

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION**

MARLON BLACKWELL ARCHITECTS,)
P.A.,)
)
Plaintiffs,)
)
v.)
)
HBG DESIGN, INC.; SARACEN)
DEVELOPMENT, LLC; and)
JOHN L. BERREY, in his official capacity as)
Chairman of the Quapaw Tribal Business)
Committee,)
)
Defendants.)

No. 4:19-cv-00925-KGB

**BRIEF OF DEFENDANT, SARACEN DEVELOPMENT, LLC, IN
SUPPORT OF MOTION TO DISMISS**

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**BRIEF OF, DEFENDANT SARACEN DEVELOPMENT, LLC, IN
SUPPORT OF MOTION TO DISMISS**

Defendant, Saracen Development, LLC (“Saracen”), hereby files this brief in support of its motion to dismiss the claims asserted against it in this action (ECF No. 12) pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

**INCORPORATION OF ARGUMENTS IN MOTION OF DEFENDANT
HBG DESIGN, INC., BY REFERENCE**

In addition to the arguments contained herein, Saracen joins in the Motion to Dismiss of HBG Design, Inc. (ECF No. 8), and the Brief in Support of the Motion to Dismiss of HBG Design, Inc. (“HBG”) (ECF No. 9) with respect to the claims for copyright infringement and unjust enrichment and the request for statutory damages. As they are applicable to Saracen, the arguments and authorities contained therein are adopted in full and incorporated by reference herein pursuant to Fed. R. Civ. P. 10(c). Each of these arguments applies to Saracen because the Plaintiff, Marlon Blackwell Architects, P.A. (“MBA”), has failed to state a claim with respect to each cause of action due to deficient allegations that fail to link any conduct of either of the respective defendants to any liability under the causes of action alleged.

INTRODUCTION

MBA’s Complaint begins with a prologue reciting Marlon Blackwell’s awards and accomplishments, and then moves into a narrative of Blackwell’s interactions with Saracen concerning its preliminary conceptual design work. However, the narrative ends on March 26, 2019, when difficulties that had been ongoing throughout the preliminary design phase culminated, and MBA withdrew from the project. There are no allegations relating to Saracen after March 26, 2019, and in particular there are no allegations or any acts or omissions of Saracen that could plausibly form the basis for a copyright infringement claim. Instead the complaint moves directly

into its causes of action, which are nothing more than a formulaic recitation of the legal elements of claims, and which have no logical relationship to any of the preceding allegations.

MBA asserts claims for copyright infringement and injunctive relief arising out of the alleged copyright infringement, but, among other deficiencies, does not sufficiently describe the copyrights it alleges have been infringed, or how and when Saracen supposedly infringed any such copyrights. In the absence of any such allegations, such claims are facially deficient as a matter of law. In addition, the unjust enrichment is preempted by federal law. Accordingly, the claims against Saracen should be dismissed in their entirety for failure to state a claim upon which relief can be granted.

BACKGROUND

The Saracen Casino Resort (the “Resort”) involves the development of a destination resort in Pine Bluff, Arkansas, by Saracen Development, LLC—the first such new resort to be developed in the state under a 2018 constitutional amendment legalizing casino gaming. Saracen is a wholly owned subsidiary of the Downstream Development Authority (“Downstream”), which began early planning for the resort in 2018. Ultimately, development of the Resort assumed by Saracen, which was awarded a casino gaming license for the Resort by the Arkansas Racing Commission in 2019.

Initially, Blackwell and MBA were approached by the project team to serve not as the main architect of record, but as an owner’s consultant to oversee design work. However, after HBG was chosen as the project architect, Blackwell advised Downstream’s project managers that he and MBA preferred to serve as a consultant to be hired by and responsible to HBG. Through the early months of 2019, Blackwell and MBA worked with HBG. By late February and March, however, the project team became increasingly concerned that Blackwell’s proposals were constantly exceeding the budget, and also by Blackwell’s resistance to meeting budget requirements. This

led in April 2019 to Blackwell's withdrawal from the project.

Saracen has operated an annex casino since September in conjunction with a travel plaza at the resort site, and construction has proceeded on the main resort, with an opening date targeted for mid-2020.

STANDARDS OF REVIEW

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint must satisfy the pleading requirement of Rule 8(a)(2), which requires “a short and plain statement of the claim that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2); *see also Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009). However, the complaint “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’ ” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974 (2007)).

The Supreme Court has explained that “[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.” *Iqbal*, 556 U.S. at 678, 127 S.Ct. at 1949. Thus, “[a] pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of ‘further factual enhancement.’” *Id.* (internal quotation marks omitted) (citations omitted). Rather, “[t]he complaint must allege facts, which, when taken as true, raise more than a speculative right to relief.” *Benton v. Merrill Lynch & Co., Inc.*, 524 F.3d 866, 870 (8th Cir. 2008) (citing *Twombly*, 550 U.S. at 555, 127 S.Ct. at 1965). Accordingly, “[w]here the allegations show on the face of the complaint there is some insuperable bar to relief, dismissal under Rule 12(b)(6) is appropriate.” *Id.* (citing *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 546 (8th Cir. 1997)).

SUMMARY OF THE ARGUMENT

MBA's claims against Saracen for copyright infringement and for injunctive relief arising out of the alleged copyright infringement should be dismissed for failure to state a claim upon which relief can be granted because MBA has not pled sufficient facts which, if taken as true, give rise to the plausible inference that Saracen is liable for copyright infringement. In particular, MBA has failed to sufficiently allege the particular copyrights alleged to have been infringed, which exclusive rights under the Copyright Act allegedly have been violated, or any factual details concerning how Saracen allegedly is liable for infringement.

MBA's only remaining claim against Saracen is for unjust enrichment, but this claim also should be dismissed for failure to state a claim upon which relief can be granted because this claim is preempted by federal copyright law. Accordingly, the Complaint should be dismissed in its entirety with respect to Saracen.

ARGUMENT & AUTHORITIES

I. MBA'S CLAIMS FOR COPYRIGHT INFRINGEMENT FAIL TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

To establish a claim for copyright infringement, MBA is required to establish two elements: (1) ownership and validity of the copyright; and (2) violation of the copyright owner's exclusive rights afforded copyright owners pursuant to the Copyright Act. *Pinkham v. Sara Lee Corp.*, 983 F.2d 824, 830 (8th Cir. 1992) (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 432-34 (1984); *Animal Fair, Inc. v. AMFESCO Ind.*, 620 F. Supp. 175, 185 (D. Minn. 1985), *aff'd* 794 F.2d 678 (8th Cir. 1986)). In applying the pleading requirements of Fed. R. Civ. P. 8 to copyright infringement actions, "courts have required that particular infringing acts be alleged with some specificity." *Hartman v. Hallmark Cards, Inc.*, 639 F. Supp. 816, 820 (W.D.

Mo. 1986) (citing *Gee v. CBS, Inc.*, 471 F. Supp. 600, 644 (E.D. Pa. 1979) *aff'd*, 612 F.2d 572 (3d Cir. 1979); *see also Wildlife Internationale, Inc. v. Clements*, 591 F. Supp. 1542 (S.D. Ohio 1984)); 3 M. Nimmer, Copyright § 12.09(a) (1984). In accordance with this heightened pleading standard, courts have required that “a properly plead copyright infringement claim must allege 1) which specific original works are the subject of the copyright claim, 2) that plaintiff owns the copyrights in those works, 3) that the copyrights have been registered in accordance with the statute, and 4) by what acts during what time the defendant infringed the copyright.” *Kelly v. L.L. Cool J.*, 145 F.R.D. 32, 36 (S.D.N.Y. 1992), *aff'd* 23 F.3d 398 (2d Cir. 1994).¹

In this case, the Complaint fails to state a claim for copyright infringement against Saracen because MBA has not sufficiently alleged the particular copyrights alleged to have been infringed, which exclusive rights under the Copyright Act allegedly have been violated, or any factual details concerning how Saracen allegedly is liable for copyright infringement.

First, the allegations do not fully specify which registrations constitute the basis of a claim for copyright infringement and/or injunctive relief arising from the alleged copyright infringement. Courts have not hesitated to reject claims where a plaintiff fails to specify an exhaustive list of the works that form the basis of a copyright claim. *See, e.g., Plunket v. Doyle*, No. 99 Civ. 11006(KMW), 2001 WL 175252, *4 (S.D.N.Y. Feb. 22, 2001) (finding where plaintiff submitted a multi-page schedule of works and provided copyright registration numbers for nine of those works, but contended that the copyright claim was not limited to those works, a claim for relief

¹ *See also Signatours Corp. v. Hartford*, No. C14-1581 RSM, 2015 WL 12030058, *6 (W.D. Wash. June 10, 2015) (adopting the *Kelly* pleading standards); *Nourison Indus., Inc. v. Virtual Studios, Inc.*, No. 09-5746 (POS), 2010 WL 2483422, *3 (D.N.J. June 3, 2010) (same); *Proline Concrete Tools, Inc. v. Dennis*, No. 07cv2310-LAB (AJB), 2008 WL 11286077, *2 (S.D. Cal. Aug. 18, 2008) (same).

was not sufficiently stated). While MBA names two (2) registrations that supposedly form the basis of the copyright infringement claim, MBA has failed to describe those registrations with anything other than a registration number, and MBA did not attach any of those registration documents to the Complaint. (Complaint, ¶ 92 (ECF No. 1).) Similarly, MBA alleges that it “has applied for but has not yet received the Certificate of Registration for numerous other copyrighted works connected to the Saracen Project,” but MBA has not described or specified the nature of these registration applications. (Complaint, ¶ 92.) The result is that Saracen has no way to discern the actual basis of MBA’s copyright claims because it is unclear which copyrights MBA claims have been infringed.

Apparent from the allegations is only that the claim has something to do with the design of the Saracen Casino Resort and/or MBA’s preliminary concept renderings. But not every element of an architectural work is protectable. *See* 17 U.S.C. § 101 (“An ‘architectural work’ . . . does not include individual standard features.”); *see also Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 348 (1991) (“The mere fact that a work is copyrighted does not mean that every element of the work may be protected.”); *Nucor Corp. v. Tenn. Forging Steel Serv., Inc.*, 476 F.2d 386, 390 (8th Cir. 1973) (“While the concept of a T-shaped building is not entitled to copyright protection, detailed plans and drawings of a specific building are.”). Without a more detailed description of the basis of its claims, MBA has failed to allege ownership and validity of the copyrights, as is required for a claim of copyright infringement.

Moreover, the Complaint fails to specify which section(s) of the Copyright Act on which the claim for copyright infringement is based, and it is therefore impossible to determine the precise nature of the claim simply by reading the allegations in the Complaint. The cause of action for copyright infringement, which was brought against all named Defendants, vaguely states that

“Defendants [including Saracen], by virtue of their continued reproduction, distribution, displaying, and performance of MBA’s protected architectural and design works, including those described by the Registrations, and by their making derivative works from the same, are infringing the exclusive rights of MBA to these architectural and design works.” (Complaint, ¶ 93.) There is no citation to any particular section of the Copyright Act in this or any other of the causes of action alleged, and it would be pure guesswork to deduce the precise statutory basis of the claim because there are no allegations of *how* or *when* Saracen allegedly reproduced, distributed, displayed, or made derivative works from, the architectural and design works at issue. Instead, Saracen has been named in this cause of action with only a generic recitation of possible elements that could comprise the cause of action, which the court is not required to accept as true.

Finally, MBA has failed to allege how Saracen actually violated any of MBA’s allegedly exclusive rights under the Copyright Act. “A copyright claim that lacks any description of acts that could lead to the conclusion of direct copyright or trademark infringement, or allegations of authorization or participation that would indicate vicarious liability or contributory infringement must be dismissed.” *Elliott v. Gouverneur Tribune Press*, No. 7:13-cv-00055 (MAD/TWD), 2013 WL 6240489, *3 (N.D.N.Y. Dec. 3, 2013) (quoting *Carell v. Shubert Org., Inc.*, 104 F. Supp.2d 236, 271 (S.D.N.Y. 2000) (internal quotation marks omitted). While the largest portion of the Complaint is addressed to describing the initial negotiations between Downstream, MBA, and HBG—as well as a profuse—and irrelevant—list of Blackwell’s individual awards and accolades—the allegations in the Complaint that refer to Saracen stop on March 26, 2019, on which date Defendant Berrey allegedly informed Blackwell that he could not see Blackwell “returning in the current capacity.” (Complaint, ¶ 67.)

However, the long recitation of the background facts in the Complaint does not extend to

facts that explain how or when the alleged infringement by Saracen occurred. Presumably, any alleged copyright infringement would have to had taken place after March 26, 2019, after which time MBA was no longer working on the project, but there are no allegations in the Complaint concerning any specific acts or omissions of Saracen or any of its principals or agents whatsoever. Instead, the timeline stops, and the Complaint is conspicuously silent as to any events between the time MBA ceased work on the project and filed the instant lawsuit. In fact, the Complaint does not specify when the alleged infringement took place at all. The result is that MBA has not alleged *any* facts with respect to Saracen that could possibly form the basis for a copyright infringement claim.

In sum, MBA has failed to state a claim for which relief can be granted with respect to its claims for copyright infringement and injunctive relief against Saracen. Accordingly, these claims should be dismissed.²

² If the Court denies the Motion to Dismiss, Saracen moves in the alternative for a more definite statement pursuant to Fed. R. Civ. P. 12(e). This Court has held that it “has the authority to treat a motion framed as a motion to dismiss as a motion for a more definite statement, where appropriate.” *Bull v. Freedom Mortg. Corp.*, 2016 WL 10591165, *1, n.1 (E.D. Ark. June 22, 2016) (Baker, J.) (citing *Baptista v. Hartford Bd. of Educ.*, 427 Fed. Appx. 39, 43 (2d Cir. 2011); *Pfizer v. Smith & Wesson Corp.*, No. 4:13-CV-676-JAR, 2014 WL 636381, at *1 (E.D. Mo. Feb. 18, 2014)).

II. MBA'S UNJUST ENRICHMENT CLAIM IS PREEMPTED BY FEDERAL LAW

MBA has also asserted a claim for unjust enrichment, which should be dismissed as well as preempted by federal copyright law. As the Eighth Circuit has explained, “the Copyright Act provides the exclusive source of protection for ‘all legal and equitable rights that are equivalent to any of the exclusive rights within the general scope of the copyright as specified in [the Act].’” *Nat’l Car Rental Sys., Inc. v. Computer Assocs., Int’l, Inc.*, 991 F.2d 426, 428 (8th Cir. 1993) (quoting 17 U.S.C. § 301(a)). Thus, when confronted by a state law unjust enrichment claim in the copyright context, courts consistently have held that such unjust enrichment claims are preempted by the federal Copyright Act.³

In particular, a claim arising under state law is preempted by the Copyright Act if: “(1) the work at issue is within the subject matter of copyright as defined in § 102 and 103 of the Copyright Act, and (2) the state law created right is equivalent to any of the exclusive rights within the general scope of copyright as specified in § 106 of the Copyright Act.” *Ray v. ESPN, Inc.*, 783 F.3d 1140, 1142 (8th Cir. 2015) (quoting *Nat’l Car Rental Sys., Inc.*, 991 F.2d at 428). In other words, where an unjust enrichment claim is based upon the violation of rights protected by the Copyright Act,

³ See, e.g., *R.W. Beck, Inc. v. E3 Consulting, LLC*, 577 F.3d 1133, 1148 (10th Cir. 2009); *Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 306 (2d Cir. 2004); *Murray Hill Publ’ns, Inc. v. ABC Commc’ns, Inc.*, 264 F.3d 622, 637-38 (6th Cir. 2001), *abrogated on other grounds by Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010); *Pan-Am. Prods. & Holdings, LLC v. R.T.G. Furniture Corp.*, 825 F. Supp.2d 664, 695-96 (M.D.N.C. 2011); *Two Palms Software, Inc. v. Worldwide Freight Mgmt., LLC*, 780 F. Supp.2d 916, 923 (E.D. Mo. 2011); *Blue Nile, Inc. v. Ice.com, Inc.*, 478 F. Supp.2d 1240, 1251 (W.D. Wash. 2007); *Recursion Software, Inc. v. Interactive Intelligence, Inc.*, 425 F. Supp.2d 756, 769 (N.D. Tex. 2006); *Ott v. Target Corp.*, 153 F. Supp.2d 1055, 1067 (D. Minn. 2001).

such a claim “sounds squarely in copyright infringement” and is therefore preempted.⁴ *Ott*, 153 F. Supp.2d at 1067 (concluding that an unjust enrichment claim based on the allegation that “[b]y failing to compensate Plaintiffs for the use of their dolls and designs, Defendants have been unjustly enriched at the expense of Plaintiffs” was preempted because this claim was based on defendants’ distribution and copying of plaintiffs’ dolls). Furthermore, although actual enrichment is part of an unjust enrichment claim and such enrichment “is not required for copyright infringement,” this slight difference between the claims does not go “far enough to make the unjust enrichment claim qualitatively different from a copyright infringement claim.”⁵ *Briarpatch*, 373 F.3d at 306.

Here, even though the specific allegations against Saracen are vague and fail to state a claim upon which relief can be granted with respect to the copyright claims, the tenor of the entire Complaint is one of copyright infringement. MBA has not sued Saracen on any alleged contract, and in fact there never was a written contract between Saracen and Blackwell. Rather, MBA has sued on an amorphous theory that Saracen is somehow implicated in violations of its alleged copyrights. But whatever the specific theory of relief sought by MBA, it is clear that the gravamen of the Complaint is copyright violation arising from something related to MBA’s preliminary

⁴ See also *Pan-Am. Prods.*, 825 F. Supp.2d at 695 (concluding that an unjust enrichment claim was preempted where “[t]he central allegation is that Defendants used the copyrighted designs, through advertising, distribution and sales, and were enriched thereby The gravamen of this allegation . . . is that Defendants were unjustly enriched as a result of the wrongful exercise of Pan-American’s § 106 rights.”).

⁵ See also *Zito v. Steeplechase Films, Inc.*, 267 F. Supp.2d 1022, 1027 (N.D. Cal. 2003) (“While a claim for unjust enrichment may require proof that a benefit was conferred on the defendant, where the unjust enrichment arises from defendants’ unauthorized use of a copyrighted work, such an extra element does not qualitatively change the rights at issue, the rights the plaintiff holds in the copyrighted work, and does not avoid preemption.”).

renderings for the Saracen Casino Resort. As such, the claim for unjust enrichment is preempted by the federal Copyright Act, which is the exclusive source of protection for claims arising in or related to alleged copyright violations. Accordingly, the claim for unjust enrichment should be dismissed.

CONCLUSION

MBA's claims for copyright infringement and for injunctive relief arising out of the alleged copyright infringement fail as a matter of law because MBA has not pled with sufficient detail facts that give rise to the plausible inference that Saracen is liable for those claims. In addition, MBA's claim for unjust enrichment should be dismissed because this claim is preempted by federal copyright law. For the foregoing reasons, the claims against Saracen Development, LLC, asserted in the Complaint should be dismissed in their entirety for failure to state a claim upon which relief can be granted.

Respectfully submitted,

s/ Ronald A. Hope

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CERTIFICATE OF SERVICE

I hereby certify that on this the 6th day of February, 2020, I electronically transmitted a full, true, and correct copy of the above and foregoing instrument, the “BRIEF OF DEFENDANT, SARACEN DEVELOPMENT, LLC, IN SUPORT OF MOTION TO DISMISS,” to the Clerk of Court using the Electronic Case Filing System (the “ECF System”) for filing and transmittal of a Notice of Electronic Filing to the filing following ECF registrants (names only):

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