

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

SCOTT GUNNELLS, an individual,

Plaintiff,

v.

MICHAEL JOSEPH TEUTUL, an individual;
PAUL TEUTUL, an individual; ORANGE
COUNTY CHOPPERS, INC., a New York
Corporation; DISCOVERY, INC., a Delaware
Corporation.; PILGRIM MEDIA GROUP,
LLC, a Delaware Limited Liability Company;
and DOES 1-10,

Defendants.

Civil Action No.: 1:19-cv-05331-JSR

Civil Action No.: 1:19-cv-05312-JSR

**PLAINTIFF'S BRIEF IN SUPPORT OF
REINSTATING HIS ACTIONS
AGAINST MICHAEL JOSEPH
TEUTUL, PAUL TEUTUL, AND
ORANGE COUNTY CHOPPERS, INC.**

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I. INTRODUCTION

Pursuant to the Court's January 3rd order (*see* Dkt. #48)¹, Plaintiff Scott Gunnells ("Plaintiff" or "Gunnells") respectfully requests that this Court reinstate the action to allow Gunnells to move for default judgment against Defendants Michael Teutul ("Mikey Teutul"), Paul Teutul ("Paul Teutul"), and Orange County Choppers, Inc. ("OCC").

II. RELEVANT FACTS AND PROCEDURAL HISTORY

A. Factual Background.

Gunnells is a photographer based in Pennsylvania and the author of a large portfolio of photographic works. (FAC ¶¶ 10, 13, 16, 19, 22, 25, 28, 31, 34, 37.) Gunnells photographed Mikey Teutul, creating a series of photographs (the "Teutul Photographs"). (FAC ¶¶ 13, 16, 19, 22, 25, 28, 31, 34, 37.) The Teutul Photographs are the photographs at issue in this action. *Id.* Gunnells registered the Teutul Photographs with the United States Copyright Office and received an approved registration certificate. *Id.*

In October of 2017, Gunnells discovered that Mikey Teutul, Paul Teutul, and OCC were exploiting the Teutul Photographs to promote various events, displaying the Teutul Photographs on the television show *American Choppers*, and selling apparel bearing a derivative of the Teutul Photographs ("Infringing Product"), all without Gunnells' permission. (FAC ¶¶ 12, 15, 18, 21, 24, 27, 30, 33, 36.) Gunnells did not authorize these uses of the Teutul Photographs and had not entered into any licensing or royalty agreement that would allow the Teutul Photographs to be exploited for commercial use, displayed on *American Choppers*, or used on the Infringing Product. (FAC ¶ 42.) Gunnells also discovered that Mikey Teutul, Paul Teutul, and OCC were displaying,

¹ Gunnells references the docket numbers in Case No. 1:19-cv-05331-JSR. As indicated below, Case No. 1:19-cv-05312 was accepted as related on July 8, 2019.

publishing, and distributing the Teutul Photographs after having removed Gunnells' attribution and copyright management information ("CMI") and thereafter displaying, publishing, and distributing the Teutul Photographs with false attribution and/or CMI identifying Mikey Teutul as the author of the Teutul Photographs. (FAC ¶ 50.) Subsequent to Gunnells' discovery of Mikey Teutul, Paul Teutul, and OCC's substantial involvement in the infringement at issue, Gunnells initiated this lawsuit.

B. Procedural Background.

Gunnells filed his initial complaint ("Complaint") against Mikey Teutul, Paul Teutul, and OCC in the U.S. District Court for the Southern District of New York on June 6, 2019 (*see* Dkt. #1). Gunnells served the Complaint on Mikey Teutul, Paul Teutul, and OCC on June 13, 2019 (*see* Dkt. #11, #13, and #14). Gunnells filed a statement of relatedness indicating that the Complaint was related to Case No. 1:19-cv-05312 ("Second Complaint") on July 2, 2019 (*see* Dkt. #17). The Complaint and the Second Complaint were accepted as related on July 8, 2019. A case management plan was issued on July 23, 2019 (*see* Dkt. #24). Gunnells moved for default judgment on August 7, 2019 (*see* Dkt. #28). The Court denied Gunnells' motion but issued an order allowing Gunnells to amend his Complaint on August 15, 2019 (*see* Dkt. #32).

Gunnells filed his first amended complaint ("FAC") on August 30, 2019 (*see* Dkt. #35). He served the FAC on Paul Teutul and Mikey Teutul on September 27, 2019 (*see* Dkt. #45 and #46) and OCC on September 25, 2019 (*see* Dkt. #47). Mikey Teutul, Paul Teutul, and OCC have yet to appear in this action or contact Plaintiff or the Court regarding the allegations. A pre-trial conference was scheduled on January 3, 2020, and neither counsel for Plaintiff nor the Defendants attended (*see* Dkt. #48). The Court dismissed the case on January 3, 2020 but allowed for the filing

of this brief to reinstate. *Id.* Gunnells moves to reinstate the action so that he may seek an entry of default judgment for copyright infringement as to Mikey Teutul, Paul Teutul, and OCC.

III. ARGUMENT

A. The current circumstances favor reinstatement.

Gunnells has for the most part diligently prosecuted his case in the face of challenging and somewhat unusual circumstances. He has met every deadline and made every appearance aside from the recent pre-trial conference, which his counsel erroneously concluded was no longer on calendar given the Defendants' refusal to appear. As discussed below, it is respectfully submitted that the action should be reinstated.

The dismissal of a plaintiff's case is "one of the harshest sanctions" to be reserved "for use only in the most extreme circumstances." *U.S. ex rel. Drake v. Norden Sys., Inc.*, 375 F.3d 248, 251 (2d Cir. 2004). A district court may dismiss an action "[i]f the plaintiff fails to prosecute or to comply with these rules or a court order..." Fed. R. Civ. P. 41(b). The propriety of a Rule 41(b) dismissal is determined in light of "(1) the duration of the plaintiff's failure to comply with the court order, (2) whether plaintiff was on notice that failure to comply would result in dismissal, (3) whether the defendants are likely to be prejudiced by further delay in the proceedings, (4) a balancing of the court's interest in managing its docket with the plaintiff's interest in receiving a fair chance to be heard, and (5) whether the judge has adequately considered a sanction less drastic than dismissal." *Lucas v. Miles*, 84 F.3d 532, 535 (2d Cir. 1996) (citations omitted). None of these factors presently favor dismissal.

The first factor, duration of the plaintiff's failure to comply with the court order, mitigates against dismissal. Here, Gunnells has spent considerable time and expense in prosecuting this case. He served the Complaint on Mikey Teutul, Paul Teutul, and OCC on June 13, 2019 (*see* Dkt. #11,

#13, and #14). Gunnells then moved for default judgment on August 7, 2019 (*see* Dkt. #28). Pursuant to the Court's August 15th Order (*see* Dkt. #32), Gunnells filed the FAC on August 30, 2019 (*see* Dkt. #35). Gunnells served the FAC on Paul Teutul and Mikey Teutul on September 27, 2019 (*see* Dkt. #45 and #46) and OCC on September 25, 2019 (*see* Dkt. #47). These multiple service efforts have been labor-intensive and costly for Plaintiff, who is an independent artist.

Counsel for Gunnells failed to attend the January 3rd conference due to the erroneous conclusion that the hearing was off-calendar given Defendants' refusal to appear and the settlement with, and dismissal of, the only other appearing party. Counsel apologizes for the misunderstanding and apologizes to the Court for any inconvenience caused. Gunnells' counsel noted that the remaining Defendants had failed to appear and that Gunnells had already filed his motion for default judgment. Based on the foregoing, he did not believe the conference would move forward. This was error and, in the very least, counsel should have contacted chambers to ascertain whether the hearing would be moving forward despite the remaining Defendants' default.

Counsel believed the deadlines in this case were reset once Gunnells moved for default and never intended to miss a scheduled conference or violate any order issued by the Court. This has been the first and only instance of noncompliance, and Gunnells has otherwise been diligent in prosecuting this case.

Additionally, Rule 41(b) "has been restricted to instances where a dismissal is explicitly authorized under other provisions of the Federal Rules." *Dismissal for Failure to Attend A Pretrial Conference and the Use of Sanctions at Preparatory Stages of Litigation*, 72 Yale L.J. 819, 821–22 (1963). "Thus, the situations to which Rule 41(b) has been applied do not indicate that the Rule warrants dismissal where a court order issued pursuant to Rule 16 requiring attendance at a scheduled conference has been disobeyed, since Rule 16 does not explicitly authorize dismissal or

a stay of the action for noncompliance with an order of court issued pursuant to it.” 72 Yale L.J., at 822–23. Dismissal due to counsel’s inadvertent failure to attend a scheduled conference is thus an extreme sanction in light of Gunnells’ efforts to prosecute this action.

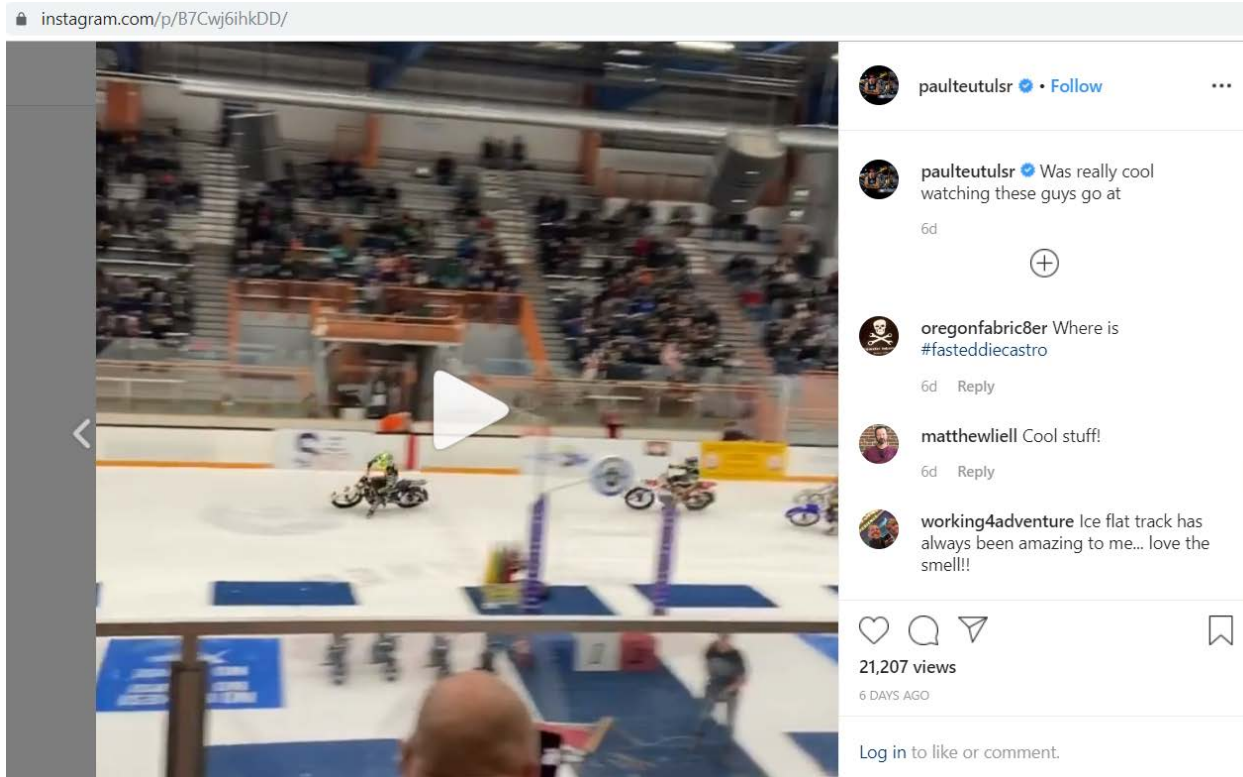
The second factor, the nature and timing of the court’s notice to the plaintiff of possible dismissal, also weighs against dismissal. Because a Rule 41(b) dismissal is one of the harshest sanctions, it must thus “‘be proceeded by particular procedural prerequisites,’ including ‘notice of the sanctionable conduct, the standard by which it will be assessed, and an opportunity to be heard.’” *Baptiste v. Sommers*, 768 F.3d 212, 217 (2d Cir. 2014) (quoting *Mitchell v. Lyons Prof'l Servs., Inc.*, 708 F.3d 463, 467 (2d Cir. 2013)). Here, the Court issued an order on January 3, 2020, granting Gunnells leave to explain why the case should be reinstated by January 17, 2020 (*see* Dkt. #48). Once the Court issued a warning of potential dismissal, Gunnells and his counsel responded in a timely fashion. The second factor thus supports reinstatement.

Additionally, the third factor, prejudice to the defendants, mitigates against dismissal. “[D]efendants have not pointed to any concrete way that they have suffered or will suffer prejudice due to [Plaintiff’s] delay.... Nothing in the record suggests any such prejudice.” *Baptiste v. Sommers*, 768 F.3d 212, 218 (2d Cir. 2014). Indeed, Defendants were not even inconvenienced because they have failed to participate in this action in any way. Gunnells has provided notice of his claims to Defendants on several occasions, yet Defendants have refused to respond (*see* Dkt. #11, #13, #14, #45, #46, #47). And Defendants’ social media accounts establish their ability to participate in this case. For example, on or approximately January 10, 2020, OCC promoted Paul Teutul’s upcoming appearance for a convention:



(last visited Jan. 14, 2020, available at https://www.instagram.com/p/B7JMnQ_Bp5p/)

Such activity demonstrates that OCC is viable and that Paul Teutul is physically capable of attending meetings. Paul Teutul recently posted a video on or approximately January 8, 2020 featuring his attendance at an automotive event:



(last visited Jan. 14, 2020, <https://www.instagram.com/p/B7Cwj6ihkDD/>)

The above demonstrates that Defendants are able yet unwilling to participate in the current proceedings. Defendants have not suffered any prejudice, and this factor supports reinstating the action.

The fourth factor, the court’s own interest in managing its docket, mitigates against dismissal as well. This factor disfavors plaintiffs who “swamp the court with irrelevant or obstructionist filings.” *LeSane v. Hall's Sec. Analyst, Inc.*, 239 F.3d 206, 210 (2d Cir. 2001). And even then, “[t]here must be compelling evidence of an extreme effect on court congestion before a litigant’s right to be heard is subrogated to the convenience of the court.” *Lucas v. Miles*, 84 F.3d 532, 535–36 (2d Cir. 1996). No such evidence exists here. Indeed, Gunnells has otherwise complied with all other deadlines and provided all submissions required by the Court. Thus, the fourth factor favors reinstatement.

Finally, the Court must contemplate the last factor, consideration of lesser sanctions as an alternative to dismissal. Indeed, “[t]he sound exercise of discretion requires the judge to consider and use lesser sanctions than dismissal in the appropriate case.” *Schenck v. Bear, Stearns & Co.*, 583 F.2d 58, 60 (2d Cir. 1978), quoting *Ali v. A & G Co.*, 542 F.2d 595, 597 (2d Cir. 1976). The January 3rd Order made no mention of lesser sanctions as an alternative to dismissal (*see* Dkt. #48). Such consideration would be appropriate here, as the previous factors weigh against dismissal. Because none of the factors presently favor dismissal, Gunnells respectfully requests reinstatement of this action.

B. The case should proceed on the merits

Dismissal of the case would also reward Defendants for their unjust behavior. The Second Circuit has held that “mere technicalities should not prevent cases from being decided on the merits.” *Monahan v. New York City Dep’t of Corr.*, 214 F.3d 275, 283 (2d Cir. 2000), citing *Foman v. Davis*, 371 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962). Here, Gunnells has brought a straightforward copyright infringement claim against Defendants Mikey Teutul, Paul Teutul, and OCC related to Plaintiff’s Teutul Photographs, as discussed further below.

Gunnells has pled a sufficient cause of action for copyright infringement against Defendants Mikey Teutul, Paul Teutul, and OCC related to Gunnells’ Teutul Photographs. To pursue a proper claim for copyright infringement, Gunnells must establish (a) ownership of a valid copyright in the work, and (b) that the defendant copied the work. *Computer Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 701 (2d Cir. 1992). In order to prove a defendant’s copying, a plaintiff may use direct evidence or by showing that the defendant had access to the work and that the allegedly infringing work is substantially, or strikingly, similar to the plaintiff’s copyrightable material. *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 48 (2d Cir. 1986).

1. Gunnells has ownership of a valid copyright

Gunnells satisfies the first prong of his claim based on his ownership of a valid copyright registration in the Teutul Photographs, namely U.S. Copyright Registration No. VAu 1-130-673. As owner of this registration, Gunnells enjoys a presumption of validity in his copyright. *See* 17 U.S.C. § 410(c). And since Mikey Teutul, Paul Teutul, and OCC have not appeared in this case to challenge the validity of Gunnells' presumptively valid copyright, such presumption endures.

2. Gunnells has established access and copying by Defendants

Mikey Teutul, Paul Teutul, and OCC

Gunnells also satisfies the second requirement for a copyright infringement claim by demonstrating that Mikey Teutul, Paul Teutul, and OCC had access to, and copied, his work. Gunnells' FAC sets forth adequately pled claims for copyright infringement against Defendants Mikey Teutul, Paul Teutul, and OCC. Gunnells alleges that he is the owner of a valid copyright in his Teutul Photographs (FAC ¶¶ 13, 16, 19, 22, 25, 28, 31, 34, 37), that Mikey Teutul, Paul Teutul, and OCC had access to the photographs directly from Gunnells (FAC ¶ 41), and that the Infringing Uses displayed, exploited, and published by and the Infringing Product sold and distributed by Mikey Teutul, Paul Teutul, and OCC bear prints that are substantially similar to Gunnells' Teutul Photographs. (FAC ¶¶ 11, 14, 17, 20, 23, 26, 29, 32, 35, 38.) The Complaint includes side-by-side comparisons of Gunnells' original Teutul Photographs and Defendants' infringing uses (FAC ¶¶ 12, 15, 18, 21, 24, 27, 30, 33, 36), demonstrating the substantial similarity between the two depictions. Such documents demonstrate not only Mikey Teutul, Paul Teutul, and OCC's access to Gunnells' Teutul Photographs, but also willfulness on the part of Mikey Teutul, Paul Teutul, and OCC to copy and illegally reproduce Gunnells' copyrighted photographs. Thus, Gunnells has pled a sufficient cause of action for copyright infringement against Defendants. It is

in the interest of justice to decide Gunnells' case on the merits instead of allowing Defendants to prevail on a mere technicality.

IV. CONCLUSION

Counsel for Gunnells apologizes to the court for not appearing at the pre-trial conference. The firm representing Gunnells, and its New York-based attorneys, have had a number of matters before this court and have endeavored at all times to accord this Court's schedule and orders the utmost respect and consideration. It is humbly submitted that this isolated incident not result in the dismissal of an artist's meritorious copyright case.

Based on the foregoing, Gunnells respectfully requests that the Court reinstate the case and allow Gunnells to move for a default judgment against Mikey Teutul, Paul Teutul, and OCC.

Dated: January 17, 2020
Brooklyn, NY

Respectfully submitted,

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