

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

PBI PERFORMANCE PRODUCTS, INC. : CIVIL ACTION
: :
v. : :
: :
NORFAB CORPORATION : NO. 05-4836

MEMORANDUM

Bartle, C.J.

October 17, 2007

Plaintiff PBI Performance Products, Inc. ("PBI") sued defendant NorFab Corporation ("NorFab") for patent infringement, unfair competition, and trademark and trade dress dilution. On August 2, 2007, this court entered summary judgment in favor of NorFab with respect to PBI's unfair competition and trademark and trade dress dilution counts. On August 29, 2007, we granted NorFab's motion for summary judgment on PBI's patent infringement count. We held that U.S. Patent No. 6,624,096 (the "'096 patent"), entitled "Textile Fabric for the Outer Shell of a Firefighter's Garment," was invalid under 35 U.S.C. § 103(a) as obvious in light of the prior art. Now before the court is PBI's motion for reconsideration of the August 29, 2007 Order.

Our Court of Appeals has explained that the purpose of a motion for reconsideration under Rule 59(e) is "to correct manifest errors of law or fact or to present newly discovered evidence." Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985). A court may grant a motion for reconsideration or alter or amend a judgment if the party seeking reconsideration "shows

at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion for summary judgment; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." Max's Seafood Café v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999).

Because of the courts' interest in the finality of judgments, "[m]otions for ... reconsideration should be granted sparingly and may not be used to rehash arguments which have already been briefed by the parties and considered and decided by the Court." Ciena Corp. v. Corvis Corp., 352 F. Supp. 2d 526, 527 (D. Del. 2005). A motion for reconsideration may not be used to give a litigant a "second bite at the apple." See Bhatnagar v. Surrendra Overseas Ltd., 52 F.3d 1220, 1231 (3d Cir. 1995). A litigant that fails in its first attempt to persuade a court to adopt its position may not use a motion for reconsideration either to attempt a new approach or correct mistakes it made in its previous one. A motion for reconsideration "should not be used as a means to argue new facts or issues that inexcusably were not presented to the court in the matter previously decided." Brambles USA, Inc. v. Blocker, 735 F. Supp. 1239, 1240 (D. Del. 1990) (quoted in Bhatnagar, 52 F.3d at 1231). Therefore, it is "improper ... to ask the Court to rethink what [it] had already thought through--rightly or wrongly." Glendon Energy Co. v. Bor. of Glendon, 836 F. Supp. 1109, 1122 (E.D. Pa. 1993).

PBI's motion for reconsideration does not meet the standard required by our Court of Appeals. There has been no intervening change of controlling law and no new evidence since August 29. And much of PBI's argument for reconsideration is merely repetitious of arguments it has previously briefed for the court. The court will, however, take this opportunity to put a few issues to rest.

PBI first argues that this court erred in not "addressing the evidence raised by PBI in the Declaration of Clifton A. Perry," one of the named inventors of the '096 patent and a PBI employee ("Perry Declaration"). Pl.'s Mot. for Recons. at 2. PBI maintains that the Perry Declaration was evidence that a person having ordinary skill in the art would not have considered the Shaffer patents when designing outer shell fabrics for firefighter's turnout gear. Contrary to PBI's characterization, the Perry Declaration does not have any evidentiary value and cannot create a dispute of material fact on the question of whether a person having ordinary skill in the art would have considered the Shaffer patents. Perry states that "I do not believe that the designer of outer shell fabrics for firemen's turnout gear would have considered U.S. Patent No. 5482763 (Shaffer)." The declaration is predicated on his belief, not on his personal knowledge, as required under Rule 56(e) of the Federal Rules of Civil Procedure. It was clearly not

manifest error for the court to decline to give any weight to the Perry Declaration.¹

PBI next argues that the court impermissibly made factual inferences against PBI in its August 29, 2007 Memorandum. When deciding a motion for summary judgment, a court must make all reasonable inferences from the evidence in the light most favorable to the non-movant, here, PBI. In re Flat Glass Antitrust Litig., 385 F.3d 350, 357 (3d Cir. 2004). PBI contends that:

The Court improperly inferred the following against PBI: a) the '096 Patent claims reference any "textile fabric", b) the Shaffer Patents are within the same field of endeavor as the '096 patent; c) it is undisputed that one of ordinary skill in the art would apply the technology of the Shaffer Patents to the prior art admitted in the '096 patent;² d) the improvements resulting from the combination of the Shaffer Patents with the admitted prior art of the '096 Patent were predictable; and e) the problems solved

1. The court also notes that on June 26, 2007 NorFab filed a motion to strike the Perry Declaration on the grounds that it was not made from personal knowledge under Rule 56(e) of the Federal Rules of Civil Procedure and was incompetent under the Federal Rules of Evidence because it does not apply the claim language. In the alternative, NorFab asked for an extension of time for discovery as to Perry pursuant to Rule 56(f) of the Federal Rules of Civil Procedure. Because the August 29, 2007 decision granting summary judgment to NorFab made NorFab's motion moot, the court did not address that motion on its merits.

2. PBI mis-characterizes this portion of the court's opinion. The court did not state that "one having ordinary skill in the art *would apply* the technology of the Shaffer Patents" Rather, the court stated that "[I]t is undisputed *that it would be within the skill* of such a person to apply the technology of the Shaffer patents" 2007 WL 2464507 at *7 (E.D. Pa. Aug. 29, 2007).

by the '096 Patent were the same problems describe in the Shaffer Patents.

Pl.'s Mot. for Recons. at 14. PBI is incorrect that these were factual inferences made by the court against it. To the contrary, they are conclusions of law, based on the undisputed evidence. As the court explained in its Memorandum, the determination of whether a patent claim would have been obvious in light of prior art is a legal conclusion, though it is based on factual inquiries. Ruiz v. A.B. Chance Co., 234 F.3d 654 (Fed. Cir. 2000). Having found the facts to be undisputed, it was entirely proper for the court to make the referenced legal conclusions.

Finally, PBI contends that a decision of the Board of Patent Appeals and Interferences ("Board") with regard to a continuation-in-part application is new evidence that should be considered by the court. The decision was rendered on August 21, 2007, and PBI submitted it to this court on the morning of August 30, 2007, a day after this court granted NorFab's motion for summary judgment.

The Federal Circuit has held, and PBI acknowledges, that "The Examiner's decision, on an original or reissue application, is never binding on a court." Fromson v. Advance Offset Plate, Inc., 755 F.2d 1549, 1555 (Fed. Cir. 1985). Nonetheless, courts are advised to give credence to a Board determination when the prior art before the court and the Board are "much the same." In re Laughlin Prods., Inc., Patent Litig.,

265 F. Supp. 2d 525, 529 (E.D. Pa. 2003). Here the '096 patent was not the subject of the Board's decision. Additionally, in its obviousness determination, the Board's decision only refers to U.S. Patent No. 5,928,971 (the "Ellis patent") and does not reference any of the other prior art considered by this court in its August 29, 2007 Memorandum. Thus, the Board decision submitted by PBI is of no evidentiary or precedential value under the present circumstances.

Because we find that the high hurdle for reconsideration under Rule 59(e) of the Federal Rules of Civil Procedure has not been met, PBI's motion for reconsideration of this court's Order of August 29, 2007 will be denied.

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ORDER

AND NOW, this 17th day of October, 2007, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that the motion of plaintiff PBI Performance Products, Inc. for reconsideration of this court's August 29, 2007 Order is DENIED.

BY THE COURT:

/s/ Harvey Bartle III
C.J.