UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STEVEN J. CHIROGIANIS, A.I.A.,

Plaintiff,

- against -

MAX PARANGI, MAX PARANGI ARCHITECTS, P.C., SPIROS MOSHOPOULOS, and EPSILON MANAGEMENT LLC,

Defendants.

11 Civ. 953 (LMS)

DECISION AND ORDER

Lisa Margaret Smith, U.S.M.J.[1]

Plaintiff Steven J. Chirogianis, A.I.A. commenced this action against Max Parangi and Max Parangi Architects, P.C. (collectively, the "Parangi Defendants"), Spiros Moshopoulos ("Moshopoulos"), and Epsilon Management LLC ("Epsilon"), asserting federal claims for copyright infringement against all Defendants, state law claims for breach of contract and account stated against Moshopoulos, a state law claim for quantum meruit against Moshopoulos and Epsilon, and a state law claim for foreclosure of a mechanic's lien against Moshopoulos. Complaint, Docket # 1. Plaintiff settled with the Parangi Defendants. Docket # 91. Currently before the Court is Plaintiff's combined motion for partial summary judgment on his claims of copyright infringement against Moshopoulos and Epsilon and to disqualify counsel for Moshopoulos and Epsilon. Docket # 96.

For the reasons that follow, the motion for partial summary judgment is **denied**, and the motion to disqualify is **granted**.

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[1]The parties have consented to my exercise of jurisdiction over this matter pursuant to 28 U.S.C. § 636(c). Docket # 48.

BACKGROUND

The following facts are undisputed unless otherwise noted.[2]

Plaintiff is an architect licensed in New York. In October, 2004, Plaintiff and Moshopoulos entered into an agreement concerning real property located at 737 White Plains Road, Eastchester, New York ("737 White Plains Road"), pursuant to which Plaintiff would provide architectural services consisting of preparing architectural drawings for an office building project and obtaining the necessary approvals and variances from the appropriate municipal entities (the "Project"). Plaintiff continued to provide architectural services to Moshopoulos through November 19, 2008.

The original office building idea was eventually abandoned, and Moshopoulos decided to develop a retail building at 737 White Plains Road instead. Sometime in 2006, it was decided that an application would be submitted for the retail building project. Plaintiff made a sketch for the retail building on April 17, 2006, which was refined over time into a series of elevation

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[2]The Court's recitation of the facts is based upon Plaintiff's Statement of Facts Pursuant to Local Civil Rule 56.1 (Docket # 101) and Defendants' Local Rule 56.1 Counter-Statement of Facts (Docket # 111). The Court notes, however, that Plaintiff's Statement of Facts is deficient insofar as it cites to the pleadings and not admissible evidence in the record. See Pl.'s Statement of Facts ¶¶ 1-4; see, e.g., Cont'l Ins. Co. v. Atl. Cas. Ins. Co., No. 07 Civ. 3635, 2009 WL 1564144, at *1 n.1 (S.D.N.Y. June 4, 2009) ("On a motion for summary judgment, . . . allegations in an unverified complaint cannot be considered as evidence.") (citation omitted). At the same time, Defendants' Counter-Statement of Facts fails to provide any citations to admissible evidence in the record as required by Local Civil Rule 56.1(d): "Each statement by the movant or opponent pursuant to Rule 56.1(a) and (b), including each statement controverting any statement of material fact, must be followed by citation to evidence which would be admissible, set forth as required by Fed. R. Civ. P. 56(c)." Nonetheless, "[a] district court has broad discretion to determine whether to overlook a party's failure to comply with local court rules." Holtz v. Rockefeller & Co., Inc., 258 F.3d 62, 73 (2d Cir. 2001) (citations omitted). And "while a court is not required to consider what the parties fail to point out in their Local Rule 56.1 statements, it may in its discretion opt to conduct an assiduous review of the record . . ." Id. (internal quotation marks and citations omitted).

sketches, and those sketches were, in turn, incorporated into formal architectural plans (the "Chirogianis Plans"). However, the parties dispute whether Plaintiff made his sketches and plans before or after reviewing plans from Wachovia Bank, a possible tenant for the building, that Defendants claim had been provided to Plaintiff (the "Wachovia Plans").

On June 25, 2008, the Chirogianis Plans were approved by the Town of Eastchester Planning Board, which incorporated approval from the Town of Eastchester Architectural Review Board. Thereafter, Plaintiff sent Moshopoulos an invoice for his services dated October 10, 2008, in the amount of $29,757. According to Plaintiff, Moshopoulos refused to pay the invoice in full. According to Defendants, when Plaintiff was first retained to provide architectural services, the parties never agreed upon the amount of money that Plaintiff would be paid or the basis upon which Plaintiff would be paid, i.e., hourly, fixed fee, etc. Defendants claim that following their receipt of the October 10, 2008, invoice, the parties arrived at an oral agreement, pursuant to which Defendants would pay $20,000 in two installments – one $10,000 installment, which Defendants paid immediately, and a second $10,000 installment upon transferring Plaintiff's plans to a new architect. However, according to Defendants, Plaintiff refused to honor the oral agreement and instead sued them after being paid the initial $10,000.

Max Parangi was subsequently retained by Defendants as the architect for the Project. Parangi was provided a copy of the Chirogianis Plans by Moshopoulos and/or his attorney and son-in-law, Constantine (Gus) Dimopoulos. The contract between Defendants and Parangi states in Section 1(A) that "Owner shall also provide Architect with all previously prepared plans for this site . . ." Parangi tried to revise Plaintiff's design, but the new design was rejected by Moshopoulos and Dimopoulos and could not be used pursuant to the Town of Eastchester approvals that had already been issued based on Plaintiff's original design. Ultimately, the

building was built in accordance with plans prepared by Parangi. Plaintiff contends that Parangi's plans included a copy of the Chirogianis Plans, but Defendants contend that the final plans upon which the building was built did not include the Chirogianis Plans. The Project generated a profit of $503,660 which was distributed by Epsilon to Moshopoulos in 2010.

The Register of Copyrights, United States of America has issued two Certificates of Registration for the Chirogianis Plans, both of which have an effective date of August 23, 2010: Registration Number VA 1-736-126 for the architectural work, and Registration Number VA 1-736-130 for the technical drawing. Plaintiff owns the copyrights for the Chirogianis Plans. Plaintiff claims that Defendants did not have his authority to (i) use the Chirogianis Plans without compensating him; (ii) give the Chirogianis Plans to Parangi and tell him to incorporate them into Parangi's own plans; or (iii) build a building using the exterior design contained in the Chirogianis Plans. Defendants contend that the exterior design of the retail building was not Plaintiff's original design.

DISCUSSION

I. Plaintiff's Motion for Partial Summary Judgment

A. Standard for Summary Judgment

Under Rule 56, summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Celotex Corp. v. Catrett, 477 U.S. 317, 320-23 (1986).

> Upon any motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, there shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried. Failure to submit such a statement may constitute grounds for denial of the motion.

Local Civ. R. 56.1(a). A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A trial judge may, therefore, grant summary judgment only if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law. See Anderson, 477 U.S. at 250. The inquiry performed is the threshold inquiry of determining whether there are any genuine factual issues that properly can be resolved only by a finder of fact. Id.

Under Local Rule 56.1(b), the papers opposing a motion for summary judgment shall include a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party, and if necessary, additional paragraphs containing a separate, short, and concise statement of additional material facts as to which it is contended that there exists a genuine issue to be tried. Local Civ. R. 56.1(b). Summary judgment may be granted only "[i]f after discovery, the nonmoving party 'has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof.' " Berger v. United States, 87 F.3d 60, 65 (2d Cir. 1996) (quoting Celotex, 477 U.S. at 323) (alteration in original). If the party opposing summary judgment does not respond to the motion, the court may "grant summary judgment if the motion and supporting materials--including the facts considered undisputed--show that the movant is entitled to it." Fed. R. Civ. P. 56(e)(3). However, even where the nonmoving party fails to respond to a motion for summary judgment, the court

> may not grant the motion without first examining the moving party's submission to determine if it has met its burden of demonstrating that no material issue of fact remains for trial. If the evidence submitted in support of the summary judgment motion does not meet the movant's

> burden of production, then summary judgment must be denied *even if no opposing evidentiary matter is presented.*

D.H. Blair & Co. v. Gottdiener, 462 F.3d 95, 110 (2d Cir. 2006) (quoting Vt. Teddy Bear Co. v. 1-800 Beargram Co., 373 F.3d 241, 244 (2d Cir. 2004)) (emphasis in original).

Moreover, a court should "constru[e] the evidence in the light most favorable to the nonmoving party and draw[] all reasonable inferences in its favor." Mount Vernon Fire Ins. Co. v. Belize NY, Inc., 277 F.3d 232, 236 (2d Cir. 2002); Farias v. Instructional Sys., Inc., 259 F.3d 91, 97 (2d Cir. 2001); Quinn v. Green Tree Credit Corp., 159 F.3d 759, 764 (2d Cir. 1998); see also Anderson, 477 U.S. at 261 n.2. Thus, "[o]nly when no reasonable trier of fact could find in favor of the nonmoving party should summary judgment be granted." Cruden v. Bank of New York, 957 F.2d 961, 975 (2d Cir. 1992) (quoting H.L. Hayden Co. v. Siemans Med. Sys. Inc., 879 F.2d 1005, 1011 (2d Cir. 1989)).

B. Standard for Copyright Infringement

Plaintiff claims entitlement to partial summary judgment on his claims of copyright infringement. "Under the Copyright Act, a party seeking to establish infringement must prove: (1) ownership of a valid copyright; and (2) copying of constituent elements of the work that are original." Axelrod & Cherveny Architects, P.C. v. Winmar Homes, 2:05-cv-711, 2007 U.S. Dist. LEXIS 15788, at *22 (E.D.N.Y. Mar. 6, 2007) (internal quotation marks and citation omitted). "To prove copying of constituent elements of the work that are original, the copyright owner must show that: (1) defendant actually copied the work; and (2) there are substantial similarities between the works that are probative of copying." Id. (internal quotation marks and citations omitted).

In order to succeed on a motion for summary judgment, the plaintiff "must show that no

reasonable trier of fact could find against it on any of the elements of proof, the most challenging of which may be proof of substantial similarity." Id., at *23. The Second Circuit has stated that "because substantial similarity is customarily an extremely close question of fact, summary judgment has traditionally been frowned upon in copyright litigation." Id. (internal quotation marks, alteration, and citations omitted). However, summary judgment "is appropriate where the degree of substantial similarity is overwhelming." Id. (citation omitted). "District courts, therefore, have been willing to grant plaintiffs summary judgment in the architectural realm where . . . no doubt exists that the offending structure is a knock off." Id. (citations omitted).

C. Analysis

"Under the Copyright Act, a plaintiff bears the burden of showing ownership of a valid copyright." Axelrod & Cherveny Architects, P.C., 2007 U.S. Dist. LEXIS 15788, at *24 (citation omitted). "The burden, though, is substantially lightened by statutory law providing that a certificate of registration issued within five years of a work's publication is *prima facie* evidence of a valid copyright and thus gives rise to a rebuttable presumption of validity." Id. (citing 17 U.S.C. § 410(c)). "In presuming that a copyright is valid, it also presumed that the work is original, for originality is one of the elements addressed by a copyright evaluation." Leddell Int'l Inc. v. Eugene Biro Corp., 1994 WL 695743, at *3 (S.D.N.Y. Dec. 12, 1994) (citing Melvin Nimmer and David Nimmer, 3 Nimmer on Copyright, § 12.11(B) (1994)).

However, "[a] defendant may present evidence to rebut the presumption of validity, and if defendant makes a sufficient showing of lack of originality, the burden shifts back to the plaintiff to prove originality." Id. (citing 3 Nimmer on Copyright, § 12.11(B)). Insofar as a defendant opts to challenge the validity of a plaintiff's copyright based on copying, "a defendant can prove copying if he [or she] can show that the plaintiff had access to another's creation, and

that the works are similar enough to support an inference that copying occurred." Id., at *4 (footnote omitted). In other words, a defendant must prove the same "elements a copyright plaintiff must prove to show infringement by a defendant . . . and the elements are the same when the defendant alleges that the plaintiff copied from an earlier work." Id. (citations omitted); see also 3 Nimmer on Copyright, § 12.11(B) (2013) ("Proof that plaintiff copied from prior works should involve the same elements as are required to establish copying by defendant from plaintiff, i.e., access and probative similarity."). However, "[e]ven when the defendant proves access and similarity, the plaintiff may still prevail if [he or she] can prove independent creation." Leddell Int'l Inc., 1994 WL 695743, at *4 (citing Nimmer §§ 12.11(B), 13.01(B)).

In this case, Plaintiff's Certificates of Registration from the Copyright Office were issued on August 23, 2010, and according to the Certificates, the date of first publication of the Chirogianis Plans (the architectural work and technical drawing) was September 18, 2008, less than five years earlier. Chirogianis Decl. (Docket # 98) Exs. 11-12. Thus, Plaintiff is entitled to a rebuttable presumption of validity as regards the copyrights for the Chirogianis Plans. However, Defendants challenge the rebuttable presumption of validity with respect to Plaintiff's copyrights on the ground that the Chirogianis Plans are not original, but are a copy of the Wachovia Plans.

Evidence in the record regarding the creation of the Chirogianis Plans

The evidence in the record is that Plaintiff's initial sketch for the retail building project at 737 White Plains Road was produced on April 17, 2006. Chirogianis Decl. Ex. 1. Subsequent sketches were produced on May 20, 2006 (SK-1), May 22, 2006 (SK-2), May 27, 2006 (SK-3), and June 5, 2006 (SK-4). Id. ¶ 6 & Exs. 2-4 (sketches SK-2, SK-3, and SK-4). The sketches were incorporated into formal architectural plans, A-1 and A-2, which were produced by

Plaintiff on September 19, 2007. Id. Ex. 5. According to Plaintiff, A-1 and A-2 – otherwise known as the Chirogianis Plans – are the plans that were approved by the Town of Eastchester Planning Board on June 25, 2008. Id. ¶ 8 & Ex. 6.[3]

In March, 2007, Epsilon was contacted by the real estate broker for Wachovia Bank, Aries Deitch & Endelson, Inc. ("Aries"), and was informed that Wachovia Bank was interested in leasing the property at 737 White Plains Road along with a building to be constructed. Dimopoulos Affirmation (Docket # 113) ¶ 10. Aries told counsel for Defendants, Constantine Dimopoulos, that Wachovia would have to approve the site and design of the building since Wachovia had a prototypical design for all of its bank locations. Id. ¶ 11. Moshopoulos and Dimopoulos were told that Wachovia would engage an architect and send Moshopoulos and Dimopoulos the required design. Id. On April 17, 2007, David Stein from the architectural firm of Silver Petrucelli emailed Dimopoulos the Wachovia Plans. Id. ¶ 13. The Wachovia Plans are dated March 28, 2007. Id. Ex. C.

On July 10, 2007, Aries sent Moshopoulos a letter of intent for Wachovia to rent the building and land at 737 White Plains Road. Id. Ex. D. The letter of intent provides in Exhibit B thereto that the Landlord's work includes "Roof and Structure . . . as Per Tenant's Plans." Id. Defendants claim that Moshopoulos and Dimopoulos then spoke to Plaintiff about completing

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[3]The Resolution from the Town of Eastchester Planning Board states that its approval was based on the drawings A-1 and A-2 dated "9/19/07, and last revised 6/04/08." Chirogianis Decl. Ex. 6. However, the Complaint provides a chart of all the drawings produced by Plaintiff and reflects three subsequent revisions made to A-1 and A-2 after 6-04-08, the last of which, Revision # 7, was dated September 19, 2008. See Compl. ¶ 12. Plaintiff's Certificates of Registration from the Copyright Office cite September 18, 2008, as the date of first publication of the Chirogianis Plans (the architectural work and technical drawing). Thus, it appears that the Plans provided by Plaintiff in support of this motion (the original version of A-1 and A-2 from September 19, 2007) are not the same version of the Plans either approved by the Town of Eastchester Planning Board or submitted to the Copyright Office.

the actual construction drawings, which were to be based on the design in the Wachovia Plans, and to be done in cooperation with Silver Petrucelli, who was to have oversight of the construction drawings. Id. ¶ 15. Because Plaintiff only hand draws his sketches and does not use the computer aided design system ("CAD") in generating his architectural drawings, Plaintiff employed the services of another architect, Charles Savigny, to produce Plaintiff's drawings for this project on the CAD system. Id. Ex. G (Chirogianis Depo.) at 74-75; see also Chirogianis Decl. ¶ 26; Reply Decl. (Docket # 117) Ex. 1 (Savigny Depo.) at 6-8. On July 18, 2007, Savigny received an email from Jeremy Jamilkowski of Silver Petrucelli which states, "Steve [Plaintiff] just asked me to forward you the Site plan, Floor plan, and Elevations in cad for the Wachovia East Chester Branch. Before I can send you these in cad format I just need you to sign and fax/email back the form that is attached in this email. It is a standard cad release form." Dimopoulos Affirmation Ex. J. This was followed up by a second email on July 23, 2007, from Jamilkowsky to Savigny which states, "I am attaching the site plan, floor plan and elevations for the Wachovia Bank Eastchester site. I have saved them down to be compatible with AutoCad 2004. If you need anything else let me know." Id.

Savigny testified at his deposition that he did not use the Wachovia CAD file to create the final drawing he made for Plaintiff. Reply Decl. Ex. 1 (Savigny Depo.) at 49. Rather, Savigny stated, "We used the footprint of the building and the plan. . . . I guess the deal never went through with Wachovia, so we kept the same floor plan and developed the exterior of the building from what would work at that site." Id. at 49-50. Savigny testified that he first saw the Wachovia drawing sometime after he had started working on the project and had seen Plaintiff's design. Id. at 56; see also id. at 62, 64 (testifying that he recalled seeing Plaintiff's sketch dated June 5, 2006, before seeing the Wachovia drawing). Savigny stated that he prepared the final set

of plans based on Plaintiff's original sketch. Id. at 61; see also id. at 66 (Savigny stated he thinks that the June 5, 2006, sketch "was the one that led to the final drawings.").[4]

Proof of Copying: Access

On the issue of access in connection with Defendants' allegation that Plaintiff copied the Wachovia Plans, there is little evidence that the Wachovia Plans were ever provided to Plaintiff himself. At his deposition, Plaintiff acknowledged that he was advised that Defendants were working on a deal to lease the building to Wachovia Bank, but when asked whether he was ever shown a copy of a plan drawn by an architect retained by Wachovia Bank, Plaintiff responded, "I don't believe so." Dimopoulos Affirmation Ex. G (Chirogianis Depo.) at 77. Plaintiff also testified that he did not remember ever seeing the Wachovia Plans. Id. at 78-79. Nor did Plaintiff remember ever being asked by Defendants or someone on their behalf to speak with an architect from Silver Petrucelli. Id. at 79[5]; but see Dimopoulos Affirmation Ex. J. (July 18,

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[4]Defendants cite to a different portion of Savigny's deposition, where he was asked, "So Mr. Chirogianis provided you with a copy of Wachovia's drawing and asked you to design the building along the lines of the plans that we just saw --," to which Savigny responded, "Correct." Reply Decl. Ex. 1 at 45:24-46:3. However, Savigny's testimony on this point is equivocal at best since he subsequently stated that he contacted the architect from Silver Petrucelli in order to get the Wachovia drawings in CAD. Id. at 47. And indeed, a few pages later the deposition transcript reads as follows:

> Q. When you received the Wachovia drawing that we just discussed, who gave it to you?
> A. The Petrucelli firm.
> Q. It was not given to you by Steve [Plaintiff]?
> A. Correct.

Id. at 53:12-16. In addition, as noted above, Savigny testified that he did not use the Silver Petrucelli CAD file to complete his own drawing for Plaintiff. Id. at 49.

[5]At his deposition, Plaintiff was asked by Dimopoulos, "Were you ever asked by the defendants or anyone on their behalf, *mainly me*, to speak with an architect from Silver-Petrucelli & Associates," to which Plaintiff responded, "I do not remember that." Dimopoulos

2007, email from Jeremy Jamilkowski of Silver Petrucelli to Savigny states, "Steve [Plaintiff] just asked me to forward you the Site plan, Floor plan, and Elevations in cad for the Wachovia East Chester Branch.").[6] David Stein, the architect from Silver Petrucelli who designed the Wachovia Plans, stated at his deposition that around the time he was designing the building for 737 White Plains Road, he had no conversations with either Moshopoulos, Dimopoulos, or Plaintiff, and he never sent Plaintiff any of his drawings, nor did Plaintiff send Stein any of his drawings. Dimopoulos Affirmation Ex. K (Stein Depo.) at 15:23-16:12; see also id. at 40:13-20 (Stein never provided a copy of his plans to Plaintiff). There is evidence that the Wachovia Plans were provided to Savigny, who worked for Plaintiff, but although the Wachovia Plans are dated March 28, 2007, the evidence in the record is that they were not provided to Savigny until July 23, 2007.[7]

Nonetheless, Defendants' counsel Dimopoulos avers in his affirmation that when he and Moshopoulos met with Plaintiff after the deal with Wachovia fell through, they "instructed

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Affirmation Ex. G (Chirogianis Depo.) at 79:14-18 (emphasis added). This colloquy bolsters the Court's finding, explained in detail below, that Dimopoulos' testimony would be necessary at trial.

[6]The July 18, 2007, email itself only proves that Plaintiff spoke to Jeremy Jamilkowski about sending the plans to Savigny; it does not prove that Plaintiff had access to, or saw, the plans himself. However, to the extent that it contradicts Plaintiff's deposition testimony, it raises an issue of Plaintiff's credibility which cannot be resolved on summary judgment. E.g., Brooks v. D.C. 9 Painters Union, No. 10 Civ. 7800, 2013 WL 3328044, at *1 (S.D.N.Y. July 2, 2013) ("Resolutions of credibility conflicts and choices between conflicting versions of the facts are matters for the jury, not for the court on summary judgment.") (internal quotation marks omitted) (quoting United States v. Rem, 38 F.3d 634, 644 (2d Cir. 1994)).

[7]Thus, although Dimopoulos states in his affirmation that Plaintiff's plans were completed on September 19, 2007, "some **six (6) months** after the Wachovia Plan was provided to him," Dimopoulos Affirmation ¶ 19 (emphasis in original), there is no evidence in the record that Plaintiff, or anyone working for him, was given the Wachovia Plans at or about the time that they were created (March 28, 2007).

Plaintiff that Moshopoulos liked the Wachovia Plan, and told [Plaintiff] to follow it in concept and submit a plan to the Town." Id. ¶ 17. According to Dimopoulos, "Defendants have always stated that they gave the Plaintiff the Wachovia Plan and instructed him to use it as a general guide towards proposing the Building to the Town." Id. ¶ 23. In addition, Dimopoulos testified at his deposition to providing Plaintiff with the documents that he received from Wachovia. See Behar Affirmation (Docket # 100) Ex. C (Dimopoulos Depo.) at 84:2-15.[8] Thus, although the evidence of access is thin, Defendants have succeeded in raising a genuine issue of material fact concerning Plaintiffs access to the Wachovia Plans.[9]

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[8]At his deposition, Dimopoulos testified as follows:

> Q. Okay. All right. Was anything that was provided to you in documents or any form from Wachovia provided to Steve?
> A. Yes.
> Q. And how was that provided to Steve?
> A. I don't recall.
> Q. Okay.
> A. I know it wasn't by e-mail.
> Q. Okay.
> A. It was either a fax or in person or mail.
> Q. Okay. If it was by mail or by fax would you have a record of that in your file?
> A. No.

Behar Affirmation (Docket # 100) Ex. C (Dimopoulos Depo.) at 84:2-15. The fact that there is only Dimopoulos' testimony on the issue of the transmission of Wachovia documents to Plaintiff supports the Court's finding that Dimopoulos' testimony would be necessary at trial.

[9]To the extent that there is a dispute concerning the timing of Plaintiffs creation of his sketches – in particular the June 5, 2006, sketch, in contrast to the timing of Plaintiffs alleged access to the Wachovia Plans, and when Plaintiff finalized the Chirogianis Plans (September 19, 2007), this dispute raises issues of credibility that cannot be resolved on a motion for summary judgment. Brooks v. D.C. 9 Painters Union, footnote 6, supra; compare, e.g., Dimopoulos Affirmation ¶¶ 21-22 ("The only evidence the Plaintiff has to prove the Plaintiffs Plans are his original work are two drawings – labeled SK-3 and SK-4 – which are dated by hand . . . which pre-date the Wachovia Plans. . . . In essence, the Plaintiff could have written any date on those plans – and as the Court will see below, the Plaintiffs credibility should be an issue for the jury. .

Proof of Copying: Probative Similarity

"On the issue of probative similarity[[10]], the Court asks whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work." Porto v. Guirgis, 659 F. Supp. 2d 597, 608 (S.D.N.Y. 2009) (internal quotation marks and citations omitted).[11] "Under the probative similarity analysis used in this Circuit, the Court must look at each work in its entirety, including protectible and unprotectible elements." Id. at 608 n.4 (citations omitted). "Similarities between the two works are probative only if the similarities would not be expected to arise if the works had been created independently." Id. at 608-09 (internal quotation marks and citations omitted). "Probative similarity is a less demanding test than substantial similarity and requires only that the works are similar enough to support an inference that [one party] copied the [other party's] work." Blakeman v. The Walt Disney Co., 613 F. Supp. 2d 288, 304 (E.D.N.Y. 2009) (internal quotation marks and citation omitted).

In this case, on the issue of probative similarity, Defendants note that the initial sketches for the building produced by Plaintiff in April and May, 2006, show a flat, rectangular design for

. This is a huge issue of fact for the jury. These drawings look almost identical to the Wachovia Plan – yet they are 'hand-dated' almost a year before Silver drew the Wachovia Plan – this is highly unbelievable and for the reasons set forth below, impossible.") with Reply Decl. ¶ 25 ("I [Plaintiff] personally reviewed the sketches that I created (Exs. 1-4 to my moving papers) with Mr. Dimopoulos in his office in 2006 when they were created. His testimony on this issue will be crucial to the jury making a credibility determination as to that key fact in the event that summary judgment is denied.").

[10]Probative similarity is "the test for copying that requires access and similarity probative of copying." Porto v. Guirgis, 659 F. Supp. 2d 597, 608 n.3 (S.D.N.Y. 2009) (citations omitted).

[11]There is no evidence that the Wachovia Plans are copyrighted; however, Stein testified at his deposition that "Wachovia had a prototype which was built across the country, and [Silver Petrucelli was] a regional architect that implemented their prototypical design. They had various layouts and designs to sort of pick and choose from." Dimopoulos Affirmation Ex. K (Stein Depo.) at 8:15-19.

six stores. Dimopoulos Affirmation ¶ 9; Chirogianis Decl. Exs. 1-2.[12] Defendant's counsel Dimopoulos states that after Wachovia backed out of the deal,

> Moshopoulos and I met with the Plaintiff and instructed him to proceed in earnest to obtain a site plan approval and move to the next steps of drafting construction drawings to obtain a building permit. We further instructed Plaintiff that Moshopoulos liked the Wachovia Plan, and told him to follow it in concept and submit a plan to the Town. I received approval to move forward with the Wachovia Plans from Mr. Stein himself.

Dimopoulos Affirmation ¶ 17.[13]

Defendants then cite to the Chirogianis Plans (A-1 and A-2) dated September 19, 2007, and claim that they are "nearly identical to the Wachovia Plan," with the "only deviation" being that the Chirogianis Plans "include six (6) stores instead of one (1) because Epsilon felt it would be easier to rent six (6) separate smaller retail stores instead of one (1) large retail location." Id. ¶¶ 19-20. Defendants claim that Plaintiff's "*only* evidence" that the Chirogianis Plans are Plaintiff's original work are the SK-3 and SK-4 drawings "which are dated by hand – not by computer – and which pre-date the Wachovia Plans. . . . In essence, the Plaintiff could have written any date on those plans . . . the Plaintiff's credibility should be an issue for the jury." Id. ¶ 21 (emphasis in original).

For his part, Plaintiff states in his declaration submitted in support of this motion that he

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[12]The April 17, 2006, drawing actually shows a building with five stores. Chirogianis Decl. Ex. 1.

[13]Interestingly, when Dimopoulos took Stein's deposition, he did not elicit any testimony regarding Stein's provision of approval for Defendants to use the Wachovia Plans after the deal fell through. Rather, during the deposition, Stein testified that when he completed the Wachovia design, he sent it to Tom Denis of Wachovia and had no idea what Tom Denis did with the plan. Id. Ex. K at 20:5-12. In Dimopoulos' affirmation, however, he states, "On April 17, 2007, David Stein from Silver emailed me the proposed store design and elevations ('Wachovia Plans') showing the desired exterior." Id. ¶ 13.

was the person who created and drew the sketches and the Plans. Chirogianis Decl. ¶¶ 5-7.[14] Additionally, Savigny stated at his deposition that he prepared the final set of CAD plans based on Plaintiff's original sketch, which pre-dated the Wachovia Plans. To the extent that Defendants claim that the Chirogianis Plans are "nearly identical" to the Wachovia Plans, Plaintiff has provided a report from his expert, Melvin Beacher, AIA, which states,

> It is difficult to make a positive comparison between Mr. Chirogianis' design shown on his Dwg.A-2 (9-19-07), and the design proposal for Wachovia Bank by Silver/Petrucelli (Dwg. A2 3-26-07). Except for the exterior dimensions of the building and the raised center parapet, the designs shown on these plans are entirely different.
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> The most obvious differences being on the "primary facade" (not facing the street): the multi-tenant storefronts with six entrance doors separated by vertical brick piers shown on Chirogianis Dwg.A-2 (9-19-07) versus what appears to be an all stucco facade (no materials identified) emphasizing multiple horizontal bands, no entrance(s) and three glazed areas in a grid pattern for the Wachovia Bank.
>
> Comparing the street facades clearly shows the continuing differences in the design schemes. The Chirogianis plan repeats the storefront pattern: on this face, three bays wide separated by vertical brick piers and has no entrance door. The design for the bank also is divided into three areas, but with entrance doors and a raised parapet in the center section. There are glazed areas to the sides of the entrance doors which exhibit the same grid pattern as on the side (primary) elevation and also a continuation of the horizontal bands.
>
> It also appears that the center section of the facade is projected forward from the face of the building (towards the street). My understanding of

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[14]At his deposition, Plaintiff testified as follows:

> Q. Were you shown any pictures in terms of what building designs [Defendants] liked?
> A. No.
> Q. Were you given any guidance?
> A. No.

Dimopoulos Affirmation Ex. G (Chirogianis Depo.) at 107:14-18.

> the approvals granted would make this encroachment into the required ten foot (10) front yard setback non-conforming and would require a new approval process.
>
> These significant differences would also suggest entirely different uses for the building. It is my professional opinion that the two designs must have been developed independent of one another.

Reply Decl. Ex. 5 at 3-4. Defendants have provided no evidence to refute the expert's opinion.

However, there is confusion in the record as to which plans are in issue in this case. The version of Plaintiff's design labeled A-2 dated September 19, 2007, which is attached to the Complaint as Exhibit A, does not have an entrance door on the street facade. See Compl. Ex. A. The Complaint states that this is a "copy of drawing A-2 from the revised version of the Plans." Compl. ¶ 13. According to the Complaint, seven (7) subsequent revisions were made to the original plans, the last one dated September 19, 2008. Id. ¶ 12. Although it is difficult to read, the version of A-2 attached to the Complaint notes in the upper right-hand corner seven revisions, leaving the Court to assume that it is a copy of Revision # 7.

In contrast, the version of Plaintiff's design labeled A-2 dated September 19, 2007, which is submitted as an Exhibit to Plaintiff's Declaration and which Plaintiff states is part of the "Plans" for which he owns a copyright, appears to be the original, unrevised version of A-2 (no revisions are listed in the upper right-hand corner) and shows an entrance door and a raised parapet in the center section of the front elevation, or street facade. See Chirogianis Decl. ¶¶ 7, 14 & Ex. 5. Based on the excerpt from the expert report set forth above, it appears that Plaintiff gave his expert a revised version of A-2, i.e., one without an entrance door on the street facade, but it is unclear which of the seven revised versions of A-2 the expert relied upon in drafting his report. Moreover, as explained in footnote 3, supra, it appears that the Plans provided by Plaintiff in support of this motion (the original version of A-1 and A-2 from September 19,

2007) are not the same version of the Plans that were submitted to the Copyright Office.

To the extent that there is confusion in the record regarding which versions of A-1 and A-2 were copyrighted by Plaintiff and which version of A-2 was relied upon by Plaintiff's expert, the Court cannot decide the issue of probative similarity as a matter of law. Accordingly, the Court concludes that there are genuine issues of material fact concerning the originality, and thus the validity, of Plaintiff's copyrights, precluding a grant of partial summary judgment on Plaintiff's claims of copyright infringement.[15]

II. Plaintiff's Motion to Disqualify Constantine "Gus" Dimopoulos, Esq.

Plaintiff filed his first motion to disqualify Maniatis & Dimopoulos P.C. and Constantine "Gus" Dimopoulos, Esq. as counsel for Moshopoulos and Epsilon before Defendants filed their Answer. Docket # 14. The Honorable Vincent L. Briccetti, U.S.D.J. denied the motion without prejudice as premature. Docket # 16. On February 7, 2012, Plaintiff renewed his motion to disqualify, contending that the Affirmation submitted to the Court by Dimopoulos in support of Defendants' withdrawn cross-motion for partial summary, Docket # 38, established that Dimopoulos was a necessary witness. The Court again found that the motion was premature and denied it without prejudice to renewal. Docket # 86.

Along with his motion for partial summary judgment, Plaintiff renews his motion to disqualify Dimopoulos as counsel for Moshopoulos and Epsilon. In his reply papers, however, Plaintiff states that he is no longer seeking to disqualify Maniatis & Dimopoulos P.C.,

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[15]Because the Court cannot decide the issue of validity based on confusion as to which version of the plans were copyrighted by Plaintiff, it cannot proceed to consideration of the second element of a claim for copyright infringement, i.e., whether Defendants copied original elements of Plaintiff's copyrighted work.

Dimopoulos' law firm, and that he "has no objection to other attorneys at his firm acting as trial counsel in this case." Reply Mem. of Law (Docket # 115) at 12.

A. Standard for Motion to Disqualify Counsel

Disqualification of an attorney "is a matter committed to the sound discretion of the district court." Cresswell v. Sullivan & Cromwell, 922 F.2d 60, 72 (2d Cir. 1990) (citations omitted). Federal courts' authority to disqualify counsel "derives from their inherent power to preserve the integrity of the adversary process." Hempstead Video, Inc. v. Inc. Vill. of Valley Stream, 409 F.3d 127, 132 (2d Cir. 2005) (internal quotation marks and citation omitted). In ruling on a motion to disqualify counsel, the court must "balance a client's right freely to choose his [or her] counsel against the need to maintain the highest standards of the profession." Id. (internal quotation marks and citations omitted). "[T]he party seeking disqualification must meet a heavy burden of proof in order to prevail." Amusement Indus. v. Stern, 657 F. Supp. 2d 458, 460 (S.D.N.Y. 2009) (internal quotation marks and citation omitted). Disqualification is warranted only if an "attorney's conduct tends to taint the underlying trial." Bd. of Educ. of N.Y. v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979) (internal quotation marks and citation omitted).

The advocate-witness rule is set forth in Rule 3.7 of the New York Rules of Professional Conduct.[16] Subsection (a) of the Rule provides, with certain exceptions, that "[a] lawyer shall not act as an advocate before a tribunal in a matter in which the lawyer is likely to be a witness

[16]The rule had previously been codified in Disciplinary Rule ("DR") 5-102(A) of the New York Code of Professional Responsibility. However, the Second Circuit has noted that "Rule 3.7(a) of the New York Rules of Professional Conduct . . . is substantially the same as DR 5-102(A)." Ramchair v. Conway, 601 F.3d 66, 74 n.6 (2d Cir. 2010).

on a significant issue of fact." N.Y. R. Prof'l Conduct § 3.7(a).[17] According to the Second Circuit, there are four risks that Rule 3.7(a) is devised to alleviate:

> (1) the lawyer might appear to vouch for his [or her] own credibility; (2) the lawyer's testimony might place opposing counsel in a difficult position when [he or] she has to cross-examine [his or] her lawyer-adversary and attempt to impeach his [or her] credibility; (3) some may fear that the testifying attorney is distorting the truth as a result of bias in favor of his [or her] client; and (4) when an individual assumes the role of advocate and witness both, the line between argument and evidence may be blurred, and the jury confused.

Murray v. Metro. Life Ins. Co., 583 F.3d 173, 178 (2d Cir. 2009) (citation omitted).

"Disqualification may be required only when it is likely that the testimony to be given by [counsel] is necessary." Purgess v. Sharrock, 33 F.3d 134, 144 (2d Cir. 1994) (internal quotation marks and citations omitted). "Courts in this Circuit have stated that when considering the necessity of testimony, a court should examine factors such as the significance of the matters, weight of the testimony, and availability of other evidence." Sea Trade Maritime Corp. v. Coutsodontis, No. 09 Civ. 488, 2011 WL 3251500, at *8 (S.D.N.Y. July 25, 2011) (internal quotations marks, alterations, and citations omitted). If an attorney's testimony "could be significantly useful to his [or her] client . . . , he [or she] should be disqualified regardless of

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[17]The exceptions to the Rule are as follows:

> (1) the testimony relates solely to an uncontested issue;
> (2) the testimony relates solely to the nature and value of legal services rendered in the matter;
> (3) disqualification of the lawyer would work substantial hardship on the client;
> (4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or
> (5) the testimony is authorized by the tribunal.

N.Y. R. Prof'l Conduct § 3.7(a)(1)-(5).

whether he [or she] will actually be called." Lamborn v. Dittmer, 873 F.2d 522, 531 (2d Cir. 1989) (citation omitted).

"While it is true that disqualification is disfavored in the Second Circuit, any doubt is to be resolved in favor of disqualification." Sea Trade Maritime Corp., 2011 WL 3251500, at *12 (internal quotation marks and citation omitted).

B. Analysis

Necessity of Testimony

Given the centrality of the issue of whether Plaintiff copied the Wachovia Plans to Defendants' defense against the claim of copyright infringement, the Court finds that Dimopoulos' testimony would be necessary at trial. Indeed, in opposition to this motion, Dimopoulos provided an affirmation in which he states that David Stein from Silver Petrucelli emailed him the Wachovia Plans, and that after the deal with Wachovia fell through and Dimopoulos and Moshopoulos told Plaintiff to "follow [the Wachovia Plans] in concept," Dimopoulos was the one who "received approval to move forward with the Wachovia Plans from Mr. Stein himself." Dimopoulos Affirmation ¶¶ 13, 17. Moreover, while Dimopoulos states in his affirmation that "Defendants have always stated that they gave the Plaintiff the Wachovia Plan and instructed him to use it as a general guide towards proposing the Building to the Town," id. ¶ 23, there is no statement from "Defendants" to this effect in the record provided. Instead, the Dimopoulos affirmation disputes Plaintiff's deposition testimony that Plaintiff never saw the Wachovia Plans, stating that this is contradicted by Savigny's deposition testimony to the effect that Plaintiff provided the Wachovia Plans to Savigny and asked Savigny to copy them. Id. ¶¶ 24-25; see footnote 4, supra. However, assuming this were true (and, as noted above, Savigny's testimony was equivocal on this point), it begs the question of how Plaintiff obtained a

copy of the Wachovia Plans. Dimopoulos testified at his deposition that he provided Plaintiff with whatever Wachovia provided to him, see footnote 8, supra, and according to Dimopoulos' affirmation, "Defendants have always stated that they gave the Plaintiff the Wachovia Plan and instructed him to use it as a general guide towards proposing the Building to the Town." Dimopoulos Affirmation ¶ 23. Nonetheless, Dimopoulos states that Plaintiff was provided with the Wachovia Plans six months before September 19, 2007, the date of the Chirogianis Plans, but at the same time points to emails from July, 2007, between Savigny and Jeremy Jamilkowski at Silver Petrucelli to argue that "[t]here can be no doubt as to when Savigny and the Plaintiff received the Wachovia Plan . . . " Id. ¶¶ 19, 21, 27. The record is demonstrably unclear on the issue of Plaintiff's access to the Wachovia Plans, and Dimopoulos' testimony will be necessary at trial to resolve this issue.[18]

In sum, insofar as there are genuine issues of material fact regarding the validity of Plaintiff's copyrights, i.e., whether the Chirogianis Plans are original or whether they were copied from the Wachovia Plans, and resolution of these issues is central to the determination of the copyright claims in this case, Dimopoulos' testimony is necessary, and he is disqualified from representing Moshopoulos and Epsilon.

Substantial Hardship

Defendants argue against Dimopoulos' disqualification on the ground that they would suffer substantial hardship. However, "[b]ecause of the strong policy considerations in support of the advocate-witness rule, courts have given the substantial hardship exception a very narrow

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[18]Dimopoulos' testimony will also be necessary to resolve the credibility issues surrounding Plaintiff's claim that he created the sketches upon which the Chirogianis Plans are based in 2006, well before the creation of the Wachovia Plans. See footnote 9, supra.

reading." Sea Trade Maritime Corp., 2011 WL 3251500, at *14 (internal quotation marks and citations omitted). "The exception expressly qualifies the hardship that must be shown to permit continued representation as one that arises because of the distinctive value of the lawyer or his [or her] firm as counsel in the particular case." Id. (internal quotation marks and citation omitted). "Indeed, if the expense and delay routinely incident to disqualification satisfied the substantial-hardship exception, that exception would soon swallow the rule." Id. (internal quotation marks and citation omitted).

Defendants here base their claim of substantial hardship on the expense and delay that they would suffer if Dimopoulos were disqualified, see Mem. of Law in Opp. (Docket # 103) at 10, which, as noted above, does not qualify as substantial hardship. Defendants additionally claim that Dimopoulos has a "distinctive value to Defendants as their attorney" because of his "comprehensive understanding of the underlying transactions involved in this proceeding," as well as "having represented Defendants in connection with the Project at issue here and many other matters . . ." Id. However, the Court does not find the issues involved in this case to be particularly complex such that the case could not be handled by other competent counsel. See, e.g., Ulster Scientific, Inc. v. Guest Elchrom Scientific AG, 181 F. Supp. 2d 95, 105 (N.D.N.Y. 2001) ("Plaintiff states that Malmed has represented it since 1994 and possesses detailed knowledge of plaintiff's business situation and history; however, this case is not complex and could be handled by any competent lawyer practicing in the field of commercial contracts."). Simply put, Defendants have not demonstrated that they fall within the substantial hardship exception to the advocate-witness rule, and Dimopoulos cannot continue to serve as their attorney.

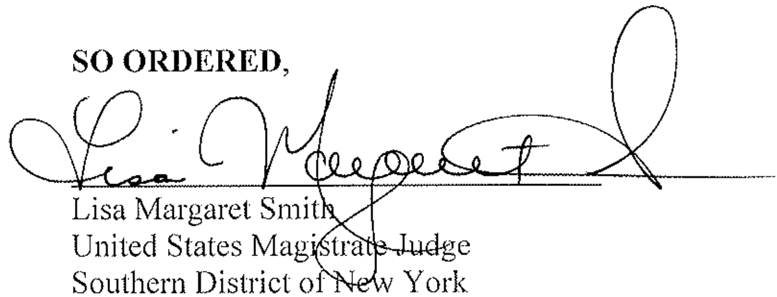
CONCLUSION

For the foregoing reasons, the Plaintiff's motion for partial summary judgment (Docket # 96) is **denied**, and Plaintiff's motion to disqualify (Docket # 96) is **granted**.

In light of the Court's decision, the conference scheduled for March 28, 2014, is hereby **cancelled**, and Defendants are granted **thirty (30) days** in which to retain new counsel. The parties are directed appear for a conference on May 5, 2014, at 10:00AM in Courtroom 520.

Dated: March 24, 2014
White Plains, New York

SO ORDERED,



Lisa Margaret Smith
United States Magistrate Judge
Southern District of New York