UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CRAIG VAN DEN BRULLE, doing business as CAPITOL FURNISHINGS, Plaintiff, - vs. – NIEDERMAIER INC., JUDY NIEDERMAIER and RIO HAMILTON, Defendants.	CIVIL ACTION NO. 06 - 3027 (JSR)

MEMORANDUM OF LAW
IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

Plaintiff Craig Van Den Brulle submits this memorandum of law in opposition to the motion by defendants Niedermaier Inc., Judy Niedermaier and Rio Hamilton (collectively "defendants") to dismiss Mr. Van Den Brulle's complaint on the ground of lack of subject matter jurisdiction.

STATEMENT OF FACTS[1]

Mr. Van Den Brulle is a visual artist and sculptor who operates a gallery and retail establishment, Capitol Furnishings, in New York City. Mr. Van Den Brulle created an original work known as Lucite Obelisks and, at all relevant times, has been and is still the owner of the exclusive rights to reproduce and distribute, and to authorize the reproduction and distribution of the Lucite Obelisks.

Beginning in or around 2000, the Lucite Obelisks were sold on Mr. Van Den Brulle's behalf by high-end retail stores such as Neiman Marcus and Bergdorf Goodman, as well as directly through Capitol Furnishings. In approximately 2003, Mr. Van Den Brulle contracted with defendant

[1] The facts set forth herein are based on the Amended Complaint filed in this action, *see*, *Raila v. U.S.*, 355 F.3d 118, 119 (2d Cir. 2004) (on motion to dismiss, court should accept as true all of the factual allegations in the complaint) and the Verification of Counsel filed herewith.

Neidermaier, Inc., a gallery in lower Manhattan, to show and sell his original Lucite Obelisks at its galleries on Mr. Van Den Brulle's behalf in exchange for a commission. Defendant Judy Niedermaier is the principal of Niedermaier, Inc. and operates the company and its Chicago gallery from Chicago, where she lives. Defendant Rio Hamilton is the manager of Niedermaier, Inc.'s New York gallery.

At no time did Mr. Van Den Brulle authorize any defendant to copy and/or duplicate any of his original works or to offer for sale or sell any copies of his original works.

From 2003 through late 2005, Neidermaier, Inc. sold a number of Lucite Obelisks and paid commissions to Mr. Van Den Brulle. In late 2005, however, Mr. Van Den Brulle learned that Neidermaier, Inc. galleries were selling more Lucite Obelisks than they were purchasing from Mr. Van Den Brulle. To his shock, Mr. Van Den Brulle discovered that the Neidermaier, Inc. galleries were selling "knock off" or counterfeit copies of the Lucite Obelisks, and were even promoting and holding out to the public the counterfeit Lucite Obelisks as the original work of Mr. Van Den Brulle.

On September 27, 2005, an attorney representing Mr. Van Den Brulle sent a letter to defendants demanding that they cease reproducing and selling reproductions of Mr. Van

Den Brulle's original works. On October 25, 2005, defendant Judy Niedermaier responded to Mr. Van Den Brulle's lawyer, stating "We at Niedermaier would like to have a cordial relationship with Capital. We will sell out the obelisks that we have and put through another design in the near future." The "obelisks" Ms. Niedermaier was referring to were the unauthorized reproductions of Mr. Van Den Brulle's work. The letter was an implicit admission that the Lucite Obelisks had indeed been copied at the direction of one or more defendant.

Despite Ms. Niedermaier's October 25, letter, however, Niedermaier, Inc. continued to cause reproductions or derivative works to be made of Mr. Van Den Brulle's design and to sell those reproductions. This lawsuit followed.

After this motion was brought, Mr. Van Den Brulle filed an Amended Complaint (no answer having been filed) which specifically alleged the refusal of the Copyright Office to issue a registration, in order to meet all opinions of the sufficiency of the pleading. Defendants were asked by letter on August 25, 2006 to withdraw this motion considering its apparent mootness but as of the time of this filing, defendants have not responded to plaintiff's request.

LEGAL ARGUMENT

I. THIS COURT HAS SUBJECT MATTER JURISDICTION OVER THIS CASE AND DEFENDANTS' MOTION TO DISMISS SHOULD BE DENIED

Mr. Van Den Brulle's Complaint, and the Amended Complaint, allege that he filed an application to register the Lucite Obelisks design with the Copyright Office in full compliance with the Copyright Act. On a motion to dismiss based on lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1), the court should accept as true all of the factual allegations in the complaint and must draw all reasonable inferences in favor of the non-moving party. *Raila v. U.S.*, 355 F.3d 118, 119 (2d Cir. 2004); *Lunney v. U.S.*, 319 F.3d 550, 554 (2d Cir. 2003).

There is no dispute that subject-matter jurisdiction for a claim of copyright infringement is not conferred upon a federal court until the United State Copyright Office ("Copyright Office") has either approved or denied a pending application for copyright registration. *See* 17 U.S.C. §411(a); *Corbis Corp. v. UGO Networks, Inc.*, 322 F. Supp. 2d 520, 521 (S.D.N.Y. 2004); *Greene v. Columbia Records/Sony Music Entertainment, Inc.*, 2004 WL 3211771 at *3 (S.D.N.Y. 2004). Federal courts are, however, split as to exactly when that subject matter jurisdiction attaches.

Thus, courts in this District have held that jurisdiction does not arise until the pending application has been actually approved or denied, which of course is the case here. *See*, e.g., *Tabachnik v. Dorsey*, 2005 WL 1668542 at *3 (S.D.N.Y. 2005); *City Merchandise, Inc. v. Kings Overseas Corp.*, 2001 WL 286724 at *2 (S.D.N.Y. 2001); *U-Neek, Inc. v. Wal-Mart Stores, Inc.*, 147 F. Supp. 2d 158, 169 (S.D.N.Y. 2001). Other courts have held, however, that jurisdiction is conferred at the time when the Copyright Office receives the application and fee, even if a decision has not yet been rendered. *See Lakedreams v. Taylor*, 932 F.2d 1103, 1108 (5th Cir. 1991); *Well-Made Toy Mfg. Corp. v. Goffa Int'l Corp.*, 210 F. Supp. 2d 147, 157 (E.D.N.Y. 2002); *Havens v. Time Warner, Inc.*, 896 F. Supp. 141, 143 (S.D.N.Y. 1995); *Sebastian Int'l v. Consumer Contact (PTY) Ltd.*, 664 F. Supp. 909, 912 (D.N.J. 1987).

Still, all agree that where, as here, a decision has actually been communicated to the applicant, and certainly where the plaintiff's pleadings alleges the fact, jurisdiction adheres. Thus this Court need not revisit this issue, because under either test Mr. Van Den Brulle satisfies this jurisdictional requirement: his application with the Copyright Office on was filed on February 21, 2006, it was refused on March 7, 2006 and this action was

not commenced until April 14, 2006. *See* Declaration of Ronald D. Coleman. The original Complaint does not explicitly allege that the Copyright Office refused Mr. Van Den Brulle's application on March 7, 2006, though counsel for Mr. Van Den Brulle orally communicated that fact to defendants on several occasions prior to the filing of this motion. But the Amended Complaint, filed on August 28, 2006, does in fact allege the refusal of the Copyright Office, thereby mooting defendants' motion.

II. IF THE COURT FINDS THAT THERE IS NO SUBJECT MATTER JURISDICTION AS CURRENTLY PLED, THE PROPER REMEDY IS FOR THE COURT TO GRANT MR. VAN DEN BRULLE LEAVE TO REPLEAD

As demonstrated above, it is black-letter law that this Court has subject matter jurisdiction over this infringement action. If, however, the Court were to rule that Mr. Van Den Brulle's failure explicitly to allege that his application was denied by the Copyright Office on March 7, 2006 in the original Complaint was determinative, and that for some reason the filing of the Amended Complaint on August 28, 2006 did not properly remedy this pleading deficiency, it is well established that the proper remedy is not a dismissal but rather to grant plaintiff leave to replead and include that allegation.

Federal Rule of Civil Procedure 15(a) states that leave to be replead should "be freely given when justice so requires." Fed. R. Civ. P. 15(a); *Manning v. Utilities Mut. Insur. Co.*, 254 F.3d 387, 402 (2d Cir. 2001) (on motion to dismiss, the interests of justice of Rule 15(a) strongly favor allowing a plaintiff to replead). As the Circuit has taught:

> Rule 15(a) of the Federal Rules of Civil Procedure provides that the court should grant leave to amend "freely ··· when justice so requires," and the principle that permission to amend to state a claim should be freely granted is likewise applicable to dismissals for failure to plead an adequate basis for federal jurisdiction. In dismissing a complaint for failure to show jurisdiction, the court should heed the admonition of Rule 15 and allow amendment 'freely' if it appears at all possible that the plaintiff can correct the defect. Thus, in vacating a dismissal with prejudice for, *inter alia,* failure to state a claim and lack of subject matter jurisdiction, we have noted that when a motion to dismiss is granted, the usual practice is to grant leave to amend the complaint. ··· Although the decision whether to grant leave to amend is within the discretion of the district court, refusal to grant leave must be based on a valid ground. Where the possibility exists that the defect can be cured and there is no prejudice to the defendant, leave to amend at least once should normally be granted as a matter of course.

Oliver Schools, Inc. v. Foley, 930 F.2d 248, 252-253 (2nd Cir. 1991) (citations and internal quotations omitted).

Here no answer has been filed, but because plaintiff has amended its complaint once, leave of court would be required to file any further amendment. Fed. R. Civ. P.

15(a). Certainly defendants, who had initially defaulted by failing to file a timely response to the complaint and were granted, *nun pro tunc*, additional time to respond merely by making an appearance at a court-ordered motion for default judgment, cannot be heard to complain of prejudice if Mr. Van Den Brulle were permitted to amend the complaint to add whatever technical allegation the Court deems necessary to perfect the pleadings. Under the law cited in Section (I) above, however, and in light of the amendment already filed, it is respectfully submitted that there is no substantive basis under the law on which defendants' motion can be granted.

CONCLUSION

Based on the foregoing, Mr. Van Den Brulle respectfully requests that defendants' motion be denied in its entirety and if the defendants' motion is granted, Mr. Van Den Brulle respectfully requests leave to replead.

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Dated: August 30, 2006