

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division**

PAUL LEITNER-WISE,

Plaintiff,

v.

ACTION NO. 2:14cv619

BEAM DISTRIBUTING, INC.,

Defendant.

DISMISSAL ORDER

This matter is before the Court pursuant to Defendant's Motion to Dismiss. (ECF No. 8.) Plaintiff has not filed a response. For the reasons set forth below, Defendant's Motion to Dismiss is **GRANTED**.

I. Factual and Procedural Background

On December 5, 2014, Plaintiff filed a Complaint against Defendant, alleging one (1) claim of patent infringement and one (1) claim of copyright infringement. (Compl. ¶ 3, 7.) Plaintiff claims that on June 25, 2013, "United States Letters Patent No. D684,820 was issued to the Plaintiff for the design of a Drinking Vessel." (Id. ¶ 2.) Plaintiff asserts that Defendant "has infringed and is still infringing on the Letters Patent D684 820 by selling, and using images of drinking vessels that embody the patented design." (Id. ¶ 3.) Plaintiff further claims that he "applied for United States Copyright of its United States Letters Patent No. D684,820 issued June 25th 2013, Image: No. 1-1923124421." (Id. ¶ 6.) He states that Defendant "has infringed and is still infringing the Letters Patent and pending Copyright by selling, and using images of drinking vessels that embody the patented design and pending copyright." (Id. ¶ 7.) Plaintiff

seeks damages as well as a “preliminary and final injunction against the continuing infringement.” (Id. ¶ 9.)

II. Standard of Review

Defendant seeks dismissal of Plaintiff’s Complaint under Rule 12(b)(1) for lack of standing. In determining whether subject matter jurisdiction exists, the district court “may consider evidence outside the pleadings without converting the proceeding to one for summary judgment.” Velasco v. Gov’t of Indonesia, 370 F.3d 392, 398 (4th Cir. 2004); Johnson v. Portfolio Recovery Assocs., LLC, 682 F. Supp. 2d 560, 566-67 (E.D. Va. 2009). “The burden of proving subject matter jurisdiction on a motion to dismiss is on the plaintiff, the party asserting jurisdiction.” Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982).

Defendant also seeks dismissal of Plaintiff’s Complaint under Rule 12(b)(6) for failure to state a claim upon which relief may be granted. A motion to dismiss under Rule 12(b)(6) should be granted if a complaint fails to “allege facts to state a claim to relief that is plausible on its face.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). Such a motion “tests the sufficiency of a complaint and ‘does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses.’” Johnson v. Portfolio Recovery Assocs., LLC, 682 F. Supp. 2d 560, 567 (E.D. Va. 2009). A court must accept all factual allegations contained in the complaint as true and draw all reasonable inferences in favor of the plaintiff. Id.

III. Analysis

A. **Patent Infringement Claim**

Plaintiff first asserts that Defendant “has infringed and is still infringing on the Letters Patent D684 820 by selling, and using images of drinking vessels that embody the patented

design.” (Compl. ¶ 3.) Defendant asserts that Plaintiff’s claim should be dismissed under Rule 12(b)(1) for lack of standing.

“[A]s a matter of substantive patent law, all co-owners must ordinarily consent to join as plaintiffs in an infringement suit.” Ethicon, Inc. v. U.S. Surgical Corp., 135 F.3d 1456, 1468 (Fed. Cir. 1998); see also Israel Bio-Eng’g Project v. Amgen Inc., 475 F.3d 1256, 1264-65 (Fed. Cir. 2007) (“Absent the voluntary joinder of all co-owners of a patent, a co-owner acting alone will lack standing.”). In his Complaint, Plaintiff states:

Plaintiffs Paul Leitner-Wise and Vanessa Truog are citizens of the State of Virginia. Plaintiffs Leitner-Wise Manufacturing, LLC, Rich Caviar, LLC, and Muzzleshot, LLC are each incorporated under the laws of Virginia with its principal place of business in Virginia (Plaintiffs Paul Leitner-Wise, Vanessa Truog, Leitner-Wise Manufacturing, LLC, Rich Caviar, LLC, and Muzzleshot, LLC are collectively referred to herein as “Plaintiff”).

(Compl. ¶ 1.) Essentially, in the Complaint, “Plaintiff” refers to five (5) separate individuals and entities. Moreover, Plaintiff Paul Leitner-Wise is the only Plaintiff who signed the Complaint, and *pro se* plaintiffs cannot represent a corporate entity or another person. See Myers v. Loudon Cnty. Pub. Schs., 418 F.3d 395, 401 (4th Cir. 2005); Pridgen v. Andreson, 111 F.3d 391, 393 (2d Cir. 1997) Given this, the Court must conclude that the patent infringement claim must be dismissed for lack of standing because of the failure to properly join the four (4) co-owners as plaintiffs in this matter. Accordingly, Defendant’s Motion to Dismiss is **GRANTED** as to the patent infringement claim.

B. Copyright Infringement Claim

As noted above, Plaintiff also asserts that Defendant has infringed upon the copyright “by selling, and using images of drinking vessels that embody the patented design and pending

copyright.” (Compl. ¶ 7.) Defendant asserts that Plaintiff’s claim should be dismissed pursuant to Rule 12(b)(6).¹

Under Twombly, a plaintiff’s complaint “requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” 550 U.S. at 555-56. “In order to prove copyright infringement, a plaintiff must show that it owns a valid copyright, and it must establish that the defendant engaged in unauthorized copying of the work protected by the copyright.” Nelson-Salabes, Inc. v. Morningside Dev., LLC, 284 F.3d 505, 513 (4th Cir. 2002) (citing Towler v. Sayles, 76 F.3d 579, 581 (4th Cir. 1996)). “To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” Feist Publ’n’s, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991).

Here, Plaintiff has provided “no information whatsoever about the allegedly infringing works.” Home Design Servs., Inc. v. J.F. Schoch Bldg. Corp., No. 2:11cv574, 2012 WL 442008, at *4 (E.D. Va. Feb. 10, 2012). Plaintiff only alleges that Defendant “has infringed and is infringing . . . the pending Copyright by selling, and using images of drinking vessels that embody the . . . pending copyright.” (Compl. ¶ 7.) “Plaintiff’s threadbare and factually devoid assertions . . . fall far short of satisfying the pleading requirements of Rule 8(a), particularly considering that a primary purpose of the Rule is to put defendants on notice of their wrongdoing.” Home Design Servs., Inc., 2012 WL 442008, at *4. Moreover, Plaintiff fails to allege that Defendant had access to Plaintiff’s copyrighted work. Because “access is an essential element of a copyright infringement claim,” Plaintiff’s claim cannot stand. Id. at *3.

¹ There is no issue concerning standing as to Plaintiff’s copyright infringement claim because “a joint owner is not required to join his other co-owners in an action for infringement.” Davis v. Blige, 505 F.3d 90, 99 (2d Cir. 2007).

Accordingly, Defendant's Motion to Dismiss is **GRANTED** as to Plaintiff's copyright infringement claim.

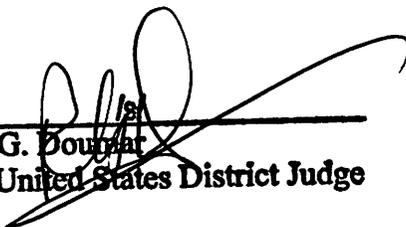
IV. Conclusion

For the reasons set forth above, Defendant's motion to dismiss (ECF No. 8) is **GRANTED**. The Clerk is **DIRECTED** to enter judgment in favor of Defendant.

Plaintiff may appeal from this Dismissal Order by forwarding a written notice of appeal to the Clerk of the United States District Court, Norfolk Division, 600 Granby Street, Norfolk, Virginia 23510. The written notice must be received by the Clerk within thirty (30) days from the date of the entry of this Dismissal Order. If Plaintiff wishes to proceed *in forma pauperis* on appeal, the application to proceed *in forma pauperis* is to be submitted to the Clerk, United States Court of Appeals, Fourth Circuit, 1100 E. Main Street, Richmond, Virginia 23219.

The Clerk is **DIRECTED** to mail a copy of this Dismissal Order to Plaintiff and counsel for Defendant.

IT IS SO ORDERED.



Robert G. Doumar
Senior United States District Judge

Norfolk, Virginia

September 16, 2015