

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION**

OSMENT MODELS, INC.)	
)	
and)	
)	
O Co.,)	Case No. 2:09-cv-04189-NKL
)	
Plaintiffs,)	
)	
v.)	
)	
MIKE'S TRAIN HOUSE, INC.,)	
)	
Defendant.)	

ORDER

Plaintiffs Osment Models, Inc., and O Co. ("Plaintiffs") and Defendant Mike's Train House, Inc. ("Mike's"), are companies engaged in the model railroad industry. Plaintiffs have sued Mike's for copyright infringement, false advertising, and unfair competition as to two of its copyrighted designs. Before the Court is Mike's' Motion to Reconsider the Court's Summary Judgment Order and, in the Alternative, to Re-open Discovery and Advance Trial Date. [Doc. # 284]. The Court has thoroughly reviewed Mike's arguments. For the following reasons, Mike's motion to reconsider is denied, and the Court declines to re-open discovery and advance the trial date.

Mike's contends that it suffered undue prejudice because the Court relied on evidence it claims should be stricken. Osment's response to Mike's Motion for Summary Judgment did reference a declaration by Plaintiffs' expert, Miles Hale, and a second Supplemental

Copyright Registration for the train depot model. In its reply, Mike's did not specifically contest these statements, although it referenced its motions to strike the sources of the statements, [Docs. # 218, #221]. While, the Court noted these statements in the factual background section of its Order, it did not rely upon them in its analysis and holdings. Plaintiffs' submissions did not cause Mike's any prejudice. The admissibility of this evidence can be considered at the scheduled pretrial conference.

As to the substance of the Court's Order, Mike's argues that it successfully rebutted the presumption of validity as to Plaintiffs' copyrights. In support, it cites to *Folio Impression, Inc. v. Byer Cal.*, 937 F.2d 759, 763 (2d Cir. 1991) (at trial, defendant rebutted presumption of copyright validity by offering evidence that design was "copied" from an "unspecified public domain source"). However, as opposed to what Mike's suggests in its current motion, the Court did not find that "Plaintiffs' gas station was copied from 'unspecified public domain sources.'" [Doc. # 287, at 4]. Rather, the Court specifically noted: "Plaintiffs and Mike's dispute how Plaintiffs' research and development impacts the creation of a model: as a search for images upon which models will be copied, or a search for inspiration to create models." [Doc. #267, at 10 (citations omitted)]. Additionally, the Court stated that "Plaintiffs did not simply 'copy' Jefferson Station into a different medium. . . . [T]he Court notes ostensible visual differences" between Jefferson Station and Plaintiffs' model. [Doc. #267, at 13-14].

As the Court previously concluded, Mike's presents insufficient evidence to shift the burden of proof back to Plaintiffs as to the validity of Plaintiffs' copyright. Further,

“[b]ecause the scope of originality for all of Plaintiffs’ models remain a question of fact, . . . the determination of the models’ protectable elements” necessarily remain a question of fact. [Doc. #267, at 16].

The Court clarifies that its statement that Plaintiffs “maintain[] that [its gas station model] is a completely original work” is based on Plaintiffs’ statement that “Defendant’s speculation that there must have been a building from which Plaintiffs copied its gas station model is baseless.” [Doc. #214, ¶ 25]. To the extent that the Court’s statement confuses the parties, it redacts the word “completely.”

The Court declines to address other arguments raised by Mike’s in its Motion to Reconsider that were not initially raised in its Motion for Summary Judgment.

Accordingly, it is hereby ORDERED that Defendant Mike’s Train House’s Motion to Reconsider the Court’s Summary Judgment Order, and, in the Alternative, to Re-open Discovery and Advance the Trial Date [Doc. # 284] is DENIED.

s/ NANETTE K. LAUGHREY
NANETTE K. LAUGHREY
United States District Judge

Dated: January 13, 2011
Jefferson City, Missouri