

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

PETER ROSKOVENSKY,

Plaintiff,

v.

Case No.: 2:22-cv-602-JLB-NPM

SANIBEL CAPTIVA ISLAND VACATION
RENTALS, LLC,

Defendant.

_____ /

ORDER

This cause comes before this Court upon the Parties' Cross-Motions for Summary Judgment. (Docs. 36, 49). The Court is fully briefed on the matter.¹ For the reasons discussed below, Defendant Sanibel Captiva Island Vacation Rentals, LLC's ("Sanibel") Motion for Summary Judgment (Doc. 36) is **GRANTED** in part and **DENIED** in part, and Plaintiff Peter Roskovensky's Motion for Summary Judgment (Doc. 49) is **DENIED**.

¹ Mr. Roskovensky responded to Sanibel's Motion for Summary Judgment (Doc. 44). Sanibel also responded to Mr. Roskovensky's Motion for Summary Judgment (Doc. 54).

BACKGROUND²

This is a copyright infringement case. Mr. Roskovensky is a professional photographer. (Doc. 50 at ¶ 4). Mr. Roskovensky’s photography work includes creating images of properties in Florida, which he licenses to third parties. (Doc. 50 at ¶ 4).

Sanibel is in the business of marketing vacation rental properties. (Doc. 36 at 1; Doc. 50-4 at 1). To that end, Sanibel operates a website and a Facebook account where it posts pictures of the properties that it manages. (Doc. 49 at 3–4).

² In Mr. Roskovensky’s response to Sanibel’s Motion for Summary Judgment (Doc. 44), Mr. Roskovensky correctly points out that Sanibel’s Motion for Summary Judgment (Doc. 36) fails to comply with this Court’s rules governing statements of material facts. Critically, Sanibel’s Statement of Facts includes very few citations to the record and no pinpoint citations. *See Salas v. AMC E. Communities, LLC*, No. 8:20-CV-688-T-33CPT, 2020 WL 13228407, at *1 (M.D. Fla. Apr. 30, 2020) (“When resolving a motion for summary judgment, the Court has no independent duty to search and consider any part of the record not otherwise referenced and pinpoint cited in the statement of material facts and response thereto. *See Fed. R. Civ. P. 56(c)(3)* (“The court need consider only the cited materials, but it may consider other materials in the record.”)). Mr. Roskovensky urges the Court to deny Sanibel’s Motion for Summary Judgment on this basis alone. (Doc. 44 at 1–2). While the Court agrees that Sanibel’s Statement of Facts is non-compliant, it will still consider Sanibel’s Motion. However, the Court’s decision will be based only upon competent record evidence. *See Tippens v. Celotex Corp.*, 805 F.2d 949, 952 (11th Cir. 1986) (“The District Court shall consider all evidence in the record when reviewing a motion for summary judgment—pleadings, depositions, interrogatories, affidavits, etc. . . .”); *Macuba v. Deboer*, 193 F.3d 1316, 1322–23 (11th Cir. 1999) (“The general rule is that inadmissible hearsay cannot be considered”) (footnote and internal quotation marks omitted).

Mr. Roskovensky Photographs the Property for the First Time

On April 8, 2019, Mr. Roskovensky took a series of photographs (the “Pre-existing Images”) of 1175 Sand Castle Road, Sanibel, Florida (the “Property”). (Doc. 50 at ¶ 7). The Pre-existing Images included images of both the Property’s interior (the “Pre-existing Interior Images”) and the Property’s exterior. (Doc. 50 at ¶ 7; Doc. 50-1 at 1–13³). Mr. Roskovensky created these Pre-existing Images so that VIP Realty Group of Sanibel, Florida (“VIP”), a non-party in these proceedings, could use them to market the Property. (Doc. 50 at ¶ 9).

Also on April 8, 2019, Mr. Roskovensky applied to the United States Copyright Office (the “USCO”) to register the Pre-existing Images, which were ultimately registered under Registration No. VA 2-159-469. (Doc. 50 at ¶ 8; Doc. 50-2).

Sanibel Requests Permission to Use the Pre-existing Images

Sometime after Mr. Roskovensky created the Pre-existing Images for VIP, Sanibel began managing the Property. (Doc. 50-4 at 1). To that end, on August 15, 2019, Sanibel’s Owner Relations Concierge, Sue Plein, contacted VIP and asked if Sanibel could use the Pre-existing Images⁴ such that it could “quickly” market the

³ Mr. Roskovensky has only provided the Court with the Pre-existing Interior Images and has not provided the Pre-existing Images that capture the Property’s exterior.

⁴ Specifically, Ms. Plein emailed VIP to ask about using a subset of the Pre-existing images—only those photos that capture the “exterior” of the Property. There is no evidence that Mr. Roskovensky was copied on this email.

Property. (Doc. 50 at ¶ 11; Doc. 50-4 at 1–2). VIP said that it “had to ask [Mr. Roskovensky] first.” (Doc. 50-4 at 2).

Thereafter, on August 16, 2019, Mr. Roskovensky wrote to Ms. Plein and told her that he was “more than happy to allow the usage of the images.” (Doc. 50-4 at 3).⁵ Mr. Roskovensky offered to allow Sanibel to use the “the images” for a duration of “90 days” in exchange for a payment of \$75.00. (Doc. 50-4 at 3). Ms. Plein thanked Mr. Roskovensky for his offer. (Doc. 50-4 at 3). A few days later, on August 22, 2019, Mr. Roskovensky sent an email to Ms. Plein providing her a “link to the photo downloads.”⁶ (Doc. 50-4 at 4). When Mr. Roskovensky provided Ms. Plein with the link to the photographs, he told her that she could “start using the photos,” and that he would send her an invoice that would “include usage until November 30th, 2019.” (Doc. 50-4 at 4).

Mr. Roskovensky has provided a copy of an invoice, which he created dated August 22, 2019 (the “Invoice”). (Doc. 50-6). Mr. Roskovensky construes the Invoice

⁵ While Mr. Roskovensky testified that Ms. Plein “requested permission to use certain exterior pictures” of the Property (Doc. 50 at ¶ 11), the record does not support that Ms. Plein’s request to Mr. Roskovensky was quite so narrow. Indeed, in his writing to Ms. Plein, Mr. Roskovensky did not distinguish between the Pre-existing Images of the Property’s exterior and the Pre-existing Interior Images. (Doc. 50-4 at 3–4). And while Ms. Plein did ask VIP Realty to specifically use exterior photos of the Property, the Court does not find that Ms. Plein and Mr. Roskovensky’s written communications were limited to a discussion of the exterior photos. (*Compare* Doc. 50-4 at 1 *with* Doc. 50-4 at 3–4). Further, while the Court acknowledges that Ms. Plein’s October 25, 2019 email to Mr. Roskovensky expressly states that Mr. Roskovensky granted Sanibel the right to use the exterior images of the Property, Ms. Plein’s email is silent as to Sanibel’s rights to use the Pre-existing Interior Images. (Doc. 50-4 at 8).

⁶ The link that Mr. Roskovensky sent to Ms. Plein has not been made accessible to the Court.

as a “copy of the temporary license” that he provided to Sanibel. (Doc. 50 at ¶ 12). The Invoice described that Mr. Roskovensky was providing Sanibel with a license for “temporary use of images” of the Property and again provided an “images download link.” (Doc. 50-6).⁷ The Invoice does not distinguish between use of the exterior and interior Pre-existing Images of the Property available at the download link. (Doc. 50-6). The Invoice also defines the term length of the “temporary use” in two seemingly contradictory ways. First, the Invoice states that the “images may be used for marketing purposes until November 30th, 2019,” and second, the Invoice purports to grant Sanibel a “license” to use the images for “six months,” which would ostensibly permit a license to use the images until February 22, 2020. (Doc. 50-6). In all events, Sanibel paid the \$75.00 fee. (Doc. 50-6).

At the time that Mr. Roskovensky provided the temporary license to Sanibel on August 22, 2019, he anticipated that Sanibel would engage him to take *additional* photographs of the Property’s interior; but Sanibel had not yet hired him

⁷ Here again, the link that Mr. Roskovensky included in the Invoice has not been made accessible to the Court. However, the Parties seem to agree that the link contained in the Invoice provided Sanibel with access to the Pre-existing Interior Images. For Sanibel’s part, it asserts that the Invoice’s “download link [contained] unrestricted access” to the Pre-existing Interior Images. (Doc. 54 at 2). And Mr. Roskovensky agrees that “the email communications submitted with [his] Complaint” demonstrate that Sanibel “had access to the Pre-Existing Images.” (Doc. 49 at 10). The Court presumes that Mr. Roskovensky is referring to the email available at Doc. 50-4 at 4, which contains a link that is identical to the one contained in the Invoice (Doc. 50-6). Based on this, the Court concludes that it is undisputed that the link contained in the Invoice provided Sanibel with access to the Pre-existing Interior Images.

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