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Miller v. Suriel Grp., Inc.

United States District Court for the Southern District of Florida, Miami Division

July 21, 2020, Decided; July 22, 2020, Entered on Docket

Case No. 19-24936-CIV-MARTINEZ-OTAZO-REYES

Reporter

2020 U.S. Dist. LEXIS 197832 *

ROBERT MILLER, Plaintiff, vs. SURIEL GROUP, INC., et al, Defendants.

Subsequent History: Dismissed by [Miller v. Suriel Grp., Inc., 2020 U.S. Dist. LEXIS 243187 \(S.D. Fla., Dec. 23, 2020\)](#)

Core Terms

photographs, fair use, allegations, motion to dismiss, infringement, copyright protection, copyrighted work, authorship

Counsel: [*1] For Robert Miller Plaintiff: Melissa Ann Higbee, Higbee and Associates, Santa Ana, CA USA.

For Suriel Group, Inc., c/o Felix Suriel, Defendant: Rosenny Burgos, LEAD ATTORNEY, Law Offices of Rosenny Burgos, P.A., Miami, FL USA.

Judges: JOSE E. MARTINEZ, UNITED STATES DISTRICT JUDGE.

Opinion by: JOSE E. MARTINEZ

Opinion

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

THIS CAUSE is before the Court upon Defendant Suriel Group Inc.'s Motion to Dismiss, [ECF No. 23]. The Court has carefully reviewed the Motion [ECF No. 23], Plaintiff's Response in Opposition [ECF No. 24], and Defendant's Reply thereto [ECF No. 25]. The Court has also reviewed the pertinent portions of the record and is otherwise fully advised in the premises. For the following reasons, the Motion to Dismiss is **DENIED**.

I. BACKGROUND

Plaintiff brings this copyright infringement action against Suriel Group, Inc ("Defendant") based on Defendant's use of Plaintiff's photographs on its website. [ECF No. 22]. Plaintiff is a professional photographer who sells photographs to major media outlets. [*Id.* at ¶ 11]. Plaintiff authored two photographs that were featured in two separate New York Post articles, each of which included a photo credit attributing authorship to Plaintiff. [*2] [*Id.* at ¶¶ 16-17]. The first photograph featured a man in a green shirt being arrested and was published in the New York Post on March 18, 2018. [*Id.* at ¶ 16]. The second photograph featured an injured woman being treated by paramedics and was published in the New York Post on June 12, 2018. [*Id.* at ¶ 18]. Plaintiff alleges he is the sole owner of these photographs and that they are both registered with the United States Copyright Office. [*Id.* at ¶¶ 12-13].

Approximately two weeks after the first photograph was published in the New York Post, Plaintiff discovered that the same photograph had been reproduced on Defendant's website. [*Id.* at ¶ 17]. Attribution of authorship had been removed from the photograph. [*Id.*]. Similarly, Plaintiff discovered the second photograph reproduced on Defendant's website approximately one month after the photograph was published in the New York Post. [*Id.* at ¶ 18]. Again,

attribution of authorship had been removed from the photograph. [*Id.*]

Based on these events, Plaintiff asserts two causes of action against Defendant. [*Id.* at 24-38]. In his first cause of action, Plaintiff brings a claim for copyright infringement alleging that he did not consent, authorize, or permit [*3] Defendant to use the photographs. [*Id.* at ¶ 25]. In Plaintiff's view, Defendant willfully infringed upon Plaintiff's copyrighted images in violation of Title 17 of the United States Code. [*Id.* at ¶ 26]. In his second cause of action, Plaintiff alleges Defendant violated the Digital Millennium Copyright Act by falsifying, altering and removing copyright management information. [*Id.* at ¶¶ 30-38]. Specifically, Plaintiff alleges Defendant purposefully failed to credit Plaintiff as author of the photographs and intentionally removed Plaintiff's authorship credit. [*Id.* at ¶¶ 32-33].

In support of dismissal, Defendant advances two arguments. First, Defendant claims that its use of Plaintiff's photographs constituted fair use of a copyrighted work primarily because Defendant used the photographs in connection to news reporting. [ECF No. 23 at ¶¶ 8-24]. Second, Defendant claims that Plaintiff's photographs are not copyrightable because they lack the requisite level of originality to qualify for copyright protections. [*Id.* at ¶¶ 25-29].

For the reasons set forth herein, Defendant's Motion to Dismiss is denied.

II. LEGAL STANDARD

To survive a motion to dismiss under [Rule 12\(b\)\(6\)](#), "a complaint must contain sufficient [*4] factual matter, accepted as true, to state a claim for 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). While a complaint "does not need detailed factual allegations," it must provide "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action." [Bell Atl. Corp. v. Twombly](#), 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

A court considering a [Rule 12\(b\)](#) motion is generally limited to the facts contained in the complaint and the exhibits attached thereto, including documents referred to in the complaint that are central to the claim. See [Wilchombe v. TeeVee Toons, Inc.](#), 555 F.3d 949, 959 (11th Cir. 2009); [Maxcess, Inc. v. Lucent Technologies, Inc.](#), 433 F.3d 1337, 1340 (11th Cir. 2005) ("[A] document outside the four corners of the complaint may still be considered if it is central to the plaintiff's claims and is undisputed in terms of authenticity."). As a general rule, "[i]n ruling on a motion to

dismiss, the court must accept the well pleaded facts as true and resolve them in the light most favorable to the plaintiff." [St. Joseph's Hosp., Inc. v. Hosp. Corp. of Am.](#), 795 F.2d 948, 954 (11th Cir. 1986). Nonetheless, courts "are not bound to accept as true a legal conclusion couched as a factual allegation." [Twombly](#), 550 U.S. at 555; [Iqbal](#), 556 U.S. at 678.

III. ANALYSIS

A. Count I: Copyright Infringement

Defendant seeks dismissal of Plaintiff's copyright infringement claim on the grounds that (1) Defendant's use of the photographs constituted fair use of a copyrighted work; and (2) that the infringed upon photographs [*5] lack the requisite "minimal degree of creativity" to support a finding of originality. These arguments will be addressed in turn.

i. Fair Use

A defendant's fair use defense cannot usually be analyzed upon a [Rule 12\(b\)\(6\)](#) motion. [Katz v. Cheveldina](#), 900 F. Supp. 2d 1314, 1315 (S.D. Fla. 2012). The fair use affirmative defense is a "mixed question of law and fact." [Harper & Row Publishers, Inc. v. Nation Enters.](#), 471 U.S. 539, 560-61, 105 S. Ct. 2218, 85 L. Ed. 2d 588 (1985). A proper fair use analysis requires a court to weigh four statutory factors: "(1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the substantiality of the portion used in relation to the copyrighted work as a whole; [and] (4) the effect on the potential market for or value of the copyrighted work." *Id.* Accordingly, a court's fair use determination "usually requires making factual findings or relying on undisputed or admitted material facts." [Katz](#), 900 F. Supp. 2d at 1315-16. Because a court may not make factual determinations in evaluating a motion to dismiss, and "in light of the court's narrow inquiry at this stage and limited access to all potentially relevant and material facts needed to undertake the analysis," disposition of Defendant's fair use defense is inappropriate at this juncture. *Id.*; see also [Hawthorne v. Mac Adjustment, Inc.](#), 140 F.3d 1367, 1370 (11th Cir. 1998).

ii. The Photographs are Sufficiently "Original"

Defendant also contends that Plaintiff's [*6] photographs are not subject to copyright protections because they lack sufficient originality. Like Defendant's fair use argument, the issue of whether Plaintiff's photographs qualify for copyright

protection is more appropriate for a later stage in the proceedings. See *Wisser v. Morris Visitor Publ'ns, LLC, No. CV 118-150, 2020 U.S. Dist. LEXIS 48818, 2020 WL 1492535, at *3 (S.D. Ga. Mar. 17, 2020)* (noting that an "originality consideration generally generates a question of fact" and "it would be inappropriate for the Court to consider competing proof regarding originality at the motion to dismiss stage").

The issue of whether or not a work is sufficiently original enough to qualify for copyright protection is a question of fact. *Home Legend, L.L.C. v. Mannington Mills, Inc., 784 F.3d 1404, 1409 (11th Cir. 2015)*. Notably, the originality requirement presents an extremely low bar. See *Home Legend, 784 F.3d at 1409*; *Feist, 499 U.S. at 345* ("To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice."). "[T]he vast majority of works make the grade quite easily, as they possess some creative spark, no matter how crude, humble or obvious it might be." *Pohl v. MH Sub I L.L.C., 770 F. App'x 482, 487 (11th Cir. 2019)* (quoting *Feist, 499 U.S. at 345*).

These principles traditionally apply to photographic works. "Federal courts have historically applied a generous standard of originality in evaluating photographic works for copyright protections." [*7] *Latimer v. Roaring Toyz, Inc., 601 F.3d 1224, 1234 (11th Cir. 2010)* (quoting *Schrock v. Learning Curve Int'l, Inc., 586 F.3d 513, 519 (7th Cir. 2009)*).

Without citing to any supportive caselaw, Defendant contends that Plaintiff's photographs do not meet the originality requirement because they are photographs of incidents that occurred in the public view; thus, anybody could have taken them. [ECF No. 23 at ¶¶ at 28-29]. Given the low bar that federal courts apply when determining whether a photograph is sufficiently original, Plaintiff's allegations survive dismissal. While Plaintiff admits that these photographs were not intended to create "high-fashion" art, [ECF No. 24 at 9], the photographs need only possess "some creative spark, no matter how crude, humble or obvious it might be." *Feist, 499 U.S. at 345*. Accepting all factual allegations as true and viewing them in the light most favorable to the Plaintiff, the Court cannot find, as a matter of law, that Plaintiff's photographs do not satisfy the originality requirement for copyright protection.

B. Count II: Falsification, Removal and Alteration of Copyright Management Information

Defendant also argues for dismissal of Count II. Defendant does not attack Plaintiff's allegations as insufficient to state a claim but rather continues to assert a fair use affirmative

defense and attacks the originality [*8] of these particular photographs. Defendant further argues that because it was unaware of the alleged infringement until it was informed by Plaintiff's attorneys, Defendant lacked intention.

Under the Digital Millennium Copyright Act, no person shall "intentionally remove or alter any copyright management information[.]" *17 U.S.C. § 1202(b)(1) (1999)*. Copyright management information includes information such as the title and name of the author of a work. *17 U.S.C. § 1201(c)(1)-(2)*; *Roof & Rack Prods. v. GYB Investors, LLC, Case No. 13-80575-CV, 2014 U.S. Dist. LEXIS 92333, 2014 WL 3183278, at *5 (S.D. Fla. July 8, 2014)*. "An action for removal of copyright management information requires the information to be removed from a plaintiff's product or original work." *Faulkner Press, L.L.C. v. Class Notes, L.L.C., 756 F. Supp. 2d 1352, 1359 (N.D. Fla. 2010)*.

Here, Plaintiff alleges that Defendant took the images from New York Post articles, which had specifically attributed the photographs to Plaintiff, and then removed Plaintiff's authorship credit before reproducing the photographs on its website. [ECF No. 22 at ¶¶ 31-33]. In support of dismissal, Defendant contends that they learned of the alleged unauthorized use from Plaintiff's attorney and thus did not have the requisite intent to conceal an infringement. [ECF No. 23 at ¶ 33]. However, as Plaintiff points out, this is a new factual allegation that cannot be considered on a motion to dismiss. As the Court [*9] is limited to the allegations set forth in Plaintiff's Amended Complaint, Plaintiff has sufficiently pled a cause of action under the Digital Millennium Copyright Act.

IV. CONCLUSION

For the foregoing reasons, Suriel Group, Inc's Motion to Dismiss Plaintiff's Amended Complaint, [ECF No. 23], is **DENIED**. Defendants shall answer Plaintiff's Amended Complaint **on or before August 5, 2020**.

DONE AND ORDERED in Chambers, Miami, Florida, this 21st day of July 2020.

/s/ Jose E. Martinez

JOSE E. MARTINEZ

UNITED STATES DISTRICT JUDGE