

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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OKSANA BAIUL et al.,
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Plaintiffs,
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-v-
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NBC SPORTS, a division of NBC Universal
Media LLC, a Delaware limited liability
company, et al.,
:

Defendants.
:
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15-cv-9920 (KBF)

MEMORANDUM
DECISION & ORDER

KATHERINE B. FORREST, District Judge:

Once again before this Court is the latest in a series of lawsuits brought by Oksana Baiul (“Baiul”) and her company, Oksana, Ltd., against a variety of entities seeking millions in damages for events that took place decades ago. This particular case is now before the Court for the second time—the Court previously remanded this action to state court (at a time when a prior complaint was operative) for lack of subject matter jurisdiction. See Baiul v. NBCUniversal Media, LLC, 15-cv-2816(KBF). Plaintiffs are now on their Fourth Amended Complaint, and the case has been removed for the second time to this Court on the basis that plaintiffs’ claims, as currently pled, are completely preempted by the Copyright Act, 17 U.S.C. § 101 et seq. (ECF No. 5.) Pending before the Court is plaintiffs’ motion to remand this action to the New York State Supreme Court. (ECF No. 15.) For the reasons set forth below, plaintiffs’ motion is DENIED.

I. LEGAL STANDARDS

A defendant may remove an action from state to federal court by filing a notice of removal in the federal court. See 28 U.S.C. § 1446(a). The notice must contain “a short and plain statement of the grounds for removal,” id. § 1446(a), and “be filed within 30 days after the receipt by the defendant . . . of a copy of the initial pleading,” id. § 1446(b)(1). “If the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days after receipt by the defendant . . . of a copy of an amended pleading . . . from which it may first be ascertained that the case is one which is or has become removable.” Id. § 1446(b)(3). A “party seeking removal bears the burden of showing that federal jurisdiction is proper.” Montefiore Med. Ctr. v. Teamsters Local 272, 642 F.3d 321, 327 (2d Cir. 2011).

Removal is proper in “any civil action . . . of which the district courts of the United States have original jurisdiction.” 28 U.S.C. § 1441(a). A federal district court has federal question jurisdiction “of all civil actions arising under the Constitution, laws, or treaties of the United States.” Id. § 1331. “The presence or absence of federal-question jurisdiction is governed by the ‘well-pleaded complaint rule,’ which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff’s properly pleaded complaint.” Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987); see Romano v. Kazacos, 609 F.3d 512, 518-19 (2d Cir. 2010). A federal question may arise in two ways—either where “federal law creates the cause of action asserted” or where a state law claim “necessarily raise[s]

a stated federal issue, actually disputed and substantial.” Gunn v. Minton, 133 S. Ct. 1059, 1064-65 (2013) (quoting Grable & Sons Metal Products, Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 314 (2005)).

A federal district court has subject matter jurisdiction over state law claims that are preempted by the Copyright Act. Briarpatch Ltd., L.P v. Phoenix Pictures, Inc., 373 F.3d 296, 305 (2d Cir. 2004). A state law claim is preempted by the Copyright Act: “(i) if it seeks to vindicate legal or equitable rights that are equivalent to one of the bundle of exclusive rights already protected by copyright law under 17 U.S.C. § 106—the general scope requirement; and (ii) if the work in question is of the type of works protected by the Copyright Act under 17 U.S.C. §§ 102 and 103—the subject matter requirement.” Barclays Capital Inc. v. Theflyonthewall.com, Inc., 650 F.3d 876, 892 (2d Cir. 2011) (quotation marks omitted). The types of works that are protected by Copyright Act include, inter alia, pantomimes, choreographic works, motion pictures and other audiovisual works. 17 U.S.C. § 102. The bundle of exclusive rights protected by the Copyright Act includes, inter alia, the rights of production, preparation of derivative works, and distribution of copies. Id. § 106. Finally, for preemption to apply, the defendant must also satisfy the “extra element” test, under which a state law claim is not preempted if “an extra element is required instead of or in addition to the acts of reproduction, performance, distribution or display, in order to constitute a state-created cause of action.” Barclays Capital, 650 F.3d at 893 (citing Computer Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 716 (2d Cir. 1992)) (quotation marks omitted).

II. DISCUSSION

In the operative Fourth Amended Complaint, which was filed on December 9, 2015, plaintiffs allege three state law claims for unjust enrichment, conversion and restitution, and an accounting on the basis that defendants used and exploited a television motion picture recording entitled “Nutcracker On Ice Starring Oksana Baiul” without entering into a written contract with Baiul or compensating her. (Fourth Am. Compl. ¶¶ 1-2, 14-21, ECF No. 5-14.) On December 21, 2015, defendant NBCUniversal Media, LLC (“NBCUniversal”) removed this action on the basis of federal question jurisdiction under 28 U.S.C. § 1331, asserting that plaintiffs’ claims are completely preempted by the Copyright Act. (Notice of Removal ¶ 22, ECF No. 5.) Specifically, NBCUniversal argues that the subject of plaintiffs’ claims—i.e. the use and exploitation of the recording of Baiul’s Nutcracker performance—is copyrighted material and plaintiff is alleging that she is entitled to royalties based on defendants’ distribution and/or publication of the recording without authorization or payment to Baiul. (Notice of Removal ¶¶ 19-22.) Although the merits of defendants’ preemption argument are not yet ripe on this motion to remand, the Court finds that there is a strong basis to conclude that plaintiffs’ claims are completely preempted by the Copyright Act. That is a sufficient ground to confer federal jurisdiction over this action. Briarpatch, 373 F.3d at 305.

As to the subject matter requirement, the Court believes there are two bases to find that the work in question is of the type protected by the Copyright Act.

First, there is no dispute that the motion picture recording of Baiul’s performance is a work entitled to copyright protection. E.g., Nat’l Basketball Ass’n v. Motorola, Inc., 105 F.3d 841, 847 (2d Cir. 1997) (“The Copyright Act was amended in 1976 specifically to insure that simultaneously-recorded transmissions of live performances and sporting events would meet the Act’s requirement that the original work of authorship be ‘fixed in any tangible medium of expression.’” (quoting 17 U.S.C. § 102(a)). Second, there is at least a substantial question as to whether Baiul’s underlying performance in the Nutcracker on Ice show—which is akin to a choreographed dance—is entitled to copyright protection once fixed in a tangible medium of expression. See Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc., 380 F.3d 624, 632 (2d Cir. 2004); Horgan v. Macmillan, Inc., 789 F.2d 157, 160-62 (2d Cir. 1986). Because Baiul’s filmed performance serves as the basis for plaintiffs’ claims, there is a strong basis to conclude, at this stage, that the subject matter requirement is met.

As to the general scope requirement, the crux of events giving rise to plaintiffs’ state law claims is that defendants “used and exploited” the motion picture recording of Baiul’s performance. (Fourth Am. Compl. ¶ 2.) The Fourth Amended Complaint alleges that defendants produced and distributed numerous copies and versions of the recordings of Baiul’s performance. (Id.) Reproduction and distribution are clearly rights that are encompassed within the bundle of rights afforded to copyright owners. 17 U.S.C. § 106. Finally as to the extra element test, numerous courts have held that an unjust enrichment claim, such as plaintiffs’,

does not contain an extra element in addition to reproduction or distribution. E.g., Briarpatch, 373 F.3d at 306-07; I.C. ex rel. Solovsky v. Delta Galil USA, No. 1:14-CV-7289-GHW, 2015 WL 5724812, at *17 (S.D.N.Y. Sept. 29, 2015); Stadt v. Fox News Network LLC, 719 F. Supp. 2d 312, 321-22 (S.D.N.Y. 2010); see also Forest Park Pictures v. Universal Television Network, Inc., 683 F.3d 424, 432 (2d Cir. 2012).

Because the Fourth Amended Complaint on its face raises a substantial question as to whether plaintiffs' claims are preempted by the Copyright Act, federal subject matter jurisdiction over this action is proper.

III. CONCLUSION

For the foregoing reasons, plaintiffs' motion to remand is DENIED. The Clerk of Court is directed to terminate the motion at ECF No. 15.

SO ORDERED.

Dated: New York, New York
February 16, 2016



KATHERINE B. FORREST
United States District Judge