

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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MARIA CASTILLO, JAMES COCHRAN,	:	Case No. 15-3230
LUIS GOMEZ, BIENBENIDO GUERRA,	:	
RICHARD MILLER, KAI NIEDERHAUSEN,	:	
CARLO NIEVA, RODNEY RODRIGUEZ,	:	<u>COMPLAINT</u>
and KENJI TAKABAYASHI,	:	
	:	<u>JURY TRIAL</u>
Plaintiffs,	:	<u>DEMANDED</u>
	:	
-against-	:	
	:	
G&M REALTY L.P., 22-50 JACKSON AVENUE	:	
OWNERS, L.P., 22-52 JACKSON AVENUE LLC,	:	
ACD CITIVIEW BUILDINGS, LLC and GERALD	:	
WOLKOFF,	:	
	:	
Defendants.	:	
-----X	:	

Plaintiffs MARIA CASTILLO, JAMES COCHRAN, LUIS GOMEZ, BIENBENIDO GUERRA, RICHARD MILLER, KAI NIEDERHAUSEN, CARLO NIEVA, RODNEY RODRIGUEZ and KENJI TAKABAYASHI (“Plaintiffs”), by and through their undersigned counsel, EISENBERG & BAUM, LLP, as and for their Complaint against Defendants G&M REALTY L.P., 22-50 JACKSON AVENUE OWNERS, L.P., 22-52 JACKSON AVENUE LLC, ACD CITIVIEW BUILDINGS, LLC and GERALD WOLKOFF, (“Defendants”) hereby allege as follows:

PRELIMINARY STATEMENT

1. For more than a decade, Defendants permitted Plaintiffs, a group of renowned visual artists, to create and display their work on the exterior and interior of a derelict property owned by Defendants in Long Island City, Queens. Over the years, the spectacular artistic creations blossomed into an international tourist attraction and transformed the neighborhood

from a virtual wasteland into an attractive place for residential development. Without giving Plaintiffs a fair opportunity to remove and preserve their work, or even the minimum notice required by law, Defendants suddenly decided to destroy it under cover of night, even though at the time of the destruction they were far from ready to demolish the buildings in question. The destruction was gratuitous, willful and wanton, and undertaken without regard to the feelings, reputations or financial interests of the plaintiffs, who now seek compensation for their devastating losses.

NATURE OF THE CLAIMS

2. Plaintiffs seeks equitable relief, monetary damages, and attorneys fees to redress Defendants' unlawful destruction of their works of art in violation of the Visual Artists Rights Act, 17 U.S.C. §106A *et seq.* ("VARA").

3. Plaintiffs also assert tort claims pursuant to the common law.

THE PARTIES

4. Plaintiff Maria Castillo resides in Sunnyside, New York and is a professional artist under the name "Toofly" ("Castillo"). Castillo is the "author of a work of visual art" within the meaning of 17 U.S.C. §106A.

5. Plaintiff James Cochran resides in London, England and is a professional artist under the name "JimmyC" ("Cochran"). Cochran is the "author of a work of visual art" within the meaning of 17 U.S.C. §106A.

6. Plaintiff Luis Gomez, a/k/a Victor Palenque, resides in Ashville, North Carolina, and is a professional artist under the name "Ishmael" ("Gomez"). Gomez is the "author of a work of visual art" within the meaning of 17 U.S.C. §106A.

7. Plaintiff Bienbenido Guerra resides in Flushing, New York and is a professional artist under the name "FCEE" ("Guerra"). Guerra is the "author of a work of visual art" within the meaning of 17 U.S.C. §106A.

8. Plaintiff Richard Miller resides in North Charleston, South Carolina, and is a professional artist under the name "Patch Whiskey" ("Miller"). Miller is the "author of a work of visual art" within the meaning of 17 U.S.C. §106A.

9. Plaintiff Kai Niederhausen resides in Cologne, Germany and is a professional artist under the name "Semor" ("Niederhausen"). Niederhausen is the "author of a work of visual art" within the meaning of 17 U.S.C. §106A.

10. Plaintiff Carlo Nieva resides in New York, New York, and is a professional artist under the name "Diego" ("Nieva"). Nieva is the "author of a work of visual art" within the meaning of 17 U.S.C. §106A.

11. Plaintiff Rodney Rodriguez resides in Freeport, New York and is a professional artist under the name "Panic" ("Rodriguez"). Rodriguez is the "author of a work of visual art" within the meaning of 17 U.S.C. §106A.

12. Plaintiff Kenji Takabayashi resides in Brooklyn, New York, and is a professional artist under the name "Python" ("Takabayashi"). Takabayashi is the "author of a work of visual art" within the meaning of 17 U.S.C. §106A.

13. Castillo, Cochran, Gomez, Guerra, Miller, Niederhausen, Nieva, Rodriguez and Takabayashi are referred to collectively herein as "Plaintiffs."

14. Defendant G & M Realty L.P. ("G&M Realty") is a New York limited partnership with an office and principal place of business at 1 Executive Drive, Edgewood, New York, 11717.

15. Defendant 22-50 Jackson Avenue Owners L.P. ("Jackson Owners") is a New York limited partnership with an office and principal place of business at 1 Executive Drive, Edgewood, New York, 11717.

16. Defendant 22-52 Jackson Avenue, LLC ("22-52 Jackson") is a New York limited liability corporation with an office and principal place of business c/o Alan Hoffman, 85 West Hawthorne Ave., Valley Stream, New York, 11590.

17. Defendant ACD Citiview Buildings, LLC ("Citiview") is a New York limited liability corporation with an office and principal place of business at 1 Executive Drive, Edgewood, New York, 11717.

18. Defendant Gerald Wolkoff ("Wolkoff") is an individual with an office and principal place of business at 1 Executive Drive, Edgewood, New York, 11717.

19. G&M Realty, Jackson Owners, 22-52 Jackson, Citiview and Wolkoff are referred to collectively herein as "Defendants."

JURISDICTION AND VENUE

20. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §1331 in that this civil rights action arises under federal law, *see* 29 U.S.C. § 621 et seq. The court has supplemental jurisdiction over plaintiffs' state law claims under 28 U.S.C. §1367 and principles of pendent and/or ancillary jurisdiction.

21. This court has *in personam* jurisdiction over Defendants because they own real property and conduct operations within, transact business in and provide services within New York City, State of New York.

22. Venue is proper in this district pursuant to 28 U.S.C. §1391(b)(2) because a substantial part of the events that give rise to the claim occurred in this district.

BACKGROUND

I. The 5Pointz Properties

A. Queens Block 86, Lot 1

23. Defendant G&M Realty is the owner in fee simple of certain improved real property located at 46-23 Crane Street, 46-09 Crane Street, 45-46 Davis Street, 45-12 Davis Street, 22-42 Jackson Avenue and 22-44 Jackson Avenue, Queens, New York (collectively these addresses comprise Queens Block 86, Lot I) ("Queens Block 86, Lot 1").

24. Either G&M Realty or other entities owned or controlled by Wolkoff, have owned Queens Block 86, Lot I in fee simple since on or about 1971.

B. The 46-45 Crane Street Lot

25. Defendant G&M Realty is the owner in fee simple of certain improved real property located at 46-45 Crane Street, Queens, New York ("Queens Block 86, Lot 22").

26. Either G&M Realty or other entities owned or controlled by Wolkoff, have owned Queens Block 86, Lot 22 in fee simple since on or about 1971.

C. The 22-50 Jackson Avenue Lot

27. Defendant Jackson Owners is the owner in fee simple of certain improved real property located at 22-50 Jackson Avenue, Queens, New York ("Queens Block 86, Lot 6").

28. Either Jackson Owners or other entities owned or controlled by Wolkoff, have owned Queens Block 86, Lot 6 in fee simple since on or about 2005.

D. The 22-48 Jackson Avenue Lot

29. Defendant Jackson Owners is the owner in fee simple of certain improved real property located at 22-48 Jackson Avenue, Queens, New York ("Queens Block 86, Lot 7").

30. Either Jackson Owners or other entities owned or controlled by Wolkoff, have owned Queens Block 86, Lot 7 in fee simple since on or about 2001.

E. The 22-52 Jackson Avenue Lot

31. Defendant 22-52 Jackson is the owner in fee simple of certain improved real property located at 22-52 Jackson Avenue a/k/a 45-06 Davis Street, Queens, New York ("Queens Block 86, Lot 8").

32. Defendant Citiview is currently holding itself out as the owner in fee simple of Queens Block 86, Lot 8 in various eviction actions pending in New York State Civil Court.

33. 22-52 Jackson, Citiview or other entities owned or controlled by Wolkoff, have owned Queens Block 86, Lot 8 in fee simple since on or about 2004.

34. Queens Block 86, Lots 1,6,7,8 and 22, inclusive, are referred to collectively herein as "5Pointz."

II. 5Pointz As The Mecca Of The Aerosol Art World

35. Beginning in approximately 1993, Wolkoff permitted artists to use the interior and exterior walls of 5Pointz for works of visual art.

36. Jonathan Cohen ("Cohen") is an artist by training who has painted hundreds of commissioned art pieces throughout the East Coast and in Europe. He paints under the name of "Meres One."

37. In or around 2002, Wolkoff and Cohen agreed that Cohen would take over as the volunteer curator/registrar/director/manager of the art program at 5Pointz. Wolkoff gave Cohen keys to 5Pointz and leased several secure spaces in 5Pointz for Cohen to use as an office and to store cans of spray paint, ladders and other painting supplies for Cohen and other artists.

38. Wolkoff gave Cohen full authority to determine what works of visual art could be painted on 5Pointz, with three restrictions: a) the works of visual art were not to be political; b) they were to contain nothing religious; and c) no pornography was allowed.

39. Wolkoff directed Cohen to have works of visual art painted on every 5Pointz building.

40. Wolkoff did not request or require that title to the works of visual art be transferred to him.

41. Each individual artist, or group of artists, retained all copyrights to his, her or their works of visual art.

42. None of the artists who have painted works of visual art on or at 5Pointz was paid for his or her time or work.

43. Since Cohen became curator at 5Pointz, no artist has been allowed to put a work of visual art on or at 5Pointz without Cohen's express permission.

44. Cohen would only allow artists to place works of visual art on or at 5Pointz after they provided a portfolio of their work and he approved their proposed piece to ensure that the proposed visual art met the requirements imposed by Wolkoff.

45. Artists were required to provide proposed layouts of their proposed works of visual art so that Cohen could determine where to place the works of art on or at 5Pointz.

46. Some of the larger, more elaborate works of visual art on 5Pointz took extended periods of time to create.

47. Beginning in 2002, the works of visual art on 5Pointz developed into one of the foremost collections of aerosol art in the world, and this has resulted in 5Pointz being referred to as world's "Graffiti Mecca."

48. The non-profit corporation formed by Cohen, 5Pointz Aerosol Arts Center, Inc., maintains a website which showcases the works of visual art that were on or at 5Pointz and publicizes the free community events sponsored by 5Pointz.

49. Because of its stature in the international art community and its high visibility, having a work of visual art accepted and displayed on 5Pointz added considerable prestige to an artist's reputation.

50. For aspiring artists, having a work of visual art accepted and displayed on 5Pointz was guaranteed to raise their profile and enhance their credibility in the art world.

51. Artists have traveled from as far away as Kazakhstan, Australia, Japan and Brazil for the opportunity to paint their works of visual art on 5Pointz.

52. 5Pointz is listed in many major guidebooks covering New York City, and is included in numerous international travel guides as well.

53. In any given week of its operation, hundreds of tourists from all around the world visited 5Pointz to see the works of visual art displayed there.

54. As the *Christian Science Monitor* observed, many patrons of MoMA's P.S. 1, located across the street from 5Pointz, were "inexorably drawn" to cross the street and view 5Pointz as well.

55. Thousands of New York City subway passengers also viewed 5Pointz every day from the Number 7 subway train that passes by the building.

56. In addition, Cohen conducted over 100 formal school tours of 5Pointz every year for groups ranging from university students -- including Parsons School of Design -- to children as young as seven years of age.

57. Over the last two decades, 5Pointz has become a Long Island City landmark, and has been featured in films (such as “Now You See Me”), television programs (such as “Project Runway”) as well as music videos and commercial photo shoots.

58. For instance, world-renowned fashion designer Donna Karan used photographic murals depicting 5Pointz on the walls of her Madison Avenue, New York City store to serve as the backdrop for her Spring/Summer 2013 Collection.

59. For instance, Grammy Award-winning musician Joss Stone filmed the music video for her song "Tell Me 'Bout It" at 5Pointz, and flew Cohen to Los Angeles to do the body paint work for the cover of her album "Introducing Joss Stone."

III. The Works of Visual Art at 5Pointz

60. 5Pointz had over 350 works of visual art on its exterior and interior walls at the time Defendants destroyed them.

A. Castillo’s Work of Visual Art at 5Pointz

61. Castillo's works of visual art are works of recognized stature. Her work can be found in galleries and exhibitions in North and South America and Europe.

62. Castillo's works of visual art or at 5Pointz included a joint work with the artist “Meres,” titled “Love Warrior and Burner.”

63. Castillo created, or may have created, other works of visual art on or at 5Pointz.

64. Castillo has not executed or signed a written instrument that specifies that installation of “Love Warrior and Burner.” and/or her other works of visual art on or at 5Pointz may subject any of those works of visual art to destruction, distortion, mutilation, or other modification for any reason, including removal.

N. Cochran's Work of Visual Art at 5Pointz

65. Cochran's works of visual art are works of recognized stature. His work can be found in galleries and exhibitions around the world, including in the United States, Europe and Australia.

66. Cochran had a work of visual art on or at 5Pointz titled "Subway Rider."

67. Cochran has not executed or signed a written instrument that specifies that installation of "Subway Rider" and/or his other works of visual art on or at 5Pointz may subject any of those works of visual art to destruction, distortion, mutilation, or other modification for any reason, including removal.

O. Gomez's Work of Visual Art at 5Pointz

68. Gomez's works of visual art are works of recognized stature. His work can be found in galleries and exhibitions across the United States.

69. Gomez had a work of visual art on or at 5Pointz titled "Inside King Kong."

70. Gomez has not executed or signed a written instrument that specifies that installation of "Inside King Kong" may subject any of those works of visual art to destruction, distortion, mutilation, or other modification for any reason, including removal.

P. Guerra's Work of Visual Art at 5Pointz

71. Guerra's works of visual art are works of recognized stature. His work can be found in galleries and exhibitions in New York and he has been featured in several aerosol arts magazines.

72. Guerra had a joint work of visual art with the artist "Diego" on or at 5Pointz titled "Return of New York."

73. Guerra has not executed or signed a written instrument that specifies that installation of “Return of New York” may subject any of those works of visual art to destruction, distortion, mutilation, or other modification for any reason, including removal.

Q. Miller’s Work of Visual Art at 5Pointz

74. Miller's works of visual art are works of recognized stature. His work can be found in galleries and exhibitions across the country and is frequently mentioned in the press.

75. Miller had a work of visual art on or at 5Pointz titled “Monsters I.”

76. Miller had a work of visual art on or at 5Pointz titled “Monsters II.”

77. Miller has not executed or signed a written instrument that specifies that installation of “Monsters I” and “Monsters II” may subject any of those works of visual art to destruction, distortion, mutilation, or other modification for any reason, including removal.

R. Niederhausen’s Work of Visual Art at 5Pointz

78. Niederhausen's works of visual art are works of recognized stature. His work can be found in galleries and exhibitions across the Germany and throughout Europe.

79. Niederhausen had a joint work of visual art on or at 5Pointz titled “Food Chain.”

80. Niederhausen had a joint work of visual art on or at 5Pointz titled and “Swiss Mountains.”

81. Niederhausen created, or may have created, other works of visual art on or at 5Pointz.

82. Niederhausen has not executed or signed a written instrument that specifies that installation of “Food Chain” and/or “Swiss Mountains” and/or his other works of visual art on or at 5Pointz may subject any of those works of visual art to destruction, distortion, mutilation, or other modification for any reason, including removal.

S. Nieva's Work of Visual Art at 5Pointz

83. Nieva's works of visual art are works of recognized stature. His work can be found in galleries and exhibitions around New York State.

84. Nieva had a joint work of visual art with the artist "FCEE" on or at 5Pointz titled "Return of New York."

85. Nieva created, or may have created, other works of visual art on or at 5Pointz.

86. Nieva has not executed or signed a written instrument that specifies that installation of "Return of New York" and/or his other works of visual art on or at 5Pointz may subject any of those works of visual art to destruction, distortion, mutilation, or other modification for any reason, including removal.

T. Rodriguez's Work of Visual Art at 5Pointz

87. Rodriguez's works of visual art are works of recognized stature. He has works of visual art in many graffiti halls of fame in the United States, and he has been featured in several aerosol arts magazines.

88. Rodriguez had a joint work with the artist with the artist "Python" on or at 5Pointz titled "Starry Night."

89. Rodriguez has not executed or signed a written instrument that specifies that installation of "Starry Night." may subject any of those works of visual art to destruction, distortion, mutilation, or other modification for any reason, including removal.

U. Takabayashi's Work of Visual Art at 5Pointz

90. Takabayashi's works of visual art are works of recognized stature. He has been featured in many graffiti halls of fame in the United States and abroad. His work has appeared in feature films and has been published in several books and urban art magazines. He made

significant contributions to numerous large murals at 5Pointz, spending dozens of hours working on these projects.

91. Takabayashi had a joint work with the artist with the artist “Panic” on or at 5Pointz titled “Starry Night.”

92. Takabayashi has not executed or signed a written instrument that specifies that installation of “Starry Night” may subject any of those works of visual art to destruction, distortion, mutilation, or other modification for any reason, including removal.

IV. The Destruction of the Artwork

93. G&M Realty brought a proceeding in New York Civil Court, Queens County to evict Cohen from one of the multiple 5Pointz spaces that Wolkoff gave him permission to use.

94. In settlement of the eviction proceeding, G&M Realty and Cohen executed a so-ordered stipulation that Cohen would vacate the office space -- and only the office space -- on or before November 30, 2013.

95. Accordingly, Plaintiffs had no reason to believe that their access to their artwork could or would be interfered with before November 30, 2013. Moreover, at no time did Defendants ever warn Plaintiffs of intent to destroy the artwork prior to the demolition of the structure itself.

96. Via Order to Show Cause, Plaintiffs sought a preliminary injunction in this Court seeking to preserve the status quo until the final adjudication of this matter. This Court issued a temporary restraining order preventing both sides from making any alterations to the artwork pending a hearing on the request for preliminary injunction.

97. Before this Court had issued its Memorandum Decision on the request for preliminary injunction, which it did on November 20, 2013, and before the agreed upon

surrender date by Cohen on November 30, 2013, under cover of night on November 19, 2013, defendants whitewashed the artwork, permanently destroying, distorting and/or mutilating it though not entirely concealing all of it. Defendants had already announced their plan to dismantle the commercial structures that held Plaintiffs' artwork in order to erect new structures for residential housing, meaning that the whitewashing was entirely gratuitous and unnecessary.

98. By whitewashing the artwork, Defendants denied Plaintiffs the opportunity to record, preserve and/or remove their artwork, which could have been readily accomplished prior to or during the demolition of the building or with legal notice. Defendants could have permitted Plaintiffs an opportunity to mitigate their damages, but they chose not to do so. Instead, they chose to act in a manner that can only be seen as having been intended to cause intense shock and emotional trauma by inflicting an egregious public insult and destruction of protected artwork.

99. The whitewashing was carried out in a disgracefully crude, unprofessional manner which was clearly calculated to cause maximum indignity and shame to Plaintiffs. White paint was slapped onto the artwork in a haphazard fashion, and some parts of the artwork were left visible (for example, some bodies remained with only faces whitewashed). A smiley face was applied to some of the artwork with the white paint. The result is the replacement of something beautiful with something profoundly ugly.

100. Defendants' conduct evinces a gratuitous, willful and malicious mindset, supporting a claim for punitive damages.

**AS AND FOR A FIRST CAUSE OF ACTION
(VARA)**

101. Plaintiffs repeat and reiterate each and every allegation set forth in the foregoing paragraphs of this First Amended Complaint with the same force and effect as if more fully set

forth at length herein.

102. Each of the Plaintiffs herein created, and maintained all ownership and copyright interests in, works of art subject to the protection of VARA, and installed those works on Defendants' buildings with their permission.

103. Without providing Plaintiffs with notice as required by VARA, Defendants destroyed, mutilated, modified and defaced each and every one of the works of art installed by Plaintiffs on 5Pointz, including each work of art listed by name herein and other works of art not specifically identified or described herein. Defendants did not provide Plaintiffs with notice in writing regarding their intent to destroy the artwork nor did they afford Plaintiffs, pursuant to 17 U.S. Code §113, a period of 90 days after receiving such notice either to remove the work or to pay for its removal.

104. Plaintiffs are artists of recognized stature and requisite professional standing within the meaning of VARA, who are therefore entitled to the statute's protection. Their works were in high demand in the public marketplace, they attracted legions of admirers who visited them in situ, and the artists have high name recognition among the artistic community.

105. Plaintiffs incurred significant financial losses as a result of the wanton destruction of their valuable works of art.

106. The distortion, mutilation, and/or modification of the work occurred in a manner prejudicial to the plaintiffs' honor and/or reputation, and causing them substantial harm in this regard.

107. Defendants' actions were willful, wanton, intentional and malicious.

**AS AND FOR A SECOND CAUSE OF ACTION
(Conversion)**

108. Plaintiffs repeat and reiterate each and every allegation set forth in the foregoing paragraphs of this First Amended Complaint with the same force and effect as if more fully set forth at length herein.

109. Defendants committed an actionable wrong other than breach of contract which caused Plaintiffs' injury.

110. Plaintiffs had ownership of the artwork described herein or an immediate superior right of possession to the artwork at the time it was converted.

111. Defendants exercised unauthorized dominion or interference over the artwork to the detriment of Plaintiffs and converted Plaintiffs' artwork.

112. The artwork was specific and identifiable.

113. Defendants were to have treated the artwork in a particular manner but it was not so treated, and as a result Plaintiffs suffered the loss of value of their property.

**AS AND FOR A THIRD CAUSE OF ACTION
(Property Damage)**

114. Plaintiffs repeat and reiterate each and every allegation set forth in the foregoing paragraphs of this First Amended Complaint with the same force and effect as if more fully set forth at length herein.

115. Defendants violated property rights held by Plaintiffs and destroyed artwork belonging to them contrary to their wishes and without their permission.

116. Defendants owed a duty to Plaintiffs not to destroy such property and negligently, recklessly and/or willfully breached that duty in destroying said property.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request judgment against Defendants as follows:

- A) Enter a declaratory judgment, pursuant to Rule 57 of the Federal Rules of Civil Procedure, stating that Defendant's practices, policies and procedures are in violation of the VARA;
- B) Award such damages as will compensate Plaintiffs fully for their financial losses and for the damage to their honor and reputation and for their humiliation, mental anguish, embarrassment, stress and anxiety, loss of self-esteem, self-confidence, personal dignity, shock, emotional distress, inconvenience, emotion pain and suffering and any other physical and mental injuries Plaintiffs suffered due to Defendants improper conduct pursuant to VARA and the common law;
- C) Award punitive damages to Plaintiffs pursuant to VARA and the common law;
- D) Award reasonable costs and attorneys' fees pursuant to VARA;
- E) Granting such further relief as the Court may deem just and proper.


JURY DEMAND

Plaintiffs demand trial by jury for all of the issues a jury properly may decide, and for all of the requested relief that a jury may award.

Dated: New York, New York
June 3, 2015

EISENBERG & BAUM, LLP

By: _____


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