

11-3711-cv (L)
Gordon v. McGinley

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT’S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION “SUMMARY ORDER”). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 13th day of November, two thousand twelve.

PRESENT: JOHN M. WALKER, Jr.,
GERARD E. LYNCH,
Circuit Judges,
JOHN GLEESON,
*District Judge.**

JANINE GORDON,
Plaintiff-Appellant-Cross-Appellee,

v.

11-3711 (L);
11-3766 (XAP)

RYAN MCGINLEY, LEVI STRAUSS & CO. INC.,
CHRISTOPHER PEREZ, RATIO 3 GALLERY,
TEAM GALLERY, INC., PETER HALPERT,
PETER HAY HALPERT FINE ART,
Defendants-Appellees-Cross-Appellants,

Jose Freire, Agnes Andree Margueri Trouble,
AKA Agnes B., Agnes B. Worldwide Inc.,
AKA CMC Agnes B.,
Defendants.

* The Honorable John Gleeson, of the United States District Court for the Eastern District of New York, sitting by designation.

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2 FOR PLAINTIFF-APPELLANT-CROSS-
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23 APPELLANTS PETER HALPERT & PETER
24 HALPERT FINE ART:

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27 Appeal from the order of the United States District Court for the Southern District
28 of New York (Richard J. Sullivan, *Judge*).

29 Plaintiff-Appellant-Cross Appellee Janine Gordon, proceeding *pro se*, appeals
30 from the district court's judgment dismissing her amended complaint for copyright
31 infringement and related state law claims. Defendants-Appellants-Cross-Appellees
32 ("defendants") appeal from that portion of the district court's judgment declining to
33 exercise supplemental jurisdiction over Gordon's state law claims, brought pursuant to
34 New York's General Business Law and New York common law. We assume the parties'
35 familiarity with the underlying facts, the procedural history of the case, and the issues on
36 appeal.

1 **A. Gordon's Appeal**

2 Our independent review of the record and relevant case law, including our de novo
3 review of the 150 allegedly infringing images, convinces us that the district court properly
4 granted defendants' motion to dismiss Gordon's federal copyright infringement claims,
5 for substantially the same reasons stated by the court in its August 18, 2011, opinion and
6 order. See Gordon v. McGinley, No. 11-CV-1001, 2011 WL 3648606 (S.D.N.Y. Aug.
7 18, 2011). Whether the "ordinary observer" test or the "more discerning observer" test is
8 employed, the copyright infringement analysis involves a "common sense" determination,
9 based solely on the works themselves, as to whether the allegedly infringing work is
10 substantially similar to the copyrighted work, focusing on "total concept and overall feel."
11 Peter F. Gaito Architecture, LLC v. Simone Dev. Corp., 602 F.3d 57, 66 (2d Cir. 2010).

12 This Court has long recognized that a photograph may comprise original
13 expression subject to copyright protection. See, e.g., Leibovitz v. Paramount Pictures
14 Corp., 137 F.3d 109, 116 (2d Cir. 1998) ("[A photographer] is entitled to protection for
15 such artistic elements as the particular lighting, the resulting skin tone of the subject and
16 the camera angle that she selected."); Rogers v. Koons, 960 F.2d 301, 307 (2d Cir. 1992)
17 ("Elements of originality in a photograph may include posing the subjects, lighting, angle,
18 selection of film and camera, evoking the desired expression, and almost any other variant
19 involved."); Gross v. Seligman, 212 F.2d 930, 931 (2d Cir. 1914) (noting the "exercise of
20 artistic talent" reflected in "pose, light, and shade, etc."). In light of the subtlety of these
21 considerations, we disagree with the district court's suggestion that Gordon's claim was
22 frivolous. See Gordon, 2011 WL 3648606, at *1, 7.

1 Nevertheless, we ultimately conclude that, for the reasons articulated by the
2 district court, the similarities between McGinley’s allegedly infringing images and
3 Gordon’s copyrighted images are outweighed by the works’ numerous and significant
4 differences. We therefore affirm the district court’s dismissal of Gordon’s federal
5 copyright claims.

6 **B. Defendants’ Cross-Appeal**

7 Defendants argue that the district court improperly declined to exercise
8 supplemental jurisdiction over Gordon’s state law claims, and should have instead
9 dismissed those claims with prejudice as completely preempted by the Copyright Act.
10 The “complete preemption” doctrine, where applicable, “substitutes a federal remedy for
11 [a claim under state] law, thereby creating an exclusive federal cause of action.”
12 Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc., 373 F.3d 296, 305 (2d Cir. 2004). While
13 district courts generally have discretion to decline to exercise supplemental jurisdiction
14 over state law claims pursuant to 28 U.S.C. § 1367(c), where the state law claims are
15 completely preempted by federal law such discretion is lacking. “[O]nce a district court
16 determines that a state law claim has been completely preempted . . . the court must then
17 dismiss the claim for failing to state a cause of action.” Id. at 309. We therefore vacate
18 the dismissal of Gordon’s state law claims, and remand them to the district court to
19 determine which of the claims are completely preempted by the Copyright Act, and only
20 then to decide whether to “exercise supplemental jurisdiction over any state law claim
21 surviving preemption.” Phillips v. Audio Active Ltd., 494 F.3d 378, 392 (2d Cir. 2007).

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CONCLUSION

We have considered all of the parties’ remaining arguments and find them to be without merit. We therefore **VACATE** the district court’s judgment to the extent that it dismissed Gordon’s state law claims, and **REMAND** with instructions that the district court determine which of those claims are preempted by federal law. In all other respects, the judgment of the district court is **AFFIRMED**.

FOR THE COURT:
Catherine O’Hagan Wolfe, Clerk



The image shows a handwritten signature in black ink that reads "Catherine O'Hagan Wolfe". The signature is written over a circular official seal. The seal is pink and white with the text "UNITED STATES" at the top, "SECOND CIRCUIT" in the center, and "COURT OF APPEALS" at the bottom. There are two small stars on either side of the center text.