

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

MALIBU MEDIA, LLC,)
)
 Plaintiff,) Civil Case No. 8:13-cv-03007-JSM-TBM
)
 v.)
)
 ROBERTO ROLDAN,)
)
 Defendant.)
 _____)

**PLAINTIFF’S MEMORANDUM IN OPPOSITION TO DEFENDANT’S MOTION FOR
SUMMARY JUDGMENT**

I. INTRODUCTION

Plaintiff respectfully requests the Court deny Defendant's motion for summary judgment. At this time, Plaintiff has not had an adequate opportunity to conduct discovery. Indeed, Defendant filed his motion for summary judgment only days after providing Plaintiff with the documents and exhibits in his motion – despite having signed his affidavit in September. Plaintiff has not yet been able to conduct depositions of Defendant or his family or otherwise verify that his defense is credible. For the foregoing reasons, Plaintiff respectfully requests the Court deny Defendant's motion for summary judgment.

II. FACTUAL BACKGROUND

A. Plaintiff's Movies Were Repeatedly Infringed at Defendant's Parent's Home

Beginning on August 18, 2013 and continuing until November 7, 2013, an individual connected to the IP address 96.58.134.12 and illegally downloaded 40 of Plaintiff's movies using the BitTorrent protocol. *See* CM/ECF 36-2. Plaintiff's additional evidence demonstrates that the infringer also illegally obtained over 2,500 copyrighted works, including movies, television, music and software.¹ After receiving Plaintiff's subpoena, Brighthouse correlated the IP address to the subscriber Angel Roldan. Plaintiff named his son, Roberto Roldan, in this law suit as Defendant because Roberto Roldan's public interests via social media corresponded with Plaintiff's additional evidence, making him the most likely infringer. Further, LexisNexis's Accurint database identified Defendant as residing at his parent's house until January, 2014, after the infringement ended.

¹ Plaintiff has not attached its additional evidence as an exhibit because it contains some content and titles that may be considered embarrassing. Because Defendant is proceeding under his real name, Plaintiff will avoid filing it until Defendant has the opportunity to determine whether he would like it to remain confidential. Should the Court request to see Plaintiff's additional evidence at this stage, Plaintiff will submit it under seal, unless the Court orders otherwise.

Defendant admits in his interrogatories that he is a consistent BitTorrent user. *See* Exhibit A at Response to Interrogatories #3 and #21. He uses the BitTorrent client μ Torrent to obtain files through the BitTorrent protocol. *Id.* The infringer in this case used the same BitTorrent client – μ Torrent to steal Plaintiff's movies. *See* CM/ECF 36-2.

B. Defendant Provided Documents Suggesting He Was Not Living at His Parent's Home During the Time of Infringement

Although Plaintiff's evidence suggests that Defendant Roberto Roldan is the infringer, on January 15, 2015, after numerous conferral meetings, multiple requests by Plaintiff, several extensions, and a whole scale revision of Plaintiff's discovery production, Defendant produced to Plaintiff the overwhelming majority of documents which he relies upon in his September 5, 2014 affidavit supporting his motion for summary judgment. *See* CM/ECF 37 Exhibits 4-15. These documents include an affidavit from his roommate, and friend, a class schedule, work stubs, bank records, and transcripts - all of which call into question whether Defendant had access to the infringing IP address during the time period of infringement. *See e.g.* CM/ECF 37. Prior to January 15, 2015, the only documents Defendant produced relating to his residence during the time of infringement were his lease and utilities bill on November 21, 2014. *See* CM/ECF 37-2,3. Plaintiff has not had *any* opportunity to investigate the vast majority of supporting documents because it received them only four days before the motion was filed. Significantly, although Defendant's affidavit was signed on September 5, 2014, Defendant withheld all of this evidence until January 15, 2015 – and then filed his motion for summary judgment four days later.

Plaintiff has depositions scheduled for Defendant and his parents on February 12, 2015. After the depositions, Plaintiff will likely be able to determine whether Defendant had access to

the IP address or if another person in his parents' home committed the infringement. If Defendant did not have access, Plaintiff will move to dismiss its case.

III. LEGAL STANDARD

“Rule 56 ‘implies [that] district courts should not grant summary judgment until the non-movant has had an adequate opportunity for discovery.’” *Sanborn v. Jagen Pty. Ltd.*, No. 8:10-CV-142-T-30MAP, 2010 WL 1730756, at *2 (M.D. Fla. Apr. 28, 2010). “The party opposing a motion for summary judgment has a right to challenge the affidavits and other factual materials submitted in support of the motion by conducting sufficient discovery so as to enable him to determine whether he can furnish opposing affidavits.” *Snook v. Trust Co. of Georgia Bank of Savannah*, 859 F.2d 865, 870 (11th Cir. 1988). (internal citations omitted). “Simply put, ‘[i]f the documents or other discovery sought would be relevant to the issues presented by the motion for summary judgment, the opposing party should be allowed the opportunity to utilize the discovery process to gain access to the requested materials.’” *Young v. Bond Collect Servs., Inc.*, No. CIV.A. 10-0429-WS-B, 2010 WL 4874864, at *2 (S.D. Ala. Nov. 23, 2010) citing *Snook v. Trust Co. of Georgia Bank of Savannah*, 859 F.2d 865, 870 (11th Cir. 1988).

IV. ARGUMENT

A. Plaintiff Has Not Had An Adequate Opportunity to Take Discovery

In his summary judgment motion, Defendant presented a threshold issue of whether he had access to the infringing IP address during the time of infringement. Defendant relies on affidavits and discovery documents produced in discovery only four days before his motion was filed. Plaintiff has not yet been afforded the opportunity to accurately analyze the documents or depose Defendant or his parents. Indeed, Defendant's production of a class schedule does not necessarily support that he was in class on those dates. Moreover, Defendant's bank records still list his address as the address where the infringement took place. *See* CM/ECF 37:12-15.

Defendant admits he has used BitTorrent. *See* Exhibit A at Response to Interrogatories #3 and #21. He shares many of the same interests as on Plaintiff's additional evidence, suggesting he is either the infringer, or shares interests with the infringer. He uses the exact same type of BitTorrent software that was used to commit the infringement. *Id.* And, he previously resided at the house where the infringement took place. *See* CM/ECF 37. There is more to this case than simply "mistaken identity" as Defendant contends. Indeed, Plaintiff did not pick Defendant out of thin air – there is a link between him and the infringement. Plaintiff should have the opportunity to properly respond to Defendant's motion. "A party opposing summary judgment should be given the opportunity to discover information relevant to the summary judgment motion." *Dean v. Barber*, 951 F.2d 1210, 1214 (11th Cir. 1992).

B. Plaintiff Did Not Know Defendant Resided in Tampa Until Defendant Produced Discovery Documents – Months After the Lawsuit Commenced

Defendant argues in his summary judgment motion that identifying him as Defendant fails a "common sense-fallacy" because his class schedule, work schedule, lease, and other documents imply that he was not living with his parent's during the time of infringement and therefore would have only downloaded the videos if he were "visiting". *See* CM/ECF 36 at *9. Defendant also articulates that Malibu Media "knew" Defendant lived in Tampa, FL during the time of infringement. Defendant's arguments are meritless because Defendant did not provide documentation of an address in Tampa, FL until November, 2014 and did not provide all the supporting documents calling into question whether he is the infringer until January, 2015.

Plaintiff cannot understand why Defendant would wait so long, and allow a lawsuit to proceed for months, if he was innocent and could have ended it against him nearly a year ago. Defendant must have been aware of Plaintiff's intention to name him in the lawsuit when Plaintiff tried to serve him at his parents' house in April. *See* CM/ECF 8. Why did he not come

forward then with his lease, class schedule, work schedule, etc. and say “you’ve got the wrong guy – it couldn’t be me!”? And, when Defendant filed his Motion to Dismiss in June – he attached hundreds of exhibits attempting to attack Plaintiff’s expert. *See* CM/ECF 16. Why didn’t he simply attach his lease, class schedule, utilities, or work schedule - any sort of proof that would support his denial? Why instead spend so much energy attacking Plaintiff’s expert in Germany if he was really innocent? When Plaintiff first propounded discovery to Defendant – Defendant responded with objections – and still failed to provide any evidence other than a denial that he didn’t reside at his parents’ home. *See* Exhibit B. Amazingly, the affidavits produced to Plaintiff on January 15, 2015 were signed on August 22, 2014 (Affidavit of Vinnie Beneduci) and August 26, 2014 (Affidavit of Christian Harris). *See* CM/ECF 36, Exhibit 4-5. This means that Defendant had compiled all of this evidence in support of his summary judgment motion in August and September. But, when Plaintiff propounded discovery, he responded with objections – instead of providing it to Plaintiff.

C. Defendant’s Affidavit Was Signed On September 5, 2014

The affidavit of Roberto Roldan – complete with references to Exhibits and extensively detailing the evidence supporting his defense – was signed on September 5, 2014. *See* CM/ECF 37. It was notarized on the same day. *Id.* This seems to suggest that Defendant’s counsel actually prepared the summary judgment motion in September. Why in the world would Defendant wait more than four and a half months to provide this evidence to Plaintiff? These actions by Defendant have wasted hundreds of hours of Plaintiff’s time, wasted the Court’s resources, and Defendant’s counsel has recorded an attorney bill of \$25,000.00. *See* Exhibit C. Plaintiff can only imagine that Defendant would do this for one of two reasons: either (1) Defendant is hiding pertinent information regarding the case which would be called into question

upon proper examination of his supporting documents or (2) Defendant's counsel is playing an egregious game of "gotcha" litigation and attempting to increase her attorney's fees bill believing that Plaintiff will be liable for it.²

Plaintiff respectfully requests the Court deny Defendant's motion for summary judgment and allow Plaintiff limited discovery to depose Defendant and his parents and investigate the documents he provides in his summary judgment motion.

V. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests the Court deny Defendant's Motion for Summary Judgment.

Dated: February 5, 2015

Respectfully submitted,

By: /s/ M. Keith Lipscomb
M. Keith Lipscomb (429554)
klipscomb@lebfirm.com
Emilie Kennedy
ekennedy@lebfirm.com (92808)
LIPSCOMB EISENBERG & BAKER, PL
2 South Biscayne Blvd.
Penthouse 3800
Miami, FL 33131
Telephone: (786) 431-2228
Facsimile: (786) 431-2229
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2015, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF and that service was perfected on all counsel of record and interested parties through this system.

By: /s/ M. Keith Lipscomb

² Given that Defendant's counsel is currently insisting on deposing Plaintiff's witnesses (after filing his summary judgment motion) in Germany and serving them via the Hague Convention – despite Plaintiff offering to accept service if Defendant would agree to a video deposition - it may be the latter. See CM/ECF 38.