UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PASTIME LLC et al.,
Plaintiffs,

-v-

LEE SCHREIBER,
Defendant.

16-CV-8706 (JPO)

OPINION AND ORDER

J. PAUL OETKEN, District Judge:

At the center of this case is a play, titled "Once Upon a Pastime," which its creators hope to mount as a successful stage production. But before that can happen, the characters in this case have to resolve their own drama: Who owns the rights to the play? Defendant Lee Schreiber holds a registration from the U.S. Copyright Office listing him as the play's sole author, but Plaintiffs Pastime LLC, Dennis M. Mnogue (personally known as Terry Cashman), PKM Music, and Metrostar Music (collectively, "Pastime") claim that Schreiber's employment contract divested him of any copyright in the work. Instead, Pastime claims that the play's owners transferred their copyrights to Pastime, making Pastime the lawful owner of "Once Upon a Pastime."

In this action, Pastime asks this Court to declare it the play's rightful owner and to nullify Schreiber's registration. Schreiber has moved to dismiss Pastime's Complaint for failure to state a claim upon which relief can be granted. For the reasons that follow, Schreiber's motion is granted in part and denied in part.

I. Background

The following facts are taken from the Complaint and attached exhibits, and are presumed true for purposes of deciding Schreiber's motion to dismiss.

Over a decade ago, Warren Baker and Sally Jacobs-Baker ("the Bakers") set out to produce a musical titled "Passin' It On." (Dkt. No. 1 ("Compl.") ¶ 8; Dkt. No. 1-1.) The Bakers acquired rights to the play from PKM Music and Terry Cashman, who had written the music, and commissioned author Larry Atlas to write the book for the project. (Compl. ¶ 8.) After a few underwhelming first-run performances of "Passin' It On," the Bakers hired Schreiber and Cashman to rewrite Atlas's book under a new title, "Once Upon a Pastime." (Compl. ¶¶ 9, 12.)

But the Bakers were dissatisfied with the rewrite and decided to withdraw as producers. (Compl. ¶¶ 12, 14.) Not wanting to abandon the project, Cashman, PKM Music, and Metrostar Music entered into a deal with the Bakers, which resulted in the Bakers' transferring their rights in the musical to Cashman and PKM Music. (Compl. ¶ 14–15.) Cashman, PKM Music, and Metrostar Music subsequently transferred their rights to Pastime LLC. (Compl. ¶ 15.)

Still looking to attract investors and producers, PKM Music and Metrostar Music began presenting readings of the musical. The first two readings occurred at the York Theater in New York City. (Compl. ¶ 16.) Schreiber made some revisions between the first and second readings, but the musical received no offers. (*Id.*) Although Schreiber requested the opportunity to make further revisions, Cashman decided instead to contract with a more experienced author, James Glossman. (Compl. ¶¶ 17–18.) The second set of readings, now of the Glossman-Cashman vintage, were held at Montclair State University. (Compl. ¶ 18.) No offers were made, and more revisions followed. (*Id.*) Finally, a third attempt at a New York City rehearsal hall generated some interest, and producer Armand Paganelli undertook a production of the musical for five performances at the White Plains Performing Arts Center. (Compl. ¶ 19.)

This is where the Pastime's budding success story hit a snag: In May 2016, Schreiber confronted Paganelli at the White Plains Performing Arts Center and orally threatened to sue him

for infringing Schreiber's rights in the musical. (*Id.*) As a result, Paganelli has not made any further plans to produce the musical, and he plans to defer decision on further productions until Schreiber's claims are resolved. (*Id.*)

Schreiber and Pastime have competing claims to authorship—and ownership—of the musical. On the one hand, Schreiber holds a registration from the U.S. Copyright Office that lists him as the sole author of "Once Upon a Pastime." (Compl. ¶ 20.) On the other hand, Pastime points to Schreiber's original employment agreement with the Bakers, which states:

> You acknowledge and agree . . . that the Book . . . was specifically commissioned by [the Bakers] and shall be considered for copyright . . . purposes a "contribution to a collective work" and a "work for hire" for [the Bakers] . . . . [The Bakers] are, therefore the owner[s] of all rights in and to the Book and all copyrights therein . . . .

(Dkt. No. 1-1 ¶ 6; *see also* Compl. ¶¶ 10–12.) Pastime argues that, in light of Schreiber's employment agreement, "Schreiber intentionally falsified the writing and ownership information in his copyright registration application." (Compl. ¶ 21.)

Pastime filed this action for a declaratory judgment to resolve the competing claims to "Once Upon a Pastime."[1] In response, Schreiber argues that Pastime has not asked for any relief that this Court has the capacity to grant. Schreiber moves to dismiss the Complaint for failure to state a claim upon which can be granted under Federal Rule of Civil Procedure 12(b)(6). (Dkt. No. 25). Where appropriate, this Court also considers Schreiber's motion as a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).

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[1] As a technical matter, the play "Once Upon a Pastime" is protected by a bundle of copyrights in various creative elements such as the script, music, and choreography. Only the linguistic elements of the play—that is, the lyrics, screenplay, and script—are at issue in this case. However, for purposes of resolving the instant motion, the Court will sacrifice precision for readability and refer to the rights in dispute as rights to "Once Upon a Pastime," "the play," or "the musical."

II. Legal Standard

"Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (first quoting Fed. R. Civ. P. 8(a)(2), then quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). "To survive a motion to dismiss [under Rule 12(b)(6)], a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). When considering a motion to dismiss under Rule 12(b)(6), courts "must accept as true all of the factual allegations contained in the complaint," *Twombly*, 550 U.S. at 572 (quoting *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508 n.1 (2002)), and must draw "all inferences in the light most favorable to the non-moving party[]," *In re NYSE Specialists Sec. Litig.*, 503 F.3d 89, 95 (2d Cir. 2007) (Sotomayor, J.).

Because federal courts are courts of limited subject matter jurisdiction, "[a] case is properly dismissed for lack of subject matter jurisdiction . . . when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). "[T]he plaintiff bears the burden to prove subject-matter jurisdiction by a preponderance of the evidence." *Morrow v. Ann Inc.*, No. 16 Civ. 3340, 2017 WL 363001, at *2 (S.D.N.Y. Jan. 24, 2017). "When considering a motion to dismiss for lack of subject matter jurisdiction . . . , a court must accept as true all material factual allegations in the complaint . . . [b]ut . . . jurisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it." *Shipping Fin. Servs. Corp. v. Drakos*, 140 F.3d 129, 131 (2d Cir. 1998).

III. Discussion

This case is about who owns the rights to "Once Upon a Pastime," but Schreiber's motion to dismiss presents a play-within-a-play (about a play). Specifically, the parties have thus far concerned themselves with litigating how to characterize their dispute. Schreiber characterizes the Complaint as asserting a claim for fraud on the U.S. Copyright Office and then argues that "there is no affirmative private right of action" for such fraud. (Dkt. No. 27 at 2.) Pastime, in response, argues that its Complaint states a claim "for a declaration of the parties' respective ownership rights in [the musical], and for cancellation of [Schreiber's] copyright registration." (Dkt. No. 30 at 6.)

Pastime's Complaint raises two distinct issues: (1) the validity of Schreiber's *registration*; and (2) rightful ownership of the *copyright*. Although "copyright" and "registration" are sometimes treated as synonyms in common parlance, it is important to distinguish these two legal concepts. A copyright "exists automatically upon the creation and fixation of an original work of authorship in a tangible medium of expression." *Chere Amie, Inc. v. Windstar Apparel, Corp.*, 191 F. Supp. 2d 343, 350 (S.D.N.Y. 2001); *see also* 17 U.S.C. § 102(a) ("Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated . . . ."). A registration, in contrast, is granted by the Copyright Office, and the Copyright Act conditions certain statutory benefits—most notably, the right to sue for infringement—on registration. *See Chere Amie*, 191 F. Supp. 2d at 350. In other words, copyrights exist by virtue of the author's creation, while copyright registrations exist by grant of the Copyright Office.

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