

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division
CASE NO. 97-3924-CIV-SIMONTON

JERRY GREENBERG, individually,
and IDAZ GREENBERG, individually,

Plaintiffs,

vs.

NATIONAL GEOGRAPHIC
SOCIETY, a District of Columbia
corporation, NATIONAL GEOGRAPHIC
ENTERPRISES, INC., a corporation,
and MINDSCAPE, INC., a
California corporation,

Defendants.

**PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION
TO STRIKE PLAINTIFFS' DEMAND FOR A JURY TRIAL;
ALTERNATIVELY, MOTION FOR DESIGNATION OF JURY TRIAL;
AND INCORPORATED MEMORANDUM OF LAW**

Plaintiffs, JERRY GREENBERG and IDAZ GREENBERG (together "Greenberg"),
herewith respond to Defendants' Motion to Strike Plaintiffs' Demand for a Jury Trial, filed by
defendants NATIONAL GEOGRAPHIC SOCIETY, NATIONAL GEOGRAPHIC
ENTERPRISES, and MINDSCAPE, INC. (collectively "the Society"). The motion should be
denied because Greenberg timely filed a demand for jury trial pursuant to the Federal Rules of
Civil Procedure. Alternatively, pursuant to Rule 39 (b), the Court should exercise its discretion
and order a trial by jury of all issues as to damages.

MEMORANDUM OF LAW

A Procedural Chronology

The key events pertinent to the motion are as follows:

December 5, 1997	Original Complaint filed
December 23, 1997	Amended Complaint filed
January 30, 1998	Defendants' Motion for Partial Summary Judgment filed
November 5, 2001	Defendants' Answers filed
November 13, 2001	Plaintiffs' motion to strike answers filed
November 13, 2001	Plaintiffs' demand for jury trial as to damage issues filed
January 11, 2002	Order striking the defendants' answers

The motion filed by the defendants on January 30, 1998 tolled the time for a response to the Amended Complaint because the motion was brought pursuant to Rule 12 (b)(6) and alternatively pursuant to Rule 56. The Court considered matters outside the Amended Complaint and granted summary judgment as to Counts III and V, both of which are still being litigated as to damages. When the Eleventh Circuit reversed the summary judgment order and held that the defendants had infringed the Greenberg copyrights, the defendants answered the Amended Complaint on November 5, 2001. The chronology above shows actions taken thereafter by Greenberg.

The Applicable Law as to Demand for Jury Trial

Rule 38 (b), Federal Rules of Civil Procedure, provides that “[a]ny party may demand a trial by jury of any issue triable of right by a jury” by serving a demand for jury trial “not later

than 10 days after the service of the last pleading directed to such issue.”¹ Trial by jury of statutory damage claims was not permitted under the Copyright Act until 1998, when the Supreme Court held that the Seventh Amendment provision for jury trials is applicable to a determination of statutory damages under the Act. Feltner v. Columbia Pictures Television, 523 U.S. 340 (1998). The definition of “pleading” in Rule 7 includes a complaint and an answer to the complaint. Thus, the defendants’ answers filed on November 5, 2001 were “pleadings” as contemplated in Rule 38 (b).

Eight days after the filing of the answers, Greenberg filed a demand for jury trial as to damages. On the same day, November 13, 2001, Greenberg filed a motion seeking, in part, to strike the answers. The Court granted Greenberg’s motion, and on January 11, 2002 entered an order striking the defendants’ answers.

Greenberg Did What the Rules Required

The Society now contends that the demand for jury trial was untimely because, two months after Greenberg made the demand, the Court struck the answers as untimely. For the purpose of a jury demand, the defendants propose that the most recent pleading that survived the Court’s order on January 11, 2002, was the Amended Complaint. The motion cites to no legal authority for such a conclusion. Because Greenberg did not demand a jury trial within 10 days of the filing of the Amended Complaint, goes the argument, Greenberg has waived such a

¹ The defendants cite to Communications Maint., Inc. v. Motorola, Inc., 761 F.2d 1202 (7th Cir. 1985), for the proposition that the “last pleading” itself must be timely in order to comply with Rule 38. But the facts there were very different. The last pleading was an answer filed by CMI to a counterclaim, and CMI’s jury trial demand was embedded in the answer. The court said that CMI’s answer was not timely, and that anything embedded therein also would be untimely. The court went on to say, however, that “this untimeliness under Rule 15(a) is not by itself sufficient to deny [CMI’s] jury demand.” 761 F.2d at 1209. The actual reason for denial was that CMI had been solely responsible for delays in the litigation, and CMI filed the jury demand on the day before the start of trial.

demand.² Nothing in the rules required Greenberg to make a jury demand after filing the Amended Complaint.

As an initial matter, a jury trial as to statutory damages was not available to Greenberg when the Amended Complaint was filed on December 23, 1997. A jury trial directed to statutory damages was not authorized under any law until the Supreme Court decided Feltner on March 31, 1998.

Rule 38 (b) requires the filing of a jury trial demand within 10 days after the last pleading. Greenberg did that, and satisfied the rule. The answers to the Amended Complaint were in the record when the jury demand was made. The fact that the answers subsequently were stricken does not alter the fact that Greenberg did what Rule 38 required.

Greenberg, say the defendants, “should not be able to, at the same time, take the position that the Society’s pleading was untimely, but that their jury request should be sustained.” Defs. Mem. at 5. Such a position, they say, is “wholly inconsistent.” Defs. Mem. at 4. The defendants thus would have Greenberg choose between a constitutional right to a jury trial and an effort to have untimely answers stricken. Significantly, the striking of the answers ended any further litigation by the defendants only as to liability issues. The striking did not end the case because it had no effect at all on the determination of damages, which is the only issue addressed in Greenberg’s jury demand. Moreover, Greenberg could not know, when he filed the demand for a jury, that his motion to strike would be granted two months later.

In any event, Greenberg complied with Rule 38 (b), and that should control the issue here. The defendants’ motion should be denied.

² To the contrary, the defendants should be estopped from raising the issue of untimeliness eleven months after Greenberg filed his jury demand, and nine months after the Court’s order striking the answers. The defendants’ question -- albeit an improper one -- was as ripe then as it is now.

**Alternatively, the Court Should
Direct a Trial by Jury on Damages**

If the Court should somehow conclude otherwise, Greenberg moves for the Court to exercise its discretion pursuant to Rule 39 (b) and direct a trial by jury of all issues as to damages.

“In this circuit, the general rule governing belated jury requests under Rule 39 (b) is that the trial court ‘should grant a jury trial in the absence of strong and compelling reasons to the contrary.’” Parrott v. Wilson, 707 F.2d 1262, 1267 (11th Cir. 1983), quoting Swofford v. B & W, Inc., 336 F.2d 406, 408 (5th Cir. 1964), cert. denied, 379 U.S. 962 (1965). The Parrott Court noted that district courts “often freely grant” Rule 39 (b) motions after considering such things as whether the issues are best tried to a jury, whether the court’s or the adverse party’s schedule would be disrupted, and the degree of prejudice to the adverse party. 707 F.2d at 1267.

The defendants propose that statutory damages are not best tried to a jury. The Supreme Court in Feltner decided that they are, however, and expressly held that the “Seventh Amendment provides a right to trial by jury on all issues pertinent to an award of statutory damages” under the Copyright Act. 523 U.S. at 1288. That should put to rest the Society’s concerns that a jury trial will “lead to a confused, potentially irrational, jury process and verdict.” Mem. at 4. Why, indeed, should juries ever be trusted to handle complex, document-intensive product liability or antitrust cases?

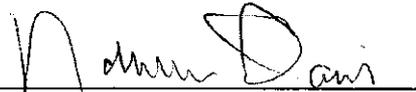
Finally, the Society asserts that it will be prejudiced if a jury should try the damage issues. Greenberg submits that the prejudice to him will be far more manifest if he is deprived of a constitutional right to a jury trial that has been sanctioned by the Supreme Court.

Conclusion

Greenberg complied fully with Rule 38 in filing his jury trial demand. If that does not suffice, Rule 39 (b) provides ample basis for the Court to direct a jury trial.

Respectfully submitted,

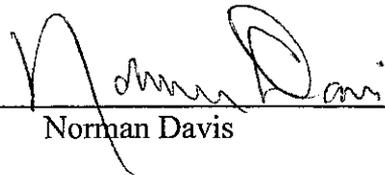
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Certificate of Service

I hereby certify that a copy of the foregoing response and motion was served by mail on Edward Soto, Esq., Weil, Gotshal & Manges LLP, 701 Brickell Avenue, Suite 2100, Miami, FL 33131; and by facsimile and mail on Robert G. Sugarman, Esq., Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York NY 10153 this 16th day of October, 2002.


Norman Davis