyright infringement against James Knox individually, the National Association of Elementary School Principals, and the BOE. To illustrate, Count I asserts a claim for direct Copyright Infringement, pursuant to 17 U.S.C. §502-505, Count III asserts a claim for Vicarious Copyright Infringement, pursuant to 17 U.S.C. §§101 *et seq.*, and Count IV asserts a claim for Contributory Infringement, without citation to a particular code section giving rise to the cause of action. Finally, Plaintiff’s Prayer for Relief establishes that Plaintiff seeks redress for alleged violations of 17 U.S.C. §§503 - 505, as well as 17 U.S.C. §1203. (See Plaintiff’s Complaint with Exhibits, attached hereto as Exhibit “A”)

Although the Plaintiff’s allegations are otherwise well pled, Plaintiff’s facts concern conduct that occurred in 2010, approximately nine year before the complaint was filed. Plaintiff Woodson, who is still employed as a teacher at the New York Avenue School where Defendant James Knox is the principal according to the Complaint, allegedly “created a document in 2010, which involved the discussion of extensive changes of the New York Avenue School and the progress the student body made” as well as a digital presentation to accompany the report. Plaintiff attached both items as exhibits to the Complaint, denoted them as “Plaintiff’s Work,” and alleges that she received “copyright registration number TX 8-573-531 for Plaintiff’s work.” (See Complaint, ¶¶23-26)

Rather than provide her with appropriate credit for her work, Plaintiff alleges that “Defendant Knox wrote an article entitled ‘At Risk For More Than Academic Failure’ in the

professional journal of Defendant National Association of Elementary School Principals called 'Principal' in its edition for January/February 2011 which borrowed heavily from Plaintiff's Work." In addition, Plaintiff claims that she "created an application to the Panasonic National School Change Awards, which includes" Plaintiff's Work, yet she "received no credit in the application to the Panasonic National School Change Awards." Although Plaintiff does not explicitly state when this occurred, she alleges on the face of the Complaint that Defendant Knox "used the application to the Panasonic National School Change Awards in its entirety in his 'At Risk For More Than Academic Failure' article." Finally, Plaintiff alleges that she "received no credit" in the aforementioned article. (See Complaint, ¶¶ 24-31) Since the application to the Panasonic National School Change Awards is referenced in the January/February 2011 article, according to the allegations of the Complaint, Plaintiff's Work in that regard must have occurred prior to January/February 2011.

As will be established in the following section, Plaintiff's Complaint must be dismissed based solely upon the allegations contained therein, even if accepted as true. Plaintiff describes conduct that occurred in 2010-2011, as well as her knowledge that she was not being credited for her contributions. Since the statute of limitations for claims alleging copyright infringement is only three years, Plaintiff's claims should have been brought at the latest by February 2014 (assuming publication occurred in February 2011 and not prior). Second, Plaintiff's allegations in the Complaint, including the items denoted "Plaintiff's Work", make clear that she created the work while she was employed as a teacher at the New York Avenue School and the work was within the scope of her employment as a teacher. Additional discovery is unnecessary given the clarity of the factual allegations, and dismissal pursuant to Rule 12(b)(6) is required.

LEGAL ARGUMENT

- I. SINCE PLAINTIFF’S COMPLAINT INVOLVES ACTIONS THAT OCCURRED NEARLY NINE YEARS AGO, AND THE APPLICABLE STATUTE OF LIMITATIONS IS ONLY THREE YEARS, PLAINTIFF’S COMPLAINT MUST BE DISMISSED AS UNTIMELY.

When considering a motion to dismiss under Rule 12(b)(6), the Court must determine whether the complaint “contain[s] sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). A court should find that a “claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Ashcroft, 556 U.S. at 678. While the Court must accept the plaintiff’s allegations as true, it is not required to accept sweeping legal conclusions cast in the form of factual allegations, unwarranted inferences, or unsupported conclusions. Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997); see also Phillips v. County of Allegheny, 515 F.3d 224, 234 (3d Cir. 2008) (“Factual allegations must be enough to raise a right to relief above the speculative level.”).

If a Court considers evidence beyond the complaint in deciding a 12(b)(6) motion, the general rule is that the motion is then “converted to a motion for summary judgment.” Sims v. Viacom, Inc., No. 2: 11-cv-0675, 2012 U.S. Dist. LEXIS 11485, at \*8 (W.D. Pa. Jan. 31, 2012)(citing Anjelino v. New York Times Co., 200 F.3d 73, 88 (3d Cir. 1999)). That is not the case, however, if the Court looks to matters of public record, including court files and records, and documents referenced in the complaint. Id. (citing Pension Benefit Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir. 1993)). In the present case, the Plaintiff has not only referenced certain documents in her Complaint, but has further attached them as exhibits, all of which may be considered by this Court without converting the motion to dismiss into a motion

for summary judgment. In short, as the Third Circuit has stated, “When deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court may look only to the facts alleged in the complaint and its attachments.” Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir.1994). Finally, a statute of limitations defense is cognizable as a Rule 12(b)(6) motion if the failure to file within the statutory deadline is evident from the four corners of the Complaint. Sims, slip op at 11-12.

17 U.S.C. §507(b) states, in no uncertain terms, “No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued.” See also Tech. Based Sols., Inc. v. Elecs. Coll., Inc., 168 F. Supp. 2d 375, 380 (E.D. Pa. 2001). Since the Plaintiff in this matter filed her Complaint on July 1, 2019, the accrual of her claims must be evaluated as of July 1, 2016. William A. Graham Co. v. Haughey, 568 F.3d 425, 433 (3d Cir. 2009).

Under the discovery rule, a cause of action accrues “when the plaintiff discovers, or with due diligence should have discovered, the injury that forms the basis for the claim.” Id. at 438 (quoting Disabled in Action of Pennsylvania v. Se. Pennsylvania Transp. Auth., 539 F.3d 199, 209 (3d Cir. 2008)). To avail herself of the benefit of the discovery rule, therefore, Plaintiff must establish that she did not discover, nor in the exercise of reasonable diligence should have discovered, the basis for her claim against the Defendants until after July 1, 2016. As our Circuit has stated in the context of a Copyright Infringement action like the present case, the issue reduced to whether Plaintiff “should have known of the basis for [her] claims, [which] depends on whether [she] had sufficient information of possible wrongdoing to place [her] on inquiry notice or to excite storm warnings of culpable activity.” Id. (quoting Benak ex rel. Alliance Premier Growth Fund v. Alliance Capital Mgmt. L.P., 435 F.3d 396, 400 (3d Cir. 2006)). The

concept of “inquiry notice” (which states that a party has a duty of inquiry when she is aware of sufficient facts that furnish her with a potential claim) outlines the “plaintiff’s duty of reasonable diligence.” Plaintiff is then charged with the knowledge that actual inquiry would have revealed. William A. Graham Co. v. Haughey, 484 F. Supp. 2d 324, 328 (E.D. Pa. 2007)

Moreover, District Courts within the Third Circuit have ruled that the “continuous wrong” theory has no application in copyright infringement actions. There has been a recognized split in the Circuits on this issue, where the Seventh Circuit held that “only the last infringing act had to occur within the three year statutory period.” Hunter v. Squirrel Hill Assocs., L.P., 413 F. Supp. 2d 517, 520-21 (E.D. Pa. 2005). The Eastern District of Pennsylvania was “persuaded by the reasoning in the Ninth, Sixth, Fifth, and Second Circuits, which all rejected the Seventh Circuit’s reasoning, and which found that the statute bars recovery on any claims for damages which have accrued more than three years before the commencement of the suit.” Id. at 521. The doctrine of equitable tolling, which should only be applied “sparingly,” would apply if Plaintiff could establish the defendant has actively misled her respecting her cause of action, the plaintiff in some extraordinary way has been prevented from asserting her rights, or the plaintiff has timely asserted her rights in the wrong forum. Id. (citing Podobnik v. United States Postal Service, 409 F.3d 584, 591 (3d Cir. 2005)). Presaging the Third Circuit’s adoption of the discovery rule, the Court cited with approval a Ninth Circuit case holding, “A cause of action for copyright infringement accrues when one has knowledge of a violation or is chargeable with such knowledge.” Id. (quoting Roley v. New World Pictures, Ltd., 19 F.3d 479, 481 (9th Cir. 1994))

In the present case, the Plaintiff alleged that she is currently, and was at all relevant times, “a teacher under the employ of the Atlantic City Board of Education and the New York

Avenue School of which Defendant Knox is the Principal.” While employed by the BOE, Plaintiff created a document in 2010 and an accompanying digital presentation, “which involved the discussion of extensive changes of the New York Avenue School” where she was employed “and the progress the student body made.” (Exhibit “A”, ¶¶23-25) The Complaint appears to be predicated on two primary allegations: 1) Defendant Knox used her work in order to apply for an award known as the Panasonic National School Change Awards and 2) then further “borrowed heavily from Plaintiff’s Work” when he wrote an article entitled “‘At Risk For More Than Academic Failure’ in the professional journal of Defendant National Association of Elementary School Principals called ‘Principal’ in its edition for January/February 2011.” (Exhibit “A”, ¶¶27-29) All of the actions Plaintiff alleged in violation of her copyright occurred over eight years ago, making her Complaint untimely by approximately six years.

With regard to the Plaintiff’s knowledge, she was aware that her work was being used as part of the application to the Panasonic National School Awards, and she was aware that she was not receiving credit in the application. In fact, she alleges that she herself “created the application” yet received no credit. (Exhibit “A”, ¶¶28-29) As such, she was acutely aware of these facts as they were occurring, making the discovery rule inapplicable. Although her knowledge of the published article is not developed fully, the fact that she created the awards application and was not being credited for it would have put her on inquiry notice with the concomitant duty of reasonable diligence. Based solely on the allegations of the Complaint, Plaintiff’s Complaint must be dismissed.

II. THE ALLEGATIONS IN THE COMPLAINT ESTABLISH THAT PLAINTIFF WAS AN EMPLOYEE OF THE BOARD OF EDUCATION AT THE TIME SHE CREATED THE WORK, WHICH INVOLVED AN ANALYSIS OF THE SCHOOL WHERE PLAINTIFF WAS A TEACHER, MAKING THE WORK A “WORK FOR HIRE”.

Courts within the Third Circuit have stated “that where one person employs another to produce work of an artistic nature, in the absence of a contractual reservation of the copyright in the artist, the presumption arises that title to the copyright is in the employer.” Brown v. Cosby, 433 F. Supp. 1331, 1343 (E.D. Pa. 1977); see also Meltzer v. Zoller, 520 F. Supp. 847, 856 (D.N.J. 1981)(citing Brattleboro Publishing Co. v. Winmill Publishing Corp., 369 F.2d 565 (2d Cir. 1966) and I Nimmer on Copyright, supra, § 5.03(B)). In fact, the Copyright Act itself states, “In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.” 17 U.S.C. 201(b); Maclean Assocs. v. Wm. M. Mercer-Meidinger-Hansen, Inc., 952 F.2d 769, 775 (3d Cir. 1991). When an employee creates a work for his employer’s benefit, “[t]he employer, rather than the employee/creator, is the copyright-owner of a work-for-hire, unless the employer and employee have expressly agreed otherwise in writing.” Bieg v. Hovnanian Enters., Inc., 157 F. Supp. 2d 475, 479 (E.D. Pa. 2001). The definition section of the Act then defines a “work for hire” as “a work prepared by an employee within the scope of his or her employment.” 17 U.S.C. § 101.

Although the Act itself does not define what constitutes “a work prepared by an employee within the scope of his or her employment,” the Supreme Court of the United States has held (after analyzing various approaches taken in different circuits) “the language and structure of § 101 of the Act” indicate “that a work for hire can arise through one of two mutually exclusive means, one for employees and one for independent contractors, and ordinary canons of statutory interpretation indicate that the classification of a particular hired party should



be made with reference to agency law.” Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 743 (1989). This reading of the “undefined statutory terms”, moreover, ...

... finds considerable support in the Act's legislative history. The Act, which almost completely revised existing copyright law, was the product of two decades of negotiation by representatives of creators and copyright-using industries, supervised by the Copyright Office and, to a lesser extent, by Congress. Despite the lengthy history of negotiation and compromise which ultimately produced the Act, two things remained constant. First, interested parties and Congress at all times viewed works by employees and commissioned works by independent contractors as separate entities. Second, in using the term "employee," the parties and Congress meant to refer to a hired party in a conventional employment relationship. These factors militate in favor of the reading we have found appropriate.

Id. at 743 (citations omitted). Accordingly, whenever an employee creates a work, the employer holds the copyright provided the work falls within the scope of employment; a commissioned work by an independent contractor may still result in the copyright in the hiring party under §101(b), if the “hired party is an employee under the general common law of agency,” which in turn depends on a host of different factors. Id. at 751.

The analysis of whether the “work for hire” doctrine should apply often reduces to this sole issue of whether an individual is an employee or whether, under the common law of agency, the individual was an independent contractor. The Courts within the Third Circuit will then evaluate a host of factors (similar to those set forth in Reid) in order to determine the proper classification. The distinction is often dispositive, since an independent contractor finding will often equate to a determination that the work was not for hire. Marco v. Accent Publ'g Co., 969 F.2d 1547, 1550 (3d Cir. 1992). In the case of an independent contractor, the employer would retain the copyright only if such reservation was made explicit (utilizing terms such as “as though you were our employee-for hire”) in the independent contractor agreement or if the

factual context brought the commission within the purview of §101(b). See Brown, 433 F.Supp. at 1333; 17 U.S.C. §101(b).

The Delaware District Court case entitled Le v. City of Wilmington provides a similar set of facts that should inform this court's analysis. In Le, plaintiff was employed by the Defendant City of Wilmington as an Information Analyst II and sought to develop an "Instant Ticketing" software program for use by the City's Department of Licenses and Inspections ("L&I"), so that L&I could keep track of citations by computer software rather than paper tickets. In 2004, Plaintiff completed a prototype of the program, and Jeffery Starkey, the City's Commissioner of L&I, authorized him to install the software on the City's computer network for testing and comment by L&I personnel. Because of budgetary concerns, City Council eliminated the entire division where Plaintiff worked, and within three days after this vote, Plaintiff filed a Certificate of Registration with the United States Copyright Office seeking federal copyright protection for his Instant Ticketing software. Id., 736 F.Supp.2d 842, 845-46 (D. Del. 2010).

Plaintiff alleged, inter alia, that the City was guilty of copyright infringement, which the City averred was impossible because the program was a work for hire. Pursuant to Reid and MacLean, analyzed in greater detail supra, the Court easily found that the work was for hire, within the scope of his employment, since it was "undisputed that Le was a City employee during the entire period in which the Work was created" and "that there is no written agreement assigning ownership of the Work from the City to Le." Id. at 848.

The only issue, which the Court resolved in the City's favor on summary judgment, was whether the work was done within the scope of his employment based on Le's allegation that he worked on the program in his own time, on his own home computer, and was precluded from developing the program while at work. The Court found "persuasive authority to the effect that,

even if Le created the Work on his own time, if he did so during his employment and without a specific written agreement from the City to the contrary, the copyright on the Work belongs to the City.” Id. at 849. The time of day and location of the work were not important, since it was clear that he was a salaried employee and the work was going to be used by his employer in its operations. Id. at 849-50 (citing Genzmer v. Public Health Trust of Miami-Dade County, 219 F. Supp. 2d 1275, 1281-82 (S.D. Fla. 2002), Rouse v. Walter & Assocs., L.L.C., 513 F. Supp. 2d 1041, 1058 (S.D. Iowa 2007), Miller v. CP Chems., Inc., 808 F. Supp. 1238, 1240, 1244 (D.S.C. 1992) and Marshall v. Miles Labs., Inc., 647 F. Supp. 1326, 1330 (N.D. Ind. 1986). Since the “undisputed record establishes that the Work was made to facilitate the City’s business of issuing tickets of various violations,” there could be no reasonable conclusion other than that it was within the scope of his employment. Id. at 851.

Finally, this Court should take note of the fact that the Plaintiff’s Copyright Registration is NOT entitled to a presumption of validity in this action. The Copyright Act states:

In any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate. The evidentiary weight to be accorded the certificate of a registration made thereafter shall be within the discretion of the court.

17 U.S.C. § 410. This section “deals with the allocation of the burden of proof in a copyright infringement claim,” and requires the Plaintiff to sustain her burden of establishing “that (1) [s]he has valid copyright protection and (2) [defendant] has infringed on this protection,” without the benefit of the presumption. In short, when the Plaintiff files for copyright protection five years or more after publication, there is no burden shift and Plaintiff at all times carries the burden of proof. Cameron v. Graphic Mgmt. Assocs., Inc., 817 F. Supp. 19, 23 (E.D. Pa. 1992)

In the present case, the sole issue necessary to resolve the current motion is whether Plaintiff was an employee at the time she created the work, and whether the work was within the scope of her employment. Based on the allegations of the Complaint, which includes the Work itself, this Court can only answer both of those issues in the affirmative. First, the entirety of the multi-factor analysis discussed in Marco (Third Circuit) and Reid (Supreme Court) is irrelevant, since it is undisputed, based on the allegations of the Complaint that Woodson was a full-time employee when she created the work and continues to be so to this day. Second, whether she worked on the project at home and otherwise asserted complete control over the work is simply irrelevant. Although Le involved the development of a computer program, the Plaintiff's allegations supporting ownership are nearly identical, and identically devoid of merit. Plaintiff was a salaried employee, and the employer sought to use the work to obtain an award for the school, and to author an article in a publication called "Principal".

It, frankly, shocks the conscience that Plaintiff would even allege that her preparation of a report about the very school where she was employed, setting forth the academic progress of those students and the cultural changes the school was able to achieve under Principal Knox's leadership, is somehow NOT within the scope of her employment as a teacher. Although Plaintiff may cite to her allegation that she "created Plaintiff's Work not as an employee in furtherance of her work but as a bonus to Defendant Atlantic City Board of Education and as an author who was able to make her own decisions as to the creation of Plaintiff's Work," the foregoing analysis establishes that the allegation is irrelevant to the determination of this Motion to Dismiss. First, the allegation is in actuality a sweeping legal conclusion cast in the form of a factual allegation, an unwarranted inference, and an unsupported conclusion, all of which should be ignored in this Court's analysis pursuant to Morse and Phillips. Second, as Reid, Marco and

Le make clear, Plaintiff's self-serving description of her intent, as well as the extent of her control over the creative process, have absolutely no bearing on the issue. The allegations of the Complaint establish 1) that she created this while employed by the BOE in 2010; 2) that her employer then used the work in connection with education related activities (i.e. the application for the Award and the article in the publication Principal) in 2011; 3) there was no written agreement vesting ownership in the Plaintiff; and 4) the "work" itself (attached to the Complaint) involves Plaintiff describing academic achievement by the students at the school where she was employed as a teacher and the overall cultural changes that occurred at that school, as a result of programs put in place by her supervisor, Principal Knox. No reasonable juror could determine that the Work was not within the scope of her employment.

Finally, Plaintiff does not even enjoy the normal presumption of the validity of the copyright. It appears (because the document is somewhat illegible) that the Plaintiff's litigation counsel here, Anthony M. Verna, III Esq. filed the registration on May 10, 2018, over eight years after the first alleged publication on March 4, 2010. (See Exhibit "C" to Plaintiff's Complaint) Pursuant to 17 U.S.C. § 410, Plaintiff bears the burden of establishing "that (1) [s]he has valid copyright protection and (2) [defendant] has infringed on this protection," which she will be unable to carry given the allegations of the Complaint.

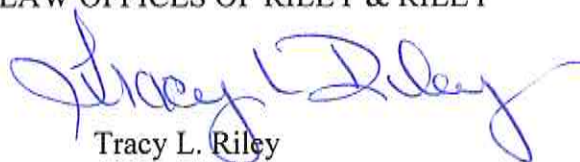
### CONCLUSION

For the foregoing reasons, Plaintiff's Complaint must be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6), without resort to any materials other than what was contained in Plaintiff's initial filing. The time periods set forth in the Complaint establish that the statute

of limitations has already expired, while the factual allegations of the Complaint, coupled with the substance of the supposedly copyright protected work, shows they constitute work for hire.

Respectfully submitted,

LAW OFFICES OF RILEY & RILEY



Tracy L. Riley

Dated: August 15, 2019