UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SARL LOUIS FERAUD INTERNATIONAL,

Plaintiff,

-against-

VIEWFINDER INC. d/b/a FIRSTVIEW,

Defendant.

04 Civ. 9760 (GEL)

OPINION AND ORDER

S.A. PIERRE BALMAIN,

Plaintiff,

-against-

VIEWFINDER INC. d/b/a FIRSTVIEW,

Defendant.

04 Civ. 9761 (GEL)

James P. Duffy, III, Berg and Duffy, LLP, Manhasset, New York, for Plaintiffs Sarl Louis Feraud International and S.A. Pierre Balmain.

Steven J. Hyman and Paul H. Levinson, McLaughlin & Stern, LLP, New York, New York, for Defendant Viewfinder Inc.

GERARD E. LYNCH, District Judge:

Plaintiffs brought these actions to enforce default judgments they had obtained against defendant in a French court. This Court dismissed the action, finding that enforcing the judgment would violate New York's public policy because defendant's actions were protected by the First Amendment, Sarl Louis Feraud Int'l v. Viewfinder Inc., 406 F. Supp. 2d 274

(S.D.N.Y. 2005) ("Feraud I"). The Court of Appeals vacated and remanded, instructing this Court to consider first, whether the defendant's actions would be protected by the fair use doctrine under American law, and second, if they were so protected, whether French intellectual property law provides protection comparable to that afforded by the fair use doctrine. Sarl Louis Feraud Int'l v. Viewfinder Inc., 489 F.3d 474 (2d Cir. 2007) ("Feraud II").

The Court of Appeals having declined to resolve the issue of fair use itself, finding that "the record before us is insufficient to determine fair use as a matter of law," 489 F.3d at 483, this Court permitted additional discovery on that issue. Following discovery, rather than proceed to a hearing to determine the matter, plaintiffs moved for summary judgment, contending that, on the basis of the facts now in evidence, a court applying American law would be required to rule against defendant's fair use claim as a matter of law. Because resolution of the fair use issue will require detailed findings of fact regarding matters about which there are genuine disputes, the motion will be denied.

BACKGROUND

Because the procedural and factual background to this dispute is set forth in some detail in Feraud I and Feraud II, only those facts bearing directly on this motion will be presented here. The plaintiffs, Sarl Louis Feraud International ("Feraud") and S.A. Pierre Balmain ("Balmain"), are French corporations that design and market high-fashion clothing.[1] From 1996-2001, the period relevant to the underlying French Judgment, plaintiffs were members of the Fédération

[1] Feraud is no longer an operating business entity, but still exists as a shell corporation for purposes of, inter alia, pursuing this action. (Ashby Dep. 38.) Although this motion for summary judgment primarily addresses Balmain's case, Feraud is listed as a plaintiff on all filings, and the parties have treated the motion as filed on behalf of both plaintiffs.

Française de la Couture, du Prêt-à-Porter des Couturiers et des Créateurs de Mode (French Federation of Fashion and of Ready-to-Wear of Couturiers and Fashion Designers) (the "Federation"). The Federation controlled the press accreditation process for the fashion shows organized by the plaintiffs that are the subject of the French Judgment.

Defendant Viewfinder Inc. is a Delaware corporation with its principal place of business in New York. Viewfinder operates an internet fashion magazine called firstView, www.firstview.com, on which it posts photographs of fashion shows, including plaintiffs'. The photographs are taken by Donald Ashby and Marcio Madeira, respectively the president and vice-president of Viewfinder, who are professional fashion photographers. The firstView website contains both photographs of the current season's fashions, which may be viewed only by purchasing a subscription, and photographs of past collections, which are available for free. FirstView also sells its photographs of runway shows to various other publications, including Vogue and The New York Times. See http://www.firstview.com/page.php?i=7 (last visited Oct. 4, 2008). Viewfinder does not sell clothing or designs.

In the French action, the plaintiffs contended – and the court, after Viewfinder defaulted, found – that Viewfinder made unauthorized use of plaintiffs' intellectual property and engaged in unfair competition by posting photographs of plaintiffs' clothing designs. The Court then entered judgment in favor of plaintiffs, awarding 1,000,000 francs[2] in compensatory damages.[3] On September 29, 2005, this Court held that the French Judgment's compensatory remedies were

[2] The exchange rate of the French franc is locked to the euro at 6.55957 francs. See http://coinmill.com/FRF_calculator.html (last visited Dec. 17, 2008). On December 17, 2008, the exchange rate of euros to dollars was 1.00-1.44160. http://www.xe.com/ucc/convert.cgi.

[3] For a detailed description of the French action, see Feraud II, 489 F.3d at 477-79.

inconsistent with the First Amendment and therefore repugnant to public policy; accordingly, it granted defendant's motions to dismiss and for summary judgment. See Feraud I, 406 F. Supp. 2d at 274.

On June 5, 2007, the Second Circuit vacated this Court's Order. The Court of Appeals agreed with this Court that a foreign judgment that conflicted with First Amendment protections of free expression could be repugnant to public policy. Feraud II, 489 F.3d at 480. It concluded, however, that "[b]ecause the fair use doctrine balances the competing interests of the copyright laws and the First Amendment, some analysis of that doctrine is generally needed before a court can conclude that a foreign copyright judgment is repugnant to public policy." Id. at 482. Moreover, the Court noted that even if Viewfinder's actions would be protected as fair use under American law, enforcing the judgment would not violate public policy if French law provided comparable protections. Id. at 481-82. Viewfinder could not default the French actions, declining to take advantage of such protection, and then litigate the fair use issue in the United States instead. Accordingly, the Second Circuit remanded the action to this Court to determine first "the level of First Amendment protection required by New York public policy when a news entity engages in the unauthorized use of intellectual property at issue here"[4] and second "whether the French intellectual property regime provides comparable protections." Feraud II, 489 F.3d at 480.

[4] Where, as in the instant case, federal jurisdiction rests on diversity of citizenship, federal courts look to the law of the forum state in determining the enforceability of foreign judgments. Feraud I, 406 F. Supp. 2d at 279 (citing S.C. Chimexim S.A. v. Velco Enters., Ltd., 36 F. Supp. 2d 206, 211 (S.D.N.Y. 1999)).

Thus, this Court was asked to determine (1) whether Viewfinder's actions would constitute fair use under American intellectual property law, and therefore would be protected by the First Amendment, and (2) whether French intellectual property law provided comparable protection to American fair use doctrine. Rejecting this Court's suggestion that the parties proceed to a hearing to determine both issues, or alternatively deal first with the essentially legal determination of the extent to which French intellectual property law permitted defenses analogous to our fair use doctrine, plaintiffs elected to move for summary judgment, arguing that the Court need not reach any issue of French law because defendant's conduct as a matter of law would not be considered fair use under American copyright and First Amendment principles. The evidence relating specifically to the fair use issue will be discussed below.

DISCUSSION

I. Summary Judgment Standard

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court's responsibility is to determine whether there is a genuine issue to be tried, and not to resolve disputed issues of fact. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). The Court must draw all reasonable inferences and resolve all ambiguities in the nonmoving party's favor, and construe the facts in the light most favorable to the nonmoving party. Id. at 254-55. However, "[i]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Id. at 249-50 (citations omitted).

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