UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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KIT-YIN SNYDER AND RICHARD HAAS,

Plaintiffs,

22-CV-03873 (LAK)

v.

ERIC ADAMS, Mayor of the City of New York, in his official capacity, and **THE CITY OF NEW YORK**,

Defendants.

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DEFENDANTS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS THE COMPLAINT

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September 19, 2022

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

ARGUMENT 1

I. The Complaint does not Sufficiently Plead a Claim for a Violation of VARA. 2

A. Plaintiffs Have Not Adequately Pleaded a Violation of 17 U.S.C. § 106A(a)(3)(A). 2

1. Prejudice to Honor and Reputation is Not Adequately Alleged. 2

2. The Works are not all Visual Art and are Separate Pieces. 3

B. Plaintiffs Have Not Adequately Pleaded a Violation of 17 U.S.C. § 106A(a)(3)(B). 4

II. The Works are Covered by an Exception to VARA. 7

A. The Relocation of the Works Does Not Constitute a Violation of VARA. 7

B. The Works are Covered by the VARA Building Exception. 8

C. Upright's "Destruction" was a Result of the Passage of Time. 9

III. Plaintiffs' Request to Amend the Complaint Should Be Denied. 10

CONCLUSION 10

TABLE OF AUTHORITIES

Cases **Pages**

Ashcroft v. Iqbal,
556 U.S. 662, 129 S. Ct. 1937 (2009)....................1, 3

Bell Atl. Corp. v. Twombly,
550 U.S. 544, 127 S. Ct. 1955 (2007)....................1, 4, 6

Carter v. Helmsley-Spear, Inc.,
71 F.3d 77 (2d Cir. 1995)....................4

Carter v. Helmsley-Spear, Inc.,
861 F. Supp. 303 (S.D.N.Y. 1994),
aff'd in part, *vacated in part*, and *rev'd in part*, 71 F.3d 77 (2d Cir. 1995)....................3, 4, 5

Cheffins v. Stewart,
825 F.3d 588 (9th Cir. 2016) 4

Foman v. David,
371 U.S. 178 (1962)....................10

Holbrook v City of Pittsburgh,
18 Civ. 539, 2019 WL 4409694 (W.D. Pa. Sep. 16, 2019) 7

IMG Fragrance Brands, LLC v. Houbigant, Inc.,
679 F. Supp. 2d 395 (S.D.N.Y. 2009)....................5

Lucente v. IBM,
310 F.3d 243 (2d Cir. 2002)....................10

Martin v. City of Indianapolis,
982 F. Supp. 625 (S.D. Ind. 1997)....................5

McCarthy v. Dun & Bradstreet Corp.,
482 F. 3d 184 (2d Cir. 2007)....................10

Phillips v. Pembroke Real Estate, Inc.,
459 128 F.3d (1st Cir. 2006)....................7

Pollara v. Seymour,
344 F.3d 265 (2d Cir. 2003)....................4

Schnauder v. Gibens,
679 Fed. App'x 8 (2d Cir. 2017)....................6

Scott v. Dixon,
309 F. Supp. 2d 395 (E.D.N.Y. 2004) 5

Cases **Pages**

Tobin v. Rector,
17 Civ. 2622 (LGS), 2017 WL 5466705 (S.D.N.Y. 2017 November 14, 2017).......................8

Statutes

17 U.S.C. § 106A...1

17 U.S.C. § 106A(a)(3)(A) 1, 2, 9

17 U.S.C. § 106A(a)(3)(B) 1, 4, 8

17 U.S.C. § 106A(c)(1)..9

17 U.S.C. § 113(d) 8, 9

Fed. R. Civ. P 12(b)(6)..2, 6

Defendants, ERIC ADAMS, Mayor of the City of New York, in his official capacity and THE CITY OF NEW YORK (collectively "Defendants") by their attorney, HON. SYLVIA O. HINDS-RADIX, Corporation Counsel of the City of New York, submit this reply memorandum of law in further support of Defendants' motion to dismiss the Complaint ("Cmpl.").

PRELIMINARY STATEMENT

Defendants' motion to dismiss should be granted because Plaintiffs have not adequately alleged a violation of 17 U.S.C. § 106A ("VARA"). Plaintiffs do not allege how the Defendants' proposed deinstallation of the five works at issue in this action (the "Works") would prejudice their honor and reputation under section 106A(a)(3)(A). Further, although Plaintiffs argue to the contrary, the Works are not one work of visual art because there is no plausible allegation of collaboration, a common theme, or a common location. In addition, as a walkway, and thus a work of applied art, "Upright" is not visual art for the purposes of VARA.

Most fatal to their claim is the fact that Plaintiffs have failed to allege that the Works are of recognized stature as required by 17 U.S.C. § 106A(a)(3)(B). Tellingly, the Works have received only one piece of recognition in 30 years – an award granted by the City, the entity that commissioned the Works. Finally, exceptions to VARA – for relocation and for works incorporated on a building prior to VARA's effective date – apply to the Works. Accordingly, Plaintiffs' Complaint must be dismissed in its entirety, and Plaintiffs' tardy request to file a motion for leave to amend should be denied as any such amendment would be futile.

ARGUMENT

On a motion to dismiss, it is not enough that the Plaintiffs offer "labels and conclusions or a formulaic recitation of the elements of a cause of action…[or] naked assertions devoid of further factual enhancement." *Ashcroft v. Iqbal*, 556 U.S. 662, 662, 129 S. Ct. 1937, 1942 (2009). *See also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 548, 127 S. Ct. 1955, 1961 (2007) ("While a complaint

attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations…a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do."). Yet, that is precisely what Plaintiffs have done here and, thus, the Complaint must be dismissed.

I. The Complaint does not Sufficiently Plead a Claim for a Violation of VARA.

A violation of VARA requires allegations either that a work of visual art has been intentionally distorted, mutilated or modified in a way which "would be prejudicial to [the artist's] honor or reputation," (17 U.S.C. § 106A(a)(3)(A)) or that a work of recognized stature has been grossly or negligently destroyed. *Id*. at 106A(a)(3)(B). As set forth below, Plaintiffs have failed to adequately plead a violation of either 17 U.S.C. § 106A(a)(3)(A) or (B).

A. Plaintiffs Have Not Adequately Pleaded a Violation of 17 U.S.C. § 106A(a)(3)(A).

1. Prejudice to Honor and Reputation is Not Adequately Alleged.

Plaintiffs do not adequately allege that Defendants have or will intentionally distort, mutilate, or modify the Works in a manner that would prejudice Plaintiffs' honor or reputation. To support their claim of such harm, Plaintiffs simply offer self-serving platitudes that Haas's portion of the Works is his "most important and preserved works of cultural significance and community value," while Snyder's portion is "one of her most prided works." Cmpl. ¶¶39, 49. Yet, Plaintiffs fail to explain how Defendants' preservation of the Works, or documentation of the Works that cannot be preserved due to the demolition of the Manhattan Detention Complex ("MDC"), together with proposed relocation or reproduction of the Works in consultation with Plaintiffs, constitutes an intentional distortion, mutilation or modification that will harm Plaintiff Snyder's pride in her work or the cultural significance and value of Plaintiff Haas's work. Nor have Plaintiffs detailed how the demolition of a City jail complex adversely impacts their personal honor and

reputation as artists. *Id.* ¶79. These statements, without anything else – including a discussion of the harm they allege they will suffer – are insufficient to defeat a motion to dismiss.

While Plaintiffs argue that prejudice to the artists is a "fact-intensive inquiry that is not resolvable on a pre-answer motion to dismiss," and cite for alleged support to two non-binding cases that addressed the issue on summary judgment motions, they are wrong. Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss ("Pls. Op.") at 14. All complaints, irrespective of the claims being asserted, are subject to the motion to dismiss standard set forth by the Supreme Court in *Iqbal.* That standard requires a court to reject "threadbare recitals" of the elements of a cause of action "supported by mere conclusory statements," and requires "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678. In this District, with regard to "honor or reputation," the courts have noted that they "consider whether [the proposed] alteration would cause injury or damage to plaintiffs' good name, public esteem, or reputation in the artistic community." *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 323 (S.D.N.Y. 1994), *aff'd in part*, *vacated in part*, and *rev'd in part*, 71 F.3d 77, 83 (2d Cir. 1995). Plaintiffs have failed to plead how Defendants' efforts to preserve and/or reproduce the Works will damage their "good names" or reputation in the public or artistic community.[1]

2. <u>The Works are not all Visual Art and are Separate Pieces.</u>

Plaintiffs argue that where there are multiple pieces of artwork in the same general location, the pieces of artwork may be considered to be "multiple components of a single work of art for determining whether the sum is a 'work of visual art.'" Pls. Op. at 17. In support, Plaintiffs cite to

[1] This abject failure to provide anything other than "threadbare recitals" that their honor and reputation are prejudiced (*see* Cmpl. ¶¶79, 85) differs, for example, from the *Buchel* and *Leveille* cases cited by Plaintiffs which were addressed on summary judgment motions. In *Buchel*, the plaintiff affirmatively set forth that a museum had altered his work without consent, displayed it, and then received negative reactions to it. As for *Leveille*, the plaintiff set forth that the defendant altered or modified the artwork by shooting, signing, and writing derogatory remarks on the artwork and then widely distributing the images of the altered artwork on social media.

Carter v. Helmsley-Spear, Inc., 71 F.3d 77 (2d Cir. 1995). Yet, *Carter* is inapposite as the works at issue in that case were "a very large 'walk-through sculpture' occupying most, but not all, of the building's lobby." *Id.* at 80. The works consisted of one sculpture with multiple parts with a unified theme and the sculptors worked together, operating under a single name. *Id.*

To the contrary, the Works are not located near each other, do not all share a common theme, and there is no allegation that Plaintiffs Haas and Snyder worked together while creating their individual pieces of art. The argument that the Works are spatially[2] or thematically[3] related is one that the Court previously found to be unconvincing.

Further, as a walkway, "Upright" is applied art and not visual art. *See Pollara v. Seymour*, 344 F.3d 265, 269 (2d Cir. 2003) ("VARA may protect a sculpture that looks like a piece of furniture, but it does not protect a piece of utilitarian furniture, whether or not it could arguably be called a sculpture."); *see also Cheffins v. Stewart*, 825 F.3d 588, 594 (9th Cir. 2016) ("an object constitutes a piece of 'applied art'—as opposed to a 'work of visual art'—where the object initially served a utilitarian function and the object continues to serve such a function….").

B. Plaintiffs Have Not Adequately Pleaded a Violation of 17 U.S.C. § 106A(a)(3)(B).

With regard to Plaintiffs' claim under 17 U.S.C. § 106A(a)(3)(B), Plaintiffs simply allege in a conclusory fashion that the Works are of recognized stature. Cmpl. ¶¶35, 81-83. Yet, as noted above, such "a formulaic recitation of a cause of action's elements will not do." *Bell Atl. Corp.*, 550 U.S. at 548. Noticeably absent from the Complaint, as well Plaintiffs' opposition, is a citation to any specific facts that support such a formulaic legal recital.

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[2] Specifically, the Court noted that "In any case, I don't find the general location argument at all persuasive." Declaration of Genan F. Zilkha in Support of Defendant's Motion to Dismiss ("GFZ Dec.") Exhibit ("Ex.") F at 48:12-13.

[3] *See* GFZ Decl. Ex. F at 47:4-9.

Plaintiffs argue that they have "adequately plead facts to satisfy" the two prongs set forth in *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303 (S.D.N.Y. 1994) that the Works have "stature" and that this stature is "recognized" by art experts or a cross-section of society. Pls. Op. at 10. They further claim that the Complaint contains "detailed allegations supporting that the Artwork is of high quality, status, and caliber that has been acknowledged as such by the relevant community." *Id.* Yet, contrary to their conclusory claims, the allegations set forth in the Complaint regarding the stature of the art are by no means "detailed," nor do they "support" that the Works are of recognized stature in the relevant community. *See* Cmpl. ¶¶35, 81-83.

While the Complaint lists numerous accolades that were personally received by the Plaintiffs, it lists only one award that the Works received in over 30 years (*Id.* at ¶¶4 and 35) conveyed by the City of New York, the entity that commissioned the Works. Plaintiffs cite to no independent publications, awards, or statements from art critics, art historians, or others, discussing the significance of the Works. *Compare Martin v. City of Indianapolis*, 982 F. Supp. 625, 631 (S.D. Ind. 1997) (recognized stature evidenced by "statements contained within the proffered newspaper and magazine articles and letters…offered by Martin to show that respected members of the art community and members of the public at large consider Martin's work to be socially valuable and to have artistic merit…"). At most, the Complaint contains "'naked assertion[s]' devoid of 'further factual enhancement.'" *IMG Fragrance Brands, LLC v. Houbigant, Inc.*, 679 F. Supp. 2d 395, 402 (S.D.N.Y. 2009) (citations omitted).

Artist reputation may contribute to "recognized stature," such as a "newly discovered Picasso [that] is not within the scope of VARA simply because it has not been reviewed by experts in the art community." *Scott v. Dixon*, 309 F. Supp. 2d 395, 400 (E.D.N.Y. 2004). However,

Plaintiffs have not received a level of acclaim where their reputations alone are sufficient to afford VARA protection to each piece of work they produce.

To try and save their deficiently pled Complaint from dismissal, Plaintiffs argue that the question of "recognized stature" is dependent on the testimony of experts and that it is premature to provide such information now. Pls. Op. at 12. First, the promise of future discovery cannot save a claim from dismissal on a Rule 12(b)(6) motion. *See Schnauder v. Gibens*, 679 Fed. App'x 8, 10 (2d Cir. 2017) (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. at 556) (Conclusory "allegations are insufficient to sustain or 'raise a reasonable expectation that discovery will reveal evidence' in support of his claim."). Second, it bears noting that at the April 11, 2022 hearing held by the New York City Public Design Commission ("PDC"), regarding the removal of the Works, Kerri Culhane,[4] an architectural historian, only spoke about how the demolition of the MDC will impact the Chinatown community.[5] Ms. Culhane did not attest that the Works are of "recognized stature" in the art community. That omission is telling.

Finally, Plaintiffs do not adequately allege that Defendants have or will "grossly or negligently destroy" the Works. Instead, paragraphs 87 - 89 of the Complaint, which Plaintiffs reference in their opposition as supporting this claim, only say that the two pieces entitled "Upright" and "Immigration on the Lower East Side of New York" (hereinafter "Immigration") are part of the public plaza adjacent to the MDC, that removing them will "cause the work's destruction, distortion, mutilation or modification[,]" and that Plaintiffs did not consent to such. At no point in the Complaint, though, do Plaintiffs claim that Defendants intend to "grossly or negligently" destroy anything, nor could they, as this Court is well aware that the removal,

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[4] Ms. Culhane also submitted a declaration in support of Plaintiffs' motion for a preliminary injunction.
[5] *See* Video of April 11, 2022 meeting https://youtu.be/r3pkQh9Q1Zk at 1:04:21 (last accessed May 16, 2022).

reproduction and/or relocation of the Works, all of which will be in consultation with the artists, is necessitated solely by the fact that the MDC is being demolished. *See generally* Cmpl.

II. The Works are Covered by an Exception to VARA.

A. The Relocation of the Works Does Not Constitute a Violation of VARA.

Plaintiffs argue that the Works are not covered by the VARA relocation exception because (1) "Upright" and "Immigration" will be completely "destroyed;" and (2) the remaining pieces of the Works will be "mutilated and distorted in such a way that [they] will no longer be recognizable as the Plaintiffs' work…." Pls. Op. at 20. Both arguments fail.

First, while "Upright" and "Immigration" cannot be salvaged due to the fact that they are inextricably connected to the portions of the MDC that are being demolished, Plaintiffs ignore the fact that Defendants were required to "work with the artist to develop a proposal to share the artwork with the public either at the new jail facility or another appropriate location approved by the artist." Declaration of Genan F. Zilkha in Support of Defendant's Motion to Dismiss ("GFZ Dec.") Exhibit ("Ex.") E at 037 and 039. These pieces cannot be salvaged but they will be reproduced in close consultation with Plaintiffs. *See* GFZ Dec. Ex. D at 010.

Similarly misguided is Plaintiffs' argument that the remaining pieces of the Works will be "mutilated and distorted." Pls. Op. at 20. As the Plaintiffs are aware, Defendants have previously represented that these remaining pieces of artwork will be carefully salvaged and "[r]e-install[ed]…in consultation with artist." GFZ Dec. Ex. D at 009. As for Plaintiffs' argument that the relocation of the remaining pieces of artwork somehow constitutes "mutilation" or "distortion" in and of itself, they cite to no case law to support such an expansive reading of VARA.[6] And, in fact, courts have found the opposite. *See, e.g., Phillips v. Pembroke Real Estate, Inc.*, 459 128

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[6] The only case Plaintiffs cite to discusses "distortion" and "mutilation" but does not discuss relocation. *See Holbrook v City of Pittsburgh*, 18 Civ. 539, 2019 WL 4409694 (W.D. Pa. Sep. 16, 2019).

F.3d, 143 (1st Cir. 2006) ("[T]he plain language of VARA does not protect site-specific art. If such protection is necessary, Congress should do the job."); *see also Tobin v. Rector*, 17 Civ. 2622 (LGS), 2017 WL 5466705 (S.D.N.Y. 2017 November 14, 2017).

Even if such relocation did constitute a "distortion" or "mutilation" (which it does not), this claim fails because a violation of 17 U.S.C. § 106A(a)(3)(B) requires an allegation of intentional or grossly negligent destruction. Plaintiffs have not alleged gross negligence. Moreover, any allegation of "intentional" destruction is conclusory and lacking factual support. *see* Cmpl. ¶56 ("However, the Artwork has been incorporated in and made part of 124-125 White Street in such a way that removing it, or any part thereof, from 124-125 White Street would cause its destruction, distortion, mutilation or modification."). Any specific allegations of intentional destruction only relates to the removal of "Upright" and "Immigration." *See id*. at ¶59. Although Plaintiffs do allege intentional destruction with regards to these two pieces, they also admit that these pieces will be documented and reproduced. *Id.* Defendants have diligently worked to document and preserve the Works and have represented that any relocation or recreation will be in consultation with Plaintiffs.

B. The Works are Covered by the VARA Building Exception.

Plaintiffs argue "Immigration" does not fall within the VARA building exception. Pls. Op. 22. They are incorrect. Under 17 U.S.C. § 113(d), a work is not protected by VARA if it has been "incorporated in…a building" such that removing the work will cause "destruction" of the work and the "**author consented to the installation of the work in the building…before the effective date**" of VARA (emphasis added).

Plaintiffs claim they never "consented to the destruction of their Artwork either before or after the effective date of VARA…." Pls. Op. at 22. That is not the standard. All that is required for a work to be covered by the VARA building exception is an agreement, executed before VARA

became effective, for work to be placed on a building. The agreement governing the Works was executed in 1987, before VARA became effective, and the Plaintiffs clearly consented to the installation of the artwork at the MDC. Therefore, under the plain language of 17 U.S.C. § 113(d), the building exception applies. Plaintiffs' argument that the repainting of a panel of "Immigration" after the VARA effective date somehow brings it outside of the purview of the building exception is incorrect. Under the VARA building exception, the only date that matters is the date the agreement was executed. In this case, that date precedes the effective date of VARA.[7]

C. Upright's "Destruction" was a Result of the Passage of Time.

Under 17 U.S.C. § 106A(c)(1), the modification of a "work of visual art which is a result of the passage of time or the inherent nature of the materials is not a distortion, mutilation, or other modification described in subsection (a)(3)(A)." Thus any claim brought with regards to the destruction of "Upright" under 17 U.S.C. § 106A(a)(3)(A) fails as a matter of law because of the poor condition of "Upright" as a result of the passage of time. GFZ Dec. Ex. C at 030.

Although Plaintiffs argue that the deterioration of the work has been "intentionally caused by Defendants, who were contractually responsible for maintaining the Artwork" (Pls. Op. at 23) and that "[a]ny 'poor' condition of the Artwork was caused by the City's intentional act of causing the Artwork to be used as a parking lot for City workers," (*Id.* at 24) there is **no allegation of either intentional or gross negligent destruction** leading to Upright's deterioration in the Complaint. In fact, there is no allegation in the Complaint whatsoever that "Upright" was used as

[7] As already noted in Defendants' initial moving papers, to the extent the Court credits Plaintiffs' argument that all of the pieces of artwork constitute a single work, then the building exception to VARA would apply to all of the Works, a fact acknowledged by the Court itself during the preliminary injunction hearing. GFZ Dec. Ex. F at 52:1-3 ("were I to find that this were a single work of visual art, there would be a substantial chance that the plaintiffs would lose under the building exception") In response, Plaintiffs simply offer rote, unsupported objections that such an interpretation is "contrary to the spirit of VARA" and is "rigid and dogmatic." Pls. Op. at 22-23. Simply put, Plaintiffs cannot have it both ways - that the Works are part of the MDC and one work of art when it suits them, but that the Works are separate and not part of the MDC when it does not.

a parking lot. Since Plaintiffs have not alleged intentional or gross negligent destruction with regards to the condition of Upright, they have not adequately pleaded a violation of VARA.

III. <u>Plaintiffs' Request to Amend the Complaint Should Be Denied.</u>

Plaintiffs request leave to file a motion to amend the Complaint should any portion of Defendants' motion to dismiss be granted. Pls. Op. at 24-25. This request should be denied. The Court has discretion to grant or deny a motion for leave to amend a complaint. *McCarthy v. Dun & Bradstreet Corp.*, 482 F. 3d 184, 200 (2d Cir. 2007). While leave to amend "shall be freely given when justice so requires," a court may "deny leave for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party." *Id.* (*citing Foman v. David*, 371 U.S. 178, 182 (1962)). A proposed amendment is considered futile if it fails to state a claim. *See Lucente v. IBM*, 310 F.3d 243, 258 (2d Cir. 2002).

Here, any proposed amendment would be futile. Plaintiffs have failed to sufficiently allege how their "honor or reputation" will be damaged or that the Works have recognized stature. Plaintiffs' failure to allege either is fatal to their claim for a violation of VARA. Allowing Plaintiffs to amend their Complaint will not cure these underlying flaws in their pleadings which, in the end, cannot be rectified. they should not be permitted leave to file a motion to amend the Complaint.[8]

<u>CONCLUSION</u>

For the foregoing reasons, Defendants respectfully request that this Court dismiss the Complaint in its entirety, together with other and further relief as this Court deems just and proper.

[8] Plaintiffs previously represented to Defendants and the Court that they would amend their Complaint by July 8, 2022 (*see* ECF Dkt. 30). By letter dated July 15, 2022, Plaintiffs notified the Court that they "decided not to amend the complaint…prior to receiving Defendants Mayor Eric Adams and the City of New York's response to the complaint." No amended complaint was filed in response to Defendants' response to the complaint.

Dated: New York, New York
September 19, 2022

By: ________/s/__________________________
Gati Dalal
Genan Zilkha
Assistant Corporation Counsels