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NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

FAIRVIEW DEVELOPMENT CORPORATION, an Arizona corporation,

Plaintiff,

vs.

DAVID W. SCHMID and PATRICIA SCHMID, husband and wife,

Defendants.

No. CV-09-0784-PHX-GMS

ORDER

Pending before the Court is the Motion to Dismiss of Defendants David W. Schmid and Patricia Schmid. (Dkt. # 7.) For the reasons set forth below, the Court grants Defendants' Motion.

BACKGROUND

On February 14, 2007, Plaintiff Fairview Development Corporation ("Fairview") and two additional plaintiffs who were subsequently dismissed (Case No. CV-07-0337-PHX-SMM, Dkt. # 96 at 6), filed suit against Defendant David W. Schmid and a fictitious defendant (Jane Doe Schmid) who represented "Mr. Schmid's spouse, if he [was] married." (Case No. CV-07-0337-PHX-SMM, Dkt. # 1 ¶ 4.) After amending the complaint multiple times, Fairview ultimately asserted a single claim of copyright infringement pursuant to the Federal Copyright Act, 17 U.S.C. §§ 101 *et seq.*, against the defendants. (Case No. CV-07-

1 0337-PHX-SMM, Dkt. # 47.) Fairview’s copyright claim was predicated upon the allegation
2 that Mr. Schmid infringed architectural plans for a custom home that were owned by
3 Fairview. (*See id.*) On August 8, 2009, the defendants moved for summary judgment. (Case
4 No. CV-07-0337-PHX-SMM, Dkt. # 78.) The Court found that Mr. Schmid had not
5 infringed the subject architectural plans and granted the motion in favor of the defendants.
6 (Case No. CV-07-0337-PHX-SMM, Dkt. # 96 at 23 (“The Court does not find Defendants
7 liable to Fairview for copyright infringement because Seidner granted Defendants a license
8 when he owned the copyright. Therefore, the Court will grant summary judgment in favor
9 of Defendants.”).)

10 In the complaints filed in the former case, Fairview explicitly reserved the right to
11 “seek leave to amend [the] Complaint and/or to issue a replacement summons as to ‘Jane
12 Doe’ Schmid when her true name [was] determined.” (Case No. CV-07-0337-PHX-SMM,
13 Dkt. ## 1 ¶ 4, 47 ¶ 4.) Fairview apparently sought the inclusion of Mrs. Schmid for purposes
14 of complying with the community property joinder requirements of Arizona Revised Statutes
15 section 25-215(D). However, Fairview failed to either amend or seek leave to amend its
16 complaint to join Mrs. Schmid as a defendant prior to the granting of summary judgment and
17 termination of the former case, even though Fairview had learned her identity. As a
18 consequence of not amending its complaint to join Mrs. Schmid, the Court also dismissed
19 the fictitious “Jane Doe Schmid” in the order granting summary judgment, citing the Ninth
20 Circuit’s “disfavor of fictitious defendants.” (Case No. CV-07-0337-PHX-SMM, Dkt. # 96
21 at 5.)

22 On April 1, 2009, Fairview filed its Notice of Appeal to the Ninth Circuit. (Case No.
23 CV-07-0337-PHX-SMM, Dkt. # 106.) The issues raised on appeal include the Court’s
24 finding of no infringement and whether service was properly effectuated on “Jane Doe
25 Schmid.” (Case No. CV-07-0337-PHX-SMM, Dkt. # 108.)

26 Fairview then filed a new complaint against both Mr. and Mrs. Schmid on April 16,
27 2009, asserting the identical copyright infringement claim previously asserted against Mr.
28 Schmid in the prior case and asserting a claim for declaratory relief. (Dkt. # 1.) According

1 to Fairview, the second case was filed because Fairview “believes the District Court’s
2 Judgment in the [former] Lawsuit dismissing ‘Jane Doe’ Schmid leaves open the question
3 of whether an ‘action’ has been ‘commenced’ against Patricia Schmid for purposes of tolling
4 the three-year statute of limitations in 17 U.S.C. § 507(b).”¹ (Dkt. # 1 ¶ 28.) Fairview
5 therefore admits that it “brings this second action . . . for the sole purpose of preserving the
6 statute of limitations as to Patricia Schmid should the Subject Appeal result in reversal and
7 remand.” (*Id.* ¶ 29.) Defendants now move for dismissal arguing that claim preclusion, issue
8 preclusion, and Arizona community property joinder rules bar this action. The Court will
9 address each argument in turn.

10 DISCUSSION

11 I. Claim Preclusion

12 Defendants first argue that the copyright infringement claim asserted against Mr.
13 Schmid is barred under principles of claim preclusion. (Dkt. # 7 at 1-2.) Under the doctrine
14 of claim preclusion, “a final judgment on the merits bars further claims by parties or their
15 privies based on the same cause of action.” *Montana v. United States*, 440 U.S. 147, 153
16 (1979); *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001)
17 (“[C]laim preclusion . . . bars litigation in a subsequent action of any claims that were raised
18 or could have been raised in the prior action.”). The elements necessary to establish claim
19 preclusion are: (1) an identity of claims; (2) a final judgment on the merits; and (3) privity
20 between the parties. *Headwaters Inc. v. U.S. Forest Serv.*, 399 F.3d 1047, 1050-52 (9th Cir.
21 2005).

22 Here, Plaintiff does not dispute that each of these requirements is satisfied. (*See* Dkt.
23 # 10 at 4-12.) Rather, Plaintiff argues that pursuant to sections 20 and 26 of the Restatement
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26 ¹17 U.S.C. § 507(b) states that “[n]o civil action shall be maintained under the
27 provisions of this title unless it is commenced within three years after the claim accrued.”
28 According to Fairview, the three year statute of limitations expired in late April, 2009. (Dkt.
#10 at 2.)

1 (Second) of Judgments, exceptions to claim preclusion apply. The exceptions set forth in
2 those sections, however, are not applicable on the facts of this case.

3 Section 20(1) of the Restatement (Second) of Judgments states: “A personal judgment
4 for the defendant, although valid and final, does not bar another action by the plaintiff on the
5 same claim . . . [w]hen the judgment is one of dismissal for lack of jurisdiction, for improper
6 venue, or for nonjoinder or misjoinder of parties” Here, the judgment was not based
7 on a lack of jurisdiction, improper venue, nonjoinder, or misjoinder, but rather on the
8 conclusion that Mr. Schmid was not liable for copyright infringement. Therefore, there is
9 no merit to Plaintiff’s contention that section 20 of the Restatement (Second) of Judgments
10 would allow it to reassert the claim against Mr. Schmid.

11 Section 26 of the Restatement (Second) of Judgments states:

12 (1) When any of the following circumstances exists, the general
13 rule of § 24 does not apply to extinguish the claim, and part or
14 all of the claim subsists as a possible basis for a second action
by the plaintiff against the defendant:

...

15 (c) The Plaintiff was unable to rely on a certain theory of
16 the case or to seek a certain remedy or form of relief in
17 the first action because of the limitations on the subject
18 matter jurisdiction of the courts or restrictions on their
19 authority to entertain multiple theories or demands for
multiple remedies or forms of relief in a single action,
and the plaintiff desires in the second action to rely on
that theory or to seek that remedy or form of relief [.]

20 Despite citing this section, Fairview fails to articulate any reason why section 26(1) would
21 permit a second action against Mr. Schmid. Rather, Fairview argues that it “had no practical
22 opportunity” to assert a community claim against Mr. and Mrs. Schmid and that this is “akin
23 to the situation where the first tribunal’s subject matter jurisdiction is limited” as set forth in
24 section 26(1). Neither contention is correct. First, Plaintiff identifies no limitations on the
25 subject matter jurisdiction of the federal district court or other restrictions in the former case
26 that would have prevented Plaintiff from asserting a community theory of infringement or
27 relief. Plaintiff could have sought leave to amend its complaint to join Mrs. Schmid as a
28 defendant in the action at any time within the nearly one-year period prior to the Court’s

1 order granting summary judgment after it had discovered her identity. Fairview learned of
2 Mrs. Schmid's identity during discovery as early as May 14, 2008. (*See* Dkt. # 88 Ex. 2 at
3 8.) Second, Plaintiff was certainly able, both theoretically and practically, to rely on a
4 community theory of copyright infringement/relief in the first action. Therefore, Plaintiff's
5 contention that section 26 of the Restatement (Second) of Judgments makes claim preclusion
6 inapplicable against Mr. Schmid has no merit.

7 Because the elements necessary to establish claim preclusion are satisfied and because
8 no exceptions to claim preclusion have been established, Plaintiff is precluded from again
9 asserting the copyright infringement claim against Mr. Schmid.

10 **II. Issue Preclusion**

11 Defendants next argue that any claims asserted against Mrs. Schmid for purposes of
12 establishing community liability for copyright infringement must be dismissed under
13 principles of issue preclusion. (Dkt. # 7 at 4.) Assuming that Mrs. Schmid was not a party
14 in the former action,² she seeks to use issue preclusion offensively against Plaintiff. "[T]he
15 application of offensive nonmutual issue preclusion is appropriate if (1) there was a full and
16 fair opportunity to litigate the identical issue in the prior action; (2) the issue was actually
17 litigated in the prior action; (3) the issue was decided in a final judgment; and (4) the party
18 against whom issue preclusion is asserted was a party or in privity with a party to the prior
19 action." *Syverson v. Int'l Bus. Mach. Corp.*, 472 F.3d 1072, 1078 (9th Cir. 2007) (citations
20 omitted).

21 Plaintiff argues that issue preclusion does not bar this action because "[a]t issue in the
22 present suit is the community nature of any copyright infringement liability David Schmid
23 is found to have." (Dkt. # 10 at 3.) Plaintiff contends that this issue was not litigated or
24 decided by the Court in the prior action because "the court in the First Lawsuit expressly
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26 ²The Court expresses no opinion on whether Mrs. Schmid was a party in the prior
27 action and if so, whether she was properly served. To the extent that she may be found to
28 be a party in the prior action, application of claim and issue preclusion would likewise
preclude the claims asserted against her in this case.

1 declined to decide the issue that underlies any community property liability, which is whether
2 David Schmid is personally liable for copyright infringement as a primary or contributory
3 infringer.” (*Id.*) Plaintiff, however, does not dispute that it did have a full and fair
4 opportunity to litigate the issue of Mr. Schmid’s liability, or that Fairview was a party in the
5 former action.

6 Plaintiff’s assertion that Judge McNamee did not determine the issue of David
7 Schmid’s personal liability is without merit. In its Response brief to the pending motion,
8 Plaintiff represents multiple times that, in the first lawsuit, the Court granted summary
9 judgment “without determining David Schmid’s personal liability for infringement.” (Dkt.
10 # 10 at 4, 11, 12.) Plaintiff’s representation is based on the following statement by the Court:
11 “As the Court has granted summary judgment in favor of Defendants, the Court does not
12 address whether Schmid could have been held liable under a theory of primary or
13 contributory infringement.” (Case No. CV-07-0337-PHX-SMM, Dkt. # 96 at 23.) Plaintiff’s
14 assertion that this statement indicates that the Court did not determine David Schmid’s
15 personal liability is disingenuous at best. In its order, Judge McNamee unambiguously found
16 that Mr. Schmid had not infringed the copyright on the subject architectural plans – either
17 under a theory of direct infringement or contributory infringement. The Court’s statement
18 merely indicated that, given its conclusion of no infringement, it was unnecessary for the
19 Court to resolve the refined question of whether Mr. Schmid would have been liable for
20 direct infringement or contributory infringement had infringement been found.

21 Here, the issue of Mr. Schmid’s liability for copyright infringement is the identical
22 issue that Defendants argue supports the application of issue preclusion. Indeed, Defendants
23 argue that “Patricia Schmid has no liability because David Schmid did not infringe Plaintiff’s
24 copyright.” (Dkt. # 12 at 4.) In the former case, the issue of Mr. Schmid’s liability for
25 copyright infringement was actually litigated, as both parties conducted substantial discovery
26 on the issue and ultimately submitted the issue for summary adjudication. The Court made
27 its ruling on the merits. Therefore, Plaintiff is precluded from asserting that Mrs. Schmid or
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1 the Schmid marital community are liable to Plaintiff under a theory of copyright
2 infringement.

3 **III. Arizona Revised Statutes Section 25-215(D)**

4 In the Complaint and Plaintiff's Response to the pending motion, Plaintiff makes clear
5 that "[t]he filing of the present lawsuit is a precautionary measure to ensure Fairview retains
6 the right to execute any judgment against the Schmid marital community should the Ninth
7 Circuit reverse the court's decision in the First Lawsuit." (Dkt. ## 10 at 3; 1 ¶¶ 28-29.)
8 Defendants argue that pursuant to Arizona law, Plaintiff "cannot bring a second lawsuit to
9 cure their failure to properly sue David and Patricia jointly in the First lawsuit." (Dkt. # 7
10 at 4.)

11 Arizona Revised Statutes section 25-215(D) requires that "[i]n an action on . . . a debt
12 or obligation the spouses shall be sued jointly." Assuming that Mrs. Schmid was not a party
13 in the former lawsuit, an issue that appears to be contested by the parties, the parties dispute
14 whether Plaintiff may cure that deficiency by asserting a second lawsuit in which the spouses
15 are sued jointly. Defendants argue that *C & J Travel, Inc. v. Shumway*, 161 Ariz. 33, 775
16 P.2d 1097 (Ct. App. 1989), precludes this option.

17 In *Shumway*, the plaintiff, C & J travel, sought to enforce against the marital
18 community a foreign judgment it had obtained in another state against the husband only,
19 David Shumway. *Id.* at 34-35, 775 P.2d at 1098-99. The Arizona Court of Appeals held that
20 the foreign judgments were final, "and that doctrines of merger and res judicata prevent[ed]
21 [the plaintiff] from suing David Shumway again." *Id.* at 37, 775 P.2d at 1101. The court
22 concluded that:

23 The inability to sue David on the original cause of action . . .
24 prevents the creditors from complying with A.R.S. § 25-215(D)
25 because both spouses cannot be sued jointly unless and until the
26 domesticated judgments based on the final New Hampshire
27 judgment are vacated or set aside pursuant to procedural and
28 legal rules which might permit that action.

1 *Id.* Based upon this holding, Defendants argue that, even had Plaintiff obtained a judgment
2 against Mr. Schmid in the first lawsuit, it would be precluded from a secondary suit aimed
3 at curing its failure to join both spouses in the first action. (Dkt. # 7 at 3-4.)

4 Plaintiff, however, argues that the Arizona Court of Appeals, in *Heinig v. Hudman*,
5 177 Ariz. 66, 865 P.2d 110 (Ct. App. 1993), qualified the applicability of *Shumway* and
6 permits a second cause of action in certain circumstances. (Dkt. # 10 at 7-11.)

7 In *Heinig*, George Hudman, a married man, entered into a partnership agreement to
8 develop raw land owned by Heinig. *Heinig*, 177 Ariz. at 68, 865 P.2d at 112. Hudman
9 represented, both orally and in the partnership agreement, that he was a married man dealing
10 with his sole and separate property. *Id.* Subsequently, when the real estate market
11 deteriorated and the partnership project failed, Heinig instituted arbitration proceedings
12 against Hudman under the arbitration clause of the partnership agreement. *Id.* During the
13 course of arbitration, Heinig learned that Hudman had misrepresented the source of his
14 funding, and that in fact he had acquired his partnership interest with community property.
15 *Id.* Consequently, Heinig tried to join Hudman's wife as a party to the arbitration. *Id.* The
16 arbitrator, however, ruled that he had no authority under the agreement to arbitrate claims
17 against Mrs. Hudman. *Id.* In so ruling, the arbitrator expressly stated that he did not regard
18 his ruling as a bar to any subsequent action against the community. *Id.* at 68-69, 865 P.2d
19 at 112-13. The arbitration award in Heinig's favor was subsequently confirmed by the
20 Arizona superior court. *Id.* at 69, 865 P.2d at 113.

21 Heinig then sued both Mr. and Mrs. Hudman in state court, seeking declaratory relief
22 that the judgment against Mr. Hudman was enforceable against both parties. *Id.* The
23 superior court granted summary judgment in favor of the Hudmans, but on review, the court
24 of appeals reversed in part. *Id.* The court decided that Heinig's claims against the Hudmans
25 were not barred by res judicata because, pursuant to the Restatement (Second) of Judgments,
26 the rule of preclusion had exceptions that applied under the circumstances of the case. *Id.*
27 at 71-73, 865 P.2d at 115-17. Specifically, because the court in the first action expressly
28 reserved Heinig's right to maintain the action, and because Heinig had no opportunity to

1 include Mrs. Hudman in the arbitral proceeding, the general rule of preclusion did not apply.
2 *Id.* The court therefore distinguished *Shumway*, noting that “no procedural impediment
3 prevented joinder of the wife” there. *Id.* at 72, 865 P.2d at 116.

4 Here, unlike *Heinig*, and as previously reviewed, there was no legal impediment
5 preventing Plaintiff from bringing its original action against both Mr. and Mrs. Schmid.
6 Additionally, there was no reservation of the right to assert a second action against the
7 community. Therefore, as in *Shumway*, where no procedural impediment stands in Plaintiff’s
8 way, Plaintiff is barred from asserting a second action for copyright infringement to cure its
9 failure to assert a claim against the marital community in the first action. *See, e.g., Nw. Nat’l*
10 *Ins. Co. v. Schubach*, 93 F.3d 386, 389-90 (7th Cir. 1996) (holding that, under Arizona law,
11 a creditor who choose not to join the defendant’s wife in a suit in federal court could not later
12 bring suit naming both spouses to impose the judgment on the marital community). Plaintiff
13 is barred from seeking to cure, in a second action, a failure to sue the community in the first.

14 **IV. Declaratory Relief**

15 In addition to asserting a claim of copyright infringement against the Schmid
16 community and Mr. Schmid individually, Plaintiff also asserts a claim for declaratory relief.
17 (Dkt. # 1 ¶¶ 36-39.) Plaintiff alleges that:

18 An actual and justiciable controversy exists between and/or
19 among [Fairview] and David and Patricia Schmid as to whether
20 David Schmid was acting in furtherance of his marital
21 community in committing any copyright infringement, whether
22 an action was ‘commenced’ as against Patricia Schmid in the
23 [former lawsuit] . . . , whether a subsequent amendment of the
24 complaint in the [former lawsuit] would relate back to the filing
25 of the original complaint, whether Patricia Schmid was properly
26 served with process [in] the [former lawsuit] and/or other
27 controversies.

28 (*Id.* ¶ 37.)

The Declaratory Judgments Act states, “In a case of actual controversy within its
jurisdiction . . . any court of the United States . . . may declare the rights and other legal
relations of any interested party seeking such declaration.” 28 U.S.C. § 2201(a). Initially
then, “the court must inquire whether there is a case of actual controversy within its

1 jurisdiction.” *Am. States Ins. Co. v. Kearns*, 15 F.3d 142, 143 (9th Cir. 1994). This
2 requirement is identical to Article III’s constitutional case or controversy requirement.
3 *Societe de Conditionnement en Aluminium v. Hunter Eng’g Co.*, 655 F.2d 938, 942 (9th Cir.
4 1981). “In order for a case to be justiciable under Article III of the Constitution, it must be
5 ripe for review.” *Aydin Corp. v. Union of India*, 940 F.2d 527, 528 (9th Cir. 1991). When
6 asserting a claim under the Declaratory Judgments Act, a plaintiff must establish “that there
7 is a substantial controversy, between parties having adverse interests, of sufficient immediacy
8 and reality to warrant issuance of a declaratory judgment.” *Scott v. Pasadena Unified Sch.*
9 *Dist.*, 306 F.3d 646, 658 (9th Cir. 2002) (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312
10 U.S. 270, 273 (1941)).

11 Plaintiff argues that, in light of the three-year statute of limitations for commencing
12 copyright claims, these issues are ripe for review now and Plaintiff “will suffer a hardship
13 if it is prohibited from asserting its present claims and if such claims are barred in the future
14 by the statute of limitations.” (Dkt. # 10 at 13-14.) The Court has already concluded,
15 however, that the nature of the Court’s determination of the previous copyright claim against
16 Mr. Schmid precludes a similar claim against the Schmid marital community in a second
17 action. Whatever hardship results from this ruling cannot be alleviated at this point by
18 granting declaratory relief. Accordingly, dismissal of Plaintiff’s declaratory relief claim is
19 warranted.

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CONCLUSION

