

ENTERED

November 10, 2020

David J. Bradley, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

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| JOE HAND PROMOTIONS, INC., | § | |
| | § | |
| Plaintiff, | § | |
| VS. | § | CIVIL ACTION NO. 1:19-CV-00140 |
| | § | |
| BELLA'S BAR & GRILL LLC, <i>et al.</i> , | § | |
| | § | |
| Defendants. | § | |

ORDER AND OPINION

Plaintiff Joe Hand Promotions, Inc. (JHP) is a commercial licensor of sports and entertainment programming to commercial businesses. JHP brings suit against Defendants Bella's Bar & Grill LLC, d/b/a Bella's Bar & Grill, and its owner and manager, Daniel Zuniga, alleging that they aired the boxing match *Floyd Mayweather, Jr. vs. Conor McGregor* (the Event) without authorization and without paying a sublicense fee to JHP. (Complaint, Doc. 1, 6–7 (alleging causes of action under 17 U.S.C. §§ 106 and 501 (Copyright Act), and 47 U.S.C. §§ 605 or 553 (Communications Act))

JHP moves for summary judgment on its cause of action under the Copyright Act.¹ (Motion, Doc. 23)

I. Summary Judgment Facts**A. Admissions**

Both parties have submitted summary judgment evidence for the Court's consideration. During the course of discovery, however, both Zuniga and Bella's failed to respond or object to properly-served requests for admissions under Federal Rule of Civil Procedure 36. (JHP's Req. for Admissions, Doc. 23-7) As a result, the factual statements in those requests for admissions are deemed admitted and conclusively established.² FED. R. CIV. P. 36(b); *see In re Carney*, 258 F.3d 415, 421–22 (5th Cir. 2001) (affirming summary judgment based on facts resulting from a

¹ JHP titles its Motion as one for "Final Summary Judgment", but as JHP does not move for summary judgment on all its causes of action, the Motion is one for partial summary judgment.

² Defendants also have not moved to withdraw or amend the admissions.

party's failure to respond to a request for admissions). The summary judgment facts for purpose of the Motion stem in large measure from these admissions. As to factual matters not established through the admissions, the Court views the competent summary judgment evidence in the light most favorable to Defendants. *See* FED. R. CIV. P. 56(a); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

B. Facts

In 2017, JHP “purchased and retained the exclusive right to distribute and publicly perform the *Floyd Mayweather, Jr. vs. Conor McGregor* broadcast, including all undercard bouts and commentary” to commercial businesses in the United States. (J. Hand Decl., Doc. 23-2, ¶ 4) JHP’s Licensing Agreement with the Event’s copyright author and owner, Showtime Networks Inc., granted JHP the exclusive commercial rights “to distribute the public exhibition of the audiovisual presentation of the Event to commercial establishments” in the state of Texas. (Copyright Registration, Doc. 23-3; J. Hand Decl., Doc. 23-2, ¶ 6; Lic. Agree., Doc. 23-4, ¶ 1) The contract also granted JHP the “right to take enforcement measures, prosecute and commence legal actions” stemming from any “unauthorized exploitation” of JHP’s rights. (J. Hand Decl., Doc. 23-2, ¶ 6; Lic. Agree., Doc. 23-4, ¶ 7) For a commercial business to receive and broadcast the Event, the location was required to pay JHP a commercial sublicense fee based on the capacity or fire code occupancy of the establishment. (J. Hand Decl., Doc. 23-2, ¶ 11; Event Rate Card, Doc. 23-5) Once a business paid the commercial fee, JHP would then “authorize the receipt of the Event through the establishment’s television programming provider.” (J. Hand Decl., Doc. 23-2, ¶ 13)

Bella’s is a commercial business that operates as a restaurant and bar, and Zuniga is its principal, owner, member, manager, and registered agent.³ (Bella’s Admissions, Doc. 23-7, 2; Zuniga Admissions, Doc. 23-7, 7; Cert. of Formation, Doc. 23-1, 1) Zuniga “arranged cable service at [Bella’s] by telephone”. (Zuniga Aff., Doc. 25-1, 3) On August 26, 2017, the date of the

³ Zuniga affies that Bella’s no longer operates as a business. (Zuniga Aff., Doc. 25-1, 3)

Event, Bella's was open and willfully broadcasted the Event to numerous patrons. (Bella's Admissions, Doc. 23-7, 2-3; Zuniga Admissions, Doc. 23-7, 8) Zuniga was at the restaurant that day, had the right and ability to supervise Bella's, and witnessed the Event's broadcast. (Zuniga Admissions, Doc. 23-7, 2) Both Bella's and Zuniga possessed a financial interest in and derived financial benefit from the restaurant the day the Event was broadcast there. (Bella's Admissions, Doc. 23-7, 4; Zuniga Admissions, Doc. 23-7, 9)

On the day of the Event, JHP's Event Auditor Wanda Castillo witnessed Defendants air the Event to about 115 restaurant patrons. (Castillo Aff., Doc. 23-6, 1-2; Photos, Doc. 23-6, 3-25) The restaurant has capacity for about 180 people (Castillo Aff., Doc. 23-6, 2) Defendants "did not pay the commercial fees to JHP to legally receive the Event." (J. Hand Decl., Doc. 23-2, ¶ 14; Bella's Admissions, Doc. 23-7, 3; Zuniga Admissions, Doc. 23-7, 8) Instead, Defendants obtained the Event through a residential cable or satellite account. (Bella's Admissions, Doc. 23-7, 3; Zuniga Admissions, Doc. 23-7, 8) Based on the 180-person capacity of the restaurant, Defendants would have had to pay a fee of \$6,700.00 to legally broadcast the Event. (J. Hand Decl., Doc. 23-2, ¶ 11; Event Rate Card, Doc. 23-5, 1)

C. Objections to Summary Judgment Evidence

1. Defendants' Objections

Defendants "object[] to Plaintiff's summary judgment evidence", but do not contend that any specific evidence that JHP has offered is not competent summary judgment evidence. (Response, Doc. 25, 2-3) As a result, the Court does not consider the Response as asserting objections to the summary judgment evidence that JHP has submitted.

2. JHP's Objections

JHP objects to various statements in Defendant's Response, arguing that Defendants offer no competent summary judgment evidence to support those factual statements or that Defendants cannot present such evidence because the facts have been conclusively established through admissions. (Reply, Doc. 27, ¶¶ 7-12 (contesting, for example, the Defendants' ability

to deny knowing that Bella’s broadcast of the Event was wrongful)) The Court agrees that statements in a party’s brief do not constitute competent summary judgment evidence. *See* FED. R. CIV. P. 56(c)(1)(A) (listing categories of proper evidence for purposes of summary judgment). The only evidence that Defendants offer that falls within Rule 56(c) is the Affidavit of Daniel Zuniga. (Doc. 25-1) Aside from statements in that affidavit, Defendants offer no competent summary judgment evidence. In addition, to the extent that Zuniga’s affidavit seeks to controvert admitted facts, the Court disregards such statements.

JHP also relies on the best evidence rule to object to statements in Zuniga’s affidavit that “no provision in any agreement with any cable service provider” restricts the Defendants’ use of the service, and that Bella’s “charter is forfeited”. (Reply, Doc. 27, ¶¶ 10–11) When attempting to prove the contents of a writing, an original of that writing is required. FED. R. EVID. 1002. Zuniga’s statements at issue seek to prove the contents of a writing—i.e., the provisions of an agreement and the status of a corporate charter. As a result, JHP’s objections to these statements are sustained.

II. Analysis

JHP sues Bella’s and Zuniga under the Copyright Act of the United States, 17 U.S.C. §§ 101 and 501 (2019), and the Communications Act of 1934, as amended, 47 U.S.C. § 553 (1992), or alternatively § 605 (1996). (Complaint, Doc. 1) In its Motion, however, JHP moves for summary judgment solely under the Copyright Act. (Motion, Doc. 23, 7 n.1)

A. Standard of Review

Summary judgment is proper if the evidence, viewed in the light most favorable to the nonmoving party, shows that no genuine dispute of material fact exists, and that the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); *Matsushita Elec. Indus. Co.*, 475 U.S. at 587. A genuine dispute over material facts exists if the evidence presents an issue “that properly can be resolved only by a finder of fact because [it] may reasonably be resolved in favor of either party,” and the fact at issue might affect the outcome of the case. *Anderson v. Liberty*

Lobby, Inc. 47 U.S. 242, 248, 250 (1986). The moving party “bears the burden of identifying those portions of the record it believes demonstrate the absence of a genuine issue of material fact.” *Triple Tee Golf, Inc. v. Nike, Inc.*, 485 F.3d 253, 261 (5th Cir. 2007) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–25 (1986)). All facts and inferences drawn from those facts must be viewed in the light most favorable to the nonmovant. *Scott v. Harris*, 550 U.S. 372, 378 (2007).

If this evidence is provided, the burden then shifts to the responding party to present affirmative evidence to defeat the motion. *Anderson*, 477 U.S. at 257. “[T]he nonmoving party must set forth specific facts showing the existence of a ‘genuine’ issue concerning every essential component of its case.” *Morris v. Covan Worldwide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir. 1998) (citing *Anderson*, 477 U.S. at 255–57). “Unsubstantiated assertions, improbable inferences, and unsupported speculation, however, are not sufficient to defeat a motion for summary judgment.” *Brown v. City of Houston*, 337 F.3d 539, 541 (5th Cir. 2003) (internal quotation marks omitted).

B. Copyright Act Claim

“The Copyright Act prohibits infringement by ‘[a]nyone who violates any of the exclusive rights of the copyright owner.’” *Prostar v. Massachi*, 239 F.3d 669, 677 (5th Cir. 2001) (citing 17 U.S.C. § 501(a)). To succeed on a claim that these rights have been infringed, a plaintiff must generally demonstrate two elements: (1) ownership of a valid copyright, and (2) that a defendant violated one or more of the plaintiff’s exclusive rights under the copyright. *Avtec Sys., Inc. v. Peiffer*, 21 F.3d 568, 571 (5th Cir. 1994); *Microsoft Corp. v. Software Wholesale Club, Inc.*, 129 F. Supp. 2d 995, 1001–02 (S.D. Tex. 2000). “Ownership of a valid copyright is established by proving the originality and copyrightability of the material and compliance with the statutory formalities.” *Norma Ribbon & Trimming, Inc. v. Little*, 51 F.3d 45, 47 (5th Cir. 1995). A copyright registration certificate is prima facie evidence of copyright validity. *Id.*; 17 U.S.C. § 410(c).

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