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

JAMES W. ROSS, INC.,

Plaintiff,

-vs-

Case No. 6:03-cv-792-Orl-28KRS

**CECIL ALLEN CONSTRUCTION, INC.,
CECIL B. ALLEN, TERRY R. CALLAHAN,
JOHN HOUSTON, JR., MARY D.
HOUSTON,**

Defendants.

ORDER

James W. Ross, Inc. ("Ross") brings this action against Defendants Cecil Allen Construction, Inc., Cecil B. Allen, Terry R. Callahan, and John and Mary Houston ("the Houstons") alleging copyright infringement under the Copyright Act of 1976, 17 U.S.C. § 101 et seq. Ross claims that the Defendants built a house that infringed on his copyrighted architectural work entitled the Greenbriar Model 3658.

The Houstons have filed a Motion for Summary Judgment on the Issue of Statute of Limitations (Doc. 39, filed January 12, 2004), asserting that this action is barred by the three-year statute of limitations in 17 U.S.C. § 507(b). After the Court heard oral argument on the Houstons' motion, Defendants Cecil Allen Construction, Inc. and Cecil B. Allen (collectively "Allen") filed a motion for summary judgment (Doc. 50, filed April 5, 2004) making the same statute-of-limitations argument made by the Houstons.¹ Upon

¹Ross has filed responses to both motions. (Docs. 43 & 52).

consideration of the record in this matter, argument of counsel, and relevant case law, and as more specifically set forth below, the Court concludes that both motions must be denied.

I. Factual Background

The Houstons built a home in Orlando in 1999 and received a Certificate of Occupancy on January 5, 2000. (Doc. 39 at 1). On April 13, 2003, Ross was driving in the neighborhood and became suspicious of the home's design because the rear of the house resembled one he had previously designed and built, and for which he ultimately received a copyright. (Ross Aff., Doc. 45, at 1-2). Ross then obtained copies of the Houston's house plans from the Orange County Building Department and compared them to his Greenbriar model. (Doc. 45 at 2). Ross claims that the Houstons' house was a direct copy of his original model because the floor plan and elevations were exact and because the Greenbriar has a "very unique roof design." Id. Ross then filed this lawsuit on June 10, 2003.

II. Discussion

A. Summary Judgment Standards

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of establishing that no genuine issues of material fact remain. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). When faced with a "properly supported motion for

summary judgment, [the nonmoving party] must come forward with specific factual evidence, presenting more than mere allegations.” Gargiulo v. G.M. Sales, Inc., 131 F.3d 995, 999 (11th Cir. 1997). “The evidence presented cannot consist of conclusory allegations or legal conclusions.” Avirgan v. Hull, 932 F.2d 1572, 1577 (11th Cir. 1991); see also Fed. R. Civ. P. 56(e) (providing that nonmovant’s response “must set forth specific facts showing that there is a genuine issue for trial”).

In ruling on a motion for summary judgment, the Court construes the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). However, summary judgment is mandated “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Celotex, 477 U.S. at 322. At the summary judgment stage, “the judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” Anderson, 477 U.S. at 249.

B. The Merits of the Defendants’ Motions

The Defendants argue that because more than three years passed between completion and occupancy of the Houstons’ home in January 2000 and filing of this suit in June 2003, Ross’s claim is barred by the Copyright Act’s three-year statute of limitations. That provision states that “[n]o civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued.” 17 U.S.C. § 507(b). At issue here is when Ross’s infringement claim accrued.

Courts in other circuits have applied the discovery rule to claims brought under the Copyright Act. In other words, those courts have held a copyright claim accrues “when the plaintiff learns, or should as a reasonable person have learned, that the defendant was violating his rights.” Gaiman v. McFarlane, 360 F.3d 644, 653 (7th Cir.), reh’g and reh’g en banc denied (7th Cir. 2004); see also Lyons P’ship, L.P. v. Morris Costumes, Inc., 243 F.3d 789, 796 (4th Cir. 2001) (“The limitations period for bringing copyright infringement claims is three years after the claim accrues. And a claim accrues when ‘one has knowledge of a violation or is chargeable with such knowledge.’”) (citations omitted); Roley v. New World Pictures, Inc., 19 F.3d 479, 481 (9th Cir. 1994) (same)²; Stone v. Williams, 970 F.2d 1043, 1048 (2d Cir. 1992) (same); John G. Danielson, Inc. v. Winchester-Conant Props., Inc., 186 F. Supp. 2d 1, 24 (D. Mass. 2002) (same), aff’d, 322 F.3d 26 (1st Cir. 2003); Barbour v. Head, 178 F. Supp. 2d 758, 765 (S.D. Tex. 2001) (noting “that nothing in the law of the Fifth Circuit forecloses the application of the discovery rule or any other equitable tolling rules to copyright infringement actions” and finding implicit acceptance of such application by the Fifth Circuit in two cases).

As acknowledged by both parties, the Eleventh Circuit has not squarely addressed the issue of whether the discovery rule applies to copyright suits. However, the rule has been mentioned in a concurring opinion in an Eleventh Circuit copyright case. See

²Defendants cite Los Angeles News Service v. Reuters Television International, Ltd., 149 F.3d 987, 993 (9th Cir. 1998), for the statement therein that “a claim accrues when an act of infringement occurs, not when consequent damage is suffered.” However, in that case the Ninth Circuit was discussing the domestic (versus extraterritorial) application of the Copyright Act rather than a straightforward statute-of-limitations argument, and it cited Roley for the quoted statement. Thus, in Los Angeles News Service the Ninth Circuit did not overturn its holding in Roley regarding application of the discovery rule in copyright actions.

Calhoun v. Lillenas Publ'g, 298 F.3d 1228, 1236 (11th Cir. 2002) (Birch, J., specially concurring) (“The limitations period may be triggered when a plaintiff knows or, in the exercise of reasonable diligence, should have known about an infringement.”), cert. denied, 123 S. Ct. 2251 (2003). The Defendants argue, however, that to the extent the Eleventh Circuit has endorsed the discovery rule in the copyright context, the rule’s application should be limited in cases involving house plans. (Defs.’ Mot. for Summ. J., Doc. 39, at 5).

The Defendants claim the discovery rule should be limited in these circumstances because house plans are available for inspection at the job site and because plans become part of the public record when they are submitted to governing bodies for approval. Id. The Defendants further argue that under these circumstances, any failure to discover an infringing house within three years is per se unreasonable. Id. Through their reasoning, the Defendants seem to be suggesting that every owner of a copyrighted house plan would need to employ a full-time investigator to scour public records and drive around every housing development to ensure that no infringing houses are being built.

This argument is unpersuasive, and the Court declines to carve out an exception to application of the discovery rule merely because house plans rather than other copyrighted works are at issue. There is no authority for Defendants’ position, and indeed there is caselaw to the contrary. See, e.g., Zitz v. Pereira, 119 F. Supp. 2d 133 (E.D.N.Y. 1999) (applying discovery rule in the house-plan context and finding claim time-barred on the facts of that case), aff’d, 225 F.3d 646 (2d Cir. 2000). Thus, as in other copyright cases, examination of the facts of each particular house-plan case determines whether the

suit was brought within three years of when the plaintiff should reasonably have discovered the infringement of the copyrighted plans.

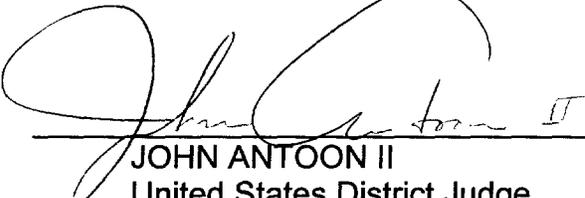
In Zitz, the court concluded that the infringement claim was time-barred because the court found that the plaintiff had learned of the infringement more than three years prior to filing suit; the defendant had been observed photocopying the plans in the public library in January 1993 but suit was not filed until March 1996. 119 F. Supp. 2d at 136. In contrast, in the instant case there is no record evidence suggesting that Ross knew or should have known about the infringement at issue prior to April 2003 or that Ross did not act diligently in discovering the alleged infringement. Ross testified that he first learned of the alleged infringement in April 2003 and filed this lawsuit only two months later. (Ross Aff., Doc. 45, at 1). The Defendants have not presented evidence that Ross should reasonably have discovered the infringement prior to April 2003, and certainly not that he should reasonably have discovered it prior to June 2000 – three years before this suit was filed. Thus, the Defendants have not established their entitlement to summary judgment on this issue.

Conclusion

In accordance with the foregoing analysis, it is **ORDERED** and **ADJUDGED** that Defendants' Motion for Summary Judgment on the Issue of Statute of Limitations (Doc. 39, filed January 12, 2004) filed by Defendants John and Mary Houston and Defendants' Motion for Summary Judgment on the Issue of Statute of Limitations (Doc. 50, filed April

4, 2004) filed by Defendants Cecil Allen Construction, Inc. and Cecil B. Allen are **DENIED**.

DONE and **ORDERED** in Chambers, Orlando, Florida this 26 day of April,
2004.



JOHN ANTOON II
United States District Judge

Copies furnished to:
Counsel of Record
Any Unrepresented Party

H-26-04
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F I L E C O P Y

Date Printed: 04/27/2004

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