
11-2558

In the United States Court of Appeals
for the Eighth Circuit

CURTIS J. NEELEY, JR.

Plaintiff-Appellant

v.

NAMEMEDIA, INC. AND GOOGLE, INC.

Defendants-Appellees

On Appeal from the United States District
Court for the Western District of Arkansas

The Honorable Jimm Larry Hendren

BRIEF OF APPELLEE NAMEMEDIA, INC.

H. William Allen
Brooks C. White
ALLEN LAW FIRM
212 Center Street, 9th floor
Little Rock, AR 72201
(501) 374-7100

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SUMMARY OF THE CASE

Appellant Curtis J. Neeley, Jr. (“Neeley”) is a *pro se* litigant who filed a complaint - amended twice - asserting multiple claims against Appellee NameMedia, Inc. (“NameMedia”) and others. The district court denied Neeley’s motion for leave to amend his complaint a third time, concluding that the proposed amendment should not be allowed under this Court’s standard for amendment of pleadings set forth in *Dennis v. Dillard Department Stores, Inc.*, 207 F.3d 523 (8th Cir. 2000). Neeley appeals from the district court’s denial of his motion for leave to amend. The district court did not abuse its discretion in denying Neeley’s motion.

Neeley also appeals from the district court’s dismissal of his copyright infringement claims related to certain nude photographs he posted on a website owned by NameMedia. It is undisputed that Neeley has no registration as to the photos. The district court also construed 17 U.S.C. §106A, dealing with moral rights as to certain original works of art, to afford Neeley no relief as to any conduct of NameMedia as to the photographs. The district court’s interpretation of the statute was in all respects correct and should be affirmed.

NameMedia does not believe oral argument is necessary for disposition and thus respectfully request that it not be scheduled.

CORPORATE DISCLOSURE STATEMENT

NameMedia is a private company with no parent company. No publicly held corporation owns 10% or more of its stock.

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STATEMENT OF JURISDICTION

The district court has subject matter jurisdiction over this action under the federal-question statute, 28 U.S.C. § 1331, because the appeal involves claims for copyright infringement under the U.S. Copyright Act, 17 U.S.C. § 101 *et seq.*

As there remain no claims below to be adjudicated, the issues Neeley appealed are ripe for decision by this Court.

STATEMENT OF THE ISSUES

1. Whether the district court erred in dismissing Neeley's copyright claims without prejudice due to Neeley's lack of registrations.

17 U.S.C. §411(a)

Action Tapes, Inc. v. Mattson, 462 F.3d 1010 (8th Cir. 2006)

2. Whether the district court erred in construing 17 U.S.C. §106A such that Neeley's photographs are given no protection as to any alleged conduct by NameMedia.

17 U.S.C. §106A

17 U.S.C. §101

3. Whether the district court abused its discretion in denying Neeley's motion to amend his complaint a third time.

Dennis v. Dillard Department Stores, Inc., 207 F.3d 523 (8th Cir. 2000)

Williams v. Little Rock Mun. Water Works, 21 F.3d 218 (8th Cir. 1994)

STATEMENT OF THE CASE AND THE FACTS

Neeley appeals from only two of the district court's rulings. First, he appeals from dismissal of his copyright claims, which center upon certain nude photographs which he chose to post to photo.net, a website now owned by NameMedia which allows individuals to post their photographs for viewing by others. At some point, Neeley decided that he did not want the photos to be visible on the internet with his name associated with them, and became upset when search engine image searches returned the photos with a search on his name. He sued NameMedia for copyright infringement related to the photos, despite the fact that he has no registration for any of them. Due to the lack of registration, the district court dismissed his ordinary infringement claims without prejudice. Additionally, Neeley argued infringement of certain moral rights under 17 U.S.C. §106A as to the photos. The district court held that Neeley's photos were not given any protection under this statutory provision as to any electronic publication of them by NameMedia.

Secondly, Neeley appeals from the district court's denial of his motion for leave to amend his complaint a third time. After he had been allowed to amend his initial complaint twice, Neeley moved to amend his complaint yet a third time, and the district court denied the motion. The added claims and allegations in the proposed amended complaint (Docket #111-1) were poorly enunciated, so it is difficult to ascertain precisely what, if anything, is substantively asserted against NameMedia or Google that was not contained in the live complaint (Docket #53). The proposed amendment *may* have added claims for the tort of outrage against NameMedia and/or Google which were not in the original complaint. The only clearly ascertainable difference was the naming of several new defendants. It appears that most of the additional defendants were owners or operators of search engines which also allegedly returned the photographs with searches on Neeley's name. The proposed third amended complaint also contained a somewhat nebulous claim against ICANN, Inc.

SUMMARY OF ARGUMENT

The district court properly held that Plaintiff has no viable copyright claim, because he has no registration and because the photographs are given no protection under 17 U.S.C. §106A, either in general or as to any alleged conduct of NameMedia. Under the plain language of 17 U.S.C. §411, lack of registration precludes a suit for infringement. As to Section 106A, the photographs are not “works of visual art” within the definition of 17 U.S.C. §101, so they do not belong to the class of protected works under Section 106A. Second, even if the photographs themselves did qualify as “works of visual art”, Subsection(c)(3) provides that Section 106A’s protections do not extend to certain reproductions of the “work of visual art” – specifically, those enumerated in subparagraph (A) of 17 U.S.C. §101. Included in subparagraph (A) is any “electronic publication.” By the plain language of the statute, the appearance of the photos on the internet is an “electronic publication.” Therefore, in any event, Section 106A does not apply to any publication of the photos on the internet, and the district court’s interpretation of the statute is correct.

The district court also properly refused to allow Neeley to further multiply these proceedings by filing a third amended complaint containing nothing but frivolous additions which would have had no chance of succeeding on the merits. The district court properly applied this Court's standards for evaluating a proposed amendment, and did not abuse its discretion in refusing to allow Neeley to once again amend his complaint.

STANDARD OF REVIEW

The dismissal of Neeley's copyright claims involves only questions of statutory interpretation and thus is reviewed *de novo*. See, e.g., *Norwest Bank, N.D. v. Doth*, 159 F.3d 328, 332 (8th Cir. 1998). The denial of Neeley's motion for leave to amend is reviewed for abuse of discretion. See, e.g., *Krispin v. May Department Stores Co.*, 218 F.3d 919, 924 (8th Cir. 2000).

ARGUMENT

I. The District Court Correctly Applied the Applicable Statutes in Dismissing Neeley's Copyright Claims.

The district court dismissed Neeley's ordinary copyright infringement claims without prejudice in its Order dated March 1, 2010 (Docket #97). Furthermore, in its Order dated June 7, 2011 (Docket #267), the Court ruled that Neeley had no claim for relief under 17 U.S.C. §106A. Neeley's lack of any registration of any copyright clearly bars his claims for ordinary copyright infringement under the plain language of 17 U.S.C. §411(a). *See Action Tapes, Inc. v. Mattson*, 462 F.3d 1010, 1013 (8th Cir. 2006), *citing Olan Mills, Inc. v. Linn Photo Co.*, 23 F.3d 1345, 1349 (8th Cir. 1994) (lack of registration precludes action for infringement). Therefore, Neeley has no viable copyright claim unless the photos fit within the class of works defined as "works of visual art" under 17 U.S.C. §101, so that he is afforded the moral rights set forth in 17 U.S.C. §106A. Neeley's brief contains only a short, obtuse argument as to why he believes the district court misinterpreted Section 106A and that he is entitled to relief for any act taken by NameMedia as to the photos. As best as NameMedia can tell, Neeley

argues, in an entirely conclusory fashion, that Congress did not intend for electronic publications of photographs on the internet to be excluded from Section 106A's protections because Congress could not have contemplated the internet in 1990 when it passed the Visual Artists Rights Act.

The first threshold which Neeley must meet in order for his photos to be protected under Section 106A is that they meet the definition of a "work of visual art" set forth in Section 101. The only type of photograph which meets the definition of a "work of visual art" under the language of Section 101 is "a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author." There is no evidence, or even an allegation, for that matter, that the photos in question either exist in a single copy signed by Neeley, or were produced in limited editions of 200 copies or fewer signed and consecutively numbered. Therefore, by the plain language of the statute, Neeley's photos do not even meet the threshold requirement for protection under Section 106A.

Furthermore, even it is assumed solely for purpose of argument that the photos do meet the definition of a “work of visual art”, Section 106A does not protect against their electronic publication on the internet. As observed by the district court, Section 106A(c)(3) provides that the rights afforded under Section 106A(a)(1) and (a)(2) do not apply to “any reproduction, depiction, portrayal, or other use of a work in, upon, or in any connection with any item described in subparagraph (A) or (B) of the definition of ‘work of visual art’ in section 101.” Section 106A(c)(3) further provides that “any such reproduction, depiction, portrayal, or other use of a work is not a destruction, distortion, mutilation, or other modification described in paragraph (3) of subsection (a).” In turn, the list of items in Section 101, subparagraph (A)(i) includes any “electronic publication.” Therefore, under the plain language of Section 106A, an electronic publication of a “work of visual art” is not an act which violates any of the rights given to the artist under Section 106A. A court’s task in interpreting legislation is to start with the plain meaning of its words, and only if the statute is ambiguous does this Court look to the legislative history to determine Congress's intent. *See United States v. Maswai*, 419 F.3d 822, 824 (8th

Cir. 2005). By the plain and ordinary meaning of the words “electronic” and “publication”, the appearance of the photos on the internet is an “electronic publication” of the photographs, which is an act that does not violate any rights Neeley might otherwise have in the photos under Section 106A.

It appears that there are few reported cases construing Section 106A as applied to photographs, but the case of *Martin v. Walt Disney Internet Group*, 96 U.S.P.Q. 2D (BNA) (S.D. Cal. 2010) is instructive. There, the court dismissed plaintiff’s claims under Section 106A where the defendants published her photograph in a magazine. The court noted that “magazine” was one of the items listed in subparagraph (A)(i) of Section 101. This is the same subparagraph which lists “electronic publication.” The court stated that “[i]n this case, the plain language of Section 106A(c)(3) excludes Defendants’ actions from VARA protection because Defendants reproduced and published Plaintiff’s photograph in a magazine.” *Id.* The court also looked to the legislative history of Section 106A, which indicated that it was intended to protect the original work of art. The court cited H.R. Rep. No. 101-514, which

states that “[i]t is the original or limited edition still photographic image, whether in print or negative form, that garners the rights VARA bestows.”

Therefore, because Neeley has no registration for any of the photos, and because Section 106A does not provide any rights to Neeley as to any conduct of NameMedia with regard to the photos, the district court properly dismissed Neeley’s copyright claims.

II. The district court Did Not Abuse Its Discretion in Denying Neeley’s Motion for Leave to Amend His Complaint a Third Time.

As correctly observed by the district court in its order denying leave to amend a third time (Docket #125), to the extent the claims in the proposed third amended complaint were different from those in the live complaint, they would have been subject to summary dismissal. Leave to amend may be withheld where if the plaintiff does not have at least colorable grounds for relief, or is guilty of undue delay, bad faith, dilatory motive, or if permission to amend would unduly prejudice the opposing party. *See Williams v. Little Rock Mun. Water Works*, 21 F.3d 218, 224 (8th Cir. 1994), *citing Foman v. Davis*, 371 U.S. 178, 182, 9 L.

Ed. 2d 222, 83 S. Ct. 227 (1962). This Court has also stated that “[a] district court can refuse to grant leave to amend a pleading only where it will result in “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment.” See *Dennis v. Dillard Department Stores, Inc.*, 207 F.3d 523, 525 (8th Cir. 2000).

In his brief, Neeley does not even appear to argue that the district court misapplied this Court’s standards for evaluating a proposed amended pleading. Instead, he argues that this Court’s standards are wrong and should be modified. Specifically, he argues that this Court should get rid of the requirements that the amendment not spring from a bad-faith or dilatory motive, and that the amendment not come in the face of repeated failure to cure deficiencies by amendments previously allowed (see Neeley’s brief, p. 24). His only explanations as to why the Court’s standards are improper are that the “bad faith or dilatory motive” factor violates the Seventh Amendment, and the “repeated failure to cure” factor also violates the Seventh Amendment and “puts

judges in the position of a king.” These arguments are so patently meritless and unsupported by authority that no further discussion is necessary.

The district court was well within its discretion in refusing to allow Neeley to file an amended complaint which added no meritorious claims and would have thus been futile.

CONCLUSION

For the foregoing reasons, this Court should in all respects affirm the district court as to its dismissal of Neeley’s copyright claims – both for ordinary copyright infringement and for violation of moral rights under 17 U.S.C. §106A – and as to its denial of Neeley’s motion for leave to file a third amended complaint.

September 12, 2011

Respectfully submitted,

/s/ Brooks C. White
Brooks C. White
ALLEN LAW FIRM
212 Center Street, 9th floor
Little Rock, AR 72201
(501) 374-7100
Attorneys for Appellee
NameMedia, Inc.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B) and (C), and Eighth Circuit Rule 28A(c) I hereby certify that the foregoing brief is proportionately spaced, has a typeface of 14 points or more, and contains 2,593 words. I used Microsoft Word 2007 to prepare this brief.

/s/ Brooks C. White
Brooks C. White

CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2011, I electronically filed the foregoing Brief of Appellee NameMedia, Inc. with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Pursuant to Eighth Circuit Rule 28A(d), I will serve a paper copy of the Brief on the *pro se* Plaintiff/Appellant, Curtis J. Neeley, Jr., within five days of receipt of the notice from the Clerk that the brief has been filed, at his address of 2619 North Quality Lane, Apartment 123, Fayetteville, Arkansas 72703.

/s/ Brooks C. White
Brooks C. White