

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

BIDZIRK, LLC, DANIEL G. SCHMIDT,)
III, and JILL PATTERSON,)
)
Plaintiffs,)
)
v.)
)
PHILIP J. SMITH,)
)
Defendant.)

Civil Action No. 6:06-CV-00109-HMH

MOTION FOR SUMMARY JUDGMENT

COMES NOW BidZirk, LLC (“BidZirk”), Daniel G. Schmidt, III (“Schmidt”) and Jill Patterson (“Patterson”), Plaintiffs in the above-captioned action, and file this their motion for summary judgment pursuant to Fed. R. Civ. P. 56, and show the Court as follows:

1.

Plaintiffs commenced the above-captioned action on January 10, 2006. On July 28, 2006, Plaintiffs served Defendant with interrogatories, requests for production of documents and requests for admission. See Exhibits 1-3.

2.

Plaintiff BidZirk noticed Defendant’s deposition for September 14, 2006. See Exhibit 4. Defendant appeared at the deposition, but quit the proceeding before the deposition was completed. At the time Defendant left his deposition, he took with him five original exhibits, which included copies of Plaintiffs’ discovery requests, including Plaintiffs’ requests for

admission. Plaintiffs filed a motion to compel Defendant's attendance at a second deposition, which the Court granted. See Exhibit 5.

3.

Plaintiffs noticed Defendant's second deposition for December 29, 2006, a date selected by Defendant. See Exhibit 6. Plaintiffs' counsel requested in advance of December 29 that Defendant return the original exhibits he retained on September 14. Defendant agreed to do so. On December 29, 2006, Defendant appeared for his second deposition, bringing with him the original exhibits 1-5, which were marked during Defendant's original September 14 deposition.

4.

At his first deposition on September 14, 2006, Defendant claimed that he had not received Plaintiffs' discovery requests, though same were served July 28, 2006, and certified by counsel as such.

5.

Between September 14, 2006 and December 29, 2006, a period of 106 days, Defendant never served responses to Plaintiffs' discovery requests. During his December 29 deposition, Defendant admitted that (1) since September 14, he had continuous custody of the original exhibits, including copies of Plaintiffs' discovery requests; (2) he reviewed the discovery requests; and (3) he did not serve any responses to the discovery requests. See Exhibit 6.

6.

Pursuant to Fed. R. Civ. P. 36, Defendant has admitted in judicio the facts set forth in Plaintiffs' requests for admission, including his liability for Plaintiffs' claims of defamation and invasion of privacy. Plaintiffs are entitled to summary judgment on these claims.

7.

Defendant's failure to respond at all to Plaintiffs' interrogatories and requests for production of documents also renders Defendant subject to sanctions, including the striking of Defendant's responsive pleadings.

8.

Plaintiffs' memorandum of law in support of their motion for summary judgment is filed contemporaneously herewith.

WHEREFORE, Plaintiffs pray that the Court grant their motion and enter summary judgment against Defendant on Plaintiffs' claims for defamation, trademark infringement and invasion of privacy.

This 15th day of January, 2007.

/s/ Kevin M. Elwell

KEVIN M. ELWELL
USDC Bar No. 9706

K.M. ELWELL, P.C.
111 East North Street
Greenville, South Carolina 29601
(864) 232-8060
(404) 759-2124 e-facsimile
kmelwell@kmelwell.com

Attorneys for Plaintiffs BidZirk, LLC,
Daniel G. Schmidt, III and Jill Patterson

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

BIDZIRK, LLC, DANIEL G. SCHMIDT,)
III, and JILL PATTERSON,)
)
Plaintiffs,)
)
v.)
)
PHILIP J. SMITH,)
)
Defendant.)

Civil Action No. 6:06-CV-00109-HMH

CERTIFICATE OF SERVICE

This is to certify that I have this day served the foregoing MOTION FOR SUMMARY JUDGMENT by depositing same in the United States Mail in a properly-addressed envelope with adequate postage affixed to:

Mr. Philip J. Smith
601 Cleveland Street, Apartment 5-C
Greenville, South Carolina 29601

This 15th day of January, 2007.

/s/ Kevin M. Elwell

KEVIN M. ELWELL
USDC Bar No. 9706

K.M. ELWELL, P.C.
111 East North Street
Greenville, South Carolina 29601
(864) 232-8060
(404) 759-2124 e-facsimile
kmelwell@kmelwell.com

Attorneys for Plaintiffs BidZirk, LLC,
Daniel G. Schmidt, III, and Jill Patterson