

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ISACK KOUSNSKY,

Plaintiff,

-against-

AMAZON.COM, INC., PYRAMID AMERICA
L.P., EBAY, INC., and ART.COM,

Defendants.
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**ORDER DISMISSING
COMPLAINT**

13 Civ. 9176 (AKH)

ALVIN K. HELLERSTEIN, U.S.D.J.:

Plaintiff, Isack Kousnsky, alleges that the defendants have collectively infringed his rights by publishing, selling, and distributing works of art created by the plaintiff. Defendants, Pyramid America, L.P. (“Pyramid”), Art.Com, Inc. (“Art.com”), and Amazon.com, Inc. (“Amazon”) have moved for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). Ebay, Inc. (“Ebay”) has moved to dismiss under Fed. R. Civ. P. 4(m) for insufficient and untimely service of process. For the reasons stated below, I grant the motions as to all defendants and dismiss the case.

Pyramid publishes and sells inexpensive poster-size reproductions of images wholesale to customers such as Amazon, Art.com, Amazon, and Ebay. On October 27, 2009, the plaintiff entered into a contract with Pyramid by which the latter agreed to mass produce and sell plaintiff’s photographs. The contract states that plaintiff “grants to PA [Pyramid], its successors and assigns, a worldwide exclusive right and license, but not an obligation, to: (a) publish, promote, sell and distribute photography provided by Isack Kousnsky in all size posters and print format . . . by any means Pyramid reasonably uses now or in the future.” See Ex. C to the Complaint. The contract does not limit Pyramid’s sale of the posters in any way nor does it limit what Pyramid’s wholesale customers may do with the posters after purchase. From November

2009 through 2012, Pyramid printed 19,385 posters depicting plaintiff's photographs and sold them to wholesale customers, including the defendants, Amazon, Art.com and Ebay who then resold them.

Plaintiff's complaint alleges that since 2009, the defendants "directly and/or tacitly, infringed the Plaintiff's copyright by offering such works of art for sale and placing them in the online market without regard to Plaintiff's copyright, and which distributions were copied completely from Plaintiff's copyrighted works, without regard to plaintiff's right to give assent, to receive royalties, or right to receive attribution . . ." *See* Complaint ¶ 32. Plaintiff also alleges that the defendants have "tacitly, coercively and otherwise been publishing, selling, and otherwise marketing works of art, and have, thereby engaged in unfair trade practices and unfair competition against the Plaintiff." *See* Complaint ¶ 33. The Complaint acknowledges the contract which permits defendants to sell the images in the manner alleged but claims that this contract was entered into "through untoward coercion," resulting in what plaintiff characterizes as an "adhesion contract." *See* Complaint ¶ 46.

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 v. Iqbal*, 556 U.S. 662, 663 (2009) (internal citation omitted). Plaintiff fails to sufficiently plead the elements of copyright infringement so his claim cannot survive a motion for judgment on the pleadings. *See, e.g., Palmer Kane LLC v. Scholastic Corp.*, 2013 WL 709276 (S.D.N.Y. Feb. 27, 2013); *Marvullo v. Gruner & Jahr*, 105 F. Supp. 2d 225 (S.D.N.Y. 2000). Here the contract expressly permits the acts undertaken by defendants which form the basis of plaintiff's copyright infringement claim. "It is axiomatic that a party cannot seek damages for [a violation] of copyright law if the use was authorized by the copyright owner."

Leutwyler v. Royal Hashemite Court of Jordan, 184 F. Supp. 2d 303, 306 (S.D.N.Y. 2001)
(internal citations omitted).

Thus, plaintiff has not “provide[d] the grounds upon which his claim rests through factual allegations sufficient to raise a right to relief above the speculative level.” *ATSI Commc’ns v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) (internal citations and quotations omitted). While plaintiff’s complaint exclusively alleges copyright infringement, his only potentially plausible cause of action is breach of contract. There is no basis in the complaint providing me with the diversity jurisdiction necessary to hear a contract dispute. The complaint is therefore dismissed with prejudice as to all defendants.

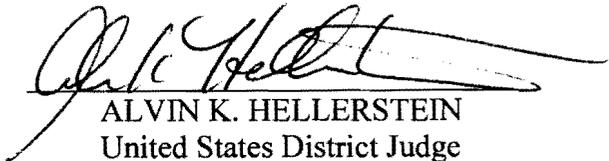
Ebay’s motion under Fed. R. Civ. P. 4(m) is also granted. Mailing by Federal Express is not proper service. The time to effect service has lapsed. However, since the entire case is dismissed on the merits, it is not necessary to rule separately on Ebay’s motion.

The Clerk shall mark the motions (Doc. Nos. 11 and 24) terminated, and the case closed.

SO ORDERED.

Dated:

May 13, 2014
New York, New York


ALVIN K. HELLERSTEIN
United States District Judge