

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JAN 09 2004
By: JAMES W. MCCORMACK, CLERK
DEP. CLERK
PLAINTIFF

MICHAEL GALSTER

V.

NO. 4:03-CV-01013 JMM

KELLY DUDA

DEFENDANT

DEFENDANT'S RESPONSE TO
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION
AND COUNTERMOTION TO DISMISS FOR FAILURE TO
STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

COMES NOW THE DEFENDANT, and in his response, states:

1. As an initial matter, this Court has no jurisdiction to issue the relief requested by Plaintiff. Plaintiff cites 17 USC §106A as the basis for relief. By its own terms, it does not apply to film.
 - A. The provision of 17 USC §106A(a) specifically notes that the rights protected are those of "the author of a work of visual art". Notwithstanding the matters asserted hereinbelow, to wit, that Plaintiff played no role whatsoever in the making of "Factor 8, the Arkansas Prison Blood Scandal", this provision does not deal with or protect works of film.
 - B. 17 USC §101 defines "a work of visual art" as "a painting, drawing, print, or sculpture. . ." or "a *still photographic image*". 17 USC (1)(A) 1 & 2. (Emphasis supplied)

- C. Specifically excluded from the definition of “a work of visual art” is “any . . . motion picture or other audiovisual work”. *Id.* at A(i)
 - D. The protections against “distortion, mutilation, or other modification” thus apply to works of visual art and not to works of audiovisual art, such as “Factor 8, the Arkansas Prison Blood Scandal.”
 - E. No relief may be granted on the complaint as filed.
 - F. On this basis, the complaint should be dismissed outright under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.
- 2. Alternatively, Defendant responds to the motion as follows:
 - 3. Admits that the Plaintiff has made various allegations in a complaint, none of which are true.
 - 4. Denies paragraph 2. There is no film called simply “Factor 8” to Defendant’s knowledge. Insofar as Plaintiff attempts to reference “Factor 8, the Arkansas Prison Blood Scandal”, Defendant denies that he has illegally and/or wrongfully taken possession of any such work from Plaintiff but rather that it is his own work product. It is, therefore, his to display at the Slamdance Film Festival if he so desires or not.
 - 5. Defendant’s film, “Factor 8, the Arkansas Prison Blood Scandal”, in no way distorts or modifies any existing work in which Plaintiff holds an interest. The only work on this subject by Plaintiff is a work of fiction, a subsidy published novel, “Blood Trail”, which Plaintiff avers is a product of a “fertile imagination”.
 - 6. Defendant denies that this work in its current form would be “prejudicial” in any way. Honor and reputation are not copyrightable and if Plaintiff’s honor and reputation are

being besmirched, the appropriate forum to address such defa nation is an Arkansas State Court.

7. Plaintiff has little chance of success on the ultimate merits.
8. Plaintiff has made a conclusory allegation of irreparable harm but has stated no way in which he will be harmed if the injunction be not granted.
9. The harm to Defendant Kelly Duda, a trained film maker with experience in various media of film making, and to his future earning potential career would be nearly immeasurable. The Slamdance Film Festival represents a single chance to get his work before the entertainment community, a chance that will not be repeated and for which there is no adequate substitute. Potentially, the damage to Mr Duda's career could be enormous.
10. Plaintiff, an orthotics specialist with little or no experience or income from film making, stands to suffer no great loss if the injunction be not granted.
11. There is great public interest in getting this film out to those who can air it generally. It could, potentially, cause an investigation of the persons and events causing fatal harm to thousands of citizens of allied countries, to wit, Canada, the European Union, and Japan.

WHEREFORE, having fully pleaded, Defendant prays that Plaintiff's motion for preliminary injunction be set aside, quashed and held for naught.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served upon the individual(s) indicated herein below by placing a copy of same in the United States Mail, postage prepaid, or by such other service as may be indicated herein.

Dated this 8th day of Jan, 2004

Joseph W. Woodson, Jr., 400 W. Capitol Ave, Suite 2990, Little Rock, AR. 72201

