

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

EGAMES, INC., et al.,	:	CIVIL ACTION
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
MPS MULTIMEDIA, INC., et al.,	:	
	:	
Defendants.	:	No. 04-5463

MEMORANDUM AND ORDER

eGames, Inc. filed a motion for partial summary judgment on the false advertising claim in this unfair competition case. For the reasons discussed below, I will deny the motion.

I. BACKGROUND

eGames, Inc., Rene Gilles-Deberdt, and Goodsol Development, Inc. filed this unfair competition action on November 23, 2004, raising claims of false advertising, trade dress infringement, and trademark infringement under the Lanham Act, 15 U.S.C. § 1125(a), as well as a claim of copyright infringement under the Copyright Act, 17 U.S.C. § 501, et seq., and a common law right of publicity claim.

Since 1996, eGames has been manufacturing and selling computer video games, including “Mahjongg Master 5,” “Solitaire Master 4,” “Solitaire Master 5,” and “Galaxy of Games 350.” eGames sells its games directly and through distributors, and its products are sold to the public through retailers. According to eGames, it has sold more than sixteen million games with total sales of more than \$160 million.

Defendants are in the business of manufacturing and selling computer video games in competition with eGames. According to eGames, defendants sell their games in interstate

commerce to many of the same retailers. eGames claims that defendants distribute and offer for sale: a mahjongg computer game entitled “XP Championship Mahjongg” which is substantially similar to and competes with eGames’ “Mahjongg Master 5” game; a solitaire computer game entitled “XP Championship Solitaire” which is substantially similar to and competes with eGames’ “Solitaire Master 4” and “Solitaire Master 5” games; and a computer variety collection entitled “XP Championship 555,” portions of which are substantially similar to and compete with eGames’ “Mahjongg Master 5,” “Solitaire Master 4,” “Solitaire Master 5,” and “Galaxy of Games 350” games.

eGames uses product packaging to promote the sale of its products and to call out salient features of its games. eGames states that customers rely on the claims on product packaging, and both eGames and defendants intend that customers rely on those claims in determining what to purchase.

According to eGames, defendants promote their “XP Championship Mahjongg,” “XP Championship Solitaire,” and “XP Championship 555” games with packaging that contains false statements about the salient features of those games. Specifically, eGames contends that the packaging for defendants’ “XP Championship Mahjongg” game falsely states that the game contains more than 1,500 backgrounds and more than 300 layouts even though it actually contains only 1,403 backgrounds and 249 layouts; the packaging for defendants’ “XP Championship Solitaire” game falsely states that the game contains more than 1,500 backgrounds even though it actually contains only 1,392 backgrounds; and the packaging for defendants’ “XP Championship 555” game states that the game contains more than forty sports games and more than thirty casino games even though it actually contains only thirty-six sports games and twenty-

eight casino games.

On February 11, 2005, eGames moved for summary judgment against defendants on the false advertising claim as to liability only. eGames requests that this court permanently enjoin defendants from making any of the following false statements: (1) that the “XP Championship Mahjongg” game contains more than 1,500 backgrounds; (2) that the “XP Championship Mahjongg” game contains more than 300 layouts; (3) that the “XP Championship Solitaire” game contains more than 1,500 backgrounds; (4) that the “XP Championship 555” game contains more than forty sports games; and (5) that the “XP Championship 555” game contains more than thirty casino games. eGames also requests that this court order defendants to: immediately take steps to recall all packaging containing the false statements; submit to this court a declaration describing in detail all steps taken to comply with the order; and turn over to eGames for retention pending the final termination of this case all packaging containing the false statements. eGames seeks the right to pursue damages against defendants on the false advertising claim at a later time.

II. STANDARD OF REVIEW

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” F.R.C.P. 56(c). In deciding a motion for summary judgment, all reasonable inferences are drawn in the light most favorable to the nonmoving party. Boyle v. County of Allegheny, Pennsylvania, 139 F.3d 386, 393 (3d Cir. 1998). There is a genuine issue of fact if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Id.

If the party moving for summary judgment is the defendant, or the party without the burden on the underlying claim, the moving party has no obligation to produce evidence negating the nonmoving party's case. National State Bank v. Federal Reserve Bank, 979 F.2d 1579, 1581-82 (3d Cir. 1992). The moving party only has to point to the lack of any evidence supporting the nonmoving party's claim. Id. at 1582. However, where, as here, the moving party is the plaintiff, or the party bearing the burden of proof at trial, the standard is more stringent. Id. The moving party must support its motion with credible evidence that would entitle it to a directed verdict if not controverted at trial. See id. In other words, when the moving party has the burden of proof at trial, that party must establish, on all of the essential elements of its case, that no reasonable jury could find for the nonmoving party. In re Bressman, 327 F.3d 229, 238 (3d Cir. 2003). If the moving party makes such an affirmative showing, it is entitled to summary judgment unless the nonmoving party responds with probative evidence demonstrating the existence of a triable issue of fact. Id.

III. DISCUSSION

A claim for false advertising under 15 U.S.C. § 1125(a) requires proof that: (1) the defendant has made false or misleading statements regarding a product; (2) there is actual deception or at least a tendency to deceive a substantial portion of the intended audience; (3) the deception is material in that it is likely to influence purchasing decisions; (4) the advertised goods traveled in interstate commerce; and (5) there is a likelihood of injury to the plaintiff in terms of declining sales, loss of good will, etc. Johnson & Johnson-Merck Consumer Pharmaceuticals, Co. v. Rhone-Poulenc Rorer Pharmaceuticals, Inc., 19 F.3d 125, 129 (3d Cir. 1994). If a plaintiff proves a challenged claim is literally false, a court need not consider whether

the buying public was misled. Id.

In this case, defendants do not dispute eGames' allegation that defendants made false claims on their packaging.¹ Significantly, however, defendants have provided evidence that eGames is not likely to be injured as a result of the false claims. For example, defendants have provided evidence that eGames and defendants' competing games are not likely to be sold side by side.² According to defendants, each retail outlet displays and locates games in a different fashion; there is no consistency with respect to how games are shelved.³ Moreover, games are often disorganized because of customers picking them up to look at the package and not putting them back where they were originally located.⁴ Thus, according to defendants, because eGames' and defendants' games are not likely to be sold side by side, the false claims on defendants' games' packaging would have no effect on eGames' games.

Viewing the evidence in the light most favorable to defendants, the nonmoving party, this

¹ Instead, defendants indicate that they have corrected the false statements. Edgar Chen Decl. ¶¶ 26, 28 (“Upon discovery of the discrepancies in 555 Games XP Championship, on or about January 19, 2005, MPS provided to Viva Media, LLC a new gold master of the software for 555 Games XP Championship, which contained the additional games, thereby correcting the two discrepancies on the box package. . . . [A] new printing of 555 Games XP Championship using the new gold master has occurred, and all copies of the game being produced and sold by defendants contain correct statements on the game packaging.”); id. ¶¶ 29-31 (“Upon discovery of the discrepancies in Solitaire XP Championship and Mahjongg XP Championship, on or about December 20, 2004, MPS placed two downloadable patches available to customers on its website located at <www.selectsoft.com> to add additional available backgrounds and tile layouts to Solitaire XP Championship and Mahjongg XP Championship in order that the game packaging match the available products. Additionally, on or about December 16, 2004, MPS provided to Viva Media, LLC new gold masters of the software for Solitaire XP Championship and Mahjongg XP Championship, which contained the additional backgrounds and tile layouts, thereby also correcting the background and tile layout number discrepancies. Future printings of Solitaire XP Championship and Mahjongg XP Championship will contain a number of backgrounds matching the indication on the box packaging.”).

² Eric Levin Decl. ¶ 10 (“My experience is that while retailers would like the sale of games to be organized by game genre and category, the reality in execution at the store level is extremely rare at best. For instance, competing categories of games being grouped together in stores is extremely rare.”).

³ Karsten Voelker Decl. ¶ 19.

⁴ Id. ¶ 21.

court finds that defendants have adequately demonstrated that there is a genuine issue of material fact regarding whether there is a likelihood of injury to eGames as a result of defendants' false statements. Accordingly, eGames' motion for summary judgment on the false advertising claim is denied.

IV. CONCLUSION

As the party moving for summary judgment, and as the party bearing the burden of proof at trial, eGames was required to establish, on all of the essential elements of its false advertising claim, that no reasonable jury could find for the nonmoving party. However, defendants have adequately demonstrated that there is a genuine issue of material fact regarding whether there is a likelihood of injury to eGames as a result of the false statements on defendants' games' packaging. Therefore, this court finds that eGames has not established that no reasonable jury could find for defendants on all of the essential elements of the false advertising claim. Accordingly, eGames' motion for partial summary judgment is denied. An appropriate order follows.

AND NOW, this 22nd day of March, 2005, upon consideration of plaintiffs' motion for partial summary judgment (Doc. # 10), and replies thereto, it is hereby ORDERED that said motion is DENIED.

/s/
LAWRENCE F. STENGEL, J.