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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

John Anthony Drafting & Design, LLC, et al.,

Plaintiff,

v.

Sabin Lee Burrell, et al.,

Defendants.

No. CV-18-00970-PHX-ESW

ORDER

The Court has reviewed the parties' briefing concerning (i) the Motion for Partial Summary Judgment (Doc. 87) filed by Plaintiff John Anthony Drafting & Design LLC and (ii) the Motion for Summary Judgment (Doc. 89) filed by Defendants Sabin Lee Burrell, Kayla Jantz, 5650 Wilkinson, LLC, and Black Dog Management, L.P.[1] For the reasons set forth herein, the Motions (Docs. 87, 89) will be denied.[2]

I. LEGAL STANDARDS

Summary judgment is appropriate if the evidence, when reviewed in a light most favorable to the non-moving party, demonstrates "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ.

[1] The parties have consented to proceeding before a Magistrate Judge pursuant to Federal Rule of Civil Procedure 73 and 28 U.S.C.§ 636(c). (Doc. 36).

[2] Although requested, the Court does not find that oral argument on the Motions is necessary.

P. 56(a). Substantive law determines which facts are material in a case and "only disputes over facts that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "A fact issue is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002) (quoting *Anderson*, 477 U.S. at 248). Thus, the nonmoving party must show that the genuine factual issues "can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Cal. Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987) (quoting *Anderson*, 477 U.S. at 250).

Because "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . [t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor" at the summary judgment stage. *Anderson*, 477 U.S. at 255 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970)); *Harris v. Itzhaki*, 183 F.3d 1043, 1051 (9th Cir. 1999) ("Issues of credibility, including questions of intent, should be left to the jury.") (citations omitted).

When moving for summary judgment, the burden of proof initially rests with the moving party to present the basis for his motion and to identify those portions of the record and affidavits that he believes demonstrate the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the movant fails to carry his initial burden of production, the non-movant need not produce anything further. The motion for summary judgment would then fail. However, if the movant meets his initial burden of production, then the burden shifts to the non-moving party to show that a genuine issue of material fact exists and that the movant is not entitled to judgment as a matter of law. *Anderson*, 477 U.S. at 248, 250; *Triton Energy Corp. v. Square D. Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995). The nonmovant need not establish a material issue of fact conclusively in his favor. *First Nat'l Bank of Ariz. v. Cities Serv.*

Co., 391 U.S. 253, 288-89 (1968). However, he must "come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v.Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal citation and emphasis omitted); *see* Fed. R. Civ. P. 56(c)(1).

Conclusory allegations unsupported by factual material are insufficient to defeat a motion for summary judgment. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989); s*ee also Soremekun v. Thrifty Payless, Inc.*, 502 F.3d 978, 984 (9th Cir. 2007) ("[c]onclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment"). Nor can such allegations be the basis for a motion for summary judgment.

II. BACKGROUND

This is a copyright infringement action. Plaintiff John Anthony Macewicz ("Macewicz") owns an architectural design firm named John Anthony Drafing & Design, LLC ("JADD"). (Doc. 93 at 5, ¶ 10). Defendants Sabin Lee Burrell ("Burrell") and Kayla Jantz ("Jantz") are husband and wife. In March 2015, Defendant Burrell entered into a written agreement with JADD for the design of a residential home. (*Id.* at 6, ¶¶ 13-15). The structure at issue is located at 5650 North Wilkinson Road in Paradise Valley, Arizona and is referred to herein as the "Burrell Residence." (Doc. 90 at 2, ¶ 3). Defendant Burrell is the sole manager and member of Defendant 5650 Wilkinson, LLC, which is the record owner of the Burrell Residence. (*Id.* at 9-10, ¶¶ 50-52). Defendant Burrell also is the manager of Panzer Investments, LLC, which is Defendant Black Dog Management, L.P.'s general partner. (Doc. 98 at 10, ¶ 112). Defendant Black Dog Management, L.P. provided financing for the construction of the Burrell Residence. (*Id.*, ¶¶ 113-15). Burrell, Jantz, 5650 Wilkinson, LLC, and Black Dog Management, L.P. are collectively referred herein as the "Burrell Defendants." The remaining four Defendants are (i) Craig Banner ("Banner"); (ii) American Tradition Builders, Inc. ("ATB"); (iii)

Tom Spencer ("Spencer"); and (iv) CBAN, LLC.[3] On April 11, 2016, Defendants Burrell, ATB, and CBAN, LLC entered into a contract for the construction of a residence (the "Building Contract"). (Doc. 90 at 9, ¶ 43).

Plaintiff Macewicz states that in May 2016, he applied to register the copyright for the Burrell Residence's design. (Doc. 88-2 at 4, ¶ 14). The Certificate of Registration issued by the Copyright Office reflects that the title of the protected work is "Burrell Residence." (Doc. 88-3 at 4). The Certificate of Registration lists an effective date of May 3, 2016, with June 9, 2015 as the date of first publication. (*Id.*). In January 2018, Plaintiff Macewicz assigned all copyrights in the Burrell Residence to Plaintiff JADD. (Doc. 88-5 at 3). Plaintiffs contend that the home constructed pursuant to the Building Contract infringes on the copyrights in the Burrell Residence's design. In its Amended Complaint, Plaintiffs assert that the Burrell Defendants are liable for vicarious and contributory copyright infringement. (Doc. 54 at 10, ¶¶ 38-39). One of the Burrell Defendants' contentions is that Plaintiff JADD's copyright is not valid because the Burrell Residence does not constitute an original architectural work.

III. DISCUSSION

A. Plaintiff JADD's Motion for Partial Summary Judgment (Doc. 87)

Architectural plans and drawings are entitled to copyright protection under the Federal Copyright Act. 17 U.S.C. § 101 et seq. "Architectural work" is defined as "the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings." 17 U.SC. § 101. Plaintiff JADD moves for summary judgment that it owns a valid copyright in the Burrell Residence's design. (Doc. 87).

To establish copyright infringement, a party must show (i) ownership of a valid copyright and (ii) unauthorized copying by another party of the constituent original elements of the work. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361

[3] These Defendants have not moved for summary judgment.

(1991). A certificate of registration made within five years of the first publication of the work "constitutes *prima facie* evidence of copyrightability and shifts the burden to the defendant to demonstrate why the copyright is not valid." *Bibbero Sys., Inc. v. Colwell Sys., Inc.*, 893 F.2d 1104, 1106 (9th Cir. 1990) (citing 17 U.S.C. § 410(c)). In order to rebut the presumption of validity, an alleged infringer must offer "some evidence or proof to dispute or deny the [copyright holder's] prima facie case of infringement." *United Fabrics Int'l, Inc. v. C&J Wear, Inc.*, 630 F.3d 1255, 1257 (9th Cir. 2011) (internal quotation marks and citation omitted). Because "originality is the indispensable prerequisite for copyrightability," the alleged infringer may rebut the presumption of validity by showing that "the [copyright holder's] work is not original." *N. Coast Indus. v. Jason Maxwell, Inc.*, 972 F.2d 1031, 1033 (9th Cir. 1992). Where the accused infringer offers evidence that the plaintiff's product was copied from another work or other probative evidence as to originality, the burden of proving validity shifts back to the plaintiff. *Entm't Research Grp. v. Genesis Creative Grp., Inc.*, 122 F.3d 1211, 1217-18 (9th Cir. 1997) (citing *North Coast Indus.*, 972 F.2d at 1033).

Although originality is the prerequisite for copyrightability, the "originality requirement does not mean that for valid copyright protection, the copyright must represent something entirely new under the sun." *North Coast*, 972 F.2d at 1033. Originality requires that a work "owes its origin" to the "author," whose contribution is "more than a trivial variation, something recognizably his own." *Id.* (quoting *Sid & Marty Krofft Television v. McDonald's Corp.*, 562 F.2d 1157, 1163 n.5 (9th Cir. 1977)). The Supreme Court has held that "the requisite level of creativity is extremely low; even a slight amount will suffice. The 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." *Feist*, 499 U.S. at 345 (internal quotation marks and citation omitted); *see also Gaste v. Kaiserman*, 863 F.2d 1061, 1066 (2d Cir. 1988) ("[T]he originality requirement for obtaining a copyright is an extremely low threshold, unlike the novelty requirement for securing a patent. Sufficient originality for copyright purposes amounts to little more

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