


**MEMORANDUM ENDORSEMENT**

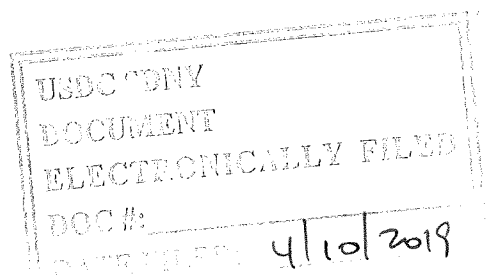
Hirsch v. Art Observed LLC, 18 cv 11316 (NSR)

The Court is in possession of the attached pre-motion letter from Defendant, dated April 9, 2019, and Plaintiff's letter, dated April 9, 2019. The Amended Complaint (ECF No. 14) supersedes the original Complaint (ECF No. 1). The Court waives the pre-motion conference requirement and grants Defendant leave to file its motion to dismiss the Amended Complaint. Defendant is granted leave to supplement its motion papers served on February 28, 2019 if it so chooses. Such supplement shall be served **not filed** on May 1, 2019. If Defendant chooses to rest on its previously served moving papers, counsel shall notify the Court and Plaintiff's counsel in writing on or before May 1, 2019. Plaintiff's opposition shall be served **not filed** June 3, 2019. Defendant's reply shall be served **not filed** June 18, 2019. **All motion documents shall be separately filed on the reply date, June 18, 2019.** The parties shall provide 2 copies of their respective motion documents to Chambers on the dates the documents are served upon their adversary.

Dated: April 10, 2019  
White Plains, NY

SO ORDERED.

  
\_\_\_\_\_  
Nelson S. Román, U.S.D.J.



LAW OFFICES OF LAUREN B. LEPORE, P.C.  
200 PARK AVENUE, 17<sup>TH</sup> FLOOR  
NEW YORK, NEW YORK 10166  
(646) 632-3787 (TELEPHONE)  
(212) 682-0278 (FACSIMILE)  
LLEPORE@LEPORELAWFIRM.COM

April 9, 2019

Via Facsimile (914.390.4179)

Honorable Nelson S. Roman  
United States District Court  
Southern District of New York  
300 Quarropas Street  
White Plains, NY 10601-4150

Re: *Steven Hirsch v. Art Observed LLC*  
Case No.: 7:18-CV-11316

Dear Judge Roman:

As the Court may recall, this firm represents the Defendant, Art Observed (“Art Observed” or “AO”), in the above-referenced action. On February 28<sup>th</sup>, 2019, we filed a Motion to Dismiss Plaintiff’s Complaint along with a Memorandum of Law in Support on AO’s behalf (the “Motion to Dismiss”). The Motion to Dismiss was denied without prejudice pursuant to your Honor’s order dated March 6, 2019, due to a technical error. On March 14, the Court granted AO’s request for permission to submit its Motion to Dismiss and set a briefing schedule which required Plaintiff to serve its opposition to AO’s motion on or before April 15, 2019 with AO’s reply being due on or before May 1, 2019. Subsequently, on March 22, Plaintiff filed an Amended Complaint in this action.

For factual background and AO’s legal arguments, we refer the Court to our letter of March 8, 2019 and Memorandum of Law in support of the Motion to Dismiss.

Plaintiff’s Amended Complaint adds a handful of new allegations, none of which change the thrust or strength of Plaintiff’s claims (or, as a result, Art Observed’s arguments to dismiss them).

First, paragraph 19, a new allegation, states as follows: “The Article makes specific reference to the New York Post, indicating that Defendant knew of the existence of the New York Post Article about Leigh Morse at the time the Article was posted to the Website.” *See* Amended Complaint at ¶19. This allegation does nothing to bolster Plaintiff’s claim; AO does not deny its knowledge of the New York Post Article.

Next, Plaintiff adds a series of allegations in Paragraphs 24 – 28 of the Amended Complaint, the sum and substance of which are that; (1) AO did not offer commentary but simply reported; (2) upon information and belief, AO did not consult with copyright lawyers; and (3) a licensing market existed for the photograph and AO used the photograph to save it the expense of licensing the photograph or commissioning its own photographer. *See* Amended Complaint at

¶¶24-27. As these are the crux of Plaintiff's "new allegations", it is worthwhile to briefly consider each in turn.

First, as set forth in detail in AO's Motion to Dismiss, AO did in fact offer commentary. Merely stating it did not does not satisfy the *Twombly* standard requiring plausibility. See *Bell Atlantic Corp. v. Twombly*, 379 U.S. 984, 127 S. Ct. 1955, 1965, 167 L.Ed.2d 929 (2007). Indeed, the website itself has been incorporated into the Complaint (and Amended Complaint) and as such the Court is free to consider and analyze its content as it sees fit. See *Global Networks Communic'ns Inc. v. City of New York*, 458 F.3d 150, 156-157 (2d Cir. 2006) ("The Court may consider documents attached as exhibits or incorporated by reference in the pleading and matters of which judicial notice may be taken."). The addition of a meritless statement in an Amended Complaint whose sole purpose is to defeat a motion to dismiss and to take advantage of the generally plaintiff-friendly legal standard should not be condoned under *Twombly* and its progeny. As described more fully in AO's memorandum of law, Art Observed uses several techniques to make its commentary on the art world and its happenings and simply stating that it does not, on Plaintiff's say so alone, must not carry the day.

Next, Art Observed makes no claim to have consulted with copyright lawyers prior to being sued. This allegation and the implication that Art Observed *should* have consulted copyright lawyers is troubling and seems to be at the crux of the societal problem that Plaintiff himself is perpetuating. Must lawyers be involved every step of the way when a small, essentially revenue-less blog for art enthusiasts sets out to educate the community about art with no malice or intent to break any laws or reasonable knowledge that it may be doing so? For a host of obvious reasons, the answer should be "no". If anything, the fact that AO did not consult a copyright lawyer in advance of being unexpectedly sued goes to its innocence and shows that AO was not trying to "see what they could get away with". They simply, in good faith, posted commentary on the art world to their blog without looking to infringe on anyone's rights or otherwise damage anyone.

Finally, assuming it is true that a licensing market existed, as this Court should under the applicable legal standard, it does not follow that AO sought to avoid the expense of licensing the photograph as Plaintiff alleges. AO had no means or reason to know that a licensing market existed, if it did, and did not itself profit in any way from the use of the photograph. Nor would it have commissioned its own photographer under the circumstances as any reasonable person would recognize. Rather, it included the photograph as an illustration of the seedy side of the art world, and the media coverage thereof, which amounted to its commentary on the current state of that world.

With regard to the CMI allegations, the new allegations do nothing to bolster Plaintiff's claims. He has added nothing more than allegations "upon information and belief" that AO knowingly removed CMI and had "reasonable knowledge" that it would be disseminated without the CMI. See Amended Complaint at ¶¶36 *et seq.* As set forth in AO's memorandum of law, these allegations too fall flat.

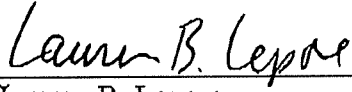
It is respectfully submitted that Plaintiff's Amended Complaint does not rescue its claims from perishing under the applicable legal standard. In a transparent attempt to do an end run around the legal requirements and to cause AO to incur further legal costs, Plaintiff has submitted its Amended Complaint to pre-emptively head off AO's meritorious arguments. Yet, as set forth above, Plaintiff merely added some additional conclusory and insignificant allegations to its claims which should not change the outcome of AO's Motion to Dismiss.

Therefore, in an effort to conserve judicial resources and being ever mindful of Art Observed's mounting legal costs, AO respectfully requests that the Court consider its motion papers served on February 28, 2019 as contemplated by the Court's March 6 endorsement.

Should the Court prefer that AO submit a new motion in response to the Amended Complaint, we would be happy to do so. In that case, we respectfully request that the Court notify us of the date by which our new motion would be due.

Thank you very much for your consideration of this matter.

Respectfully submitted,

  
\_\_\_\_\_  
Lauren B. Lepore

cc: Richard Liebowitz, Esq. (*via electronic mail*)

Liebowitz  Law Firm, PLLC  
ATTORNEYS FOR THE PHOTOGRAPHIC ARTS

11 SUNRISE PLAZA, STE. 305  
VALLEY STREAM, NY 11580  
(516) 233-1660  
WWW.LIEBOWITZLAWFIRM.COM

April 9, 2019

VIA FAX (914-390-4179)

Honorable Nelson S. Román  
United States District Court  
Southern District of New York  
300 Quarropas Street  
White Plains, NY 10601

Re: Hirsch v. Art Observed LLC., 7:18-cv-11316 (NSR)

Dear Judge Román:

We represent plaintiff Steven Hirsch, in the above-referenced action and write in opposition to Defendant Art Observed LLC ("Defendant")'s request to set a briefing scheduling in the absence of a pending motion to dismiss.

It is well established that an amended complaint ordinarily supersedes the original and renders it of no legal effect. *Benavidez v. Piramides Mayas Inc.*, No. 09 CIV. 5076 KNF, 2013 WL 2357527, at \*5 (S.D.N.Y. May 24, 2013). Furthermore, "the filing of an amended complaint following the filing of a motion to dismiss the initial complaint moots the motion to dismiss." *Brown v. Napoli*, No. 07-CV-0838, 2008 WL 4507590, at \*2 (W.D.N.Y. Sep. 29, 2008) (citing *Haywood v. Republic Tobacco, Co., L.P.*, No. 05-CV-0842, 2007 WL 1063004 (W.D.N.Y. Apr. 6, 2007)). As such, the Rules require that Defendant serve a renewed motion to dismiss the Amended Complaint.

In the event that the Court grants Defendant's requested relief to forego the filing of a renewed motion, Plaintiff respectfully requests twenty-one (21) calendar days from the date of the Court's order to file its opposition brief. At that time, Plaintiff will address the substantive arguments raised in Defendant's letter of April 9.

Respectfully Submitted,

/s/richardliebowitz/  
Richard Liebowitz

*Attorney for Plaintiff Steven Hirsch*



**FAX COVER SHEET**

**TO:** Hon. Judge Nelson S. Román (U.S.D.J.)

**FAX #:** (914) 390-4179

**FROM:** Liebowitz Law Firm PLLC [*Counsel for Plaintiff*]

**RE:** *Hirsch v. Art Observed*, 18-cv-11316 (NSR)

**PAGES:** 1 + Cover Sheet

---

Dear Judge Román:

Enclosed please find Plaintiffs' letter to Your Honor, dated April 9, 2019.

Sincerely,

Richard Liebowitz

Richard Liebowitz