

# Guity v. Santos

United States District Court for the Southern District of New York

December 5, 2019, Decided; December 5, 2019, Filed

18-cv-10387 (PKC)

## Reporter

2019 U.S. Dist. LEXIS 210125 \*; Copy. L. Rep. (CCH) P31,564; 2019 U.S.P.Q.2D (BNA) 465915; 2019 WL 6619217

NAZIM I. GUILTY, Plaintiff, -against- ANTHONY SANTOS, et al., Defendants. BACKGROUND

**Subsequent History:** Reconsideration denied by, Costs and fees proceeding at, Motion denied by Guity v. Santos, 2020 U.S. Dist. LEXIS 133545 (S.D.N.Y., July 28, 2020)

**Counsel:** [\*1] For NAZIM I. GUILTY, Plaintiff: Simon Rosen, LEAD ATTORNEY, LAW OFFICE OF SIMON ROSEN, PHILADELPHIA, PA; Simon Rosen, LEAD ATTORNEY, Law Office of Simon Rosen PLLC, Philadelphia, PA.

For Anthony Santos, P/K/A ROMEO SANTOS, Sony Music Entertainment Inc., Sony Music Holdings Inc., Sony Corporation of America, Defendants: John Cornell Fuller, LEAD ATTORNEY, Fox Rothschild LLP (PA), Philadelphia, PA; David Aronoff, Fox Rothschild LLP, Los Angeles, CA.

**Judges:** P. Kevin Castel, United States District Judge.

**Opinion by:** P. Kevin Castel

## Opinion

### OPINION AND ORDER

CASTEL, U.S.D.J.

Plaintiff Nazim I. Guity ("Guity") brings this action against Anthony Santos, professionally known as Romeo Santos, ("Santos"), Sony Music Entertainment, Inc., Sony Music Holdings, Inc., and Sony Corporation of America (collectively, "Sony"), Milton "Alcover" Restituyo ("Alcover"), and We Loud, LLC, doing business as We Loud Studios, LLC and formerly known as Los Mejores Studios ("We Loud"). Guity alleges that defendants recorded, released, and profited from a song by Santos that infringed Guity's copyrighted work. Santos and Sony ("Movants") move to dismiss the case under Rule 12(b)(6) for failure to state a claim. For the reasons below, Movants' motion to dismiss [\*2] will be granted.

In 2011, Guity composed and authored a musical composition, entitled "Eres Mia" (the "Guity Song"). (Compl. ¶ 10). At some later point, Guity hired defendants Alcover and We Loud to assist in the creation of a master recording of the Guity Song. (Compl. ¶¶ 11-12). On March 25, 2014, Guity was granted a copyright for the Guity Song. (Compl. ¶ 18). "Contemporaneously with, and subsequent to" the recording of the Guity Song, Alcover and We Loud worked with Santos to record a song also entitled "Eres Mia" (the "Santos Song"). (Compl. ¶¶ 15-16). Following the recording of the Santos Song, Santos worked with Sony to market and commercially distribute this work. (Compl. ¶¶ 38-39). Guity alleges that the Santos Song incorporates protected elements of and is so substantially similar to the Guity Song as to constitute copyright infringement. (Compl. ¶¶ 20-21).

In the present action, Guity brings four claims: (1) copyright infringement based on a failure to obtain a mechanical license and/or pay royalties (Compl. ¶¶ 22-34); (2) copyright infringement based on defendants' creation, distribution, and claim of ownership in a work that infringed Guity's protected work (Compl. [\*3] ¶¶ 35-44); (3) civil conspiracy to commit copyright infringement (Compl. ¶¶ 46-48); and (4) an accounting and constructive trust (Compl. ¶¶ 49-52).

Guity initially filed this action in the Eastern District of Pennsylvania. (Compl. at 1). On September 26, 2018, Judge Michael M. Baylson ordered the action transferred to the Southern District of New York pursuant to both 28 U.S.C. § 1404(a) and § 1406(a). (Order, Guity v. Santos, No. 17-cv-3447 (E.D. Pa. Sept. 26, 2018) (Doc. 39)). On March 7, 2019, Santos and Sony filed a motion to dismiss the complaint pursuant to Rule 12(b)(6), Fed. R. Civ. P., (Defs.' Mot. to Dismiss Pls.' Compl. Pursuant to Fed. R. Civ. P. 12(b)(6) (Doc. 53)),<sup>1</sup> arguing that Guity's claims fail as a matter of law because, there is no substantial similarity between the Guity

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<sup>1</sup>Though named as defendants in the complaint, Alcover and We Loud have not appeared in this action and there is no indication that either has even been served. The time to serve these two defendants under Rule 4(m), Fed. R. Civ. P., long ago expired.

Song and the Santos Song and therefore is no copyright infringement, (Mem. of Law in Supp. of Defs.' Mot. to Dismiss Pls.' Compl. at 3 (Doc. 54 at 3)).

#### RULE 12(b)(6) STANDARD

Rule 12(b)(6) requires a complaint to "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). In assessing the sufficiency of a pleading, a court must disregard legal conclusions, which are not entitled to the presumption of truth. Id. Instead, the Court must examine [\*4] the well-pleaded factual allegations, which are accepted as true, and "determine whether they plausibly give rise to an entitlement to relief." Id. at 678-79. "Dismissal is appropriate when 'it is clear from the face of the complaint, and matters of which the court may take judicial notice, that the plaintiff's claims are barred as a matter of law.'" Parkcentral Global Hub Ltd. v. Porsche Auto. Holdings SE, 763 F.3d 198, 208-09 (2d Cir. 2014) (quoting Conopco, Inc. v. Roll Int'l, 231 F.3d 82, 86 (2d Cir. 2000)).

"[T]he purpose of Federal Rule of Civil Procedure 12(b)(6) 'is to test, in a streamlined fashion, the formal sufficiency of the plaintiff's statement of a claim for relief without resolving a contest regarding its substantive merits.'" Halebian v. Berv., 644 F.3d 122, 130 (2d Cir. 2011) (quoting Global Network Commc'ns, Inc. v. City of New York, 458 F.3d 150, 155 (2d Cir. 2006)). A court reviewing a Rule 12(b)(6) motion "does not ordinarily look beyond the complaint and attached documents in deciding a motion to dismiss brought under the rule." Id. A court may, however, "consider 'any written instrument attached to [the complaint] as an exhibit or any statements or documents incorporated in it by reference . . . and documents that the plaintiffs either possessed or knew about and upon which they relied in bringing the suit.'" Stratte-McClure v. Morgan Stanley, 776 F.3d 94, 100 (2d Cir. 2015) (first alteration in original) (quoting Rothman v. Gregor, 220 F.3d 81, 88 (2d Cir. 2000)). As such, "[i]n copyright infringement actions, 'the works themselves supersede and control contrary descriptions of them.'" Peter F. Gaito Architecture, LLC v. Simone Dev. Corp., 602 F.3d 57, 64 (2d Cir. 2010) (quoting Walker v. Time Life Films, Inc., 784 F.2d 44, 52 (2d Cir. 1986)).

#### DISCUSSION

In support [\*5] of their motion to dismiss, Movants submitted several exhibits, including audio files of the two songs at issue, (Exs. B & E (Doc. 54 at 35, 45)), and a signed supporting declaration, (Ex. C (Doc. 54 at 37)), as well as certified Spanish-to-English written translations of the two

songs, (Exs. D & F (Doc. 54 at 40, 47)). The Court considers these audio files because the two works at issue "themselves supersede and control" and were relied upon by plaintiff when crafting the complaint. Peter F. Gaito Architecture, 602 F.3d at 64; see also McDonald v. West, 138 F. Supp. 3d 448, 453 (S.D.N.Y. 2015), aff'd, 669 F. App'x 59 (2d Cir. 2016) ("Courts in this district regularly apply this rule in music copyright cases to listen to the songs at issue when evaluating a motion to dismiss."). As plaintiff does not contest the accuracy of the certified translations, the Court takes judicial notice of them. Grisales v. Forex Capital Mkts. LLC, No. 11-cv-228 (NRB), 2011 U.S. Dist. LEXIS 144932, 2011 WL 6288060, at \*2 n.7 (S.D.N.Y. Dec. 9, 2011) ("We note that we can also take judicial notice of this uncontested translation in proceeding under Rule 12(b)(6)." (citing Negrin v. Kalina, No. 09-cv-6234 (BSJ), 2010 U.S. Dist. LEXIS 71068, 2010 WL 2816809, at \*2 n.4 (S.D.N.Y. July 15, 2010)).

Plaintiff's opposition brief contains factual allegations not included in the complaint, (Mem. of Law in Supp. of Pl.'s Resp. to Defs.' Rule 12(b) Mot. to Dismiss at 4 (Doc. 60 at 4)), and attaches as exhibits a declaration, (Declaration of [\*6] Nazim I. Guity (Doc. 60-2)), and two musicological reports, (Eres Mia Musicological Report (Doc. 60-3); Musicological Report Pt. 2 (Doc. 60-4)). The facts newly alleged in plaintiff's opposition brief and the attached exhibits were neither incorporated by reference into the complaint nor relied upon by plaintiff when crafting the complaint and, as such, were not considered by the Court when deciding Movants' motion to dismiss.

#### I. Legal Standard for a Copyright Infringement Claim.

A claim of copyright infringement requires a plaintiff to plausibly allege "(1) ownership of a valid copyright, and (2) the defendants' copying of constituent, original elements of plaintiff's copyrighted work." McDonald, 138 F. Supp. 3d at 453 (citing Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361, 111 S. Ct. 1282, 113 L. Ed. 2d 358 (1991)). A showing of copying in turn requires plaintiff to plausibly allege 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." Peter F. Gaito Architecture, 602 F.3d at 63 (quoting Hamil Am. Inc. v. GFI, 193 F.3d 92, 99 (2d Cir. 1999)). For the purposes of this motion, the Court assumes, and Movants do not dispute, that plaintiff has sufficiently alleged ownership of a valid copyright and actual copying of plaintiff's work by defendants. [\*7] Movants instead argue that plaintiff has failed to plausibly allege substantial similarity between the Guity Song and the Santos Song. (Doc. 54 at 5-15).

A district court may "resolve the question of substantial

similarity as a matter of law on a Rule 12(b)(6) motion to dismiss." Peter F. Gaito Architecture, 602 F.3d at 65. For the substantial similarity analysis, "no discovery or fact-finding is typically necessary, because what is required is only a visual [or] [aural] comparison of the works." May v. Sony Music Entertainment, 399 F. Supp. 3d 169, 181 (2019) (second alternation in original) (quoting Peter F. Gaito Architecture, 602 F.3d at 64). "If, in making that evaluation, the district court determines that the two works are not substantially similar as a matter of law, the district court can properly conclude that the plaintiff's complaint, together with the works incorporated therein, do not plausibly give rise to an entitlement to relief." Peter F. Gaito Architecture, 602 F.3d at 64 (internal citation and quotation marks omitted). Two works are not substantially similar as a matter of law "either because the similarity between two works concerns only non-copyrightable elements of the plaintiff's work, or because no reasonable jury, properly instructed, could find that the two works are substantially similar." Id. at 63 (quoting Warner Bros. Inc. v. Am. Broad. Cos., 720 F.2d 231, 240 (2d Cir. 1983)).

Copyright protects only the original elements of a work, [\*8] meaning those components which were independently created and display "at least some minimal degree of creativity." Feist, 499 U.S. at 345. "Single words or short phrases 'which do not exhibit the minimal creativity for copyright protection' are not protectible expression." Pyatt v. Raymond, No. 10-cv-8764 (CM), 2011 U.S. Dist. LEXIS 55754, 2011 WL 2078531, at \*6 (S.D.N.Y. May 19, 2011), aff'd, 462 F. App'x 22 (2d Cir. 2012), as amended (Feb. 9, 2012) (quoting Arica Inst., Inc. v. Palmer, 970 F.2d 1067, 1072 (2d Cir. 1992)). Similarly, copyright protects neither "generalized idea[s] or themes," Walker, 784 F.2d at 48-49, nor "the basic building blocks of music, including tempo and individual notes," McDonald, 138 F. Supp. 3d at 454. However, "a work may be copyrightable even though it is entirely a compilation of unprotectible elements" if the work consists of "the original way in which the author has 'selected, coordinated, and arranged' [its] elements." Knitwaves, Inc. v. Lollytogs Ltd. (Inc.), 71 F.3d 996, 1004 (1995) (quoting Feist, 499 U.S. at 358). Therefore, a song that combines and organizes non-protected lyrical phrases, notes, tempos, and themes into a unique work may still be protected under the copyright laws.

"The standard test for substantial similarity between two items is whether an ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard [the] aesthetic appeal as the same." Peter F. Gaito Architecture, 602 F.3d at 66 (alteration in original) (quoting Yurman Design, Inc. v. PAJ, Inc., 262 F.3d 101, 111 (2d Cir. 2001)). "In applying the so-called 'ordinary observer [\*9] test,' we ask whether 'an average lay observer would recognize the

alleged copy as having been appropriated from the copyrighted work.'" Id. (quoting Knitwaves, 71 F.3d at 1002). "In the context of music plagiarism, the Second Circuit has described this ordinary observer test as requiring proof that 'defendant took from plaintiff's works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such . . . music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff.'" Pyatt, 2011 U.S. Dist. LEXIS 55754, 2011 WL 2078531, at \*4 (alteration in original) (quoting Repp & K & R Music, Inc. v. Webber, 132 F.3d 882, 889 (2d Cir. 1997)).

When evaluating "works 'that have both protectible and unprotectible elements,' [the court's] analysis must be 'more discerning' and [the court] instead 'must attempt to extract the unprotectible elements from [its] consideration and ask whether the protectible elements, standing alone, are substantially similar.'" Peter F. Gaito Architecture, 602 F.3d at 66 (first quoting Fisher—Price, Inc. v. Well—Made Toy Mfg. Corp., 25 F.3d 119, 123 (2d Cir. 1994) and then quoting Knitwaves, 71 F.3d at 1002). However, when applying this "more discerning observer" test, courts should not "dissect the works into their separate components, and compare only those elements which are in themselves copyrightable," but instead "compar[e] the contested design's 'total concept [\*10] and overall feel' with that of the allegedly infringed work as instructed by our 'good eyes and common sense.'" Id. (first quoting Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc., 338 F.3d 127, 133 (2d Cir. 2003) and then quoting Hamil Am., 193 F.3d at 102). "Thus, in the end, [the] inquiry necessarily focuses on whether the alleged infringer has misappropriated 'the original way in which the author has "selected, coordinated, and arranged" the elements of his or her work.'" Id. (quoting Knitwaves, 71 F.3d at 1004).

## II. Plaintiff Fails to State a Claim for Copyright Infringement

Plaintiff argues that the Santos Song infringes upon the copyrighted Guity Song, alleging substantial similarity between the works taken in their entirety. (Compl. ¶¶ 20-21). Plaintiff also generally identifies protectible elements of the Guity Song and alleges that "[c]ertain" of these elements were infringed upon by the Santos Song. (Compl. ¶¶ 14, 17). As explained below, plaintiff's claims fail because (1) the alleged protectible elements of the Guity Song are either not protected under copyright or insufficiently pled as to allow for a finding of protectibility, and, (2) taken in their entirety, the songs are not substantially similar.

### A. The Alleged Protected Elements of the Guity Song Are Either Not Protected or Insufficiently Pled, [\*11] so Cannot Support a Claim of Copyright Infringement.

Plaintiff alleges that the Guity Song contained several protectible elements under copyright law, "[c]ertain" of which have been infringed by the Santos Song. (Compl. ¶¶ 14, 17). Upon examination, none of the listed components alone are sufficient to support a claim of copyright infringement.

First, some of the listed protectible elements do not qualify as such on the facts here. For instance, plaintiff alleges that the Guity Song's "unique lyrical themes" and "substantially similar concept behind the song's theme" are protected. (Compl. ¶ 14). However, the themes at issue in the Guity Song, love and desire, are the exact type of broad themes that lie beyond copyright's protection. Walker, 784 F.2d at 48-49. Similarly, plaintiff identifies the Guity Song's "unique song title," "Eres Mia," as a protectible element and then points to the Santos Song's use of the same title as evidence of defendants' infringement. (Compl. ¶¶ 14, 20). Yet, this phrase, which translates as "You're Mine" in English, is too short and generic to meet the required threshold for creativity and thereby qualify for copyright protection. Arica Inst., Inc., 970 F.2d at 1072-73; see also McDonald, 138 F. Supp. 3d at 456 (holding that "Made in America" was [\*12] not copyrightable as a song title). As such, the shared titles of the Guity and Santos Songs cannot serve as the basis for a copyright infringement claim.

Second, for the remaining listed protectible elements of the Guity Song, plaintiff fails to plausibly allege which, if any, of these elements have actually been infringed by the Santos Song. Specifically, while several of plaintiff's alleged protectible elements could qualify as such, including the "unique lyrical hook," "unique lyrical content," "substantially similar melody," and "substantially similar guitar arrangements," (Compl. ¶ 14), plaintiff only actually alleges that "[c]ertain of the copyrightable elements contained in plaintiff's [Guity] Song were incorporated into defendant's song." (Compl. ¶ 17). Without a specific identification of the protected elements actually infringed upon by the Santos Song, plaintiff's complaint fails to plead substantial similarity concerning a protected element of the Guity Song and therefore fails "state a claim to relief that is plausible on its face."

Plaintiff fails to plausibly allege that specific protectible elements of the Guity Song were infringed by the Santos Song and therefore cannot [\*13] maintain claims of copyright infringement on this theory.

#### B. The Guity Song and the Santos Song Taken in Their Entireties Are Not Substantially Similar.

Plaintiff also alleges that the Santos Song "is so substantially similar to" the copyrighted Guity Song as to constitute copyright infringement. (Compl. ¶ 21). Upon examination, the

Court finds that the Guity Song and the Santos Song are not substantially similar and plaintiff therefore cannot support a claim of copyright infringement.

Though plaintiff has failed to adequately allege infringement of specific protectible elements of the Guity Song, copyright extends protection to non-protected elements organized and arranged into an original work. Knitwaves, 71 F.3d at 1004. As such, plaintiff can still maintain a claim for copyright infringement if he can adequately plead that the Santos Song has taken "from plaintiff's works so much of what is pleasing to the ears of lay listeners." Pyatt, 2011 U.S. Dist. LEXIS 55754, 2011 WL 2078531, at \*4. Here, plaintiff cannot do so.

Under either the reasonable observer test, which requires the Court to evaluate the similarities between works through the eyes of an average lay listener, or the more discerning observer test, which requires the Court to look mainly at the protected [\*14] elements of a song, the "total concept[s] and overall feel[s]" of the Guity Song and the Santos Song respectively are so distinct as to prevent a finding of substantial similarity. Specifically, though plaintiff argues that the songs' lyrics contribute to their alleged substantial similarity, (Doc. 60 at 12), the only commonalities apparent between the songs' lyrics are the use of the phrase "eres mia" and some individual words, such as "love," "mine," "night," and "baby" (as a term of affection). However, "eres mia" appears only three times in the Guity Song and does not play a unique or important role in the composition. The infrequent use of such a short generic phrase is insufficient to support a finding that the total concept and overall feel of the songs' lyrics are substantially similar. See Pyatt, 2011 U.S. Dist. LEXIS 55754, 2011 WL 2078531, at \*8 ("Nor will substantial similarity [sic] be found if only a small, common phrase appears in both the accused and complaining songs; unless the reappearing phrase is especially unique or qualitatively important, there is no basis for inferring copying." (quoting Strachborneo v. Arc Music Corp., 357 F. Supp. 1393, 1404 (S.D.N.Y. 1973))). The shared usage of single everyday words also fails to show substantial similarity between the two songs. 2011 U.S. Dist. LEXIS 55754, [WL] at \*6 ("Single words . . . [\*15] . 'which do not exhibit the minimal creativity for copyright protection' are not protectible expression."). This is especially true when, as here, the single words are employed differently in the two relevant works.

Musically, plaintiff alleges that are "various substantial similarities" between the Guity Song and the Santos Song, pointing to the songs' respective choruses and hooks. (Doc. 60 at 7). Plaintiff also argues, despite explicit case law to the contrary, that "an ordinary observer with no musical background may very well be incapable of applying the 'total concept and feel test' to determine substantial similarity."

(Doc. 60 at 11). Disregarding plaintiff's flatly incorrect characterization of the relevant standard, the Court has listened to both the Guity Song and Santo Song, with a particular focus on the highlighted chorus and hook, to determine if the "total concept and overall feel" of both songs would suggest to the ordinary listener that the Santos Song has appropriated from the Guity Song.

The Court concludes that, upon listening to the Santos Song, the average listener could find little in common with the Guity Song and, as such, no reasonable jury could find the two [\*16] works to be substantially similar. Overall, the two songs have little to nothing in common other than their title. The Guity Song is a straightforwardly brooding hard rock song, containing extended guitar riffs. In contrast, the Santos Song is a light but complex bachata,<sup>2</sup> containing varying rhythms and a bongo accompaniment. The lyrical narratives, tempos, and melodies of the two songs are distinct, and plaintiff himself admits that the bachata Santos Song is stylistically distinct from the rock-and-roll Guity Song. (Doc. 60 at 5). As the average listener would not recognize the Santos Song as having appropriated from the Guity Song "what is pleasing to the ears," the Court concludes plaintiff's claim fails the ordinary observer test and, as a matter of law, cannot show substantial similarity between the two songs taken in their entireties. See *Pyatt v. Raymond*, 462 F. App'x 22, 24 (2d Cir. 2012), as amended (Feb. 9, 2012) ("The songs are lyrically and musically distinct and the district court correctly concluded that the claim failed the ordinary observer test.").

Focusing closely on the potentially protectible elements of the Guity Song, including the chorus and hook, does not aid plaintiff's cause. The complaint fails to allege that [\*17] any specifically protectible portion of the Guity Song, such as song structure, chord progression, or lyrical rhythms, was appropriated by the Santos Song. Evaluating the total concept and overall feel of the Santos Song in light of Guity Song, the Court concludes plaintiff's claim fails the more discerning observer test and, as a matter of law, cannot support a finding of substantial similarity. As such, plaintiff cannot maintain a claim for copyright infringement.

\* \* \*

As no reasonable jury could find substantial similarity between the Santos Song and either specific protectible elements of the Guity Song or the Guity Song taken in its entirety, plaintiff cannot make out a claim for copyright infringement and Movants' motion to dismiss the complaint

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<sup>2</sup>Bachata" is "[a] style of romantic music originating in the Dominican Republic." (Doc. 60 at 5).

will be granted.

## CONCLUSION

The motions of Santos and Sony to dismiss the complaint are GRANTED. The Clerk is directed to terminate this motion. (Doc. 53). Plaintiff having failed to either (a) serve Alcover and We Loud within the time provided in Rule 4(m), Fed. R. Civ. P., or (b) seek an exclusion of time to do so, Alcover and We Loud are dismissed without prejudice. The Clerk shall enter judgment for the defendants and close the case.

SO ORDERED.

/s/ P. Kevin Castel [\*18]

P. Kevin Castel

United States District Judge

Dated: New York, New York

December 5, 2019

## JUDGMENT

It is hereby **ORDERED, ADJUDGED AND DECREED**: That for the reasons stated in the Court's Opinion and Order dated December 5, 2019, the motions of Santos and Sony to dismiss the complaint are GRANTED. Plaintiff having failed to either (a) serve Alcover and We Loud within the time provided in Rule 4(m), Fed. R. Civ. P., or (b) seek an exclusion of time to do so. Alcover and We Loud are dismissed without prejudice and judgment is entered for the defendants; accordingly, the case is closed.

**Dated:** New York, New York

December 5, 2019

Dear Litigant:

Enclosed is a copy of the judgment entered in your case. If you disagree with a judgment or final order of the district court, you may appeal to the United States Court of Appeals for the Second Circuit. To start this process, file a "Notice of Appeal" with this Court's Pro Se Intake Unit.

You must file your notice of appeal in this Court within 30 days after the judgment or order that you wish to appeal is entered on the Court's docket, or, if the United States or its officer or agency is a party, within 60 days after entry of the judgment or order. If you are unable to file your notice [\*19] of appeal within the required time, you may make a motion for extension of time, but you must do so within 60 days from

the date of entry of the judgment, or within 90 days if the United States or its officer or agency is a party, and you must show excusable neglect or good cause for your inability to file the notice of appeal by the deadline.

Please note that the notice of appeal is a *one-page* document containing your name, a description of the final order or judgment (or part thereof) being appealed, and the name of the court to which the appeal is taken (the Second Circuit) — *it does not* include your reasons or grounds for the appeal. Once your appeal is processed by the district court, your notice of appeal will be sent to the Court of Appeals and a Court of Appeals docket number will be assigned to your case. At that point, all further questions regarding your appeal must be directed to that court.

The filing fee for a notice of appeal is \$505 payable in cash, by bank check, certified check, or money order, to "Clerk of Court, S.D.N.Y." *No personal checks are accepted.* If you are unable to pay the \$505 filing fee, complete the "Motion to Proceed *in Forma Pauperis* on Appeal" form [\*20] and submit it with your notice of appeal to the Pro Se Intake Unit. If the district court denies your motion to proceed *in forma pauperis* on appeal, or has certified under 28 U.S.C. § 1915(a)(3) that an appeal would not be taken in good faith, you may file a motion in the Court of Appeals for leave to appeal *in forma pauperis*, but you must do so within 30 days after service of the district court order that stated that you could not proceed *in forma pauperis* on appeal.

For additional issues regarding the time for filing a notice of appeal, see Federal Rule of Appellate Procedure 4(a). There are many other steps to beginning and proceeding with your appeal, but they are governed by the rules of the Second Circuit Court of Appeals and the Federal Rules of Appellate Procedure. For more information, visit the Second Circuit Court of Appeals website at <http://www.ca2.uscourts.gov/>.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

(List the full name(s) of the plaintiff(s)/petitioner(s).)

-against-

(List the full name(s) of the defendant(s)/respondent(s).)

Notice is hereby given that the following parties:

(List the names of all parties who are filing an appeal)

in the above-named case appeal to the United States Court of Appeals for the Second Circuit

from the  judgment  order entered on:

(date that judgment or order was entered on docket)

that:

(If the appeal is from an order, provide a brief description above of the decision in the order.)

Dated

Signature

Name (Last, First, MI)

Address

City

State

Zip Code

Telephone Number

E-mail Address (if available)

\* Each party filing the appeal must date and sign the Notice of Appeal and provide his or her mailing address and telephone number. EXCEPT that a signer of a pro se notice of appeal may sign for his or her spouse and minor children if they are parties to the case. Fed. R. App. P. 3(c)(2). Attach additional sheets of paper as necessary.

Rev. 12/23/13

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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(List the full name(s) of the plaintiff(s)/petitioner(s).)

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(List the full name(s) of the plaintiff(s)/petitioner(s).)

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-against-

**MOTION FOR EXTENSION  
OF TIME TO FILE NOTICE  
OF APPEAL**

-against-

**MOTION FOR LEAVE TO  
PROCEED IN FORMA  
PAUPERIS ON APPEAL**

\_\_\_\_\_  
(List the full name(s) of the defendant(s)/respondent(s).)

\_\_\_\_\_  
(List the full name(s) of the defendant(s)/respondent(s).)

I move under Rule 4(a)(5) of the Federal Rules of Appellate Procedure for an extension to file a notice of appeal in this action. I would like to appeal the judgment entered in this action on \_\_\_\_\_ but did not file a notice of appeal within the required time period because:  
date

I move under Federal Rule of Appellate Procedure 24(a)(1) for leave to proceed *in forma pauperis* on appeal. This motion is supported by the attached affidavit.

\_\_\_\_\_  
Dated

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Name (Last, First, MI)

\_\_\_\_\_  
(Explain here the excusable neglect or good cause that led to your failure to file a timely notice of appeal.)

\_\_\_\_\_  
Address City State Zip Code

\_\_\_\_\_  
Telephone Number

\_\_\_\_\_  
E-mail Address (if available)

\_\_\_\_\_  
Dated:

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Name (Last, First, MI)

\_\_\_\_\_  
Address City State Zip Code

\_\_\_\_\_  
Telephone Number E-mail Address (if available)

**Application to Appeal In Forma Pauperis**

\_\_\_\_\_ v. \_\_\_\_\_ Appeal No. \_\_\_\_\_  
 District Court or Agency No. \_\_\_\_\_

<p><b>Affidavit in Support of Motion</b></p> <p>I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the docket fees of my appeal or post a bond for them. I believe I am entitled to redress. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. (28 U.S.C. § 1746; 18 U.S.C. § 1621.)</p> <p>Signed: _____</p>	<p><b>Instructions</b></p> <p>Complete all questions in this application sign it. Do not leave any blanks: if the question is "0," "none," or "not applicable" write that response. If you need more space, a question or to explain your answer, a sheet of paper identified with your name, docket number, and the question number.</p> <p>Date: _____</p>
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Interest and dividends	\$	\$	\$	\$
Gifts	\$	\$	\$	\$
Alimony	\$	\$	\$	\$
Child support	\$	\$	\$	\$
Retirement (such as social security, pensions, annuities, insurance)	\$	\$	\$	\$
Disability (such as social security, insurance payments)	\$	\$	\$	\$
Unemployment payments	\$	\$	\$	\$
Public-assistance (such as welfare)	\$	\$	\$	\$
Other (specify):	\$	\$	\$	\$
<b>Total monthly income:</b>	<b>\$0</b>	<b>\$0</b>	<b>\$0</b>	<b>\$0</b>

My issues on appeal are: (required):

2. List your employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

1. For both you and your spouse estimate the average amount of money received of the following sources during the past 12 months. Adjust any amount that was weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	\$	\$	\$	\$
Self-employment	\$	\$	\$	\$
Income from real property (such as rental income)	\$	\$	\$	\$

Employer	Address	Dates of employment	Gross monthly pay
			\$
			\$
			\$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of employment	Gross monthly pay
			\$
			\$
			\$



4. How much cash do you and your spouse have? \$ \_\_\_\_\_

Below, state any money you or your spouse have in bank accounts or in any financial institution.

Financial Institution	Type of Account	Amount you have	Amount spouse
		\$	\$
		\$	\$
		\$	\$

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
	\$	\$
	\$	\$
	\$	\$
	\$	\$

If you are a prisoner seeking to appeal a judgment in a civil action or proceeding, attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional account. If you have multiple accounts, perhaps because you have been in multiple institutions, attach a certified statement of each account.

7. State the persons who rely on you or your spouse for support.

Name [or, if a minor (i.e., underage), initials only]	Relationship	Age

5. List the assets, and their values, which you own or your spouse owns. Do not include ordinary household furnishings.

Home	Other real estate	Motor vehicle #1
(Value) \$	(Value) \$	(Value) \$
		Make and year:
		Model:
		Registration #:

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate.

Motor vehicle #2	Other assets	Other assets
(Value) \$	(Value) \$	(Value) \$
Make and year:		
Model:		
Registration #:		

	You	Your Spouse
Rent or home-mortgage payment (including lot rented for mobile home) Are real estate taxes included? <input type="checkbox"/> Yes <input type="checkbox"/> No Is property insurance included? <input type="checkbox"/> Yes <input type="checkbox"/> No	\$	\$
Utilities (electricity, heating fuel, water, sewer, and telephone)	\$	\$
Home maintenance (repairs and upkeep)	\$	\$
Food	\$	\$
Clothing	\$	\$
Laundry and dry-cleaning	\$	\$
Medical and dental expenses	\$	\$

Transportation (not including motor vehicle payments)	\$	\$
Recreation, entertainment, newspapers, magazines, etc.	\$	\$
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's:	\$	\$
Life:	\$	\$
Health:	\$	\$
Motor vehicle:	\$	\$
Other:	\$	\$
Taxes (not deducted from wages or included in mortgage payments) (specify):	\$	\$
Installment payments		
Motor Vehicle:	\$	\$
Credit card (name):	\$	\$
Department store (name):	\$	\$
Other:	\$	\$
Alimony, maintenance, and support paid to others	\$	\$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	\$	\$
Other (specify):	\$	\$
<b>Total monthly expenses:</b>	<b>\$ 0</b>	<b>\$ 0</b>

9. *Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?*
- Yes     No    If yes, describe on an attached sheet.
10. *Have you spent — or will you be spending — any money for expenses or attorney fees in connection with this lawsuit?*  Yes  No
- If yes, how much? \$ \_\_\_\_\_*
11. *Provide any other information that will help explain why you cannot pay the docket fees for your appeal.*
12. *Identify the city and state of your legal residence.*
- City \_\_\_\_\_ State \_\_\_\_\_
- Your daytime phone number: \_\_\_\_\_
- Your age: \_\_\_\_\_ Your years of schooling: \_\_\_\_\_
- Last four digits of your social-security number: \_\_\_\_\_