

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION**

AMERICA’S HOME PLACE, INC., :

Plaintiff, :

v. :

CIVIL ACTION NO.
2:15-CV-0197-RWS

FINE BUILT CONSTRUCTION OF :
NORTH CAROLINA, INC., :
CLIFFORD T. FINE, TERRY :
NEISLER, and KIM NEISLER, :

Defendants.

ORDER

This case is before the Court for consideration of the Neisler Defendants’ Motion for Fees under L.R. 54.2 [113] and Fine Defendants’ Motion for Attorney’s Fees [114]. After reviewing the record, including the briefs submitted by the parties, the Court enters the following Order.

Background

I. Factual Background

This is a copyright case involving residential building designs. Plaintiff America’s Home Place, Inc. is a “scattered-lot” custom home builder. (Pl.’s Statement of Undisputed Material Facts (“Pl.’s SMF”), Dkt. [73-2] ¶ 1.) Plaintiff owns certificates of registration from the United States Copyright

Office for two residential construction plans called the Mountainview I and Mountainview II.¹ (Id. ¶¶ 2–6; Vandiver Decl., Dkt. [74] at Ex. A, Ex. B.)

In 2014, Kim and Terry Neisler approached Plaintiff and several other local builders about building a home for them in Blairsville, Georgia. (Decl. of Terence Neisler (“Neisler Decl.”), Dkt. [71-4] ¶¶ 3, 8–9.) When the Neislers met with Plaintiff, some time in October 2014, they had already created a conceptual layout for their future home. (Pl.’s Resp. to Defs.’ Statement of Undisputed Facts (“Pl.’s Resp. to Fine SOF”), Dkt. [96] ¶ 105.) While in discussions with Plaintiff, the Neislers were shown portions of the Mountainview I-B and II-B plans, which are modified versions of the original Mountainview designs. (Defs.’ Resp. to Pl.’s Statement of Undisputed Material Facts (“Fines’ Resp. to Pl. SOF”), Dkt. [97-1] ¶ 33–34.) The Mountainview I-B and II-B were redlined to reflect modifications requested by the Neislers. (Id.)

Ultimately, however, the Neislers never contracted with Plaintiff.

¹ The registration numbers for the Mountainview I and Mountainview II are VAu000610338 and VAu000610339, respectively.

Instead, the Neislars retained Fine Built Construction (“Fine Built”)² to build their home. (Pl.’s Resp. to Fine SOF, Dkt. [96] ¶¶ 104, 106.) Fine Built then hired Diane Wilson to draft plans for the Neislars’ home, and the Fine Defendants constructed a home based on those plans. (Id. ¶¶ 115–16; Fines’ Resp. to Pl. SOF, Dkt. [97-1] ¶ 41.) After Plaintiff noticed similarities between its Mountainview plans and the home the Neislars had built, this litigation ensued. Plaintiff brought this copyright action alleging that the Neislars’ home impermissibly infringes upon the Mountainview I-B and Mountainview II-B designs, as well as the redlined versions of those plans.

II. Procedural Background

After answering Plaintiff’s complaint, both the Neislars and Fine Defendants filed Motions for Judgment on the Pleadings. (Dkt. [22 & 28].) On May 12, 2016, the Court issued an Order denying those motions, finding that Plaintiff had stated a plausible claim for copyright infringement under the applicable pleading standard. (Order, Dkt. [34].) In particular, the Court found that Plaintiff had satisfied the first element of a copyright claim based on the

² Defendant Clifford T. Fine is the president of Fine Built. (Pl.’s Resp to Fine SOF, Dkt. [96] ¶ 15.) The two, collectively, will be referred to as the “Fine Defendants.”

certificates of registration for the Mountainview I and Mountainview II plans, which were attached to Plaintiff's complaint.³ (Id. at 6.) Furthermore, by alleging that Defendants "used" its plans, the Court found that Plaintiff had "asserted a sufficient factual narrative to suggest that direct evidence of copying plausibly exists," such that Plaintiff should be permitted "to proceed with discovery." (Id. at 7.) Thus, the Court denied the Motions for Judgment on the Pleadings. (Id. at 7–8.)

Ultimately, the case came before the Court on Motions for Summary Judgment filed by all parties. (Dkt. [71, 73, & 83].) Plaintiff alleged copyright infringement of the Mountainview I-B and Mountainview I-B plans, which Plaintiff admitted were derivative works of the registered Mountainview I and Mountainview II plans. Plaintiff produced the copyright registrations of the latter two plans, but not the actual designs. "[A] derivative work must be registered separately from the underlying work prior to filing a copyright suit based on the derivative; if not, the unregistered derivative work is protected only to the extent it includes protected elements of the underlying design."

³ The Court added, "Although defendants challenge the validity of [Plaintiff's] copyrights in their answers, arguments in their current motion focus exclusively on the 'copying' element of the infringement claim." (Order, Dkt. [34] at 6.)

(Order, Dkt. [111] at 10 (citing Montgomery v. Noga, 168 F.3d 1282, 1292 (11thCir. 1999)). In this case, “Plaintiff [] neither produced a copyright registration for the derivative plans, nor explained how the derivative plans incorporated original, protectable elements of the underlying, registered works.” (Id. at 11.) As Plaintiff failed to produce the original Mountainview designs, the Court found it was “impossible to discern what in the derivative plans might be protected and what, as a matter of law, cannot be. As a result, Plaintiff [] failed to carry its burden.” (Id. at 14.) Thus, the Court concluded that Defendants were entitled to summary judgment.

Nonetheless, the Court went on to consider the second element of Plaintiff’s copyright claim—copying—although it was unnecessary to the ultimate conclusion. This analysis focused on whether the home ultimately constructed for the Neislars was substantially similar to the Mountainview plans. Noting that the protection afforded to compilations such as floor plans is “thin,” the Court compared the Neislars’ home with the Mountainview plans. The Court found “several striking dissimilarities,” and enumerated those in the Order. (Id. at 20.) The Court concluded that “Plaintiff [] failed to demonstrate that the Neislars’ home and Mountainview plans are substantially similar under

the applicable law.” (Id. at 21.) Thus, Defendants were entitled to summary judgment on this ground, as well.

After judgment [112] was entered in Defendants’ favor, the Defendants filed their motions for attorneys’ fees that are presently before the Court.

Discussion

The Court is authorized to “award a reasonable attorney’s fee to the prevailing party as part of the costs.” 17 U.S.C. § 505. “A defendant is a prevailing party if the plaintiff achieves none of the benefits sought in bringing its lawsuit. If the case is litigated to judgment on the merits in favor of the defendant, the defendant is the prevailing party.” Pickett v. Iowa Beef Processors, 149 F. App’x 831, 832 (11th Cir. 2005) (internal quotations and citations omitted). “Prevailing plaintiffs and prevailing defendants are to be treated alike, but attorney’s fees are to be awarded to prevailing parties only as a matter of the court’s discretion.” Fogerty v. Fantasy, Inc., 510 U.S. 517, 534 (1994). “In copyright cases, although attorneys’ fees are awarded in the trial court’s discretion, they are the rule rather than the exception and should be awarded routinely.” Arista Records, Inc. v. Beker Enters., Inc., 298 F. Supp. 2d 1310, 1316 (S.D. Fla. 2003) (internal quotations and citations omitted). The

Supreme Court has noted “several nonexclusive factors” to consider as guidance for deciding this issue: “frivolousness, motivation, objective reasonableness, and the need in particular circumstances to advance considerations of compensation and deterrence.” Fogerty, 510 U.S. at 534 n.19. “In [the Eleventh Circuit], a showing of bad faith or frivolity is not a precondition to awarding attorneys’ fees.” Cable/Home Commc’n Corp. v. Network Productions, Inc., 902 F.2d 829, 853 (11th Cir. 1990).

The Court finds that Defendants are the prevailing parties in this action. Plaintiff achieved none of the benefits sought in bringing this lawsuit as Defendants prevailed on every issue. Having found Defendants to be the prevailing parties, the Court will consider the factors suggested by the Supreme Court for determining whether attorneys’ fees should be awarded.

I. Frivolity

The Court granted Defendants’ Motions for Summary Judgment after finding that Plaintiff failed to show how the derivative plans in issue incorporated original, protectable elements of the underlying, registered works. The Court noted that Plaintiff’s failure to produce the actual designs for Mountainview I and Mountainview II made it impossible for the Court to

discern what in the derivative plans might be protected. In its response to the present motions, Plaintiff seeks to address this failure by attaching the actual designs. However, the Court will address the issues raised by the present motions based upon the record that was before the Court when ruling on the Motions for Summary Judgment. On that record, Plaintiff's claims were frivolous.

This conclusion is further supported by the Court's finding that Plaintiff failed to demonstrate that the Neislars' home and the Mountainview plans are substantially similar under the applicable law. Thus, Plaintiff was unable to establish either of the elements of its infringement claim.

Plaintiff asserts that the denial of Defendant's Motions for Judgment on the Pleadings establishes that Plaintiff's claims were not frivolous. The denial of these motions was based upon allegations in Plaintiff's complaint which were, for purposes of considering those motions, accepted as true. However, after completing discovery, Plaintiff was unable to prove its allegations. Based on the evidence produced in the case, Plaintiff's claims were frivolous.

II. Motivation

Attempting to discern the motivations of parties, particularly on the

present record, is difficult. Certainly, protection of a copyright is a legitimate motivation for pursuing an action. However, the lack of merits of the claim raises questions about the motivation. Also, the fact that the alleged infringement involved a single homeowner and a single contractor suggests the actual damages that would have been suffered by Plaintiff had there been infringement were not significant. All parties assert that the opposing parties failed to engage in good faith efforts to resolve this case through settlement. Taking these factors into account, the court finds that, while Plaintiff may not have been guilty of bad faith, it's motivations were at least questionable.

III. Objective Reasonableness

For the reasons that the Court finds the action to be frivolous, the Court finds that the action was not objectively reasonable.

IV. The Need to Advance Considerations of Compensation and Deterrence

“[D]efendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement. Thus, a successful defense of a copyright infringement action may further the policies of the Copyright Act every bit as much as a successful prosecution of an

infringement claim by the holder of a copyright.” Fogerty, 510 U.S. at 527.

“When the prevailing party is the defendant, who by definition receives not a small award but no award, the presumption in favor of awarding fees is very strong. For without the prospect of such an award, the party might be forced into a nuisance settlement or deterred altogether from exercising his rights.”

Assessment Techs. Of WI, LLC v. WIREdata, Inc., 361 F.3d 434, 437 (4th Cir.

2004) (internal citation omitted). In the present case, an award of fees to

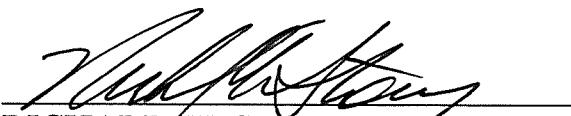
Defendants would serve the goals of compensation and deterrence.

Conclusion

The Court finds that Defendants are the prevailing parties and are entitled to recover their reasonable attorneys’ fees. Therefore, the Neisler Defendants’ Motion for Fees under L.R. 54.2 [113] and Fine Defendants’ Motion for Attorney’s Fees [114] are **GRANTED**. Within 14 days, Defendants shall submit a detailed specification and itemization of the requested fees.

Plaintiff may file objections thereto within 14 days thereafter.

SO ORDERED, this 25th day of April, 2018.



RICHARD W. STORY
UNITED STATES DISTRICT JUDGE