

APPENDIX

containing opinions below
& order denying rehearing

United States Court of Appeals For the First Circuit

No. 24-1360

CYNTHIA ALYSON FOSS, d/b/a Hunter Foss Design & Interest,

Plaintiff, Appellant,

v.

EASTERN STATES EXPOSITION,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Timothy S. Hillman, U.S. District Judge]

Before

Montecalvo, Kayatta, and Aframe,
Circuit Judges.

Andrew Grimm, with whom Gregory Keenan and Digital Justice Foundation were on brief, for appellant.

Lauren C. Ostberg, with whom James C. Duda and Bulkley, Richardson and Gelinas, LLP were on brief, for appellee.

Paul A. Maddock and Carey, Danis & Lowe were on brief, for Professor Christine Davik, amicus curiae in support of appellant.

August 21, 2025

MONTECALVO, Circuit Judge. This case returns to us for the second time on appeal. Appellant Cynthia Foss appeals the dismissal of her federal copyright-infringement suit against appellee Eastern States Exposition ("Eastern") on claim preclusion and statute-of-limitations grounds. For the reasons that follow, we conclude that the district court properly dismissed the suit as untimely and, accordingly, affirm.

I. Background

We draw the following facts from the operative complaint's allegations, which we take as true and examine in the light most favorable to Foss. See Fantini v. Salem State Coll., 557 F.3d 22, 26 (1st Cir. 2009) (quoting Nisselson v. Lernout, 469 F.3d 143, 150 (1st Cir. 2006)).

In 2016, Spencer Brewery commissioned Foss, who is a graphic designer, to "produce a room-sized artwork" for the brewery's exhibition space at the 2016 "Big E," an annual fair that Eastern produces and runs. Under that agreement, Foss produced a photorealistic installation resembling the interior of a Trappist monastery for Spencer Brewery. She did so, however, subject to the conditions, as relevant here, that (1) she retain copyright ownership over the installation and (2) the brewery only show the installation in person and only to paying patrons of the 2016 Big E physically present at the installation space.

During the 2016 Big E, "Eastern created marketing videos prominently featuring [Foss's] works and . . . widely disseminated the[] videos online," without crediting Foss. Eastern posted "these numerous videos" on its Facebook page and on YouTube and encouraged viewers to "[s]hare the post!" Foss requested that Eastern include attribution for her work -- specifically "a credit line and/or mention" -- in the videos, but Eastern did not do so.

Later, Foss applied for copyright registration of her work with the U.S. Copyright Office ("Copyright Office"), which received her application on April 19, 2017. The Copyright Office eventually registered the work, but the record does not reveal when the Copyright Office made a decision on Foss's application. A series of lawsuits followed.

A. Previous Lawsuits

Foss, proceeding pro se,¹ initiated her first suit in Massachusetts Federal District Court in early 2018, alleging that Eastern, along with several other parties, infringed upon her copyright ("First Action"). As we will explain, Foss's first complaint included more details regarding certain aspects of Eastern's alleged infringement than did her complaints in subsequent lawsuits. In response to Foss's First Action complaint, Eastern moved to dismiss, arguing in part that Foss had failed to

¹ Following Eastern's dismissal in that case, Foss obtained counsel.

allege that she had satisfied "statutory prerequisites for filing for relief under the Copyright Act," namely the requirement that a plaintiff register their copyright with the Copyright Office prior to bringing suit, 17 U.S.C. § 411(a). In a short text order, on June 27, 2018, the district court granted the motion "for the reasons in [Eastern's] memorandum." That dismissal was without prejudice and "did not prevent Foss from seeking to cure the § 411(a)-related defect in that same action by filing an amended complaint." Foss v. E. States Exposition, 67 F.4th 462, 464 (1st Cir. 2023) (first appeal in this case).

Foss did not attempt to cure that defect and instead initiated a second action, again acting pro se, this time in state court, in July 2018. That case was removed to federal court (for reasons unclear to us the removed case was docketed as two actions, but we will refer to these singularly as the "Second Action"). Eastern again moved to dismiss, and, with respect to Foss's copyright-infringement claim, the district court granted the motion without prejudice, allowing Foss "leave to file an amended complaint . . . stating a plausible claim." Foss v. Spencer Brewery, 365 F. Supp. 3d 168, 172 (D. Mass. 2019).

Foss then filed an amended complaint, and the defendants (including Eastern) yet again moved to dismiss, arguing that Foss had failed to state a plausible copyright-infringement claim, that the amended complaint failed to comply with local rules and was

otherwise infirm, and that Foss again failed to allege that she had fulfilled the copyright-registration precondition to suit. Foss did not respond to the motions to dismiss, and the district court granted the motions and dismissed Foss's federal copyright-infringement claims with prejudice, explaining that the motion was granted "for the reasons stated in [defendants'] supporting memorandum."

B. Present Action

This time represented by counsel, Foss initiated the present case solely against Eastern on December 4, 2020, alleging claims of copyright infringement in violation of the U.S. Copyright Act, 17 U.S.C. § 106(1)-(3), (5), and the U.S. Visual Artists Rights Act, 17 U.S.C. § 106A(a)(1)(A). In response, Eastern filed a motion to dismiss, arguing in relevant part that the federal claims were subject to claim preclusion because of the outcome in the Second Action and should be dismissed with prejudice. The district court agreed, concluding that the dismissal of the Second Action precluded Foss's copyright-infringement claim, and dismissed the case with prejudice. Foss v. E. States Exposition, 593 F. Supp. 3d 1, 4-5 (D. Mass. 2022). Foss then appealed. Foss, 67 F.4th at 466.

On appeal, this court reversed and remanded, adopting the Restatement (Second) of Judgment's alternative-determinations

doctrine² and directing the district court to determine whether, even though the alternative-determinations doctrine provided relief from preclusion, the dismissal of the previous action "must be given claim-preclusive effect nonetheless due to the prejudice to Eastern caused by Foss's failure to allege satisfaction of the precondition to suit." Id. at 473; see also id. at 473-74 (addressing grounds for declining to apply the alternative-determinations doctrine).

On remand, Eastern again moved to dismiss, this time arguing that (1) allowing Foss to subject Eastern to yet another lawsuit was prejudicial and, therefore, claim preclusion applied and (2) the copyright-infringement statute of limitations barred suit. The district court agreed on both counts. Foss v. E. States Exposition, No. 4:20-cv-12167, 2024 WL 1178460, at *5 (D. Mass. Mar. 14, 2024).

Regarding prejudice, the district court recounted the facts of the First and Second Actions and determined that "without

² The court explained that, as set forth in the Restatement, the alternative-determinations doctrine provides that "if an adjudication 'rendered by a court of first instance' is 'based on two or more determinations, at least one of which, standing alone, would not render the judgment a bar to another action on the same claim,' then the judgment 'should not operate as a bar' to future litigation." Foss v. E. States Exposition, 67 F.4th 462, 469 (1st Cir. 2023) (quoting Restatement (Second) of Judgments § 20 cmt. e (Am. L. Inst. 1982)). And, because the Second Action was dismissed in part on non-merits grounds (namely, § 411(a)'s registration precondition), this court determined that the district court's dismissal "[could not] stand." Id. at 467-68, 473.

serious question" Foss "ha[d] prejudiced Eastern and that it would be manifestly unfair to force it to again have to defend against Foss's claims." It thus concluded that, despite the alternative-determinations doctrine, the prejudice to Eastern meant that claim preclusion nevertheless applied. With respect to timeliness, the district court (after dismissing Foss's argument that the Federal Rules of Civil Procedure barred Eastern from raising the issue in a Rule 12(b)(6) motion)³ determined that "[o]n the record before [it], it [was] clear that Foss did not file suit within the requisite three-year period." In so holding, the district court referenced allegations from Foss's earlier suits against Eastern, noting that Foss had specifically referenced those previous lawsuits in her operative complaint and that the allegations in the earlier suits were therefore subject to judicial notice.⁴ The district court also considered correspondence between

³ Foss does not now raise any claim of error as to that determination.

⁴ In response to Eastern's motion to dismiss, Foss also filed a motion to strike and, in the alternative, a motion for discovery on "prejudice, burden, and limitations." She argued that Eastern relied on "matters outside the complaint" in its motion and that that material should be disregarded. In the alternative, she requested discovery relevant to "prejudice, burden, and limitations," arguing that "essential facts as [would] be disclosed by discoverable information [we]re presently unavailable to her." The district court determined that the majority of the outside materials Eastern cited were susceptible to judicial notice and were permissible but that some other materials, including screenshots of social media posts, were not needed to resolve the dispute and were thus stricken. As to allowing discovery, the district court denied the request without

Foss and Eastern referenced in Foss's original complaint in this action.

As a reminder, the operative complaint in this case merely alleges, without specifying when, that Eastern created marketing videos that included shots of Foss's work and posted those videos on its Facebook and YouTube accounts, encouraging viewers to share the videos (there are no allegations that Facebook or YouTube users ever shared the videos). However, Foss's complaint in the Second Action provided some additional detail: there, she alleged that Eastern posted videos depicting Foss's work online beginning in September 2016 and again in the spring of 2017 to advertise for the 2017 "Big E." The Second Action complaint also alleged that Foss sent a letter to Eastern in early 2017 demanding Eastern remove the videos. The original complaint in this action similarly alleged that Foss notified Eastern that she believed it to be infringing her copyright at around this time.

Accordingly, the district court reasoned that, "given Foss's own allegations and documentation from the various cases she has filed against Eastern, it is clear that she knew or should have known of her cause of action well before December 4, 2017" (the date three years prior to the initiation of this suit).⁵ The

explanation. On appeal, Foss only argues that it was error to deny discovery with respect to the claim preclusion issue.

⁵ Foss has not clearly raised any claim of error with respect to the district court's consideration of the facts alleged in

district court then concluded that Foss's "claims [we]re barred by the statute of limitations." Foss timely appealed.

II. Standard of Review

"We review the district court's grant of [the] motion to dismiss de novo," Wadsworth v. Nguyen, 129 F.4th 38, 61 (1st Cir. 2025) (cleaned up) (quoting Torres-Estrada v. Cases, 88 F.4th 14, 23 (1st Cir. 2023)), "accept[ing] as true all well-pleaded facts [and] 'indulging all reasonable inferences in [appellant's] favor,'" Fantini, 557 F.3d at 26 (quoting Nisselson, 469 F.3d at 150). And it is "well settled in this circuit that a motion to dismiss may be granted on the basis of an affirmative defense, such as the statute of limitations, as long as 'the facts establishing the defense [are] clear "on the face of the plaintiff's pleadings.'"" Álvarez-Maurás v. Banco Popular of P.R., 919 F.3d 617, 628 (1st Cir. 2019) (second alteration in original) (quoting Blackstone Realty LLC v. FDIC, 244 F.3d 193, 197 (1st Cir. 2001)).

III. Discussion

Foss now argues that the district court erred in determining that the Second Action precluded this case and

Foss's earlier lawsuits. To the extent she seeks to so argue, any such argument is deemed waived. United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.").

separately erred in concluding that the statute of limitations barred the suit. We find that Foss has failed to establish, at least, that the district court erred in dismissing her case as untimely. And because untimeliness alone is a sufficient basis for dismissal, we need not consider the claim preclusion issue. We turn now to the specifics of Foss's statute of limitations arguments, first setting forth some basic guiding principles.

Copyright-infringement claims must be "commenced within three years after the claim [has] accrued." 17 U.S.C. § 507(b). "[T]he limitations period generally begins to run at the point when 'the plaintiff can file suit and obtain relief.' A copyright claim thus arises or 'accrues' when an infringing act occurs." Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. 663, 670 (2014) (cleaned up) (quoting Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal., 522 U.S. 192, 201 (1997)). "Under [§ 507(b)]'s three-year provision, an infringement is actionable within three years, and only three years, of its occurrence." Id. at 671. Importantly, copyright-infringement claims are subject to the separate-accrual rule, which provides that a new statute of limitations begins to run with every separate instance of infringement. Id. This means that "[i]f a defendant reproduces or sells an infringing work on a continuing basis, a plaintiff can sue every [three] years until the copyright term expires." Id. at 689 (Breyer, J., dissenting). And the Court

emphasized that the separate-accrual rule applied to "discrete infringing acts." Id. at 672 & n.7.

Foss makes three specific arguments on appeal: first, that the district court misunderstood the importance of when Eastern's violations ceased for the purposes of the statute of limitations; second, that it misunderstood the moment that she was able to "come to court to seek relief"; and, third, even if her suit was untimely, that the district court erred in not equitably tolling the statute of limitations. Before we address -- and reject -- each of these contentions, we note that Foss, both in the operative complaint in this case and the complaints in her previous suits, alleges that Eastern posted infringing videos online in 2016 and in 2017 during the lead-up to each respective year's Big E. And Foss does not contest on appeal the district court's consideration of prior litigation documents showing that she was aware of these videos by early 2017 at the latest. In other words, unless Foss prevails on her arguments, our understanding, like that of the district court, is that the statute of limitations began to run in or around spring 2017, making her December 4, 2020 complaint untimely.

A. Separate-Accrual Rule

Foss first argues that the district court erred in not applying the separate-accrual rule, under which "[e]ach time an infringing work is reproduced or distributed, the infringer

commits a new wrong" and a new limitations period begins. See Petrella, 572 U.S. at 670-71. Below and in her opening brief, she claimed that the allegedly infringing posts "constitute[d] infringing displays unless and until they were taken down," and that because Eastern did not establish that end-date, it failed to show that the statute of limitations had even begun to run for all Foss's claims. But in Petrella, the Supreme Court made clear that "[s]eparately accruing harm should not be confused with harm from past violations that are continuing." Id. at 671 n.6. And Foss's argument that Eastern's posts "constitute[d] infringing displays . . . until they were taken down" would seem to identify a continuing harm from Eastern's original decision to post the videos -- not a string of new violations that might implicate the separate-accrual rule. See id.

In her reply brief and then at oral argument, Foss introduced a new argument to fill this gap. Her new position is that a video posted on the internet results in a string of successive violations, as opposed to one single, continuing violation. See Bell v. Wilmott Storage Servs., LLC, 12 F.4th 1065, 1072 (9th Cir. 2021) (discussing display element of copyright-infringement claim for online content and explaining that "a person displays a photographic image by using a computer to fill a computer screen with a copy of the photographic image fixed in the computer's memory" (quoting Perfect 10, Inc. v.

Amazon.com, Inc., 508 F.3d 1146, 1160 (9th Cir. 2007))). So, says Foss, every day the videos remained online, a new statute of limitations period began to run. In her view, that means that if the videos remained up until at least December 5, 2017, there was at least one timely infringement claim when she filed suit on December 4, 2020.

But before the district court, Foss never argued that a video posted online created multiple infringements, as opposed to a single infringement with continuing harms. Nor did she make this argument in her principal brief before us. Her principal brief cited to Petrella (which did not address the dissemination of copyrighted material over the internet), without providing any analysis or citation to explain why the separate-accrual rule meant her claim was timely. Because Foss's argument -- that a single online post creates multiple "display[s] and new distributions of infringing materials" -- could not be gleaned from Foss's earlier filings, Eastern did not have an opportunity to respond to this contention until oral argument before us.

Thus, because Foss did not provide this argument in her opposition to Eastern's motion to dismiss below and did not raise it before us until her reply brief, her argument that an allegedly infringing video posted online begins a new limitations period every day it remains online is waived. See United States v. Trahan, 111 F.4th 185, 193 & n.6 (1st Cir. 2024) (explaining that

an argument, which "was [not] self-evident from the beginning and [wa]s not a natural counter to [opponent]'s position," raised for the first time in the appellant's reply brief was both forfeited and waived) (first citing In re Redondo Constr. Corp., 678 F.3d 115, 121 (1st Cir. 2012) ("It is black-letter law that arguments not presented to the trial court are, with rare exceptions, forfeit on appeal."); and then citing United States v. Casey, 825 F.3d 1, 12 (1st Cir. 2016) ("[A]rguments raised for the first time in an appellate reply brief [are] ordinarily deemed waived.")).

Without this necessary premise, Foss cannot establish her contention that the district court's analysis had an "end date problem." So, because the separate-accrual rule does not detain us, we turn to Foss's argument on when she "was able to come to court to seek relief."

B. Ability to Seek Relief

While Foss's first argument focuses on whether the alleged infringement here amounts to multiple violations, her second argument centers on when a particular infringement begins the running of the three-year statute of limitations, focusing on what it means to be able to seek relief. Foss contends that the district court erred in concluding that her claims accrued at the time of the alleged infringement (or her knowledge of the same)⁶

⁶ We note that the discovery rule applies to copyright-infringement claims in the First Circuit, meaning that

rather than at the moment she was "able to come to court to seek relief." To make this argument, Foss relies on language from Green v. Brennan, where the Supreme Court explained that the "standard" limitations rule is that a limitations period begins to run when "the plaintiff can file suit." 578 U.S. 547, 554 (2016) (quoting Bay Area Laundry, 522 U.S. at 201). She also cites to Corner Post, Inc. v. Board of Governors of Federal Reserve System, where the Supreme Court explained that a right does not accrue "until the plaintiff can file suit and obtain relief." 603 U.S. 799, 810 (2024) (quoting Bay Area Laundry, 522 U.S. at 201).

Foss then points us to § 411(a)'s registration precondition. As we have explained, § 411(a)'s non-jurisdictional precondition to filing a claim, Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 166 (2010), requires a party to plead that they have registered their copyright or that the Copyright Office refused to register the copyright in order to initiate a copyright-infringement suit, Foss, 67 F.4th at 464. "[R]egistration occurs, and a copyright claimant may commence an infringement suit, when the Copyright Office registers a copyright" -- notably, "[u]pon registration of the copyright, however, a copyright owner can recover for infringement that

"a claim accrues only when a plaintiff knows or has sufficient reason to know of the conduct upon which the claim is grounded." Warren Freedendfeld Assocs., Inc. v. McTigue, 531 F.3d 38, 44 (1st Cir. 2008).

occurred both before and after registration." Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC ("Fourth Estate"), 586 U.S. 296, 299 (2019).

Foss contends that, because § 411(a) prevents a copyright-infringement suit before a plaintiff has registered a copyright, she could not seek relief in court until the moment of registration. Thus, she argues that her copyright-infringement claim did not accrue until she had obtained the registration decision from the Copyright Office under § 411(a).⁷ She relies in part on Fourth Estate because the Supreme Court explained there that "registration is akin to an administrative exhaustion requirement that the owner must satisfy before suing to enforce ownership rights." 586 U.S. at 301. In Foss's estimation, this means that § 411(a) impacts copyright-infringement claim accrual. Foss does not cite any case to support this position, and, furthermore, her position allows for a scenario where a would-be plaintiff delays filing for registration in order to increase their time to bring suit, a scenario that runs against the fundamental

⁷ Importantly, the record does not include the date the Copyright Office registered Foss's copyright -- the registration itself reflects only the date of application. Foss argues that she could not have sued on July 11, 2018, as demonstrated by Eastern having successfully obtained dismissal of the complaint in her second action filed on that date. In turn, Foss argues that because July 11, 2018 is less than three years before she commenced this action, this action is timely. This argument is meritless, for the reasons we will explain.

principles of statutes of limitation. See, e.g., Ord. of R.R. Telegraphers v. Ry. Express Agency, 321 U.S. 342, 348-49 (1944) ("Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.").

And, as Eastern points out, the Fourth Estate Court considered this very scenario. There, the plaintiff argued that "a copyright owner may lose the ability to enforce her rights if the Copyright Act's three-year statute of limitations runs out before the Copyright Office acts on her application for registration." Fourth Estate, 586 U.S. at 309. The Court rejected that argument, explaining that the "fear [wa]s overstated, as the average processing time for registration applications [was then] currently seven months, leaving ample time to sue after the [Copyright Office's] decision, even for infringement that began before submission of an application." Id. After the publication of Fourth Estate, the Court resolved a circuit split on the proper assessment of copyright damages in circuits applying the discovery rule (that is, holding that the statute of limitations begins to run when the copyright holder discovers the infringement, not when the infringement occurs). Warner Chappell Music, Inc. v. Nealy, 601 U.S. 366, 371-74 (2024). The Court assumed, without deciding,

that the discovery rule could apply to copyright-infringement claims. Id. at 371. And in so doing, the Court repeatedly cited Petrella's holding that a "copyright claim 'accrue[s]' when 'an infringing act occurs.'" Id. at 369, 371 (alteration in original) (emphasis added) (quoting Petrella, 572 U.S. at 670). At no point did the Court reference the moment of registration or suggest that anything other than infringing conduct itself, or the plaintiff's discovery of that conduct, could cause the three-year statute of limitations to begin to run. See id. at 369-70. Thus, Foss has not convinced us that the date the Copyright Office registers a copyright is what initiates the limitations period.

Accordingly, Foss has failed to establish that the district court erred in determining that by the time she filed this suit in December 2020 her claims were untimely.

C. Equitable Tolling

We turn then to Foss's final argument: that the district court erred in declining to equitably toll the running of the limitations period.⁸

⁸ Although Foss raised equitable tolling below, the district court's decision on the statute-of-limitations issue did not directly address that argument. Foss does not now advance any claim that the court erred in not squarely addressing equitable tolling, and we infer from the district court's silence that it considered and rejected Foss's position. See Denson v. Marshall, 230 F.3d 1347 (1st Cir. 2000) (unpublished table decision) (concluding that where district court "did not explicitly mention" an argument it "implicitly [rejected] appellant's contention").

"We review [the] district court's ruling rejecting the application of the doctrine of equitable tolling for abuse of discretion" Abraham v. Woods Hole Oceanographic Inst., 553 F.3d 114, 119 (1st Cir. 2009). "Equitable tolling is available 'in exceptional circumstances' to extend the statute of limitations." Vistamar, Inc. v. Fagundo-Fagundo, 430 F.3d 66, 71 (1st Cir. 2005) (quoting Neverson v. Farquharson, 366 F.3d 32, 40 (1st Cir. 2004)).

"In order for equitable tolling to apply, the plaintiff must show that circumstances beyond [their] control precluded a timely filing. However, equitable tolling is sparsely applied and cannot be used to rescue a plaintiff from [their] lack of diligence." Abraham, 553 F.3d at 119 (internal citations omitted) (first citing Monrouzeau v. Asociación del Hosp. del Maestro, Inc., 153 F. App'x 7, 9 (1st Cir. 2005); and then citing Cao v. Puerto Rico, 525 F.3d 112, 115 (1st Cir. 2008)).

Foss specifically references the time during which her application was pending with the Copyright Office, contending that equitable tolling would be appropriate for that period. But the record does not reveal when the Copyright Office registered Foss's copyright, and Foss has not told us. Without any information about

In addition, Foss lists, without further explanation or legal support, equitable estoppel as an additional equitable basis for reversal. Because Foss has inadequately briefed the issue, we deem it waived. See Zannino, 895 F.2d at 17.

the length of the Copyright Office's delay and its effects on her ability to timely assert her claims, Foss cannot show that the district court erred in declining to equitably toll the statute of limitations on her copyright-infringement claim due to a delay potentially attributable to the Copyright Office. See supra note 7.

Foss alludes to her previous suits, contending that she had applied for registration but was awaiting a decision such that her lateness should not be faulted given her diligence. Again, Foss has not provided legal support for this position, and we are not convinced that these circumstances were beyond her control. She notes that, prior to Fourth Estate, the federal courts of appeals were split as to whether a copyright plaintiff could file suit upon submission of a registration application or instead had to wait until the Copyright Office reviewed and registered the copyright. See Alicea v. Machete Music, 744 F.3d 773, 779 (1st Cir. 2014) (noting circuit split and declining to take a position). And she states that, as a result of this circuit split, "it was unclear when she could even come to court." Foss's problem, however, is not that she held off on suing Eastern until the Copyright Office registered her copyright -- which, in any event, would have been exactly what Fourth Estate later required, see 586 U.S. at 299 -- but that she repeatedly filed complaints against Eastern that failed to allege that her copyright for the supposedly

infringed work had been registered, never correcting this deficiency despite the district court's admonitions. See Foss, 365 F. Supp. 3d at 172 (citing Fourth Estate and permitting Foss leave to amend to comply with its requirements); Foss, 67 F.4th at 464 (noting that "Foss did not avail herself of [the] option" to cure the § 411(a)-related defect in her first suit). Foss could have sued well within the limitations period had she simply taken the first step to bringing a claim -- registering her copyright (which need not await infringement) -- and then informed the court that she had done so. Equitable tolling cannot rescue Foss from this lack of diligence in the face of clear instructions.

Foss also argues that it would be unfair to bar her suit as untimely when her previous cases were dismissed as "being premature" and "coming too soon." This argument misunderstands § 411(a)'s precondition-to-suit requirement and the reasons her earlier complaints were dismissed. The earlier suits were not dismissed for "coming too soon" but for failing to allege facts related to § 411(a)'s requirement that a copyright be registered before an infringement suit can proceed. Again, Foss has not established that the court abused its discretion in rejecting this basis for tolling.

IV. Conclusion

For these reasons, we affirm the district court's order dismissing Foss's case.

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

**CYNTHIA “CINDY” FOSS d/b/a HUNTER FOSS
DESIGN & INTEREST,
Plaintiff,**

V.

CIV. ACT. NO. 20-12167-TSH

EASTERN STATES EXPOSITION
Defendant.

MEMORANDUM OF DECISION AND ORDER

March 14, 2024

HILLMAN, S.D.J.

Background

Cynthia (“Cindy”) Foss (“Foss” or “Plaintiff”) has filed a Complaint against Eastern States Exposition (“Eastern” or “Defendant”) alleging claims for copyright infringement in violation of the United States Copyright Act, 17 U.S.C. §106(1)-(3), (5), and Violation of the United States Visual Artists Rights Act (“VARA”), 17 U.S.C. §106A(a)(1)(A). More specifically, Foss alleges that without her consent, in marketing videos, Eastern used copyrighted works of her “photo-realistic artistic compilations and art installation pieces,” which she had created for St. Joseph’s Abbey (the “Abbey”). Foss further alleges that in its videos, Eastern did not give her attribution for the work

A brief summary of the procedural events culminating in this Memorandum and Order of Decision addressing Eastern's second motion to dismiss Foss's Amended Complaint is helpful to understanding the present posture of this matter.¹ On December 4, 2020, Foss filed the instant action. On February 24, 2021, Eastern filed a motion to dismiss then original Complaint, with prejudice. On March 3, 2021, Foss filed an Amended Complaint, as of right, asserting identical claims supported by substantially the same allegations.² On March 24, 2021, Eastern filed a motion to dismiss Foss's Amended Complaint on the grounds that this suit is barred by principles of *res judicata*. More specifically, Eastern asserted that this suit is barred by the claim preclusive effect of the following actions Foss had previously filed against Eastern: (1) on June 27, 2018, this Court had dismissed substantially identical claims against Eastern brought by Foss in the case of *Foss v. Spencer Brewery, et al*, 18-40011-TSH³; (2) On May 31, 2019, this Court for the second time dismissed substantially identical claims against Eastern, this time in the case of *Foss v. Spencer Brewery, et al*, 18-40125-TSH ("Civ. Act. No. 18-40125")⁴; and on October 29, 2018, the Court had dismissed a case brought by Foss involving identical claims against

¹ The Court's summary is limited to the procedural posture of the motions before it—in reality, this matter arises from a long and torturous procedural history which includes the filing of multiple complaints in multiple jurisdictions over a prolonged period of time. The Court will provide a more comprehensive outline of how the case has arrived at this point throughout the opinion. Additionally, the First Circuit opinion, cited *infra* sets forth a detailed description of this case's history.

² This Court's rules of procedure provide that a party may amend their complaint as a matter of course within 21 days after service of a motion to dismiss under Fed.R.Civ.P. 12(b). *See* Fed.R.Civ.P. 15(a)(1)(B). Foss's filing of the Amended Complaint mooted Eastern's motion to dismiss. Nevertheless, Foss filed an opposition to that motion. Given that the motion to dismiss was effectively mooted, it was never addressed by the Court. *See* Docket Entry No. 29 (finding motion to dismiss original complaint moot).

³ The case was dismissed for failure to state a claim for the reasons stated in Eastern's supporting memorandum. Foss had not opposed the motion to dismiss.

⁴ This case was originally filed in Massachusetts state court and was removed to this Court by the Abbey and another defendant. The case was dismissed for failure to state a claim for the reasons stated in Eastern's supporting memorandum. Foss had not opposed the motion to dismiss.

Eastern as those set forth in Civ. Act. No. 18-40125. *See Foss v. Spencer Brewery, et al*, 18-40122-TSH⁵.

On March 23, 2022, the Court granted Eastern's Motion to Dismiss on the grounds that her claims were barred by principles of res judicata and/or failed to state a claim upon which relief may be granted. *See Memorandum of Decision and Order*, dated March 23, 2022 (Docket No. 31). Foss appealed to the First Circuit. On appeal, the First Circuit reversed the judgement in Eastern's favor after finding that this action is not barred by claim preclusion as the result of Foss's failure to have satisfied a precondition to suit (the only res judicata ground argued by Eastern). *See Foss v. Eastern States Exposition*, 67 F.4th 462 (1st Cir. 2023)⁶. The Circuit did not address whether the claims may be barred on other res judicata grounds such as issue preclusion. The Circuit also left open the question of whether claim preclusion may bar the instant action on prejudiced-based grounds. *See Foss*, 67 F.4th at 466 n.6, 468-69, 473. Although taking no position on the outcome, the Circuit intimated that upon remand, Eastern would be free to pursue any other grounds for barring the instant action left open by its decision.

Following remand, Eastern has filed a renewed motion to dismiss seeking dismissal of the Amended Complaint on the grounds that allowing Foss to pursue yet another action against it is unfair and prejudicial, and her claims are barred by the statute of limitations. *See Eastern States Exposition's Motion to Dismiss* (Docket No. 54). Foss has filed a motion to exclude matters outside the pleadings on the grounds that the factual matters asserted by Eastern go

⁵ This case was originally filed in Massachusetts state court and was removed to this Court by Eastern and another defendant. This action was the same state court suit as Civ. Act. No. 18-40125 and had inadvertently been assigned a different case number after being removed from state court by different defendants. The case was dismissed at the request of the parties as a duplicative cause of action.

⁶ The Circuit held that federal res judicata law recognizes the alternative determination doctrine (as modified by the court) which, in general, "strips a dismissal of claim preclusive effect if the dismissal rests on multiple grounds, not all of which would on their own render the dismissal claim preclusive." *Foss*, 67 F.4th at 463, 474. The Circuit further held that a claim based on a failure to satisfy a precondition to suit is not necessarily claim preclusive. *Id.*, at 474.

beyond what is asserted in the Amended Complaint. *See* Cynthia Foss’s Rule 12(D) And 56(D) Motion To Exclude Matters Outside The Complaint Or, Alternatively, To Permit Discovery Into Such Matters (Docket No. 56).

For the reasons set forth below, Foss’s motion to strike and/or for additional discovery is *granted*, in part, and *denied*, in part. Eastern’s motion to dismiss is *granted*.

Discussion

Foss’s Motion to Strike/For Additional Discovery

Foss contends that in support of its motion to dismiss her claims on unfairness/prejudice grounds and/or violation of the statute of limitations, Eastern has relied on matters outside of the pleadings. In ruling on whether the complaint states an actionable claim, the court must consider only the complaint and documents annexed to it; the court cannot consider affidavits and miscellaneous documents proffered by parties, *unless* such other materials are fairly incorporated within the complaint, or are susceptible to judicial notice. *Rodi v. S. New England Sch. Of Law*, 389 F.3d 5, 12 (1st Cir. 2004); *Watterson v. Page*, 987 F.2d 1, 3 (1st Cir. 1993)(in deciding a motion to dismiss, the court may consider “documents the authenticity of which are not disputed by the parties; ... official public records; ... documents central to plaintiffs’ claim; [and] documents sufficiently referred to in the complaint.”). In this case, Eastern has relied on facts supported by materials outside the record, specifically, docket entries and court orders in separate (but related) matters, a letter sent by Foss to Eastern in 2017, *which she referenced to and relied on in her original Complaint* (*see* Docket No. 1, p. 21 at ¶ 21), and snapshots from Foss’s Instagram account showing posts and deleted content. In other words, the matter outside of the pleadings relied upon by Eastern are documents/information which are a part of the public record (or readily available to the public) and/or in her possession, custody and control. As to the

letter Foss sent to Eastern which is referenced in her original complaint, such information is quintessentially the type which are susceptible to judicial notice. Accordingly, Foss's motion to strike the letter is denied, as are facts supported by docket entrees and prior court orders in related cases (the Court notes that Foss refers to the prior suits on multiple occasions in the Amended Complaint, thereby incorporating the allegations contained therein by reference). Foss's social media posts and deletions are a closer question. An argument could be made that the posts are incorporated by reference into the complaint as they relate to Foss's various theories of the case, however, given that Eastern's motion can be resolved without reference to the social media posts cited by it, the Court need not resolve the question. The Court has not considered the Foss's Instagram posts cited by Eastern in support of its motion to dismiss and therefore, Foss's motion to strike the same is *granted*. Accordingly, Foss's motion to the extent it seeks additional discovery prior to the Court's ruling on Eastern's motion to dismiss is *denied*.

Whether the Instant Action should be Dismissed on Prejudice Grounds

In vacating this Court's dismissal of Foss's claims in the instant suit, the First Circuit recognized that "in holding that a dismissal based on failure to satisfy a condition precedent to suit is in general not claim preclusive under Massachusetts law ... such a failure might be preclusive under Massachusetts law if 'the plaintiff's failure to satisfy [the] precondition before bringing the first suit prejudices the defendants'." *Foss*, 67 F.4th at 468-69 (citation to quoted case omitted). At the same time, the Circuit noted that this Court had not addressed whether "a prejudice-based ground for deeming the dismissal ... claim preclusive was applicable." Eastern has accepted the First Circuit's invitation to seek dismissal of this action on the grounds that it would be prejudiced if Foss were permitted to pursue her copyright infringement claim and other causes of action in this, the third suit she has brought against it on the same underlying facts and

legal grounds. More specifically, Eastern asserts that it has been prejudiced by Foss's failure to satisfy a condition precedent, *i.e.*, the copyright registration requirement set forth in 17 U.S.C. §411(a), in the *multiple* cases she filed prior to bringing the instant copyright infringement action.

In its opinion, the Circuit set out in careful detail the multiple actions that Foss has brought against Eastern in this Court and Massachusetts state court⁷ seeking to recover for Eastern's alleged exploitation of photographs she took on behalf of the Abbey for use at a booth at the Big E exposition ("Big E")⁸ to promote products produced by a brewery it owned and operated ("Spencer Brewery").⁹ *See Foss*, 67 F.4th at 464-65. Moreover, the Circuit described the multiple opportunities that Foss had to cure the identified deficiency with respect to her copyright infringement claim in the suits she filed prior to the instant action, *i.e.*, failure to fulfill the copyright registration-related precondition set forth in §411(a). *Id.*, at 468-69, 471. In its motion, Eastern details the extensive legal work and court proceedings which it has undertaken in connection with Foss's multiple suits, such as: having to respond to her multiple complaints, motions (including motions for injunctive relief) and discovery requests, preparing counterclaims, engaging in dispositive motion practice, and attending and preparing for status/scheduling conferences. Eastern also engaged in attempts to mediate Foss's claims, which included having to prepare a detailed memorandum, and both counsel and Eastern's Chief

⁷ As set forth in the Court's background summary, the state court case was removed to this Court.

⁸ The Big E is an annual, multi-state exhibition which is run by Eastern and held in Springfield, MA.

⁹ More specifically, Foss took pictures of the interior of the Abbey dining hall comprised largely of stained-glass windows and interior stoned walls, enlarged them and displayed them in such a way as to recreate the dining hall in the Abbey's/Spencer Brewery's booth at the Big E. Eastern video-taped an interview with Father Isaac, lead monk at the Abbey/Spencer's Brewery, which was conducted inside the re-created dining room as part of an ongoing informative series with "CoffeE with Julie." Foss asserts that Eastern violated her intellectual property rights by showing the video interview with Father Isaac on You Tube and Face Book to promote the Big E without attributing the alleged works of art in the background to her (*i.e.*, the photographs depicting the interior of the Abbey dining hall).

Executive Officer appearing in person for a mediation session with a United States Magistrate Judge in Worcester, Massachusetts. Additionally, during the course of the litigation, Foss, who was then represented by counsel, filed a *pro se* motion to compel arbitration. Moreover, given that Foss did not appeal from prior dismissals of her claims, significant time has passed during which memories have obviously faded and evidence has been lost or destroyed (not to undermine the litigation, but because it was thought that finality had been achieved).¹⁰

I find without serious question that Foss's failure to satisfy §411(a)'s precondition in the multiple actions filed prior to this suit, despite having been advised of the necessity to do so, has prejudiced Eastern and that it would be manifestly unfair to force it to again have to defend against Foss's claims. Moreover, the failure to satisfy the precondition rests solely on Foss's shoulders—she was represented by counsel who presumably knew and understood the prerequisites for pursuing her claims. At the same time, she was actively involved and attentive to what was happening in her case as evidenced by her filing motions *pro se* while represented by counsel. Nonetheless, in the prior multiple suits filed in multiple jurisdictions over multiple years, she failed to plead that she had taken the necessary action to comply with §411(a). Her failure is particularly troublesome, and frankly inexplicable, given that the evidence on the record is she satisfied §411(a)'s precondition prior to filing previous suits.

Simply put, the multiple litigations that Foss has brought against Eastern regarding the same underling facts and legal theories has caused Eastern to have to rigorously defend itself at *great* cost and vexation. Given the extreme prejudice that would result to Eastern should this

¹⁰ In her motion to exclude matters outside of the pleading, Foss argued that any prejudice suffered by Eastern was speculative and/or relied on matters outside of the pleadings. As stated in the Court's prior discussion of Foss's motion to strike, evidence relating to the prejudice suffered by Eastern can be found in documents, pleadings, etc. filed in the multiple related cases filed by Foss and therefore, is subject to judicial notice. Moreover, common sense supports long recognized propositions such as memories fade over time.

case go forward, the Court finds that claim preclusion bars this action due to Foss's failure to have previously satisfied §411(a)'s precondition (or failure to have previously pled the satisfaction of the same). Accordingly, Eastern's motion to dismiss is *granted*.

Foss's Assertion that the Court may not Consider Eastern's Statute of Limitation's Argument

Eastern seeks to dismiss Foss's Amended Complaint on the grounds that her claims are barred by the statute of limitations. Foss asserts that pursuant to this Court's rules of procedure, Eastern is barred from seeking dismissal of this action on statute of limitations' ground because it failed to raise the issue in its first motion to dismiss. *See* Fed.R.Civ.P. 12(g), 12(h). Foss argues that this Court should deny the motion to dismiss on statute of limitation grounds without addressing its merits and instead, require Eastern to seek dismissal on such grounds pursuant to a motion for judgement on the pleadings.

A literal reading of Rules 12(g) and 12(h)(2) supports Foss's position, *i.e.*, while Eastern has not waived its statute of limitations defense by failing to seek dismissal on that ground in its first motion to dismiss, it cannot seek dismissal on such ground in a subsequent motion to dismiss but, instead, must raise the issue in a motion for judgment on the pleadings after filing an answer. However, because the standard of review for motions to dismiss and judgment on the pleading is identical, the First Circuit and other federal courts have not applied the rule as strictly as its wording would dictate. Instead, the courts have found that pursuant to Rule 12(h)(2), a party may file a motion to dismiss pursuant to Rule 12(b)(6) at any time before or at trial.¹¹ Accordingly, the Court will consider Eastern's motion to dismiss Foss's Amended Complaint on statute of limitations grounds. In doing so, the Court applies the well-known and oft cited standard of review governing motions to dismiss.

¹¹ A motion to dismiss on statute of limitations grounds is considered a motion to dismiss for failure to state a cause of action under Rule 12(b)(6).

It is undisputed that a three-year statute of limitations applies to Foss's claims. On the record before the Court, it is clear that Foss did not file suit within the requisite three-year period and therefore, her claims are barred by statute of limitations. More specifically, given Foss's own allegations and documentation from the various cases she has filed against Eastern, it is clear that she knew or should have known of her cause of action well before December 4, 2017¹². In so holding, the Court notes that Foss's attempts to save her claims by attributing third party actions to Eastern, and/or asserting a continuing infringement theory are spurious given the allegations in her various pleading which do not support such theories.

Conclusion

1. Eastern States Exposition's Motion to Dismiss (Docket No. 54) is ***granted*** for the reasons stated in this Memorandum of Decision and Order; and

2. Cynthia Foss's Rule 12(D) And 56(D) Motion To Exclude Matters Outside The Complaint Or, Alternatively, To Permit Discovery Into Such Matters (Docket No. 56) is ***granted***, in part, and ***denied***, part, as provided in this Memorandum of Decision and Order.

/s/ Timothy S. Hillman
TIMOTHY S. HILLMAN
SENIOR DISTRICT JUDGE

¹² In her Amended Complaint, Foss has avoided alleging specific dates regarding alleged wrongful acts or conduct by Eastern with respect to her copyright infringement and VARA claims. However, she made specific references to such dates in her prior suits against Eastern and she references those suits in her Amended Complaint.

United States Court of Appeals For the First Circuit

No. 24-1360

CYNTHIA FOSS, d/b/a Hunter Foss Design & Interest,

Plaintiff - Appellant,

v.

EASTERN STATES EXPOSITION,

Defendant - Appellee.

Before

Barron, Chief Judge,
Kayatta, Gelpí, Montecalvo, Rikelman, Aframe, and Dunlap,*
Circuit Judges.

ORDER OF COURT

Entered: November 19, 2025

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

By the Court:

Anastasia Dubrovsky, Clerk

cc:

Stephen J. Gordon, Andrew Grimm, Gregory William Keenan, James C. Duda, Lauren C. Ostberg,
Paul A. Maddock, Christine Davik

*Judge Dunlap did not participate in this matter.