20-3529-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

DENISE K. SHULL, THE RETHINK GROUP, INC.,

Plaintiffs-Appellants,

v.

TBTF PRODUCTIONS, INC., SHOWTIME NETWORKS INC,
CBS CORPORATION, BRIAN KOPPELMAN, DAVID LEVIEN,
DAVID NEVINS, ANDREW ROSS SORKIN,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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For the reasons set forth in the opening brief and in this reply brief, Plaintiffs-Appellants Denise Shull ("Shull") and The ReThink Group Inc. ("ReThink" and collectively, "Appellants") respectfully request that this Court reverse the orders of the District Court for the Southern District of New York (Hon. George B. Daniels) ("District Court") dismissing the Complaint and denying Appellants' Rule 59(e) and Fed. R. Civ. P. 60(b) motion, vacate the District Court's judgment, and remand for further proceeding allowing Appellants to file their First Amended Complaint against Defendants-Appellees Andrew Ross Sorkin ("Sorkin"), Brian Koppelman ("Koppelman"), David Levien ("Levien"), David Nevins ("Nevins"), TBFT Productions Inc. ("TBFT"), Showtime Networks Inc. ("Showtime"), and CBS Corporation ("CBS" and collectively, "Appellees").[1]

ARGUMENT

A. Appellants' Specifically Pled Claims of Actual Lay Observers' Apprehension of Substantial Similarity and Actual Consumer Confusion Were Not Addressed by the District Court and Are Avoided by Appellees.

Despite Appellees' recitation of an extensive summary of facts, in both the background and the argument sections of their brief, which itself shows the intensely factual nature of the dispute and the inappropriateness of the District Court's resolution of all disputed factual issues at the motion to dismiss/pleadings

[1] Appellees' Brief is referred to herein as "Appellees' Brf. at __" and the record on appeal is referred to herein as "A__".

stage, Appellees continue to avoid Appellants' undisputed factual allegations, including most conspicuously an extraordinary number of specifically identifiable lay observers who find the characters, if not the works, substantially similar. (A315, ¶ 25; A318, ¶ 40; A319, ¶¶ 45–46; A320, ¶ 48; A321–A322, ¶¶ 52–53; A324–A331, ¶¶ 59–72(i)–(xx)–73, ¶ 73; A333–A336, ¶¶ 87–101). (Appellees' Brf. at p. 22 citing to *Williams v. Crichton*, 84 F.3d 581, 587 (2d Cir. 1996) (The test for substantial similarity is "whether, in the eyes of the average lay observer, [one work is] substantially similar to the protectible expression in the [other].")).

Appellants' allegations are that *Billions* repeatedly and repetitively copies Shull's proprietary method through its character Wendy, and that method is integral to Appellants' expression in *Market Mind Games* and her persona generally, and is integral to Wendy and to the show and critical to her appearing particularly valuable to the hedge fund therein. See eg (A315, ¶ 25; A318, ¶ 40; A319, ¶¶ 45–46; A320, ¶ 48; A321–A322, ¶¶ 52–53; A324–A331, ¶¶ 59–72(i)–(xx)–73, ¶ 73; A333–A336, ¶¶ 87–101). The District Court did not specifically determine that Shull's unique *as-pled* method, combining neuroeconomics, modern psychoanalysis and neuropsychoanalysis and applying them to risk decision-making and performance coaching for hedge funds, was not proprietary, or that her book, "Market Mind Games, is the only book known to combine all three fields of study and apply them in the world of finance." (A19 at ¶20). The District Court

only found that "The idea of eating, sleeping, and exercising to perform well is not a novel one." (A300).

Shull's method as expressed in *Market Mind Games* is not de minimis to her work and her character, it is central, and its application to the character of Wendy and her scenes in Billions is not de minimis, but rather the basis of her believability and what differentiates her from the handful of more prosaic hedge fund coaches the District Court identified in its own independent internet research. *Warner Bros., Inc. v. American Broad. Cos., Inc.*, 720 F.2d 231, 240-41 (2d Cir. 1983) (discussing de minimis exception which allows for literal copying of a small and usually insignificant portion of the plaintiff's work).

For the viewer pleased by the idiosyncratic realism of *Billions*, not just its prurient aspects, the psychoanalytic method Wendy employs must be realistic. Similarly, Axe's financial analysis must be realistic. Chuck's legal machinations must be realistic. What is pleasing to that viewer about Wendy is the unique psychoanalytic method she applies to the hedge fund, which is only realistic because Appellants', and only Appellants, actually expressed and employed it before it was copied by Appellees. See eg (A16 ¶ 3; A19 at ⁋20; A20; ¶ 21, 23; A24-A25, ¶¶ 43-46); See *Arnstein v. Porter*, 154 F.2d 464, at 4473 (2d Cir.1946) ("defendant took from plaintiff's works so much of what is pleasing to [lay

observers] who comprise the audience for whom such [works are] composed, that defendant wrongfully appropriated something which belongs to the plaintiff.")

Infringement can be shown where there has been copying of anything material of substance and value. See e.g. *Atari, Inc. v. N. Amer. Phillips Consumer Elec. Corp.*, 672 F.2d 607, 614, 619 (7th Cir. 1982). So long as there has been copying of protected expression, no accused infringer can excuse the claimed wrong by showing how much of his work was not copied. *Id*. at 619. "It is enough that substantial parts were lifted; no plagiarist can excuse the wrong by showing how much of his work he did not pirate." Quoting *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir.), cert. denied, 298 U.S. 669, 56 S. Ct. 835, 80 L. Ed. 1392 (1936). Infringement may be found where the similarity relates to matter which constitutes a substantial portion of plaintiffs' work-i.e., matter which is of value to plaintiffs. 3 Nimmer § 13.03(A)(2), at 13-31 to -32; see also *Universal Pictures Co., Inc. v. Harold Lloyd Corp.*, 162 F.2d 354, 361 (9th Cir. 1947).

Here, Billions is copying a materially valuable portion of Appellants' work and thus infringing. *Tufenkian Import/Export Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 134 (2d. Cir. 2003) ("[T]he defendant may infringe on the plaintiff's work not only through literal copying of a portion of it, but also by parroting properties that are apparent only when numerous aesthetic decisions

embodied in the plaintiff's work of art . . . are considered in relation to one another.")

Laying aside that Appellees' factual summary reads like a prolix advertisement for their television program, at a bare minimum, Rule 12 does not permit ignoring Appellants' compelling, specifically pled evidence or indulging all inferences against the plaintiffs, let alone disregarding allegations of admissions of copying in the complaint. Fed R. Civ. P. 12; A21("¶26. In 2012, Defendant Sorkin invited Ms. Shull to appear on '*Squawk Box*.' In connection with this appearance, Ms. Shull learned that Mr. Sorkin had read *Market Mind Games* and was aware of the popularity of Ms. Shull and her unique approach to performance coaching and trading psychology."); A23 (with Defendants Koppelman and Levien present, ¶35…Ms. Siff stated that she was reading *Market Mind Games* and believed that the book would be an integral part of developing the character of Dr. Wendy Rhoades for the "*Billions*" television series.).

Not surprisingly, Appellees cite no precedent under similar circumstances of copying of an articulated and unique, original and proprietary method in a particular field, and in which the analysis of substantial similarity was performed at the pleadings stage. Their cases all go to *scènes à faire* and common background themes. (Appellees' Brf. pp. 23–25). They cite no precedent that would permit undercutting the Rule 12(b)(6) standard that Appellants' factual allegations in the

Complaint are accepted as true and the Court will draw all reasonable inferences in the nonmoving party's favor. Fed R. Civ. P. 12.

Here, Appellants' genuine, identifiable and specifically pled allegations of actual consumer confusion and lay observers' recognition of substantial similarity of Shull's methodology and persona should hold more weight at the motion to dismiss stage than the Court's personal analysis of substantial similarity. Indeed, as argued previously with regard to consumer confusion, even at summary judgment stage, a plaintiff need only show a likelihood of confusion to prevail, and actual confusion is the most substantial evidence. *Hypnotic Hats, Ltd. v. Wintermantel Enterprises, LLC*, 335 F.Supp.3d 566, at 589 (S.D.N.Y. 2018) citing *Savin Corp. v. Savin Group*, 391 F.3d 4839 (2d Cir 2004).

Appellees' procrustean review of the record further concedes that the District Court incorrectly rejected Appellants' factual allegations that *only she* employs her unique methodology as expressed in *Market Mind Games*, the utilization of which is known in her industry to be unique, and which, in conjunction with her overall persona, was unquestionably copied for the Wendy character in *Billions*. (A19, ¶ 20; A314, ¶ 20). The District Court instead reduced Appellants' content to "The idea of eating, sleeping, and exercising to perform well… in the context of any high-risk and high-stress setting, all three are necessary to performing well, and are thus scènes-à-faire" (A300). It did not credit

her as-pled factual allegations of unique and proprietary methodology (A19, ¶ 20; A314, ¶ 20) as expressed in her work and as embodied in her character, the copying of which is expanded upon in the FAC with additional allegations of similarities between *Market Mind Games* and *Billions,* including repeating scenes with specific interactions utilizing Shull's unique, proprietary, and exclusive methodology and copied by Appellees through their character "Wendy." (A323, ¶ 59–A329, ¶ 71). The District Court further reduced Shull to a two-dimensional character—a generic female hedge fund coach—after its "quick internet search" convinced it that there were "numerous in-house performance coaches who are currently on Wall Street" (A295). This internet search thus goes to the very heart of the District Court's erroneous application of the Rule 12 standard, and was not harmless error, as Appellees insist without even addressing the factual error to which this search contributed.

B. The District Court's "Quick Internet Search" Led It to a Simplified Concept of a Performance Coach without Providing Plaintiff Opportunity to Contest and Was Not Harmless Error.

The District Court drew improper factual inferences from its "quick internet search" that oversimplified the complexity of the Shull method and fictionalized character. Appellees argue that the District Court's "quick internet search" "merely confirmed that the idea of an in-house performance coach is not an original one." However, the District Court, in deciding to dismiss the complaint, had already

completed its analysis of originality using "the very *Dealbook* article" that was actually in the record. (A294). The District Court did not articulate a basis for taking judicial notice until reconsideration, when it asserted that, "[i]t is well settled within this Circuit that in reviewing a motion under Rule l2(b)(6), a district court 'may refer "to documents attached to the complaint as an exhibit or incorporated in it by reference to matters of which judicial notice may be taken or to documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit."" (citation omitted (A442–A443). The District Court footnoted that,

> Specifically, a routine internet search in further support of the conclusion that (1) it is common on Wall Street to use in-house performance coaches and (2) therefore, it is not reasonable for Plaintiff Shull to claim that she can copyright the idea of a female in-house performance coach. (See Oct. 4, 2019 Decision at 22-23.) The results of this search (*see id.*) as clearly articulated in this Court's previous decision, served solely to confirm the information and evidence that Plaintiffs themselves proffered to this Court in their opposition to Defendants' motion to dismiss, (see Decl. of Rosanne Elena Felicello. Ex. 4 (November 11, 2013 *Dealbook* Article). ECF No. 62-4).

(A442).

However, what the District Court really took judicial notice (A442–A443) of was a lumping of Shull with other individuals to whom it unilaterally decided she was similar. (A295) ("Denise Shull, Dr. Andrew Menaker, Steven Goldstein, Kenny Lissak, and Dr. Tara Swart are all performance coaches."). None of these other coaches are known or alleged to have met with Appellees in development of

Billions, nor is there any evidence that the Wendy character exploits their methodologies, whatever they might be, or is similar to them at all.

Appellees concede that, as shown in Appellants' opening brief, whether there are "numerous" performance coaches, or whether the other performance coaches cited by the District Court have some similarity to Shull are facts subject to reasonable dispute. The accuracy of the District Court's sources can reasonably be questioned, and Appellants were never provided an opportunity to argue against the District Court's position. Judicial notice that it is common to find in-house hedge fund coaches and therefore Appellants' female hedge fund coach is not protectable is a far cry from judicial notice of something so innocuous and inarguable as the time of sunset, existence of teardrop bodied instruments or that there are many types of yellow rain hats available for sale (Appellees' Brf. 37–38). Indeed, there would be little reason for the District Court to perform an internet search to confirm what it deems already established by the *Dealbook* article, and if the District Court were confirming that, then in fairness it should also address the extraordinary volume of evidence of actual confusion alleged by Appellants, which could be found on publicly available social media channels such as Twitter. The District Court erroneously took judicial notice of a simplified notion of a performance coach without giving Appellants opportunity to contest. This is especially problematic in light of Appellants' allegations that Shull's unique

methodology is central to her protectable content rather than Shull just being a generic female hedge fund coach.

And Appellees are simply incorrect in asserting that "Appellants never explain how that search had any substantive impact on the District Court's entirely correct substantial similarity analysis." (Appellees' Brf. p.38). The District Court's "quick internet search" elucidates the District Court's improperly constricted reading of Shull's allegations of proprietary content. The District Court allowed its inferences concerning generalized hedge fund coaches as stated by a couple of articles to have a pervasive effect on its view that it was entirely common and not novel at all to be a hedge fund coach employing the specific methods and practices pled by Appellants.

If the attributes of a hedge fund coach had been so common, it would not have been necessary for Appellees to meet with Shull and study her work. They too could have completed their research with a quick internet search. The difference is Shull's unique method, which is expressed in and integral to *Market Mind Games* and to Shull's persona and is pled to be copied by Appellees. See e.g. (A19, ¶ 20; A314, ¶ 20; A323, ¶ 59–A329, ¶ 71). The rest of the world could and did immediately see the unique similarities between Wendy and Ms. Shull and her fictionalized character (not the other generic hedge fund coaches shown by the

District Court's independent searching); only the District Court refused to see these compelling similarities.

C. Appellants' FAC Identifies Additional Points of Similarity and Should Be Given Opportunity to Re-Plead on That Basis and in the Interests of Judicial and Party Economy

Appellees also incorrectly argue that the FAC fails to identify additional points of similarity (Appellees' Brf. p. 41–43). The FAC does so substantially, along with pleading further allegations of actual consumer confusion. (A315, ¶ 25; A318, ¶ 40; A319, ¶¶ ¶ 45–46; A320, ¶ 48; A321–A322, ¶¶ 52–53; A324–A331, ¶¶ 59–72(i)–(xx)–73, ¶ 73; A333–A336, ¶¶ 87–101).

In essence, Appellees attempt to deny Appellants' opportunity to pursue their Lanham Act claims in this action before it even begins. Appellees concede Appellants remain free to bring yet another action, which demonstrates why dismissal is contrary to the interests of judicial and party economy,

While Appellants' counsel may not have formally requested leave to amend at the Rule 12 motion stage, as argued previously no formal motion was required, and Appellants plainly *did* address the issue to the District Court on oral argument and on motion to vacate and for reconsideration. (A444 at footnote 5; SPA 7 at footnote 5; A237, ln.13–15; A242, ln. 7–10; A251, ln. 15–20.) Rather than provide even one opportunity to amend, the District Court simply dismissed all claims

(A273–A306) and entered judgment just days later. (A307.) As argued in Appellants' opening brief, the District Court's denial of Appellants' non-futile FAC does not comport Second Circuit case law and is an abuse of discretion.

D. Appellees' Qualified First Amendment Defense Is Inherently Contradictory and They Have No First Amendment Defense.

Appellees insist that the Wendy character is not based on and owes nothing to Shull, but there can be no First Amendment protection for speech concerning a topic about which the party contends it is not speaking. See *Lois Vuitton Malletier v Warner Bros*, 868 F. Supp.2d 172 (S.D.N.Y. 2012) (where travel bag was a copy of the Louis Vuitton original); *Twin Peaks Productions, Inc. v. Publications Intern., Ltd.*, 996 F.2d 1366, 1379 (1993)(book was self-avowedly about the TV show); *Rogers v. Grimaldi*, 875 F.2d 994, 996-998 (2d Cir.1989) (subject film "story of two fictional Italian cabaret performers, Pippo and Amelia, who, in their heyday, imitated [Ginger] Rogers and [Fred] Astaire and became known in Italy as 'Ginger and Fred.'"). Appellees cannot have it both ways.

Appellees use Shull's signature method, appearance, and even her being from Ohio, and therefore are incorrect to argue that that they do not "*not* use Shull's name, place of residence, educational background, employment history, personal history, family history, voice, or physical likeness in *Billions* and the title, *Billions*, does not relate in any way to Shull." (Appellees' Brf. at p. 50). Indeed, as

pled and as previously argued, lay observers and consumers specifically see the Wendy character and her interactions as Shull and her persona. As alleged, *Billions* is using the Shull method and persona as a regular refrain to impose idiosyncratic realism on the Wendy character in her coaching scenes. Appellees' argument that Shull "bootstrapped" consumer confusion (Appellees' Brf. at p. 51) is false, but also shows that there is an issue of fact here, and using Appellants' proprietary and signature content is not protected by the First Amendment protection or properly decided at this stage under the circumstances.

In any event, District Court dismissed without weighing the multifactor Polaroid test for a qualified First Amendment defense. See *Twin Peaks, supra*; *Polaroid Corp. v. Polarad Electronics Corp.*, 287 F.2d 492, 495 (2d Cir. 1961), cert. denied, 368 U.S. 820 (1961). *Lois Vuitton Malletier,* supra at 177 (When applying these factors, courts should focus "on the ultimate question of whether consumers are likely to be confused.").

This Court should not undertake that analysis in the first instance in place of the District Court. *Twin Peaks*, supra at 379 ("Unfortunately, the District Court did not apply the Polaroid factors individually or determine whether the likelihood of confusion was so great as to overcome the presumption of Rogers. While we have occasionally endeavored to apply at least some of the Polaroid factors at the appellate level (citations omitted), we believe the better course in this case is a

remand to allow the District Court the opportunity to fully examine the factors relevant to likelihood of confusion.”).

In sum, Appellants respectfully request that this Court review District Court’s clearly erroneous assessment of the facts as pled and reverse its denial of a post-judgment motion for leave to replead as abuse of discretion and remand for further proceeding on Appellants’ FAC.

CONCLUSION

For the foregoing reasons, and those in Appellants' opening brief, the District Court's judgment dismissing this Action should be vacated and its decision denying Appellants' opportunity to file their First Amended Complaint should be reversed and the matter remanded to District Court.

Dated: New York, NY
February 25, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,238 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14 point font.

Dated: New York, NY
February 25, 2021

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