

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

2007-1365

ADVANCED CARDIOVASCULAR SYSTEMS, INC.
and GUIDANT SALES CORPORATION,

Plaintiffs-Appellees,

v.

MEDTRONIC VASCULAR, INC. and MEDTRONIC USA, INC.,

Defendants-Appellants.

ON MOTION

Before MAYER, GAJARSA, and PROST, Circuit Judges.

PROST, Circuit Judge.

ORDER

Advanced Cardiovascular Systems, Inc. et al. (ACS) move to dismiss Medtronic Vascular, Inc. et al.'s (Medtronic) appeal as premature. Medtronic opposes. ACS replies.

ACS brought suit against Medtronic in the United States District Court for the District of Delaware for patent infringement. Advanced Cardiovascular Sys., Inc. v. Medtronic Vascular, Inc., No. 98-CV-80 (May 3, 2007). A jury found that Medtronic infringed ACS's patents and that the patents were not invalid. The district court entered "judgment" in favor of ACS, and Medtronic appeals. Pending at the district court are, inter alia, ACS's request for damages and its claim for injunctive relief.

ACS asserts that the appeal is premature because the district court has not yet adjudicated its request for an injunction and thus the district court's "judgment" is not

final except for an accounting pursuant to 28 U.S.C. § 1292(c)(2). ACS cites the Fifth Circuit's decision in Stamicarbon, N.V. v. Escambia Chemical Corp., 430 F.2d 920, 930 (5th Cir. 1970) for the proposition that a case is not final except for an accounting if an unadjudicated request for injunctive relief remains pending before the district court. Medtronic contends that ACS has not yet filed a motion for a permanent injunction and thus the request is not properly before the district court. As such, Medtronic argues that the present appeal is not premature and should not be dismissed.

We agree with ACS that Medtronic's appeal is premature because ACS's request for permanent injunctive relief in its complaint remains pending and thus the case is not final except for an accounting. See PODS, Inc. v. Porta Stor, Inc., 484 F.3d 1359, 1365 (Fed. Cir. 2007) (although appeal was premature under 28 U.S.C. § 1292(c)(2) because request for injunctive relief had not been decided, appeal was treated as timely when district court decided claim for injunctive relief during pendency of appeal); Nystrom v. Trex Co., 339 F.3d 1347, 1350 (Fed. Cir. 2003) ("If a case is not fully adjudicated as to all claims for all parties and there is no express determination that there is no just reason for delay or express direction for entry of judgment as to fewer than all of the parties or claims, there is no final decision under 28 U.S.C. § 1295 (a)(1) and therefore no jurisdiction"). Thus, Medtronic's appeal is premature and must be dismissed.

Accordingly,

IT IS ORDERED THAT:

- (1) ACS's motion to dismiss is granted.

(2) Each side shall bear its own costs.

FOR THE COURT

August 1, 2007

Date

/s/ Sharon Prost

Sharon Prost
Circuit Judge

cc: J. Michael Jakes, Esq.
George M. Sirilla, Esq.

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ISSUED AS A MANDATE: August 1, 2007