

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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STEVAN MENA,

Plaintiff,

v.

FOX ENTERTAINMENT GROUP, INC., FOX
BROADCASTING COMPANY, FOX
TELEVISION STATIONS, INC., DAVID
HUDGINS, HUDGINS PRODUCTIONS INC.,
CRAIG PERRY, PRACTICAL PICTURES
INC., JASON KOFFEMAN, LOU PITT,
LOU PITT PRODUCTIONS, WARNER BROS.
TELEVISION INC., WARNER BROS.
TELEVISION DISTRIBUTION INC.,
WARNER BROS. ENTERTAINMENT INC.,
BONANZA PRODUCTIONS, INC., TOM LUSE,
SCOTT SWANSON, DERAN SARAFIAN,

Defendants.

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BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Plaintiff Stevan Mena ("Mena" or "Plaintiff") brought this action against Fox Entertainment Group, Inc., Fox Broadcasting Company, Fox Television Stations, Inc., David Hudgins, Hudgins Productions Inc., Craig Perry, Practical Pictures Inc., Jason Koffeman, Lou Pitt, Lou Pitt Productions, Warner Bros. Television Inc., Warner Bros. Television Distribution Inc., Warner Bros. Entertainment Inc., Bonanza Productions, Inc., Tom Luse, Scott Swanson, and Deran Sarafian (collectively "Fox" or

"Defendants"), alleging violations of the Copyright Act of 1976 (17 U.S.C. §§ 101 et seq.). Pursuant to Federal Rule of Civil Procedure 12(b)(6), Fox moved to dismiss the Amended Complaint for failure to state a claim on which relief could be granted. See Fed. R. Civ. P. 12(b)(6). For the reasons explained below, Defendants' Motion to Dismiss is GRANTED.

BACKGROUND

I. Procedural History

Plaintiff filed his Complaint on August 8, 2011. (Dkt. 1.) On October 12, 2011, the parties stipulated and agreed that Mena would be permitted to file and serve an Amended Complaint pursuant to Fed. R. Civ. P. 15(a)(2). (Dkt. 21.) Mena filed his Amended Complaint on October 17, 2011. (Dkt. 25.) On October 26, 2011, Defendants Bonanza Productions, Inc., Fox Entertainment Group, Inc., Fox Broadcasting Company, Fox Television Stations, Inc., David Hudgins, Hudgins Productions Inc., Lou Pitt, Lou Pitt Productions, Warner Bros. Television Inc., Warner Bros. Television Distribution Inc., Warner Bros. Entertainment Inc., Tom Luse, and Scott Swanson filed this Motion to Dismiss the Amended Complaint. (Dkt. 28.) Defendants Craig Perry, Practical Pictures Inc., and Jason Koffeman joined the Motion to Dismiss on October 27, 2011. (Dkt. 30.) On January 6, 2012, Mena filed his Opposition to the Motion to Dismiss the Amended Complaint.

(Dkt. 35.) Defendants filed their Reply to Plaintiff's Opposition on February 2, 2012. (Dkt. 37.)

II. Nature of the Dispute

This case centers on two works, *Transience* and *Past Life*, which add a recondite twist to traditional crime dramas by merging the mundane with the mystical. Both tell the story of murder victims who have been reincarnated following their deaths but retain fragmented memories that hold elusive clues to the identity of their killers. For the sake of clarity, the essential aspects of the parties' respective works are described briefly below.

A. Plaintiff's *Transience*

Transience is a screenplay for a feature-length film that chronicles the efforts of a grizzled and despondent detective, Jack Ridge, fighting against time to solve a series of abductions and murders committed by a serial killer. (Am. Compl. ¶ 2.) In the course of this investigation, Ridge is contacted by an old psychiatrist friend who has possibly helpful - though highly unusual - information. One of the psychiatrist's patients, a nine-year-old girl named Rebecca Lowell, suffers from severe nightmares depicting a brutal crime. In the course of treating Rebecca through regressive hypnotherapy, the psychiatrist comes to the astonishing realization that Rebecca is recounting vivid memories of her murder by the serial killer.

The psychiatrist comes to believe that Rebecca is in fact the reincarnation of the killer's previous victim - a shocking hypothesis that is confirmed when recordings of Rebecca's recollections (or "regressions") lead Ridge to discover that victim's remains.

As the investigation progresses, Rebecca's "regressions" eventually provide the clues necessary to locate the serial killer's hideout. This discovery in turn leads the rescuing of the villain's latest captive and the surprising revelation of the killer's identity. Spurred by these discoveries, Ridge valiantly rushes to the aid of Rebecca, who is again in danger from the killer. Arriving just in time, Ridge is able to save Rebecca and her mother but is mortally wounded himself. With Rebecca safe and the mystery solved at last, Ridge dies only to be reincarnated himself as his estranged brother's newborn child.

Mena began work on *Transience* in 2002 and in July 2006 produced an initial draft that he registered with the Writers Guild of America. (Am. Compl. ¶¶ 34-35.) Mena continued to work on the draft and produced several subsequent iterations well into 2008.¹ (*Id.* at ¶ 36.) In September 2008, Mena submitted a

¹ Mena included as exhibits to his Amended Complaint drafts of *Transience* dated December 28, 2008 (Ex. 1), September 2008 (Ex. 2), and December 1, 2008 (Ex. 3). These drafts differ in minor respects from one another. Mena concedes, however, that "if *Past Life* is not substantially similar to the December 28, 2008 draft, then it is also not substantially similar to the

copy of *Transience* to Defendant Perry, who expressed interest in the screenplay and worked with Mena make additional revisions. (*Id.* at ¶ 39.) Mena also registered the screenplay with the U.S. Copyright Office in September 2008, later submitting two other versions whose registration became effective August 9, 2011.² (Am. Compl. ¶ 11.)

B. Defendants' *Past Life*

Past Life was an hour-long television series that first appeared on Fox in 2010 and ran for a short time before apparently being cancelled in June 2010. (Am. Compl. ¶ 3, 13; Defs.' Supp. Mem. at 3, 5.) The series featured Price Whatley, a former New York Police Department detective, and Dr. Kate McGinn, a psychiatrist, both of whom were employed by a private institute dedicated to solving mysteries in the past lives of its patients. The pilot episode, the alleged infringing work in the Amended Complaint, concerns a fourteen-year-old student named Noah Powell. Noah's parents bring him to the institute in New York City when he begins experiencing frightening and inexplicable flashbacks. McGinn, eager and earnest, and Whatley, skeptical and reluctant, team up in order to decipher the fragmented clues contained in Noah's visions.

earlier drafts." (Pl.'s Opp. Mem. at 6 n.4.) Thus, the Court compares only the December 28, 2008 draft to *Past Life*. (See *id.*)

² Registration is not required in order to obtain copyright protection for an original work, but a certificate of registration is required to bring an action for infringement. See 17 U.S.C. § 411(a).

Over the course of their investigation McGinn and Whatley discover that Noah is actually the reincarnation of Rachel Bell, an eight-year-old girl who disappeared along with her sister, Rebecca, before Noah was born. Following the clues from Noah's visions (also "regressions"), McGinn, Whatley, and a team of FBI investigators eventually track down the owner of a mysterious boat with special significance for Rachel. Tracing the boat to its original owner, the sleuths locate Rachel's killer and discover her sister, Rebecca, still alive but brainwashed into believing her abductor was really her father. Rebecca is reunited with her family and Rachel's memories subside, leaving Noah in peace to live out his new life.

III. Legal Standards

A. Motion to Dismiss

When considering a motion to dismiss pursuant to Rule 12(b)(6), the Court accepts as true all factual allegations made in the complaint and draws all reasonable inferences in favor of the plaintiff. See ATSI Commc'ns v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007). To survive the motion, the complaint must allege "enough facts to state a claim to relief that is plausible on its face," Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007), meaning that "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Conversely, a pleading that only “offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action’” is not sufficient. Id. (quoting Twombly, 550 U.S. at 555).

B. Copyright Infringement

A certificate of registration from the U.S. Register of Copyrights is prima facie evidence of a valid copyright. See 17 U.S.C. § 410(c); accord Folio Impressions, Inc. v. Byer California, 937 F.2d 759, 763 (2d Cir. 1991). Copyright infringement may be inferred upon a showing of (1) access to the copyrighted work and (2) substantial similarities as to protectible material. See Folio Impressions, 937 F.2d at 765. “Even when [a] plaintiff can show access, there is no infringement if the similarities between the works are not sufficient to prove copying.” Id. at 765. Thus, in order to survive Fox’s Motion to Dismiss, Mena must be able to establish each element of a prima facie case of infringement.

For the purposes of this motion, Defendants have assumed sufficient proof of access.³ (Defs.’ Supp. Mem. at 8 n.6.) Accordingly, the sole issue before this Court is whether a substantial similarity exists between the Plaintiff’s screenplay

³ Thus, the Court does not consider at this stage Mena’s ability or inability to prove access, nor does it consider Fox’s possible defenses to infringement. As such, Mena’s allegations concerning evidence of actual copying are inapposite to this motion. (See Am. Compl. ¶¶ 36-52; Pl.’s Opp. at 5-6.)

and the Defendants' allegedly infringing television show. It is well settled that the Court can resolve questions of substantial similarity as a matter of law.⁴ See, e.g., Peter F. Gaito Architecture, LLC v. Simone Dev. Corp., 602 F.3d 57, 63-64 (2d Cir. 2010). Where "the works in question are attached to a plaintiff's complaint, it is entirely appropriate for the district court to consider the similarity between those works in connection with a motion to dismiss, because the court has before it all that is necessary in order to make such an evaluation." Id. at 64. Cf. Gordon v. McGinley, 11 CIV. 1001 RJS, 2011 WL 3648606 (S.D.N.Y. Aug. 18, 2011). If the Court determines that the works are "not substantially similar as a matter of law," Kregos v. Associated Press, 3 F.3d 656, 664 (2d Cir. 1993), the complaint does not "plausibly give rise to an entitlement to relief," Iqbal, 556 U.S. at 679, and the action must be dismissed.

DISCUSSION

I. Protectible Expression

Copyright protection cannot be claimed for mere ideas, concepts, or principles, which are permanent denizens of the public domain. See 17 U.S.C. § 102(b). The literal words and

⁴ For this reason, Mena's assertion that "the question of substantial similarity typically presents a close fact question traditionally reserved for the trier of fact" is an incorrect statement of the law. (Pl.'s Opp'n. Mem. at 16.) "[N]o discovery or fact-finding is typically necessary" Gaito, 602 F.3d at 64 (internal quotations omitted).

other expressive elements of a work, however, are protectible. Id. Copyright protection may also extend to non-literal elements including the structure and organization of a work. See Nichols v. Universal Pictures, 45 F.2d 119, 121 (2d Cir. 1930) (recognizing the need to protect less concrete elements of a work to prevent a "plagiarist [from] escap[ing] liability by immaterial variations"). The line between unprotectible ideas and copyrightable embodiments in original works, however, has not always been easy to draw. See id.

One major exception to copyrightable subject matter is "sequences of events that necessarily result from the choice of a setting or situation." Williams v. Crichton, 84 F.3d 581, 587 (2d Cir. 1996). "Copyrights . . . do not protect thematic concepts or scenes which necessarily must follow from certain similar plot situations." Reyher v. Children's Television Workshop, 533 F.2d 87, 91 (2d Cir. 1976). These elements are commonly called *scenes à faire*. Courts have consistently held that *scenes à faire* are not copyrightable as a matter of law "[b]ecause it is virtually impossible to write about a particular historical era or fictional theme without employing certain 'stock' or standard literary devices." Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 979 (2d Cir. 1980).

II. Substantial Similarity

Substantial similarity is evaluated with respect to numerous aspects of a work, such as "the total concept and feel, theme, characters, plot, sequence, pace, and setting." Williams, 84 F.3d at 588. Generally, the Court evaluates substantial similarity according to the "ordinary observer test," which asks "whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work." Hamil Am. Inc. v. GFI, 193 F.3d 92, 100 (2d Cir. 1999); accord Peter F. Gaito Architecture, LLC v. Simone Dev. Corp., 602 F.3d 57, 66 (2d Cir. 2010).

Where a work is not "wholly original" because it incorporates elements from the public domain, "[w]hat must be shown is substantial similarity between those elements, and only those elements, that provide copyrightability to the allegedly infringed compilation." Key Publ'ns, Inc. v. Chinatown Today Publ'g Enters., Inc., 945 F.2d 509, 514 (2d Cir. 1991); see also Boisson v. Banian, Ltd, 273 F.3d 262, 272 (2d Cir. 2001); Williams, 84 F.3d at 587. "In applying this test," however, "a court is not to dissect the works at issue into separate components and compare only the copyrightable elements." Boisson, 273 F.3d at 272. Excessive splintering of the elements of a work "would be to take the 'more discerning' test to an extreme" and would "result in almost nothing being copyrightable

because original works broken down into their composite parts would usually be little more than basic unprotectible elements.”

(Id.)

Therefore, the Court also considers the “total concept and feel” of a work. Knitwaves, Inc. v. Lollytogs Ltd. (Inc.), 71 F.3d 996, 1003 (2d Cir. 1995) (citing Eden Toys, Inc. v. Marshall Field & Co., 675 F.2d 498, 500 (2d Cir. 1982)).

Reconciling these mandates is not always straightforward. See, e.g., Gordon v. McGinley, 11 CIV. 1001 RJS, 2011 WL 3648606, at *3 (S.D.N.Y. Aug. 18, 2011) (“Courts have noted the apparent tension between a copyright test that embraces the holistic impression of the lay observer and one that imposes the partial filter of the ‘more discerning’ observer.”); Canal+ Image UK Ltd. v. Lutvak, 773 F. Supp. 2d 419, 436 (S.D.N.Y. 2011) (“On its face, disavowing the notion that courts should compare only those elements which are in themselves copyrightable seems hard to square with the more discerning observer test” (internal citations omitted)).

Mena argues that “the Second Circuit has clarified that courts should not engage in the filtration process that the discerning observer test seems to require” and instead should be “principally guided by comparing the contested work’s ‘total concept and overall feel’ with that of the allegedly infringing work.” (Pl.’s Opp’n. Mem. at 17.) Fox, on the other hand, urges

that the Court confine its focus narrowly to the individual protectible elements of Mena's work, "ignoring those aspects of [his] work that are unprotectible in making the comparison." (Defs.' Supp. Mem. at 9 (citing Laureyssens v. Idea Group, Inc., 964 F.2d 131, 141 (2d Cir. 1992).) Neither party's position accurately describes the state of the law.

First, Mena urges this Court to dispense with the "more discerning observer" test, something it is neither free nor inclined to do. (See Pl.'s Opp. Mem. at 17.) Second, contrary to Fox's assertions (Defs.' Supp. Mem. at 3 n.3), the "total concept and feel" inquiry is not confined to cases involving visual works. See, e.g., Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc., 338 F.3d 127, 133 (2d Cir. 2003) (tracing the evolution of the "total concept and feel" analysis); Reyher, 533 F.2d at 91-92 (applying the "total concept and feel" analysis in the context of children's books). But see Canal+ Image UK Ltd., 792 F. Supp. 2d at 684 (observing that "[o]ne explanation . . . is that the Second Circuit's emphasis on the total concept and feel inquiry is the result of applying to visual works a copyright doctrine developed with respect to works consisting of discrete elements"). Moreover, even a work that is entirely a compilation of unprotectible elements may be copyrightable under certain circumstances. See Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 362

(1991) (holding that compilations of unoriginal data may be copyrightable if selected or arranged in an original way); Knitwaves, 71 F.3d at 1003-04.

Both the "more discerning observer" test and the "total concept and feel" analysis can and should be applied when evaluating substantial similarity. For any inquiry concerning a work that contains both protectible and unprotectible elements, the "more discerning observer test" is always the starting point. Tufenkian, 338 F.3d at 134 (stating that the substantial similarity analysis "must begin by dissecting the copyrighted work into its component parts in order to clarify precisely what is not original"). When conducting this analysis, the Court "must attempt to extract the unprotectible elements from [its] consideration and ask whether the *protectible elements, standing alone*, are substantially similar." DiTocco v. Riordan, 11-4438-CV, 2012 WL 4016898, at *1 (2d Cir. Sept. 13, 2012) (quoting Knitwaves, 71 F.3d at 1002 (emphasis in original)).

Yet it is also apparent that "[b]y factoring out similarities based on non-copyrightable elements, a court runs the risk of overlooking wholesale usurpation of a prior author's expression." Hoehling, 618 F.2d at 979-80. A piecemeal comparison therefore is not independently sufficient because "copyright holder[s] must be protected not only from literal copying but also from infringement that is apparent only by

comparing the aesthetic import of the works in their entirety.” DiTocco, 2012 WL 4016898, at *1; Gaito, 602 F.3d at 66. Thus, the Court must also look to the “total concept and feel” of the works being compared. Gaito, 602 F.3d at 66; cf. Canal+ Image UK Ltd., 773 F.Supp.2d at 435 (“[C]omparison by dissection is not the end of the matter. The Court must also consider whether there is a substantial similarity between the total concept and feel of the two works.”). This “total concept and feel” analysis is guided by common sense. Boisson, 273 F.3d at 273; Hamil, 193 F.3d at 102.

The “total concept and feel” inquiry, however, is not carte blanche to rest findings of infringement on vague or amorphous determinations. Such an approach would “invite[] an abdication of analysis” or “end up erroneously protecting ‘ideas.’” Tufenkian, 338 F.3d at 134 (internal citations omitted). Thus, “[w]here [courts] have described possible infringement in terms of whether two designs have or do not have a substantially similar ‘total concept and feel,’ [they] generally have taken care to identify precisely the particular aesthetic decisions – original to the plaintiff and copied by the defendant – that might be thought to make the designs similar in the aggregate.” Id.

While “[t]he standard of originality is low, . . . it does exist.” Feist Publications, 499 U.S. at 362. Unprotectible

elements are extracted completely from the calculus only when their use is "so mechanical or routine as to require no creativity whatsoever." Id.; see also Folio Impressions, 937 F.2d at 765-66; Knitwaves, 71 F.3d at 1009. Aesthetic decisions relevant to the "total concept and feel" of a work must themselves be original and protectible; merely assembling stock elements or *scenes à faire* without original "selection, coordination, and arrangement" cannot sweep under the mantle of copyright protection what was once in the public domain. Feist Publications, 499 U.S. at 362.

III. Application

Applying the rules discussed above, the Court finds that *Transience* is a work comprised of original combinations of ideas and concepts, as well as components drawn from the public domain. Thus, Mena's work is composed of both protectible and unprotectible elements and the Court applies the "more discerning observer test" to the individual protectible elements of Mena's work. The Court then employs the "total concept and feel" analysis to consider the work as a whole. Ultimately, the Court finds that *Past Life* does not infringe *Transience* under these tests.

A. "More Discerning Observer" Test

1. Setting, Mood, and Themes

Transience is set in a small Midwestern community, with all of the action in the story occurring in or around the same town. In *Past Life*, the protagonists travel in and among Connecticut, New York City, Washington, D.C., and more rural locations in Virginia and North Carolina. *Past Life* also makes ample use of sweeping urban vistas and stock images of well-known locales that are absent from *Transience*. It is thus readily apparent that the settings of the two works are significantly different.

Similarly, the mood of *Transience* is quite unlike from that of *Past Life*. Mena's screenplay is replete with brooding characters, blood, and brutality, while *Past Life* is clearly intended to appeal to a more general audience. The characters in *Transience* struggle with failed relationships, accidental deaths, estranged family members, guilt, violence, and terminal illness. In contrast, the characters in *Past Life* are likeable and less developed, often engaging in humorous banter and revealing little outside of that necessary to drive the plot. Moreover, while *Transience* contains chilling imagery and several violent scenes, a few brief flashbacks that imply drowning are the only hints of violence in *Past Life*. In short, *Transience* has all the hallmarks of a dark crime drama while *Past Life* was

intended to be a more lighthearted investigatory adventure. The moods of the two works are not substantially similar.

The themes of the works are also quite dissimilar. While Mena alleges that both works incorporate religious references (Am. Compl. ¶¶ 94, 118-19), it is obvious that *Past Life* does not contain any significant religious symbolism at all. Mena's assertion rests entirely on one reference - the use of the name "Maria" as a clue - and is taken completely out of context. (See id.) Fox correctly points out that the only meanings ever ascribed to "Maria" in *Past Life* are the name of Noah's girlfriend, Noah's possible name in his past life, a witness to Noah's murder, the name of a counselor at a sailing camp, and the name of a boat. (See Defs.' Supp. Mem. at 20 n.16.) Mena's claim that both works incorporate religious imagery is simply incorrect.

Mena also argues that reincarnation is a prominent theme in both *Transience* and *Past Life*. (Am. Compl. ¶ 5.) Fox insists that "*Transience* and *Past Life* treat the subject of past life regression quite differently." (Defs.' Supp. Mem. at 20.) In fact, Fox urges that "*Past Life* is not a reincarnation story so much as it is a ghost story." (Id. at 21.) The Court is not persuaded, however, that reincarnation is of so little import in *Past Life*. The distinctive feature of Fox's series was precisely that it featured clues gleaned from past lives - not from ghosts

or other apparitions. Further, there is little support for Fox's claim that "Noah [is] temporarily channeling the spirit of the drowned girl." (Id.)

The general concept of reincarnation, however, is not protectible and to acknowledge that reincarnation is a prominent theme in both works is not to say that their treatments of the theme are substantially similar. *Transience* examines the nature and implications of reincarnation at length, delving into the mechanics and implications of a soul's "transmigration." (Am. Compl., Ex. 1 at 47.) *Past Life*, however, offers only cursory and conclusory explanations for what would otherwise be a rather fantastic phenomenon. It is quite clear that reincarnation, though a prominent theme and plot device in both *Transience* and *Past Life*, is viewed and presented very differently in each work.

2. Narrative and Plot

Mena also alleges that, "[i]n addition to being reincarnation stories, *Transience* and *Past Life* are also 'crime procedurals' in which the detective solves an abduction/murder that took place more than a decade earlier" (Am. Compl. ¶ 5.) Both *Transience* and *Past Life* are investigatory procedurals with the distinctive twist that crimes are solved using clues extracted from past life flashbacks. The plots of both works rely on the process of inducing and interpreting

"regressions," identifying "triggers," and deciphering disjointed clues. Both works are also concerned primarily with deducing what trauma befell a reincarnated individual in a prior life in order to resolve a contemporary problem.

Fox and Mena correctly recognize, however, that this general narrative is not itself protectible. (See Pl.'s Opp'n. Mem. at 23 ("Anyone may write about a detective who uses clues from a reincarnated murder victim to solve a crime as long as they express this idea differently."); Defs.' Reply Mem. at 13-14.) Original though they may be, ideas and concepts remain ever open to public appropriation. See 17 U.S.C. § 102(b) (2012); Nichols, 45 F.2d at 121. Mena argues instead that "virtually every significant scene and plot point in *Past Life* is the same or distinctly similar to the analogous portion of *Transience*." (Pl.'s Opp'n. Mem. at 2.) Fox responds that the major motivation in *Past Life* is the therapeutic resolution of issues stemming from a past life occurrence, while *Transience* is driven purely by a law enforcement mission. (Defs.' Supp. Mem. at 13.) While true that *Past Life*'s Whatley and McGinn are not as singularly focused on solving a crime as *Transience*'s Ridge, it is not correct that this purpose is entirely absent.⁵ Any review of the works must recognize the obvious parallels between the plots.

⁵ For example, both Whatley and McGinn are employed by a private organization dedicated to solving past life mysteries. Moreover, both *Past Life* protagonists have law enforcement connections; Whatley is a former detective

The commonalities, however, are insufficient to support a finding of substantial similarity. The main plot points Mena identifies include: an initial flashback; a concerned parent meeting with a psychiatrist; attempts to induce flashbacks to gather more clues; the struggle to decode a difficult clue obtained from a flashback; an incident that increases the sense of urgency for the protagonists; a climactic moment in which the reincarnated person buckles under the strain of the past life memories; an event that prompts the reincarnated person to disappear and the search that ensues; and an emotional reunion with members of the reincarnated person's family from his or her past life. (Pl.'s Opp'n. Mem. at 6-16.) Each of these scenes in *Transience* is expressed differently in *Past Life*. More importantly, these plot points flow from the idea of a crime procedural involving reincarnation and are likely to be found in any story involving an individual with past life memories of a crime. To hold that the use of such elements is copyrightable would be to deprive this unique genre of vehicles necessary to advance the plot, effectively preventing others from penning similar stories. These are precisely the kinds of *scenes à faire* that are outside the purview of copyright protection.

with the NYPD and McGinn relies both on Whatley and on her connections in the FBI to discover the past identities of her patients and to apprehend Rachel's murderer.

Absent substantial similarities between specific scenes or sequences, the protectible elements of the plots in *Transience* and *Past Life* are sufficiently different to preclude a finding of infringement.

3. Specific Allegations of Infringing Scenes

Mena does allege that several scenes from *Past Life* are directly drawn from his work.⁶ First, Mena argues that the opening sequence of *Transience* is substantially similar to that of *Past Life*. According to Mena, “[i]n both works, an opening visual sequence depicts a circle of light on a black screen” that shifts, grows, and eventually encompasses the whole screen in such a way as to create the impression that “the viewer passe[d] through the light and emerge[d].” (Am. Compl. ¶ 56.) Fox argues that the opening sequences are not substantially similar because “the light in *Past Life* takes the shape of a face that constantly evolves into faces of different individuals, one after another.” (Defs.’ Supp. Mem. at 30, App. A ¶ 1.)

The use of a white light on a black background is hardly a concept that can be claimed by a single creator. Similarly, the idea of passing through that light and emerging on the other

⁶ The Amended Complaint contains more allegations of discrete instances of copying than the sequences listed here. (See Am. Compl. ¶¶ 53-136). Many of these purported “similarities,” however, are trivial, exaggerated, or classic *scènes à faire*. The sequences considered by the Court are those for which substantial similarity could most plausibly be argued.

side is too general to be copyrightable. Mena argues instead that the actual expression of this concept in both works is substantially similar. (Pl.'s Opp. Mem. at 6-7.) Fox correctly points out, however, that "all we know of the opening sequence" is three lines constituting abstract stage directions and "[h]ow exactly the *concept* of a flashing light would have been expressed is unclear." (Defs.' Reply Opp. at 12.) The concept Mena seeks to claim is simply too general to be restricted to his work and his work alone. While the opening sequence of *Past Life* may be similar to that contemplated by the screenplay for *Transience*, this similarity is too abstract - and too speculative - to amount to infringement.

Second, Mena alleges that the scene following the opening sequence, in both works a flashback experienced by the reincarnated victim, is substantially similar in *Transience* and *Past Life*. (Am. Compl. ¶ 57.) Specific scenes or unique progressions using similar elements may sometimes be protectible, but a review of the two scenes quickly reveals that they are actually quite different. Though Mena asserts that the reincarnated victim in both works has a "terrifying vision in which an unidentified person is chased, attacked, beaten, and presumably killed," this is simply incorrect. (Am. Compl. ¶ 57.) In *Transience* this altercation is linear, occurs in a dark forest, and implies the victim is strangled not beaten. The

corresponding sequence in *Past Life* shows a confused jumble of images including a house, a body of water, shaky views of a backyard, and an irate man with a baseball bat. The *Past Life* progression takes place during the day and is markedly less "terrifying" than the scene described in *Transience*. (*Id.*) Additionally, in *Transience* the victim experiences this vision as a dream while *Past Life* presents the event as a flashback experienced in the midst of a basketball game. These scenes are simply too divergent to support a finding of substantial similarity. See *Denker v. Uhry*, 820 F. Supp. 722, 732 (S.D.N.Y. 1992) *aff'd*, 996 F.2d 301 (2d Cir. 1993) ("Plaintiff points out that each of the works opens with an 'accident' befalling the main character. [. . .] [T]o claim that the events are similar in that both are "accidents" is less an argument than a pun; the events are distinct not only as expression but also in the ideas they express.").

Third, Mena alleges that *Past Life* is substantially similar to *Transience* because it imports a scene in which the reincarnated victim runs away and is later located by the protagonists. (Am. Compl. ¶¶ 81-83; Pl.'s Opp'n. Mem. at 12.) The development of a particular plot device "is protectible, but only at a level that particularizes this general theme into characters, details, and events." *Smith v. Weinstein*, 578 F. Supp. 1297, 1303 (S.D.N.Y. 1984), *aff'd*, 738 F.2d 419 (2d Cir.

1984) (rejecting a claim of infringement where two works used prison rodeos as the setting for an escape). The "use of a plot device that differs as to characters, details, and events does not amount to infringement." Denker, 820 F.Supp. at 732 (internal quotations omitted).

The relevant sequences in *Transience* and *Past Life* are very different in that they involve different characters and contain different details.⁷ Just as a "[p]laintiff is not entitled to copyright protection for all instances of misfortune that befall the elderly or all demonstrations of dedication by a servant or helper," neither is Mena entitled to sole use of a sequence in which a young person, haunted by unexplained visions of the past, runs off to a strange location and is later found and questioned. Id. Many works employ sudden departures to drive the plot and quicken the pace. Most would be far shorter if main characters that made such hasty exits were never woven into the story.

Fourth, Mena urges that the significance of the "tower" in both stories is also evidence of substantial similarity. (Am. Compl. 95-96; Pl.'s Opp. Mem. at 14.) Both *Transience* and *Past Life* do feature tower-like structures that figure prominently in the plot. In *Transience*, a water tower with the phrase "Find

⁷ In *Past Life*, for example, this "runaway" sequence coincides with the discovery that Noah's gender was different in his past life - a detail and plot twist wholly absent from *Transience*.

Jesus" serves as an important landmark that leads the detective to the serial killer's lair. In *Past Life*, the reincarnated victim's preoccupation with a flashing red light atop a water tower helps the detectives discover the Noah's former identity by revealing that he could see the Washington Monument from his bedroom window.

Still, these elements are significantly different in each work. The water tower in *Transience* does not appear until the end of the work, functioning as one of the last clues leading to the rescue of a kidnapped victim. In *Past Life*, however, the significance of the flashing light is an initial clue that allows the detective to discover the victim's identity. Moreover, the significance of these landmarks in each story arguably turns not on the nature of the tower itself, but on an additional element of each tower. In *Transience*, the phrase "Find Jesus" - an oft-repeated phrase throughout the story used simultaneously as foreshadowing and allusion - is the key landmark, not the water tower itself. Similarly, in *Past Life* it is not the water tower but the flashing red light at its apex, a characteristic of structures tall enough to require air traffic indicators - like the Washington Monument - that provides the vital clue. Given their different expression and functions, these elements are not substantially similar.

Finally, Mena alleges that "[t]here is a false lead in each work (a man believed to be the killer turns out to be innocent), but the stories conclude soon after the mystery of the child's cryptic New Testament Reference is solved." (Am. Compl. ¶ 7; Pl.'s Opp. Mem. at 14-15.) As an initial matter, a "false lead" - or, to use the literary term, a red herring - is a routine element of any detective story. Thus, the use of this element is not protectible. To the extent that Mena suggests that any "false lead" is infringement, his argument necessarily fails.

Likewise, there is no basis for finding substantial similarity between the red herrings in each work. Certainly the fact that the red herring in both stories resulted in suspicion of the wrong person cannot reasonably be understood as a meaningful similarity. The function of a red herring, after all, is to lead the detective astray. Nor is the element expressed in the same way or introduced at the same point in both works. In *Transience*, the red herring is a false confession and Ridge does not decipher the final crucial riddle until after the wrong perpetrator has been arrested and everyone but Ridge is convinced the mystery is solved. Conversely, in *Past Life* the red herring is the ownership of a suspicious boat and is introduced after the final crucial riddle has already been

cracked.⁸ Finally, the Court is unable to credit Mena's allegation that both red herrings constitute "cryptic New Testament reference[s]." (Am. Compl. ¶ 7.) As explained above, there is simply no indication in *Past Life* that any religious overtone is intended.

With respect to those copyrightable elements of these sequences, the Court concludes that no observer would assume *Past Life* had copied any protectible elements from *Transience*. Thus, after comparing the works in question the Court finds that the relevant sequences identified in *Past Life* are not substantially similar to *Transience* under the "more discerning observer" standard.

4. Characters and Character Development

Mena also alleges that *Past Life* infringes his work because it appropriates several important characters.⁹ "The bar for

⁸ The Court must view the facts alleged in the Amended Complaint in the light most favorable to Mena and so accepts the claim that the "Maria" reference in *Past Life* is a red herring. While the reference does lead the investigators initially to suspect the owner of a boat with that name, his revelation that he did not own the boat at the relevant time quickly shifts suspicion to the previous owner who is, in fact, the correct suspect. The reference in *Past Life* could more properly be classified as one clue in a series that leads to the resolution of the mystery, while the reference in *Transience* is a true red herring designed to deter or derail the detective.

⁹ The Court addresses in depth only those main characters central to the plot in *Transience* and *Past Life*. Mena's allegations regarding other supporting characters fail as a matter of law because "[n]o character infringement claim can succeed unless plaintiff's original conception sufficiently developed the character, and defendants have copied this development and not merely the broader outlines." *Smith v. Weinstein*, 578 F. Supp. 1297, 1303 (S.D.N.Y. 1984), *aff'd*, 738 F.2d 419 (2d Cir. 1984); *Williams*, 84 F.3d at 589 ("[T]he less developed the characters, the less they can be copyrighted."); *see also Sheldon Abend Revocable Trust v. Spielberg*, 748 F. Supp. 2d 200, 208 (S.D.N.Y. 2010).

substantial similarity in a character is set quite high.”
Sheldon Abend Revocable Trust v. Spielberg, 748 F. Supp. 2d 200, 208 (S.D.N.Y. 2010); DiTocco v. Riordan, 815 F. Supp. 2d 655, 658 (S.D.N.Y. 2011), aff'd, 11-4438-CV, 2012 WL 4016898, at *1 (2d Cir. Sept. 13, 2012) (finding no substantial similarity between two teenaged heroes who fought creatures from Greek mythology); Arden v. Columbia Pictures Industries, Inc., 908 F.Supp. 1248, 1261 (S.D.N.Y. 1995) (finding no substantial similarity between two middle-aged, self-centered bachelors that became trapped in a repeating day while pursuing love).

First, Mena argues that the reincarnated murder victims who provide the clues to solve the murders are substantially the same in each work. (Am. Compl. ¶¶ 59-60; Pl.’s Opp’n. Mem. at 26-27.) The reincarnated victim in *Transience* is named Rebecca Lowell, while the corresponding character in *Past Life* is Noah Powell. Rebecca is a nine-year-old artistic prodigy, while Noah is an otherwise normal fourteen-year-old boy. Mena urges that these characters are substantially similar because both were a young girl¹⁰ in a past life, murdered and reincarnated, socially ostracized, artistic, and increasingly burdened by flashbacks to

¹⁰ It is worth noting that the purported similarity between the past identities of Rebecca and Noah is a bit exaggerated. While both were female in their previous lives, Rebecca was a Hispanic teenage college student while Noah was a Caucasian eight-year-old girl.

his or her former life.¹¹ (Am. Compl. ¶¶ 59-60; Pl.'s Opp'n. Mem. at 26-27.)

Fox argues that a "victim with past life memories" is a "scene à faire that flows from the idea of a police procedural." (Defs.' Supp. Mem. at 18-19 n.14.) Fox also urges that the Rebecca and Noah are not substantially similar because their ages, genders, and backgrounds are not the same. (Defs.' Reply Mem. at 5.) The Court also notes that the manner of death of each character in his or her previous life differs. In *Transience*, the victim was raped, beaten, and strangled, while in *Past Life* the victim could not swim and was left to drown.

Care must be taken to distinguish an unlawfully copied character from "a somewhat similar though non-infringing character whose appearance, behavior, or traits, and especially their combination, significantly differ from those of a copyrighted character, even though the second character is reminiscent of the first one." Warner Bros. Inc. v. Am. Broad. Companies, Inc., 720 F.2d 231, 242 (2d Cir. 1983). Admittedly both Rebecca and Noah embody the concept of reincarnation and their "regressions" serve as a source of clues. This alone cannot sustain a finding of substantial similarity, however.

¹¹ Mena also alleges similarity because "[i]n *Transience*, the murderer buried the [the victim] near a river" and "in *Past Life*, the murderer threw the [victim] into the ocean." (Am. Compl. ¶ 60.) Equating the two scenarios obscures an important difference, however, as the former describes the killer's disposal of the victim's body while the latter describes the manner of death.

See, e.g., *Arden*, 908 F.Supp. at 1261 ("Plaintiff also argues that the use of similar plot devices, such as each protagonist's sole knowledge of the repeating day and the underdevelopment of other characters, constitutes substantial similarity. Literary devices, however, cannot be copyrighted.").

In addition to the distinctions noted above, these characters also play very different roles in their respective works. Noah is a flat character with a passive role in the *Past Life* storyline. Rebecca, on the other hand, is more fully developed and imbued with a degree of omniscience that guides other characters at critical junctures.¹² Given the significant differences between Rebecca and Noah, the Court concludes that these characters are not sufficiently similar to support a finding of infringement.

Second, Mena alleges that the detective characters - Jack Ridge and Price Whatley - are substantially similar. (Am. Compl. ¶¶ 68; Pl.'s Opp'n. Mem. at 26-28.) Both *Transience* and *Past Life* feature the familiar figure of a tough, capable, determined detective who follows clues and facts. In both works, the detective has lost his wife, is practical, and displays skepticism with regard to reincarnation. (Pl.'s Opp'n. Mem. at

¹² For example, Rebecca is described as "exceptionally bright" and "[a] true prodigy" when it comes to art. (Am. Compl., Ex. 1 at 13, 17.) Additionally, throughout *Transience* Rebecca demonstrates knowledge beyond her years, inexplicably speaks fluent Spanish, consoles her mother from her prior life, and subtly encourages a romance between Ridge and her current mother. (*Id.*, Ex. 1 at 16, 52, 94-95, 101.)

10.) The "difficulty in this regard is that any two devices purporting to represent a natural prototype or archetype are likely to be similar, quite apart from any copying." First Am. Artificial Flowers, Inc. v. Joseph Markovits Inc., 342 F. Supp. 178, 186 (S.D.N.Y. 1972). The image of the hardscrabble detective is, after all, a recurrent figure throughout literature and serves as a stock character in myriad genres. See, e.g., Walker v. Time Life Films, Inc., 784 F.2d 44, 50 (2d Cir. 1986) ("Foot chases and the morale problems of policemen, not to mention the familiar figure of the Irish cop, are venerable and often-recurring themes of police fiction.").

Likewise, the motivation of a lost loved one, a despair mitigated only by the thrill of the chase, and the promise of love renewed are all familiar plot devices. Mena's "purported list of common attributes . . . evokes only a general sketch of a character (i.e., an unprotectible idea), rather than a recognizable identity that can be linked to a particular figure (i.e., a protected expression of that idea)." Allen v. Scholastic Inc., 739 F. Supp. 2d 642, 660 (S.D.N.Y. 2011). To the extent that Mena seeks to claim a copyright in these aspects, the detective persona is not protectible.

Furthermore, though they occupy similar positions in their respective plotlines, Ridge and Whatley are very different dramatic characters. Ridge is tough, hard-nosed, miserable, and

sickly. A paragon of struggle and strife, he embodies the prevalent themes of tragedy, redemption, grief, hope, and eternity that permeate *Transience*. In contrast, Whatley is suave, handsome, clever, and full of vitality. With less dramatic depth, he is a character with whom the audience will identify - someone easy to root for from episode to episode as he pursues both justice and love. "Stirring one's memory of a copyrighted character is not the same as appearing to be substantially similar to that character, and only the latter is infringement." Warner Bros. Inc., 720 F.2d at 242. Since the detectives in *Transience* and *Past Life* are similar as stock characters but dissimilar otherwise, there is no substantial similarity here.

Third, Mena alleges that the psychiatrist characters, Dr. Leonard Hellerman and Dr. Kate McGinn, are substantially similar.¹³ (Am. Compl. ¶¶ 63-64, 67, 69-74; Pl.'s Opp'n. Mem. at 26-27.) Specifically, Mena urges that these characters interact with the reincarnated victims and the detective in similar ways

¹³ In his Amended Complaint, Mena treats the role of the psychiatrist and the character Dr. McGinn separately. Instead of comparing McGinn as the psychiatrist to the characters in *Transience*, Mena instead labels McGinn "the Female Lead" and compares her to Rebecca's mother. The Court is not persuaded that this comparison is valid given that, unlike Rebecca's mother, McGinn is intimately involved in each phase of the investigation, plays a prominent role in the story, and does not function in the same caretaking capacity with respect to the reincarnated victim. The Court also declines to adopt Mena's more abstract nomenclature for the purpose of making comparisons as many of his identifiers - including "Female Lead," "Detective," and "Murder Victim" - would "constitute [] general prototype[s] too indistinct to merit copyright protection." Allen, 739 F.Supp.2d at 660.

in both works. (Id.) But this is not quite correct. Though Mena alleges that "[t]he [p]sychiatrist in each work reaches the same conclusion: the [c]hild is a reincarnated murder victim," the route to that realization differs greatly in *Transience* and *Past Life*. (Id.) In the former, Hellerman is startled, frightened, and finally awed and excited by his discovery that Rebecca is reliving memories from a prior life. In contrast, McGinn is employed by the Talmadge Center, a private organization that specializes in past life therapy, and never doubts the significance or veracity of Noah's flashbacks.

The most striking distinction, however, is seen in the relationship between the psychiatrist and the detective in each work. Mena asserts that "in each work a homicide detective . . . is enlisted to decipher the [r]eincarnated [c]hild's cryptic clues," but this ignores major character differences. (Id.) In *Transience*, Hellerman enlists Ridge's help by violating the doctor-patient privilege and enticing Ridge with the information he has gleaned from his sessions with Rebecca. In *Past Life*, Whatley is actually employed by the same institution as McGinn and already a member of the team seeking to help Noah. Similarly, Hellerman is never more than a peripheral character, appearing in few scenes and functioning primarily as a vehicle for Ridge to access Rebecca's flashbacks. McGinn, on the other hand, is a protagonist in her own right, partnered with the

detective and foreshadowed as a potential love interest. Beyond the fact of their profession, few similarities exist between the psychiatrists in *Transience* and *Past Life*.

Mena further claims that Fox infringed by "t[aking] certain characteristics of the Female Lead from *Transience* and transferr[ing] them to the female Psychiatrist, who is the Female Lead in *Past Life*." (Am. Compl. ¶ 78.) This argument is also unavailing because the modification or fusion of character attributes is sufficient to distinguish McGinn from Hellerman. Cf. Hogan v. DC Comics, 48 F. Supp. 2d 298, 312 (S.D.N.Y. 1999) (finding no substantial similarity even though both characters were white males named Nicholas Gaunt; in their early twenties; half-human, half vampire; and had "thin-to-medium builds, pale skin, dark messy hair and a slovenly appearance"). Moreover, while "no plagiarist can excuse the wrong by showing how much of his work he did not pirate, a defendant may legitimately avoid infringement by intentionally making sufficient changes in a work which would otherwise be regarded as substantially similar" Warner Bros, Inc. v. American Broadcasting Cos., 654 F.2d 204, 211 (2d Cir. 1981) (citations and internal quotations omitted); cf. Knitwaves, 71 F.3d at 1002. Thus, Mena's allegations concerning Fox's copying and alteration of the "Female Lead" and the "Psychiatrist," even if correct, fail to show substantial similarity.

With respect to those character elements that are copyrightable, the Court concludes that no observer would assume *Past Life* had copied any protectible elements from the above characters found in *Transience*. Therefore, the Court finds that the characters and character development in *Past Life* is not substantially similar to *Transience* under the "more discerning observer" standard.

B. "Total Concept and Feel" Analysis

Finally, the Court looks at Mena's "original contributions" in terms of how he "selected, coordinated, and arranged" the elements of his work to determine whether *Transience* and *Past Life* are substantially similar under the "total concept and feel" analysis. Feist Publications, 499 U.S. at 350, 358; Knitwaves, 71 F.3d at 1004. The Court is guided in this assessment by common sense. Boisson, 273 F.3d at 273. However, the Court must point to "particular aesthetic decisions" made by Mena and copied by Fox in order to sustain a finding of substantial similarity with respect to "total concept and feel." Tufenkian, 338 F.3d at 134 (internal citations omitted).

The Court's review of the works in this case compels the conclusion that the "total concept and feel" of *Past Life* is sufficiently different from that of *Transience*. Though Mena contends "[b]oth [w]orks are unapologetically dramatic, intense, and emotional thrillers with little comic relief and hopeful

endings," this appraisal is only accurate with respect to *Transience*. (Pl.'s Opp'n. Mem. at 28.) *Past Life* does, in fact, contain many instances of comic repartee designed to make the characters appeal to a wider audience. Additionally, while some of the action in *Past Life* can be described as exciting, *Transience* is far more "dramatic, intense, and emotional" because it employs elements that are far more gruesome and suspenseful.

The selection, coordination, and arrangement of scenes and elements also differ substantially in both works. Both *Transience* and *Past Life* contain subplots and twists not found in the other. Arguably similar scenes occur at different times, important clues are cracked by different people and at different stages in the investigation, and analogous characters are developed to different degrees. *Transience* is written as a feature-length film, standalone and self-contained, while *Past Life* is clearly structured as a serial program intended to proceed in an episodic fashion. Exercising common sense and reasonable judgment, the Court is unable to pinpoint any sufficiently original aesthetic decisions that appear to have been copied by Fox. Consequently, the Court concludes that *Transience* and *Past Life* are not substantially similar under "total concept and feel" analysis.

CONCLUSION

In light of the above discussion, the Court finds that no discerning observer would conclude that *Past Life* had appropriated protected elements from *Transience*. The Court further finds that *Transience* and *Past Life* are not substantially similar with respect to "total concept and feel." As such, the Court concludes that "no reasonable jury, properly instructed, could find that the two works are substantially similar," Warner Bros., 720 F.2d at 240; Durham Industries, Inc. v. Tomy Corp., 630 F.2d 905, 918 (2d Cir. 1980), and finds that the works are not substantially similar as a matter of law. Since the Amended Complaint does not "plausibly give rise to an entitlement to relief," Iqbal, 556 U.S. at 679, this action must be dismissed.

For the foregoing reasons, Defendants' Motion to Dismiss the Amended Complaint is hereby GRANTED. The Clerk of the Court is directed to terminate the motion (Dkt. 28) and to close this case.

SO ORDERED:



BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
September 27, 2012