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Disney Can't Sink Writer's 'Pirates' IP Row, 9th Circ. Told

By **Daniel Siegal**

Law360, Los Angeles (April 7, 2017, 7:28 PM EDT) -- Disney battled a Florida writer Friday in a Ninth Circuit hearing over claims that the studio stole copyrighted ideas for its "Pirates of the Caribbean" film franchise, with the writer arguing that he followed the legal notice steps required to sue again following a 2007 settlement with the studio.

At a hearing in Pasadena, California, Columbia Law School Professor Ronald J. Mann, representing Florida writer Royce Mathew, urged a three-judge panel to revive his client's 2013 lawsuit alleging the Walt Disney Co. in 2007 fraudulently lured him into settling a copyright infringement lawsuit, which alleged that the company's blockbuster film franchise is based on his drawings, storyboards and screenplay drafts.

Mathew alleged in 2013 that two years after he signed his 2007 agreement, he discovered that Disney took artwork originally intended for its Treasure Island theme park ride and manipulated it to appear like Pirates of the Caribbean artwork in order to assert that the company and its artists independently created the concepts behind the movies. Because of the alleged fraudulent acts, Mathew sought to have the release agreement rescinded and his copyright infringement allegations reinstated.

In April 2015, U.S. District Judge Gary B. Klausner dismissed the suit, ruling the media giant was prejudiced because it didn't receive any pre-suit notice from Mathew.

Mann argued Friday that Judge Klausner had erred in ruling that Mathew failed to provide Disney with proper pre-suit notice that he was planning to rescind their 2007 settlement, because the judge had focused on Mathew's multiple informal communications to Disney of his intent to sue — while ignoring a California law, Section 1691, that holds a complaint seeking to rescind a settlement can itself serve as a notice of rescission.

"Whether [the informal communications] count as notice or not, we filed a complaint, so you cannot possibly affirm a dismissal for lack of being a notice, because under the state statute, the complaint itself is a notice," he said.

Circuit Judge John Owens, however, said that the notice has to be "timely," regardless of the form it comes in.

Mann responded that the law is clear that a late notice is only barred if it would be "substantially prejudicial" to the other side, and that Disney had not proven, based on the complaint, that it had

suffered substantial prejudice from the time when Mathew knew the 2007 settlement was being breached until he actually filed suit.

Mann said that, once there was evidence in the record, it might be shown that Disney would have gone forward with releasing “Pirates of the Caribbean” movies even if it had received a rescission notice from Mathew.

“They would have to be able to convince a fact finder that the delay, the time between when Mathew found out ... and when Mathew filed the lawsuit, caused substantial prejudice,” he said. “It’s possible they could have trial and prove that, but they haven’t had a trial and proved that, they haven’t even had discovery and proved that.”

The settlement agreement, which released Disney from any copyright infringement of Mathew's works before its execution date in May and June 2007, put an end to copyright claims he brought in 2005 following the 2003 release of the first “Pirates of the Caribbean” movie, according to court documents.

Mathew claimed Disney lifted ideas for the franchise from supernatural pirate drawings, storyboards, screenplay drafts and other materials that he created in the 1980s and 1990s, registered with the U.S. Copyright Office and showed to the company’s representatives and agents during meetings. The movies featured Mathew’s idea of pirates turning into skeletons under moonlight, an idea that was not incorporated in Disney’s Pirates theme park rides, the suit alleged.

On Friday, Sanford Litvack of Hogan Lovells LLP, representing Disney, urged the appeals court to affirm Judge Klausner's ruling that Disney was prejudiced, saying first that Mathew had now conceded he didn’t send any sufficient pre-suit notice, and then argued that Disney didn’t have to show it was prejudiced by the delay in filing the suit, because Mathew had included that information himself in his complaint.

“The plaintiff told you there was prejudice,” he said. “The defendant in this case Disney invested substantial sums, went ahead and made a fourth movie, which they did, worked on a fifth movie which is about to be released … they established a movie franchise.”

Circuit Judge Clifton, however, asked if Disney had proven that it would not have taken these actions even if Mathew had filed suit promptly.

“There has been nothing, there’s nothing in the complaint and nothing in the record, that demonstrates that Disney wouldn’t have not done the same thing anyway,” he said.

Litvack responded that this could be proven simply with “common sense,” especially since Mathew was not filing a new complaint, but challenging a prior release of claims.

“If you really knew that somebody was challenging the release, you bring a declaratory relief action and get it done, you don’t have to show I would have stopped,” he said. “I would have taken steps, that is what you show.”

The panel took the matter under submission.

Circuit Judges Richard Clifton and John Owens sat on the panel that heard Friday’s arguments with U.S. District Judge John Antoon II sitting by designation.

Mathew is represented by Ellyn S. Garofalo of Liner LLP, Columbia Law School Professor Ronald J. Mann and Edward Millstein.

Disney is represented by Sanford Litvack and Poopak Nourafchan of Hogan Lovells LLP.

The case is Mathew v. The Walt Disney Co. et al, case number 15-56726, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Fola Akinnibi and Brian Amaral. Editing by Alyssa Miller.
