08-2376-cv
Lava Records LLC v. Amurao

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV/). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan Courthouse, 500 Pearl Street, in the City of New York, on the 16th day of November, two thousand nine.

Present:

JOHN M. WALKER, JR.,
ROBERT A. KATZMANN,
JANE R. ROTH,[*]

Circuit Judges.

LAVA RECORDS LLC, a Delaware limited liability company, WARNER BROS. RECORDS INC., a Delaware corporation, CAPITAL RECORDS INC., a Delaware corporation, UMG RECORDINGS INC, a Delaware corporation, SONY BMG MUSIC ENTERTAINMENT, a Delaware general partnership, ARISTA RECORDS LLC, a Delaware limited liability company, BMG MUSIC, a New York general partnership, doing business as The RCA Record Label,

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[*] The Honorable Jane R. Roth, of the United States Court of Appeals for the Third Circuit, sitting by designation.

Plaintiffs-Counter-Defendants-Appellees,

v. No. 08-2376-cv

ROLANDO AMURAO,

Defendant-Counter-Claimant-Appellant.

For Appellant: RICHARD A. ALTMAN, New York, NY

For Appellees: TIMOTHY M. REYNOLDS (Laurie J. Rust, *on the brief*), Holme, Roberts & Owen LLP, Boulder, CO

Appeal from the United States District Court for the Southern District of New York (Brieant, *J.*).

ON CONSIDERATION WHEREOF, it is hereby **ORDERED**, **ADJUDGED**, and **DECREED** that the judgment of the district court be and hereby is **AFFIRMED**.

Defendant-Counter-Claimant-Appellant Rolando Amurao appeals from so much of the judgment of the district court entered on April 15, 2008, as (1) denied his motion for attorneys fees and (2) dismissed his counterclaim for copyright misuse. We assume the parties' familiarity with the facts, procedural history, and specification of issues on appeal.

The district court has discretion to award attorneys fees to the prevailing party in a copyright action in the exercise of its "equitable discretion," *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994), and we see no abuse of that discretion here, in light of, *inter alia*, the evidence plaintiffs possessed pointing to Amurao as the infringing party prior to filing suit, including Amurao's pre-suit written admission to the plaintiffs that "[w]e downloaded the songs [in question] through a program called Lime Wire," Amurao's subsequent less-than-candid responses

to plaintiffs' discovery requests, and the plaintiffs' efforts to terminate this case quickly once it became clear through discovery that another member of Amurao's household, rather than Amurao himself, had, in fact, downloaded the copyrighted materials. *See Matthew Bender & Co. v. W. Publ'g Co.*, 240 F.3d 116, 122 (2d Cir. 2001) ("[T]he imposition of a fee award against a copyright holder with an objectively reasonable litigation position will generally not promote the purposes of the Copyright Act."); *see also Virgin Records Am., Inc. v. Thompson*, 512 F.3d 724 (5th Cir. 2008) (upholding the district court's denial of fees in a case with facts similar to those presented here). Nor do we see any merit in Amurao's argument, that the district court did not properly consider relevant factors before exercising its discretion. *See Fogerty*, 510 U.S. at 534 & n.19 (noting that "[t]here is no precise rule or formula" for making determinations about attorneys fees in copyright cases and listing some factors that "*may* be used to guide courts' discretion" (emphasis added)). Finally, to create, as Amurao asks, a presumption that in a certain type of copyright case a prevailing defendant should receive attorneys fees as a matter of course would be contrary to the statutory language, *see* 17 U.S.C. § 505 ("[T]he court *may* . . . award a reasonable attorney's fee to the prevailing party as part of the costs." (emphasis added)), as construed by the Supreme Court and this Court. *See Fogerty*, 510 U.S. at 533 ("The statute says that 'the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.' The word 'may' clearly connotes discretion. *The automatic awarding of attorney's fees to the prevailing party would pretermit the exercise of that discretion*." (emphasis added)); *Matthew Bender*, 240 F.3d at 121 (noting that "the standard governing the award of attorneys' fees under section 505 *should be identical for prevailing plaintiffs and prevailing defendants*" (emphasis added) (citing *Fogerty*, 510 U.S. at 534)). To the extent that Amurao relies on case law from other circuits to

support the creation of such a presumption, we find those cases unpersuasive.

We also decline to create an independent cause of action for "copyright misuse," as Amurao urges us to do. Amurao, who has cited no case in which "copyright misuse" was allowed as an independent cause of action for damages rather than as a defense to an infringement claim, has not made a persuasive case for the creation of such a cause of action here.

For the foregoing reasons, the judgment of the district court is **AFFIRMED**.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK

By:_____