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3rd Circ. Backs Viacom, Penguin In IP Suit Over Xmas Book

By **Bill Wichter**

Law360 (July 2, 2019, 7:17 PM EDT) -- Viacom and Penguin Random House scored a victory Tuesday when the Third Circuit declined to revive an author's suit alleging the companies copied her children's book about a tree that dreams of becoming the Christmas tree in New York City's Rockefeller Center.

In a nonprecedential opinion, a circuit panel upheld a Pennsylvania federal court ruling tossing a complaint by writer Jennie Nicassio. The panel said U.S. District Judge Nora Barry Fischer properly found that Nicassio's book "Rocky" was not "substantially similar as a matter of law" to the book "Albert," which was published by Penguin Random House LLC and turned into an animated movie by Viacom International Inc.

"Here, 'an ordinary observer would [not] perceive that [appellees have copied] protected elements of [Nicassio's] work,'" the panel said, citing the circuit's 2018 *Tanksley v. Daniels* opinion.

"For instance, Albert clearly explores themes not present in Rocky, such as the importance of family, empathy, and forgiving others — and does so by using plot twists that are completely missing from Rocky," the panel added.

As an example, the panel pointed to Judge Fischer's observation that while the main characters in both books face verbal bullying, "Albert overcomes additional obstacles to achieve his goal, mainly escaping from the violent bully Cactus Pete twice, evading a pack of hungry vegetarian bunnies, and suffering defeat when Big Betty is selected as the Empire City Christmas tree."

The judge also noted that "unlike Rocky, once Albert reaches his goal, he realizes that family is more important than being the most famous Christmas tree in the world. He then discovers that Pete was only trying to ruin Christmas because he was lonely, so he trades places with Pete and returns home to spend the holiday with his family at the plant nursery," the panel said.

The panel further highlighted other differences between the two books, including that Rocky's only friend is a forest fairy, while Albert's friends include a child, a palm tree and a stink-breath weed.

Compared to the "bullying spruce tree" in "Rocky," Cactus Pete in "Albert" was "a more complex character ultimately driven by a feeling of loneliness and exclusion," the panel added.

"Given these circumstances, 'the works' 'total concept and overall feel ... as instructed by good eyes and common sense' would not lead a lay observer to conclude that [appellees'] alleged copying, if proven, was of protectable aspects of Rocky,'" the panel said, quoting from Judge Fischer's April 2018 opinion.

In November 2009, Nicassio published her book, "Rocky: The Rockefeller Christmas Tree," which tells "the story of a young Christmas tree named Rocky that dreamed of becoming the Rockefeller Center Christmas tree in New York City," according to her June 2017 complaint.

Between 2011 and 2016, Nicassio sent copies of "Rocky" to Viacom and other companies in connection with potential adaptations of the book, the complaint said. In September 2016, Penguin published "Albert: The Little Tree With Big Dreams," which was written by Will and Aaron Eisenberg,

the complaint said.

The complaint alleged that "Albert mirrors the story in Nicassio's book *Rocky*, which tells the tale of a young Christmas tree that wishes to one day stand in a big city."

Counsel for the parties could not immediately be reached for comment Tuesday.

Judges Thomas M. Hardiman, Anthony J. Scirica and Robert E. Cowen sat on the panel for the Third Circuit.

Nicassio is represented by Anthony H. Handal of Handal & Morofsky LLC and Gwen R. Acker Wood of Acker Wood Intellectual Property Law LLC.

Viacom and Penguin Random House are represented by Jonathan Zavin, Wook Hwang and Sara Slavin of Loeb & Loeb LLP.

The case is *Jennie Nicassio v. Viacom International Inc. et al.*, case number 18-2085, in the U.S. Court of Appeals for the Third Circuit.

--Editing by Haylee Pearl.

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