

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEBRASKA

ORIENTAL TRADING COMPANY,)	
INC., a Delaware corporation,)	
and FUN EXPRESS LLC, a)	
Nebraska limited liability)	
corporation,)	
)	
Plaintiffs,)	8:13CV351
)	
v.)	
)	
YAGOOZON, INC., a Rhode)	MEMORANDUM AND ORDER
Island corporation,)	
)	
Defendant.)	
)	

This matter is before the Court on plaintiffs' Oriental Trading Company, Inc. and Fun Express, LLC ("plaintiffs"), three separate motions for partial summary judgment. See Filing No. [64](#), Filing No. [103](#) and Filing No. [106](#). The first of plaintiffs' motions requests the Court conclude as a matter of law that the defendant, Yagoozon, Inc. ("defendant" or "Yagoozon") is liable for copyright infringement, trademark infringement, unfair competition, and violations of two Nebraska state laws pertaining to seventeen items ("Set One"). See Filing No. [65](#). Plaintiffs' second motion seeks partial summary judgment as to each of defendant's affirmative defenses. See Filing No. [104](#). Finally, plaintiffs ask the Court to grant summary judgment and find defendant liable for copyright infringement, trademark

infringement, unfair competition, and violations of two Nebraska state laws pertaining to thirty-seven additional items ("Set Two"). The matters have been fully briefed by the parties. See Filing Nos. 65, 75, 81, 104, 116, 107, 118, and 139. After review of the motions, the parties' briefs, and the relevant law the Court finds as follows.

BACKGROUND

This case arises out of defendant's business activities. Defendant utilizes Amazon.com, Inc. ("Amazon") to advertise and sell various toys, party supplies, and other novelty products (Filing No. [35](#) at 3). On August 29, 2014, plaintiffs filed a second amended complaint

seeking damages and injunctive relief for copyright infringement under the copyright laws of the United States, 17 U.S.C. §§ 101 to 1332; for trademark infringement and unfair competition under § 32(a) of the Lanham Act, 15 U.S.C. § 1114; for unfair competition and false advertising under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a); for deceptive trade practices under Nebraska's Uniform Deceptive Trade Practices Act, Neb. Rev. Stat. §§ 87-301 to 87-306 (Reissue 2008); and for violations of the Nebraska's Consumer Protection Act, Neb. Rev. Stat. §§ 59-1601 to 59-1603 (Reissue 2008).

(*Id.* at 1-2).

On September 15, 2015, plaintiffs filed their first motion for partial summary judgment (Filing No. [64](#)). Plaintiffs asked the Court “find that [d]efendant . . . infringed [p]laintiffs’ copyrights and trademarks, and engaged in unfair competition and deceptive trade practices with regard to [the] . . . ‘Set 1 Items.’” (*Id.* at 2). On November 12, 2015, plaintiffs filed a *Daubert* motion (Filing No. [90](#)). Plaintiffs filed a second motion for partial summary judgment on December 2, 2015 (Filing No. [103](#)). The second motion for partial summary judgment asked the Court to conclude that defendant’s “affirmative defenses fail as a matter of law.” (Filing No. [103](#) at 1).

The same day, plaintiffs also filed a third motion for partial summary judgment (Filing No. [106](#)). Plaintiffs’ third motion asks the Court to find that defendant’s actions “constitute copyright infringement, trademark infringement, unfair competition, and violations of Nebraska’s laws prohibiting deceptive trade practices and consumer fraud” as to thirty-seven additional products (“Set Two”). (*Id.* at 1).

Before the plaintiffs filed their reply brief in support of the motion for partial summary judgment for Set 2, the parties entered into serious settlement negotiations and filed an unopposed motion to extend the progression order. See Filing No.

[121](#). The defendant subsequently filed a motion to enforce settlement (Filing No. [123](#)). After defendant's motion to enforce settlement was fully briefed, the Court held a hearing (Filing No. [130](#)). The parties then filed a joint motion to stay existing deadlines pending resolution of defendant's motion to enforce settlement (Filing No. [131](#)). The Court denied defendant's motion to enforce settlement and ordered the parties submit a joint proposal for progression of the case on or before March 31, 2016 (Filing No. [136](#) at 8). On April 5, 2016, the Court granted the joint motion (Filing No. [137](#)) to extend the progression order and gave plaintiffs until April 6, 2016 to file their reply brief in support of their motion for partial summary judgment for the Set 2 Items (Filing No. [138](#)). The briefing for all plaintiffs' motions for partial summary judgment is now complete. See Filing No. [139](#).

LAW

Summary judgment is only proper when the Court determines the evidence "show[s] that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), (c); *Semple v. Federal Exp. Corp.*, 566 F.3d 788, 791 (8th Cir. 2009) (quoting Fed. R. Civ. P. 56(c)). The evidence must be viewed in the light most favorable to the nonmoving party, giving the nonmoving party

the benefit of all reasonable inferences. *Kenney v. Swift Transp., Inc.*, 347 F.3d 1041, 1044 (8th Cir. 2003). At the summary judgment stage, it is not the function of the Court to “weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

DISCUSSION

I. Summary Judgment as to Sets One and Two

The Court finds genuine issues of material fact exist. For reasons discussed more fully below, the Court finds that plaintiffs have failed to meet the stringent summary judgment standard as to all causes of action for both Set One and Set Two. Therefore, plaintiffs’ motions for partial summary judgment as to Set One and Set Two will be denied.

A. Direct Copyright Infringement

The Copyright Act of 1976, as amended, 17 U.S.C. §§ 101 *et seq.* (the “Act”), provides copyright owners protection from infringement and relief if infringement is proved. See 17 U.S.C. §§ 101 *et seq.* Anyone who violates one of the exclusive rights listed in the Act is an infringer. *Broadcast Music, Inc. v. Ottis, Inc.*, No. 8:09CV402, 2010 WL 5288106, at *3 (D. Neb. Dec. 16, 2010) (internal citations omitted). For a plaintiff to prove

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