UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

David Oppenheimer, Plaintiff, v. Michael C. Scarafile, Patricia R. Scarafile, Sheila Glover Romanosky, O'Shaughnessy Real Estate, Inc. d/b/a Carolina One Real Estate, Defendants.	Civil Action No. 2:19-cv-3590-BHH **Opinion and Order**

This matter is before the Court on Defendants Michael C. Scarafile, Patricia R. Scarafile, Sheila Glover Romanosky, and O'Shaughnessy Real Estate, Inc. doing business as Carolina One Real Estate's motion to dismiss Plaintiff David Oppenheimer's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. (ECF No. 13.) For the reasons set forth in this Order, the motion to dismiss is denied.

BACKGROUND

Plaintiff David Oppenheimer, who is a professional photographer, brought this copyright infringement action against Defendants Michael and Patricia Scarafile, Sheila Romanosky, and O'Shaughnessy Real Estate, Inc. doing business as Carolina One Real Estate.[1] Oppenheimer alleges that he is the author and sole owner of the original

[1] Hereinafter, Michael Scarafile and Patricia Scarafile are referred to collectively as "the Scarafiles." Sheila Romanosky is referred to as "Romanosky." The Scarafiles and Romanosky are referred to collectively as "the Individual Defendants." O'Shaughnessy Real Estate, Inc. doing business as Carolina One Real Estate is referred to as "Carolina One." The Individual Defendants and Carolina One are referred to collectively as "Defendants." David Oppenheimer is referred to as "Plaintiff" or "Oppenheimer."

photographs at issue in this case (the "Copyrighted Works"). The two original photographs at issue are registered under the title "Travel, Festival, and Concert Photography by David Oppenheimer 2013," bearing certificate number VAu 1-142-190, with an effective registration date of August 31, 2013. (ECF No. 1-2.) The first Work is an aerial southern-facing photograph that frames the Toler's Cove Marina in Mount Pleasant, South Carolina. (ECF No. 1-1 at 2.) The second Work is a wider aerial, southern-facing photograph that depicts Toler's Cove Marina, the Sullivan's Island Narrows, part of Sullivan's Island, and the coast of the Atlantic Ocean. (*Id.* at 3.)

Oppenheimer alleges that fewer than three years before filing the instant action, he discovered that one or more of the Defendants, or someone at their direction, infringed his copyrights by copying and distributing (or directing others to do so) the Copyrighted Works without license or authorization on more than 100 different websites—of at least 34 different realtors, agents, brokers, and/or other real estate sales entities—for the purpose of advertising and marketing a boat slip located at 0 Toler's Cove Marina 5G, in Mount Pleasant, South Carolina (the "Boat Slip"). (*See* Compl. ¶¶ 13–15, 21, 26, 48, ECF No. 1; ECF Nos. 1-3 & 1-4 (depicting allegedly infringing real estate listings and URLs).) Oppenheimer further alleges that at the time Carolina One performed the infringing acts, the Scarafiles were managing principals of Carolina One—controlling nearly all decisions of the company, Romanosky was the listing broker, and all of the Individual Defendants had a direct financial interest in the infringing activities. (*See* Compl. ¶¶ 29–30.)

On June 24, 2019, Oppenheimer's attorney sent a formal letter to Defendants identifying all of the known infringing URLs, demanding Defendants cease and desist from their ongoing infringements, and seeking information about the uses to which the

Copyrighted Works had been put and any profits resulting therefrom. (*See* ECF No. 1-5.) The complaint alleges that in October 2019, after acknowledging receipt of the cease and desist letter, while some of the infringing uses were removed, Defendants failed and/or refused to remove all instances of infringement displayed on several of the URLs. (*See* Compl. ¶ 16.) Oppenheimer further claims that in October 2019 his attorney notified Defendants that infringing uses of the Copyrighted Works were still being published on the URLs and requested that Defendants immediately remove all such instances infringement, but Defendants did not fully comply with the demand and ongoing instances of infringement continued. (*See* Compl. ¶¶ 17–18.)

Defendants filed the instant motion to dismiss on February 28, 2020. (ECF No. 13.) Plaintiff responded on November 13, 2019. (ECF No. 6.) Plaintiff filed a response on March 5, 2020. (ECF No. 18.) The matter is ripe for consideration and the Court now issues the following ruling.

STANDARD OF REVIEW

A motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6) "challenges the legal sufficiency of a complaint, considered with the assumption that the facts alleged are true." *Francis v. Giacomelli*, 588 F.3d 186, 192 (4th Cir. 2009) (internal citations omitted). "To survive a motion to dismiss, a complaint must contain sufficient 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 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting

Twombly, 550 U.S. at 556)). Although the allegations in a complaint generally must be accepted as true, that principle "is inapplicable to legal conclusions," and the Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Id.* (citations and quotation marks omitted). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id*. at 678 (quoting *Twombly*, 550 U.S. at 557). Stated differently, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id*. at 679 (quoting Fed. R. Civ. P. 8(a)(2)). Still, Rule 12(b)(6) "does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations." *Colon Health Centers of Am., LLC v. Hazel*, 733 F.3d 535, 545 (4th Cir. 2013) (quoting *Neitzke v. Williams,* 490 U.S. 319, 327 (1989)). "A plausible but inconclusive inference from pleaded facts will survive a motion to dismiss . . . ." *Sepulveda-Villarini v. Dep't of Educ. of Puerto Rico*, 628 F.3d 25, 30 (1st Cir. 2010).

DISCUSSION

"To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991) (citation omitted). In their motion to dismiss, Defendants do not dispute that Oppenheimer owns a valid copyright for the Copyrighted Works or that copies of the Works were published in real estate listings for the purpose of marketing the Boat Slip. Defendants state:

> In November 2016, Ms. Romanosky listed a boat slip for sale on Charleston Trident Association of Realtors' Multiple Listing Service for her seller client. The boat slip was located at 0 Tolers Cove, 5G in Mount Pleasant, South Carolina 29464, using two photographs of an aerial view of the Marina where the boat slip is locate [sic]. Shortly thereafter, the boat slip sold for Eighty-Five Thousand and no/100 Dollars ($85,000.00) on June 13, 2017. Ms. Romanosky and Carolina One received a combined commission of Two Thousand Five Hundred Fifty and no/100 Dollars ($2,550.00) on the transaction.

(ECF No. 13 at 1–2.) Oppenheimer's complaint raises five causes of action: (1) Non-Willful Copyright Infringement by all Defendants (Compl. ¶¶ 19–21); (2) Reckless/Willful Copyright Infringement by all Defendants (*id.* ¶¶ 22–27); (3) Vicarious Copyright Infringement by the Individual Defendants (*id.* ¶¶ 28–30); (4) Contributory Copyright Infringement by the Individual Defendants (*id.* ¶¶ 31–34); and (5) Violations of the Digital Millennium Copyright Act by all Defendants (*id.* ¶¶ 35–41). The Court will examine the legal sufficiency of the allegations supporting each cause of action in turn.

A. Non-Willful Copyright Infringement

Defendants argue that the complaint fails to show that the Scarafiles or Carolina One are liable for non-willful copyright infringement because it does not include "plausible allegations that any of these Defendants reproduced the work, prepared derivative works, distributed copies of the work to the public, performed the work publicly, or displayed the works publicly." (ECF No. 13 at 4.) Defendants further argue that Plaintiff fails to show that Romanosky is liable for non-willful copyright infringement because Plaintiff failed to provide "plausible allegations that Ms. Romanosky copied the works in question." (*Id.* at 5.) The Court disagrees and finds that Plaintiff's allegations meet the pleading standards necessary to survive a challenge under Rule 12(b)(6).

Plaintiff alleges that he discovered the Copyrighted Works were being publicly

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