23-7483-cv
Baker v. Coates

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 11th day of December, two thousand twenty-four.

Present:

GERARD E. LYNCH,
WILLIAM J. NARDINI,
EUNICE C. LEE,
Circuit Judges.

RALPH W. BAKER, JR.,

Plaintiff-Appellant,

v. 23-7483

TA-NEHISI P. COATES, BCP LITERARY, INC., THE ATLANTIC, LAURENE POWELL JOBS, DAVID G. BRADLEY, BERTELSMANN SE & CO. KGAA, SPIEGEL & GRAU, CHRIS JACKSON, NICOLE COUNTS, VICTORY MATSUI, KENYATTA MATTHEWS, THE APOLLO, MACEO-LYN, KAMILAH FORBES, SUSAN KELECHI WATSON, WARNER BROS. DISCOVERY, INC., Ms. OPRAH WINFREY, THE WALT DISNEY COMPANY, APPLE, INC., PLAN B, MGM STUDIOS, RYAN COOGLER, JOE ROBERT COLE, ROXANE GAY, YONA HARVEY, THE ATLANTIC MONTHLY GROUP LLC, VICTORIA MATSUI, ENTERTAINMENT,

INC., METRO-GOLDWYN-MAYER STUDIOS INC., SPIEGEL & GRAU LLC,

Defendants-Appellees,

For Plaintiff-Appellant:	RALPH W. BAKER, Jr., *pro se*, Brooklyn, New York.
For Coates Defendants-Appellees:	JOHN M. BROWNING (Linda J. Steinman, Laura R. Handman, Celyra I. Myers, *on the brief*), Davis Wright Tremaine LLP, New York, NY.
For Defendant-Appellees Oprah Winfrey and Apple, Inc.:	TAL DICKSTEIN (Barry Slotnick, David Forrest, *on the brief*), Loeb & Loeb LLP, New York, NY.
For Defendant-Appellees The Apollo and Kamilah Forbes:	Howard Schiffman, Robert Griffin, *on the brief*, Schulte Roth & Zabel LLP, New York NY.

Appeal from a judgment of the United States District Court for the Southern District of New York (J. Paul Oetken, *District Judge*; Sarah L. Cave, *Magistrate Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Appellant Ralph W. Baker, Jr., proceeding *pro se*, appeals from a judgment of the United States District Court for the Southern District of New York (J. Paul Oetken, *District Judge*) entered on September 27, 2023, granting Appellees' motion to dismiss the Complaint. Baker sued author Ta-Nehisi Coates, as well as a variety of associated companies and individuals, alleging that Coates and the other defendants infringed on the copyright of Baker's self-published memoir, *Shock Exchange: How Inner-City Kids From Brooklyn Predicted the Great Recession and the Pain Ahead* ("*Shock Exchange*"). Baker alleged that upon reading Coates's novel *The Water Dancer*, he realized that Coates had attempted to mimic his writing style and had copied portions of *Shock*

Exchange, which Baker had sent Coates in 2013. Approximately eighty pages of Baker's complaint are dedicated to side-by-side comparisons between *Shock Exchange* and Coates's various literary works including: *The Water Dancer*, *Between the World and Me*, *We Were Eight Years in Power*, several magazine articles and comic books, as well as dialogue from the movie *Black Panther*. For instance, Baker used the following two passages to demonstrate how, in his view, Coates must have appropriated what Baker describes as *Shock Exchange*'s "rhythmic prose and tedious talk" writing style:

The Water Dancer	*Shock Exchange*
The effect of all this was a kind of watchfulness among the tasking folks, in particular toward those you did not know. This worked the other way too, so that if you were new to Lockless or any of these other houses of bondage, you took things slow, you did not question or inquire on people's affairs, for if you did you might then be thought to be among those who were eye [sic] and ears, who tasked among the Task, and this was a dangerous place because then you thought yourself might be poisoned or plotted against.	We would see all kinds of people from the community, some from Mercy Seat, Hampden-Sydney, Darlington Heights, etc., looking like they were in dire straits. If he didn't know the person, then Grandpa miraculously was out of liquor. We kids saw this take place for years and never once mentioned it, not even amongst ourselves; we knew better.

Complaint, Ex. B, at 9, 17, *Baker v. Coates*, No. 22-cv-7986, 2023 WL 6289964 (S.D.N.Y. Sept. 27, 2023), ECF No. 2.

After conducting a lengthy review of Baker's allegations, the magistrate judge recommended dismissing the Complaint for failure to state a claim, reasoning in part that the works were not substantially similar as a matter of law. The district court adopted the report and recommendation and dismissed the Complaint. *See Baker v. Coates*, 22-CV-7986 (JPO) (SLC), 2023 WL 6007610 (S.D.N.Y. July 26, 2023), *report and recommendation adopted*, 2023 WL

6289964 (S.D.N.Y. Sept. 27, 2023).[1] On appeal, Baker challenges the dismissal of his Complaint, and moves to hold Appellees' counsel in contempt and to strike Appellee Apple, Inc.'s brief. We assume the parties' familiarity with the case.

We review *de novo* the grant of a motion to dismiss for failure to state a claim. *See Hernandez v. United States*, 939 F.3d 191, 198 (2d Cir. 2019). To establish copyright 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'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). A plaintiff "must demonstrate that: (1) the defendant has actually copied the plaintiff's work; *and* (2) the copying is illegal because a substantial similarity exists between the defendant's work and the protectible elements of plaintiff's." *Hamil Am. Inc. v. GFI*, 193 F.3d 92, 99 (2d Cir. 1999).

An evaluation of substantial similarity is "guided by comparing the contested [work's] total concept and overall feel with that of the allegedly infringed work." *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 66 (2d Cir. 2010). The court may consider similarities in "feel, theme, characters, plot, sequence, pace, and setting," but must look beyond "superficial similarities." *Williams v. Crichton*, 84 F.3d 581, 588–89 (2d Cir. 1996). Dismissal is appropriate if the works in question are not substantially similar as a matter of law—that is, if no reasonable jury could find the works substantially similar. *See Peter F. Gaito Architecture*, 602 F.3d at 63–64. "[T]he works themselves supersede and control contrary descriptions of them, including any contrary allegations, conclusions or descriptions of the works contained in the pleadings." *Id.* at 64.

[1] Unless otherwise indicated, when quoting cases, all internal quotation marks, alteration marks, emphases, footnotes, and citations are omitted.

The district court properly dismissed Baker's complaint. We agree with the district court that Baker has failed to demonstrate substantial similarity as a matter of law between *Shock Exchange* and the alleged infringing works. The passages that Baker includes in his Complaint to demonstrate alleged similarities in content and style show neither; the works are so dramatically different in content, total concept, and overall feel that no "lay observer" would regard Coates's works as having been appropriated from *Shock Exchange*. *Id.* at 66. Where the excerpts of *Shock Exchange* employ a straightforward, unadorned literary style, the excerpts of Coates's works demonstrate a more intricate and detailed manner of writing. Beyond relating to Black history and culture, the overall concepts of *Shock Exchange* and Coates's works bear little overlap. To the extent there are any similarities between Baker's work and Coates's, they concern *ideas*, which are not copyrightable, rather than the *expression* of those ideas or the form in which they are presented, which are copyrightable. For example, while Coates's works and *Shock Exchange* both touch on Reconstruction, imprisonment, and redlining, the Complaint's side-by-side excerpts reveal no similarities beyond general factual narratives; to the extent there are any similarities of wording or expression, such similarities are minor or superficial.

Baker argues that the district court erred in concluding there was no substantial similarity between the works without considering comprehensive nonliteral similarity. This argument is unavailing. The comprehensive nonliteral similarity test refers to an examination of "whether the fundamental essence or structure of one work is duplicated in another," in contrast to "the fragmented literal similarity test, which focuses upon copying of direct quotations or close paraphrasing." *Castle Rock Ent., Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 140 (2d Cir. 1998). In evaluating substantial similarity in terms of total concept and overall feel, the district court

assessed whether the fundamental essence or structure of *Shock Exchange* was duplicated in Coates's works. We agree with the district court that it was not.

Baker also argues that the district court erred in adopting the R&R's recommendation to dismiss his copyright claims against a subset of defendants for insufficient service of process and his unfair competition claims. However, the absence of substantial similarity is dispositive of Baker's copyright claims against all defendants, as well as his unfair competition claims. *See Warner Bros. Inc. v. Am. Broad. Cos.*, 720 F.2d 231, 246 (2d Cir. 1983) (observing that an unfair competition action may fail where comparison of the works "establishes as a matter of law a lack of substantial similarity that would create a likelihood of confusion as to source"). Accordingly, even assuming *arguendo* that those issues were properly before us, any error by the district court would be of no moment.[2]

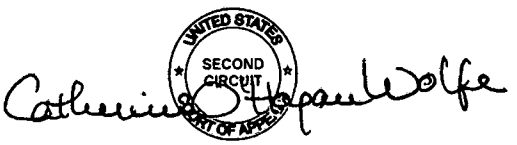
Finally, Baker's motion to strike Apple's brief and hold the law firms in contempt is denied because it is meritless. Not only does Baker allege no bad faith on appeal, but his filings reveal that he was not actually deprived of access to the material on certain unplayable discs. Accordingly, Baker's ability to respond to the motions to dismiss was not meaningfully hindered.

* * *

[2] A *pro se* litigant's failure to timely object to a magistrate judge's recommendation will preclude appellate review of unobjected-to portions, provided the report and recommendation gives adequate warning, as it did here. *See Small v. Sec'y of Health & Hum. Servs.*, 892 F.2d 15, 16 (2d Cir. 1989); *see also Baker*, 2023 WL 6007610, at *23. The district court observed that Baker had failed to object to the relevant portions of the report and recommendation, and reviewed them for clear error only. *See Baker*, 2023 WL 6289964, at *2–3, 5. Thus, by failing to object to the service-of-process and unfair-competition recommendations, Baker forfeited his right to appeal those aspects of the decision.

We have considered all of Baker's remaining arguments and find them unpersuasive. Accordingly, we **AFFIRM** the judgment of the district court and **DENY** Baker's motion.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RALPH W. BAKER, JR.,
Plaintiff,

-v-

TA-NEHISI P. COATES, *et al.*,
Defendants.

22-CV-7986 (JPO)

OPINION AND ORDER ADOPTING REPORT AND RECOMMENDATION

J. PAUL OETKEN, District Judge:

Plaintiff Ralph W. Baker, Jr. ("Baker") brings this action against author and journalist Ta-Nehisi P. Coates ("Coates") and twenty-four other defendants (together with Coates, "Defendants").[1] Baker is the author of an autobiographical work, and he alleges that Defendants unlawfully copied Baker's work in their publication of various books, articles, and comic book series, as well as in their adaptations of those works. (ECF No. 2.)

Before the Court are four motions by Defendants. Coates and twenty other defendants ("Coates et al.") move to dismiss for failure to state a claim and for insufficient service of process as to a subset of defendants (ECF No. 89), Winfrey moves to dismiss for insufficient service of process (ECF No. 91), Apollo and Forbes move to dismiss for failure to state a claim (ECF No. 96), and Apple moves to dismiss for failure to state a claim (ECF No. 114). Baker

[1] The twenty-four other defendants are BCP Literary, Inc., The Atlantic, Laurene Powell Jobs ("Jobs"), David G. Bradley ("Bradley"), Bertelsmann SE & Co. KGaA, Spiegel & Grau ("Spiegel"), Chris Jackson ("Jackson"), Nicole Counts ("Counts"), Victory Matsui ("Matsui"), Kenyatta Matthews, the Apollo, Maceo-Lyn, Kamilah Forbes ("Forbes"), Susan Kelechi Watson ("Watson"), Warner Bros. Discovery, Inc. ("Warner"), Oprah Winfrey ("Winfrey"), The Walt Disney Company, Apple, Inc. ("Apple"), Plan B, MGM Studios ("MGM"), Ryan Coogler ("Coogler"), Joe Robert Cole ("Cole"), Roxane Gay ("Gay"), and Yona Harvey ("Harvey").

filed a response to Defendants' motions to dismiss (ECF No. 120), and Apple, Coates et al., Apollo and Forbes, and Winfrey each filed a reply (ECF Nos. 128, 134, 135, 136).

Magistrate Judge Sarah L. Cave conducted a thorough and careful review and issued a Report and Recommendation on July 26, 2023 (the "R&R" or "Report") advising that Baker's claims should be dismissed for failure to state a claim, as well as for insufficient service of process as to a subset of Defendants. (ECF No. 145.) Baker filed objections to the Report on August 31, 2023 (ECF No. 150), and Apple and Winfrey, Coates et al., and Apollo and Forbes filed responses to Baker's objections on September 15, 2023 (ECF Nos. 152, 153, 155). For the reasons that follow, the Court adopts the Report in its entirety.

I. Legal Standard

When reviewing a report and recommendation by a magistrate judge, a district court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). "The Court reviews the Report strictly for clear error where no objection has been made and will make a *de novo* determination regarding those parts of the Report to which objections have been made." *McDonaugh v. Astrue*, 672 F. Supp. 2d 542, 547 (S.D.N.Y. 2009).

When the objecting party is proceeding *pro se*, as is the case here, the court is "obligated to afford a special solicitude" to that party, *Tracy v. Freshwater*, 623 F.3d 90, 101 (2d Cir. 2010), and that party's submissions are read "to raise the strongest arguments that they suggest," *Pabon v. Wright*, 459 F.3d 241, 248 (2d Cir. 2006) (internal quotation marks omitted and citation omitted).

Baker objects to the Report's recommendations on the ground that the Report failed to grapple with the "comprehensive non-literal similarity" between Defendants' works and Baker's work. (ECF No. 150.) Because Baker does not appear to object to the Report's recommendation

that this Court dismiss Baker's claims against a subset of Defendants for insufficient service of process, this Court reviews that recommendation for clear error. The Court reviews de novo the Report's recommendation to dismiss Baker's claims against the remaining defendants for failure to state a claim, however, as Baker objects to that recommendation. (*Id.*)

II. Discussion

A. Insufficient Service of Process

To exercise jurisdiction over defendants, "the procedural requirement of service of summons must be satisfied." *Omni Cap. Int'l, Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 104 (1987). Because service implicates this Court's jurisdiction, the adequacy of service of process "is ordinarily considered before any merits-based challenge to the complaint." *George v. Pro. Disposables Int'l, Inc.*, 221 F. Supp. 3d 428, 442 n.7 (S.D.N.Y. 2016). Under Rule 12(b)(5), a court may dismiss a claim due to insufficient service of process. On such a motion, "the plaintiff bears the burden of establishing that service was sufficient." *Khan v. Khan*, 360 F. App'x 202, 203 (2d Cir. 2010) (summary order).

Magistrate Judge Cave recommended that the Court grant Winfrey's motion to dismiss for insufficient service of process, as well as Coates et al.'s motion to dismiss for insufficient service of process as to Defendants Cole, Gay, Watson, Matsui, Maceo-Lyn, Jobs, Warner, Counts, Bradley, Jackson, Coogler, Spiegel, Harvey, and MGM. (R&R at 16-17.) This Court adopts those recommendations.

As Judge Cave explained, Baker fell short of serving a number of Defendants. As to Defendant MGM, Baker did file an affidavit of service, but the affidavit states that MGM was "NOT SERVED." (R&R at 14; ECF No. 25.) As to the remaining aforementioned defendants, the entities that Baker did purport to serve do not have any relevant connection to the particular defendant. For example, with respect to Defendant Cole, Baker represented that he served Cole

via "Rose Leda Ehler" on October 14, 2022, by delivering the Summons and Complaint to "Eddie Jimenez," a "Mailroom Associate" at the law firm Munger, Tolles, & Olson. (ECF No. 16.) Baker, however, did not establish that the individual he did serve is an authorized agent of the relevant defendant. Accordingly, there is no clear error in the Report's conclusion that Baker "has not met [his] burden to show that" the individuals he served were indeed Defendants' "agent[s] for service of process." *Weston Funding, LLC v. Consorcio G Grupo Dina, S.A. de C.V.*, 451 F. Supp. 2d 585, 590 (S.D.N.Y. 2006).

Normally, Rule 4(m) requires a court to "dismiss the action without prejudice" if a plaintiff fails to properly serve a defendant within the requisite time period. Fed. R. Civ. P. 4(m). But when the "problem with [the plaintiff's] causes of action is substantive" and "better pleading will not cure it," a district court may dismiss a case with prejudice. *Black v. Vitello*, 841 F. App'x 334, 336 (2d Cir. 2021) (summary order) (alteration in original) (quoting *Cuoco v. Moritsugu*, 222 F.3d 99, 12 (2d Cir. 2000)); *see also Samaan v. City of New York*, No. 18-CIV-9221, 2023 WL 2499263, at *10 (S.D.N.Y. Mar. 14, 2023); *Cox v. City of New Rochelle*, No. 17-CV-8193, 2020 WL 5774910, at *9 (S.D.N.Y. Sept. 28, 2020); *Nesbeth v. New York City Mgmt. LLC*, No. 17-CIV-8650, 2019 WL 110953, at *4 (S.D.N.Y. Jan. 4, 2019). Where, as here, the "same grounds for dismissal of the [served Defendants] . . . warrant[s] dismissal" of the complaint "as to the Unserved Defendants," as explained below, "dismissal with prejudice is appropriate" despite Rule 4(m)'s language permitting a court to dismiss without prejudice. *Cox*, 2020 WL 5774190, at *9 (alterations in original) (internal quotation marks and citation omitted).

As a result, with respect to Baker's claims against Defendants Winfrey, Cole, Gay, Watson, Matsui, Maceo-Lyn, Jobs, Warner, Counts, Bradley, Jackson, Coogler, Spiegel, Harvey, and MGM, this Court dismisses those claims with prejudice.

B. Failure to State a Claim

Baker is the author and copyright owner of the autobiographical work "Shock Exchange: How Inner-City Kids From Brooklyn Predicted the Great Recession and the Pain Ahead" ("Shock Exchange"). (ECF No. 2 ¶ 2.) Baker alleges that Coates and the remaining defendants willfully copied elements of Shock Exchange in their works. (*Id.* ¶¶ 1-2, ¶¶ 9-23.) Baker seeks declaratory relief, injunctive relief, damages, and attorney's fees. (*Id.* ¶¶ 353-59.) All Defendants other than Winfrey have moved to dismiss Baker's complaint for failure to state a claim. (ECF Nos. 89, 96, 114.) Magistrate Judge Cave recommended that the Court grant those motions to dismiss. (R&R at 46-47, 51.) For the reasons that follow, this Court adopts that recommendation.

To survive a motion to dismiss under Rule 12(b)(6), a plaintiff must state "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This means that a complaint is properly dismissed where "the allegations in a complaint, however true, could not raise a claim of entitlement to relief." *Twombly*, 550 U.S. at 558. A complaint is also properly dismissed "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." *Iqbal*, 556 U.S. at 679.

To demonstrate copyright infringement, a plaintiff must show "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Feist Pub'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). Copying is "generally established by showing (a) that the defendant had access to the copyrighted work and (b) the substantial

similarity of protectible material in the two works." *Kregos v. Associated Press*, 3 F.3d 656, 662 (2d Cir. 1993).

Because copyright law protects only "the expression of ideas" and "not the ideas themselves," certain elements of works are not copyrightable. *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 67 (2d Cir. 2010). When a work contains both protectable and unprotectable elements, courts "must attempt to extract the unprotectible elements from our consideration and ask whether the *protectible elements, standing alone*, are substantially similar." *Knitwaves, Inc. v. Lollytogs Ltd. (Inc.)*, 71 F.3d 996, 1002 (2d Cir. 1995) (emphasis in original). For example, "facts are not copyrightable," *Feist*, 499 U.S. at 344, nor are "'scènes à faire,' which involve 'incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic,'" *Effie Film, LLC v. Pomerance*, 909 F. Supp. 2d 273, 292 (S.D.N.Y. 2012) (quoting *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir. 1980)). Still, "a compilation of unprotectable elements may enjoy copyright protection when those elements are arranged in an original manner," although "random similarities scattered throughout the works" do not support a finding of substantial similarity. *Montgomery v. Holland*, 408 F. Supp. 3d 353, 363 (S.D.N.Y. 2019) (internal quotation marks and citations omitted).

Ultimately, courts ask "whether a lay observer would consider the works as a whole substantially similar to one another." *Id.* (quoting *Williams v. Crichton*, 84 F.3d 581, 590 (2d Cir. 1996)). Although the question of substantial similarity is often answered by a jury, the Second Circuit has "repeatedly recognized that, in certain circumstances, it is entirely appropriate for a district court to resolve that question as a matter of law." *Gaito*, 602 F.3d at 63.

This case presents one of those circumstances, as Baker fails to state a claim that Defendants' works exhibit substantial similarity to protected elements of Shock Exchange. As described in the complaint, Shock Exchange "explains the stock market and the economy through the eyes of the New York Shock Exchange, a travel basketball team and financial literacy program Mr. Baker started in 2006 for his 11-year-old son and other boys his age." (ECF No. 2 ¶ 65.) Shock Exchange covers Mr. Baker's life growing up, his family members, and Baker's "thinking on the economy, the political climate and Black culture." (*Id.* ¶¶ 67-71.) According to Baker, Coates's works — such as the book "Between the World and Me," the Black Panther comic book series, and the article "The Case for Reparations" — substantially copied Shock Exchange. (*Id.* ¶¶ 9-23.)

To begin, as Magistrate Judge Cave highlighted, Baker premises many of his claims on elements of his work that are not protectable under copyright law. (*See* R&R at 34-43.) While Baker alleges that Defendants copied his unique writing style of "rhythmic prose and tedious talk" (*e.g.*, ECF No. 2 ¶¶ 4, 9, 14, 94, 96, 97, 147), he does not identify elements of Shock Exchange that constitute unique enough literary devices to qualify as copyrightable material. *See Whitehead v. CBS/Viacom, Inc.*, 315 F. Supp. 2d 1, 11 (D.D.C. 2004) ("While similar writing styles may contribute to similarity between works' total concept and feel, a particular writing style or method of expression standing alone is not protected by the Copyright Act."). Baker also alleges that Coates copied his "interpretative analysis of redlining" (ECF No. 2 ¶¶ 119), but he does not point to similarities beyond general factual narratives, such as discrimination by banks in the mortgage business, that are unprotectable (*see, e.g.*, *id.* ¶¶ 130-33). And while Baker alleges that the settings in some of Defendants' works (such as a plantation house setting in Coates's book, "The Water Dancer") are similar to the setting of his grandmother's house in

Shock Exchange (*see, e.g., id.* ¶ 74), such generalized settings are not protectable under copyright law. *See Effie Film*, 909 F. Supp. 2d at 292.

More critically, even granting that Baker's work contains protectable elements, Baker's claims must be dismissed because he fails to allege substantial similarity between his work and the allegedly infringing works. Baker objects to the Report by arguing that it ignores the "comprehensive non-literal similarity" between Defendants' works and his work, as the "fundamental essence or structure of [Baker's] work is duplicated" in their works. (ECF No. 150 at 1-2.) In support of his position, Baker provides in his complaint a comprehensive list of side-by-side comparisons of passages from Shock Exchange and passages from the allegedly infringing works. (ECF No. 2 at 75-161.) But as Magistrate Judge Cave observed, those side-by-side comparisons demonstrate that Baker's and Defendants' works actually "differ dramatically . . . in total concept and overall feel . . . as well as in elements more easily isolated, like plot, themes, and pacing." *Montgomery*, 408 F. Supp. 3d at 375 (internal quotation marks and citation omitted).

For example, Baker includes a comparison of a passage from Shock Exchange and a passage from "Between the World and Me" that are purportedly similar. (ECF No. 2 at 117.) Baker's excerpt describes his relationship with his grandmother and the games he played with his family when growing up. (*Id.*) That excerpt, however, differs dramatically in both style and content from Coates's passage, which describes Coates's thoughts on journalism and the advent of the Internet. (*Id.*) Such lack of similarity ultimately pervades the numerous comparisons that Baker provides in his complaint. (*See* R&R at 43-46.)

As Magistrate Judge Cave explained, such lack of similarity is unsurprising, given the divergent natures of Baker's work and the challenged works: While Baker's work is a "largely

autobiographical book recounting Baker's life and his analysis of the 2008 financial crisis," the challenged works include everything from "a surreal tale of an escape from slavery (Water Dancer)" to "superhero stories involving fictional kingdoms, global revolution, and the struggle against fascist takeover (the Comics and Black Panther Movie)." (*Id.* at 43-44.)

Finally, while Baker also appears to assert that Defendants engaged in unfair competition (*see, e.g.*, ECF No. 2 ¶¶ 183, 195, 222, 229), Baker does not object to the Report's recommendation that claims about misrepresentations of the author of a work are not cognizable under either the Lanham Act or New York common law (R&R at 49-51). As a result, Baker fails to state a claim under either copyright law or any law governing unfair competition claims.

Although courts typically grant *pro se* plaintiffs leave to amend a complaint to replead factually insufficient claims, *see Grullon v. City of New Haven*, 720 F.3d 133, 139-40 (2d Cir. 2013), leave to amend is not necessary when it would be futile, *Black*, 841 F. App'x at 336. This Court has had the opportunity to review both Baker's work and Defendants' work at length, and because of the significant dissimilarity between those two bodies of work, further amendment would be futile.

Accordingly, the claims against the remaining defendants are dismissed for failure to state a claim.

III. Conclusion

For the foregoing reasons, the Report and Recommendation dated July 26, 2023, by Judge Sarah L. Cave (ECF No. 145) is hereby ADOPTED and Baker's objections (ECF No. 150) are OVERRULED. Defendants' motions to dismiss (ECF Nos. 89, 91, 96, 114) are hereby GRANTED, and the complaint is dismissed with prejudice.

The Clerk of Court is directed to close the motions at Docket Numbers 89, 91, 96, and 114, to enter judgment in favor of Defendants dismissing the complaint with prejudice, and to close this case.

SO ORDERED.

Dated: September 27, 2023
New York, New York

J. PAUL OETKEN
United States District Judge

C. ANALYTICAL DISSECTION OF ARRANGEMENT OF WORDS

Analytical Dissection - Shock Exchange v. Coates' Plagiarized Works

Plagiarized Work	Arrangement / Scene	Shock Exchange Arrangement / Scene	Total Occurrence v. Shock Exchange: Top 5 Repeated Words	Total Occurrence v. Shock Exchange: Next 4 Repeated Words
Chosen By District Court -				
Between	Cmplt. Ex: F ¶ I	Cmplt. Ex: E ¶ I	65%	62%
Water Dancer	H-O-R-S-E	H-O-R-S-E	148%	114%
Water Dancer	Lake Geneva	Lake Geneva	68%	77%
2014 Essay	Redlining	Redlining	74%	89%
2015 Essay	Mass Incarceration	Mass Incarceration	72%	76%
Water Dancer	Parade	Parade	138%	120%
Water Dancer	Switch	Switch	79%	87%
Between	Switch	Switch	83%	93%
Black Panther Movie	Switch	Switch	92%	100%
Black Panther Comic	Switch	Switch	88%	100%
Captain America Comic	Switch	Switch	142%	107%
Mean - Entire Dissection	Switch	Switch	97%	98%
Median - Entire Dissection	Switch	Switch	90%	100%
Water Dancer	Switch	Lake Geneva	76%	100%
Between	Switch	Lake Geneva	80%	108%
Black Panther Movie	Switch	Lake Geneva	88%	115%
Black Panther Comic	Switch	Lake Geneva	84%	115%
Captain America Comic	Switch	Lake Geneva	136%	123%
Mean - Entire Dissection	Switch	Lake Geneva	94%	110%
Median - Entire Dissection	Switch	Lake Geneva	86%	112%
Black Panther Movie	Cmplt. Ex: I ¶ XVI	Switch	88%	100%
Water Dancer	Cmplt. Ex: B ¶ III	Cmplt. Ex: B ¶ I	95%	93%
Eight Years	Reconstruction	Reconstruction	81%	85%

Source: Ralph W. Baker, Jr., Complaint pursuant Baker v. Coates, et al., DktEntry 30.1, Dkt. 150.