UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

KLEIN & HEUCHAN, INC., Plaintiff and Counter-Defendant, v. COSTAR REALTY INFORMATION, INC. and COSTAR GROUP, INC., Defendants and Counter-Plaintiffs.	Case No. 8:08-cv-01227-JSM-EAJ

COSTAR'S OPPOSITION TO PLAINTIFF/COUNTER-DEFENDANT, KLEIN & HEUCHAN, INC.'S MOTION FOR JUDGMENT AS A MATTER OF LAW OR ALTERNATIVELY MOTION FOR JUDGMENT ON PARTIAL FINDINGS ON COSTAR'S THEORY OF VICARIOUS LIABILITY

During trial of this matter, Plaintiff/Counter-Defendant, Klein & Heuchan, Inc. ("K&H") filed a Motion for Judgment as a Matter of Law or Alternatively Motion for Judgment on Partial Findings on Costar's Theory of Vicarious Liability (the, "Motion") (Doc. #120). In its Motion, K&H asks the Court to dismiss the secondary infringement claims that CoStar Realty Information, Inc. and CoStar Group, Inc. (collectively, "CoStar") filed against it, arguing that CoStar's settlement with Scott Bell extinguished such claims. K&H contends that the settlement agreement retroactively conferred a license for Bell to access the copyrighted CoStar products and that the only cause of action preserved against K&H is one for direct infringement. CoStar respectfully submits that the Motion should be denied. K&H's arguments conflict with federal copyright law,

the governing Florida statute, the language and intent of the settlement agreement, and controlling Eleventh Circuit precedent.

I. Under the Governing Law, CoStar's Claims Against K&H Survive.

K&H's argument that CoStar's settlement with Bell extinguished CoStar's claims against K&H flies in the face of federal copyright law, the Florida Statutes, and controlling Eleventh Circuit precedent.

Under the Copyright Act, all who participate in an infringement -- in this case Bell and K&H -- are jointly and severally liable the damages that result therefrom. (Uncontested Points of Law ¶ 16) (emphasis added). "Copyright infringement is in the nature of a tort, for which all who participate in the infringement are jointly and severally liable." *Screen Gems-Columbia Music, Inc. v. Metlis & Lebow Corp.*, 453 F.2d 552, 553-54 (2nd Cir. 1972)(direct infringers and contributory infringers joint and severally liable).

Section 768.31(5) of the Florida Statutes governs the scenario where a party settles against one of multiple joint tortfeasors. That section provides, "[w]hen a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death: (a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater." (*Id.*)

In the copyright case of *BUC Int'l Corp. v. Int'l Yacht Council*, 517 F.3d 1271, 1278 (11th Cir. 2008), the Eleventh Circuit already dealt with this exact situation. As

enunciated in *BUC*, the rule is that "a plaintiff is entitled to only one satisfaction for a single injury, such that amounts received in settlement from an alleged tortfeasor are credited against judgments for the same injury against non-settling tortfeasors." *Id.* In *BUC*, the district court found that the settlement agreements did not release the non-settling defendants from liability, and on appeal the Eleventh Circuit reached the issue of the "one satisfaction" rule, holding that the amounts received from the settling tortfeasor reduced the amount of the judgment against the non-settling tortfeasor. (*Id.*)

Accordingly, the Court should reject K&H's argument that CoStar's settlement with Scott Bell extinguished CoStar's claims against K&H. *See also, e.g., Screen Gems-Columbia Music, Inc.*, 453 F.2d at 553-54 (judgment against contributory infringer following bench trial reduced by amount of pre-trial settlements with direct and contributory infringers).

II. The Language of the Settlement Agreement Neither Grants a Retroactive License Nor Extinguishes the Claims Against K&H.

K&H's Motion also overlooks the key language and the obvious intent of the settlement agreement. K&H argues in its Motion that the release CoStar provided to Bell was a retroactive license, and if Bell was licensed, then K&H cannot be held liable as a secondary infringer. No reading of CoStar's release, however, could reasonably be interpreted to have granted a retroactive license.

First, the language says, "CoStar's **release** shall only cover Bell's unauthorized use, copying and distribution to the extent such activity would have complied with each and every term and condition of the standard CoStar license agreement for the CoStar Products, as if Bell had been a fully licensed subscriber at all relevant times." (Doc. #120,

Exh. A, ¶ 3(a)(emphasis added)). That language plainly describes only the scope of the release; i.e., conduct that would have been authorized had it been that of a licensed subscriber. The "licensed subscriber" reference is merely a means to describe the activity within the scope of the release and makes no attempt to go back in time and "undo" any infringement.[1]

Second, other language in the settlement agreement makes clear that CoStar's claims against K&H survive. The Settlement Agreement, which is between CoStar and Bell and does not include K&H, specifically provides that, "CoStar's release shall be limited to Bell alone". (¶ 3(c)). The document states that "nothing in this Agreement shall be construed to confer on K&H, or any person other than the Parties, any rights or remedies hereunder." (¶ 8). The Settlement Agreement even further clarifies that "[n]othing in this Agreement shall prevent CoStar from initiating or continuing any civil proceedings against K&H or any other party." (¶ 8).

Third, the recently-executed Settlement Agreement has a provision requiring Bell to appear at trial to provide complete and truthful testimony in connection with CoStar's secondary infringement claims against K&H. (¶ 1). This provision would have no meaning if the claims against K&H ceased to exist, and such a result obviously was not the intent of the parties.

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[1] The Second Circuit's decision in *Davis v. Blige*, 505 F. 3d 90, 102-03 (2nd Cir. 2007), reinforces CoStar's position. In that case, the Second Circuit struck down the validity of an attempt to grant a retroactive license, reasoning that retroactive licenses undercut the need to deter infringement and encourage certainty/predictability. Clarifying the difference between a settlement and a license, the Second Circuit explained that licenses are prospective, in that they permit use by a non-owner who would not otherwise have a right to use the property, whereas a settlement agreement is retrospective, in that it recognizes the unauthorized use while providing a remedy to the injured owner that is acceptable to all parties to the agreement. (*Id.*) Clearly, the CoStar agreement with Bell is a settlement agreement, not a retroactive license.

Fourth, far from supporting K&H's assertion, CoStar and Bell jointly requested that the Court enter judgment in CoStar's favor against Bell on CoStar's claim of direct infringement. (¶ 6; Doc. #105). That is consistent with the settlement agreement being a release, not a retroactive license.

Conclusion

Accordingly, resolution of CoStar's claim against Bell did not extinguish its secondary liability claims against K&H. K&H's Motion should be denied, except that any resulting judgment against K&H should be reduced by the $5,000 payment from Bell to CoStar.

Dated: March 26, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of March, 2010, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

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