

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DONALD KENNEDY,

Plaintiff,

v.

JOAN LaCASSE, BLUE BARN BED AND
BREAKFAST LLC, EMILY RITZ, KAILY
RITZ,

Defendants.

No. 17-CV-2970 (KMK)

OPINION & ORDER

Appearances:

Henry J. Joseph, Esq.
Kamaras & Joseph, PLLC
Brooklyn, NY
*Counsel for Plaintiff*¹

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Counsel for Defendants

KENNETH M. KARAS, District Judge:

Plaintiff Donald Kennedy (“Plaintiff”) filed this Action on January 3, 2017 in New York Supreme Court, Kings County, against Defendants Joan LaCasse (“LaCasse”), Blue Barn Bed and Breakfast LLC (“Blue Barn”), Emily Ritz, and Kaily Ritz (collectively, “Defendants”), alleging claims for quantum meruit, tortious interference with contract, tortious interference with prospective contractual relations, unjust enrichment, and breach of contract. (*See* Notice of Removal Ex. A (“Compl.”) (Dkt. No. 1).) The claims arise out of what Plaintiff alleges was a

¹ Mr. Joseph has not yet entered a notice of appearance on behalf of Plaintiff. He shall do so immediately.

business relationship between himself and LaCasse regarding the ownership and operation of Blue Barn, and concerns the acceptance and use of certain professional services rendered by Plaintiff without remuneration. (*See id.*) On March 13, 2017, Plaintiff filed a separate action in this Court, alleging claims for copyright infringement against LaCasse and Blue Barn for the unauthorized use of photographs Plaintiff took of Blue Barn and the surrounding area. (*See* Compl. (Dkt. No. 4, 17-CV-1839 Dkt.)) On April 24, 2017, Defendants removed the present Action to this Court. (*See* Dkt. No. 1.) The Court solicited briefing from the Parties and must now determine whether it has subject matter jurisdiction over the Action such that removal is proper. For the following reasons, the Court dismisses any portion of Plaintiff's claims that may be read as seeking compensation for the use of copyrighted materials and orders additional briefing regarding the proper forum for the case.

I. Background

A. Factual Background

1. Allegations in State Complaint

The Court will first set forth the allegations as described in the Complaint that is the subject of this Opinion & Order (the "State Complaint").

In or around February 2015, LaCasse purchased property in Millbrook, New York. (*See* Compl. ¶ 9.) Prior to this purchase, LaCasse and Plaintiff had agreed that LaCasse would purchase the property in Millbrook with the understanding that she and Plaintiff would convert it into a bed and breakfast, with Plaintiff contributing services to what would eventually become Blue Barn. (*See id.* ¶ 10.) The two agreed that in order for LaCasse to devote her full resources to the project, Plaintiff would forgo receiving any contemporaneous compensation for his

services until Blue Barn began to turn a profit. (*See id.* ¶ 11.) Plaintiff alleges that during the development stages of the project, he:

“provided all manner of interior and exterior design and decoration services, designs and specifications for furniture and fixtures,” (*id.* ¶ 13);

“supervised and created marketing materials for Blue Barn Bed and Breakfast in addition to in-person social networking, marketing, and outreach to build interest and a customer base,” (*id.* ¶ 14); and

“provided professional photography services for BLUE BARN BED AND BREAKFAST LLC, with his photographs being used as décor on the premises as well as in marketing materials,” (*id.* ¶ 15).

Plaintiff alleges that he was a co-manager of and partner in Blue Barn from February 2015 to January 2016, and that he was held out as such in marketing materials. (*See id.* ¶¶ 16, 18.)

Plaintiff was “on-call” at all times for “any needs or issues that arose from the design phase through construction and into operation of Blue Barn Bed and Breakfast for customers, and received such calls on a daily basis.” (*Id.* ¶ 17.) Plaintiff claims that the services he provided were accepted by LaCasse, who used those services, including the photographs Plaintiff took. (*See id.* ¶ 19.) Plaintiff received no remuneration for those services because before Blue Barn earned any profits, LaCasse terminated their partnership agreement and ordered Plaintiff off of the premises. (*See id.* ¶ 19.)

Plaintiff seeks, in this Action, to recover the reasonable value of the services he rendered to LaCasse and Blue Barn, which he estimates to be at least \$72,800. (*See id.* ¶ 20.) Plaintiff additionally claims that Emily Ritz and Kaily Ritz (the daughters of LaCasse) unlawfully interfered with Plaintiff’s partnership with LaCasse and thereby harmed Plaintiff. (*See id.* ¶¶ 22–38.)

2. Allegations in Federal Complaint

In the Complaint filed in the related action (the “Federal Complaint”), Plaintiff provides some additional information about the photography services he allegedly provided. (*See* Compl. (Dkt. No. 4, 17-CV-1839 Dkt.)) Specifically, Plaintiff alleges that between February and October 2015, while Plaintiff and LaCasse were preparing the premises for a fall opening, Plaintiff took a number of photographs of the premises. (*See id.* ¶ 12.) Plaintiff permitted LaCasse and Blue Barn to display those photographs on the Internet and in other promotional materials, conditioned on LaCasse’s agreement that Plaintiff was her partner in the venture and in consideration of Plaintiff’s equity stake in the business. (*See id.*) When the business opened, Plaintiff’s photographs “served as the B&B’s sole advertising and marketing tools,” and “were the sole driving force behind the marketing of the business and they were responsible for driving clientele to the business and getting the business off to a successful start.” (*Id.* ¶ 13.) After LaCasse terminated their partnership agreement, she continued to use the photographs as marketing tools, notwithstanding that Plaintiff had registered the copyrights in the photographs in his name. (*See id.* ¶¶ 15–17.)

3. Allegations by Defendants

Although of only limited value in this Opinion & Order, Defendants have offered their own view of the facts. LaCasse admits to having a “personal romantic relationship with [Plaintiff] from approximately December 2013 to January 2016.” (Resp. to Order to Show Cause, Aff. of Joan LaCasse (“LaCasse Aff.”) ¶ 5 (Dkt. No. 16-6).) After Plaintiff was evicted from his brother’s home, he moved in with LaCasse and agreed to reimburse LaCasse for his reasonable living expenses and to help with household chores. (*See id.* ¶ 6.) In June 2015, LaCasse put her home up for sale and purchased the property that would become Blue Barn.

(*See id.* ¶ 7.) Plaintiff moved in with LaCasse at Blue Barn, allegedly under the same agreement that he would reimburse LaCasse for reasonable living expenses and would help with household chores. (*See id.*)

LaCasse denies that Plaintiff was at all involved in the business, and denies that he contributed money, labor, or supplies toward the business. (*See id.* ¶ 8.) LaCasse claims that over the course of their relationship, she loaned Plaintiff thousands of dollars under the belief that Plaintiff would eventually reimburse her—he never did. (*See id.* ¶ 10.) LaCasse finally ended their romantic relationship in 2016 and asked Plaintiff to move out. (*See id.* ¶ 11.) Plaintiff allegedly became threatening and told LaCasse he would destroy her life and business. (*See id.* ¶ 12.) Although LaCasse called the police on Plaintiff, she thereafter decided to let Plaintiff stay in her home for a few weeks while he found alternative living arrangements, though she insisted that Plaintiff execute agreements stating he would not interfere with LaCasse’s business. (*See id.* ¶¶ 12–14.)

According to LaCasse, the only thing Plaintiff contributed to the business was to take a few pictures; LaCasse notes that Plaintiff did not even own a camera and LaCasse had to purchase one for him. (*See id.* ¶¶ 19–20.) LaCasse alleges that Plaintiff has made numerous representations that he would never charge LaCasse for his photography services, (*see id.* ¶ 23), although prior to the filing of these actions, Plaintiff sent LaCasse an invoice for those services, (*see id.* ¶ 24).

B. Procedural History

Plaintiff filed this Action in New York Supreme Court, Kings County, on January 3, 2017, and Defendants removed the Action to this Court on April 24, 2017. (*See* Dkt. No. 1.) On March 13, 2017, Plaintiff filed the Federal Complaint in the related action, (*see* Dkt. No. 1 (17-

CV-1839 Dkt.)), and refiled the Federal Complaint on March 27, 2017 to correct deficiencies in the original filing, (*see* Dkt. No. 4 (17-CV-1839 Dkt.)). Defendants answered the Federal Complaint on April 24, 2017, (*see* Dkt. No. 7 (17-CV-1839 Dkt.)), and the State Complaint on May 1, 2017, (*see* Dkt. No. 10).

On May 2, 2017, the Court issued an Order to Show Cause in the instant Action, ordering the Parties to show cause as to why the Action should not be either transferred to the Eastern District of New York (the federal district embracing the county in which the State Complaint was originally filed) or remanded to the state court for lack of jurisdiction. (*See* Dkt. No. 12.) The Parties submitted timely responses. (*See* Dkt. Nos. 13, 16.)

II. Discussion

The primary question in this case is clear: are Plaintiff's claims for quantum meruit and unjust enrichment preempted by the Copyright Act, 17 U.S.C. § 501 et seq.? The answer, however, is far more opaque. Defendants argue that because Plaintiff has asserted claims arising out of Defendants' use of the allegedly copyrighted photographs that form the basis for the Federal Complaint, the State Complaint should be construed as raising claims under the Copyright Act, thereby vesting this Court with jurisdiction. (*See* Resp. to Order to Show Cause, Defs.' Mem. of Law in Opp'n to Remand and Supp. of Defs.' Mot. To Dismiss 8–12 (Dkt. No. 16-10).) While Defendants have not accurately framed the question, they are correct that Plaintiff's allegations regarding the use of allegedly copyrighted photographs implicate issues that are relevant to this Court's jurisdiction.

Pursuant to 28 U.S.C. § 1338(a), federal district courts have exclusive jurisdiction over state law claims that are preempted by the Copyright Act. *See Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 305 (2d Cir. 2004). Such complete preemption occurs when

(1) the particular work to which the [state law] claim is being applied falls within the type of works protected by the Copyright Act under 17 U.S.C. §§ 102 and 103, and (2) the claim 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.

Id. The first of these prongs is called the “subject matter requirement,” and the second prong is called the “general scope requirement.” *Id.* (internal quotation marks omitted).

A. Subject Matter Requirement

The Copyright Act protects “original works of authorship fixed in any tangible medium of expression,” but does not extend to an “idea, . . . regardless of the form in which it is described, explained, illustrated, or embodied.” 17 U.S.C. § 102(a)–(b). The statute specifically includes in protected works “pictorial, graphic, and sculptural works.” *Id.* § 102(a)(5). There is no dispute that photographs may be protected works under the Copyright Act. *See, e.g., Lefkowitz v. McGraw-Hill Global Educ. Holdings, LLC*, 23 F. Supp. 3d 344, 352 (S.D.N.Y. 2014) (holding that the plaintiff had stated a claim for copyright infringement of protected photographs); *Agence Fr. Presse v. Morel*, 769 F. Supp. 2d 295, 302 (S.D.N.Y. 2011) (same). At least a portion of the services for which Plaintiff seeks compensation relate to his photography of Blue Barn and the surrounding area, (*see* Compl. ¶¶ 15, 19), and therefore some of the subject matter implicated by this lawsuit may be protected by the Copyright Act, *cf. Forest Park Pictures v. Universal Television Network, Inc.*, 683 F.3d 424, 429 (2d Cir. 2012) (“We have held . . . that works may fall within the subject matter of copyright, and thus be subject to preemption, even if they contain material that is uncopyrightable under [§] 102.”).

B. General Scope Requirement

More difficult here is whether Plaintiff’s claim for “the reasonable value of the services he rendered” seeks to “vindicate legal or equitable rights that are equivalent to one of the bundle

of exclusive rights already protected by copyright law.” *Briarpatch*, 373 F.3d at 305. Section 106 of the Copyright Act gives “copyright owners the exclusive rights, among other things, to reproduce a copyrighted work, to prepare derivative works, to distribute copies of the work to the public, and to display the work publicly.” *Forest Park*, 683 F.3d at 430. “The general scope requirement is satisfied only when the state-created right may be abridged by an act that would, by itself, infringe one of the exclusive rights provided by federal copyright law.” *Briarpatch*, 373 F.3d at 305. In other words, “the state law claim must involve acts of reproduction, adaptation, performance, distribution or display.” *Id.* “But 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, there is no preemption.” *Forest Park*, 683 F.3d at 430 (internal quotation marks omitted).

Here, Plaintiff has brought claims for unjust enrichment and quantum meruit, seeking remuneration for the “reasonable value of the services he rendered” to the benefit of LaCasse and Blue Barn. (Compl. ¶ 20; *see also* ¶ 45.) Under New York law, unjust enrichment claims and quantum meruit claims are typically analyzed together as a single quasi-contract claim. *See Mid-Hudson Catskill Rural Migrant Ministry, Inc. v. Fine Host Corp.*, 418 F.3d 168, 175 (2d Cir. 2005). To establish such a claim, the claimant must show “(1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services.” *Id.* (internal quotation marks omitted).

Courts in the Second Circuit have consistently held that unjust enrichment and quantum meruit claims brought under New York law are preempted by the Copyright Act. *See, e.g., Solovsky ex rel. I.C. v. Delta Galil USA*, 135 F. Supp. 3d 196, 218–19 (S.D.N.Y. 2015);

Transcience Corp. v. Big Time Toys, LLC, 50 F. Supp. 3d 441, 454–55 (S.D.N.Y. 2014); *Ardis Health, LLC v. Nankivell*, No. 11-CV-5013, 2012 WL 5290326, at *10 (S.D.N.Y. Oct. 23, 2012).

For its part, the Second Circuit in *Briarpatch* held that the plaintiffs’ unjust enrichment claim, which was based on “the theory that [the defendant] was unjustly enriched by turning Jones’ novel and Malick’s screenplay into a motion picture without compensating [the plaintiffs] or obtaining [the plaintiffs’] permission,” was preempted because it was “clear that the specific right they [were] trying to enforce [was] the right of adaptation.” 373 F.3d at 306.

But this line of cases applies only where the unjust enrichment claim arises out of “acts of reproduction, adaptation, performance, distribution or display.” *Id.* at 305. Notably, the cases cited above all involved circumstances in which the plaintiffs alleged unjust enrichment arising out of the *use* of copyrighted material. *See, e.g., I.C.*, 135 F. Supp. 3d at 218–19 (“The crux of [the] plaintiff’s unjust enrichment and quantum meruit claims allege that [the] defendants unjustly benefited from [the] plaintiff’s design, and they have used that design without paying fair compensation. These allegations are not qualitatively different from her copyright infringement claim.”); *Transcience*, 50 F. Supp. 3d at 454–55 (“[The] [p]laintiffs explicitly state that the unjust enrichment claim is premised on [the defendant’s] continuing and ongoing unauthorized sales of the previously licensed Sea-Monkeys product. Accordingly, the unjust enrichment claim is preempted, but only to the extent it relies on [the] [p]laintiffs’ copyrighted works; the unjust enrichment claim may otherwise proceed.” (citation, footnote, and internal quotation marks omitted)); *Ardis*, 2012 WL 5290326, at *10 (“[The plaintiff’s] unjust enrichment and *quantum meruit* claims apply to the . . . website, which undisputedly falls within the subject matter of the Copyright Act. Furthermore, [the plaintiff] bases her claims on the

movants' public use and display of the website, a right protected by 17 U.S.C. § 106." (citations omitted)).

By contrast, courts have recognized that an unjust enrichment claim may not be preempted where the claim seeks to vindicate a right not covered by the Copyright Act, for example, a right to receive remuneration for services rather than a right to receive compensation for use of copyrighted works. *See Palatkevich v. Choupak*, 152 F. Supp. 3d 201, 222 (S.D.N.Y. 2016) (“[The] [p]laintiffs’ allegations state a claim for unjust enrichment, not because such software/code/programs were [the] [p]laintiffs’ copyright—they were not—but because [the] [p]laintiffs alleged that [the] [d]efendants were ‘enriched’ by the work each of them did for [the company], at [the] [p]laintiffs’ ‘expense’ (because they did not get compensated for their work via receipt of 10% of the company)”); *cf. Strauss v. Hearst Corp.*, No. 85-CV-10017, 1988 WL 18932, at *9 (S.D.N.Y. Feb. 19, 1988) (holding that an unjust enrichment claim was preempted because “[w]hile it [was] true that in creating the original photograph [the plaintiff] performed valuable services that enriched [the] defendant . . . , [the plaintiff] [did] not contend that he was unjustly denied compensation for those services”). It may be the case, for instance, that a defendant is unjustly enriched at the time it accepts a copyrighted work from the plaintiff without paying for it, even before the defendant ever publishes or displays the copyrighted work.

Here, it is unclear whether Plaintiff is seeking remuneration for the use and display of his allegedly copyrighted photographs or merely for the value of the photographs, irrespective of their subsequent use. Plaintiff alleges that by removing Plaintiff from his position, LaCasse “unjustly obtained the benefit of services and ideas provided by [Plaintiff] without providing payment for those services and ideas,” (Compl. ¶ 43), a claim that would appear to sound solely in unjust enrichment and not in copyright. In the next paragraph, however, Plaintiff alleges that

“[w]ith each new guest at BLUE BARN AND BREAKFAST LLC and each potential customer viewing the BLUE BARN BED AND BREAKFAST LLC website and other marketing materials, JOAN LA CASSE continues to obtain further benefit from the services provided by [Plaintiff],” (*id.* ¶ 44), a claim that appears to invoke copyright law.

The Complaint thus goes in both directions, invoking copyright law in some paragraphs and eschewing it in others. But the remedy here is not a complicated one. Where claims are preempted by the Copyright Act, the proper procedure is to “dismiss the claim for failing to state a cause of action.” *Briarpatch*, 373 F.3d at 309. “In other words, the complete preemption doctrine ensures that a federal forum will be available to decide that a plaintiff’s claim is preempted; but it does not allow a federal court to decide claims that have not actually been pleaded.” *Id.* Thus, to the extent Plaintiff seeks damages under state law for the use or display of his allegedly copyrighted photographs, those claims are dismissed for failing to state a claim. To the extent Plaintiff seeks damages for the value of his photographs, regardless of their use, or for other services he allegedly provided during the period in question, those claims are not preempted by state law and thus need not be dismissed.

C. Supplemental Jurisdiction

Having dismissed the portions of Plaintiff’s claims that are preempted by the Copyright Act, “the Court has discretion under 28 U.S.C. § 1367(c) to either retain or decline to retain jurisdiction over [Plaintiff’s] remaining state law claims.” *Einiger v. Citigroup, Inc.*, No. 14-CV-4570, 2014 WL 4494139, at *8 (S.D.N.Y. Sept. 12, 2014). “[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims.” *Carnegie-Mellon*

Univ. v. Cohill, 484 U.S. 343, 350 n.7 (1988). The calculus here, however, is complicated by the fact that the copyright claims have been properly alleged in the related action, which is already before this Court. There is thus some judicial efficiency to be gained if, as Defendants ask, this case is ultimately consolidated with the related action alleging claims under the Copyright Act.

In light of these facts, the Parties are directed to submit to the Court letters, not to exceed three single-spaced pages, within 14 days detailing whether the Court should consolidate this Action with the related action (Dkt. 17-CV-1839) or remand this Action back to state court.

D. Court of Removal

As noted in the Court's Order to Show Cause, (*see* Dkt. No. 12), because this Action was initiated in Kings County, the case should have been removed to the Eastern District of New York instead of this Court, *see* 28 U.S.C. § 1441. In their responses, neither Party addressed whether the Court is permitted to exercise jurisdiction over the case, notwithstanding that it was removed to the wrong federal district. Courts in the Second Circuit, however, have recognized that removal to the wrong federal district is a defect in venue, not jurisdiction, and therefore a plaintiff may waive objections to improper removal. *See Cardona v. Mohabir*, No. 14-CV-1596, 2014 WL 1088103, at *1 (S.D.N.Y. Mar. 18, 2014) (“[N]ot all defects in removal extend to the court’s subject matter jurisdiction and some of those that do not are waivable by the non-removing party.”); *Port Auth. of N.Y. & N.J. v. Am. Warehousing of N.Y., Inc.*, No. 04-CV-6092, 2004 WL 2584886, at *1 (S.D.N.Y. Nov. 10, 2004) (“Since objections to venue are waived if not timely raised, it has been held that removal to the wrong district is a procedural defect, like improper venue, which is waived by the failure to object to it timely.” (citation and internal quotation marks omitted)). While the Court nevertheless retains “discretion to transfer such a case to the proper district,” *Am. Warehousing*, 2004 WL 2584886, at *1, the Court sees no

reason for doing so here. As set forth above, either the exercise of supplemental jurisdiction is appropriate because of the efficacy of consolidating this Action with the related copyright action (pending in this Court, and not the Eastern District of New York), or the exercise of supplemental jurisdiction is inappropriate and this Action should be remanded to state court. In neither scenario, however, would a transfer to the Eastern District of New York be an effective solution.

Notwithstanding the above, in the Order to Show Cause, the Court expressed that nothing in Plaintiff's response to the Order would be construed as a waiver of the other grounds for remand, and thus the Court will allow Plaintiff, should he choose, to include in his letter argument for why the Action should be transferred to the Eastern District of New York. If Plaintiff elects not to make such an argument, the Court will not transfer the case on its own.

III. Conclusion

For the foregoing reasons, to the extent Plaintiff seeks compensation in this Action for the use or display of his allegedly copyrighted photographs, those claims are dismissed on preemption grounds. The Court will not consider the sufficiency of the remaining claims at this time.² The Parties are to submit letters to the Court, not to exceed three single-spaced pages, within 14 days explaining whether the Court should consolidate this Action with Docket Number 17-CV-1839 or remand this Action back to state court. No extensions will be granted.

SO ORDERED.

DATED: July 20, 2017
White Plains, New York



KENNETH M. KARAS
UNITED STATES DISTRICT JUDGE

² Defendants are advised that it is not proper to make arguments for dismissal for failure to state a claim without first filing a premotion letter pursuant to the Court's Individual Rules. Moreover, the Order to Show Cause directed the Parties to answer a discrete question about jurisdiction, not to opine about the merits of the case.