

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JAMES BASS,

Plaintiff,

-vs-

Civil Action No.
5:19-CV-566-TJM-ATB

SYRACUSE UNIVERSITY,

Defendant.

**SYRACUSE UNIVERSITY'S RESPONSIVE STATEMENT OF MATERIAL FACTS IN
OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

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Defendant Syracuse University (the “University”), pursuant to Fed. R. Civ. P. 56 and Rule 7.1 of the Local Rules of Civil Practice, submits this Responsive Statement of Material Facts in opposition to the motion for partial summary judgment filed by Plaintiff James Bass (“Plaintiff”).

RESPONSE TO PLAINTIFF’S STATEMENT OF MATERIAL FACTS

1. Bass is a professional photographer who is in the business of licensing his work for a fee [Declaration of James Bass, dated May 28, 2020 (“Bass Declr.”), ¶ 2]

University’s Response: Admit that Plaintiff is a former professional photographer who discontinued his business in November 2018. (Declaration of John D. Cook, dated June 26, 2020 (“Cook Decl.”), Ex. A at 19:17-20:1.)

2. Syracuse is a private university with address at 900 South Crouse Avenue, Syracuse, New York 13244. [Compl. ¶ 6; Answer, ¶ 6].

University’s Response: Admit.

3. Plaintiff photographed members of the 2018 Syracuse basketball team, specifically Oshae Brissett (Player #11) and Tyrus [sic] Battle (Player # 25) (the “Photographs”). [Bass Decl. ¶ 3, Ex. A]

University’s Response: Admit that Plaintiff took photographs of certain members of the 2018-2019 Syracuse University’s Men’s Basketball Team, including Oshae Brissett and Tyus Battle.

4. Plaintiff is the author of the Photographs and has at all times been the sole owner of all right, title and interest in and to the Photographs, including the copyright thereto. [Bass Decl. ¶ 4, Ex. A]

University’s Response: Admit that Plaintiff is the author of certain photographs of members of the 2018-2019 Syracuse University’s Men’s Basketball Team, including

Oshae Brissett and Tyus Battle, and that he is the owner of copyrights for such photographs, but deny that he is the “sole owner of all right, title and interest in and to [those] photographs” to the extent the statement is intended to suggest that the University does not have a license to the photographs, which it does. (Complaint, Dkt. 1 at ¶ 12; Declaration of Jordan Kligerman, dated June 23, 2020 (“Kligerman Decl.”), ¶¶ 15-17.)

5. Plaintiff licensed the Photographs to Defendant for certain uses. Specifically, Defendant was permitted to use the Photographs on its own social media accounts, but not on commercial billboards, third-party cross promotion purposes or any other commercial purpose. [Bass Decl. ¶ 7]

University’s Response: Admits that Plaintiff licensed photographs he took of certain members of the 2018-2019 Syracuse University’s Men’s Basketball Team, including Oshae Brissett and Tyus Battle to the University, and deny that such license was limited to “its own social media accounts.” Rather, the license provided to the University by Plaintiff was not restricted in scope. (Kligerman Decl., ¶¶ 15-17.)

6. Plaintiff never authorized Defendant to display the Photographs on billboards. Bass Decl. ¶ 7]

University’s Response: Deny. The license provided to the University by Plaintiff was not restricted in scope. (Kligerman Decl., ¶¶ 15-17.)

7. Plaintiff did not enter into any written contract with Defendant. [Bass Decl. ¶ 8]

University’s Response: Admit.

8. Based on oral communications with a Syracuse University’s employee, Plaintiff understood that he was providing the Photographs for use on Defendant’s social media accounts in exchange for a flat fee. [Bass Decl. ¶ 8]

University's Response: Admit that Plaintiff was paid a flat fee to take photographs of certain members of the 2018-2019 Syracuse University's Men's Basketball Team, including Oshae Brissett and Tyus Battle, but deny that permitted use of such photographs by the University was limited to its "social media accounts." The license provided to the University by Plaintiff was not restricted in scope. (Kligerman Decl., ¶¶ 6, 15-17.)

9. Plaintiff never agreed to permit the Photographs to be used for commercial purposes, such as on billboards, third-party cross promotion purposes or any other commercial purpose. [Bass Decl. ¶ 8]

University's Response: Deny. The license provided to the University by Plaintiff was not restricted in scope. (Kligerman Decl., ¶¶ 15-17.)

10. Defendant used the Photographs on a billboard, thereby exceeding the scope of the oral licensing agreement. [Bass Decl. ¶ 9, Ex. C]

University's Response: Admit that the University used two photographs taken by Plaintiff of certain members of the 2018-2019 Syracuse University's Men's Basketball Team, namely Oshae Brissett and Tyus Battle, on a billboard, but deny that such use exceeded the scope of the license provided by Plaintiff because such license was not restricted in scope. (Kligerman Decl., ¶¶ 15-17.)

11. Plaintiff first became aware of the Defendant's infringing activities in November 2018 with respect to unauthorized use on a billboard and then later in March 2019 with respect to third-party cross-promotional materials. [Bass Decl. ¶ 9]

University's Response: Admit that Plaintiff first became aware of the University's use of two photographs taken by Plaintiff of certain members of the 2018-2019 Syracuse University's Men's Basketball Team, namely Oshae Brissett and Tyus Battle, on a

billboard, at least as early as November 28, 2018, and first became aware of certain social media posts that utilized photographs taken by Plaintiff at least as early as March 13, 2019, but deny that either use was infringing because the license provided to the University by Plaintiff was not restricted in scope. (Kligerman Decl., ¶¶ 12, 14, 15-17.)

12. Defendant did not license the Photographs from Plaintiff for uses besides social media, nor did Defendant have Plaintiff's permission or consent to publish the Photographs in media other than social media. [Bass Decl. ¶ 10]

University's Response: Deny. The license provided to the University by Plaintiff was not restricted in scope. (Kligerman Decl., ¶¶ 15-17.)

13. Plaintiff's counsel in this action, Liebowitz Law Firm, PLLC (the "Firm"), follows a routine practice of registering photographs with the U.S. Copyright Office (the "USCO") on behalf of the Firm's clients. [Declaration of Donna Halperin, dated May 29, 2020 ("Halperin Declr."), ¶ 4]

University's Response: Deny knowledge or information sufficient to form a belief as to the veracity of the alleged fact, but admit for the limited purpose of this motion.

14. Plaintiff authorized the Firm to register the Photograph with the USCO on his behalf. [Halperin Declr., ¶ 6]

University's Response: Deny knowledge or information sufficient to form a belief as to the veracity of the alleged fact, but admit for the limited purpose of this motion.

15. The photograph depicting Oshae Brissett (Player #11) was registered with the U.S. Copyright Office ("USCO"), was deposited with the USCO under content tile "09.21.18_cuse_mbb_082.jpg" and was given registration number no. VA 2-144-189 (the "186 Registration"). [Bass Decl. ¶ 5, Ex. B; Halperin Declr. ¶ 7]

University's Response: Admit.

16. The photograph depicting Tyrus [sic] Battle (Player #25) was registered with the USCO and was deposited with the USCO under content title "09.21.18_cuse_mbb_195.jpg" as part of the 186 Registration. [Bass Decl. ¶ 5, Ex. B; Halperin Declr. ¶ 8]

University's Response: Admit that the photograph depicting Tyus Battle was registered with the USCO and was deposited with the USCO under content title "09.21.18_cuse_mbb_196.jpg" as part of the 186 Registration.

17. Plaintiff obtained the 186 Registration on March 21, 2019, within five years after the first publication of the Photographs, which took place on September 21, 2018. [Bass Declr. ¶¶ 5-6, Ex. B]

University's Response: Admit.

18. The Firm's registration of the Photograph on Bass' behalf was carried out in accordance with the Firm's routine practice of registering photographs with the USCO on behalf of its clients. [Halperin Declr. ¶ 9]

University's Response: Deny knowledge or information sufficient to form a belief as to the veracity of the alleged fact, but admit for the limited purpose of this motion.

RESPONSIVE STATEMENT OF MATERIAL FACTS

1. It is the University's regular practice to hire external photographers to take photographs of its intercollegiate sports teams for internal and external promotional use, where the University obtains the exclusive rights to the photographs. (Kligerman Decl., ¶ 4.)

2. Plaintiff agreed to conduct the September 21, 2018 photoshoot with members of the University's men's basketball team and coaching staff in exchange for a \$450 payment from the University, which was the University's standard rate provided to other photographers in connection with similar engagements. (Kligerman Decl., ¶ 6.)

3. Plaintiff received the \$450 payment from the University. (Cook Decl., Ex. A at 101:7-13; Kligerman Decl., ¶ 9.)

4. Plaintiff also received two tickets to the University's men's basketball team's game versus the University of Pittsburgh, which occurred on January 19, 2019. (Kligerman Decl., ¶¶ 9, 13.)

5. Plaintiff does not like to conduct oral negotiations or enter into verbal agreements because he "want[s] there to be a paper trail so that nothing is misconstrued or misunderstood." (Cook Decl., Ex. A at 36:3-8.)

6. Plaintiff did not provide, request, or execute a written agreement with the University in connection with the September 21, 2018 photoshoot. (Kligerman Decl., ¶ 6.)

7. Plaintiff only had one telephone call with Jordan Kligerman, which took place on or about September 18, 2018. (Cook Decl., Ex. A at 35:15-38:18; Kligerman Decl., ¶ 5.)

8. During Plaintiff's telephone call with Mr. Kligerman, Mr. Kligerman explained the purpose of the September 21, 2018 photoshoot and how the photographs taken could be utilized

by the University, including for social media postings, tickets, programs, posters, billboards, in game visuals, and other promotional purposes. (Kligerman Decl., ¶¶ 3, 6.)

9. During Plaintiff's telephone call with Mr. Kligerman, Plaintiff did not state that use by the University of the photographs taken during the September 21, 2018 photoshoot would be limited in any way, including as to medium, use, location, time frame, or otherwise. (Cook Decl., Ex. A at 38:16-18; 51:19-24; Kligerman Decl., ¶ 6.)

10. During text messages exchanged between Plaintiff and Mr. Kligerman, Plaintiff did not state that use by the University of the photographs taken during the September 21, 2018 photoshoot would be limited in any way, including as to medium, use, location, time frame, or otherwise. (Cook Decl., Ex. A at 38:22-25; Kligerman Decl., ¶ 15.)

11. During email exchanges between Plaintiff, Mr. Kligerman, and/or other University representatives, Plaintiff did not state that use by the University of the photographs taken during the September 21, 2018 photoshoot would be limited in any way, including as to medium, use, location, time frame, or otherwise. (Cook Decl., Ex. A at 39:1-21; Kligerman Decl., ¶ 7.)

12. During discussions between Plaintiff, Mr. Kligerman, and/or other University representatives that occurred during the September 21, 2018 photoshoot, Plaintiff did not state that use by the University of the photographs taken during the photoshoot would be limited in any way, including as to medium, use, location, time frame, or otherwise. (Cook Decl., Ex. A at 42:18-43:15; Kligerman Decl., ¶ 15.)

13. Plaintiff did not ever "have any specific conversations with Mr. Kligerman, or anyone else associated with Syracuse University, concerning the scope of the license that would be applicable to the photographs that [he took] and provid[ed]" during the September 21, 2018 photoshoot. (Cook Decl., Ex. A at 51:6-11; Kligerman Decl., ¶ 15.)

14. Plaintiff never stated to Mr. Kligerman or any other University representative that the University was “not allowed to use [the] photographs [from the September 21, 2018 photoshoot] for anything other than social media.” (Cook Decl., Ex. A at 51:19-24; 71:20-72:6; Kligerman Decl., ¶¶ 15-16.)

15. At the conclusion of the September 21, 2018 photoshoot, Plaintiff provided the University with a memory card that contained approximately 900 photographs, which were copied by the University and the memory card was returned to Plaintiff. (Kligerman Decl., ¶ 8.)

16. The University was permitted to use the photographs taken by Plaintiff during the September 21, 2018 photoshoot in whatever manner it chose – its use was not limited in any way, including as to medium, use, location, time frame, or otherwise. (Kligerman Decl., ¶ 17.)

17. The University only utilized the photographs taken by Plaintiff during the September 21, 2018 photoshoot for social media postings and a billboard. (Kligerman Decl., ¶ 10.)

18. The billboard was located near the University, alongside Interstate 81, and was present for a three-month period from October 15, 2018 through January 15, 2019. (Kligerman Decl., ¶ 11.)

19. Plaintiff first learned on or before November 28, 2018 that the University utilized certain of the photographs taken by Plaintiff during the September 21, 2018 photoshoot on a billboard. (Cook Decl., Ex. B at Response to Interrogatory No. 5; Cook Decl., Ex. A at 105:18-106:19; Kligerman Decl., ¶ 12 and Ex. 1.)

20. On November 28, 2018, Plaintiff sent Mr. Kligerman an email, which stated, among other things, “I’ve been seeing the photos all over, even on a billboard next to I-81 if I’m not mistaken.” (Kligerman Decl., ¶ 12 and Ex. 1.)

21. On or before November 28, 2018, Plaintiff did not allege, claim, or suggest that utilization of the photographs on the billboard was improper, violated an agreement of the parties, or constituted infringement. (Cook Decl., Ex. A at 59:23-60:1-6; 106:20-24; Kligerman Decl., ¶ 12.)

22. On January 22, 2019, Plaintiff sent Mr. Kligerman an email thanking him for the requested tickets to the University of Pittsburgh game. (Kligerman Decl., ¶ 13 and Ex. 1.)

23. On or before January 22, 2019, Plaintiff did not allege, claim, or suggest that utilization of the photographs on the billboard was improper, violated an agreement of the parties, or constituted infringement. (Kligerman Decl., ¶ 13.)

24. On March 13, 2019, Plaintiff sent Mr. Kligerman an email taking issue with the use of certain photographs that he took on a social media post made by the University on Instagram, and claimed for the first time that “I never signed a release or agreement with the university granting them any sort of usage rights.” (Kligerman Decl., ¶ 14 and Ex. 2.)

25. On or before March 13, 2019, Plaintiff did not allege, claim, or suggest that utilization of the photographs on the billboard was improper, violated an agreement of the parties, or constituted infringement. (Cook Decl., Ex. A at 96:8-97:9; Kligerman Decl., ¶ 15.)

26. At no time prior to March 13, 2019, including during any oral or written communications with Mr. Kligerman or any other University representative, did Plaintiff ever expressly or impliedly state that use by the University of the photographs taken during the September 21, 2018 photoshoot was limited in any way, including as to medium, use, location, time frame, or otherwise. (Kligerman Decl., ¶ 15.)

27. Plaintiff “never told anyone affiliated with Syracuse University that they could not use the copyrighted photographs on a billboard.” (Cook Decl., Ex. A at 93:18-21.)

28. The first time that Plaintiff alleged, claimed, or suggested that utilization of the photographs on the billboard was improper, violated an agreement of the parties, or constituted infringement occurred on May 13, 2019, when Plaintiff filed his Complaint in this case. (Cook Decl., Ex. A at 62:25-63:14; Kligerman Decl., ¶ 12; Dkt. 1.)

29. Plaintiff understood that the photographs he took during the September 21, 2018 photoshoot would be used by the University for social media. (Cook Decl., Ex. A at 35:15-36:8; 37:25-38:2.)

30. Twitter, Instagram, and Facebook are forms of social media. (Cook Decl., Ex. A at 37:20-22; 70:18-20.)

31. Plaintiff licensed the University to use the photographs taken during the September 21, 2018 photoshoot on Twitter, Instagram, and Facebook. (Cook Decl., Ex. A at 71:9-13.)

32. Plaintiff never stated to Mr. Kligerman or any other University representative that the University was permitted to use the photographs taken during the September 21, 2018 photoshoot on social media, “so long as [the University] does not include information concerning any other commercial endeavor.” (Cook Decl., Ex. A at 77:24-78:5.)

33. Plaintiff “never told anyone affiliated with Syracuse University that they could not use [his] copyrighted photographs on an Instagram post that also included the logo of someone else’s business.” (Cook Decl., Ex. A at 93:22-94:2.)

Dated: June 26, 2020

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