

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SCOTT BOEHM and DAVID STLUKA,

Plaintiffs,

v.

OPINION & ORDER

15-cv-379-jdp

SHEELS ALL SPORTS, INC., SCOTT SVEHLA,
SCOTT'S BREWERY COLLECTIBLES,
NICHOLAS MARTIN,
SPORTS-4-LESS, LUKE WEIN,
BEYOND STUDIO + PUBLISHING, LLC,
JOHN DOE 1, SCOOTER G SPORTS,
MICHAEL LOVELACE, 22 PROMOTIONS, LLC,
GERALD MILLER, ANDREW WREDBERG,
AW ARTWORKS, LLC, JESSE WINIECKI,
AMANDA MCVEIGH, JOHN GEORGE,
GAMEDAY SPORTS, ANGELA CLEARY,
EVENT USA CORP., BRIAN BOPREY,
NANCY BOPREY, DAVID THOMASON,
WAUKESHA SPORTSCARDS,
ROBB DOBRATZ, and MICHAEL CLEARY,

Defendants,

STATE FARM FIRE AND CASUALTY COMPANY,

Intervenor,

and

SCOTT'S BREWERY COLLECTIBLES and SCOTT SVEHLA,

Third-Party Plaintiffs,

v.

WEST BEND MUTUAL INSURANCE COMPANY,

Third-Party Defendant.

Plaintiffs Scott Boehm and David Stluka have moved for sanctions against certain defendants for violating the court's order for preliminary injunction. Dkt. 103 and Dkt. 124.¹

¹ Plaintiffs have also moved for leave to file a reply brief in support of one of the motions.

Plaintiffs seek significant fines, directed verdicts, and judgments of willfulness against Angela Cleary, Gameday Sports, and Nicholas Martin. The court would grant plaintiffs' motions in part: it would impose remedial civil contempt sanctions on the offending defendants and require them to pay plaintiffs' reasonable attorney fees in bringing the motions. But plaintiffs have not clearly articulated what remedial relief they seek. Most of the requested sanctions are not remedial but punitive, which requires that the court afford defendants due process before imposing such sanctions. *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 826 (1994). Therefore, the court will require defendants to show cause and set a hearing to consider what sanctions would be appropriate.

None of these sanctions will apply to defendant Michael Cleary, because he was not bound by the injunction until September 24, 2015. Dkt. 133.

A. Background

Plaintiffs moved for a preliminary injunction to keep defendants from infringing their copyrights and to preserve evidence while this case proceeds. Dkt. 2. Most of the defendants (of those that had been served at that point) opposed the injunction as unnecessary, contending that they had voluntarily stopped using plaintiffs' photographs. The court set a hearing on the motion for preliminary injunction for August 14, 2015.

Through counsel, defendants Gameday Sports and Angela Cleary told the court that they had already voluntarily stopped using plaintiffs' images. Dkt. 36, at 3-4. Michael Cleary, although not yet named as a defendant, submitted an affidavit in which he denied that Gameday Sports had any of plaintiffs' photographs for sale or displayed on its websites. Dkt. 37. Gameday Sports and Angela Cleary asked to be excused from appearing at the

Dkt. 136. The motion will be granted and the reply is accepted.

hearing and they expressly waived any objection to whatever injunction the court would issue. Dkt. 77. The court excused their appearance, “with the understanding that these defendants have waived objections to any injunction that the court may impose following the hearing.” Dkt. 79.

Defendant Nicholas Martin (d/b/a Sports-4-Less) also opposed the injunction as unnecessary because, he claimed, he had voluntarily complied with plaintiffs’ cease and desist letter long before plaintiffs filed their complaint. Dkt. 42. Martin submitted a declaration in which he stated that he had removed plaintiffs’ photographs from display in his store and that he had not copied, displayed, or sold any of plaintiffs’ photographs since about February 25, 2015. Dkt. 43.

The court held a hearing on the motion for injunction on August 14, 2015. Gameday Sports and Angela Cleary did not appear. Martin appeared by counsel and pressed his objection that an injunction was unnecessary. At the hearing, the court informed the parties that it would issue an injunction. *See* Dkt. 130. Three days later, on August 17, the court issued a proposed order, indicating that it was at that point binding only on those defendants that had been served. Dkt. 84. The court gave the parties until August 20 to object to the form of the order. Defendant Martin objected to the form of the injunction on the grounds that prohibitions related to photographs “by” plaintiffs was not sufficiently specific. Dkt. 91. The court issued the final order for injunction on September 9, which identified the enjoined photographs in an attachment. Dkt. 107. The attachment was Exhibit 1 from the complaint, which specifically identified the 343 photographs in which plaintiffs had registered their copyrights.

B. Violations of the injunction

Plaintiffs discovered that the Clearys and Gameday Sports were out of compliance before the final version of the injunction issued. On August 29, 2015, plaintiffs identified products displayed for sale at the Gameday Sports store that used four of the enjoined photographs.² Dkt. 105. Angela Cleary and Gameday Sports do not dispute that they had the infringing copies, but they contend that their violations of the injunction were unintentional. Dkt. 121. Michael Cleary had not been served and was not bound by the injunction until September 24, 2015. Dkt. 133.

Martin, too, was out of compliance immediately. On September 16, 2015, Martin reported to the court that he had “no reproductions in his possession of photographs identified as ‘covered photographs’ in the Court’s Preliminary Injunction.” Dkt. 120. But the next day, plaintiffs filed a motion for sanctions, with a declaration identifying two enjoined photographs³ that Martin was using for online sales. Dkt. 126. Martin admits that in fact he had failed to remove some products using the enjoined photographs, although he contends that his violation of the injunction was inadvertent. Dkt. 147.

C. Sanctions

Injunction violations merit the court’s use of the contempt power to impose sanctions. *S.E.C. v. Homa*, 514 F.3d 661, 674 (7th Cir. 2008) (“The court whose order was defied must enforce the injunction through the contempt power because contempt is, in essence, an affront to the court that issues the order.”). To sustain their claim for civil contempt,

² Copyright registration nos. VA0001840332, VAv0001791990, VAu001089115, and VAu001089115.

³ Copyright registration nos. VA0001791990 and VAu0001086210.

plaintiffs must show that: (1) a court order set forth an unambiguous command; (2) defendants violated that command; (3) the violation was significant, meaning that they did not substantially comply with the order; and (4) defendants failed to take steps to reasonably and diligently comply with the order. *Prima Tek II, L.L.C. v. Klerk's Plastic Indus., B.V.*, 525 F.3d 533, 542 (7th Cir. 2008). Only element four is in dispute, as the offending defendants oppose sanctions on the ground that their violations were unintentional. If defendants' failure to satisfy their obligations and comply with the injunction "was the result of at least negligence, which is a degree of fault sufficient for imposing sanctions," then sanctions are warranted. *e360 Insight, Inc. v. Spamhaus Project*, 658 F.3d 637, 642-43 (7th Cir. 2011).

The offending defendants' violations of the injunction were at least negligent. The injunction order required the defendants that were bound by the injunction to collect and segregate all reproductions of the enjoined photographs. But apparently, the Clearys and Martin did not search their inventories thoroughly until plaintiffs filed their motions for sanctions. The court is not persuaded that defendants did not know what photographs were at issue until the final version of the injunction issued because the attachment to the injunction is Exhibit 1 to the complaint. Their carelessness is all the more apparent because they had assured the court that the injunction was unnecessary because they were done selling infringing products.

The court finds, preliminarily, that Angela Cleary, Gameday Sports, and Nicholas Martin are in contempt, and that remedial sanctions for civil contempt would be appropriate. Plaintiffs have asked for lavish fines and judgments of liability. But, as plaintiffs appear to recognize, these sanctions are partly punishment. Plaintiffs have not clearly identified the

remedial sanctions to which they would be entitled. The court will defer consideration of precisely what remedial sanctions are warranted until it holds a hearing.

Despite the outrage expressed in plaintiffs' briefs, the court is not persuaded that the offending conduct warrants punitive sanctions. And, even if punitive sanctions are ultimately warranted, the court must provide full due process to the offending defendants before imposing them. *F.T.C. v. Trudeau*, 579 F.3d 754, 769 (7th Cir. 2009). Indeed, "[i]f any part of [the sanction] winds up being punitive instead of remedial, then criminal proceedings are required to sustain it." *Id.* at 770. Criminal sanctions require proof beyond a reasonable doubt. *Id.* at 769 (citing *Bagwell*, 512 U.S. at 826-27).

Accordingly, the court will order Angela Cleary, Gameday Sports, and Nicholas Martin to show cause why they should not be sanctioned for contempt, including potentially for criminal contempt, for their violations of this court's order for injunction. Although Michael Cleary was not bound by the injunction at the time plaintiffs filed their motion, Michael Cleary is ordered to show cause why he should not be sanctioned for submitting a false affidavit (Dkt. 37) to the court. The court will schedule a hearing on the show-cause orders and plaintiffs' motions for sanctions to be held in approximately 14 days.

Other defendants are not required to appear at the hearing. Those wishing to appear by telephone should submit a written request to the court.

ORDER

IT IS ORDERED that:

1. Plaintiffs Scott Boehm and David Stluka's motion for leave to file a reply, Dkt. 136, is GRANTED.

2. Ruling on plaintiffs' motions for sanctions, Dkt. 103 and Dkt. 124, is DEFERRED to the future hearing.
3. The court will hold an in-person hearing to discuss the propriety of criminal sanctions for defendants' violation of the injunction order. The court will contact the parties to schedule the hearing.

Entered October 26, 2015.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge