UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
SOUTHOLD HISTORICAL SOCIETY,

Plaintiff,

-against-

MEMORANDUM & ORDER
10-CV-5259(JS)(WDW)

TERENCE WALLACE,

Defendant.
----------X
APPEARANCES:
For Plaintiff: Jeffrey B. Gold, Esq.
Gold Stewart Kravatz Benes LLP
1025 Old Country Road
Westbury, NY 11590

For Defendant: Todd Wengrovsky, Esq.
285 Southfield Road
P.O. Box 585
Calverton, NY 11933-1763

SEYBERT, District Judge:

Southold Historical Society ("Plaintiff") moves for leave to file an Amended Complaint against Defendant Terence Wallace ("Defendant"), who has not opposed the motion. The Proposed Amended Complaint eliminates Plaintiff's copyright infringement claims and adds a claim for breach of a licensing agreement. (Gold Aff. ¶ 2.) Plaintiff concedes that the Court's subject matter jurisdiction has been predicated on Plaintiff's federal copyright claims and that the Court likely does not have independent jurisdiction over the claims raised in Plaintiff's Proposed Amended Complaint. (Gold Aff. ¶ 4; Prop. Am. Compl. ¶ 2.) Nevertheless, it maintains that subject matter

jurisdiction is proper in light of Defendant's federal counterclaims.

Under Federal Rule of Civil Procedure 15, leave to amend should be granted freely where justice so requires. Notwithstanding the lack of opposition to Plaintiff's motion, the Court concludes that the Proposed Amended Complaint would be futile for lack of subject matter jurisdiction. E.g., Hill v. Curcione, __ F.3d __, No. 10–CV-1320, 2011 WL 4090760, at *6 (2d Cir. Sep. 15, 2011) ("Where a proposed amendment would be futile, leave to amend need not be given."). The Supreme Court has held that federal jurisdiction cannot "rest upon an actual or anticipated counterclaim," Vaden v. Discover Bank, __ U.S. __, 129 S. Ct. 1262, 1272, 173 L. Ed. 2d 206 (2009), a ruling that precludes Plaintiff's Proposed Amended Complaint. See also In re Air Crash Near Clarence Center, N.Y., on Feb. 12, 2009, No. 09-MD-2085, 2010 WL 5185106, at *9 (W.D.N.Y. Dec. 12, 2010).

CONCLUSION

For the foregoing reasons, Plaintiff's unopposed motion for leave to file an Amended Complaint is DENIED.

SO ORDERED.

/s/ JOANNA SEYBERT
Joanna Seybert, U.S.D.J.

Dated: October 26, 2011
Central Islip, New York