

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

CASE NO: 1:23-cv-22380-JEM

LICKERISH, INC.,

Plaintiff,

v.

MEMORABILIA FOR LESS, LLC,

Defendants.

**DEFENDANT’S MOTION TO DISMISS PLAINTIFF’S COMPLAINT
AND MEMORANDUM OF LAW**

Defendant MEMORABILIA FOR LESS, LLC (“MEMORABILIA”), by and through its undersigned counsel, and pursuant to Federal Rule of Civil Procedure 12(b)(6), hereby files this Motion to Dismiss Plaintiff’s Complaint And Memorandum of Law. In support thereof, Defendant respectfully states as follows:

1. The Complaint fails to state a claim upon which relief can be granted for willful copyright infringement.
2. The Complaint fails to state a claim upon which relief can be granted for injunctive relief.

MEMORANDUM OF LAW

Federal Rule of Civil Procedure 12(b)(6) provides in pertinent part:

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

...

(6) failure to state a claim upon which relief can be granted;

...

Fed. R. Civ. P. 12(b)(6).

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendant moves to Dismiss Plaintiff's Complaint on the grounds that (1) it fails to state a claim upon which relief can be granted for willful copyright infringement and (2) it fails to state a claim upon which relief can be granted for injunctive relief.

A. The Plaintiff fails to state a claim upon which relief can be granted for willful infringement.

Plaintiff alleges that Defendant willfully infringed on copyrights of the Plaintiff. The other allegations of the Complaint, and its attachments, are not only insufficient to state a claim upon which relief can be granted, but they are actually inconsistent with such allegation.

Specifically, Plaintiff alleges in Paragraph 42 that "Defendant's infringement was willful as it acted with actual knowledge or reckless disregard for whether its conduct infringed upon Plaintiff's copyright." (Complaint, ¶42) However, Plaintiff alleges in Paragraph 32 that it discovered Defendant's unauthorized use/display of the subject photographs in July of 2022. It is obvious that Defendant must have obtained the subject photographs before that time. Indeed, in Paragraph 27 of the Complaint, Plaintiff attached screenshots of Defendant's website showing the photographs of Bella Thorne, Caity Lots and Austin Butler, the photos at issue here. Looking at the date on which each screenshot was taken in the lower left of each screenshot, one can see that the screenshots were taken on June 16, 2022. Hence, Defendant must have obtained such photographs at least as early as June 16, 2022. Yet, from the allegations of the Complaint itself, and Exhibits "A", "B" and "C," as of June 16, 2022, none of the subject photographs had been registered by the Plaintiff with the Copyright Office so as to give notice to the public, and specifically the Defendant, that such photographs were copyrighted.

In fact, based on the allegations of the Complaint, the photograph of Bella Thorne was

registered on April 26, 2023. (Complaint, ¶13)(Exhibit “A”) Defendant had obtained this photograph more than ten (10) months before such registration and notice of copyright. Similarly, the photograph of Caity Lots was registered on November 23, 2022. (Complaint, ¶16)(Exhibit “B”) Defendant had obtained this photograph more than five (5) months before such registration and notice of copyright. Finally, the photograph of Austin Butler was registered on November 23, 2022. (Complaint, ¶21)(Exhibit “C”) Defendant had obtained this photograph more than five (5) months before such registration and notice of copyright. Defendant could not have known that Plaintiff had registered the photographs with the Copyright Office at the time that it obtained the photographs and published them on its website.

Plaintiff further alleges that after its copyright registration of the photographs, Defendant published the photographs on its website, webpage and/or social media. (Complaint ¶27) As support therefor, Plaintiff shows the previously discussed screenshots. Once again, the allegations of the Complaint are inconsistent with the screenshots attached. As stated above, the screenshots of Defendants website were taken on June 16, 2022, more than five (5) to ten (10) months before the photographs were registered by the Plaintiff.

The Complaint should also be dismissed because the allegations of the Complaint are inconsistent with each other and the exhibits in and attached to the Complaint. The allegations cannot be reconciled with the exhibits attached thereto thus creating a pleading repugnancy rendering the allegations and claims a nullity as shown above.

Hence, a material inconsistency exists rendering the Complaint objectionable. See Hillcrest Pacific Corp. v. Yamamura, 727 So. Wd 1053, 1056 (Fla. 4th DCA 1999) (quoting Harry Pepper & Assoc., Inc. v. Lasseter, 247 So. 2d 736, 736-37 (Fla. 3d DCA 1971)) (“ [if there] is an inconsistency between the general allegations of material facts in the . . . complaint and the

specific facts revealed by the exhibit [attached or referred to in the complaint] . . . they have an effect of neutralizing each allegation as against the other, thus rendering the pleading objectionable.”) Accordingly, the allegations of the Complaint are insufficient to state a claim upon which relief can be granted for willful copyright infringement and the Complaint should be dismissed as a matter of law.

B. The Plaintiff fails to state a claim upon which relief can be granted for injunctive relief.

Plaintiff makes a demand for injunctive relief. Plaintiff has failed to make any allegation regarding its demand for injunctive relief, or alleging any of the elements required to state a claim upon which relief can be granted for injunctive relief. Accordingly, the allegations of the Complaint are insufficient to state a claim upon which relief can be granted for injunctive relief and the Complaint should be dismissed as a matter of law.

WHEREFORE, Defendant MEMORABILIA FOR LESS, LLC respectfully requests that this Court enter an Order dismissing the Complaint and granting it such other and further relief as this Court deems just and proper.

Respectfully submitted,

s/ A. Francisco Areces

A. Francisco Areces, Esq. (Florida Bar Number: 0724017)

Attorney E-mail address: fareces@areceslaw.com

ARECES RODRIGUEZ, P.A

2525 Ponce de Leon Boulevard, Suite 300

Coral Gables, Florida 33134

Telephone: (305) 300-8888

Attorneys for Defendant Memorabilia For Less, LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of August, 2023, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF, and that a true and correct copy of this

document is being served via transmission of Notice of Electronic Filing generated by CM/ECF upon: Meghan Medacier, Esq., meghan@copycatlegal.com, COPYCAT LEGAL PLLC, 3111 N. University Dr., Suite 301, Coral Springs, FL 33065.

s/ A. Francisco Areces, Esq.
ARECES RODRIGUEZ, P.A.