

Suit for Copyright Infringement of Architectural Plans Allowed to Move Forward

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In a September 22 decision, District Judge David J. Novak denied the bulk of a motion to dismiss a suit alleging that a general contractor had infringed an architectural firm's copyright on design plans for a brewery and tasting room to be built in Williamsburg. *Michael Pellis Architecture PLC v. M.L. Bell Construction LLC*, Civil Action No. 3:22CV470 (DJN), 2023 U.S. Dist. LEXIS 169697 (E.D.Va. Sept. 22, 2023)

According to the complaint, Michael Pellis Architecture, PLC created several different drafts of architectural plans for a new brewery and tasting room. The complaint alleges that the defendants, M.L. Bell Construction LLC and Michael Bell, altered Pellis' plans without Pellis' knowledge and submitted them as part of an application for a building permit. Pellis claimed that the altered plans contained mistakes, inaccurate information and other changes, and that the plans improperly included Pellis Architecture's title block and logo and used Michael Pellis' architect's seal, license number and signature without his authority.

The Copyright Claim and Plaintiffs' Motion for Direction to the Copyright Office

The primary claim asserted in the complaint is a claim for copyright infringement brought by both Pellis Architecture and Michael Pellis individually. The problem for the plaintiffs was that the copyright registration for the plans did not name Michael Pellis as an author or co-claimant. After Bell moved to dismiss Michael Pellis' copyright claim for lack of standing, Pellis Architecture filed an application for supplementary registration with the Copyright Office, seeking to amend the copyright registration to add Michael Pellis as a co-claimant and to change the date of publication of the plans. Because of the pending litigation, however, the Copyright Office refused to consider the application for summary registration, and so the plaintiffs filed a "Motion for Direction" asking the court to direct the Copyright Office to process the application.

Relying primarily on the Copyright Office's Compendium of Practices (Compendium), Judge Novak denied the motion for direction. Based on the Compendium, Judge Novak ruled that the court had the discretion to direct the Copyright Office to deviate from its practice of suspending applications while litigation is pending, but he concluded that courts have disfavored attempts to supplement registrations that are the subject of pending litigation. Here, the failure to identify Michael Pellis on the registration went to the central question of Pellis' standing. In addition, allowing plaintiffs to supplement the registration after Bell had moved to dismiss "would permit an inequitable use of the supplementary registration system." Accordingly, the court denied the motion for

direction.

Pellis Architecture Permitted to Seek Statutory Damages

A second problem with the copyright registration was that it was filed on June 17, 2022, after infringement allegedly began, and it identified the date of first publication as March 16, just over three months before the registration was filed. Statutory damages under the Copyright Act, 17 U.S.C. § 504, cannot be recovered if infringement began before the effective date of registration, unless the registration is made within three months of the first publication of the work. See 17 U.S.C. § 412.

Pellis Architecture attempted to correct the problem in its application for supplementary registration by including a request to change the publication date of the plans from March 16 to March 18. According to Pellis, while March 16 was the date that Bell filed the building permit application that contained the altered plans, those plans were not available to the public in the building permit office until March 18.

The court denied Bell's motion to dismiss Pellis Architecture's claim for statutory damages, holding that the date of publication was a contested factual issue, and so Pellis Architecture had stated a plausible claim for statutory damages.

Violations of the Visual Artists Rights Act and Trespass to Chattels

In addition to copyright infringement, the plaintiffs asserted two other related claims. The first of these is a claim by Michael Pellis for violation of his rights of attribution and integrity under the Visual Artists Rights Act (VARA), 17 U.S.C. § 106A.

VARA protects the "moral rights" of certain artists. The right of attribution consists of the right to be recognized as the author of a work and to prevent the use of the author's name on works created by others. The right of integrity allows artists to prevent modifications of their work that would be prejudicial to their honor or reputations. VARA, however, applies only to a "work of visual art," and Bell moved to dismiss on the grounds that architectural plans did not fall within the statutory definition but were instead a "technical drawing" expressly excluded from protection under VARA.

The decision does not cite any authority applying the definition of a "work of visual art" to architectural plans, and so it appears to be an issue of first impression. Judge Novak denied Bell's motion to dismiss, citing two grounds. First, he noted that the architectural plans were registered for a copyright as an "architectural work," as opposed to a technical drawing. Second, Congress added the definitions of a "work of visual art" and "architectural work" to the Copyright Act at the same time. See 17 U.S.C. § 101. From that context, the court inferred that if Congress had meant to exclude all architectural works from the definition of "works of visual art" under VARA, it would have done so more explicitly. While the plans could potentially fall within the scope of a "work of visual art," however, whether they met the statutory definition, the judge held, was a factual issue that could not be resolved on a motion to dismiss.

The plaintiffs also asserted a claim for trespass to chattels, which occurs when a party "intentionally uses or intermeddles" with the personal property of another and "the chattel is impaired as to its condition, quality, or

value.” While traditionally limited to tangible property, trespass to chattels has been extended to cover intangible property, but it requires a showing of damage or impairment of the property itself, not just copying or stealing the property.

Here, the court ruled, the plaintiffs had sufficiently alleged damage to the “condition, quality, or value” of the plans through the allegation that Bell had diminished the value of Pellis’ original plans by using them in association with deficient plans, which were distributed to the building permit office, the owners of the project and other contractors. Further, it did not matter that Pellis could still use the architectural plans. Trespass to chattels does not require that a defendant exercise control of the property, only that the property be impaired as to its condition, quality or value.

Takeaways and Procedural Points

Judge Novak addressed one procedural issue which bears mentioning. Local Rule 7(E) provides that a motion “shall be deemed withdrawn” if a party does not set it for a hearing, or submit it to the court without a hearing, within thirty days of filing. Local Rule 7(E) is seldom, if ever enforced, and Judge Novak dealt with the argument quickly, holding that application of the local rules is within the court’s discretion, and “this Court does not utilize the provisions of Local Rule 7(E) to the extent that it requires a movant to schedule a hearing” within thirty days.

It is also notable that this case is only now getting past the motion to dismiss stage, despite being pending since July 1, 2022, almost fifteen months ago. While the plaintiffs’ scrambling to amend its copyright registration and file an amended complaint took up some of this time, the case is still an example of how a defendant can use a motion to dismiss to delay the usual quick pace of litigation in the rocket docket. Judge Novak has already set an initial pretrial conference for October 19, though, and the case is expected to move swiftly from this point.

The most obvious takeaway is that potential copyright infringement plaintiffs must pay attention to the detail of a copyright registration to make sure that the registration names all appropriate authors and act promptly to protect the ability to claim statutory damages. But for the errors in the original registration, all of Pellis’ substantive claims would have survived the motion to dismiss.

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