CYNTHIA CLAY, Plaintiff,

v.

JAMES CAMERON, et al., Defendants.

Case No. 10-22203-CIV-JORDAN.

United States District Court, S.D. Florida, Miami Division.

October 20, 2011.

ORDER GRANTING MOTION TO DISMISS

ADALBERTO JORDAN, District Judge.

As provided in the order [D.E. 36] issued on October 30, 2011, James Cameron's, Twentieth Century Fox Film Corporation's, and Dune Entertainment III, LLC's motion to dismiss the first amended complaint [D.E. 26] is GRANTED.

I. ALLEGATIONS

Cynthia Clay filed this lawsuit against James Cameron, Twentieth Century Fox Film Corporation, and Dune Entertainment III, LLC, alleging copyright infringement. Ms. Clay alleges that Mr. Cameron, in the motion picture *Avatar,* stole elements of her book, *"Zollocco: A Story of Another Universe,"* in violation of federal copyright law. Ms. Clay also alleges derivative copyright claims against the corporate defendants, and a state law unjust enrichment claim against all the defendants.

Specifically, the complaint alleges that Ms. Clay created *Zollocco* in 1988, and that she shopped an unpublished manuscript of her work as early as 1990 through various publishers and agents. Letters attached to the complaint indicate that the publishers and agents were located in New York. As a result, Ms. Clay alleges, the work was in wide circulation. The book was published in 2000 and Ms. Clay applied for federal copyright protection in 2001. Mr. Cameron created the initial concept for the movie *Avatar* in approximately 1995 and the screenplay for the movie was created years later.

Ms. Clay alleges that the "similarities of each work are substantial, continuing, and direct so as to rule out any accidental copying or similarity in scenes or dialog common to the genre" [D.E. 6, ¶ 12]. Ms. Clay restricts her allegations of substantial similarity to the following elements of her story: (1) Mr. Cameron copied the name of the heroine in the infringing work; (2) the priestess in the story is marked by wearing the color blue, while the alien heroine in *Avatar* has blue skin; (3) in *Zollocco,* the human character is able to interact with

other races and worlds through telepathy, while in *Avatar* the human characters control their "avatars" by means of projected thoughts; (4) both works involve sentient forests that attempt to teach the human characters the lesson of living in harmony with the natural forest; (5) in both works the forests at the center of the plots are threatened by corporate interests; (6) Mr. Cameron uses the title of Ms. Clay's work as a battle cry in a scene in *Avatar;* and (7) the movie borrows specific incidents and dialogue from Ms. Clay's work [D.E. 6, ¶¶ 13-19].

The defendants have moved to dismiss the complaint pursuant to Rule 12(b)(6), arguing that (1) Ms. Clay has failed to adequately allege Mr. Cameron had access to her work; (2) the two works are not substantially similar in their protectable expression; and (3) Ms. Clay's unjust enrichment claim fails as a matter of law.

II. LEGAL STANDARD

To survive a motion to dismiss under Rule 12(b)(6), the plaintiff must plead "either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory." *Roe v. Aware Woman Ctr. for Choice, Inc.,* 253 F.3d 678, 683 (11th Cir. 2001). The factual allegations are accepted as true and all reasonable inferences from these allegations are drawn in the plaintiff's favor. *See Roberts v. Fla. Power & Light Co.,* 146 F.3d 1305, 1307 (11th Cir. 1998). The plaintiff, however, must allege more than "labels and conclusions." *Fin. Sec. Assurance, Inc. v. Stephens, Inc.,* 500 F.3d 1276, 1282 (11th Cir. 2007) (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 554-55 (2007)). The factual allegations in the complaint must "possess enough heft" to set forth "a plausible entitlement to relief." *Id.*

III. ANALYSIS

A. THE COPYRIGHT CLAIMS

The defendants first move to dismiss the federal copyright claims (Counts I-III) for failure to state a claim. In a copyright infringement action, Ms. Clay must allege (1) that she had a valid copyright to zollocco, and (2) that Mr. cameron copied her work. *See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.,* 499 U.S. 340, 361 (1991). This is usually alleged and proven by showing that the defendant had access to the plaintiff's work and that the alleged infringing work is substantially similar to the plaintiff's work. *See Beal v. Paramount Pictures Corp.,* 20 F.3d 454, 459 (11th Cir. 1994); *Original Appalachian Artworks, Inc. v. Toy Loft, Inc.,* 684 F.2d 821, 829 (11th Cir. 1982). For the purposes of this motion to dismiss, the defendants have conceded that Mr. Clay holds a valid copyright to *Zollocco.* The defendants assert, however, that Ms. Clay fails to state a claim for copying, as she has not alleged access and the works are not substantially similar.

The complaint alleges only that "as early as 1990, the Plaintiff circulated the unpublished work . . . to various publishers and agents" and the "work was in wide circulation in the entertainment industry prior to Defendant Cameron's claimed date of creation" [D.E. 6, ¶ 10]. To withstand the motion to dismiss, Ms. Clay must allege, above a speculative level, that there was a "reasonable possibility" that Mr. Cameron had access to her work. *See Benson v. Coca-Cola Co.,* 795 F. 2d 973, 975 (11th Cir. 1986). Even at the motion to dismiss stage, where all reasonable inferences are to be drawn in favor of Ms. Clay, she must still allege sufficient facts from which a court may draw those inferences. *See Twombly,* 550 U.S. at 556. Although Ms. Clay has alleged that her work was widely circulated, she has alleged no nexus between her circulation of the work in 1990 and Mr. Cameron. That is, she has not alleged how Mr. Cameron, a Hollywood screenwriter, plausibly had access to her unpublished work distributed to book publishers in New York. *See Benson,* 795 F.2d at 975 (no "access" shown where plaintiff alleged only that he performed his song for the public but there was no evidence or allegation that the defendant's songwriters attended any of plaintiff's concerts); *Hill v. Gaylord Enm't,* 2008 WL 115441, *4 (S.D. Fla. 2008)(dismissing copyright claim where the complaint alleged only that the plaintiff had sent his work to "publishers and literary agents for possible publication"); *Martinez v. McGraw,* 2009 WL 2447611, *4 (M.D. Tenn. 2009)(dismissing case where plaintiff failed to allege, beyond speculation, how his song got into the hands of the defendant).[1] Because Ms. Clay fails to adequately allege that Mr. Cameron had access to *Zollocco* before he created *Avatar,* Ms. Clay's complaint fails to state a claim for copyright infringement.[2]I, therefore, do not need to address whether the two works are substantially similar.

B. THE UNJUST ENRICHMENT CLAIM

The defendants move to dismiss the fourth count of Ms. Clay's complaint, a state law claim for unjust enrichment, as preempted by the federal Copyright Act. In order to state a cause of action for unjust enrichment, a plaintiff must allege that (1) she has conferred a benefit on the defendant who has knowledge of the benefit; (2) the defendant voluntarily accepted and retained the benefit conferred; and (3) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying the value of the benefit to the plaintiff. *See, e.g., Greenfield v. Manor Care Inc.,* 705 So.2d 926, 930-931 (Fla. 4th D.C.A.1997). I do not reach defendants' arguments on preemption, as I conclude that Ms. Clay fails to state a claim for unjust enrichment. Given her failure to adequately allege infringement of her work, Ms. Clay has not alleged that she conferred a benefit upon the defendants or that the defendants accepted such benefits with knowledge.

IV. CONCLUSION

For these reasons, the defendants motion to dismiss is GRANTED. All counts of the complaint are DISMISSED WITHOUT PREJUDICE. Ms. Clay shall have until November 10, 2011 to file an amended complaint, or this case will be closed.

DONE AND ORDERED.

[1] An "inference of access based on a third party's possession of the plaintiff's work requires more than a mere allegation that someone known to the defendant possessed the work in question." *Herzog v. Castle Rock Enm't,* 193 F.3d 1241, 1252 (11th Cir. 1999)(quotation marks and citations omitted). Here there are no allegations that Mr. Cameron knew, socialized with, or did business with the publishers and agents to whom Ms. Clay sent her book.

[2] This is not a case where the "similarity is so great it precludes the possibility of coincidence, independent creation, or common source." *Benson,* 795 F.2d at 975 n.2 (quotation marks and citation omitted).