

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re) Chapter 11
)
SUPERMEDIA, LLC, <i>et al.</i> ,) Case No. 13-10546(KG)
) (Jointly Administered)
Debtors.)
<hr/>	
) Re: Dkt Nos. 220, 221 and 315

MEMORANDUM OPINION

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In this strongly contested adversary proceeding over copyrighted material, SuperMedia LLC ("SuperMedia") has moved to vacate the Court's December 29, 2014, post-trial Opinion and Order (D.I. 220 and 221). The Court has found in favor of Yellow Pages Photos, Inc. ("YPPI") on liability for SuperMedia's infringement. The bifurcated damages trial is scheduled for the final week of September, 2015. SuperMedia's motion is pursuant to Section 105(a) of the Bankruptcy Code and Rule 60(b) of the Federal Rules of Civil Procedure made applicable to the instant proceedings by Rule 9024 of the Federal Rules of Bankruptcy Procedure.

In the Opinion, the Court held that SuperMedia was liable for infringement because SuperMedia had violated its license from YPPI and transferred YPPI's images to, among others, bieMedia and ASEC¹ and, as a result, the YPPI images became public. The transfers meant that YPPI had "lost control" over who had use of its product. What neither SuperMedia nor the Court knew was that bieMedia from sometime in 2005 and ASEC from August 2011 were themselves licensees of YPPI. The Court therefore issued the Opinion, based in large part on the testimony of Trent Moore, YPPI's founder, that if the YPPI images were in the public realm in advertising, it was SuperMedia's fault. The Court thought that SuperMedia had wrongly transferred material, i.e., YPPI's images, to bieMedia which then used the images in advertising. The Court was unaware that bieMedia had a license for the same images that SuperMedia had transferred to bieMedia.

¹ Reference is to ASEC Group, LLC, and includes the company and its contractors, ASEC Asia Inc. and AG Resources India PVT Ltd.

The case of ASEC is a bit different, since ASEC only had a license for the images beginning in August 2011. The impact on the Court, however, was the same: SuperMedia's transfer of YPPI images to ASEC caused the YPPI images to "go viral."

Rule 60(b)(2) provides that a court may grant relief from an order based on "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial. . . ." Rule 60(b)(3) allows for relief based on "fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party." The relief SuperMedia is seeking is "extraordinary." *Moolenaar v. Gov't of the Virgin Islands*, 822 F.2d 1342, 1346-47 (3d Cir. 1987). But, as SuperMedia's lawyer stated at the hearing on this matter, "something is wrong here" and the "something" is YPPI's conduct which according to SuperMedia brings matters within Rule 60(b)(3) and its proscription against misrepresentations to the Court. The Court has determined that it will grant relief, in part, to SuperMedia pursuant to Rule 60(b)(6) because Rule 60(b)(2) and (3) do not apply to the present facts.

First, prior to the liability trial which took place from April 9 through April 11, 2014, SuperMedia propounded the following document request and received the following response:

REQUEST NO. 14: All documents relating to the settlement of the litigation styled *Yellow Pages Photos, Inc. v. User Friendly Phone Book, LLC et al.*, 8:10-CV-00436-VMC-EAJ.

RESPONSE: Yellow Pages [YPPI] objects to this request as irrelevant, overbroad and seeking documents protected under the attorney-client privilege and/or work product doctrine. Yellow Pages further objects to this request as the agreement between the parties is subject to a confidentiality agreement.

Thereafter, during a discovery teleconference, YPPI again argued the settlement agreement was irrelevant, and the Court agreed. SuperMedia therefore did not have the settlement agreement for its use before or during the liability trial. Approximately one year later, SuperMedia again requested the settlement agreement and this time the Court granted the request and ordered its production. Surprisingly, the settlement agreement contains a "limited, non-exclusive, non-transferable (except as permitted by this Agreement), perpetual, irrevocable, worldwide, royalty-free, fully paid-up right and license . . . for use by ASEC's customers . . . in connection with print, web-based/Internet, and electronic yellow pages directories and other graphic products (including without limitation spec ads and websites) . . ." The ASEC license contained in the settlement agreement and requested by SuperMedia was not produced before the liability trial, even though SuperMedia requested not only the settlement agreement but also all documents which evidenced "licenses granted for the use of the Licensed Images." YPPI fought production of the settlement agreement, arguing even the second time that it was not relevant and despite the settlement agreement containing a license.

YPPI also did not produce – or ever mention – the license it had given in 2005 to bieMedia. The reason YPPI gives for not producing the bieMedia license is that SuperMedia’s document request only requested licenses granted from "2006 to date" and the bieMedia license was granted in 2005. The reason is unsatisfactory.

The fact is, SuperMedia’s discovery requests asked YPPI in different ways about and for production of its licenses. SuperMedia asked YPPI – without a year limitation – for:

REQUEST NO. 1: All documents that YPPI has in its possession, custody or control and may use to support its Administrative Claim.

REQUEST NO. 2: All documents relating to alleged transfer of the Licensed Images from SuperMedia to any third party.

REQUEST NO. 3: All documents relating to the alleged use of the Licensed Images in violation of YPPI’s copyrights.

REQUEST NO. 4: All documents relating to communications between YPPI and ASEC Group, LLC relating to the Licensed Images.

These requests called for the production of the ASEC settlement/license agreement and bieMedia license agreement. In discovery, a party is obligated to fairly apprise its opposition of documents that may be unhelpful to its case. Here, YPPI had a duty to produce the ASEC settlement/license agreement and the bieMedia license. Instead, YPPI hid the documents. Rule 60(b)(3) is designed to prohibit such conduct.

Second, and most egregious, Trent Moore, YPPI’s principal, forcefully testified falsely under oath, testimony which profoundly affected the Court’s Opinion. Mr. Moore testified as follows:

It's a violation to transfer. They transferred the images to untold number of parties. They are allowing people who have contractual obligations with me or with them to have my images. I have lost total control of half of my library. (Trial Tr. 24:8-12)

* * *

Q. Were you aware whether the photos had actually been transferred to ASIC?

A. Actually transferred? Yes. (Trial Tr. 25:23-25).

* * *

Well the harm comes from the dissemination of images to seem like anybody, not the damages go to here or there. They went here and there. They've gone to people that there's no contractual arrangement between me and the party of SuperMedia and the party. The images have gone to people who I don't have any right of redress contractually at all. . . . So I don't have a contract with any of these people. They don't have any permission. (Trial Tr. 65:9-19).

* * *

By giving my images out to people who they were not suppose to, they being SuperMedia, to give them to dilute the value of my images. (Trial Tr. 65:20-22).

In response, Mr. Moore testified that ASEC could not have obtained YPPI's images other than through an unlawful transfer by SuperMedia:

Q. But they didn't, you have no basi[s] for saying that SuperMedia had sent the images to the Philippines or Asia did you, Mr. Moore?

A. SuperMedia sent them.

Q. How do you know that? When you say sent them, what do you mean sent, sent them to Asia and the Phillippines?

A. How could ASIC have got the images without SuperMedia sending them to them?

(Trial Tr. 79:21-80:3).

Adam Ward testified on behalf of YPPI that:

Q Bimedia hosts the videos that are posted online, correct?

A That's correct.

Q And it hosts the videos on its own server?

A That's correct.

Q And Supermedia provides Bimedia with images to use for these videos, correct?

A Correct that Supermedia had provided images one time to Bimedia when we first entered the agreement as a way to quick start the project, yes. (Trial Tr. 9:16-24).

Ms. Richter (YPPI Trial Counsel) argued at the liability trial that:

So starting with the videos Your Honor will hear evidence that SuperMedia does not create any of its videos in-house they only use a contractor called bieMedia, b-I-e Media to create these videos. And you'll hear testimony from - through deposition from John Baracas of bieMedia that in fact bieMedia was provided in around 2010 or 2011 time frame numerous disks containing the YPPI images on them from SuperMedia with no particular restrictions on how those images could be used. And bieMedia will show that they in fact have been using those images for videos for SuperMedia. And very importantly, Your Honor, you're also going to hear evidence that those same images were also used by bieMedia for videos for Dex. In fact thousands of Dex videos contain these YPPI images. And Dex, of course, has never been a licensee of YPPI. (Trial Tr. 14:21-25; 15:1-10).

* * *

We had the testimony from BiEMEDIA, as well as Miss Candelaria and Mr. Ward, that BiMedia produces all the videos for both SuperMedia and Dex. And there's no dispute that SuperMedia, at some point in time, supplied BiEMEDIA with about 12 disks of YPPI images and that BiEMEDIA then took those images and began using them for SuperMedia videos; and then upon the merger of SuperMedia and Dex, they combine them in and started using them for both, SuperMedia and Dex. (Trial Tr. 37:11-18).

* * *

In its pre-trial brief, YPPI argued that the transfers to, among others, biMedia and ASEC caused YPPI to lose control of its images and that:

SuperMedia has transferred copies of Yellow Pages' Images to a number of unlicensed third-parties without Yellow Pages' knowledge of consent, and there is evidence of the images being used for at least one unlicensed publisher, SuperMedia's affiliate Dex. Yellow Pages is not in privity of contract with any of these outsiders, and none of SuperMedia's agreements with its "contractors" address Yellow Pages' images or provide protections for Yellow Pages.

YPPI's Pretrial Brief at 10.

YPPI also introduced at trial numerous videos which biMedia produced, and there was testimony that biMedia produced over 2,000 videos containing YPPI images. The testimony of Mr. Moore and YPPI's expert, Adam Sharp, and YPPI's attorney's arguments left the Court fully convinced that SuperMedia's transfer of the YPPI's images to biMedia had indeed caused YPPI to lose control of its copyrighted images.

Had SuperMedia, and therefore the Court, known about the license to biMedia of the very same images that YPPI licensed to SuperMedia, the result, a finding in favor of YPPI and against SuperMedia on the transfers to biMedia, would not have been different on liability. Similarly, had the Court known about the ASEC license beginning in August

2011, the result would have been the same, namely, a finding of liability for the transfers in violation of the license. The transfers to biMedia and ASEC, licensed parties, were violative of the license YPPI gave to SuperMedia. However, the damages flowing from the transfers would likely be affected.

Pursuant to Rule 60(b)(3), the moving party “must establish that the adverse party engaged in fraud or other misconduct, and that this conduct prevented the moving party from fully and fairly presenting his case.” *Stridiron v. Stridiron*, 698 F.2d 204, 207 (3d Cir. 1983) (internal citation omitted). Other courts have phrased the requirements of Rule 60(b)(3) slightly differently. In *Casey v. Albertson’s Inc.*, the Ninth Circuit stated that “to prevail, the moving party must prove by clear and convincing evidence that the verdict was obtained through fraud, misrepresentation, or other misconduct and the conduct complained of prevented the losing party from fully and fairly presenting the defense.” 362 F.3d 1254, 1260 (9th Cir. 2004) (citing *De Saracho v. Custom Food Machinery, Inc.*, 206 F.3d 874, 880 (9th Cir. 2000)).

It is undisputed that SuperMedia engaged in copyright infringement by violating and exceeding its license agreement with YPPI (Post-Trial Opinion on Yellow Pages Photos, Inc.’s Amended Motion for Allowance and Payment on Administrative Expense [D.I. 220] at 31), and by distributing the YPPI images to biMedia, ASEC and other entities. *See Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984) (internal citations omitted) (“‘Anyone who violates any of the exclusive rights of the copyright owner,’ that is, anyone who trespasses into his exclusive domain by using or authorizing the use of the

copyrighted work in one of the five ways set forth in the statute, 'is an infringer of the copyright.' Conversely, anyone who is authorized by the copyright owner to use the copyrighted work in a way specified in the statute or who makes a fair use of the work is not an infringer of the copyright with respect to such use.") The distribution of copyrighted works is one of the exclusive rights of the copyright owner. *See* 17 U.S.C.A. Section 106(3).

The Court is thus faced with the decision of what to do about the misrepresentations and non-disclosures giving rise to its ruling. YPPI has already withdrawn its claim for economic damages based on the transfers to bioMedia and ASEC. The Court need not determine whether YPPI's withdrawal was the result of SuperMedia's Rule 60(b) motion, except to posit that the withdrawal and its timing are suspicious, coming shortly after SuperMedia filed its Rule 60(b) Motion.

SuperMedia has asked the Court to vacate the Opinion and Order and enter judgment in its favor. In support of this relief, SuperMedia offers *In re Global Energies, LLC*, 763 F. 3d 1341 (11th Cir. 2014), in which the Eleventh Circuit Court of Appeals vacated an order of the bankruptcy court. The grounds for the decision were that the parties successful before the bankruptcy court had failed to produce documents which "could and should" have led to a different result. *Id.* at 1350. The Eleventh Circuit based its decision on Rule 60(b)(2), without deciding the request for relief under Rule 60(b)(3). The Eleventh Circuit also cited to the rules regulating the conduct of attorneys of the Florida Bar, pertaining to failure to disclose material and offering false evidence. The Model Rules of

Professional Conduct which governs attorneys who practice before the Court are similar. *Id.* at 3.3 (Candor Toward the Tribunal.)

Relief from a judgment under Rule 60(b)(2) is appropriate when (1) new evidence was discovered after entry of judgment, (2) movant exercised due diligence to discover the evidence, (3) the evidence was not merely cumulative or impeaching, (4) the evidence was material and (5) the evidence was likely to have produced a different result. *In re Global Energies, LLC*, 763 F. 3d at 1347. Rule 60(b)(3) requires a misrepresentation which was likely to have produced a different result.

Despite YPPI's denial that any misleading statements were made during trial (*see* Yellow Pages Photos, Inc.'s Response in Opposition to Motion for Relief From the Judgment Based on Newly Discovered Evidence or, in the Alternative, for Sanctions (D.I. 353) at 18), the record clearly shows that Mr. Moore denied the existence of the *bieMedia* and *ASEC* licenses. The first prong of Rule 60(b)(3) is therefore satisfied. The only remaining question is whether *SuperMedia* had a valid defense to the copyright infringement claims that it could have asserted during the liability trial, but was prevented in "fully and fairly" doing so.

At trial, *SuperMedia* would have argued, as it does now in its reply brief, that:

By concealing the *bieMedia* and *ASEC* licenses during discovery, and by falsely denying their existence during trial, YPPI prevented *SuperMedia* 'from fully and fairly presenting [its] case.' Had *SuperMedia* known about these licenses, it could have challenged YPPI's claim that it lost control of its images as a result of the transfers by *SuperMedia*. Instead *SuperMedia* could have shown that YPPI gave away control of its images by licensing them to

at least two outsourcers and giving them the unfettered right to place those images on the Internet. . . . At the very least, SuperMedia could have used the bieMedia and ASEC licenses to attack the credibility of Mr. Moore's testimony that he 'never sold any images to MPS or any other outsourcers.'

SuperMedia LLC's Reply Memorandum of Law in Support of its Motion for Relief From the Judgment Based on Newly Discovered Evidence or, in the Alternative, for Sanctions (D.I. 359) at 5-6.

The question presented by Rule 60(b)(3) is whether these concerns are valid defenses to copyright infringement claims. YPPI, without citing to any authority, rejects SuperMedia's arguments by stating that "it does not matter whether a transferee was licensed to use the images. Even a transfer to a licensed transferee is a breach and copyright infringement." Tab 2 of the YPPI Exhibit Book (8/26/2015).

Even assuming *arguendo* that SuperMedia had a defense, it would only have shielded SuperMedia from liability for the bieMedia and ASEC transfers. The Court has found, however, that SuperMedia also engaged in copyright infringement by distributing the images to other entities. Post-Trial Opinion on Yellow Pages Photos, Inc.'s Amended Motion for Allowance and Payment on Administrative Expense (D.I. 220) at 16-30. Therefore, the second prong of Rule 60(b)(3) is not satisfied. YPPI is correct in its claim that "[l]iability is clear, and the scope of the infringement will be material only to the scope of damages, upon which a determination has been deferred to a later date." Yellow Pages Photos, Inc.'s Trial Brief (D.I. 107) at 19.

It therefore appears that the transfers to bieMedia and ASEC were copyright infringements despite the misrepresentations, and the Court was correct in assessing

liability to SuperMedia. Rules 60(b)(2) and 60(b)(3) both require the evidence of the bieMedia and ASEC licenses to have produced a different result, i.e., a finding that SuperMedia was not liable. The Court is unable to conclude that its decision would have been different had it known of the bieMedia and ASEC licenses. Yet, the deliberate misrepresentations and non-disclosures are sanctionable. Rule 60(b)(6) provides the needed remedy. Rule 60(b)(6) warrants relief for "any other reason that justifies relief." In *Budget Blinds, Inc. v. White*, 536 F.3d 244 (3d Cir. 2008), the Third Circuit Court of Appeals found that it had authority to set aside judgments of other courts pursuant to Rule 60(b)(6) which is a catch-all provision. As the Third Circuit stated:

Rule 60(b)(6) exists so that courts may "vacate judgments whenever such action is appropriate to accomplish justice," *Klapprott v. United States*, 335 U.S. 601, 614, 69 S.Ct. 384, 93 L.Ed. 266 (1949), in situations that are not addressed by the other five clauses of Rule 60(b). The drafters of Rule 60(b)(6) apparently recognized that a catch-all provision would be necessary, since it would be impossible to specify all of the scenarios in which justice might require vacatur of a judgment.

Id. at 254.

Accordingly, having found that Rule 60(b)(2) and Rule 60(b)(3) do not provide relief for the misrepresentation, the Court will instead apply Rule 60(b)(6). YPPI made misrepresentations and non-disclosures which require some relief, but it would be completely unfair were the Court to vacate the Order and grant judgment to SuperMedia. Therefore, the Court will not accept damages testimony or exhibits – either economic or statutory damages – relating to either ASEC or bieMedia. The Court will not consider the transfers to or from bieMedia and ASEC in the damages trial. There are, however, other

transferees of the YPPI images that the Court will consider and which the Court identified in its Opinion, namely, AMDOCS/Office Tiger, Tata Consultancy Services, MacMillan Publishing Services, Hostopia, Web.com, Dex Media, Facebook, Google, and other SuperMedia customers. Further, the Court requests that SuperMedia submit its claim for fees and expenses in prosecuting the Rule 60(b) motion.

Dated: September 3, 2015



KEVIN GROSS, U.S.B.J.

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ORDER

The Court has duly considered SuperMedia, LLC's ("SuperMedia") Motion for Relief from the Judgment Based on Newly Discovered Evidence or, in the Alternative, for Sanctions (the "Motion"), the response of Yellow Pages Photos, Inc. ("YPPI"), SuperMedia's reply, and heard oral argument. For the reasons stated in the accompanying Memorandum Opinion, the Court grants the Motion, in part.

Therefore, IT IS ORDERED that:

1. The Court will not accept economic or statutory damages evidence from YPPI relating to *bieMedia* or *ASEC* (as those terms are used in the Memorandum Opinion).
2. The Court will not consider transfers to or from *bieMedia* and *ASEC* in the damages trial.
3. SuperMedia shall submit its claim for fees and costs in prosecution of the Motion.

Dated: September 3, 2015



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