

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

STENOGRAPH, L.L.C.,	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	
	:	
FRANCINE SIMS,	:	
Defendant	:	NO. 99-5354
	:	
Newcomer, S.J.	:	July , 2000

M E M O R A N D U M

Presently before this Court are plaintiff's Motion for Summary Judgment and defendant's Response thereto. For the reasons set forth below, this Court grants plaintiffs' Motion for Summary Judgment and enters judgment for plaintiff and against defendant on plaintiff's claims for copyright infringement and conversion as well as defendant's counterclaims for defamation, false light, and wrongful use of process.

I. BACKGROUND

Stenograph, L.L.C. provides goods and services to the court reporting industry. On or about August 5, 1996, Stenograph licensed its Premier Power software ("Premier Software") to a court reporter, Brenda Varlack. The Premier Software was accompanied by a software protect device, also known as a "key". Keys are programmed with a secret code, and in order for a court reporter to use Stenograph software, the key must be plugged into the parallel port of the computer. In addition, each key carries a unique serial number so Stenograph can maintain a record of its software users.

Under Stenograph's license agreement, Stenograph continues to own its software and keys and only grants the licensee the right to use the software and keys under the conditions specified in the agreement. The licensee is prohibited from transferring Stenograph's software or keys without the prior written consent of Stenograph. In the event of a violation of the license agreement, Stenograph has the right, inter alia, to terminate the license and immediately repossess its software and key.

On November 20, 1997, Varlack filed an incident report with the Philadelphia Police Department, stating that on November 19, 1997, two males jumped out of a car on Market Street and stole her black bag containing her laptop computer and a software system. Based on that police report, and pursuant to Stenograph's license agreement, Varlack was permitted to purchase replacement Premier Software and key from Stenograph at a reduced rate.

Apparently, in August and September 1998, defendant Sims contacted Stenograph's customer support service to obtain assistance using Stenograph software and the Premier Software key previously reported as stolen by Varlack. Sims claims she received the equipment and software as a gift from Varlack. Specifically, Sims asserts that Varlack left the equipment with Sims' landlord to give to Sims sometime between March and May of 1998. She also contends that Varlack wrote her a letter stating

that the equipment was a gift, but due to a flood in Sims' apartment she has been unable to find the letter.

On October 8, 1998, counsel for plaintiff sent a letter to Sims and Varlack demanding the return of both Premiere Software protect keys - the original key licensed to Varlack, and now in Sims' possession, and the replacement key obtained by Varlack after reporting the original key stolen. The letter explained that Sims had contacted Stenograph for support of the Premier Software, using the original key and claiming that Varlack had sold it to her. This letter also explained the licensing system used by Stenograph and the remedies available to Stenograph.

On October 20, 1998, Varlack sent a letter to plaintiff's counsel enclosing the replacement key, and reiterating that the original key had been stolen. On December 15, 1998, Sims wrote a letter to plaintiff's counsel explaining that the computer equipment and software had been a gift from Varlack. Sims explained that she had requested a license transfer form when she called for support, and that the forms were never sent. Sims also claimed that around September 1998, she began to receive calls from credit managers at Stenograph, accusing her of stealing the key. She explained that she wanted the calls to stop, and that she wanted to transfer the license.

On February 1, 1999, plaintiff's counsel sent Sims a letter containing a settlement offer. Sims could remit payment for the key in the amount of \$2,995 plus sales tax, or return the

key. Otherwise, Stenograph would pursue legal and equitable remedies. On April 30, 1999, plaintiff's counsel sent Sims their final demand for payment or the key before instituting the instant lawsuit for damages and injunctive relief.

Plaintiff Stenograph brings the instant summary judgment motion asserting that it is entitled to judgment as a matter of law on its claims of copyright infringement and conversion, and defendant's counterclaims of defamation, false light and wrongful use of process. Stenograph also asserts that it is entitled to immediate return of the Premier Software and key.

II. SUMMARY JUDGMENT STANDARD

A reviewing court may enter summary judgment where there are no genuine issues as to any material fact and one party is entitled to judgment as a matter of law. White v. Westinghouse Electric Co., 862 F.2d 56, 59 (3d Cir. 1988). The evidence presented must be viewed in the light most favorable to the non-moving party. Id. "The inquiry is whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one sided that one party must, as a matter of law, prevail over the other." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

The moving party has the initial burden of identifying evidence that it believes shows an absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); Childers v. Joseph, 842 F.2d 689, 694 (3d Cir. 1988). The moving party's burden may be discharged by demonstrating that there is an absence of evidence to support the nonmoving party's case. Celotex, 477 U.S. at 325. Once the moving party satisfies its burden, the burden shifts to the nonmoving party, who must go beyond its pleadings and designate specific facts by use of affidavits, depositions, admissions, or answers to interrogatories showing there is a genuine issue for trial. Celotex, 477 U.S. at 324. Moreover, when the nonmoving party bears the burden of proof, it must "make a showing sufficient to establish the existence of [every] element essential to that party's case." Equimark Commercial Fin. Co. v. C.I.T. Fin.

Servs. Corp., 812 F.2d 141, 144 (3d Cir. 1987) (quoting Celotex, 477 U.S. at 322). Summary judgment must be granted "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." White, 862 F.2d at 59 (quoting Celotex, 477 U.S. at 322).

III. DISCUSSION

A. COPYRIGHT INFRINGEMENT

Plaintiff's first claim is for copyright infringement. To prove copyright infringement, Stenograph must establish: (1) that it owns a valid copyright; and (2) that the defendant copied the copyrighted material. See Ford Motor Co. v. Summit Motor Products, Inc., 930 F.2d 277, 290 (3d Cir. 1990). Stenograph's Certificate of Registration from the U.S. Copyright Office for its Premier Software is prima facie evidence of the validity and ownership of its copyright. See id. at 290-291.

As to the second element, Sims has admitted to using the software. "If a defendant admits to using copyrighted material, that alone would make the defendant liable for copyright infringement, absent the owner's authorization." Major League Baseball Promotion v. Colour-Tex, 729 F.Supp. 1035, 1039 (D.N.J. 1990). The Court finds that even if Sims relied on a representation from Varlack that the computer and Premier Software were gifts to her, it would not effect the determination of infringement. See Fitzgerald Publishing Co. v. Baylor Publishing Co., 807 F.2d 1110, 1113 (2d Cir. 1986). The Court

determines as a matter of law that defendant Sims has infringed upon Stenograph's copyright and that she has not produced any genuine issues of material fact relating to the issue of infringement. Accordingly, summary judgment on the issue of infringement is granted in favor of plaintiff.

B. CONVERSION

Plaintiff also brings a claim for conversion, which is "the deprivation of another's right to property, or use or possession of a chattel, or other interference therewith without the owner's consent and without legal justification." Prudential Ins. Co. of America v. Stella, 994 F.Supp. 318, 323 (E.D.Pa. 1998). To be found liable for conversion, Sims is not required to have had any conscious intent of wrongdoing. See id. Simply by using Stenograph's equipment and Premier Software, Sims was using the property without the owner's consent or legal justification. Even if the software had been a gift to Sims, once Stenograph informed her that it did not belong to her and that she had no license to use it, Sims' refusal to return the key upon Stenograph's request for its return constituted conversion. See id.

Although Sims argues that the property did not belong to Stenograph because it had been sold to Varlack, that is incorrect. The agreement between Varlack and Stenograph was a license agreement. While "under the first sale doctrine, a sale of a 'lawfully made' copy terminates a copyright holder's authority to interfere with subsequent sales or distribution of

that particular copy, [a] copyright owner does not forfeit his right of distribution by entering into a licensing agreement." Adobe Systems Inc. v. One Stop Micro, Inc., 84 F.Supp.2d 1086, 1089 (N.D.Cal. 2000). A copyright owner's software cannot be transferred where the license agreement expressly forbids it. See Equinox Software Systems Inc. v. Airgas, Inc., 1997 WL 12133 (E.D.Pa. 1997). Here, Stenograph retained control of the software and explicitly stated that the license could only be transferred at the request of Varlack.

Defendant has produced no evidence of any genuine issues of material fact relating to conversion. Therefore, summary judgment is granted in favor of the plaintiff on the claim of conversion.

C. STENOGRAPH'S REQUEST FOR AN INJUNCTION

Stenograph seeks in the instant case to have its equipment and Premier Software returned by Sims. To obtain injunctive relief, Stenograph must prove: (1) a reasonable probability of success on the merits; (2) irreparable injury if the injunction does not issue; (3) that the harm to plaintiff is greater than the anticipated harm to defendant; and (4) that the injunction serves the public interest. Gerardi v. Pelullo, 16 F.3d 1363 (3d Cir. 1994).

This court has granted summary judgment in favor of the plaintiff on the claims of copyright infringement and conversion, and therefore the first requirement has been met. "A copyright plaintiff who makes out a prima facie case of infringement is

entitled to a preliminary injunction without a detailed showing of irreparable harm." Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1254 (3d Cir. 1983). Furthermore, the Court determines that any harm to Sims business is outweighed by the damage done to Stenograph by Sims' infringement. See id. at 1255. Moreover, the public interest is served by upholding the copyright. See id. Therefore the request for injunction here is granted.

D. DEFAMATION COUNTERCLAIM

Defendant has brought a counterclaim for defamation against plaintiff. Defendant contends that the October 8, 1998 letter from plaintiff's counsel contained defamatory statements and that Dennis Komorowski, a credit manager for plaintiff, made defamatory statements.

The Court finds that the letter from plaintiff's counsel to Sims and Varlack dated October 8, 1998 is privileged and therefore cannot be the basis of a defamation claim. Absolute privilege applies to communications which are issued in the regular course of judicial proceedings or preliminary to a proposed judicial proceeding and which are pertinent and material to the redress or relief sought. See Buschel v. Metrocorp., 957 F.Supp. 585, 598 (E.D.Pa. 1996). The privilege serves to encourage everyone involved in a judicial proceeding "to speak frankly and argue freely without danger or concern that they may be required to defend their statements in a later defamation

action." Smith v. Griffiths, 327 Pa.Super. 418, 422, 476 A.2d 22, 24 (1984).

With respect to the statements made by Komorowski, Sims must prove each of the following: (1) the defamatory character of the communication; (2) its publication by the defendant; (3) its application to the plaintiff; (4) the understanding by the recipient of its defamatory meaning; (5) the understanding by the recipient that it is intended to be applied to the plaintiff; (6) special harm resulting to the plaintiff; and (7) abuse of a conditionally privileged occasion. See Furillo v. Dana Corp. v. Parish Div., 866 F.Supp. 842, 847 (E.D.Pa. 1994).

Assuming arguendo, that Sims is correct in her allegations that Komorowski told her she had stolen the products, and she in fact did not steal the product, then Komorowski's statements would be defamatory. However, Sims has failed to produce any evidence of the other elements of a defamation claim: whether the statement was published; whether anyone overheard the statement; whether any hearer would have known the statements applied to Sims; and any special harm to Sims. By failing to produce evidence of all of the elements of defamation, Sims has failed to show that there are any genuine issues of material fact concerning her defamation claim.

E. FALSE LIGHT COUNTERCLAIM

Defendant also raises a counterclaim for false light.

"One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if: (1) the false light in which the other was placed would be highly offensive to a reasonable person; and (2) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed." Neish v. Beaver Newspapers, Inc., 398 Pa.Super. 588, 598, 581 A.2d 619, 624 (1990). To place Sims in a false light, the comments by Stenograph must be untrue. See id.

The letter from Stenograph's counsel to Sims and Varlack did not contain any information which was untrue. Even if the letter had contained information which was untrue, plaintiff's counsel has absolute privilege, precluding the letter from qualifying as a basis of a false light claim.

The telephone calls from Komorowski to Sims, if the allegations are true, may be considered untrue comments.¹ However, the statements must also have been publicized. To satisfy publicity, the matter must be made public, communicated to the public at large, or to so many people that it is substantially certain to become public knowledge. See Kryeski v. Schott Glass Technologies, Inc., 426 Pa.Super. 105, 118, 626 A.2d

¹The Court has not found that Sims stole the software and key.

595, 602 (1993). The Court determines that the phone calls from Komorowski to Sims cannot be considered to have been made public. Sims has presented no evidence that the subject of these phone calls was ever communicated to others so that it could be considered a matter of public knowledge.

The Court finds defendant has produced insufficient evidence to support the false light claim. Accordingly, summary judgment is granted for plaintiff as to defendant's counterclaim for false light.

F. WRONGFUL USE OF PROCESS COUNTERCLAIM

Defendant's final counterclaim is for wrongful use of process. In Pennsylvania, abuse of process is defined as "the improper use of process after it has been issued, that is, a perversion of it." Caplan v. Fellheimer Eicher Kaskey & Braverman, 884 F.Supp. 181, 182 (E.D.Pa. 1995). A claim for abuse of process is sustained not by wrongful initiation of a suit, but perversion of the legal process once a suit has been started. See id. at 182-183.

Defendant, in her Amended Complaint, claims that the instant suit was brought for some other purpose than stated in the Complaint, and that it was instituted with a malicious motive and lacking probable cause. Defendant, however, has produced no evidence that Stenograph's actions after initiation of the suit were a perversion of the legal process. Accordingly, summary judgment as to the wrongful use of process claim is granted in favor of plaintiff.

This Court finds that upon consideration of the evidence submitted in conjunction with plaintiff's Motion for Summary Judgment and defendant's Response thereto, summary judgment shall be granted in favor of plaintiff for plaintiff's claims for copyright infringement and conversion as well as defendant's counterclaims for defamation, false light, and wrongful use of process.

Clarence C. Newcomer, S.J.

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v.	:	
	:	
FRANCINE SIMS,	:	
Defendant	:	NO. 99-5354

O R D E R

AND NOW, this day of July, 2000, upon consideration of defendants' Motion for Summary Judgment, and plaintiff's response thereto, it is hereby ORDERED as follows:

(1) Plaintiff's Motion is GRANTED.

(2) JUDGMENT shall be ENTERED for plaintiff and against defendant on plaintiff's claims for copyright infringement and conversion as well as defendant's counterclaims for defamation, false light, and wrongful use of process.

(3) Plaintiff is entitled to the immediate return of all copies of the Premier Power Software and the software protect device or key in the possession of defendant Francine Sims. Defendant shall deliver the Premier Power Software and key to the office of Stenograph's local counsel, Kelly McLaughlin & Foster, 1617 JFK Boulevard, Suite 1690, Philadelphia, PA 19102 within 15 days of this Order.

(4) The parties shall file all pretrial memoranda, including, proposed findings of fact and conclusions of law, on the remaining issues of trade secret misappropriation and damages. The Final Pretrial Conference in this matter shall be

held in Chambers on July 18, 2000 at 3:15 PM as originally scheduled.

AND IT IS SO ORDERED.

Clarence C. Newcomer, S.J.