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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NEIL B GOLDBERG,
Plaintiff,

v.

JAMES CAMERON, et al.,
Defendants.

Case No. 5:15-cv-02556-RMW

**ORDER DENYING MOTION FOR
REMAND AND GRANTING MOTIONS
TO DISMISS**

Re: Dkt. Nos. 8, 14, 19

Plaintiff Neil Goldberg filed a complaint in Alameda County Superior Court against defendants James Cameron and Gale Ann Hurd, alleging claims for copyright infringement and breach of implied contract. Dkt. No. 1. Defendants removed the case to this court. Id. Plaintiff then filed a motion for remand, arguing that an as-yet-unserved amended complaint removed the federal copyright infringement claim. Dkt. No. 19. Defendants move to dismiss the complaint on res judicata grounds. Dkt. Nos. 8 (Hurd), 14 (Cameron). The court held a hearing on both motions on August 28, 2015, and the parties provided supplemental briefing. Dkt Nos. 39, 40. For the reasons explained below, the court DENIES the motion to remand and GRANTS the motion to dismiss.

I. BACKGROUND

This is plaintiff's third lawsuit against defendants. Broadly, plaintiff alleges that

1 defendants used plaintiff’s literary and musical materials to develop the ideas behind the
2 Terminator franchise.¹

3 **A. First Action: Case No. 5-CV-03534-RMW**

4 On August 31, 2005 plaintiff filed his first action against Hurd and Cameron. Case No. 5-
5 CV-03534-RMW. Goldberg alleged that Hurd and Cameron used Goldberg’s copyrighted works
6 “Long Live Music” or “Music Warrior” to develop the Terminator franchise. Goldberg asserted
7 nine claims: copyright infringement, conversion, breach of implied contract, unfair competition,
8 an accounting, declaratory relief, preliminary and permanent injunctions, a receivership, and
9 negligence. Goldberg filed a First Amended Complaint, and defendants moved to dismiss. The
10 court dismissed the conversion and unfair competition claims, dismissed in part the copyright
11 infringement and breach of implied contract claims, and gave Goldberg leave to amend. Hurd
12 then filed a motion to dismiss the remainder of Goldberg’s implied contract and negligence
13 claims, which was granted. The court then considered summary judgment motions, dismissed
14 Goldberg’s copyright infringement claim, and gave Goldberg leave to amend to state a
15 contributory copyright infringement claim against Hurd. Finally, after Goldberg filed a Third
16 Amended Complaint, the court granted Hurd summary judgment on the contributory copyright
17 infringement claim. The court then entered final judgment. Goldberg appealed. On May 7, 2012,
18 the Ninth Circuit dismissed the appeal with prejudice for failure to prosecute. Case No. 11-15983.

19 **B. Second Action: Case No. 13-CV-02493-RMW**

20 On June 3, 2013 plaintiff filed a complaint against Hurd and Cameron seeking relief from
21 judgment in the first action, and asserting substantially similar claims as before. The case was
22 originally assigned to Magistrate Judge Corley, who sua sponte issued a request for related case
23 determination under Civil Local Rule 3-12. The undersigned found the cases were related, and
24 ordered the second action transferred. On February 12, 2014, the second action was dismissed for
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26 ¹ The parties request judicial notice of various filings in state and federal court related to this case.
27 The court GRANTS the unopposed requests for judicial notice. Wheeler v. City of Oakland, No.
28 05-0647-SBA, 2006 WL 1140992, at *5 (N.D. Cal. Apr. 28, 2006).

1 failure to prosecute.

2 **C. Third Action: Case No. 15-CV-2556-RMW**

3 On June 19, 2014, plaintiff filed the third, and instant, action in the Alameda County
4 Superior Court. Dkt. No. 1. Goldberg served Hurd and Cameron with the complaint in May
5 2015. The complaint asserts claims for copyright infringement and breach of implied contract.
6 The complaint contains allegations that are materially the same as the allegations in the Second
7 Amended Complaint filed in the first action. See Dkt. No. 10-1 (redline comparison of instant
8 complaint to Second Amended Complaint in the first action). The only new allegations in the
9 complaint in the third action are:

10 Last Act of the Conspiracy: On or about May, 2014 plaintiff
11 Goldberg learned for the first time that defendants, and each of them
12 acted together to alter the television version of the Terminator
13 4/Terminator Salvation so as to conceal Critical original screenplay
14 and soundtrack elements initially stolen from plaintiff. Prior to that
15 time, said defendants had become aware that plaintiff claimed those
16 critical screenplay elements as his own. In fact, known to each and
17 every defendant was that the removed part(s) were a thumbprint of
18 plaintiff's original protected works. In essence, what defendants had
19 done by their collective and knowing conduct was resurrect all
20 statutes of limitations by creating (another) act in the conspiracy
21 against plaintiff Goldberg to steal his works of protected act:

22 The excised work then played on national television in, inter
23 alia, the County of Alameda.

24 Dkt. No. 1 ¶ 18.

25 Hurd and Cameron removed the case to this district, and the case was transferred to the
26 undersigned under Civil Local Rule 3-12. Hurd and Cameron move to dismiss the case on res
27 judicata grounds. Dkt. Nos. 8, 14. Goldberg moves to remand the case to the Superior Court.

28 Dkt. No. 19.

II. MOTION TO REMAND

A defendant may remove to federal court those civil actions filed in state court which
could have been filed in federal court in the first instance. 28 U.S.C § 1441. "The district courts
shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties

1 of the United States.” 28 U.S.C. § 1331.² A case “aris[es] under” federal law if “a well-pleaded
2 complaint establishes either that federal law creates the cause of action or that the plaintiff’s right
3 to relief necessarily depends on resolution of a substantial question of federal law.” Franchise Tax
4 Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal., 463 U.S. 1, 27–28 (1983).

5 There is no dispute that plaintiff’s original complaint pleads a federal cause of action,
6 copyright infringement, over which this court has jurisdiction. See 28 U.S.C. § 1338(a).
7 Plaintiff’s first amended complaint, however, only asserts a state law breach of implied contract
8 claim. Goldberg asserts that on May 21, 2015, he filed in state court a request for partial dismissal
9 that dismissed all federal claims from his original complaint. Dkt. No. 19 at 3. Goldberg asserts
10 that the state court entered the partial dismissal the same day. On May 22, 2015, plaintiff filed the
11 first amended complaint in state court. Dkt. No. 20-4. Goldberg never served defendants with the
12 request for dismissal or the first amended complaint. Defendants timely filed a notice of removal
13 on June 9, 2015.

14 Goldberg argues that removal was improper because the amended complaint contains no
15 federal cause of action. Dkt. Nos. 19, 40. Defendants argue that because the amended complaint
16 and notice of dismissal were not served, the original complaint is still the operative complaint.
17 Dkt. Nos. 25, 39.

18 This order agrees with Defendants. Because the amended complaint and notice of entry of
19 the dismissal were not served by the time defendants filed the notice of removal, the original
20 complaint was the operative complaint in the case. “A party that requests dismissal of an action
21 must serve on all parties and file notice of entry of the dismissal.” Cal. Rules of Court 3.1390
22 (emphasis added). See also Cal. Code Civ. Proc. § 472. A pleading may be amended once by
23 filing “and serving a copy on the adverse party.” Id. (emphasis added). Here, because Goldberg
24 did not serve the amended complaint, the original complaint controls.

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² Diversity jurisdiction is not at issue.

1 Without disputing his failure to comply³ with the requirement to serve the amended
2 pleading on defendants, Goldberg argues that the amended complaint controls. First, Goldberg
3 argues that under 28 U.S.C. § 1450, “[a]ll injunctions, orders, and other proceedings had in such [a
4 removed] action prior to its removal shall remain in full force and effect until dissolved or
5 modified by the district court.” Goldberg presents no reason why his unserved amended
6 complaint or notice of dismissal constitute “injunctions, orders, [or] other proceedings” that were
7 in effect at the time of removal. Second, Goldberg cites *Jenkins v. Commonwealth Land Title* for
8 the proposition that “[w]hen a case is removed the federal court takes it as though everything done
9 in the state court had in fact been done in the federal court.” Dkt. No. 40 at 2 (quoting *Jenkins v.*
10 *Commonwealth Land Title Ins. Co.*, 95 F.3d 791, 795 (9th Cir. 1996)). *Jenkins* is readily
11 distinguishable from the case at bar, as *Jenkins* merely held that it was not an abuse of discretion
12 for the district court to treat a request for additional time filed in state court as if it had been timely
13 filed in federal court. *Id.* *Jenkins* did not address the effect of filings not served on an adverse
14 party.

15 The approach of requiring a plaintiff to serve an amended pleading before it becomes
16 operative is consistent with the Ninth Circuit’s refusal to create a duty for defendants to
17 investigate jurisdictional facts that are not recited in an initial pleading. See *Harris v. Bankers Life*
18 *and Cas. Co.*, 425 F.2d 689, 694 (9th Cir. 2005) (rejecting argument that removal was untimely
19 because “notice of removability under § 1446(b) is determined through examination of the four
20 corners of the applicable pleadings, not through subjective knowledge or a duty to make further
21 inquiry”). Requiring defendants to respond to Goldberg’s unserved filings would be both
22 impractical and unfair.

23 Furthermore, “jurisdiction must be analyzed on the basis of the pleadings filed at the time
24 of removal without reference to subsequent amendments. Because of this rule, a plaintiff may not
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26 ³ Goldberg’s untimely-filed reply brief (Dkt. No. 29) and his supplemental brief in support of
27 remand (Dkt. No. 40) do not dispute that Goldberg’s notice of dismissal and amended complaint
were never served on Defendants.

1 compel remand by amending a complaint to eliminate the federal question upon which removal
2 was based.” *Sparta Surgical Corp. v. Nat’l Ass’n of Sec. Dealers, Inc.*, 159 F.3d 1209, 1213 (9th
3 Cir. 1998) (citation omitted). Thus, even if Goldberg now served the defendants with the
4 amended complaint, the court would still have supplemental jurisdiction over the case under 28
5 U.S.C. § 1367(c).⁴

6 As the operative (original) complaint included a federal cause of action, removal was
7 proper and Goldberg’s motion to remand is DENIED.⁵

8 **III. MOTIONS TO DISMISS**

9 Res judicata precludes claims and “bars litigation in subsequent action of any claims that
10 were raised or could have been raised in the prior action.” *Western Radio Servs. Co. v. Glickman*,
11 123 F.3d 1189, 1192 (9th Cir. 1997). “The doctrine of res judicata is applicable whenever there is
12 (1) an identity of claims, (2) a final judgment on the merits, and (3) identity or privity between the
13 parties.” *Owens v. Kaiser Foundation Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001).
14 Defendants argue that each of the three elements are met and the case should be dismissed. Dkt.
15 Nos. 9, 14.

16 Goldberg filed an opposition on August 25, 2015, Dkt. No. 30, a month after the due date
17 for opposition and only three days before the hearing on defendants’ motions. The timing of
18 Goldberg’s opposition did not provide a meaningful opportunity for defendants to reply, and the
19 court does not consider the opposition in ruling on defendants’ motions.⁶

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22 ⁴ While the court would have discretion to remand the state law claim, the court finds that in this
23 case, retaining jurisdiction “will best accommodate the values of economy, convenience, fairness,
24 and comity.” *Harrell v. 20th Century Ins. Co.*, 934 F.2d 203, 205 (9th Cir. 1991) (finding no
25 abuse of discretion for district court to retain jurisdiction after federal causes of action were
26 dismissed).

27 ⁵ Because this order finds that the original complaint is the operative complaint, it does not reach
28 the issue of whether Goldberg’s state law claim is, in substance, a copyright claim that would
confer federal jurisdiction.

⁶ Even if Goldberg’s opposition had been timely filed, it would not affect the outcome. The
opposition asserts that “[t]his is a state cause of action case based on new facts as stated in both
the original Complaint and First Amended Complaint” but provides no supporting reasoning. The
three-sentence opposition provides no analysis addressing defendants’ arguments.

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A. Identity of Claims

“The central criterion in determining whether there is an identity of claims between the first and second adjudications is ‘whether the two suits arise out of the same transactional nucleus of facts.’” Frank v. United Airlines, Inc., 216 F.3d 845, 851 (9th Cir. 2000) (quoting Costantini v. Trans World Airlines, 681 F.2d 1199, 1201–02 (9th. Cir. 1982)).

Here, Goldberg’s claims in the current complaint were brought in the first and second actions and arise from the same common nucleus of facts set forth in both of those cases. The claims all stem from Goldberg’s submission of his works “Long Live Music” or “Music Warrior” to New World Pictures. Compl. ¶ 7. The new allegation in the current complaint, that “on or about May, 2014” the defendants “acted together to alter the television version of the Terminator 4/Terminator Salvation so as to conceal Critical original screenplay and soundtrack elements initially stolen from plaintiff,” id. at ¶ 18, does not change the underlying “nucleus of facts” giving rise to plaintiff’s claim. See also Dkt. No. 12-1 (redline comparison of Second Amended Complaint in the first action to current complaint). If anything, the new allegation is relevant to the statute of limitations, but does not add anything to the underlying claims of copyright infringement or breach of implied contract. Both of those claims were asserted in the first action, and were litigated through motions for summary judgment.

The court finds that all of Goldberg’s claims in the operative complaint are based on the same transactional nucleus of facts as the prior actions. Thus, there is an identity of claims for the purposes of res judicata.

B. Final Judgment on the Merits

Both a dismissal with prejudice and a ruling on summary judgment constitute final judgments on the merits for claim preclusion purposes. See Stewart v. U.S. Bancorp, 297 F.3d 953, 956 (9th Cir. 2002) (“The phrase ‘final judgment on the merits’ is often used interchangeably with ‘dismissal with prejudice.’” (citations omitted)); Hells Canyon Pres. Council v. U.S. Forest Serv., 403 F.3d 683, 686 (9th Cir. 2005) (summary judgment is a final judgment on the merits, citing Fed. R. Civ. P. 56(c)).

1 In this case, the court dismissed with prejudice the breach of implied contract claim on
2 July 6, 2007, and granted the motion for summary judgment on the copyright infringement claim
3 on July 10, 2009. Case No. 5-CV-03534-RMW, Dkt. Nos. 51, 127. The court entered final
4 judgment on April 6, 2011. Case No. 5-CV-03534-RMW, Dkt. No. 215. The Ninth Circuit
5 dismissed Goldberg's appeal with prejudice on May 7, 2012. Case No. 11-15983, Dkt. No. 38.

6 The dismissal and grant of summary judgment on Goldberg's prior claims in the first
7 action were not based on lack of jurisdiction, improper venue, or failure to join a party. Therefore,
8 the court finds that these rulings operate as adjudications on the merits for the purposes of res
9 judicata.

10 **C. Identity or Privity Between Parties**

11 Res judicata requires that the parties be identical or in privity. See *Western Radio. Servs.*
12 *Co.*, 123 F.3d at 1192. Here, Hurd and Cameron are identical because they were named in
13 Goldberg's prior suits.

14 **D. Conclusion**

15 Because the court finds the three required elements of res judicata satisfied and because
16 Goldberg did not oppose the motion, defendants' motions to dismiss Goldberg's complaint are
17 GRANTED. The court does not reach the statute of limitations issues.

18 **IV. ORDER**

19 For the reasons explained above, the court DENIES the motion to remand and GRANTS
20 the motions to dismiss.

21 **IT IS SO ORDERED.**

22 Dated: September 11, 2015



Ronald M. Whyte
United States District Judge

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