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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FEBRUARY 8, 2012
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No. 10-14710

D.C. Docket No. 1:08-cv-03386-TWT

CHARLES WATT, d.b.a. Silverhawk Records,
d.b.a. Bend Of The River Publishing,

Plaintiff - Counter Defendant-Appellant,

versus

DENNIS BUTLER, f.k.a. Mook B,
LEFABIAN WILLIAMS, f.k.a. Fabo,
CARLOS WALKER, f.k.a. Shawty Lo,
ADRIAN PARKS, Individually and f.k.a. Stoner,
a.k.a. Stuntman,
d.b.a. D4L,
TERIYAKIE NOCODEAN SMITH, et al.,

Defendants - Counter Claimants-Appellees,

ARTIST PUBLISHING GROUP, et al.,

Defendants.

Appeal from the United States District Court
for the Northern District of Georgia

(February 8, 2012)

Before TJOFLAT and CARNES, Circuit Judges, and MICKLE,* District Judge.

MICKLE, District Judge:

This is a copyright infringement case involving a repeating three-note riff, or ostinato, used in the 2004 rap song, "Betcha Can't Do it Like Me" ("Betcha") by the rap group D4L. Appellant Charles Watt claims that the riff was copied from the group Woodlawn Click's 1995 rap song, "Come Up." Watt owns the copyright to "Come Up" and he sued D4L along with others associated with "Betcha," including Teriyakie Smith, who claims to have composed the music for "Betcha" in 2004 using three adjacent keys on his laptop keyboard and the "Fruity Loops" music production software.

The district court found that Watt presented sufficient evidence to create a jury issue regarding (1) D4L's access to "Come Up," and (2) substantial similarity between the riffs used in D4L's "Betcha" and Woodlawn Click's "Come Up." The

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* Honorable Stephan P. Mickle, United States District Judge for the Northern District of Florida, sitting by designation

district court found, however, that Watt failed to rebut Teriyakie Smith's testimony that he independently created the riff, and granted summary judgment in D4L's favor.

We review the district court's ruling de novo, applying the same summary judgment standard. Calhoun v. Lillenas Publ'g, 298 F.3d 1228, 1232 (11th Cir. 2002). We examine the facts and the reasonable inferences drawn therefrom in the light most favorable to the nonmoving party to determine whether there is any genuine dispute of material fact for a jury to decide. Id. "We may affirm the district court on different grounds as long as 'the judgment entered is correct on any legal ground regardless of the grounds addressed, adopted or rejected by the district court.'" Id. at 1230 n.2 (quoting Ochran v. United States, 273 F.3d 1315, 1318 (11th Cir. 2001)). Because the evidence was not sufficient for Watt to sustain a genuine dispute that "Betcha" was copied from "Come Up," we affirm.

I.

The gravamen of a copyright infringement suit is copying. The plaintiff must show that the defendant copied elements of an original work that is protected by the plaintiff's valid copyright. Id. at 1232. Direct evidence of copying is rarely available, so the law provides a method of proving copying indirectly, which creates a presumption of copying that may be negated with evidence of

independent creation. Id.; Herzog v. Castle Rock Entm't, 193 F.3d 1241, 1249 (11th Cir. 1999).

A plaintiff can establish prima facie evidence of copying by showing (1) that the defendant had access to the plaintiff's work; that is, a reasonable opportunity to come across the work, and (2) that there is a substantial similarity between plaintiff's and defendant's work; that is, an average lay observer would recognize defendant's work as having been taken from plaintiff's work. Calhoun, 298 F.3d at 1232, 1234 n.11. If the plaintiff is able to make the showing, then a presumption of copying arises and the burden of production shifts to the defendant. Id. at 1232; see also Keeler Brass Co. v. Cont'l Brass Co., 862 F.2d 1063, 1066-67 (4th Cir. 1988) (discussing presumptions and burdens in copyright cases). A defendant can negate the presumption of copying by presenting evidence that he independently created the work. Calhoun, 298 F.3d at 1232. Once the defendant does so, the presumption is negated and the plaintiff has the burden of proving that the defendant in fact copied his work. Id.

In this case, both sides take issue with the district court's summary judgment ruling. The appellees (collectively "D4L") argue that Watt did not present a prima facie case of copying because Watt's evidence of access and substantial similarity was insufficient to sustain a genuine dispute. Watt, on the

other hand, argues that D4L's evidence of independent creation was self-serving and not sufficient to rebut the presumption of copying that arose from its prima facie case. We find that Watt's evidence of access was too speculative and conjectural to make out a prima facie case. Furthermore, summary judgment was appropriately granted against Watt because he could not sustain a genuine dispute regarding copying.

II.

It is common in the rap industry for budding artists to distribute their music by selling or giving away copies on the street. Watt claimed that between 1996 and 2005, he and others sold or gave away 12,000 to 15,000 compact discs featuring Woodlawn Click's "Come Up" throughout the Southeast United States, including the Atlanta area where members of D4L and Teriyakie Smith are from. "Come Up" was never commercially distributed.

During the 1995-1999 time period, Woodlawn Click performed "Come Up" at least 50 times in venues in the Atlanta area, including popular nightclubs, music festivals, and the Jack the Rapper Convention. A music video for "Come Up" was broadcast on the television shows "Front Row Video" and "Comic Escape" in the Atlanta area. A 41-second portion of "Come Up" was included in the film "Dirty South," which was never commercially released but premiered to an audience of

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